# *Olmstead v. United States*: The Constitutional Challenges of Prohibition Enforcement

*by*

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# *Olmstead v. United States*: A Short Narrative

## *Introduction*

In the 1920s, the national Prohibition of alcoholic beverages led to a vast increase in the federal government's crime-fighting role and in the workload of the federal courts. The Eighteenth Amendment, ratified on January 16, 1919, prohibited the manufacture, transportation, and sale of "intoxicating liquors," and the amendment granted Congress and the states "concurrent power to enforce this article." The architects of national Prohibition anticipated that the states would assume the burden of enforcement, but, in practice, much of the responsibility fell on federal officials. Prohibition enforcement required an unprecedented scale of federal policing, which soon produced an overwhelming number of criminal prosecutions in the federal courts. For the thirteen years of national Prohibition (1920–1933), cases arising from the violation of the federal Prohibition laws averaged close to two-thirds of all U.S district court cases. The number of criminal cases handled annually by the federal district courts grew from 54,487 in 1921 to 92,174 in 1932. These criminal trials also prompted appeals in every judicial circuit. By 1925, appeals of criminal convictions in the Ninth Circuit, prompted mostly by Prohibition, constituted nearly 40% of the appeals court's work.

The increased workload in the federal courts was one of the many unexpected demands placed on the federal government by Prohibition, which redefined the government's role in the daily lives of citizens. Inadequate federal forces confronted popular disregard or opposition to the ban on liquor, and the nearly impossible task of enforcing major changes in personal behavior threatened to erode popular respect for federal authority and the judicial process. Federal enforcement also relied on new kinds of evidence gathering, such as wiretapping of phones, that prompted additional concerns about the role of the federal government and the costs of national Prohibition. The expansion of federal criminal prosecutions and the methods used by government agents presented the federal courts, including the Supreme Court, with new and difficult constitutional questions regarding entrapment, double jeopardy, property forfeiture, trial by jury, federalism, and, especially, search and seizure.

The case of Roy Olmstead reflected many of the challenges confronting the federal judicial system during national Prohibition. Olmstead ran a large bootlegging operation, importing liquor from Canada and selling it throughout Seattle, Washington. His illegal business was protected by the local police and employed a workforce at least three times the size of the federal unit responsible for enforcing Prohibition in the area. In an effort to establish evidence of Olmstead's criminal activity, federal officers tapped his phone. The testimony of what the federal officers overheard was central to

the prosecution of Olmstead and the members of his gang, who were charged with conspiracy to violate the National Prohibition Act. The *Olmstead* case raised two important constitutional questions: Did the use of evidence gathered by the wiretap violate the defendants' rights under the Fourth Amendment? And did the reliance on the wiretapped conversations to prove conspiracy violate the Fifth Amendment's protection against self-incrimination? The case also raised questions about the use of evidence gathered in violation of Washington state law that prohibited wiretaps. Throughout the *Olmstead* proceedings, the federal courts confronted the impact of new technology and its effect on traditional legal definitions of privacy and personal liberty. The telephone and the accompanying revolution in communications required the courts to consider the application of the Bill of Rights to conditions unimagined by the framers, and the courts' decisions about the Fourth and Fifth Amendments directly influenced popular opinion about the continuing experiment in national Prohibition.

## *National Prohibition and its enforcement*

Congress approved the National Prohibition Act, better known as the Volstead Act, on October 18, 1919. Congress assigned the Act's federal enforcement responsibilities to the Bureau of Internal Revenue, despite the protests of the bureau's commissioner and the Secretary of the Treasury, who cited the lack of staff and institutional support for adequate enforcement. The Bureau of Internal Revenue created a small police force of Prohibition agents to help the states and other federal officers enforce Prohibition, and by 1921 federal directors of Prohibition enforcement were appointed in each of the forty-eight states. The federal enforcement agents were exempt from civil service regulations, salaries were low, and the resulting force was small, inexperienced, and frequently corrupt. The President's commission on enforcement in 1931 reported that "a substantial number of Prohibition agents and employees actually were indicted and convicted of various crimes." The federal agents, however, did arrest many liquor law violators, and the unmanageable number of resulting cases forced U.S. attorneys to rethink how they prosecuted crimes.

At the beginning of national Prohibition there was virtually no coordination between prosecutors and investigators of crimes. U.S. attorneys, who served in each U.S. judicial district, were presidential appointees under the authority of the Justice Department. U.S. attorneys took the cases that other federal officials, such as Prohibition agents, developed for them, and exercised wide latitude in deciding whether to prosecute fully or not. Between 1921 and 1929, Assistant Attorney General Mabel Walker Willebrandt led the Justice Department's attempt to coordinate the prosecution of Prohibition crimes, and the Justice Department encouraged U.S. attorneys to bring conspiracy charges, which were easier to prove than were charges of liquor law violations.

## *Prohibition in Seattle: The Olmstead ring*

In Seattle, as in many American cities, the lucrative nature of the illegal liquor trade encouraged the expansion of organized criminal gangs. It is unknown when police lieutenant Roy Olmstead first became a bootlegger, but he was arrested for smuggling liquor in March 1920, when national Prohibition was just weeks old. He was fired from the police force. He later pled guilty and paid a $500 fine. From the time of this arrest, Olmstead was a full-time bootlegger. Indeed, he became, as the newspapers called him, King of the Northwest Bootleggers.

Olmstead's service in the police department taught him the requirements for success as a bootlegger, and the bribes he had accepted as an officer gave him ready funds to invest. He was the chief manager of a gang, coordinating all the details of what became a complex business. Olmstead procured his liquor in the Canadian province of British Columbia. At the start of United States Prohibition, the Canadian government imposed an extra tax on spirits bought for shipment to the United States. Most bootleggers merely paid the tax and passed it on to their customers. Olmstead avoided the tax by presenting forged documents indicating that he was shipping his liquor to Mexico. This willingness to break Canadian law allowed Olmstead to get all the liquor he needed at a price much lower than that paid by his competitors. He loaded his liquor onto an ocean-going vessel sailing to Mexico and then sent the liquor into the United States by smaller boatloads. Once in the United States, the liquor was shipped by truck and stored in various locations, awaiting distribution. To get liquor, customers called Olmstead's phone and placed orders; cars then delivered the liquor.

The gregarious Olmstead was known to the business and political elite of Seattle, and he found a ready clientele in a market that depended on personal connections. At its peak, Olmstead's business was delivering over 200 cases of liquor daily to Seattle residents, hotels, and restaurants. The business gave Olmstead the money to buy an expensive house and to establish Seattle's first radio station. In one year he admitted on his tax return to earning $19,000 or $20,000 more than the previous year. Olmstead bribed the Seattle police and the sheriffs of King County to ignore his operations. His brothers remained on the police force, and one of his former associates became head of the local enforcement unit, so state and local authorities never threatened Olmstead's business. Olmstead only had to worry about federal law enforcement.

## *Federal enforcement of Prohibition in Washington State*

Federal Prohibition agents were initially appointed by the Commissioner of Internal Revenue and, starting in 1921, by a state enforcement director. Roy C. Lyle, the director for the state of Washington, was a close associate of one of the state's U.S. senators, but Lyle had no experience in law enforcement. Lyle left much of the

day-to-day operations to his legal advisor and chief assistant, William M. Whitney. A Seattle lawyer and Republican politician, Whitney was a vigorous enforcer of the law and authorized the searches of the cars and homes of leading citizens. Within a year of his appointment he was widely attacked in the press for these tactics. Whitney took the lead in pursuing Olmstead and endorsed investigation methods that would raise important constitutional issues in the federal courts. As in other states, many of the agents working under Whitney misused their office when performing undercover operations, and the agents faced allegations of drinking heavily and patronizing prostitutes. Some agents were so notorious that juries refused to convict on their word, and judges rebuked the agents for their actions. The district officers nevertheless enforced the liquor ban through many arrests. By one internal account, the agents in Washington made over 7,000 arrests before 1927.

## *Wiretapping the bootlegger*

Beginning in June 1924, federal Prohibition agents, for months on end and with no authorizing warrants, listened to the phone conversations of Roy Olmstead and other members of his bootlegging gang. Even though the wiretappers were not on the line around the clock, the number of overheard conversations made for over 700 pages of transcripts, many of which were compiled by the wife of William Whitney. But the wiretaps did not generate the evidence that would enable the government to catch gang members in the act of smuggling or selling liquor.

The wiretaps were unproductive in part because Roy Olmstead was aware of them. According to the defendants, the chief wiretapper approached Olmstead and offered to sell him transcripts of his phone conversations. Olmstead refused to buy, convinced that the federal rules of evidence and Washington state law would not allow such evidence to be submitted in court.

Until the *Olmstead* case, the federal courts had established few rules about wiretap evidence or about the privacy of telephone conversations. In an age when many telephone users had access only to shared "party" lines, many people did not have the same expectations of privacy that would be assumed by later generations. The ability to tap telephone lines, however, like the introduction of technology to intercept telegraph wires in the late nineteenth century, did raise many concerns about protecting confidential communications. Most states had laws to protect telegraph communications, and by 1910 the majority of states had enacted restrictions on the tapping of telephone conversations. Law enforcement officials, however, had used wiretapping in criminal investigations, and federal officials relied on wiretaps during the surveillance of suspected radicals during World War I. Wiretaps became more frequent in federal investigations during Prohibition but no federal statutes or federal case law regulated wiretaps, and many officials were concerned about the use of evidence gained from intercepted conversations. In 1924, under Attorney General

Harlan Fiske Stone, the Federal Bureau of Investigation forbade Department of Justice agents from engaging in wiretapping. (By the time *Olmstead* reached the Supreme Court, Stone was sitting as a justice on the Court.) *Olmstead* was the most notable of the Prohibition-era cases that brought to the federal courts essential questions about legal status of telephone conversations. Did callers have a right to privacy in their telephone conversations? Were telephone conversations similar to mailed letters, which were protected by the Fourth Amendment?

While the wiretap would create the constitutional issue in the case, it was the actions of the Canadian government that made possible the prosecution of Olmstead. The Canadians caught three of Olmstead's men with a large boatload of liquor, illegally bound for the United States. The testimony of the Canadians, augmented by the information from the wiretaps, provided Whitney with enough evidence to secure a search warrant and raid on the night of November 17/18, 1924. The records seized that night, supplemented with what the federal agents had learned through the wiretaps and from the testimony of gang members, were used by the U.S. attorney's office to convince the grand jury to indict Olmstead and ninety others for conspiracy to violate the National Prohibition Act.

## *From indictment to trial*

On January 19, 1925, a federal grand jury, empanelled in the U.S. District Court for the Western District of Washington, charged ninety-one individuals with four different counts of conspiracy to violate federal law. (The crime of conspiracy consists of two or more people agreeing to commit a crime and one member of the group taking some action toward carrying out the plan. All members of the conspiracy are equally liable for the actions of any members, but the prosecution must establish that those involved in the conspiracy intended to break the law.) The indictment charged the individuals with two counts of conspiring to import and to sell prohibited alcoholic beverages in violation of the National Prohibition Act and with two counts of conspiring to defraud the national revenue and to import prohibited merchandise in violation of the Tariff Act of 1922. The indictment listed the individual's names, some with aliases such as "Shorty," "Baldy," and "Brownie." Among the indicted were two Seattle police officers.

Between the indictment in January 1925 and the trial in January 1926, Olmstead and most of the members of his organization returned to the bootlegging business. Olmstead's attorney, Jerry L. Finch, himself a codefendant, presented the court with several motions variously intended to stop the trial, to improve the likelihood of acquittal if the defendants came to trial, and to establish grounds for appeal if the defendants were convicted at trial. In a plea to dismiss the indictment, Finch alleged that agent Whitney threatened the foreman of the grand jury and presented the grand jury with insufficient and hearsay evidence. In a second motion, Finch challenged the

conspiracy indictment as too vague and too imprecise for the defendants to prepare their case. In separate decisions in April and May of 1925, Judge Jeremiah Neterer of the U.S. District Court for the Western District of Washington rejected these pretrial motions.

Finch and Olmstead filed motions asking the district court to quash the warrants for searches of their offices and Olmstead's residence, and to exclude the evidence resulting from the searches. In the motions to quash, the defendants argued that the seized records and the wiretap evidence were obtained in violation of the Fourth Amendment's protections against unreasonable search and seizure, and therefore should be excluded from the trial. The motions also argued that the evidence compromised the defendants' Fifth Amendment right against self-incrimination, and the defendants asked the judge to order the return of the records to their owners. In September 1925, Judge Neterer rejected the Fourth Amendment arguments and upheld the use of wiretap evidence, but he did specify that the papers seized from Finch and Olmstead could not be used against them in the trial. This, however, was a hollow victory for the defense because those materials could be used against all of the other defendants and, therefore, would not be returned. This ruling made clear the strategic advantage of charging the members of the Olmstead ring with conspiracy, as each could be held liable for the actions of the other members of the conspiracy and evidence that would be suppressed in a trial of a single defendant charged with a crime would be admitted in a conspiracy case.

The prosecution, headed by U.S. Attorney Thomas Revelle and assisted by Charles T. McKinney and John Marshall, worked with William Whitney to prepare the evidence for trial. The prosecution convinced members of the Olmstead organization to testify for the prosecution. One member of the organization, Alfred Hubbard, asked for and received an appointment as a federal Prohibition agent in exchange for inside information. Hubbard was the probable source that allowed federal agents to catch Roy Olmstead on Thanksgiving morning 1925, unloading liquor from a boat.

## *The trial*

By the opening of the trial on conspiracy charges, twelve defendants had pleaded guilty and agreed to testify against the others. Another twelve defendants hired the combative George Francis Vanderveer to defend them; others hired their own lawyers. And another thirty-two defendants fled to Canada, forfeiting their bail. Only forty-seven individuals, including Roy Olmstead and Jerry Finch, remained to stand trial in Seattle beginning on January 19, 1926. At the opening of the trial, the government attorneys decided not to prosecute the two charges related to the Tariff Act. The jury was selected in two days and was sequestered for the duration of the trial.

The prosecution detailed the Olmstead ring operations, from the procurement of the liquor to its final distribution. Witnesses described the acquisition of boats,

trucks, and property to facilitate the trade. Prominent Seattle citizens, most notably the business magnate William E. Boeing, testified about the purchase of liquor through the phone order service provided by the Olmstead gang. The testimonies of members of the gang who pleaded guilty and the federal agents who had listened in on the telephone taps were central to the prosecution's case. While the transcripts of the tapped conversations were never entered into evidence, the federal agents who had listened into the conversations were allowed to use the transcripts to refresh their memories when testifying. These witnesses described the full range of the smuggling and sale of liquor as well as the corruption of the local police.

The defense attempted to discredit or to exclude the wiretapped evidence. Vanderveer successfully challenged the identification of speakers on some of the wiretaps, and the government consequently dismissed indictments against thirteen people. By the end of the trial in February 1926, charges against five more defendants were dismissed, leaving only twenty-nine defendants. The jury deliberated for six hours over two days and found twenty-one of those defendants guilty. Among those convicted were Roy Olmstead and Jerry Finch.

Before the sentencing in March, Judge Neterer carefully reviewed the records of those convicted and levied heavier sentences on those who were repeat offenders or whom the evidence showed were the leaders of the ring. Olmstead received the heaviest penalties: four years in prison and $8,000 in fines. In sentencing him, Neterer said: "The operation of this conspiracy, as disclosed by the testimony was scandalous and of incalculable damage to society and the organization of government. . . . If the same energy and organization had been directed along legitimate lines . . . great good might have obtained." Jerry Finch was sentenced to two years and fined $500. Finch received the lowest fine, while the least prison time ordered by Judge Neterer was eighteen months. At the same time, Neterer rejected all the defense motions for arrest of judgment, saying, "I think all the points raised were ruled upon during the trial . . . the defendants were given every legal right."

## *The appeals*

After the sentencing, the great majority of the defendants, upon payment of their bails, were free while their lawyers planned their appeals. Before the U.S. Circuit Court of Appeals for the Ninth Circuit, Finch and Vanderveer, in appeals for separate groups of defendants, repeated their trial court arguments that the tapping of the phone lines constituted an illegal search in violation of the Fourth Amendment and that the introduction of the wiretapped evidence in court violated the defendants' Fifth Amendment rights against self-incrimination. On May 9, 1927, Judge William Ball Gilbert, joined by Judge Frank Dietrich, ruled that "the purpose of the amendments is to prevent the invasion of homes and offices and the seizure of incriminating evidence found therein." He did not see wiretapping as such an invasion, equating

it with "evidence obtained by listening at doors or windows." The court's majority also denied the appellants' claim that the grand jury had been coerced to return the indictment and the claim that the witnesses had improperly relied on transcripts of the wiretapped conversations.

In his dissenting opinion, Judge Frank Rudkin found that the witnesses had improperly relied on the transcripts, and concluded that "a better opportunity to color or fabricate testimony could not well be devised by the wit of man." Rudkin, however, quickly added that his dissent was based on "much broader grounds." The testimony drawn from the wiretaps was inadmissible in "any event" because it so clearly violated the protections offered by the Fourth and Fifth Amendments. The amendments' "chief aim and purpose was not the protection of property, but the protection of the individual in his liberty and in the privacies of life." He noted "a growing tendency to encroach upon and ignore constitutional rights," but pointed out that the Supreme Court had "consistently and persistently declared that the amendments in question must be liberally construed in favor of the citizen and his liberties, and that stealthy encroachments will not be tolerated."

Lawyers for Olmstead and two other groups of defendants submitted petitions appealing the case to the Supreme Court of the United States. In the fall of 1927, Olmstead was tried and acquitted on separate federal charges arising from his arrest on Thanksgiving Day 1925. Without wiretap evidence, and relying on the dubious testimony of Alfred Hubbard, the U.S. attorney was unable to convince a jury to convict Olmstead. Five days after this acquittal, the Supreme Court denied the petitions for certiorari. Within a week, Olmstead, Finch, and others entered federal prison.

After two groups of appellants applied for a rehearing of their petitions, the Supreme Court reconsidered and, on January 9, 1928, agreed to hear arguments in the *Olmstead* appeal and two companion cases (*Green v. United States* and *McInnis v. United States*). The Supreme Court limited arguments in the combined cases to the Fourth and Fifth Amendment questions raised by the reliance on evidence gathered by wiretapping.

## *Prohibition in the Supreme Court*

In a series of cases in the 1920s, the Supreme Court had almost always supported the enforcement of Prohibition, although the demands of federal policing and the social reform goals of the liquor ban often produced unpredictable voting alliances on the Court. The Chief Justice of the United States was William Howard Taft, the former President, appointed to the Supreme Court in 1921. Taft, who served as a professor at Yale Law School before joining the Court, had originally opposed Prohibition, in part because of the unsustainable burden it would place on the federal court system. But once the Eighteenth Amendment was ratified and he joined the Supreme Court, Taft was determined to support the enforcement of democratically

enacted and constitutionally authorized federal law. Other conservative justices on the Supreme Court, such as George Sutherland and James McReynolds, distrusted the social engineering goals of Prohibition and feared that strict enforcement would undermine public confidence in the federal courts. Justices like Louis Brandeis and Oliver Wendell Holmes generally supported the enforcement of laws passed by the Congress, but they became increasingly concerned about the lack of public support for strict enforcement of Prohibition and also questioned the police's enforcement methods.

Mabel Walker Willebrandt, who usually represented the government before the Supreme Court in Prohibition-related cases, travelled to Seattle to observe the trial, and although she signed the government's brief asking the Supreme Court not to grant certiorari, she refused to represent the government at oral arguments in *Olmstead* because she opposed the use of wiretap evidence. The Supreme Court heard arguments in *Olmstead* and the related cases on February 20 and 21, 1928; on June 4 of that year, the Court announced its decision in the case. In a five-to-four decision, the Court, in an opinion written by Chief Justice Taft, affirmed the decisions of the U.S. court of appeals and thus upheld the convictions. The Supreme Court held that the wiretaps entailed no entry into Olmstead's home or office and thus the wiretap evidence was not obtained through violations of the search and seizure limitations of the Fourth Amendment. In addition, Taft declared that phone conversations were not the equivalent of sealed letters, which previous Supreme Court decisions had protected from warrantless searches and seizures. Taft held that the invention of the telephone had not changed the meaning of the Fourth Amendment. "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." Taft added that Congress was free to protect telephone communication through legislation, but the courts could not do so without distorting the meaning of the Fourth Amendment.

There were strong dissents from Justices Pierce Butler, Oliver Wendell Holmes, and Louis Brandeis; Justice Harlan Fiske Stone concurred with most of the dissents. Justice Butler saw a clear analogy between private telephone conversations and letters, and therefore concluded that the Fourth Amendment limitations on searches and seizures should apply in the case. "The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass." Justice Holmes asserted that as a matter of policy and principle the government should not allow the introduction of evidence obtained in violation of Washington state law, for "if the Government becomes a lawbreaker, it breeds contempt for law."

In the lengthiest and most noted dissent, Justice Brandeis asserted a general "right to be let alone" from government intrusion and argued that the purpose of the Fourth

Amendment was to secure that right. In contrast to Taft and the Court's majority, Brandeis found that "there is, in essence, no difference between the sealed letter and the private telephone message." The protections of the Fourth Amendment, he said, did not apply solely to the medium familiar to the framers of the Constitution. "Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it." Having found a violation of the Fourth Amendment, Brandeis concluded that the use of the wiretap evidence had violated the defendants' Fifth Amendment protection against self-incrimination. Brandeis added that he would have reversed the lower court decisions regardless of the constitutional questions because of the admission of evidence that had been obtained in violation of Washington state law prohibiting wiretaps. In his opinion for the majority, Taft dismissed this objection, stating that the common law had long permitted the use of illegally or improperly obtained evidence.

## *The aftermath*

Much of the public reaction to the Supreme Court's decision in *Olmstead* was critical. A popular magazine, *The Outlook*, went so far as to label *Olmstead* the "the *Dred Scott* decision of Prohibition." The comparison to the Supreme Court's most reviled decision may have been exaggerated, but it reflected the growing concern that the enforcement of national Prohibition was damaging public confidence in the federal court system and undermining public respect for law enforcement. Before he became Chief Justice and before the ratification of the Eighteenth Amendment, William Howard Taft had warned that national Prohibition would be "an irretrievable national blunder" that would be unenforceable and a threat to the proper balance of state and federal governmental responsibilities. Following Taft's decision in *Olmstead*, more and more commentators concluded that Prohibition had become a threat to the rule of law in the United States. According to *The Nation*, the Court had endorsed a kind of "lawlessness" in a misguided effort to enforce Prohibition. The Court's acquiescence in what a leading business newspaper called the "dirty business" of wiretapping came to symbolize a level of federal intrusion that many were not willing to accept. Even a leader of the Anti-Saloon League protested the acceptance of wiretapping, which he feared would turn public opinion against Prohibition.

The reaction to *Olmstead* reflected growing disenchantment with Prohibition and doubts about the possibilities of effective enforcement. Although Herbert Hoover had supported the continuation of Prohibition in his successful presidential campaign in 1928, both political parties were seriously divided over the issue. After 1928, a growing number of studies documented the law enforcement challenges and judicial burdens of Prohibition. In 1928 and 1929, nearly two-thirds of the criminal cases in federal courts were related to Prohibition, and in 1930 federal prisons housed twice the number of prisoners they could normally accommodate. In May 1929, President

Hoover appointed a commission to study "Law Observance and Enforcement." The commission, in its report released in January 1931, recommended efforts to enforce the Eighteenth Amendment, but its findings indicated how difficult that would be. The report documented increased consumption of alcohol, a rise in criminal activity associated with the manufacture and sale of alcoholic beverages, and the crushing burden on law enforcement forces and the nation's courts.

Organizations supporting the repeal of the Eighteenth Amendment, including the Women's Organization for National Prohibition Reform, established by socially prominent women from throughout the nation, began to coordinate their campaign for repeal. The Democratic Party platform of 1932 endorsed repeal, and although both parties remained divided over the issue, the overwhelming victory of the Democrats in November 1932 was interpreted by most as a referendum in favor of repeal. The new Congress, on February 20, 1933, approved a constitutional amendment repealing the Eighteenth Amendment, and Congress provided for popularly elected state conventions to consider ratification. A majority of Republicans as well as Democrats in Congress approved the amendment. On December 5, 1933, the Twenty-First Amendment was ratified when Utah's state convention became the thirty-sixth convention to approve it.

In the spring of 1931, Roy Olmstead was released from prison a changed man. He had become a Christian Scientist and had renounced liquor. The repeal of Prohibition strengthened support for pardons of many convicted of violating the Volstead Act, and on Christmas 1935, Olmstead received a full presidential pardon and remittance of fines paid. In 1934, Congress passed a communication act that would in just a few years serve as the basis for Supreme Court decisions prohibiting wiretapping by federal agents without a warrant.

# The Federal Courts and Their Jurisdiction

## *United States District Court for the Western District of Washington*

The Judiciary Act of 1789 created the U.S. district courts as trial courts with jurisdiction over admiralty, minor crimes, and suits involving the federal government. Over the course of the nineteenth century, Congress expanded the district courts' jurisdiction. With the abolition of the circuit trial courts in 1911, the district courts became the sole trial courts of the federal system. They heard all matters arising in their district under the laws of the United States. During national Prohibition, district court dockets came to be dominated by criminal law cases. Originally the courts' districts mirrored state boundaries, and this remained the norm until the early twentieth century. As the population and federal jurisdiction expanded in the early twentieth century, Congress authorized multiple districts for some states.

The state of Washington was organized by Congress as a single judicial district in 1890, with one district court judge, and the district was assigned to the Ninth Judicial Circuit. In 1905, Congress divided the state into the Eastern and Western Districts. As the population and judicial business expanded dramatically with the boom of the Pacific Northwest, brought on by the Alaska and Yukon gold rushes, an additional judgeship was created for the Western District in 1909.

## *United States Circuit Court of Appeals for the Ninth Circuit*

Established in 1891, the U.S. circuit courts of appeals were the first federal courts designed exclusively to hear cases on appeal from trial courts. These were courts that settled issues of law; they did not try original cases. Congress established a court of appeals in each of the existing nine regional circuits. The existing circuit judges and one newly authorized judge in each circuit served as the judges of the appellate courts along with district court judges or Supreme Court justices, who could make up the required three-judge panels. The same 1891 act gave the U.S. circuit courts of appeals jurisdiction over the great majority of appeals from the U.S. district courts and the U.S. circuit courts. This appellate function was intended by Congress to reduce the number of cases that could be routinely appealed to the Supreme Court. The 1925 Judiciary Act, also known as the Judges' Bill, further restricted appeals to the Supreme Court, and this Act, combined with the explosion of litigation brought about by the expansion of federal activity, resulted in great growth of business before the courts

of appeals. By the 1920s, each U.S. court of appeals had at least three assigned judges, ending the need for regular service by district judges on court of appeals panels.

The U.S. Circuit Court of Appeals for the Ninth Circuit originally heard appeals from trials in federal courts in California, Oregon, Nevada, Washington, Idaho, and Montana. In 1900, the territories of Alaska and Hawaii were added to the circuit; in 1912, Arizona was added. The Ninth Circuit Court of Appeals had the broadest geographical jurisdiction as it also heard appeals from American possessions across the Pacific and a special extraterritorial court in China.

## *Supreme Court of the United States*

The Supreme Court was the only court named in the Constitution. The Judiciary Act of 1789 first set out the details of the Court's organization and jurisdiction. Subsequent acts and its practices over time altered the original plans. By the time of the *Olmstead* case, the Supreme Court was a court of nine justices, including the Chief Justice. The Supreme Court exercised limited original jurisdiction as set out in the Constitution, but it was primarily an appeals court. Moreover, the Court largely controlled what cases it would hear on appeal. The 1891 act establishing the U.S. circuit courts of appeals authorized the justices of the Supreme Court to accept or reject cases brought to them through petitions for writs of certiorari, and the 1925 Judges' Bill further increased the justices' discretion in determining which cases to hear by eliminating certain automatic appeals that had previously existed.

# The Judicial Process: A Chronology

### February 1, 1920

National Prohibition of intoxicating liquor went into effect under the Eighteenth Amendment and the Volstead Act.

### March 22, 1920

Federal Prohibition agents apprehended Roy Olmstead and a number of men unloading a boatload of smuggled Canadian liquor.

### Mid-June 1924

Federal agents began to tap Roy Olmstead's phones.

### October 6, 1924

Canadian officials captured an Olmstead boat smuggling liquor contrary to the laws of Canada and the United States.

### November 17–18, 1924

Federal agents raided and seized records from Roy Olmstead's home and office and from the office of Jerry Finch.

### January 19, 1925

A grand jury of the U.S. District Court for the Western District of Washington returned conspiracy indictments naming ninety-one individuals.

### April 23, 1925

Judge Jeremiah Neterer in the U.S. District Court for the Western District of Washington refused to grant the defendants' plea of abatement filed by Jerry Finch.

### May 13, 1925

Judge Neterer refused to grant Finch's request to drop the indictments, which Finch claimed charged the defendants multiple times for the same offence. Finch also argued that the indictments were insufficient in that they did not charge particular defendants with particular acts.

### May 25, 1925

Defendants pleaded not guilty.

### September 21, 1925

Judger Neterer rejected the Fourth and Fifth Amendment challenges to the indictments.

### November 26, 1925

Federal agents again caught Roy Olmstead smuggling liquor.

### January 19, 1926

The trial opened in the U.S. District Court for the Western District of Washington before Judge Jeremiah Neterer with only forty-seven defendants present. The government dismissed indictments against four on the eve of the trial in exchange for testimony or information.

### February 10, 1926

The prosecution rested its case, and the court dismissed seventeen more defendants on the motion of the government. At the same time, two conspiracy charges were dropped by the prosecutors.

### February 16, 1926

The defense rested its case. By this point only twenty-nine defendants remained since the exclusion of some evidence forced the government to drop charges against some defendants.

### February 18, 1926

Judge Neterer sent the case to the jury, which deliberated for six hours over two days.

### February 20, 1926

The jury convicted twenty-one defendants and acquitted eight. Among the convicted were Roy Olmstead and Jerry Finch.

### March 8, 1926

Judge Neterer sentenced the convicted.

### May 9, 1927

The Ninth Circuit Court of Appeals rejected Olmstead's appeal of his conviction. Judge William Gilbert in his opinion for the court upheld the use of the wiretapped evidence, while in dissent Judge Frank Rudkin focused on invasion of privacy by government officers.

### November 16–17, 1927

Olmstead was tried and acquitted on a federal liquor smuggling case stemming from his arrest in November 1925.

### November 21, 1927

The Supreme Court denied petitions for certiorari in *Olmstead* and companion cases.

### November 29, 1927

Olmstead, Finch, and others entered prison.

### January 9, 1928

The Supreme Court granted a writ of certiorari in *Olmstead* and companion cases on an application for rehearing.

### February 20–21, 1928

*Olmstead* and companion cases were argued in the U.S. Supreme Court. The arguments were limited to Fourth and Fifth Amendment questions raised by the wiretapping.

### June 4, 1928

The Supreme Court announced its decision in the case. In a five-to-four decision, the Court, in an opinion written by Chief Justice Taft, upheld the decision of the court of appeals, finding that there was no real search of Olmstead's home or office, that the phone conversations were not the equivalent of a sealed letter, and that wiretap evidence did not need to be excluded. In addition, since the Fourth Amendment was not violated, the Fifth Amendment did not apply.

### May 12, 1931

Olmstead released from prison.

### December 5, 1933

Twenty-First Amendment adopted repealing the Eighteenth Amendment.

### June 19, 1934

Passage of Federal Communications Act, which would be construed to prohibit wiretapping by federal agents without warrants.

### December 25, 1935

Roy Olmstead granted a full presidential pardon.

# Legal Questions Before the Federal Courts

## *Did the use of evidence gained from wiretaps and confiscated papers violate the Fourth Amendment protection against unreasonable searches and seizures?*

Each of the federal courts to consider the question held that the use of wiretaps in the *Olmstead* trial did not violate the Fourth Amendment. The Supreme Court decision in *Ex Parte Jackson*, 96 U.S. 727 (1876), had extended the Fourth Amendment to cover sealed letters in the United States mails. The government was prohibited from searching such letters, and the *Olmstead* defendants asked the courts to treat phone conversations like letters. The courts refused to see phone conversations as the equivalent to a letter and ruled the Fourth Amendment did not apply. In a pretrial ruling, Judge Neterer held that "it would not violate any constitutional right of the defendants to receive the [wiretap] evidence. The conversation is not a property right." The U.S. court of appeals agreed, stating that "whatever may be said of the tapping of telephone wires as an unethical intrusion upon the privacy of persons who are suspected of crime, it is not an act which comes within the letter of the Prohibition of constitutional provisions." In dissent, Judge Rudkin on the court of appeals found that the attempt to establish separate rules for letters and telephone conversations created "distinctions without a difference." Telephone conversations are "sealed from the public as completely as the nature of the instrumentalities employed will permit," and no federal agent had a right to use the conversations against the caller. The Supreme Court divided along similar arguments, with the majority upholding the distinction between letters and phone conversations.

## *Did the use of evidence gained from wiretaps and confiscated papers violate the Fifth Amendment protection against self-incrimination?*

In a pretrial motion, Olmstead and Finch asked the district court to exclude evidence obtained in the searches of their homes and offices and in the taps of telephone lines, arguing that use of this evidence would be a form of self-incrimination and therefore prohibited by the Fifth Amendment. The Supreme Court, in *Boyd v. United States*, 116 U.S. 616 (1886), had linked the protections of the Fourth and Fifth Amendments, holding that a warrantless seizure of evidence compelled a defendant to be a witness against himself. Judge Neterer found that the wiretaps had not violated the Fourth

Amendment since conversations were not a property right, and therefore use of the wiretap evidence would not violate the defendants' Fifth Amendment rights. Neterer, however, did find that the warrants had authorized searches only for contraband liquor, not papers, and therefore the papers seized from Olmstead could not be used against him, and the papers seized from Finch's office could not be used against Finch. Neterer said it would need to be decided at trial whether or not the seized papers could be used against other defendants.

At the two stages of appeals in the *Olmstead* case, the courts' majorities found that the wiretaps had not violated the defendants' Fourth Amendment rights, and consequently there was no violation of the Fifth Amendment's protection against self-incrimination. In the Supreme Court opinion, Chief Justice Taft said "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."

## *What was the authority of the Washington state law prohibiting wiretaps and did it apply to federal prosecutions?*

Washington law prohibited the interception or reading of communications through tapping into telephone or telegraph lines, and the defendants argued that this law should have made the wiretap evidence inadmissible. Each court that heard this question decided that, even though the federal agents broke state law, the evidence was admissible. The Supreme Court's grant of certiorari had limited arguments to the constitutional questions, but in his opinion for the majority, Chief Justice Taft responded to Oliver Wendell Holmes' dissent, which had stated that the illegally obtained evidence should not have been permitted in the trial. Taft pointed out that English and American common law held that illegally obtained evidence was admissible on the grounds of necessity. He also held that common law prevailed in Washington State and that the federal courts in that state followed the local rules of evidence. If the evidence had been obtained in violation of the Fourth and Fifth Amendments, the Supreme Court precedent in *Weeks v. United States*, 232 U.S. 383 (1914), would have made the evidence inadmissible at trial in federal courts, but Taft had already decided that the wiretaps in *Olmstead* did not violate the Fourth Amendment.

## *Was the evidence presented to the grand jury sufficient to justify an indictment on conspiracy charges?*

Each *Olmstead* trial defendant was charged under four different counts of conspiracy to transport intoxicating liquors, to sell intoxicating liquors, to import liquor into the

United States contrary to Prohibition, and to import goods into the country contrary to national tariff acts. Conspiracy was a crime that existed in all state laws and in the federal code. The crime of conspiracy consisted of two or more people agreeing to commit a crime and one member of the group taking some action toward carrying out the plan. All members of the conspiracy are equally liable for the actions of any members, but it must be proved that those involved in the conspiracy knew of the plan and intended to break the law. In demurrers—challenges to the indictment—many of the defendants asked Judge Neterer to weigh the sufficiency of the evidence brought against them and to dismiss the indictment because it did not charge particular defendants with particular acts. Judge Neterer rejected the motions, stating that the indictment set out all of the required elements of a conspiracy, including the criminal purpose of the conspirators, their agreement to work together, and the overt acts committed by one or more of the defendants toward accomplishments of the conspiracy's goal. The indictment, Neterer found, included every element of the crime of conspiracy and sufficiently apprised the defendants of the charges against them. The U.S. Court of Appeals for the Ninth Circuit affirmed Neterer's decision, stating that the indictment "furnished sufficient information of the nature and cause of the accusation, in order that the accused might prepare for trial." The court of appeals also noted that the details required for indictment on a substantive offense were not required for indictment for conspiracy.

## *Was the indictment invalid because of improper influence and pressure on the grand jury?*

Attorneys for Olmstead and thirty-two other defendants filed motions to dismiss the indictment because it was based on improperly obtained or insufficient evidence and because William Whitney allegedly threatened the grand jury foreman with prosecution for purchasing liquor from Olmstead. The defendants claimed that prosecutors had relied on transcripts of wiretaps without establishing the reliability of the source, and that they presented evidence obtained from the search of Olmstead's house and office, even though the warrant for those searches had been issued without probable cause. Judge Neterer could find no precedent for setting aside an indictment on the basis of insufficient evidence. The findings of the grand jury were not final, and the grand jurors needed only to establish a reasonable basis for the defendants guilt. For the court to assume a review of the evidence would make it "an indicting, as well as a trying tribunal," and would improperly interfere with the secrecy that was essential to the grand jury's consideration of the evidence. Neterer also ruled that even if Whitney had threatened the foreman, the foreman would have been unable to sway the majority of the grand jury who voted to indict the Olmstead gang members. If Whitney had improperly influenced the jury, Neterer added, separate charges should be brought against him.

The charge of conspiracy allowed the government to try all defendants together and to use the evidence seized from Olmstead and Finch to establish the conspiracy, even though the Fourth and Fifth Amendments protected those two individuals from conviction based solely on that seized evidence.

## *What was the impact of the Olmstead case on the law?*

Some in Congress responded to the *Olmstead* decision by proposing bills to forbid wiretapping by federal agents, but the proposed bills did not pass. In the Federal Communications Act of 1934, Congress declared that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, [or] substance." In a 1937 case, *Nardone v. United States*, the Supreme Court held that this provision prohibited wiretapping by federal agents and excluded such evidence from trial. A second *Nardone v. United States* decision in 1939 excluded from federal court proceedings even evidence generated from following leads from such taps, applying what was later called the "fruit of the forbidden tree" rule (302 U.S. 379 and 308 U.S. 338). Indeed, these later cases followed a trend in the Supreme Court that started right after the *Olmstead* case of limiting the powers of the federal government to search.

## *What did the federal courts decide in related cases?*

### Boyd v. United States, 116 U.S. 616 (1886)

In 1886, the Supreme Court established for the first time a direct relationship between the Fourth and Fifth Amendments to the Constitution when it held that evidence gathered in violation of the Fourth Amendment would, if admitted in a court proceeding, violate a defendant's Fifth Amendment protection against self-incrimination. In 1884, the U.S. attorney for the Southern District of New York sued E.A. Boyd and Sons for failing to pay the required duty on plate glass that the company imported from England. Under the authority of an 1874 act of Congress, the U.S. district court ordered Boyd and Sons to provide the court with the invoice for the glass. Under the terms of the act, failure to produce the required evidence would be considered admission of the charges alleged by the U.S. attorney. The importers delivered the document but protested that the act of 1874 was an unconstitutional infringement of their protection from unreasonable searches and seizures. After a jury in the district court and the circuit court judges on appeal found the merchants liable for the customs duty, the Supreme Court agreed to hear arguments on Boyd's claim that their Fourth and Fifth Amendment rights had been violated.

The Supreme Court, in an opinion written by Justice Joseph Bradley, held that the Fourth Amendment offered protection against any government action that demanded private papers to establish a criminal charge or a forfeiture of property, such as a fine

in a civil case. Bradley wrote that the Fourth Amendment must be understood in the context of Revolutionary debates on searches and seizures in both the Colonies and Great Britain. Citing a well-known opinion of Great Britain's Lord Camden, Bradley emphasized the founding generation's intention to protect "the sanctity of a man's home and the privacies of life." The Supreme Court also held that the order for the delivery of the merchants' papers violated the Fifth Amendment by forcing the merchants to be witnesses against themselves. According to Bradley, the two amendments in question "throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, . . . And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

Several of the briefs for the defendants' appeal in *Olmstead* cited *Boyd* in support of the defendants' argument that the Fourth Amendment protected telephone conversations from government intrusion, but Taft said the defendants' voluntarily participated in telephone conversations and had not been subject to the kind of court order that had been found unconstitutional in *Boyd*. In his *Olmstead* dissent, Justice Brandeis referred to *Boyd* as "a case that will be remembered as long as civil liberty lives in the United States," and cited the decision as evidence that the Supreme Court has repeatedly "refused to place an unduly literal construction" upon the Fourth Amendment.

## Weeks v. United States, 232 U.S. 383 (1914)

In 1914, the Supreme Court established what became known as the "exclusionary rule," which holds that evidence obtained by unconstitutional means cannot be used against a defendant. Fremont Weeks of Kansas City, Missouri, was convicted in the U.S. District Court for the Western District of Missouri on charges related to his involvement in an interstate lottery business. Weeks was convicted in part on the basis of evidence obtained from his house during a search by local police accompanied by a federal marshal. Following his conviction, Weeks appealed to the Supreme Court on the grounds that the district court was in error when it denied his petition for the return of the seized materials and his motion to exclude the use of any evidence obtained without a warrant, in violation of the Fourth Amendment.

A unanimous Supreme Court, in an opinion authored by Justice William Rufus Day, held that the Fourth Amendment protected "the people, their persons, houses, papers and effects against all unreasonable searches and seizures" conducted by federal officials or ordered by the federal courts. The marshal could have searched Weeks' house only "when armed with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the thing for which the search was to be made." If federal officials could seize private letters and

documents as they did in the *Weeks* case, Bradley said that the Fourth Amendment was of "no value, and, . . . might as well be stricken from the Constitution."

In the majority's opinion in *Olmstead*, Chief Justice Taft held that nothing in *Weeks* challenged his finding that Fourth Amendment protections were limited to warrantless searches of a person's home and private papers.

In 1961, in its decision in *Mapp v. Ohio*, the Supreme Court extended the exclusionary rule to state court proceedings.

## Carroll v. United States, 267 U.S. 132 (1925)

George Carroll and John Kiro were convicted in the U.S. District Court for the Western District of Michigan on charges of transporting liquor in an automobile, in violation of the Volstead Act. They appealed their conviction on the grounds that Prohibition agents and a state policeman had stopped and searched the automobile without a warrant, thus violating the defendants' rights under the Fourth Amendment. Chief Justice William Howard Taft, writing for the majority of the Supreme Court, held that warrantless searches and seizures of contraband goods in the process of transportation were not governed by the same rules prohibiting warrantless searches of private dwellings, and he cited cases in which the federal courts had approved warrantless searches of ships and vehicles suspected of carrying contraband. According to Taft, the agents making the seizure needed only to demonstrate probable cause to believe the car contained liquor intended for sale. Chief Justice Taft added that the Fourth Amendment must be interpreted "in a manner which will conserve public interests as well as the interests and rights of individual citizens." In the *Carroll* case, the arresting agents claimed they had reason to believe the defendants were transporting liquor in the automobile because of an attempted undercover purchase of liquor from the defendants more than two months earlier.

Justice James McReynolds, with the concurrence of Justice George Sutherland, dissented from the majority's opinion. McReynolds held that nothing in the Volstead Act displaced the common-law rule prohibiting arrests without warrant for a misdemeanor. McReynolds also reasoned that the defendants' previous and unfulfilled offer to sell liquor was not reasonable grounds for stopping their car more than two months later.

## Katz v. United States, 389 U.S. 347 (1967)

Charles Katz was convicted on charges of sending wagering information across state lines by means of a telephone. At the trial in the U.S. District Court for the Southern District of California, the FBI produced transcripts of conversations it had recorded through a device affixed to the outside of a public telephone booth used by Katz. The trial judge rejected the defendant's objection to the evidence, and the U.S. Court of Appeals for the Ninth Circuit also rejected arguments that the defendant's Fourth

Amendment rights had been violated. The Supreme Court, with an opinion written by Justice Potter Stewart, overturned Katz's conviction and held that the listening device had violated Katz's constitutional rights. Stewart specifically rejected the holding in *Olmstead* and subsequent decisions that held that physical penetration of tangible property was required for a Fourth Amendment violation. Subsequent developments, including "the vital role that the public telephone has come to play in private communication," had, according to Stewart, undermined the notion of trespass relied on in *Olmstead*. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."

Justice Hugo Black dissented, arguing that the Fourth Amendment words protecting "persons, houses, papers, and effects" connoted "tangible things with size, form, and weight, things capable of being searched, seized, or both." Black denied that the Fourth Amendment gave the Supreme Court "unlimited power to declare unconstitutional everything which affects privacy," although Stewart had written in the majority opinion that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy'."

# Legal Arguments in Court

## *The defense attorneys*

Attorneys for the *Olmstead* defendants asked the trial judge to review the evidence to make sure it was sufficient to justify an indictment. The attorneys also asked that the indictment be dismissed on grounds of improper influence, alleging that William Whitney coerced the grand jury by threatening the foreman with prosecution. On the constitutional issues, the *Olmstead* defense attorneys wanted to exclude from trial the evidence obtained by wiretapping on the grounds that the wiretapping constituted an unreasonable search and seizure in violation of the Fourth Amendment. They pointed out that the wiretapping was contrary to Washington state law and that the court ought not sanction breaking the law as a means of obtaining evidence. Drawing on the long tradition of associating search and seizure issues with property rights, the defense attorneys characterized the agents who listened in as "trespassers" on private rights and portrayed conversations on the telephone as the equivalent of letters sent in the mail, which the Supreme Court had recognized as protected by the Fourth Amendment. Defense attorneys also argued that the use as evidence of the overheard conversations compelled the defendants to be witnesses against themselves, in violation of the Fifth Amendment. Citing the two amendments and invoking property rights, in effect, postulated a right of privacy from government intrusion.

## *The government attorneys*

At the trial level and in the Ninth Circuit court of appeals, the government prosecutors argued that there was sufficient evidence to bring an indictment and that there was no undue influence on the grand jury, referring to the affidavits of the foreman and others that contradicted the defendants' claims. The government attorneys asserted that only evidence gathered in violation of the Fourth Amendment could be excluded from federal courts, and that even illegally obtained evidence, such as that obtained in violation of the Washington state law prohibiting wiretaps, could be used according to the common law. The government turned the property argument against the defendants, pointing out that the wiretap was made not on the defendants' premises and arguing there was no invasion of their property. The government also rebutted the equating of phone conversations with sealed letters, pointing out that letters were papers, which were mentioned in the text of the Fourth Amendment. In short, the government argued that there was no violation of Fourth Amendment provisions against unreasonable searches and that the evidence from the wiretaps should be admitted. The government separated the questions of the Fourth and

Fifth Amendments, arguing that if the Fourth did not exclude the evidence then the Fifth did not apply. The government claimed the Fourth Amendment was intended to prohibit the use of general warrants that did not specify the place that was to be searched or the items to be seized, and thus did not combine with the Fifth Amendment to create a right of privacy.

# Biographies

## Roy Olmstead (1886–1966)

*The defendant*

Born in Nebraska on September 18, 1886, Roy Olmstead moved to Seattle in 1904. He worked in the Seattle shipyards before joining the city police department in 1906. Olmstead rose quickly through the ranks of the Seattle police, becoming sergeant in 1910 and lieutenant in 1916. He was a rising star in the department and was well thought of in the courts, where he appeared often to recommend probation for offenders.

*Elise and Roy Olmstead (1925)*

Courtesy of Seattle Post-Intelligencer Collection, Museum of History & Industry, Seattle, Washington.

Olmstead's police career coincided with a period of tremendous growth for Seattle. From 1906 to 1920, the city's population tripled, and, like many boomtowns, Seattle fluctuated between periods of institutionalized corruption, with "wide open" flouting of restrictions on liquor, gambling, and prostitution, and periods of strict law enforcement and reform. Olmstead was a friend to two Seattle mayors, Dr. Edwin J. Brown and Hiram Gill, both of whom favored the "wide open" style. Before Prohibition, Olmstead had begun to sell his probation recommendations and soon had capital to invest.

By 1920, Olmstead was perfectly placed to become the city's major bootlegger. From his position in the police department, he saw how profitable bootlegging liquor from Canada had become. He also saw how criminal groups, one headed by a former policeman, dominated the business of illegal alcohol supply after the state of Washington went dry in 1916. After law enforcement officials broke existing bootlegging gangs, Olmstead saw his opportunity to enter the lucrative and illegal business.

In March 1920, Olmstead was caught by federal agents while unloading illegal Canadian liquor from a boat, the largest shipment seized in the area up to that time. He was fired from the police department, and while on bail he devoted his energies to bootlegging. His organization soon dominated the smuggling and supplying of liquor to Seattle.

Olmstead became widely identified as the King of the Northwest Bootleggers, and he lived a royal life. He divorced his first wife in 1924 and married Elise Campbell (known as Elsie), and they entertained at the large house he bought in the exclusive neighborhood of Mount Baker. He was a dapper dresser and moved in the highest political and economic circles of the city. He bought the city's first radio station, located its transmitter in his home, and gave his wife time on the air. Rumors spread that she sent coded messages out over the air to the bootlegging ships at sea. She was tried along with her husband in 1926, but she was acquitted.

Following his conspiracy conviction at trial, Olmstead sold his legal business, his home, and personal property. After the Ninth Circuit court rejected Olmstead's appeals, Olmstead began serving his four-year sentence at the federal penitentiary on McNeil Island in Washington. He left the prison only to appear as a witness in the corruption trial of the leading federal Prohibition administrators, including William Whitney. The administrators were acquitted.

In May 1931, Olmstead left prison a changed man. In prison he became a Christian Scientist, embracing his religion's view that liquor was a harmful substance. After his release, he made his living selling furniture. In 1935, due largely to the efforts of his wife Elise, Roy Olmstead received a presidential pardon, which remitted his fines and court costs. Eventually Olmstead became a full time Christian Science practitioner and spent much of his time visiting prisons and jails attempting to help inmates with their rehabilitations. He died on April 30, 1966.

## Thomas P. Revelle (1868–1941)

*United States attorney*

Thomas P. Revelle was born in Maryland in 1868. He first studied for the ministry at Western Maryland College and went to Seattle in 1898 to serve as a minister in a Methodist Church. He continued his education, earning a masters degree from Western Maryland College and a law degree at the University of Washington Law School. In 1906, he took up the practice of law with his brothers, forming the firm of Revelle, Revelle, & Revelle. He made Seattle his home and became involved in local politics. As a Seattle city councilman from 1906 to 1911, Revelle was a reformer. He was best known as the founder of the Pike Place Public Market. While today the market is a Seattle landmark, at the time of its founding it was an attempt to bring farm produce to the public directly and cheaply.

Revelle was appointed a U.S. attorney for the Western District of Washington by President Warren Harding and was confirmed by the Senate on October 11, 1921. As a Methodist, Revelle was personally dry, and, as an official, he was scrupulously honest. When the leading federal law enforcers, including members of his office, were indicted for corruption in 1930, Revelle's name was absent. However, the corruption of government during Prohibition, especially during the term of Mayor Edwin J. "Doc" Brown, spurred him to action. Before Revelle resigned his office, he was so concerned about corruption within Prohibition enforcement ranks that he asked the Justice Department to investigate the federal officials in his district. Revelle was an able prosecutor. His cases were always well prepared, and he was a clear presenter of evidence in court. He also had aspirations for higher office; he unsuccessfully sought the Republican nomination for governor in 1924.

Revelle remained loyal to his political patron, Senator Wesley L. Jones, and he effectively used material developed from the *Olmstead* case to attack the record of Mayor Brown when Brown began his campaign for Senator Jones's seat. With the decline in the popularity of Prohibition and with the decline in the fortune of his political patron, Revelle abandoned politics and law and took up a career in real estate. He died in 1941.

## Jerry L. Finch

*Co-defendant and lawyer*

Not much is known about Jerry L. Finch. While Thomas Revelle characterized Finch as a "fixer," and the *Seattle Daily Times* mostly commented on his attire, he was an important figure in the case. Finch was not only Roy Olmstead's attorney, but also one of the most important men in the Olmstead liquor smuggling and selling operation. Few knew as much about Olmstead's operations as Finch. Finch was the front man on many of the purchases and leases of vehicles and property used in the operation. Although better in the boardroom than the courtroom, he was a capable lawyer, and, prior to the trial, he filed a number of motions for suppression of evidence that raised the key legal questions that would be addressed on appeal. Finch again raised those points at trial and added to them in filings on appeal. After the appeals in the case ended, Finch entered prison and was disbarred.

## George Francis Vanderveer (1875–1942)

*Defense lawyer*

George Francis Vanderveer was born in Iowa on August 2, 1875. At his father's urging, he attended college at the new Stanford University in California, and then attended Columbia Law School. Vanderveer moved to the boomtown of Seattle, renewed his connections with school friends, and became associated with the business and legal leaders of the city.

Vanderveer took a job with the prosecuting attorney of King County. As a prosecutor, Vanderveer developed into an able courtroom warrior. He disliked the webs of corruption that characterized local politics, and he made a political enemy of the owner of the *Seattle Daily Times*, Alden J. Blethen. Despite the strong opposition of that paper, Vanderveer won election in 1908 as prosecuting attorney of King County. (Years later, during the *Olmstead* trial, the *Seattle Daily Times*, then being published by C.B. Blethen, son of Alden, did not print Vanderveer's name even though Vanderveer was the most active of the defense attorneys.) Vanderveer quickly became a crusading prosecutor, especially targeting corruption in the city. He was a one-term office holder, and his crusading work was quickly undone by the election of a wide-open mayor.

Vanderveer went into private practice, specializing in criminal defense and was soon defending people like those he had previously prosecuted. Vanderveer became famous defending the radical laborers of the Industrial Workers of the World (the Wobblies); at the same time he became alienated from the business community. To make a living he began working for those individuals who took advantage of loopholes in Washington's Prohibition system. The state Prohibition law of 1916 allowed legal importation of alcohol and sale for medicinal purposes. The latter provision prompted the entry of existing drug stores into the retail liquor business and also the birth of new drug stores, whose major purpose was to supply alcoholic beverages. Vanderveer devised means to take advantage of these gaps in the state Prohibition law, and he was closely identified with bootleggers.

In late 1924, his longtime girlfriend committed suicide, and Vanderveer began drinking heavily. Nevertheless, he was still recognized by many in the area as an aggressive and able courtroom advocate, so a good number of defendants in the *Olmstead* case hired him to conduct their defense. *Olmstead*, though a legal defeat, showcased Vanderveer's crusading side. Until the end of his life in 1942, he served as a lawyer to a great number of labor unions.

## Jeremiah Neterer (1862–1943)

*U.S. district court judge, Western District of Washington*

Jeremiah Neterer was born in a log house on a farm in Northern Indiana. Little is known about his childhood and early youth. He migrated to Washington, but whether he came with his family or alone is unclear. He received a law degree from Valparaiso University in 1885. By 1890, he lived in what would later become Bellingham, and beginning in 1893 he served as city attorney. He became a judge of the Superior Court of Whatcom County in 1901. As a judge he was somewhat of an innovator, organizing an informal juvenile court. Like the famous Colorado Judge Benjamin Lindsey, Neterer set certain days aside for holding conferences with boys in trouble and their parents. He was a lifelong Democrat, serving as a delegate to the Democratic National Convention in 1912. He received a recess appointment to the U.S. District Court for the Western District of Washington from Woodrow Wilson on March 4, 1913, and after confirmation by the Senate received his commission on July 21, 1913. By 1933 Neterer assumed senior status, and he continued to serve until his death.

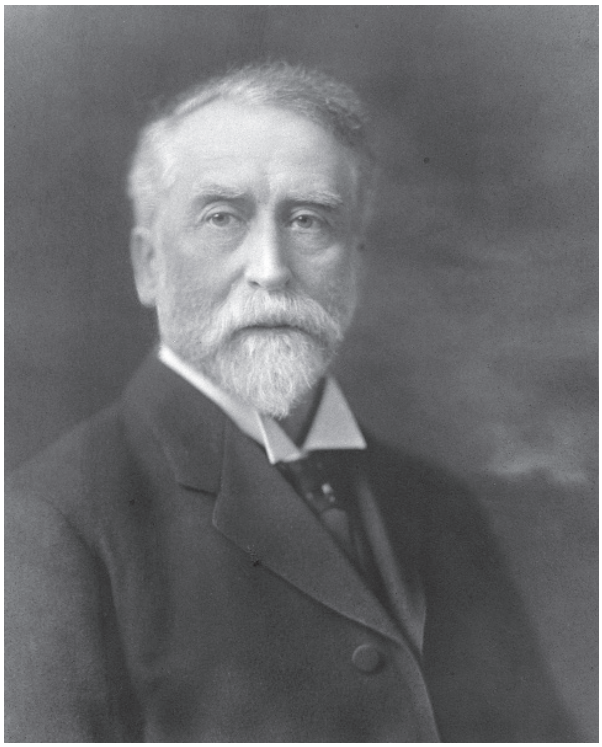
*Judge Jeremiah Neterer*

Courtesy of the U.S. District Court for the Western District of Washington.

## William Ball Gilbert (1847–1931)

*Judge of the United States Court of Appeals for the Ninth Circuit*

William Ball Gilbert was born in Fairfax County, Virginia, into a family that could trace its roots in America to the seventeenth century. His father moved the family to Ohio before the Civil War, and William spent the war years at Williams College, graduating in 1866. His first interests were scientific, but he later turned to law. Gilbert enrolled in the University of Michigan law school, earning a degree in 1872. The next year he moved to Portland, Oregon, and practiced law there until 1892. He also served one term in the Oregon legislature from 1889 to 1891. President Benjamin Harrison nominated him to the newly created U.S. Circuit Court of Appeals for the Ninth Circuit. Gilbert received his commission on March 18, 1892, and served until 1931. In his long judicial career, Gilbert proved to be a hard worker and productive jurist with a real love for the law. For over twenty years he lectured at the University of Oregon Law School. He never fully accepted modern times, refusing to ride in a car, for example. Gilbert wrote for the U.S. court of appeals in a great number of cases, both small and large, including one of the cases that came out of the Teapot Dome scandal.



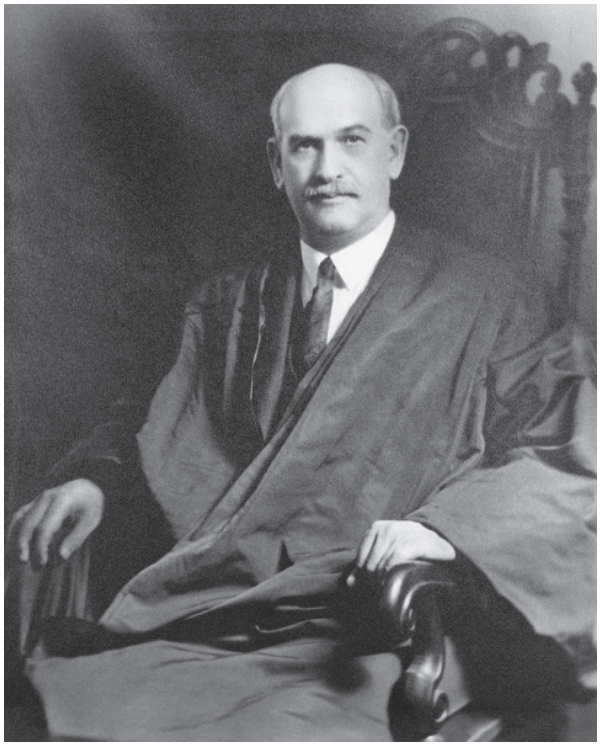
*Judge William Ball Gilbert*

Courtesy of Ninth Circuit U.S. Court of Appeals Library.

## Frank H. Rudkin (1864–1931)

*Judge of the United States Court of Appeals for the Ninth Circuit*

Frank Rudkin was born in Vernon, Ohio, and was educated in Ohio and in Canada. He attended Washington and Lee University, in Lexington, Virginia, where he took up the study of law. After completing his studies, Rudkin settled in North Yakima, Washington, where he practiced law for fourteen years before winning an election as state superior court judge in 1901. In 1905, he was elected to the Washington Supreme Court, and he became chief justice in 1909. In 1911, Rudkin accepted President William Howard Taft's appointment to become U.S. district judge for the Eastern District of Washington. Twelve years later, President Harding nominated Rudkin to the U.S. Court of Appeals for the Ninth Circuit. He served there until his death. He was by all accounts a quick study and a hard worker. He did not defer to his elders, and from his first year on the circuit he was challenging the reasoning of more established judges, especially William B. Gilbert.



*Judge Frank H. Rudkin*

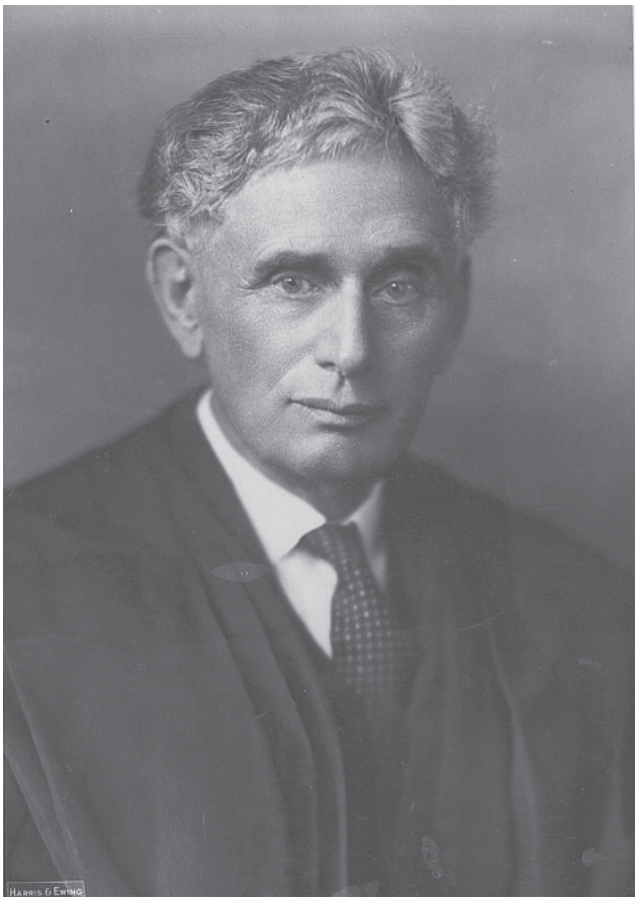
Courtesy of Ninth Circuit U.S. Court of Appeals Library.

## Louis Dembitz Brandeis (1856–1941)

*Justice of the Supreme Court of the United States*

Louis Brandeis was appointed a justice of the U.S. Supreme Court on June 1, 1916. Brandeis was already one of the most famous lawyers in the United States, and he provided legal support in defense of many Progressive reforms. He was perhaps best known for use of what became known as the "Brandeis brief," which provided courts with social and economic background that illuminated the potential impact of a court's decision in a given case. In earlier Prohibition cases before the Supreme

Court, Brandeis frequently supported the enforcement of the Volstead Act, in part because he believed the courts should generally defer to democratically enacted statutes, and because he supported the use of legislation to promote social reform. Although he joined Chief Justice Taft in the *Carroll* decision to permit unwarranted searches of automobiles suspected of transporting liquor, Brandeis offered a strong dissent to the Court's opinion in *Olmstead*. The methods employed by the government to indict and convict the Olmstead gang became for Brandeis the real threat of lawlessness. If the Supreme Court let stand a conviction based on evidence gathered in violation of a state's law, "the Government itself would become a lawbreaker." New technologies portended even more serious threats of government intrusion that would not be restricted by Taft's literal reading of the Fourth Amendment. Brandeis warned that "subtler and more far-reaching means of invading privacy have become available to the Government. . . . The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping."




*Justice Louis D. Brandeis (1916)*

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Library of Congress, Prints and Photographs Division
[LC-DIG-ppmsca-06024].

## William Howard Taft (1857–1930)

*Chief Justice of the Supreme Court of the United States*

William Howard Taft was appointed Chief Justice of the United States on June 30, 1921, and is the only former President of the United States to serve as Chief Justice. Taft had also served as a judge of the U.S. Court of Appeals for the Sixth Circuit, to which he was appointed in 1892 at the age of 34. After serving as President from 1909 to 1913, Taft was a professor at his alma mater, Yale Law School, from 1913 to

1921, and during that time he frequently gave public talks on legal issues and on the administration of the federal court system. Taft adamantly opposed the proposed constitutional amendment prohibiting alcoholic beverages, and he feared that national Prohibition would impose an impossible burden on law enforcement agencies and on the federal courts. Taft doubted that legislation alone would ever bring about such a significant social reform, and he thought the practical challenges to federal enforcement would make the nation's courts the object of popular ridicule. Prohibition, he predicted, would not end the manufacture and sale of beverage alcohol, only drive the industry into the hands of criminals. He also found nothing inherently wrong with alcohol consumption.

*Chief Justice William Howard Taft*

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Library of Congress Prints and Photographs Division
[LC-DIG-hec-15125].

Once the Eighteenth Amendment was ratified, however, Taft was determined that the federal courts apply the enforcement act. Taft's fear that disregard of the Prohibition laws would engender disrespect for all laws convinced him that the Supreme Court must strictly support the enforcement of Prohibition laws. Taft faced strong dissents from many of his fellow justices, and some of the most important Prohibition decisions, like *Olmstead*, divided the Supreme Court five to four. Taft acknowledged that his predictions about the obstacles to enforcement and public criticism of the courts had proved true, but he remained convinced that the constitutional amendment and related legislation must be observed to preserve respect for the rule of law.

Taft resigned as Chief Justice a month before his death in 1930 and did not live to see the repeal of Prohibition.

# Media Coverage and Public Debates

The *Olmstead* case went from 1924 to 1928, the middle period of the United States' experience with national Prohibition. The case began after the early optimism that Prohibition would better the nation had faded, but it came before the movement for repeal of the Eighteenth Amendment had gathered steam. The case was thus part of the debate over the effects of Prohibition on government, law, and society.

At the time, questions of government corruption were the key issue of the case, while for latter-day commentators the concerns about privacy and over active government were central. The case exemplified the worries, intensified by alcohol Prohibition, over the corruption of government and police. Much of the Seattle newspapers' coverage of the case focused on the questions of police and government corruption. In the year of the trial, for example, the weekly newspaper the *Argus*, which had always opposed Prohibition, decried the corruption of the Seattle police and the regime of Mayor Edwin J. Brown. As much as the *Argus* deprecated the social cost of corruption it also recognized the futility of attempting to enforce the Prohibition law. The *Argus* ran an editorial on the Hearst newspaper chain's attempt to poll Americans as to whether they supported the Prohibition law, and the paper was happy to report that public opinion was running strongly against Prohibition.

A year later, when the leading federal enforcers were on trial for corruption, the *Seattle Daily Times*, which strongly supported Prohibition at its onset, continued to be worried about the corruption of government. In this middle period of Prohibition, corruption and crime became the staples of discussion about Prohibition. Some advocated harsher penalties, and indeed such penalties came with the passage of the Jones "5 and 10" law of 1930, named after Washington Senator Wesley L. Jones. The law raised federal penalties for violating Prohibition to up to five years in prison and $10,000 in fines. Others advocated stricter enforcement of Prohibition or called for a modification of Prohibition, such as permitting the sale of beer and wine, or for a repeal of the system.

In 1931, Roy Olmstead left prison, prompting the *Seattle Post Intelligencer* to assess his career and subsequent events. The extraordinary effort of the government to put him out of business only resulted in his replacement by others. Prohibition continued to corrupt, and the solution, the paper thought, lay in changing the law. Thus the *Olmstead* case was part of the debate about corruption, government power, and privacy, which filtered into the debate about improving or repealing Prohibition.

## *"Police Protection for Bootleggers"*

*The Argus (a well-established weekly Seattle paper), under the management of Harry A. Chadwick, became the most important media outlet for commentary on public affairs in Seattle. Chadwick and his paper were steadfastly against Prohibition, and this editorial used the Olmstead case to attack Prohibition for creating a culture of corruption.*

[Document Source: *The Argus*, Seattle, Wash., Feb. 6, 1926.]

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Testimony so far produced in the Olmsted trial shows that certain police officers furnished protection de lux for the bootleggers now on trial. The "whispering wires" may or may not be competent evidence. It may or may not result in the conviction of the men on trial. But it will be mighty hard from now on to make some people believe that those police officers did not go the limit in protecting the headquarters of the bootleggers from raids, and when this became impossible, furnished sufficient warning. Indeed, it looks from the testimony as though certain police officers were falling all over each other in an attempt to get credit for this kindly action.

The Argus has no opinion to express at this time as to the guilt or innocence of any of the accused. It simply desires to call attention to the fact that Mayor Brown is a candidate for reelection, and that he is the man that any successful candidate will have to defeat. Without the evidence so far produced at this trial it is quite apparent that Seattle has been run wide open, insofar as the handling of liquor is concerned. Those who use liquor, or who are in touch with people who use liquor, know that at certain times, as, for instance, when Mrs. Landes was acting mayor and when the grand jury was in session, liquor was exceedingly difficult to purchase.

## *"A Judicial Farce"*

*Strongly against Prohibition from the onset, the Argus, unlike the other newspapers in Seattle, did not see the conviction of Olmstead and others as a sign that Prohibition was working. Rather, in this editorial, the paper argued exactly the opposite.*

[Document Source: *The Argus*, Seattle, Wash., Mar. 13, 1926.]

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Roy Olmsted must go to jail for four years and pay a fine of $8,000. Anyhow, that is the sentence which was handed out to him Monday. Twenty others received sentences of small fines and short terms of imprisonment.

Originally some sixty odd men were charged with conspiracy. One third of that number have been convicted; the balance are at liberty. The chances are that they are

still importing and selling liquor. Indeed, during the trial one of the gang, then out on bail, was caught with liquor in his possession.

After many weary weeks, after good men who should have been busy with their own affairs had given up their time to act as jurors, after the court had been given over to this conspiracy case while important matters which would ordinarily come before the federal court had been side-tracked, this is the result.

And thus is another ridiculous chapter written in this ridiculous and hopeless task of enforcing the prohibition law.

In a trifle over two years from the time he goes into the penitentiary Olmsted will be in a position to apply for parole. But it must be remembered that he has not yet gone to the penitentiary. It is stated that he will appeal. He will probably take advantage of all possible legal loopholes. And in the meantime there does not seem to be anything to prevent him from tacking the motto above his desk "Business as Usual."

## *"The Occasion Has Passed"*

*By the 1920s, the Seattle Daily Times, an afternoon newspaper, was a fixture of the city. The paper, owned and managed by C. B. Blethen, had been one of the most vocal opponents of Prohibition prior to the law's enactment. The paper became one of the strongest public voices in support of Prohibition after it became law. In this editorial, the Times asserts that the corruption of the law could be overcome.*

[Document Source: *Seattle Daily Times*, Nov. 17, 1927, p. 6.]

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Public interest in the real or purported rum-running activities of Mr. Roy Olmsted has been pretty well sated, and public opinion as to his guilt or innocence of the many offenses charged against him is not likely to be very influential in determining his ultimate fate. What Mr. Olmsted may say in testifying on his own behalf is of public importance only in its bearing upon matters of public knowledge or surmise.

The statement made by Mr. Olmsted, under oath, that he was offered a pardon if he would help the government "get" certain county and city officials comes within that category. Federal authorities of this district made no secret of their dissatisfaction with the workings of the county sheriff's office and the city Police Department under earlier administrations. By every means of words and gesture from all quarters the public was kept constantly aware of the fact that there was no semblance of cooperation to endorse the prohibition law.

In handling the first of the Olmsted "conspiracy" cases the federal officers frankly disclosed an eagerness for local housecleaning. If Mr. Olmsted, as he says, refused to help in that enterprise, he may have strengthened himself temporarily in certain more or less secluded quarters, but his belated recital of any such circumstances will add nothing to public appreciation of his doubtful virtues.

In any event, the occasion in which Mr. Olmsted's help might have been useful has passed. The people have done some housecleaning on their own account.

# Historical Documents Related to the *Olmstead* Case

## *The Fourth Amendment to the U.S. Constitution*

*Ratified as part of the Bill of Rights in 1791, the Fourth Amendment was a response to two specific concerns of the founding era. Prior to the American Revolution, British colonial governments attempted to enforce trade laws by using broad search warrants known as writs of assistance. These writs violated well-established English rights and were deeply resented by many colonists. Americans of the Revolutionary generation were also well acquainted with the story of the English radical John Wilkes and the British government's seizure of Wilkes' personal papers, which were used against him at his trial for libel. To prevent similar abuses, the Fourth Amendment bans unreasonable searches and seizures and sets out a general procedure to be used in searches. One of the questions raised by the Olmstead case was, did the use of wiretapping violate the Fourth Amendment?*

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AMENDMENT IV

The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants 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.

## *The Fifth Amendment to the U.S. Constitution*

*The Fifth Amendment is in essence a miniature code of criminal procedure. Ratified as part of the Bill of Rights in 1791, the amendment set out safeguards for an individual's rights before a court. Among other things, it forbade compelling a person to be a witness against himself or herself in a criminal trial. Later, that provision was interpreted by courts to limit the introduction of personal papers (such as letters) as evidence of crime. The Olmstead case raised the question of whether wire tapping of the phones forced the defendants to be witnesses against themselves, contrary to the amendment's guarantee.*

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AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or

naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## *The Eighteenth Amendment to the U.S. Constitution*

*The Prohibition amendment banned commerce in intoxicating liquors, divided enforcement between the state and federal governments, and set a time limit for ratification. The last provision was a desperate attempt by the amendment's opponents to stop Prohibition, but the amendment was passed by Congress on December 18, 1917, and ratification came on January 16, 1919, little more than a year later.*

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AMENDMENT XVIII

Section 1.

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2.

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

## *The Twenty-First Amendment to the U.S. Constitution*

*The repeal amendment not only repealed the Eighteenth Amendment, but it also gave each state authority to regulate alcohol coming into its jurisdiction from outside the country or state. This is the only amendment to require the convention method of ratification instead of putting it to a vote of state legislatures. This provision was adopted out of fear of Prohibitionist control of many state legislatures. The strategy was effective in that the amendment passed Congress on February 20, 1933, and was ratified on December 5, 1933.*

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AMENDMENT XXI

Section 1.

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

## *The National Prohibition Act (the Volstead Act)*

*Congress passed the Volstead Act on October 18, 1919, and the law went into effect February 1, 1920. The Act was organized in three titles: the first instituted a system of war-time prohibition that ran until the beginning of national Prohibition; the second set out the system of national Prohibition; and the third set up the system for the regulation of production of industrial alcohol. The Act outlawed the production and sale of alcoholic beverages unless for religious or medical purposes. The Act defined intoxicating beverages to include those that contained as little as one half of one per cent alcohol, but it allowed for the manufacture, possession, and use of alcoholic beverages in private homes. It also contains a specific provision limiting searches of private homes under the Act.*

[Document Source: 41 U.S. Statutes at Large, pp. 305–19.]

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TITLE II. Prohibition of Intoxicating Beverages.

SEC. 3.
No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that—the use of intoxicating liquor as a beverage may be prevented. . . .

SEC. 21.
Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. . . .

SEC. 25.
It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title 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. . . .

SEC. 29.
Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. . . .

SEC. 33.
After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. . . . But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and

used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used. . . .

## *Judge Jeremiah Neterer's decision on defendants' plea in abatement, U.S. District Court for the Western District of Washington*

*Soon after the grand jury presented the indictments, Jerry L. Finch, himself a defendant and attorney for the Olmstead defendants, filed a plea for an abatement, which would overturn the indictments. In addition to his allegation that William Whitney unduly influenced the grand jury, Finch asked the district court judge to assess the sufficiency of the evidence before any trial. The U.S. attorney urged that the abatement be struck, that is, not granted, and Judge Neterer agreed. In his opinion, Neterer stressed the reluctance of courts to interfere with the grand jury's responsibility for bringing an indictment.*

[Document Source: United States v. Olmstead, 7 F.2d 756 (U.S. Dist. Ct., W.D. Wash., Apr. 23, 1925).]

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The defendants contend that their rights have been invaded by the reception of incompetent evidence and by coercion of the foreman of the grand jury by a prohibition agent, and that it is the duty of the court to review the testimony and determine its sufficiency before requiring the defendants to plead, that a trial would take from 30 to 60 days, large expenses be necessitated which may now be eliminated by the court in this preliminary examination, . . . .

The grand jury is of ancient origin; . . . It is a distinct, independent body, and must act free from influence, fear, favor, affection, reward, or hope thereof proceeding from, or without, the court. The Constitution of the United States, as well as the constitutions of all the states, show it is adopted as a means of protection to the citizen as well as a necessary aid to public justice. The grand jurors being sworn officers of the court, the presumption is that the indictment was found only upon proper evidence . . . , and before the court would, under any circumstances, enter upon an investigation, it must appear by strong, positive proof that the inhibitions of the law have been violated and the presumption overcome.

May a defendant require the court to go behind the return of a true bill [an indictment] and sit as a court of error and enter upon an investigation of the testimony produced and determine its relevancy and sufficiency, review the cause as heard by the grand jury upon the sole demand of a defendant, upon statements which he ver-

ily believes to be true? May the secrecy of investigation essential to the nature of the institution, which has from time immemorial been associated with the grand jury system, and considered an efficient means of its successful operation, be set aside, and all proceedings made public, if a party charged so elects? If a review is had, and a grand juror is called as a witness, must he tell who testified before the grand jury . . . and disclose the testimony of the witnesses before the grand jury? . . . If an investigation is made as to the sufficiency of the evidence, then all the evidence must be produced . . . , and shall the court sit as a sieve through which the testimony of the government must pass, in preparation for trial by the defendants to the charge in the indictment? If in one case, it must be done in all cases on request of a defendant. May the court, irrespective of statute, adopt a procedure and assume a reviewing function, and pass upon the materiality and sufficiency of the evidence, and become an indicting, as well as a trying tribunal? I know of no rule of procedure or provision of law under which the court would be warranted to establish such a precedent. . . .

I know of no case in this circuit where an indictment has been set aside because of insufficiency of the evidence before the grand jury. Pleas in abatement are most strongly construed against the pleader, and every existing fact must be negatived and every inference denied. I think it is well established that the rule of the Fourth and Fifth Amendments is a personal privilege, and may not be here urged, except with the possible exception of defendants Olmstead and Finch . . . , and since, as I view it, the "wire tapping" and search warrant bear a different status and upon the record may not be here invoked by these parties, and are not sufficient as to these defendants, in the proceedings before the grand jury. Grand jury proceedings are not final, and the proof need only establish a reasonable ground to believe that the defendant is guilty. The record is not clear, nor the inference impelling under the plea, that there was not some competent evidence before the grand jury.

No objection can be made to the indictment because of the alleged conduct of Whitney and the foreman of the grand jury. The foreman did not control the jury. There is no allegation or intimation that the foreman sought to impress upon the jurors any undue influence, nor any influence whatever. A vote of twelve of the grand jurors was sufficient to indict, sixteen were a quorum, more were present. It was the foreman's duty to sign the indictment upon the vote of twelve finding the indictment, whether he voted in favor of it or otherwise. If Whitney was guilty of conduct as charged, he is liable to another proceeding, and, if the matter is presented before the court upon a positive declaration and statement of fact under oath, cognizance will be taken of the matter. No person, be he government agent or otherwise, has any right or license to attempt to persuade, coerce, or in any manner influence the action of a grand juror other than as a sworn witness giving testimony before the entire body.

The motion to strike is granted.

## *Majority opinion on the appeal of the Olmstead defendants, U.S. Circuit Court of Appeals for the Ninth Circuit*

*Three groups of defendants appealed the verdict in the district court trial. The appeal of Olmstead and others was prepared by Finch and Vanderveer; the two other appeals were Green v. United States and McInnis v. United States. Much of the argument for the appellants repeated the points raised by Finch at the trial, and some of the argument responded to the rulings of Judge Neterer in the district court. The defendants' attorneys asserted that Judge Neterer had erred in a number of decisions and thus the verdict should be overturned. Key to the defendants' appeal was the claim that Neterer had permitted the admission of wiretapped evidence, contrary to the Fourth Amendment. In a two-to-one decision, the circuit appeals court rejected the defendants' appeal. Judge Gilbert's opinion for the majority upheld all of Judge Neterer's rulings. On the key Fourth Amendment question, Gilbert portrayed the wiretapping as comparable to overhearing a conversation and not as an invasion of the home, which the Fourth Amendment was designed to protect.*

[Document Source: Olmstead v. United States, 19 F.2d 842 (U.S. Cir. Ct. of App., 9th Cir., May 9, 1927).]

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In Error to the District Court of the United States, for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge. . . .

Before Gilbert, Rudkin, and Dietrich, Circuit Judges.

Gilbert, Circuit Judge. . . .

The court below ruled that objection to the indictment could not be sustained on the ground of the alleged coercion of the foreman by Whitney, there being no allegation that the foreman exerted undue influence, or any influence whatever, upon the jurors, and that as to the other matters alleged in the pleas the court was not required to go behind the return of the indictment, and enter upon an investigation of the relevancy and sufficiency of the testimony to justify the indictment, upon the sole demand of a defendant who, to his plea in abatement, makes affidavit that the facts stated therein are true as he verily believes.

We find no error in the ruling of the trial court. While it is the rule in many jurisdictions that the court will not inquire into the sufficiency of the evidence before the grand jury, the decisions of the Supreme Court and those of most of the inferior federal courts have been to the effect that an indictment cannot be abated, on account of the admission of incompetent or hearsay testimony, unless it affirmatively appear in the plea that no competent evidence of the commission of the offense charged therein was presented to the grand jury, or unless all of the evidence was unlawfully

procured in violation of substantial rights of the accused, so as to subject it to exclusion if offered against him. . . .

An assignment of error challenges the testimony adduced by the witness Whitney, in that he was permitted to use a bound volume of memoranda of certain alleged telephone conversations. . . .

But the record shows that the witness testified only to conversations which he heard over the wire, and that he used the typewritten book only to refresh his memory.

. . . [This court has] held it not to be a valid objection to the use of a memorandum by a witness to refresh his memory that it had been copied from another, so long as he could testify from his own recollection. . . .

It was further ruled that the petition to suppress evidence obtained by tapping the telephone wires be denied.

It is contended that by the latter ruling the defendant's rights under the Fourth and Fifth Amendments to the Constitution were violated. The protection of those amendments, however, has never been extended to the exclusion of evidence obtained by listening to the conversation of persons at any place or under any circumstances. The purpose of the amendments is to prevent the invasion of homes and offices and the seizure of incriminating evidence found therein. Whatever may be said of the tapping of telephone wires as an unethical intrusion upon the privacy of persons who are suspected of crime, it is not an act which comes within the letter of the prohibition of constitutional provisions. It is not disputed that evidence obtained by the vision of one who sees through windows or open doors of a dwelling house is admissible. Nor has it been held that evidence obtained by listening at doors or windows is inadmissible. Evidence thus obtained is not believed to be distinguishable from evidence obtained by listening in on telephone wires. . . .

We find no error for which the judgment should be reversed. It is accordingly affirmed.

## *Minority opinion on the appeal of the Olmstead defendants, U.S. Circuit Court of Appeals for the Ninth Circuit*

*Judge Frank H. Rudkin's dissenting opinion focused exclusively on the use of the wiretapped evidence in the Olmstead trial. Rudkin expressed strong concern over the loss of protection from government intrusions into private life. He differed sharply from William Gilbert, who wrote the majority opinion in the case. That he quoted at length the third judge who heard the case suggests that Rudkin had perhaps hoped that his views would have formed the basis for the court's ruling.*

[Document Source: Olmstead v. United States, 19 F.2d 842 (U.S. Cir. Ct. of App., 9th Cir., May 9, 1927).]

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Before GILBERT, RUDKIN, and DIETRICH, Circuit Judges.

RUDKIN, Circuit Judge (dissenting): . . . There is little doubt that at least a considerable number of the plaintiffs in error are guilty of the crimes charged, and whether the indictment should be quashed because there was no competent testimony before the grand jury, or because of unlawful threats made against the foreman of the grand jury by one of the prohibition agents, if such threats are established, are questions of minor importance, in which the general public are little concerned. The same is true in large measure as to the use made by government witnesses of the compilation of telephone messages under the pretense of refreshing their recollections, although I am clearly of opinion that in this latter respect the rulings of the court below were plainly erroneous.

. . . In the present case, witness after witness, day after day, testified to names, dates, and events, so numerous and with such unerring accuracy, that it becomes at once apparent that the book, and not the witnesses, was speaking. A better opportunity to color or fabricate testimony could not well be devised by the wit of man . . . .

But my dissent is based upon much broader grounds. I do not think that testimony thus obtained by federal officers or federal agents is admissible in any event, however the conversations may be proved. Of course, I agree with the majority that courts will not ordinarily inquire into the manner in which a witness gains his information, but there are exceptions to the rule, as well established as the rule itself. For illustration I need only refer to the many decisions of the Supreme Court, of this court, and of the courts of other circuits, excluding evidence obtained by federal officers and federal agents in raiding private dwellings without search warrants, while the like evidence, obtained in the like manner by private individuals and by municipal and state officers, is universally admitted. . . .

Here we are concerned with neither eavesdroppers nor thieves. Nor are we concerned with the acts of private individuals, or the acts of municipal or state officers. We are concerned only with the acts of federal agents, whose powers are limited and controlled by the Constitution of the United States. It is a matter of common knowledge that the protection of the Fourth and Fifth Amendments to the Constitution has been invoked more often and more successfully during the past 10 years [than] during the entire previous history of the republic. I think it is also matter of common knowledge that there is a growing tendency to encroach upon and ignore constitutional rights. For this there is no excuse. . . .

What is the distinction between a message sent by letter and a message sent by telegraph or by telephone? True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed; but these are distinctions without a difference. A person using the telegraph or telephone is not broadcasting to the world. His conversation is sealed from the public as completely as the nature of the instrumentalities employed will permit, and no federal officer or federal agent has a right to take his message from the wires, in order that it may

be used against him. Such a situation would be deplorable and intolerable, to say the least. Must the millions of people who use the telephone every day for lawful purposes have their messages interrupted and intercepted in this way? Must their personal, private, and confidential communications to family, friends, and business associates pass through any such scrutiny on the part of agents, in whose selection they have no choice, and for the faithful performance of whose duties they have no security? Agents, whose very names and official stations are in many instances concealed and kept from them. If ills such as these must be borne, our forefathers signally failed in their desire to ordain and establish a government to secure the blessings of liberty to themselves and their posterity.

The judgment should be reversed.

## *Appellants' brief to the U.S. Supreme Court, Olmstead v. United States*

*Three separate cases arising from the Olmstead trial and the appeals in the Ninth Circuit were appealed to the Supreme Court. The Court initially declined to grant certiorari but after reconsideration it agreed, on January 9, 1928, to combine the three cases and accept them. The Court limited the arguments in the case to questions about the Fourth and Fifth Amendments. This appellants' brief, a collaboration of Jerry L. Finch, John F. Dore, and F. C. Reagan, argued for an expansive rather than literal reading of the Fourth Amendment, which necessarily had to be combined with the Fifth Amendment's protections against self-incrimination. The brief asserted that the Fourth Amendment covered persons, not just places and things, and it asked the Court to exclude evidence that had been obtained through warrantless search and seizure of conversations as well as papers. The brief omitted the argument about property rights that Finch had used in the lower federal courts and asserted a right to privacy, such as that first articulated in the famous 1890 article by Louis Brandeis and Samuel Warren in the Harvard Law Review ("The Right to Privacy," 4 Harv. L. Rev. 193 (1890).*

[Document Source: Olmstead v. United States, 277 U.S. 438 (1928).]

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. . . If incriminating evidence is secured by means of trickery, subterfuge, trespass or fraud, and, after it has been so secured, finds its way into the hands of government officials, no legal ground can be urged against its introduction in evidence, for the reason that no constitutional question is involved. If, however, the fraud, subterfuge, trespass or theft is perpetrated by government officials, or if a government official participates directly or indirectly therein, the evidence thus secured is not admissible for the reason that it was secured in a manner which violates the provisions of the Fourth and Fifth Amendments to the Constitution. . . .

The right to the exclusive enjoyment of a telephone free of interference from anybody, is a right of privacy. No government agent has a right to interpose an earpiece upon it any more than he has a right to raise the curtain and peek through another's window. If two persons are conversing in a room of one of them, an intrusion therein by a government agent secretly is an intrusion upon their right of privacy. Is it any the less so if they are in separate rooms connected by a telephone and some interloper "listens in" by means of "tapping" the wire? Such conduct constitutes an invasion of the privacies of life, and when done by a government agent, falls within the condemnation of the *Boyd* case; and evidence thereby secured is inadmissible for the purpose of securing a conviction in a criminal case.

## *Brief of Frank Jeffrey for the appellants, submitted to the Supreme Court in Olmstead v. United States*

*The brief of Frank Jeffrey, a Seattle attorney who represented Edward McInnis at every stage of the case, asserted a broad interpretation of the Fourth and Fifth Amendments' protections. This expansive view of the amendments was supported by an historical argument asserting that the framers of the Fourth and Fifth Amendments intended to protect individuals' liberties from government. Jeffrey challenged both Judge Gilbert of the court of appeals and Judge Neterer of the district court in their denial of a property right in the use of the telephone. Jeffrey also denied their equating the use of the telephone with the use of the radio. He argued that there was an expectation of speaking only to the person one called on the phone, unlike the recognized broad audience for a radio broadcast.*

[Document Source: Olmstead v. United States, 277 U.S. 438 (1928).]

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. . . The telephones used by the defendants were theirs against all the world, even against the telephone company while their tolls were paid. The telephone lines leading to the defendants' houses and offices, as well as the telephone equipment in the houses and offices, were the private property of the defendants. They had the right to the exclusive use and enjoyment of them, except the license given by them to connect other lines with their lines for the purpose of receiving incoming calls. When the government agents tapped the defendants' telephone lines they committed a trespass upon the property rights of the defendants. The effect of this trespass was to project themselves into the houses and offices of the defendants, with the same result as if they had broken through the windows or doors and secretly seized letters containing the identical messages that were transmitted over the 'phones. The result was not only an unlawful search for evidence, but an unlawful seizure by means of which the defendants, in effect, were compelled to testify against themselves. As stated by Judge Rudkin, those who use the telephone are not broadcasting to the world. Under

modern conditions the telephone has, to a large extent, supplanted the mails as a means of transmitting private messages. It has become indispensable to every home and office. If the stamp of approval is put upon the action of government agents in seeking and obtaining evidence against those suspected of crime by means of tapping private telephone lines, the door is opened wide for the great mass of citizens using the telephone for lawful purposes to have their private and confidential communications relating to business and family subjected to the scrutiny of government agents. Such a system of espionage would become deplorable and unbearable. It would deprive the citizenship of the country of the personal security and the enjoyment of the privacies of life guaranteed by the Constitution, and subject them to an espionage unequalled by the conditions prevailing under the King's officers prior to the Revolution.

## *George Vanderveer's brief for appellants, submitted to the Supreme Court in Olmstead v. United States*

*The Vanderveer brief, which he drafted with the help of Samuel Basset and Arthur Griffin, asserted a broad right of privacy based on the Fourth and Fifth Amendments. Hoping to convince a property-conscious Court, Vanderveer asserted that the enjoyment of privacy was a property right. Like the other defendants' briefs, this one cited a number of older cases in which seized papers were excluded as evidence because their seizure violated the Fourth Amendment, and Vanderveer argued that these decisions applied to phone conversations heard on a wiretap. The brief also appealed to the broad principles of the Founders.*

[Document Source: Olmstead v. United States, 277 U.S. 438 (1928).]

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. . . The right to use the telephone, and the right of privacy in its enjoyment, are property rights which the courts have repeatedly upheld. It was precisely this right of privacy or secrecy in business matters which this Court protected in the *Boyd* case. The same was true in *Weeks v. United States*, 232 U.S. 383, where the article involved was a cancelled lottery ticket having no pecuniary value whatever and which had been seized by government agents solely for evidential purposes. In both of these cases this Court said that each of these Amendments threw much light upon the other because they were designed to remedy the same abuses. And it has always been held that any search and seizure was unreasonable under the provisions of the Fourth Amendment which had for its purpose the compulsory extortion of evidence, no matter what the form of the evidence, to be used in violation of the Fifth Amendment. . . .

It is doubtless true that a message transmitted by telephone is in no sense a paper. But it is also true that privacy is as essential to the conduct of business by telephone or telegraph as by mail, and the courts have always been as ready to protect privacy in the one case as in the other. The Constitution was not written for a day or a year,

nor can it be re-written to meet every changing circumstance of our lives. For this reason Constitutions deal with principles.

The Government suggests that the case can not be distinguished from a case where a federal officer on a public street overhears conversations within a citizen's private residence, or where a federal officer joins a band of conspirators and listens from day to day to conversations in their homes and elsewhere. But it seems to us that both these cases are clearly distinguishable from the case at bar on the precise basis that in neither of them was there any wrongful invasion of any right of privacy, but on the contrary in both hypothetical cases the conspirators had themselves thrown privacy to the four winds and, of course, could not be heard to complain of the results of their own folly. . . .

The abuses of which we complain in this case are identical in kind with those to which the English people were subjected during the latter half of the Eighteenth Century, and the speeches of Lord Chatham and James Otis, and the letters of Thomas Jefferson and John Adams, leave no doubt in our minds as to how they would have felt on the subject of having government agents tap their private telephone wires. . . .

## *Government's brief submitted to the Supreme Court in Olmstead v. United States*

*The government's case was presented by Solicitor General William Mitchell and by Michael J. Doherty, Mitchell's former law partner acting as a special assistant to the Attorney General. Mabel Walker Willebrandt, who usually wrote the Department of Justice briefs for Prohibition cases, declined to participate because she thought the wiretapping was an invasion of privacy.*

*The government argued for a narrow interpretation of the Fourth Amendment, claiming it was intended to prohibit the use only of general warrants that did not specify the place that was to be searched or the items to be seized. The government's brief sought to separate the questions of the Fourth and Fifth Amendments, thereby undermining the idea of a general right of privacy. As for the exclusion of evidence in federal courts, the government sought to show that only evidence gathered in violation of the Fourth Amendment could be excluded and that evidence obtained in violation of Washington state law could be used since it was admissible under the traditions of the common law.*

[Document Source: Olmstead v. United States, 277 U.S. 438 (1928).]

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. . . The Fifth Amendment can only be invoked by first showing that there has been a violation of the Fourth Amendment. The third clause of the Fifth Amendment "nor shall be compelled in any criminal case to be a witness against himself" merely gave constitutional sanction to a rule of common law well established at the time the Constitution was adopted. . . .

Obviously the case has nothing to do with the provision against self-incrimination in its original and primary sense, that is, the compulsion of the accused by legal process to produce in court evidence either testimonial or physical. Ordinarily evidence of incriminating oral statements made by the accused before, during, or after the commission of a crime, overheard by a witness and testified to by him in court, is always competent.

The only inhibition against evidence in this form is that which forbids evidence of extorted confessions. Here there was neither extortion nor confession. There was no coercion, threat or promise. Moreover, the conversations were not in the nature of confessions. They were a part and parcel of the criminal transaction. The prohibition officers, relating in court what they overheard, were testifying as immediate witnesses of the crime, as much so as would be a witness who testified to having seen liquor delivered and the price paid.

Aside from the rule against duress of legal process and extorted confessions, it was a fundamental and time-honoured rule of common law that evidence was not rendered inadmissible in a criminal case by illegality of the means by which it was obtained. This rule of the common law is still in force in England and Canada and in a majority of the States. The illegality dealt with in many of the state cases was the violation of the constitutional rights under provisions of state constitutions substantially identical with the Fourth Amendment. . . .

Petitioners are urging the extension of the Fourth Amendment into a new field, the limits of which are difficult to define. If evidence obtained by tapping telephone wires at points not in private dwellings is excluded on constitutional grounds, on the same principle would not all manner of evidence gathered by ruse or entrapment have to be excluded? Suppose an officer obtains access to a telephone on a party line and listens to incriminating conversations of other parties having telephones on the line . . . ; suppose he pretends to join a conspiracy and thereby gains access to the inner councils of the conspirators and hears the hatching of their criminal schemes. These examples . . . might be multiplied indefinitely to show the extremes to which the principle contended for would lead. Once cut loose from the fair literal import of the language of the Amendment, and there is no place to anchor.

In the construction of the Amendment a balance should be sought between that which will preserve the fundamental safeguard which the Amendment was designed to secure, and at the same time not unduly fetter the arm of the Government in the enforcement of law. . . .

If, in any circumstances, obtaining evidence by tapping wires is deemed an objectionable governmental practice, it may be regulated or forbidden by statute, or avoided by officers of the law, but clearly the Constitution does not forbid it unless it involves actual unlawful entry into a house.

# *Amicus curiae brief of telephone companies submitted to the Supreme Court in Olmstead v. United States*

*The leading telephone companies of the day and their business association filed an amicus curiae brief, which is a way for a person or group interested in the case, but not a party to the case, to submit a statement of related legal arguments. Clearly fearful that telephone companies would suffer if people thought that their telephone conversations were not private, the telephone industry argued that the telephone had "become part and parcel of the social and business intercourse of the people." It was a public service just like the mails and therefore was deserving of protection under the Fourth and Fifth Amendments, as well as through the existing state laws.*

[Document Source: Olmstead v. United States, 277 U.S. 438 (1928).]

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*Messrs. Otto B. Rupp, Charles M. Bracelen, Robert H. Strahan* and *Clarence B. Randall* on behalf of The Pacific Telephone and Telegraph Company, American Telephone and Telegraph Company, United States Independent Telephone Association, and the Tri-State Telephone and Telegraph Company, as *amici curiae*, filed a brief by special leave of Court.

The petitioners were using the telephone lines and facilities of the local telephone company, such as were available to everyone without discrimination. The function of a telephone system in our modern economy is, so far as reasonably practicable, to enable any two persons at a distance to converse privately with each other as they might do if both were personally present in the privacy of the home or office of either one. When the lines of two "parties" are connected at the central office, they are intended to be devoted to their exclusive use, and in that sense to be turned over to their exclusive possession. A third person who taps the lines violates the property rights of both persons then using the telephone, and of the telephone company as well. . . .

It is of the very nature of the telephone service that it shall be private; and hence it is that wire tapping has been made an offense punishable either as a felony or misdemeanor by the legislatures of twenty-eight States, and that in thirty-five States there are statutes in some form intended to prevent the disclosure of telephone or telegraph messages, either by connivance with agents of the companies or otherwise.

The wire tapper destroys this privacy. He invades the "person" of the citizen, and his "house," secretly and without warrant. Having regard to the substance of things, he would not do this more truly if he secreted himself in the home of the citizen.

In view of what this Court has held as to the intent and scope of the Fourth and Fifth Amendments, it would not seem necessary to enter into any meticulous examination of their precise words. But if that be done, does not wire tapping involve an "unreasonable search," of the "house" and of the "person"? There is of course no

search warrant, as in the nature of the case there could not be. If the agent should secrete himself in the house or office to examine documents, would not that constitute a "search"? Is the case any different in the eyes of the law if from a distance the agent physically enters upon the property of the citizen, as he does when he taps the wire, and from that point projects himself into the house? Certainly in its practical aspect the latter case is worse than the first, because the citizen is utterly helpless to detect the espionage to which he is subjected.

If it be said that, in any event, there is no "seizure," that an oral conversation cannot be seized, we answer, in the first place, that this is a purely superficial view, which puts the letter above the spirit and intent of the law. The "privacy of life" and the liberty of the citizen have been invaded. And, in the second place, we do not understand that seizure is a necessary element to constitute the offense. An unreasonable search alone violates the Fourth Amendment. It is enough that the federal officer has made an unreasonable search, within the meaning of the Fourth Amendment, and has thereby unlawfully obtained evidence. The evidence so obtained is excluded under the provisions of the Fifth Amendment.

The Government itself provides the mail service, a public service, and the Government authorizes the telephone company to provide the telephone service, also a public service. It is settled that the communication in the mail is protected. Upon what reason, then, can it be said that the communication by telephone is not protected?

The telephone has become part and parcel of the social and business intercourse of the people of the United States, and the telephone system offers a means of espionage compared to which general warrants and writs of assistance were the puniest instruments of tyranny and oppression.

The telephone companies deplore the use of their facilities in furtherance of any criminal or wrongful enterprise. But it was not solicitude for law breakers that caused the people of the United States to ordain the Fourth and Fifth Amendments as part of the Constitution. Criminals will not escape detection and conviction merely because evidence obtained by tapping wires of a public telephone system is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the Government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts. Legislation making wire tapping a crime will not suffice if the courts nevertheless hold the evidence to be lawful. Writs of assistance might have been abolished by statute, but the people were wise to abolish them by the Bill of Rights.

# *Opinion of the Supreme Court of the United States, Olmstead v. United States*

*The Supreme Court ruled five to four to affirm the decision of the U.S. court of appeals and thus uphold the Olmstead convictions. Chief Justice William H. Taft wrote for the majority while the four dissenters filed separate opinions (of those the dissent of Harlan Fiske Stone was on procedural grounds only, although he concurred with the dissents of Brandeis and Holmes). Taft, as Chief Justice, sought to have the Prohibition laws strictly enforced and wrote most of the Court's opinions on the Prohibition cases. He feared that widespread violation of the Prohibition law undermined the sanctity of all law. His opinion echoes the decision of Judge Gilbert in focusing on the extent of the Olmstead ring's activities and thus highlighting its threat to the rule of law. Taft wrote that the Fourth Amendment did not apply, as there was no invasion of Olmstead's premises or seizure of his papers, thus there was no reason to exclude the evidence. Moreover, the Court held that the Washington statute prohibiting wiretaps did not block the introduction of the evidence since the federal rule about excluding evidence did not apply to the states, and the common law accepted evidence illegally procured.*

[Document Source: Olmstead v. United States, 277 U.S. 438 (1928).]

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MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

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 the interception. Our consideration must be confined to the Fourth Amendment.

The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment. Theretofore many had supposed that under the ordinary common law rules, if the tendered evidence was pertinent, the method of obtaining it was unimportant. . . . This Court decided with great emphasis, and established as the law for the federal courts, that the protection of the Fourth Amendment would be much impaired unless it was held that not only was the official violator of the rights under the Amendment subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received.

The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects; and to prevent their seizure against his will. . . .

The Amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized. . . .

The Fourth Amendment may have proper application to a sealed letter in the mail because of the constitutional provision for the Postoffice Department and the relations between the Government and those who pay to secure protection of their sealed letters. . . . It is plainly within the words of the Amendment to say that the unlawful rifling by a government agent of a sealed letter is a search and seizure of the sender's papers or effects. The letter is a paper, an effect, and in the custody of a Government that forbids carriage except under its protection.

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

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 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.

What has been said disposes of the only question that comes within the terms of our order granting certiorari in these cases. But some of our number, departing from that order, have concluded that there is merit in the two-fold objection over-

ruled in both courts below that evidence obtained through intercepting of telephone messages by government agents was inadmissible because the mode of obtaining it was unethical and a misdemeanor under the law of Washington. To avoid any misapprehension of our views of that objection, we shall deal with it in both of its phases.

While a Territory, the English common law prevailed in Washington and thus continued after her admission in 1889. The rules of evidence in criminal cases in courts of the United States sitting there, consequently are those of the common law. . . .

The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. . . .

The *Weeks* case announced an exception to the common law rule by excluding all evidence in the procuring of which government officials took part by methods forbidden by the Fourth and Fifth Amendments. . . . The common law rule must apply in the case at bar.

Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured. This would be at variance with the common law doctrine generally supported by authority. There is no case that sustains, nor any recognized text book that gives color to such a view. Our general experience shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received.

A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

The statute of Washington, adopted in 1909, provides … 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."

This statute does not declare that evidence obtained by such interception shall be inadmissible, and by the common law, already referred to, it would not be. . . . Whether the State of Washington may prosecute and 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 can not affect the rules of evidence applicable in courts of the United States in criminal cases. . . .

The judgments of the Circuit Court of Appeals are affirmed. The mandates will go down forthwith under Rule 31.

*Affirmed.*

## *Dissenting opinion of Justice Louis D. Brandeis in Olmstead v. United States*

*Justice Brandeis's dissenting opinion is one of the more notable dissents in Supreme Court history. He attempted to define a general right of privacy based on the Fourth and Fifth Amendments. Brandeis had long been interested in the problem of privacy in the modern age; years earlier he and his law partner, Samuel Warren, published what many consider the seminal article on the topic (Samuel Warren & Louis D. Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890)). Brandeis's opinion in Olmstead attempted to apply to the current era what he said were the principles of the Fourth and Fifth Amendments. Historians often overlook how much his approach draws on the dissenting opinion of Judge Rudkin in the circuit court, but Brandeis himself acknowledged his debt to Rudkin in the text. The quotation about "the form that evil had theretofore taken" referred to the Supreme Court decision in Weems v. United States, in which Justice Joseph McKenna wrote of the need for the Court to apply the general principles of the Constitution to new problems.*

[Document Source: Olmstead v. United States, 277 U.S. 438 (1928).]

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MR. JUSTICE BRANDEIS, dissenting. . . . By objections seasonably made and persistently renewed, the defendants objected to the admission of the evidence obtained by wire-tapping, on the ground that the Government's wire-tapping constituted an unreasonable search and seizure, in violation of the Fourth Amendment; and that the use as evidence of the conversations overheard compelled the defendants to be witnesses against themselves, in violation of the Fifth Amendment.

The Government makes no attempt to defend the methods employed by its officers. Indeed, it concedes that if wire-tapping can be deemed a search and seizure within the Fourth Amendment, such wire-tapping as was practiced in the case at bar was an unreasonable search and seizure, and that the evidence thus obtained was inadmissible. But it relies on the language of the Amendment; and it claims that the protection given thereby cannot properly be held to include a telephone conversation. . . .

When the Fourth and Fifth Amendment were adopted, "the form that evil had 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 tor-

ture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of "the sanctities of a man's home and the 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.

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 wire-tapping. 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. To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society." Can it be that the Constitution affords no protection against such invasions of individual security? . . .

In *Ex parte Jackson*, 96 U.S. 727, it was held that a sealed letter entrusted to the mail is protected by the Amendments. The mail is a public service furnished by the Government. The telephone is a public service furnished by its authority. There is, in essence, no difference between the sealed letter and the private telephone message. As Judge Rudkin said below: "True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed, but these are distinctions without a difference." The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and, although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping.

Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it. This was notably illustrated in the *Boyd* case itself. Taking language in its ordinary meaning, there is no "search" or "seizure" when a defendant is required to produce a document in the orderly process of a court's procedure. "The right of the people to be secure in

their persons, houses, papers, and effects, against unreasonable searches and seizures," would not be violated, under any ordinary construction of language, by compelling obedience to a subpoena. But this Court holds the evidence inadmissible simply because the information leading to the issue of the subpoena has been unlawfully secured. . . . The provision against self-incrimination in the Fifth Amendment has been given an equally broad construction. . . .

Decisions of this Court applying the principle of the *Boyd* case have settled these things. Unjustified search and seizure violates the Fourth Amendment, whatever the character of the paper; whether the paper when taken by the federal officers was in the home, in an office, or elsewhere; whether the taking was effected by force, by fraud, or in the orderly process of a court's procedure. From these decisions, it follows necessarily that the Amendment is violated by the officer's reading the paper without a physical seizure, without his even touching it; and that use, in any criminal proceeding, of the contents of the paper so examined—as where they are testified to by a federal officer who thus saw the document, or where, through knowledge so obtained, a copy has been procured elsewhere—any such use constitutes a violation of the Fifth Amendment.

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wire-tapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.

Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wire-tapping is a crime. . . . To prove its case, the Government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. . . .

The evidence obtained by crime was obtained at the Government's expense, by its officers, while acting on its behalf; the officers who committed these crimes are the same officers who were charged with the enforcement of the Prohibition Act; the crimes of these officers were committed for the purpose of securing evidence with which to obtain an indictment and to secure a conviction. The evidence so obtained constitutes the warp and woof of the Government's case. The aggregate of the Government evidence occupies 306 pages of the printed record. More than 210 of them are filled by recitals of the details of the wire-tapping and of facts ascertained thereby. . . .

When these unlawful acts were committed, they were crimes only of the officers individually. The Government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. . . . And if this Court should permit the Government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the Government itself would become a lawbreaker. . . .

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

# *Dissenting opinion of Justice Pierce Butler in Olmstead v. United States*

*Seldom did Justice Pierce Butler vote with Justices Brandeis and Holmes, but in this case Butler found it absurd that the government and the majority of the Court did not see the clear analogy between private telephone conversations and letters. Since letters had long had Fourth Amendment protection he thought telephone conversations should have it also. Butler's dissent arose from his belief in a limited government that did not interfere with the liberty of its citizens.*

[Document Source: Olmstead v. United States, 277 U.S. 438 (1928).]

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MR. JUSTICE BUTLER, dissenting.

Telephones are used generally for transmission of messages concerning official, social, business and personal affairs including communications that are private and privileged—those between physician and patient, lawyer and client, parent and child, husband and wife. The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it. Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard and taken down. . . .

This Court has always construed the Constitution in the light of the principles upon which it was founded. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words. . . .

When the facts in these cases are truly estimated, a fair application of that principle decides the constitutional question in favor of the petitioners. With great deference, I think they should be given a new trial.

# *Dissenting opinion of Justice Oliver W. Holmes in Olmstead v. United States*

*Justice Holmes, writing in dissent, avoided the constitutional question about wiretapping and focused on the use of illegally obtained evidence. To Holmes it did not matter that state rather than federal law had been broken by gathering evidence through wiretaps. What mattered was that the government agents broke the law. Holmes wanted to extend the rule established in the Court's earlier Weeks decision to exclude all illegally gathered evidence. Holmes's stand was both a matter of policy and also a statement of philosophy about the proper action of government.*

[Document Source: Olmstead v. United States, 277 U.S. 438 (1928).]

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MR. JUSTICE HOLMES:

My brother BRANDEIS has given this case so exhaustive an examination that I desire to add but a few words. While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them. . . . But I think, as MR. JUSTICE BRANDEIS says, that apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and, for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.

For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed. . . . And if all that I have said so far be accepted it makes no difference that in this case wire tapping is made a crime by the law of the State, not by the law of the United States. It is true that a State cannot make rules of evidence for Courts of the United States, but the State has authority over the conduct in question, and I hardly think that the United States would appear to greater advantage when paying for an odious crime against State law than when inciting to

the disregard of its own. I am aware of the often repeated statement that in a criminal proceeding the Court will not take notice of the manner in which papers offered in evidence have been obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by *Weeks v. United States,* 232 U.S. 383, and the cases that have followed it. I have said that we are free to choose between two principles of policy. But if we are to confine ourselves to precedent and logic the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law.

## *"An Unusual Prohibition Victory"*

*Mabel Walker Willebrandt intended her newspaper series (and later book) to mobilize public opinion in favor of stricter enforcement of Prohibition. Supporters and opponents of Prohibition, however, derived different conclusions from her insider account of enforcement, with drys contending that stricter laws and more vigilant enforcement would work and wets decrying the growth of government action and corruption.*

[Document Source: Mabel Walker Willebrandt, "An Unusual Prohibition Victory," Ch. 15 in *The Inside of Prohibition*, published in the *New York Times*, Aug. 19, 1929, p. 14.]

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In one case of widespread interest a prohibition victory was achieved in which I not only had no part but which I actually opposed. I refer to the so-called "whispering wires" case at Seattle, Washington. It involved the prosecution of a bootlegger named Olmstead. I certainly approved of apprehending Olmstead—he was head of a big ring of liquor runners from Canada—but didn't approve the way the prohibition agents obtained their evidence. Practically all their testimony consisted of things they overheard on tapped telephone wires.

Now, I thoroughly disapprove of the practice of tapping telephone wires. Irrespective of its legality, I believe it a dangerous and unwarrantable policy to follow in enforcing law. Many of the States of the Union have State laws against it. The point involved in the Olmstead case was whether, in the absence of a State law, the Federal Constitution alone prevented obtaining evidence by tapping wires.

When the point was sustained in the lower Federal courts, and reached the Supreme Court of the United States, I indicated to the Solicitor General my unwillingness to argue the case and try to justify the prohibition agents' wire-tapping tactics when I so thoroughly disapproved of them. Consequently, Mr. Mitchell employed distinguished counsel, a man formerly associated with his firm in Minnesota. . . .

. . . An intense bitterness developed between the two branches of the Treasury Department, and it was not an uncommon thing for agents of the intelligence unit and for the special assistants to the Attorney General who had been sent to Seattle

to handle the Hubbard case to be "shadowed" by agents of the prohibition unit and their friends.

The evidence obtained over the "whispering wires" and otherwise disclosed an illegal liquor business of amazing magnitude. It involved the employment of not less than fifty persons, of two seagoing vessels for carrying liquor from Scotland to British Columbia, the employment of smaller vessels for coastwise transportation, the purchase and use of a ranch for an underground cache for storage of liquor, the operation of a central office in the heart of Seattle, the employment of executives, salesmen, delivery men, dispatchers, scouts, bookkeepers, clerks, and even an attorney.

Monthly transactions reached a total as high as $176,000 and the aggregate for the year's operation probably exceeded $2,000,000. Olmstead was the leading conspirator. He acted as general manager. His contribution to the capital of the business was $10,000. Eleven others were his partners by virtue of contributions of $1,000 apiece. Profits were divided, one-half to Olmstead and the remaining half to eleven others.

*Mabel Willebrandt*

Bain Collection
Library of Congress, Prints and Photographs Division
[LC-DIG-ggbain-33093].

One of the chief men was always on duty at the main office to receive orders by telephone and to direct the filling of these orders by a corps of men stationed in another room, called "the bull pen." At times the sales amounted to 200 cases of liquor a day.

In this statement of the case I have largely used the language of the Supreme Court and the Court of Appeals. . . .

. . . Although personally I would still use my influence to prevent the policy of wire tapping being adopted as a prohibition enforcement measure, I nevertheless recognize that the interpretation of the United States Constitution against the lawbreaker and in favor of the government's right to catch him is a prohibition victory of no small proportions.

## *Editorial by H.L. Mencken*

*American journalist H.L. Mencken, in his characteristically sarcastic style, identified the ways in which Prohibition altered the traditional role of a federal judge and jeopardized public confidence in the nation's judiciary.*

[Document Source: *The American Mercury*, vol. 1, no. 1, Feb. 1924, p. 161.]

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Perhaps the chief victims of Prohibition, in the long run, will turn out to be the Federal judges. I do not argue here, of course, that drinking bootleg liquors will kill them bodily. I merely suggest that enforcing the unjust and insane provisions of the Volstead Act will rob them of all their old dignity. A dozen years ago, or even half a dozen years ago, a Federal judge was perhaps the most dignified and respected official yet flourishing under our democracy. The plain people, many years before, had lost all respect for lawmakers, whether Federal, State or municipal, and, save for the President himself, they had very little respect left for the gentlemen of the executive arm, high or low. More, they had begun to view the State judiciary very biliously, and showed no sign of surprise when a member of it was taken in judicial adultery. But for the Federal judges they still continued to have a high veneration, and for plain reasons. *Imprimis*, the Federal judges sat for life, and thus did not have to climb down from their benches at intervals and clamor obscenely for votes. Secondly, the laws that they were told [of] to enforce, and especially the criminal laws, were few in number, simple in character, and thoroughly in accord with almost universal ideas of right and wrong. . . .

I describe a Golden Age, now lamentably closed. The Uplift in its various lovely forms has completely changed the character of the work done by a Federal judge. Once the dispenser of varieties of law that only scoundrels questioned, he is now the harassed and ludicrous dispenser of varieties of law that only idiots approve. . . . [I]t is Prohibition—whether of winebibbing, of drug-taking, of interstate weekending, or of what not—that has carried him beyond the bounds of what, to most normal men, is common decency. His typical job today, as a majority of the plain people see it, especially in the big cities, is simply to punish men who had refused or been unable to pay the bribes demanded by Prohibition enforcement officers.

## *Report of the President's Commission on Law Observance and Enforcement, January 20, 1931*

*President Herbert Hoover appointed a commission to report on the enforcement of Prohibition laws. Chaired by George Wickersham, who served as Attorney General under President William Howard Taft, the commission included a former secretary of war, several federal and state judges, Dean Roscoe Pound of Harvard Law School, and the president of Radcliffe College. The commission recommended ways in which Prohibition might be more effectively enforced, but much of the commission's report indicated the overwhelming challenges to enforcement. Here the commission discusses the damaging impact of Prohibition on the practical business of the federal courts and on public respect for the judicial system.*

[Document Source: "A Report of the National Commission on Law Observance and Enforcement Relative to the Facts as to the enforcement, the Benefits, and the Abuses under the Prohibition Laws, Both before and since the Adoption of the Eighteenth Amendment to the Constitution." House Document No. 722, 71st Cong., 3d Sess., pp. 55–57.]

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Our federal organization of courts and of prosecution were ill adapted to the task imposed on them by the National Prohibition Act. Serious difficulties at this point soon became apparent and enforcement of national Prohibition still wrestles with them. The program of concurrent federal and state enforcement imposes a heavy burden of what was in substance the work of police courts upon courts set up and hitherto employed chiefly for litigation of more than ordinary magnitude. In the first five years of national Prohibition, the volume of liquor prosecutions in the federal courts had multiplied by seven and federal prosecutions under the Prohibition Act terminated in 1930 had become nearly eight times as many as the total number of all pending federal prosecutions in 1914. In a number of urban districts the enforcement agencies maintain that the only practicable way of meeting this situation with the existing machinery of federal courts and prosecutions is for the United States Attorneys to make bargains with defendants or their counsel whereby defendants plead guilty to minor offenses and escape with light penalties. Hence a disproportionate number of federal liquor prosecutions terminate in pleas of guilty. . . .

Lawyers everywhere deplore, as one of the most serious effects of Prohibition, the change in the general attitude toward the federal courts. Formerly these tribunals were of exceptional dignity, and the efficiency and dispatch of their criminal business commanded wholesome fear and respect. The professional criminal, who sometimes had scanty respect for the state tribunals, was careful so to conduct himself as not to come within the jurisdiction of the federal courts. The effect of the huge volume of liquor prosecutions, which has come to these courts under Prohibition, has injured their dignity, impaired their efficiency, and endangered the wholesome respect for

them which once obtained. Instead of being impressive tribunals of superior jurisdiction, they have had to do the work of police courts and that work has been chiefly in the public eye. These deplorable conditions have been aggravated by the constant presence in and about these courts of professional criminal lawyers and bail-bond agents, whose unethical and mercenary practices have detracted from these valued institutions. . . .

Nor have these bad effects been confined to the criminal side of the federal courts. There has been a general bad effect upon the whole administration of justice. There has been a tendency to appraise judges solely by their zeal in liquor prosecutions. In consequence, the civil business of the courts has often been delayed or interfered with. Zealous organizations, dictating appointments, interfering with policies and seeking to direct the course of administering the law, cooperating with other unfortunate conditions when the law took effect, brought about crude methods of enforcement.

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