

Congressional Hearing and Debate on Anti-Wiretapping Legislation—A Simulation Activity

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For use in conjunction with “Olmstead v. United States: The Constitutional Challenges of Prohibition Enforcement,” by Richard F. Hamm, available at <http://www.fjc.gov/history/home.nsf>. A unit in the Teaching Judicial History Project, developed by the Federal Judicial Center in partnership with the American Bar Association’s Division for Public Education.

Activity Objectives

Through simulation of a congressional hearing and debate regarding the anti-wiretapping provisions of the Federal Communications Act of 1934, students will gain insights into the key legal issues involved in the *Olmstead* case, the historical context of the trial, and the tension that existed between civil liberties and the enforcement of the laws during the Prohibition era and its aftermath.

Essential Questions

- Did the prosecution’s use of wiretap evidence in the *Olmstead* case violate the Fourth Amendment protection against unreasonable searches and seizures and the Fifth Amendment protection against self-incrimination?
- What were the primary arguments for and against law enforcement officials’ use of wiretaps without warrants?
- What challenges have changes in communications technologies posed for legislatures and courts in their attempts to define the scope of civil liberties?
- How have judges applied constitutional principles to factual situations that the Framers could not have anticipated?

Legal Issues Raised by the *Olmstead* Case

Attorneys for the defendants in the *Olmstead* case challenged the guilty verdicts on the ground that the prosecution had relied on evidence obtained by wiretapping telephones, in violation of a state law. On appeal, the U.S. Court of Appeals for the Ninth Circuit, and later the Supreme Court of the United States, needed to determine whether the use of such evidence violated the Fourth Amendment protection against unreasonable searches and seizures as well as the Fifth Amendment protection against self-incrimination.

Estimated Time Frame

Five (or six) 50-minute periods.

Recommended Prep Work

Students will need to be familiar with Prohibition generally as well as with the specific events and legal issues involved in the *Olmstead* case. Teachers should review “*Olmstead v. United States: The Constitutional Challenges of Prohibition Enforcement*,” by Richard F. Hamm, available online at [http://www.fjc.gov/public/pdf.nsf/lookup/olmstead.pdf/\\$file/olmstead.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/olmstead.pdf/$file/olmstead.pdf).

Make student copies of the following excerpts from the trial unit and the handout attached to this activity. (*Note:* All page numbers refer to the PDF copy of the unit.)

Excerpts

1. “*Olmstead v. United States: A Short Narrative*” (pp. 1–11)
2. Fourth and Fifth Amendments to the Constitution (pp. 43–44)
3. 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?” and “Did the use of evidence gained from wiretaps and confiscated papers violate the Fifth Amendment protection against self-incrimination?” (pp. 19–20)
4. Briefs submitted to the Supreme Court in *Olmstead v. United States* (pp. 52–58)
5. Majority opinion of the Supreme Court in *Olmstead v. United States* (pp. 59–62)
6. Dissenting opinion of Justice Louis D. Brandeis in *Olmstead v. United States* (pp. 62–65)

Handout

1. Documents Relating to Wiretapping (Horace D. Taft’s letter to the editor; Rep. John Schafer’s remarks, and text of H.R. 5416; Attorney General William D. Mitchell’s memo)

Description of the Activity

Activity Overview

Teachers will lead students in a discussion of the background to the *Olmstead* case and then will divide the class into two groups, one of which will take on the roles of U.S. senators conducting a hearing on the proposed 1934 wiretapping law and of witnesses called to testify at that hearing, and the other of which will assume the roles of U.S. senators debating the legislation. The legislation under consideration, enacted in response to the increased use of wiretapping like that at issue in *Olmstead*, provided that “no person not being authorized by the sender

shall intercept any communication and divulge or publish the existence, contents, [or] substance.”

Introduction

The teacher should review with students the basic events regarding the enactment of Prohibition, the widespread violation of the law enforcing Prohibition, and the challenges faced by law enforcement officials. Students will read several excerpts, followed by a class period devoted to discussing the reading and clarifying students’ understanding of the events leading up to the *Olmstead* trial and appeal.

Homework Assignment

Students should read about the events leading up to the *Olmstead* trial and appeal discussed in “*Olmstead v. United States: A Short Narrative*” (Excerpt #1), as well as the additional documents related to wiretapping (Handout #1).

Class Discussion (1 class period)

The Events Preceding Roy Olmstead’s Arrest and Trial:

- Why was Prohibition difficult to enforce?
- What challenges did Prohibition create for the federal courts?
- Why were some who opposed Prohibition nevertheless concerned about enforcement?

The Events Surrounding Roy Olmstead’s Arrest and Trial:

- What was Olmstead accused of doing, and how was he caught?
- What evidence was presented against Olmstead at trial, and for what purpose was the prosecution allowed to use that evidence?
- Of what specific crimes was Olmstead convicted?

The Post-Trial Events:

- On what grounds did Olmstead appeal his conviction?
- How did the Supreme Court of the United States rule on Olmstead’s claims? Why did Justice Brandeis dissent from the majority opinion?
- Describe the varying reactions to the Supreme Court’s decision and to wiretapping in general.

Preparing for the Simulation, Part 1 (1 class period)

The class should briefly review the protections against unreasonable searches and seizures provided by the Fourth Amendment and against self-incrimination provided by the Fifth Amendment (excerpt #2).

Distribute excerpt #3, Legal Questions Before the Federal Courts (regarding the Fourth and Fifth Amendment issues); excerpt #4, the briefs submitted to the Supreme Court; excerpt #5, the majority opinion of the Supreme Court; and ex-

cerpt #6, Justice Brandeis's dissenting opinion (these readings may be assigned as homework). Debrief these readings and have the students discuss the constitutional issues central to the case, the arguments presented on those issues by the attorneys and the briefs on both sides, and the reasoning employed by the majority opinion and in Brandeis's dissent. Ask the students to give their own views on the constitutional issues presented and explain their reasoning.

Divide the class into two groups. The first group will simulate a congressional hearing on the proposed wiretap legislation and will be subdivided into U.S. senators who will pose questions at the hearing, and witnesses, representing various points of view, who will testify. Possible witnesses include judges, prosecutors, defense attorneys, state and federal law enforcement officials, telephone company executives, and ordinary citizens. The second group will simulate a congressional debate on the proposed statute, and the students will assume the roles of U.S. senators holding a variety of viewpoints on the issue.

Preparing for the Simulation, Part 2 (1 class period)

Explain how the simulation will proceed and the responsibilities of each group of students. The students playing the senators conducting the hearing will pair up with the students playing the witnesses; each pair will draft a series of questions and answers relevant to the proposed statute. Encourage those playing the roles of witnesses to "flesh out" their roles with more details relevant to their perspectives on the issue. The witnesses should also prepare short introductory statements. The students playing the senators engaging in debate on the proposed measure will draft floor speeches either for or against the bill; they may also prepare proposed amendments to the bill. (If time permits, the students preparing their parts for the debate may make use of witness testimony as developed by the group simulating the hearing.) In developing their parts of the simulation, students should attempt to the greatest extent possible to incorporate references to the issues raised by the *Olmstead* case. For example, it is likely that a participant's agreement or disagreement with the Supreme Court's decision would form part of the basis for that participant's view of the proposed legislation.

Hearing and Debate Simulations (1 or 2 class periods, depending on class size)

The hearing will proceed first, with witnesses introducing themselves, reading a brief prepared statement, and being questioned by one of the senators on the panel. The scene will then shift from the hearing room to the floor of the Senate, where the senators will debate the measure. Following the debate, a vote will be held in which all students (regardless of their roles during the simulations) will cast a vote for or against the proposed legislation. (In smaller classes, both simulations may be done in one class period; in larger classes, they may have to be done on separate days.)

Debrief and Wrap-Up

(1 class period, preceded by the homework assignment)

Ask students to prepare a brief (one-page) essay explaining their vote on the proposed wiretapping law. In class, discuss the students' votes while asking them whether their views changed at all over the course of the exercise.

Ask students which witnesses or senators they found particularly persuasive and why. Also ask the students how, if at all, the events of the *Olmstead* case influenced their opinion of the wiretapping law. It may be worthwhile to close with a discussion of the tension between law enforcement and personal privacy in the context of twenty-first century communications technology.

Assessment

- Observation of student participation in preparation for and conduct of simulations
- Analysis of written scripts for simulations
- Analysis of final homework assignment (essay explaining vote on legislation)

Alternative Modalities and Enrichment Activities

- Have students write Prohibition-era newspaper editorials regarding wiretapping or analyzing the balance between civil liberties and law enforcement more generally.
- Have students research and write comparative essays on concerns about civil liberties in the contexts of Prohibition and the federal government's current drug enforcement efforts.
- Explain the standards judges use in deciding whether to grant warrants to intercept telephone calls or other electronic communications, and then ask students to rule on several hypothetical applications, explaining their decisions to grant or deny the warrants.

Involving a Judge

Invite a judge to discuss the challenges involved in balancing the need for effective law enforcement—in combating the trade in illegal drugs, for example—with the obligation to protect the constitutional liberties of the people. What role do the courts play in striking this balance?

Standards Addressed

U.S. History Standards (Grades 5–12)

Era 7 – The Emergence of Modern America (1890–1930)

Standard 3A: The student understands social tensions and their consequences in the postwar [World War I] era.

Standards in Historical Thinking

Standard 2: Historical Comprehension

- A. Identify the author or source of the historical document or narrative and assess its credibility.
- C. Identify the central question(s) the historical narrative addresses.
- F. Appreciate historical perspectives.

Standard 3: Historical Analysis and Interpretation

- A. Compare and contrast differing sets of ideas, values, etc.
- B. Consider multiple perspectives.

Standard 5: Historical Issues-Analysis and Decision-Making

- A. Identify issues and problems in the past.
- D. Evaluate alternative courses of action.
- E. Formulate a position or course of action on an issue.

Handout 1

Documents Relating to Wiretapping

Horace D. Taft, "Finds Personal Convictions Color Dry Law Discussions," letter to the editor, New York Times, July 21, 1929, p. 49 (excerpt)

Consider the wire tapping case and the fury that raged through the press on that subject. It gave the general public the idea that wire tapping had been invented by the prohibitionists. It would have been a great surprise to the public to know that the evidence of this same general kind has been accepted for ages in the courts and that if all of such evidence were excluded, we might as well abandon our war on the criminals. Perhaps the most significant fact in this connection is that some time after the wire tapping decision in the Supreme Court a man in Brooklyn was convicted of tax dodging. As far as the newspapers reported it, there was not a particle of evidence against him except that secured by wire tapping. So far as I know, there was not a word of comment on the case. Every editor was able to sleep o' nights and nobody had a spasm of virtue about the snooping.

If you put these two things together, the contrast is striking. Here we have two men on the Pacific Coast who have been running a bootlegging business of \$2,000,000 a year. Consider what an amount of bribery and crime of all kinds that meant; what it meant for the community in expense and demoralization. Nothing would have been heard of the wire tapping but that the liquor question was in it and all the money in the world was at the disposal of these men. The campaign raged in the press and the common sense decision of the majority of the court produced a prodigious number of editorials, highly moral and following the lead of one or two of the justices, to the effect that we must always be perfect gentlemen when dealing with criminals. One editor was so moved that he pronounced the decision "the Dred Scott opinion" of prohibition. Let us pause here to thank the Lord that the bootleggers are still in the penitentiary, unless they have already served their too short a term. . . .

The truth is that many of the remarks and editorials on snooping and kindred sins are maudlin. Whence came this sudden sensitiveness in regard to practices which are old as the law itself and most of which cannot be surrendered, if we are to maintain the battle of civilization?

Rep. John Schafer (R-WI), introducing bill prohibiting wire-tapping (H.R. 5416, 71st Cong., 1st sess., Congressional Record 71 (November 22, 1929): H 5968)

Mr. SCHAFER. Mr. Speaker, I introduced H.R. 5416 for the purpose of preserving the fundamental liberties guaranteed to our people under the Constitution, which were taken away by a 5 to 4 decision of the United States Supreme Court in the case of *Olmstead* against the United States.

So long as the Federal Government continues to permit the tapping of telephone and telegraph wires, it is guilty of tyranny equal to that of the most backward medieval despotisms. A wire tapper destroys the sanctity of the home and invades the person and his house secretly and without warning. If permitted to continue his nefarious practice the privacies of life and the homes of our people will be subject to public scrutiny at any time by disreputable as well as reputable Government agents and citizens.

Any individual be he a Government officer or not, who invades the privacies of the person and home of an American citizen by tapping telephone or telegraph wires, is one of the most despicable specimens of the human race. [Applause]

...

Mr. McKEOWN. Does the gentleman propose to provide that people can carry on a proposed insurrection against our Government, can preach doctrines against the Government, and you are going to hamstring the officers to prevent them from using means to ferret them out?

Mr. SCHAFER. In answer to the gentleman, I want to say that I firmly believe in the fundamental principles of liberty guaranteed by the Constitution of the United States, especially those inalienable rights included in articles 4 and 5. There is no difference between physically invading a man's home and tapping his telephone wires. I am not in favor of denying the rights and liberties to the many millions of our people under the Constitution in order to assist in the prosecution of a few criminals. [Applause]

Text of bill prohibiting wire-tapping (H.R. 5416, 71st Cong., 1st sess., Congressional Record 71 (November 22, 1929): H 5968)

A bill to prohibit the tapping of telephone and telegraph lines, and prohibiting the use of information obtained by such illegal tapping to be used as evidence in the courts of the United States in civil suits and criminal prosecutions, and for other purposes.

Be it enacted, etc., That whoever shall, without authority and without the knowledge and consent of the other users thereof, except as may be necessary for operation of the service, tap any telephone or telegraph line, or willfully interfere with the operation of such telephone or telegraph lines or with the transmission of any telephone or telegraph message, or with the delivery of any such message, or whoever being employed in any such telephone or telegraph service shall divulge the contents of any such telephone or telegraph message to any person not duly authorized to receive the same, shall be imprisoned for not less than 1 year and not more than 10 years.

SEC. 2. No information or evidence obtained by or resulting from the tapping of telephone or telegraph wires prohibited by section 1 of this act, shall be admit-

ted as evidence in the courts of the United States, in civil suits and criminal prosecutions.

Attorney General William D. Mitchell, memo on wiretapping, January 19, 1931, reprinted in Wiretapping in Law Enforcement, Hearings before the Committee on Expenditures in the Executive Departments of the House of Representatives, 71st Cong., 3d sess., February 19, 1931

The police departments around the country generally use wire tapping in the detection of crime. Of course the question of wire tapping is a broad one. It involves the general question of what you might call eavesdropping, and it is a question of how polite the Government is going to be in its efforts to detect crime. I do not believe that anybody disagrees about the proposition that indiscriminate wire tapping ought not to be allowed. If it is used at all, it should be used in a limited class of cases under the most careful supervision. These gangsters and desperate criminals, whether they were violating the prohibition law or any other law, are equipped with every modern convenience and every modern invention. They are difficult to deal with. If you prohibit wire tapping, you must consider a lot of other things. You must consider whether you will prohibit eavesdropping and require detectives in a position to overhear conversations to refrain from doing so.