

## *Olmstead v. United States*: The Constitutional Challenges of Prohibition Enforcement—Suggestions for Judges

Judges can make an important contribution to students' understanding of the cases included in the Federal Judicial Center's Teaching Judicial History project. When meeting with students who are studying the cases, judges may wish to draw on these suggested discussion topics.

### Overview

The conspiracy trial of Roy Olmstead and his gang of bootleggers focused national attention on the challenges of enforcing Prohibition and prompted public debates on the use of evidence from wiretaps. Olmstead was a well-known bootlegger in Seattle, Washington, with customers among the city's business leaders. He and 90 codefendants were indicted in 1925 in the U.S. District Court for the Western District of Washington on charges of conspiracy to violate the Volstead Act, which had been passed to enforce the Eighteenth Amendment. The prosecution relied heavily on evidence from wiretapped telephone conversations between Olmstead and his network of bootleggers. In pretrial motions and in appeals following conviction, Olmstead and many of his codefendants argued that the admission of the wiretap evidence violated their Fourth and Fifth Amendment rights. The Ninth Circuit Court of Appeals upheld the convictions and rejected the constitutional claims, although a dissenting judge found that the wiretaps violated the defendants' Fourth and Fifth Amendment rights. In a 5-to-4 decision of the Supreme Court of the United States, Chief Justice William Howard Taft held that the Fourth Amendment applied only to warrantless invasions of houses or a person's belongings, and since there was no violation of the Fourth Amendment the defendants had not been compelled to testify against themselves in violation of the Fifth Amendment. In dissent, Justice Louis Brandeis argued that the Fourth Amendment had been intended by its authors to protect an individual's "right to be let alone." Like the dissenting judge in the court of appeals, Brandeis saw no meaningful difference between a telephone conversation and a sealed letter, and the Supreme Court had earlier held that the latter was protected against warrantless interception.

Many in the popular press and among legal commentators criticized the government's reliance on wiretaps. The FBI had already forbidden the use of wiretaps without warrants, and the Justice Department's chief prosecutor for Prohibition cases refused to present the government's case in the *Olmstead* arguments before

the Supreme Court because of her opposition to the use of wiretaps. The publicity surrounding the *Olmstead* case heightened concerns about the methods used to enforce Prohibition and about the unsustainable burden the liquor ban placed on the federal courts.

### *Understanding the court procedures and legal questions*

In studying historic cases, students find it helpful to understand the differences between historical and current procedures in the federal courts. Students also want to learn how the current courts handle similar cases. The questions below highlight features of the *Olmstead v. United States* case that can frame conversations between judges and students.

1. What are the respective roles of the district courts, the courts of appeals, and the Supreme Court in deciding constitutional questions, such as the defendants' claims that their Fourth and Fifth Amendment rights had been violated?
2. The judges on the circuit court of appeals and the justices on the Supreme Court differed on the applicability of the Fourth Amendment to telephone conversations. Have the current federal courts faced similar questions regarding evidence gathered from new media?
3. Evidence presented at the *Olmstead* trial had been gathered in violation of Washington State law that prohibited the tapping of telephone and telegraph wires. Can illegally obtained evidence be submitted in courts today? What rules govern the use of evidence gathered from wiretaps? Does the Fifth Amendment apply to evidence gathered from wiretaps?
4. The *Olmstead* case provoked widespread public commentary on the problems associated with the reliance on federal courts to enforce Prohibition. Are there any parallels with the problems arising from increased reliance on the federal courts to enforce drug laws in the past 35 years?
5. Why do prosecutors choose to charge a defendant with conspiracy rather than the actual crime? What special instructions might judges deliver to the jury in trials based on conspiracy charges?
6. Dissenting judges on the Ninth Circuit Court of Appeals and justices on the Supreme Court addressed issues that had been excluded from the respective appeals. What questions can judges consider on appeal? How and why are issues narrowed from the trial court to the appellate review?

## Focus on Documents

These excerpted documents can be the basis of a classroom discussion with students who have read about the *Olmstead* case and reviewed these selections in advance of a judge's visit.

### 1. Majority and minority opinions on the appeal of the *Olmstead* defendants, U.S. Circuit Court of Appeals for the Ninth Circuit, May 9, 1927

The two-judge majority on the Ninth Circuit Court of Appeals denied that the protections of the Fourth and Fifth Amendments extended to telephone conversations. What did these judges say was the purpose of the Fourth Amendment? What was the basis of Judge Rudkin's very different conclusions about the intentions of the framers of the Bill of Rights? What did Judge Rudkin think was the significance of federal wiretaps of telephone conversations? On what basis did later courts determine that the Fourth Amendment protections against warrantless searches and seizures did extend to telephone conversations?

#### Majority opinion, written by Judge William Ball Gilbert

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.

#### Minority opinion, written by Judge Frank H. Rudkin

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 in-

voked 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.

## 2. Telephone companies' amicus brief to the Supreme Court in the appeal of the *Olmstead* decision

Several of the nation's largest telephone companies and their trade association joined in submitting to the Supreme Court an amicus brief in support of the defendants' claim of Fourth and Fifth Amendment protections against warrantless wiretaps. What is the basis of their argument that a constitutional right of privacy extended to telephone conversations? How has the doctrine of privacy evolved in the law since the *Olmstead* case? What is the function of amicus briefs and how much weight do they carry for judges when they are making their decision?

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.

### 3. Report of the President’s Commission on Law Observance and Enforcement, January 20, 1931

Numerous commentators, including many who originally supported national Prohibition, worried that federal enforcement of the liquor ban and the consequent increase in criminal caseloads in the federal courts threatened the traditional role of the federal judiciary and undermined public respect for the federal courts. What did the commission appointed by President Hoover identify as the threats to public confidence in the federal court system? Was Prohibition a threat to judicial independence? Have the federal courts faced similar threats to public confidence in the years since the repeal of Prohibition?

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.