Landmarks

Wiretaps, Searches and Seizures, and the Famous Brandeis Dissent: *Olmstead v. U.S.*

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A divided Supreme Court rejected the first challenge it faced to wiretapping more than 80 years ago, concluding that there had been no invasion of the privacy of the telephone users whose calls had been intercepted and used to convict them of violating the National Prohibition Act. Since then, the vigorous dissent by Justice Brandeis has been recognized as a thoughtful exposition of privacy rights and constitutional interpretation and — at least for now — has been adopted by the Court.

The law does not always keep up with the changing world. Indeed, it often takes an especially thoughtful judge to apply the law to new facts, or to new technology. If the majority decision written in 1928 by then-Chief Justice William Howard Taft in *Olmstead v. United States*[1] is any indication, Chief Justice Taft was not such a jurist. On the other hand, Justice Louis D. Brandeis certainly was, and his dissent in *Olmstead* — one of the most frequently referenced Supreme Court opinions and which, in particular, has been cited in the leading Supreme Court

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privacy rulings of *Griswold v. Connecticut*,[2] *Miranda v. Arizona,*[3] and *Roe v. Wade*[4] — is one illustration of just how extraordinary he was.

BACKGROUND

A handful of years after the beginning of Prohibition, the Supreme Court was faced with a wiretapping case. The precise question in *Olmstead* was whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wiretapping, amounted to a violation of the Fourth Amendment.[5] The petitioners had been convicted in the District Court for the Western District of Washington of a conspiracy to violate the National Prohibition Act by unlawfully possessing, transporting, and importing intoxicating liquors and maintaining nuisances, and by selling intoxicating liquors. Seventy-two others in addition to the petitioners were indicted. Some were not apprehended, some were acquitted, and others pleaded guilty.

As Chief Justice Taft explained, the evidence disclosed a conspiracy to import, possess, and sell liquor unlawfully, involving the employment of not fewer than 50 persons, two large vessels for the transportation of liquor to British Columbia, smaller vessels for coastwise transportation to the State of Washington, the purchase and use of a ranch beyond the suburban limits of Seattle, with a large underground cache for storage and a number of smaller caches in that city, the maintenance of a central office manned with operators, and the employment of executives, salesmen, deliverymen, dispatchers, scouts, bookkeepers, collectors, and an attorney. As Chief Justice Taft pointed out, in a bad month, sales amounted to $176,000; the aggregate for a year must have exceeded $2 million.

Chief Justice Taft stated that Roy Olmstead was the leading conspirator and the general manager of the business. He made a contribution of $10,000 to the capital; 11 others contributed $1,000 each. The profits were divided one-half to Olmstead and the remainder to the other 11. Of the several offices in Seattle, the chief one was in a large office building. In this office there were three telephones on three different lines. There were telephones in an office of the manager in his own home, at the homes of his associates, and at other places in the city. They spoke frequently

with individuals in Vancouver, British Columbia. Times were fixed for the deliveries of what Chief Justice Taft referred to as the "stuff" to places along Puget Sound near Seattle, and from there the liquor was removed and deposited in the caches referred to above.

One of the chief men was always on duty at the main office to receive orders by telephone and to direct their filling by a corps of men stationed in another room — the "bull pen." The call numbers of the telephones were given to those known to be likely customers. At times, Chief Justice Taft indicated, the sales amounted to 200 cases of liquor per day.

The information that led to the discovery of the conspiracy and its nature and extent was largely obtained by intercepting messages on the telephones of the conspirators by four federal Prohibition officers. Small wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office. Chief Justice Taft pointed out that the insertions were made "without trespass upon any property of the defendants" in that they were made in the basement of the large office building; taps from house lines were made in the streets near the houses.

The gathering of evidence continued for many months. Conversations of the conspirators, of which notes were made, were testified to by government witnesses. They revealed the large business transactions of the partners and their subordinates. Government investigators heard the orders given for liquor by customers and the acceptances.

Chief Justice Taft noted that 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." He pointed out that the Court, in *Weeks v. United States*[6] and cases that had followed, had declared 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." Chief Justice Taft then analyzed whether the Fourth Amendment prohibited the use of the evidence obtained by the wiretaps.[7]

He observed that one case, *Gouled v. United States*,[8] arose when a representative of the Army's Intelligence Department, "having by stealth obtained

admission to the defendant's office, seized and carried away certain private papers valuable for evidential purposes." The Court held that to be an unreasonable search and seizure within the Fourth Amendment. Chief Justice Taft explained that a "stealthy entrance in such circumstances became the equivalent to an entry by force," and that there was "actual entrance into the private quarters of defendant, and the taking away of something tangible." Chief Justice Taft contrasted that situation to *Olmstead*: "Here we have testimony only of voluntary conversations secretly overheard."

The Fourth Amendment, Chief Justice Taft reasoned, showed that the search is to be of "material things — the person, the house, his papers, or his effects." According to Chief Justice Taft, it was "plainly within the words" of the Fourth Amendment to say that the unlawful rifling by a government agent of a sealed letter was a search and seizure of the sender's papers or effects.

However, Chief Justice Taft continued, the United States government did not take the same care of telegraph or telephone messages as of mailed sealed letters. Here, according to Chief Justice Taft, there was "no searching," there was "no seizure," and 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."

Chief Justice Taft stated that because of the "invention of the telephone fifty years ago," one can talk with another at a far distant place. However, he declared, the language of the Fourth Amendment "cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office." He reasoned that that was because "[t]he intervening wires are not part of his house or office any more than are the highways along which they are stretched."

The Chief Justice added that Congress could 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." Chief Justice Taft stated that the "reasonable view" was 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, and, therefore, the wiretapping in this case "did not amount to a search or seizure within the meaning of the Fourth Amendment."

THE DISSENT BY JUSTICE BRANDEIS

Justice Brandeis dissented. After briefly summarizing the facts, including that before any of the defendants had been arrested or indicted, the telephones by means of which they communicated with one another and with others had been tapped by federal officers. In particular, Justice Brandeis pointed out, the government tapped eight telephones, some in the homes of the persons charged and some in their offices; at least six Prohibition agents listened over the tapped wires for more than five months, reported the messages, and prepared notes of the conversations they overheard that took 775 typewritten pages. Justice Brandeis added that the defendants objected to the admission of the evidence obtained by wiretapping on the ground that the government's wiretapping 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.

According to Justice Brandeis, the government did not attempt to defend the methods employed by its officers, conceding that if wiretapping could be deemed a search and seizure within the Fourth Amendment, such wiretapping as was practiced in this case was an unreasonable search and seizure and that the evidence thus obtained was inadmissible. The government, however, relied on the language of the Fourth Amendment, and claimed that its protection could not properly be held to include a telephone conversation. Justice Brandeis was not persuaded.

Justice Brandeis referenced the famous statement by Chief Justice John Marshall in *McCulloch v. Maryland*[9] that "we must never forget that it is a Constitution we are expounding." Since then, Justice Brandeis observed, the Court had "repeatedly sustained the exercise of power by Congress" over objects of which the Founding Fathers "could not have dreamed."

He added that the Court had likewise held that general limitations on the powers of government, such as those embodied in the Due Process clauses of the Fifth and Fourteenth Amendments, did not forbid the United States or the states from meeting modern conditions by regulations that, "a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive."[10] Justice Brandeis then declared that clauses guaranteeing to the individual protection against specific abuses of power "must have a similar capacity of adaptation to a changing world."

When the Fourth and Fifth Amendments were adopted, Justice Brandeis explained, "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 torture. It could secure possession of the individual's papers and other articles incident to the individual's 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, Justice Brandeis observed. But, he stated, "time works changes, brings into existence new conditions and purposes." Indeed, Justice Brandeis pointed out, "[s]ubtler 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, Justice Brandeis stated, "in the application of a constitution, our contemplation cannot be only of what has been, but of what may be." He declared that the progress of science in furnishing the government with means of espionage was "not likely to stop with wiretapping." He said that ways may someday be developed by which the government, without removing papers from secret drawers, could reproduce them in court, and by which it would be enabled to expose to a jury the most intimate occurrences of the home. He then asked: "Can it be that the Constitution affords no protection against such invasions of individual security?"

Justice Brandeis answered that question by referring to the Court's 1886 decision in *Boyd v. United States.*[11] As he noted, the Court in that

case reviewed the history that lay behind the Fourth and Fifth Amendments, stating with reference to Lord Camden's judgment in the British decision of *Entick v. Carrington* in 1765:[12]

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employees of the sanctities of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other.

Justice Brandeis noted that the Court, in *Interstate Commerce Commission v. Brimson,*[13] repeated the statement made in the *Boyd* case and quoted the statement of Mr. Justice Field in *In re Pacific Railway Commission*:[14]

> Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books, and papers, from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.

Justice Brandeis also noted that the Court, in *Ex parte Jackson,*[15] held that "a sealed letter entrusted to the mail is protected by the Amendments."

The mail is a public service and the telephone is a public service, and, in the view of Justice Brandeis, there was, in essence, no difference between the sealed letter and the private telephone message. Indeed, he declared, the "evil incident to invasion of the privacy of the telephone" was "far greater than that involved in tampering with the mails." Justice Brandeis observed that whenever a telephone line was tapped, "the privacy of the persons at both ends of the line" was invaded and "all conversations between them upon any subject, and, although proper, confidential and privileged, may be overheard." Moreover, he stated, "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 wiretapping."

Justice Brandeis declared that "[t]ime and again," the Court, in giving effect to the principle underlying the Fourth Amendment, had refused to place an "unduly literal construction upon it." He stated that this was illustrated in the *Boyd* case itself: Taking language in its ordinary meaning, there was no "search" or "seizure" when a defendant was 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, Justice Brandeis stated, the Court held the evidence inadmissible "simply because the information leading to the issue of the subpoena" had been "unlawfully secured."

In Justice Brandeis's opinion, "[t]he 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." Moreover, he emphasized, 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, he stated, "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, Justice Brandeis declared that the defendants' objections to the evidence obtained by wiretapping "must, in my opinion, be sustained." In his view, it was "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." He stated that experience "should teach us to be most on our guard to protect liberty" when the government's purposes were "beneficent…. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."[16]

CONCLUSION

Nearly 40 years after *Olmstead*, the Supreme Court reversed the ruling. In *Katz v. United States*,[17] the Court was faced with a case in which the Federal Bureau of Investigation had wiretapped the telephone booth from which the defendant had placed calls. The Court stated that although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, it has "since departed from the narrow view on which that decision rested." The Court in *Katz* observed that it had held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any "technical trespass under…local property law." Once this much was acknowledged, and once it was recognized that the Fourth Amendment protected people — and not simply "areas" — against unreasonable searches and seizures, it became clear that the reach of that Amendment could not turn "upon the presence or absence of a physical intrusion into any given enclosure." The Court in *Katz* concluded that the underpinnings of *Olmstead* had been "so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." The government's activities in electronically listening to and recording the pe-

titioner's words in *Katz* "violated the privacy upon which he justifiably relied while using the telephone booth, and thus constituted a "search and seizure" within the meaning of the Fourth Amendment." Interestingly, the Court did not quote the Brandeis dissent, although it did reference the famous 1890 privacy article by Brandeis and Warren.[18]

There is some question, today, about the future of the exclusionary rule in the Roberts Court.[19] Should the Roberts Court overturn that rule, the Brandeis dissent — or at least that portion supporting the exclusion of evidence obtained illegally — may once again be a minority view.

NOTES

[1] 277 U.S. 438 (1928).
[2] *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Goldberg, J., concurring).
[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[4] *Roe v. Wade*, 410 U.S. 113 (1973).
[5] The Fourth Amendment provides: "The right 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."
[6] 232 U. S. 383 (1914).
[7] Chief Justice Taft did not analyze in detail the application in this case of the Fifth Amendment, which provides that, "No person . . . shall be compelled, in any criminal case, to be a witness against himself," finding "no evidence of compulsion to induce the defendants to talk over their many telephones."
[8] 255 U.S. 298 (1921).
[9] 17 U.S. 4 (1819).
[10] *Village of Euclid v. Ambler Realty Co*., 272 U. S. 365 (1926).
[11] 116 U. S. 616 (1886).
[12] 19 Howell's State Trials 1030 (1765).
[13] 154 U. S. 447 (1897).
[14] 32 Fed. 241 (C. C. Cal. 1885).
[15] 96 U. S. 727 (1878).
[16] Justice Oliver Wendell Holmes, Jr., dissented in a brief opinion in which he stated that the government "ought not to use evidence obtained and only

obtainable by a criminal act." Justice Pierce Butler also dissented, stating that the government may not have its officers, whenever they see fit, tap wires, listen to, take down, and report private messages and conversations transmitted by telephones. Justice Harlan Fiske Stone also dissented, concurring in the opinions of Justice Holmes and Justice Brandeis and agreeing with Justice Butler so far as he dealt with the merits.

[17] 389 U.S. 347 (1967).

[18] S. Warren and L. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

[19] *See, e.g.*, Adam Cohen, "Is the Supreme Court About to Kill Off the Exclusionary Rule?" *N.Y. Times* (Feb. 15, 2009), available at http://www.nytimes.com/2009/02/16/opinion/16mon4.html?scp=1&sq=Mapp%20v.%20Ohio&st=cse.