

■ Louis D. Brandeis's Dissent in *Olmstead v. United States*

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Author: Justice Louis D. Brandeis

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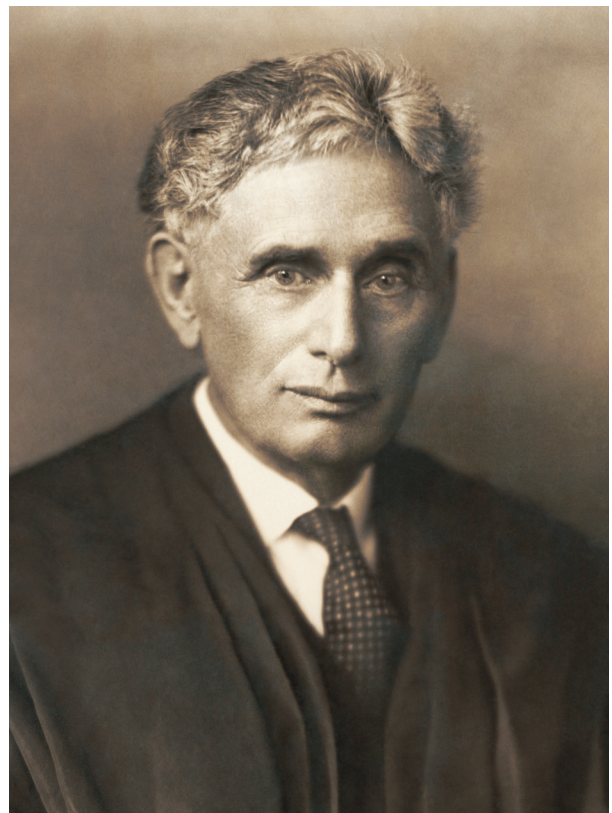
Summary Overview

In *Olmstead v. United States* (1928), the U.S. Supreme Court held that the use of evidence obtained by secretly wiretapping telephones without judicial approval does not violate the Fourth and Fifth Amendments to the U.S. Constitution. Several petitioners, including Roy Olmstead, had been convicted of conspiracy to violate the Volstead Act, establishing Prohibition in the United States. *Olmstead* is a case in which the dissents, particularly that of Justice Louis D. Brandeis, were more noteworthy than the majority's view. In his dissent, Brandeis argued that the protections offered by the Fourth and Fifth Amendments are broad and that wholesale intrusions by the government on the privacy of individuals can be construed as a violation of these protections. In 1934, the U.S. Congress passed a law outlawing the use of wiretapping, and a series of Supreme Court cases since then have taken the dissenters' views about a fundamental right to privacy.

Defining Moment

The United States adopted Prohibition through the Eighteenth Amendment, which was ratified by the needed number of states in January 1919; the manufacture, sale, or transportation of liquor was henceforth to be a crime. That ban gave rise to a lively and illegal bootlegging business that flouted the law and soon evolved into large-scale organized crime. Roy ("Big Boy") Olmstead of Seattle was a major smuggler of alcohol. Undercover agents of the U.S. government detected the activities of Olmstead and his associates (around fifty of them) and placed secret wiretaps on their telephones. For almost half a year they listened to all their phone calls, taking nearly eight hundred pages of notes. On the basis of the evidence they gathered by this method, the government arrested and convicted Olmstead and some seventy others.

The question before the Supreme Court was straightforward: Did the use of evidence obtained by secretly wiretapping telephones violate the Fourth and Fifth Amendments to the Constitution? The Fourth Amendment reads, in part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Fifth Amendment stipulates due process in criminal cases and protects



Louis Brandeis. Photo via Wikimedia Commons. [Public domain.]

citizens against self-incrimination. A slim majority of five justices, speaking through Chief Justice William Howard Taft, upheld the conviction, arguing that wiretapping did not contravene the Fourth Amendment's prohibition of unreasonable searches and seizures because it did not involve actual physical entry. Nor was the Fifth Amendment's protection against self-incrimination held to be violated by words spoken over the telephone. Four justices dissented, each writing a separate opinion, but the spirited dissent of Brandeis was the most prominent; two of the other dissenters explicitly mentioned in their opinions that they largely agreed with Brandeis's views.

Author Biography

During his long life, Louis Dembitz Brandeis (1856–1941) had four related but distinct careers. After graduating from Harvard Law School and practicing law for a year in St. Louis, Missouri, he became a highly successful attorney in Boston, Massachusetts, and a pioneer in several aspects of legal practice, including that of donating services, without fee, on behalf of public causes. Then, beginning in the mid-1890s, he devoted increasing efforts to various reform crusades, to emerge as one of the country's leading progressive reformers. In August 1914 he assumed the leadership of American Zionism, successfully shaping a tiny and impotent organization into an efficient and effective social movement aimed at securing a Jewish homeland in Palestine. Finally, from 1916 until his retirement in 1939, Brandeis served as one of the most respected and venerated associate justices in the history of the Supreme Court. His work in any one of those four fields would have entitled him to a place in U.S. history; his prominence in all of them merits his recognition as one of America's most accomplished and influential figures.

Brandeis was born on November 13, 1856, in Louisville, Kentucky. His parents were Bohemian-Jewish immigrants who were part of a group of related families who left Europe after the failure of the liberal revolutions of 1848. They were well educated, cultivated, and nonreligious. Brandeis attended Louisville public schools, but in the early 1870s, when the American depression crippled his father's business,

the family moved to Europe. They returned in 1875, and Brandeis entered Harvard Law School. He compiled a legendary record at Harvard, graduating at the age of twenty at the head of his class. Settling in Boston after an unhappy year in St. Louis, he soon built a successful legal firm and became a prominent, if sometimes controversial attorney. In 1891 he married Alice Goldmark, a second cousin from the group of families who had come to America together.

With growing financial independence Brandeis embarked upon a series of reform ventures. Beginning in Massachusetts, he worked to control public franchises, achieved a compromise on behalf of consumers of natural gas in Boston, devised and implemented a new system of life insurance for Massachusetts workers, and battled tirelessly for seven years to defeat a scheme to monopolize New England's transportation system. Somehow, he found time to defend, before the Supreme Court, several state laws regulating workers' hours and wages; in one such case—*Muller v. Oregon* (1908)—he invented a new sort of legal argument (thereafter called the “Brandeis brief”) by relying as much on sociological evidence as on legal precedent to justify state regulatory legislation. By 1910 Brandeis had emerged on the national stage with a reputation as “the people's attorney.” He plunged into numerous reform activities, encompassing fields as diverse as conservation, railroad rates, labor relations, and antitrust. During the presidential campaign of 1912, he met and greatly impressed the Democratic candidate, Woodrow Wilson; when Wilson won the election, Brandeis became a close adviser and an architect of some of the principal reform legislation in Wilson's first term. It was also during this period that he undertook the leadership of the American Zionist movement and virtually revolutionized its operations, reputation, and activities.

In January 1916, Wilson nominated Brandeis to the Supreme Court. There followed an extremely bitter and protracted U.S. Senate hearing that lasted for months. Brandeis's opponents charged that he was a “radical” who lacked the judicial temperament. No doubt the opposition was in part caused by the fact that no Jew had ever served on the court, and some Americans were wary of that possibility. He was eventually confirmed on a largely party-line vote in the

Senate. For the next twenty-three years he performed the functions of a judge, becoming well-known for some of his dissents with fellow justice Oliver Wendell Holmes Jr., and for his pathbreaking opinions in the realms of free speech, labor, federal jurisdiction, and the right to privacy. By the time he retired, in 1939, he was universally recognized as one of the most distinguished justices in the Supreme Court's history. Some of his dissents have become

standard legal doctrine, and he continues to be commonly regarded as one of the greatest judges to sit on an American bench.

In early October 1941, Brandeis—retired from the court for almost three years but still living in Washington—suffered a heart attack. He died a few days later, on October 5. His ashes were placed at the entrance of the University of Louisville's law school, which is now named in his honor.



Historical Document

The defendants were convicted of conspiring to violate the National Prohibition Act. Before any of the persons now charged had been arrested or indicted, the telephones by means of which they habitually communicated with one another and with others had been tapped by federal officers. To this end, a lineman of long experience in wiretapping was employed on behalf of the Government and at its expense. He tapped eight telephones, some in the homes of the persons charged, some in their offices. Acting on behalf of the Government and in their official capacity, at least six other prohibition agents listened over the tapped wires and reported the messages taken. Their operations extended over a period of nearly five months. The typewritten record of the notes of conversations overheard occupies 775 typewritten pages. By objections seasonably made and persistently renewed, 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.

The Government... relies on the language of the Amendment, and it claims that the protection given thereby cannot properly be held to include a telephone conversation.

"We must never forget," said Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 407, "that it is a constitution we are expounding." Since then, this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed.... 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, "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.... 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....

The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. 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....

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 wiretapping....

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 wiretapping 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 the opinion that the judgment should be reversed. By the laws of Washington, wiretapping 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....

Here, 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.... There is literally no other evidence of guilt on the part of some of the defendants except that illegally obtained by these officers. As to nearly all the defendants (except those who admitted guilt), the evidence relied upon to secure a conviction consisted mainly of that which these officers had so obtained by violating the state law....

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.

Will this Court, by sustaining the judgment below, sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands....

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 imperiled 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.



Glossary

anarchy: a political state without government or laws

construction: legal interpretation

incident to: occurring in conjunction with, not necessarily causally related

pernicious: harmful

seasonably: regularly

stretching upon the rack: an especially cruel form of torture in which a person's joints are dislocated and eventually separated (along with muscles and cartilage)

warp and woof: the structure of something, drawn from terms in weaving—warp for threads running lengthwise and woof for the threads running across

writs of assistance: legal documents used by the British as search warrants during the American Revolution

Document Analysis

The Fourth Amendment prohibits unreasonable searches and seizures by the government, and prohibits the use of evidence obtained in violation of a defendant's Fourth Amendment rights in that defendant's criminal trial. This "reasonableness" requirement usually requires law enforcement agents to obtain a warrant from an impartial magistrate authorizing the search or seizure. The Fourth Amendment now provides broader protections, but when *Olmstead* was decided, the amendment was construed narrowly to protect only searches and seizures involving a trespass (i.e., a physical violation). And while seizures almost universally involve a trespass, nontrespassory searches, such as looking through a window or listening through a wall, were generally unprotected.

Applying this trespass standard, the Supreme Court majority held that warrantless wiretaps did not violate the Fourth Amendment, both because wiretaps were not trespassory searches and because the wiretapped telephone line was not among the defendant's person, house, papers, or effects. The installation of a wiretap did not trespass against the defendant's property because the telephone line was not the defendant's property; it was the telephone company's property. More fundamentally, the majority opinion held that wiretaps should not implicate the Fourth Amendment generally because wiretaps are not trespassory searches. As the court said, "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" (*Olmstead*, 464). Although the court did acknowledge the similarity to searching mail, which requires a warrant, it distinguished this on several grounds, including the Constitution's postal clause, and that mail clearly constitutes "papers" or "effects," the search of which requires a trespass to open the envelope and read its contents.

Of greater note in the *Olmstead* case is the lengthy dissent by Justice Brandeis (coauthor of *The Right to Privacy*). Rather than adhering to a strictly textual reading of the Fourth Amendment, Brandeis argues for a more fluid interpretation that protects individuals from governmental invasions of privacy generally.

Rejecting the trespass interpretation, Brandeis recognizes the potential for technology to circumvent personal liberties with minimal or no physical violation and argued that the Fourth Amendment should extend to all "invasions of the home and the privacies of life." In his conception, the fundamental guarantee of the Fourth Amendment was not a right against government trespass but rather a "right to be let alone." Noting that wiretaps were illegal in Washington, where *Olmstead* resided, Brandeis went on to assert that evidence obtained in violation of state law should be inadmissible as a matter of both law and policy.

No one who knew Brandeis could have been surprised at his dissent. Back in 1890 Brandeis and his law partner, Samuel Warren, had published a pathbreaking article in the *Harvard Law Review* entitled "The Right to Privacy." Roscoe Pound, the illustrious dean of Harvard Law School, later said of that article that they had added a chapter to the law. To this day, appeals to a right to privacy must be traced back to that pioneering article. To Brandeis and Warren, it was one of the principal marks of a civilized society that every individual deserved to be protected from unwanted invasions of privacy.

In this dissent, Brandeis reminds readers that a living constitution must be flexible enough to change with new inventions and discoveries, especially innovations that the Founding Fathers could not possibly have foreseen. The fact that the word *wiretap* is not mentioned in the Fourth Amendment did not excuse the Supreme Court from weighing the intentions of the amendment and applying it to the modern world. But Brandeis's main thrust in his dissent is that the government must always be a scrupulous follower of legal and ethical practice, that the end (in this case, a conviction of *Olmstead* and his friends) cannot justify morally questionable means (such as wiretapping). The government must serve as a teacher of ethical behavior and a model of legal practice because citizens take behavioral cues from what they see the government doing. Justice Holmes, in his dissent, after writing that Brandeis had summed up his own view, added, "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."

This was another case in which the dissents (particularly Brandeis's) were more noteworthy than the majority's view. In 1934 the U.S. Congress passed a law outlawing the use of wiretapping, and a series of Supreme Court cases since then have taken the dissenters' views about a fundamental right to privacy. Although eventually overturned by *Katz v. United States* (1967), with its "reasonable expectation of privacy" standard, *Olmstead's* trespass approach was the governing precedent for wiretaps for nearly forty years, and it served as the impetus for the Wiretap Act (1968) and the Electronic Communications Privacy Act (1986). Additional Supreme Court decisions suggest that the trespass approach to Fourth Amendment searches and seizures is still valid.

—David W. Levy, PhD; Scott Russell, JD

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