

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Primary Source

OLMSTEAD V. UNITED STATES (1928)

View the case on the National Constitution Center's website [here](#).

SUMMARY

Olmstead v. United States was one of the most important early cases interpreting the Fourth Amendment. In *Olmstead*, federal agents suspected that Roy Olmstead was running an illegal liquor business during the height of Prohibition. Without a judicial warrant, the agents installed wiretaps on the phone lines leading to the office of Olmstead's business, as well as to Olmstead's home and to those of his suspected accomplices. The wiretaps were installed on the parts of the phone lines in the public street and in the basement of the office building. Able to listen to the suspect's phone conversations, the agents uncovered evidence that Olmstead was selling liquor and arrested him. In a 5-4 decision, the Supreme Court ruled that the government's use of wiretaps had not violated the Fourth Amendment. For the Court majority, a Fourth Amendment violation required an actual physical examination of one's person, home, papers, or physical effects. On this view, the government's use of wiretaps was not a search because it did not involve a trespass on Olmstead's property and because the government had not seized any of his physical papers or effects. However, in a powerful dissent, Justice Louis Brandeis disagreed. There, Brandeis challenged the Court to translate old constitutional principles to meet the challenges of new contexts and emerging technologies—arguing that the Court must read the Fourth Amendment in such a way that it protected at least as much privacy as in the Founding era. Decades later, the Supreme Court would embrace Brandeis's insights in *Katz v. United States* (1967).

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Chief Justice Taft

The Court begins with the Constitution's text. 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.” . . .

Then, the Court pivots to history, rooting the Fourth Amendment's purpose in Founding-era concerns about general warrants and writs of assistance. The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of

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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. . . .

To trigger Fourth Amendment protections, the government must physically search or seize the suspect's own body, house, papers, or stuff. 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. . . .

No physical search or seizure, no Fourth Amendment violation. 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. . . .

We refuse to extend Fourth Amendment protections to telephone wires. 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. . . .

However, Congress *could* pass a law to cover them; that is a job for Congress, not the courts. 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. . . .

Our decision is consistent with well-established precedent. 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.

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There was no Fourth Amendment violation here. We think, therefore, that the wiretapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.

Excerpt: Dissent, Justice Brandeis

The government wiretapped the phone lines; this was a massive investigation that produced a ton of evidence. 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

We must translate the big principles in the Constitution to cover new contexts and new technologies that the Founders never could have imagined; the Court has done this in other areas of constitutional law. "We must never forget," said Mr. Chief Justice Marshall in *McCulloch v. Maryland* . . . , "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. . . . We have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which, "a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." . . . Clauses guaranteeing to the individual protection against specific abuses of power must have a similar capacity of adaptation to a changing world. . . .

New technologies threaten Fourth Amendment interests more than the technologies available at the Founding. 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. It could compel the individual to testify – a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life – a seizure

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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. . . .

New technological advancements will surely continue to threaten Fourth Amendment interests even more than today’s available technologies; we must be sure to interpret the Fourth Amendment in ways that keep faith with the Founder’s vision, while also addressing these new challenges. 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 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. “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? . . .

Wiretapping is a massive invasion of privacy; in many ways, it is a greater threat to one’s privacy than general warrants or writs of assistance. 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.

We must not be too mechanical in how we interpret the Fourth Amendment. 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. . . .

We shouldn’t limit the Fourth Amendment’s protections to physical searches and seizures. 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

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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 Founders had a broad conception of the privacy interests protected by the Fourth Amendment. 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. . . .

Olmstead should win. 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.

***Bold sentences give the big idea of the excerpt and are not a part of the primary source.**