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In the

Supreme Court of the United States

OCTOBER TERM, 1927

ROY OLMSTEAD, JERRY L. FINCH, CLARENCE G. HEALY, CLIFF MAURICE, TOM NAKAGAWA, EDWARD ENGDAHL, MYER BERG, JOHN EARL, and FRANCIS RICHARD BROWN, *Petitioners*,

—vs.—

UNITED STATES OF AMERICA, *Respondent*.

No._____

STATEMENT OF THE CASE

Your petitioners, convicted of conspiracy to violate the National Prohibition Act, had their convictions affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, and a rehearing denied them. Justice Rudkin wrote a dissenting opinion, in which he stated that the constitutional rights of your petitioners had been invaded in a way that endangers the general public. (*Olmstead et al., vs. United States*, case not yet reported.)

Telephone wires to the petitioners' homes and offices had been "tapped" by federal prohibition agents and the petitioners' conversations so heard were used as incriminating evidence against them. Although timely and properly challenged, the trial judge and two of the circuit court judges held that the constitutional guaranties did not apply to private telephones. Justice Rudkin held they did.

ARGUMENT

Judge Rudkin's decision, which is a statement and argument at once of petitioners' petition, says:

> "But my dissent is based upon much broader grounds. I do not think that testimony thus obtained by federal officers or federal agents is admissable in any event, however the conversations may be proved. Of course, I agree with the majority that courts will not ordinarily inquire into the manner in which a witness gains his information, but there are exceptions to the rule as well established as the rule itself. For illustration I need only refer to the many decisions of the Supreme Court, of this court, and of the courts of other circuits, excluding evidence obtained by federal officers and federal agents in raiding private dwellings without search warrants, while the like evidence, obtained in the like manner by private individuals and by municipal and state officers is universally admitted. Whether this distinction is founded in reason is not for me to say. See dissenting opinion in Burdeau v. McDowell, 256 U. S. 465, 476. 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 invoked more often and more successfully during the past ten 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. As said by a great constitutional lawyer:

"'When the people of this country come to decide upon the acts of their rulers, they will take all these things into consideration. But that presents the political aspects of the case, with which we have nothing to do here. I would only say, in order to prevent misapprehension, that I think it is precisely in a time of war and civil commotion that we should double the guards upon the Constitution. In peaceable and quiet times, our legal rights are in little danger of being overborne; but when the wave of power lashes itself into violence and rage, and goes surging up against the barriers which were made to confine it, then we need the whole strength of an unbroken Constitution to save us from destruction.' Ex parte Milligan, 4 Wall. 2, 75.

"But, whatever the tendency may be in the direction I have indicated, in other quarters, fortunately the Supreme Court has set its face against it. That court has consistently and

sistently declared that the amendments in question must be liberally construed in favor of the citizen and his liberty, and that stealthy encroachments will not be tolerated. Nor are the guaranties contained in these amendments limited to houses and papers. Their chief aim and purpose was not the protection of property, but the protection of the individual in his liberty and in the privacies of life. Boyd v. United States, 116 U. S. 616; Weeks v. United States, 232 U. S. 383; Silverthorne Lumber Co. v. United States, 251 U. S. 385; Gouled v. United States, 255 U. S. 298; Agnello v. United States, 269 U. S. 20.

"In discussing the protection that surrounds a letter deposited in the mail, in Exparte Jackson, 96 U. S. 727, 733, Mr. Justice Field said:

" 'Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is

required when papers are subject to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.'

"And, it is the contents of the letter, not the mere paper that is thus protected. 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 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." (R. 772-9.)

The principles laid down by Judge Rudkin in this opinion were first announced by this court in the case of *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746. These principles have never been deviated from, but have been reiterated again and again by this court in a series of cases, the last of which is *Byars v. United States*, 47 Sup. Ct. Rep. 248, decided at the last term.

In the *Boyd* case this court said:

"The principles laid down in this (Lord Camb-den's) opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; *they apply to all invasions, on the part of the government and its employees, of the sanctity 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 offense; *but it is the invasion of his*

feasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Cambden'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 to convict him of crime or to forfeit his goods is within the condemnation of that judgment." (Italics ours.)

And later in the opinion the court adds:

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more

in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

In *Gouled v. United States*, 255 U. S. 298, 65 L. Ed. 647, the court said:

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property,' that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a

liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly over-zealous executive officers."

And in the *Byars* case the court ended its opinion with these words:

"The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

The admissibility of this "wire tapping" testimony is sanctioned by the majority opinion as follows:

"It was further ruled that the petition to suppress evidence obtained by tapping the telephone wires be denied. It is contended that by the latter ruling the defendants' 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. In the principle involved the case here is identical with that of State v. Hester, 134 S. E. 885, where evidence of conversations overheard by means of a dictaphone was held competent. Said the court: 'The fact that the officers, in a way, "entrapped" the defendants and by artifice enabled themselves to hear their talk, does not make their statements at the time incompetent as testimony.' In a case in which possession of papers had been obtained by fraudulent representation that it could be taken by force if not voluntarily delivered, Judge Hough said: 'There is as yet no authoritative decision that obtaining papers or property by fraud or guile is a violation of the Fourth Amendment. Nor, so far as I know, has any court gone quite that far i n emasculating the

prosecution of offenders.' United States v. Maresca, 266 Fed. 713, 718. 'The courts do not concern themselves with the method by which a party has secured the evidence which he adduces in support of his contentions.' 22 C. J. 192. In Firth Sterling Steel Co. v. Bethelehem Steel Co., 199 Fed. 353, the illegality of the method by which evidence was obtained was held not to effect its admissibility, the court quoting from Wigmore, (Sec. 2183): 'The illegality of the act of obtaining the evidence is by no means condoned, but is merely ignored.' In Gindrat v. People, 138 Ill. 103, it is said: 'Courts in the administration of the criminal law are not accustomed to be over-sensitive in regard to the sources from which the evidence comes, and will avail themselves of all evidence that is competent and pertinent and not subversive of some constitutional or legal right.' In Adams v. New York, 192 U. S. 585, it was held that the fact that papers may have been illegally taken from the possession of the party against whom they are offered is not a valid objection to their admissibility, that the court considers the competency of the evidence and not the method by which it was obtained." (R. 768 et seq.)

The complete answer to the majority opinion is stated by Judge Rudkin in his dissenting opinion:

"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."

And by this court in *Village of Euclid, Ohio, v. Ambler Realty Co.*, 47 Sup. Ct. R. 114, where it is said:

> " * * * while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise."

It is a matter of common knowledge that there are in use today throughout the United States upwards of fourteen million telephones. Such fact furnishes the opportunity to impose upon the citizenry of the country the most drastic and obnoxious espionage system imaginable. The legality of such a system is now squarely before this court, and it ought not to be written anywhere that such procedure has the sanction of law. The sane and wise thought of Judge Rudkin should prevail as true law.

We believe we have established the verity of each and every proposition laid down in our petition, namely:

(a) That this is a question not only of grave constitutional law, but one of supreme importance to the general public;

(b) That the question has never before been passed upon by any court, except as it was passed upon in the instant case by the said district court and the said circuit court of appeals for the ninth circuit, and it was only decided by the latter court by a majority of two to one, Judge Rudkin of that court filing a dissenting opinion of most vigorous and persuasive force;

(c) That it is a federal question, and has been decided in a way in conflict with applicable decisions of this court;

(d) That the decision of the circuit court of appeals is untenable;

(e) That the question is an important one of federal law which has not been, but should be, decided by the Supreme Court of the nation.

Wherefore, your petitioners ask that a writ of certiorari be granted as prayed for in their petition.

Respectfully submitted,

JOHN F. DORE,
F. C. REAGAN,
J. L. FINCH,

Attorneys for Petitioners.

In the

Supreme Court of the United States

OCTOBER TERM, 1927

ROY OLMSTEAD, JERRY L. FINCH, CLARENCE G. HEALY, CLIFF MAURICE, TOM NAKAGAWA, EDWARD ENGDAHL, MYER BERG, JOHN EARL, and FRANCIS RICHARD BROWN, *Petitioners*, —VS.— UNITED STATES OF AMERICA, *Respondent.*	No._____

NOTICE OF APPLICATION FOR WRIT OF CERTIORARI

TO THE ABOVE NAMED RESPONDENT AND TO THE HONORABLE JOHN G. SARGENT, ATTORNEY GENERAL, AND THE HONORABLE WILLIAM D. MITCHELL, SOLICITOR GENERAL:

You, and each of you, will please take notice that on the 1st day of September, 1927, on the opening of the Supreme Court of the United States at 12:00 o'clock noon, or as soon thereafter as the matter can be heard, the undersigned will move the Supreme Court of the United States, at the court room thereof in the City of Washington, District of Columbia, for an order granting the petition of the above named petitioners, and the writ of certiorari therein applied for directed to the United States Circuit Court of

Appeals for the Ninth Circuit, and at the same time the undersigned will submit to the Supreme Court of the United States such petition and a certified copy of the entire record of the above entitled case in the Circuit Court of Appeals as an exhibit to such petition, with petitioners' brief in support of such petition, together with this notice and your admission of service, of which petition, exhibit, brief and notice copies are herewith served upon you at Washington, District of Columbia, this_____day of August, 1927.

JOHN F. DORE,
F. C. REAGAN,
J. L. FINCH,
Solicitors and Counsel for Petitioners.

ACCEPTANCE OF SERVICE

Service of a copy of the foregoing petition and of the record as an exhibit thereto, together with copies of brief of counsel for petitioner in support of the petition, and a copy of the foregoing notice, is hereby admitted by the undersigned at Washington, District of Columbia, this _____day of August, 1927.

JOHN G. SARGENT,
WILLIAM D. MITCHELL,
Solicitors and Counsel for Respondent.