

IN THE
Supreme Court of the United States

OCTOBER TERM, 1927

No. 493

ROY OLMSTEAD, JERRY L. FINCH, CLARENCE G. HEALY,
CLIFF MAURICE, TOM NAKAGAWA, EDWARD ENG-
DAHL, MYER BERG, JOHN EARL, AND FRANCIS RICH-
ARD BROWN, *Petitioners*

v.

UNITED STATES OF AMERICA

No. 532

CHARLES S. GREEN, EMORY A. KERN, Z. J. HEDRICK,
EDWARD ERICKSON, WILLIAM P. SMITH, DAVID TROT-
SKY, LOUIS O. GILLIAM, CLYDE THOMPSON AND
BERNARD WARD, *Petitioners*

v.

UNITED STATES OF AMERICA

No. 533

EDWARD H. McINNIS, *Petitioner*

v.

UNITED STATES OF AMERICA

**Motion of counsel for The Pacific Telephone and Telegraph Com-
pany, American Telephone and Telegraph Company, United
States Independent Telephone Association, and Tri-State
Telephone and Telegraph Company, for leave to file a brief
as amici curiae**

Now come Otto B. Rupp, Counsel for The Pacific Telephone and Telegraph Company, Charles M. BraceLen and Robert H. Strahan, Counsel for American Telephone and Telegraph Company, and Clarence B. Randall, Counsel for United States Independent Telephone Association and Tri-State Telephone and Telegraph Company, and respectfully move for leave to file a brief in the above entitled causes, as *amici curiae*, in support of the contention of petitioners.

OTTO B. RUPP

Seattle, Washington

Counsel for The Pacific Telephone and
Telegraph Company

CHARLES M. BRACELEN

ROBERT H. STRAHAN

New York, N. Y.

Counsel for American Telephone and
Telegraph Company

CLARENCE B. RANDALL

St. Paul, Minnesota

Counsel for United States Independent
Telephone Association and
Tri-State Telephone and Telegraph Company

CASES CITED.

	PAGE
Agnello <i>vs.</i> United States, 269 U. S. 20.....	3
Boyd <i>vs.</i> United States, 116 U. S. 616.....	3, 8
Byars <i>vs.</i> United States, 273 U. S. 28.....	3
Ex Parte Jackson, 96 U. S. 727.....	3
Gouled <i>vs.</i> United States, 255 U. S. 298.....	3
I. C. C. <i>vs.</i> Brimson, 154 U. S. 447.....	9
International News Association <i>vs.</i> Associated Press, 248 U. S. 215.....	4
Perlman <i>vs.</i> United States, 247 U. S. 7.....	3
Pacific Railway Commission, In re, 32 Fed. 241, 250..	8
Silverthorne Lumber Co. <i>vs.</i> United States, 251 U. S. 385	3
Weeks <i>vs.</i> United States, 232 U. S. 383.....	3

IN THE
Supreme Court of the United States

OCTOBER TERM, 1927

No. 493

ROY OLMSTEAD, JERRY L. FINCH, CLARENCE G. HEALY,
CLIFF MAURICE, TOM NAKAGAWA, EDWARD ENG-
DAHL, MYER BERG, JOHN EARL, AND FRANCIS RICH-
ARD BROWN, *Petitioners*

v.

UNITED STATES OF AMERICA

No. 532

CHARLES S. GREEN, EMORY A. KERN, Z. J. HEDRICK,
EDWARD ERICKSON, WILLIAM P. SMITH, DAVID TROT-
SKY, LOUIS O. GILLIAM, CLYDE THOMPSON, AND
BERNARD WARD, *Petitioners*

v.

UNITED STATES OF AMERICA

No. 533

EDWARD H. McINNIS, *Petitioner*

v.

UNITED STATES OF AMERICA

**BRIEF OF COUNSEL, AMICI CURIAE, FILED BY LEAVE
OF COURT, IN BEHALF OF THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY, AMERICAN TELEPHONE AND TELE-
GRAPH COMPANY, THE UNITED STATES INDEPENDENT
TELEPHONE ASSOCIATION, TRI-STATE TELEPHONE AND
TELEGRAPH COMPANY, IN SUPPORT OF THE PETITIONERS'
CONTENTION.**

Federal prohibition agents secretly tapped the telephone lines of petitioners, and overheard and made a written record of private conversations between them, which were received in evidence and led to the indictment and conviction of petitioners for conspiring to violate the National Prohibition Act. The petitioners claimed the protection of the Fourth and Fifth Amendments, and this court has granted certiorari to review the action of the district and circuit courts in receiving the evidence.

In its order granting the petitions for certiorari this court has limited its consideration to the question—

“Whether the use of evidence of private telephone conversations, between the defendants and others, intercepted by means of wire tapping, is a violation of the Fourth and Fifth Amendments and, therefore, not permissible in the federal courts.”

In view of the able briefs filed by counsel for the parties, we limit our discussion to the following suggestions.

Argument.

It is said that there is no precedent to support the petitioners' contention. That there is no authoritative case on all fours, nor any case that in its adventitious circumstances closely resembles the facts of this case, is true. There is, however, more in the opinions of courts than their bare recital of facts, and the decision of the cases. The grounds of decision, the statement and exposition of the enduring principles of law which they set forth, are what give them life and vigor and make them valuable as

dents. So regarded the several decisions of this court that are relied upon and discussed in the briefs of counsel for the petitioners are believed to be in point and to sustain their contention.

Ex parte Jackson, 96 U. S. 727;
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;
Byars v. United States, 273 U. S. 28.

In these cases the court has held that the Fourth and Fifth Amendments are designed to protect the people in the privacies of life, and in the indefeasible, sacred right of personal security and personal liberty (the *Boyd*, *Weeks* and other cases). The invasion of these rights secretly and by stealth is within the condemnation of these amendments, no less than invasion accomplished by force (*Gouled* case). It is not necessary, in order to constitute a violation of the Fourth Amendment, that there be any entry into the house or office of the person, (*Ex parte Jackson*) or that there be a "search" or a "seizure" in any exact or literal sense of the words, (the *Boyd* case; see also *Perlman v. U. S.*, 247 U. S. 7). And evidence secured by federal agents in ways that violate the Fourth Amendment is inadmissible under the Fifth Amendment.

The petitioners were using the telephone lines and facilities of the local telephone company, such as were available to everyone without discrimination. *The function of a telephone system in our modern economy is, so far as*

reasonably practicable, to enable any two persons at a distance to converse privately with each other as they might do if both were personally present in the privacy of the home or office of either one. When the lines of two “parties” are connected at the central office, they are intended to be devoted to the exclusive use, and in that sense to be turned over to the exclusive possession, of the parties. A third person who taps the lines violates the property rights of both persons then using the telephone, and of the telephone company as well. *International News Service v. Associated Press*, 248 U. S. 215.

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

*We append a list of these statutes, Appendix A, in which we include also certain federal statutes.

We do not mean to suggest that the states can by statute destroy or impair any authority federal officers have under the Constitution and laws of the United States, and thus tie the hands of the Federal Government. Our suggestion is that this general and widespread recognition by the states of the privacy of the telephone lends most persuasive support to the contention that it is one of the privacies of life which the Fourth Amendment protects against invasion by the Government of the United States, and that any search which invades the privacy of the telephone is an unreasonable search and therefore violates that amendment.

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.

If it be said that, in any event, there is no “seizure”, that an oral conversation cannot be seized, we answer, in the first place, that this is a purely superficial view, which puts the letter above the spirit and intent of the law. The “privacy of life” and the liberty of the citizen have been invaded. And, in the second place, we do not understand that seizure is a necessary element to constitute the offense. An unreasonable search alone violates the Fourth Amendment. It is enough that the federal officer has made an unreasonable search, within the meaning of the Fourth Amendment, and has thereby unlawfully *obtained* evidence. The evidence so obtained is excluded under the provisions of the Fifth Amendment.

Suppose the agent, having no search warrant, were to enter a man's home by stealth, and in his absence search for and find there among his papers an incriminating letter written by him, and should merely read the letter and make some such record of its contents as was made of the contents of the communications overheard by these wire tappers. This hypothetical case and the wire tapping case are alike in that (1) the agent was searching for evidence, (2) he gained knowledge of incriminating statements made by the accused, (3) he had no search warrant, (4) he accomplished his purpose by stealth, (5) he made no "seizure" in the literal meaning of the word, and (6) the statements of the accused were extorted from him and used to obtain his conviction of a crime. They are unlike in that (1) one communication is written and the other oral or, if you please, one has been impressed upon paper to be dispatched by mail, and the other has been impressed upon an electric current to be dispatched to its destination by a wire. The Government itself provides the mail service, a public service, and *the Government authorizes the telephone company to provide the telephone service, also a public service*. It is settled that the communication in the mail is protected (*Ex parte Jackson*). Upon what reason, then, can it be said that the communication by telephone is not protected?

The cases are also unlike in that (2) in the hypothetical case the agent in person physically trespasses upon the house and searches with his eyes, while in the wire tapping case he physically trespasses upon the telephone line, which enters the house, and searches with his ears.

As Judge Rudkin states the matter in his vigorous and able dissenting opinion (Record 588, 594):

“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 instruments 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.”

It will be observed that 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 whatever subjects, however proper, confidential and privileged they may be, are overheard. Not only that, but 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. There are in the United States more than eighteen million telephones interconnected in and with the Bell System, so that any one of them can be connected with any other at any time. Daily there are many times that number of telephone conversations over these lines. These figures take no account of the telephone service available to each one of these telephones for communication to Canada, Cuba, Great Britain, continental Europe and Mexico. The telephone has become part and parcel of the social and business intercourse of the people of the United States, and this telephone system offers a

means of espionage compared to which general warrants and writs of assistance were the puniest instruments of tyranny and oppression.

The telephone companies deplore the use of their facilities in furtherance of any criminal or wrongful enterprise. But it was not solicitude for law breakers that caused the people of the United States to ordain the Fourth and Fifth Amendments as part of the Constitution. Criminals will not escape detection and conviction merely because evidence obtained by *tapping wires of a public telephone system* is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts. Legislation making wire tapping a crime will not suffice if the courts nevertheless hold the evidence to be lawful. Writs of assistance might have been abolished by statute, but the people were wise to abolish them by the Bill of Rights.

“We said in *Boyd v. United States*, 116 U. S. 616, 630,—and it cannot be too often repeated,—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of the sanctity of a man’s home and the privacies of his life. As said by Mr. Justice Field in *In re Pacific Railway Commission*, 32 Fed. Rep. 241, 250 ‘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.' ”

Interstate Commerce Commission v. Brimson,
154 U. S. 447.

Respectfully submitted,

OTTO B. RUPP,
Seattle, Washington,
Counsel for The Pacific Telephone
and Telegraph Company.

CHARLES M. BRACELEN,
ROBERT H. STRAHAN,
New York, New York,
Counsel for American Telephone
and Telegraph Company.

CLARENCE B. RANDALL,
St. Paul, Minnesota,
Counsel for United States Independent Telephone Association and Tri-State Telephone and Telegraph Company.

APPENDIX A.

State Statutes in effect January 1st, 1928, making wire tapping an offense punishable either as a felony or misdemeanor.

<i>State.</i>	<i>Reference to Statute.</i>
Alabama	Code (1923), Sec. 5256.
Arizona	Penal Code, Title 19, Sec. 692.
Arkansas	Crawford & Moses Digest (1921), Chapter 171, Sec. 10246.
California	Penal Code, Sec. 639-40.
†Colorado	Compiled Laws (1921), Sec. 6969.
Connecticut	Gen. Stats. (Rev. of 1918), Sec. 6292.
†Idaho	Compiled Stats. (1919), Sec. 8586.
Illinois	Laws 1927, p. 868, Sec. 1.
Iowa	Code (1927), Sec. 13121.
Kansas	Rev. Stats. (1923), Ch. 17, Sec. 1908.
Michigan	Comp. Laws (1915), Ch. 257, Sec. 15403.
oMinnesota	Gen. Stats. (1923), Ch. 101, Sec. 10433.
†Montana	Penal Code (1921), Sec. 11518.
Nebraska	Comp. Stats. (1922), Ch. 67, Art. III, Sec. 7115.
Nevada	Rev. Laws (1912), Sec. 4632, 6751.
New York	Penal Law, Sec. 1423.
North Dakota	Rev. Codes (1905), Chap. 72, Sec. 9426.
Ohio	Gen. Code, Title I, Ch. 20, Sec. 13402.
Oklahoma	Comp. Stats. (Supp. 1926), Ch. 6, Art. LXI, Sec. 2229.
†Oregon	Laws 1920, Tit. XIX, Sec. 2265.
†Rhode Island	Gen. Laws 1923, Title XXIX, Ch. 397, Sec. 6104.

†Statute refers in terms to telegraphic messages only.

oRefers to *interference* with any telephone instrument or apparatus.

<i>State.</i>	<i>Reference to Statute.</i>
South Dakota	Rev. Codes (1919), Ch. 15, Sec. 4312.
Tennessee	Thompson's Shannon's Code (1917), Sec. 1839-40; Laws 1921, Chap. 59, p. 88.
Utah	Comp. Laws (1917), Sec. 8432-33.
Virginia	Gen. Laws (1923), Sec. 4477.
Washington	Remington's Comp. Stats. (1922), Sec. 2656 (18).
Wisconsin	Stats. (1923), Chap. 348, Sec. 4558.
Wyoming	Comp. Stats. (1920), Ch. 452, Sec. 7148.

State Statutes in effect Jan. 1st, 1928, making disclosure of tele-
phone or telegraph messages a penal offense, either through
connivance with agents of the telephone or telegraph company,
or otherwise.

<i>State.</i>	<i>Reference to Statute.</i>
Alabama	Code (1923), Sec. 5256.
Arizona	Penal Code, Sec. 690-1.
Arkansas	Crawford & Moses Digest (1921), Chap. 171, Sec. 10250.
California	*Penal Code, Sec. 619, 641.
†Colorado	Comp. Laws (1921), Sec. 6966, 6970.
Connecticut	Gen. Stats. (Rev. of 1918), Sec. 6292.
Florida	Rev. Gen. Stats. (1920), Sec. 5755.
†Idaho	Comp. Stats. (1919), Sec. 8568.
Illinois	Rev. Stats. (1925), Ch. 134, Sec. 8.
Indiana	*Burns Ann. Stats. 1926, Sec. 2862.
†Louisiana	*Cons. & Stats. (1920), p. 2175.
†Maine	Rev. Stats. (1916), Ch. 60, Sec. 24, p. 991.
Maryland	Ann. Code (1924), Art. 27, Sec. 489.
Michigan	Comp. Laws (1915), Ch. 168, Sec. 8781, Ch. 253, Sec. 15104.

*Statute contains a proviso that message may be divulged under
order of a court of justice or other lawful authority.

†Statute refers in terms to telegraphic messages only.

<i>State.</i>	<i>Reference to Statute.</i>
Minnesota	Gen. Stats. (1923) Ch. 101, Sec. 10423.
†Mississippi	Hemingway's Ann. Code (1927), Sec. 1174.
Missouri	*Rev. Stats. (1919), Secs. 3605, 10140.
†Montana	Penal Code (1921), Sec. 11194-6.
Nebraska	Comp. Stats. (1922), Ch. 67, Art. II, Sec. 7088.
†Nevada	Rev. Laws (1912), Sec. 4603-5, Sec. 6713.
New Jersey	Comp. Stats., Vol. 4, p. 5319-20, Sec. 12-13.
New York	*Penal Law, Sec. 552.
North Carolina	Cons. Stats. (1919), Art. 46, Sec. 4497.
†North Dakota	*Rev. Codes (1905), Sec. 9343.
Ohio	Gen. Code, Title I, Ch. 20, Sec. 13419.
Oklahoma	Comp. Stats. (Supp. 1926), Ch. 6, Art. LXI, Sec. 2256.
†Oregon	Laws (1920), Title XIX, Secs. 2260, 2266.
Pennsylvania	Pa. Stats. (1921), Sec. 6308, p. 596.
†Rhode Island	Gen. Laws (1923), Title XXXIX, Ch. 397, Sec. 6104.
South Dakota	Rev. Codes (1919), Sec. 4346, Sec. 9801.
Tennessee	Thompson's Shannon's Code (1917), Sec. 1837-38.
Utah	Comp. Laws (1917), Sec. 8403-5, 8434.
Virginia	Gen. Laws (1923), Sec. 4477.
†Washington	Remington's Comp. Stats. (1922), Sec. 2662.
Wisconsin	Stats. (1923), Ch. 348, Sec. 4557-4557a.

*Statute contains a proviso that message may be divulged under order of a court of justice or other lawful authority.

†Statute refers in terms to telegraphic messages only.

Federal Statutes.

Act of Congress passed October 29, 1918 (40 Stat. L. 1017), entitled "An Act providing for the protection of the users of telephone and telegraph service and the property and funds belonging thereto during the Government operation and control," as follows:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whoever during the period of governmental operation of the telephone and telegraph systems of the United States by the Postmaster General, under the Act of Congress approved July sixteenth, nineteen hundred and eighteen, and the proclamation of the President dated July twenty-second, nineteen hundred and eighteen, shall, without authority and without the knowledge and consent of the other users thereof, except as may be necessary for operation of the service, tap any telegraph or telephone line, or wilfully interfere with the operation of such telephone and telegraph systems or with the transmission of any telephone or telegraph message, or with the delivery of any such message, or whoever being employed in any such telephone or telegraph service shall divulge the contents of any such telephone or telegraph message to any person not duly authorized or entitled to receive the same, shall be fined not exceeding \$1,000 or imprisoned for not more than one year, or both. * * *"*

Federal control of telephone lines terminated on July 31, 1919, pursuant to Act of Congress of July 11, 1919 (41 Stat. L. 137).

Act of Congress passed February 23, 1927 (Radio Act, 44 Stat. L. 1162) as follows:

“* * * SEC. 27. No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof except through authorized channels of transmission or reception to any person other than the addressee, his agent, or attorney, or to a telephone, telegraph, cable or radio station employed or authorized to forward such radio communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the radio communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcasted or transmitted by amateurs or others for the use of the general public or relating to ships in distress.”