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Cover Page Footnote
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IN SEARCH OF JUSTICE BLACK'S FOURTH AMENDMENT

JACOB W. LANDYNISKI*

JUSTICE Hugo L. Black's place among the great Justices of the United States Supreme Court seems assured by virtue of his powerful influence on the shaping of constitutional law during his 34 years on the Court, a tenure equalled only by those of Chief Justice Marshall and Justice Field, and exceeded only by that of Justice Douglas. In no small measure the Court's rapid, not to say revolutionary, expansion of the constitutional frontiers of civil rights and liberties during Black's last two decades as a member was due to his unflagging advocacy of these causes. Yet there is, to borrow a phrase from Leonard Levy, a darker side to Black's civil libertarianism, one that has for the most part been ignored, or commented upon in only the most cursory fashion, centering on his interpretation of the fourth amendment.

On few matters was Black's leadership on the Court exercised more keenly, or the imprint of his philosophy more marked, than in the area of first amendment rights. However, it does not denigrate the signifi-

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1. This evaluation is commonly shared even by scholars who are not sympathetic to Black's mode of constitutional interpretation: "He is without doubt the most influential of the many strong figures who have sat during the thirty years that have passed in his Justiceship," Freund, Mr. Justice Black and the Judicial Function, 14 U.C.L.A. L. Rev. 467, 473 (1967); "And so, for the reasons that history has accorded the accolade the 'Great Chief Justice' to John Marshall, it may well come to recognize Hugo Black as the 'Great Justice.' No other Justices have left such a deep impression on our fundamental document." Kurland, Hugo Lafayette Black: In Memoriam, 20 J. Pub. L. 359, 362 (1971).


3. The only exception in the extensive literature on Black appears to be Snowiss, The Legacy of Justice Black, 1973 Sup. Ct. Rev. 187, 215-22 (1973) [hereinafter cited as Snowiss], which devotes an eight page section to Black's search and seizure opinions.

4. I have not thought it necessary to document the obvious. The shrunken area of libel and obscenity law, as well as the recent trend of decisions in establishment of religion cases, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971), bear ample testimony to Black's influence, even though his colleagues were never persuaded by his more or less absolute position. Black, however, wrote only seven opinions for the Court in search and seizure cases. Perez v. Ledesma, 401 U.S. 82 (1971); Cooper v. California, 386 U.S. 58 (1967); Preston v. United States, 376 U.S. 364 (1964); Frisbie v. Collins, 342 U.S. 519 (1952); District of Columbia v. Little, 339 U.S. 1

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cance, even the primacy, of the guarantees in the first amendment, to point out that the number of persons who, in any given year, will claim in court that their rights to freedom of speech, press, religion, assembly or petition have been violated, is quite infinitesimal as compared with the number who will claim violations of their rights under the fourth amendment. The fourth amendment is far the most important provision of the Bill of Rights in terms of the volume of litigation to which it gives rise in the nation's courts. Nonetheless, Black as a rule construed the fourth amendment in as restrictive a manner as any other justice in the modern history of the Court.

C. Herman Pritchett, with his customary acuity, first called attention to the fact that Black's interpretation of the fourth amendment appeared to be profoundly at variance with his approach to other civil liberties issues. Pritchett's tabulation showed that in the six search and seizure cases decided during the 1941-46 terms of the Court, Justices Black and Douglas had each voted in favor of the defendant only once. By way of contrast, Justices Frankfurter, Jackson, Murphy and Rutledge had each voted for the defendant in all six cases. "The search and seizure mystery," as Pritchett termed this phenomenon, deepened when one considered that, in the twenty right to counsel, confession, and jury trial cases decided during the same period, Justices Black and Douglas, like Justices Murphy and Rutledge, had generally voted for the defendant while Justices Frankfurter and Jackson had most often voted against the defendant's claim. "In switching over from their normal libertarian position on this one issue," wrote Pritchett in a striking passage, "Black and Douglas passed Frankfurter and Jackson going in the other direction. The search and seizure clause thus appeared to possess the mysterious qualities of a mirror which turns left into right and right into left."

In fact, Black and Douglas had provided the margin for some of the restrictive search and seizure decisions on the sharply divided Court in the 1940's. Towards the end of the decade, however, a fundamental change began to take place in Douglas' approach to the fourth amendment when he reversed his position on the exasperating issue of


6. Id. at 141.
7. Id. at 152.
8. Black did so in 19 cases, Murphy in 18, Rutledge in 17, and Douglas in 16. Id. at 141.
9. Id. at 155.
10. See, e.g., Harris v. United States, 331 U.S. 145 (1947); Davis v. United States, 328 U.S. 582 (1946); Goldman v. United States, 316 U.S. 129 (1942).
search incidental to arrest,\textsuperscript{11} while Black remained unreconstructed.\textsuperscript{12} Unable to reconcile himself to many of the changes in fourth amendment law wrought by the Warren Court, Black eventually became a figure in splendid isolation: the only member of the Court who refused to bring warrantless eavesdropping under the amendment's ban.\textsuperscript{13} The difference can be summed up statistically: of the 107 search and seizure decisions in which they jointly participated from 1939 to 1971, Black and Douglas were in agreement 54 times and disagreed 53 times. Considering the cases decided since 1948, when they began to part ideological company on some of the most crucial fourth amendment issues, Black and Douglas not only clashed more frequently (53 times) than they agreed (46 times) but the cleavage became progressively wider. The years 1967-71, for example, saw them voting in opposite directions in the astounding number of 32 search and seizure cases, and together in only 8.\textsuperscript{14}


\textsuperscript{12} See text accompanying notes 33-37 infra.


\textsuperscript{14} This tabulation includes all cases decided on constitutional grounds of search and seizure or under related statutes during Black's tenure on the Court. In several cases Black and Douglas concurred or dissented on other grounds. See Dyke v. Taylor Implement Co., 391 U.S. 216 (1968); Schmerber v. California, 384 U.S. 757 (1966); Breithaupt v. Abram, 352 U.S. 432 (1957), Irvine v. California, 347 U.S. 128 (1954); Rochin v. California, 342 U.S. 165 (1952). Partial dissents are counted as dissents.

The cases tabulated include not only those which presented to the Court substantive issues of search and seizure, but some which may on the surface appear to have only marginal significance for statistical purposes. These cases raise the following questions: (1) whether retroactive effect should be given to various of the Court's search and seizure decisions. Williams v. United States, 401 U.S. 646 (1971); Fuller v. Alaska, 393 U.S. 80 (1968) (Black, J., dissenting); Angelet v. Fay, 381 U.S. 654 (1965) (Black, J., dissenting); Linkletter v. Walker, 381 U.S. 618 (1965) (Black, J., dissenting); (2) whether federal monetary remedies are available to the victims of unlawful arrest and search against officials who have flouted their constitutional rights. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (Black, J., dissenting); Monroe v. Pape, 365 U.S. 167 (1961); Bell v. Hood, 327 U.S. 678 (1946); (3) whether a federal court may enjoin the use of unlawfully seized evidence, or testimony by federal officers concerning the seizure in a state court proceeding. Perez v. Ledesma, 401 U.S. 82 (1971); Cleary v. Bolger, 371 U.S. 392 (1963); Pugach v. Dollinger, 365 U.S. 458 (1961); Wilson v. Schnettler, 365 U.S. 381 (1961); Rea v. United States, 350 U.S. 214 (1956); Stefanelli v. Minard, 342 U.S. 117 (1951). I have included these cases because many of the opinions introduce considerations peculiar to the fourth amendment with the Justices engaging in wide-ranging discussion and debate on the significance of the rights guaranteed by the amendment and the enforcement policies to be followed by the Court. The omission of the thirteen cases in these categories in any event would not materially affect the statistical picture presented here. Black agreed with the Court in nine cases, Williams v. United States, 401 U.S. 646 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Cleary v. Bolger, 371 U.S. 392 (1963); Pugach v. Dollinger, 365 U.S. 458 (1961); Wilson v. Schnettler, 365 U.S. 381 (1961);
Justice Black's fourth amendment opinions were, in some respects, consistent with his other constitutional opinions. As in the case of the first amendment, he attempted to develop a literalist approach to interpretation, though as I intend to demonstrate in the pages which follow, the attempt must be considered a failure. Again, his title of "great dissenter" was as much deserved in this field as in any other. Of the 113 search and seizure cases in which he participated during his lengthy tenure, he dissented in no fewer than 40. More remarkable yet is the fact that 24 of these dissents were entered during the years 1967-71, as opposed to only 18 agreements with the Court majority in the same period. However, where in other fields Black's dissents had cast him in the role of passionate advocate of the citizen's liberties, in fourth amendment cases he usually dissented to restrict the reach of the amendment's protection. In this Article, Black's views on three principal areas of fourth amendment controversy will be examined: warrantless searches, the exclusionary rule, and mechanical eavesdropping.15


On the other hand, eight eavesdropping cases have been omitted from the tabulation. In one case, Massiah v. United States, 377 U.S. 201 (1964), the decision was based on the sixth amendment's guarantee of right to counsel. The other seven cases, all of which were decided per curiam during 1966-69, concerned the discovery, following trial and conviction, that some of the defendants' conversations had been monitored by federal agents. The Court disposed of six cases by remanding to the district court either for a new trial or for a determination as to whether the Government's case had been tainted by information or leads obtained through the surveillance. See Giordano v. United States, 394 U.S. 310 (1969); Kolod v. United States, 390 U.S. 136 (1968); Roberts v. United States, 389 U.S. 18 (1967); Hoffa v. United States, 387 U.S. 231 (1967); O'Brien v. United States, 386 U.S. 345 (1967); Black v. United States, 385 U.S. 26 (1966). In the final case of this group, Taglianetti v. United States, 394 U.S. 316 (1969), where the district court had already made such a determination adversely to the defendant, the Court sustained the conviction. Black agreed with the Court in four decisions, Taglianetti v. United States, 394 U.S. 316 (1969); O'Brien v. United States, 386 U.S. 345 (1967); Hoffa v. United States, 385 U.S. 293 (1966); Black v. United States, 385 U.S. 26 (1966), and dissented in three, Giordano v. United States, 394 U.S. 310 (1969); Kolod v. United States, 390 U.S. 136 (1968); Roberts v. New York, 388 U.S. 19 (1967). He voted together with Justice Douglas in only three of these cases.

I have also omitted two cases, A Quantity of Books v. Kansas, 378 U.S. 205 (1964), and Marcus v. Search Warrant, 367 U.S. 717 (1961), in which first and fourth amendment issues were intertwined, because the decisions were clearly dictated by first amendment considerations even though Black's concurrence in Marcus was specifically based on the fourth amendment.

15. Black's interpretation of the standards in the warrant clause is discussed to some extent in section III, at notes 206-08 infra and accompanying text. I have not engaged in a separate discussion of Black's views on probable cause because I find it impossible to reconcile the strict approach to which he subscribed in cases like Wong Sun v. United States, 371 U.S. 471 (1963),
FOURTH AMENDMENT

I. WARRANTLESS SEARCHES

The issue that has, above any other since 1947, bedeviled fourth amendment interpretation and divided the Court in this field concerns the relationship of the amendment's two clauses. The first clause guarantees the right of the people to be free from unreasonable searches and seizures. The second clause stipulates the standards that should govern the granting of a judicial warrant: probable cause, oath or affirmation, particularity of description. The controlling word is, of course, "unreasonable." What, after all, is an unreasonable and therefore forbidden search, and conversely, what is a reasonable and permitted one? The amendment does not say. The interpretation that best accords with common sense and with the amendment's antecedent history is to treat the two clauses conjunctively so that the reasonableness required by the first clause is defined in terms of the standards set forth in the second clause: a reasonable search is one conducted pursuant to a judicially authorized warrant, an unreasonable search is one that is not. Only in the event of exigent circumstances, where the warrant standard is inappropriate because pressures of time do not permit the issuance of a warrant, for example in cases of search incidental to arrest, search of a moving vehicle, and "hot pursuit" would different standards of reasonableness need to be fashioned and applied, as indeed they have been. In Boyd v. United States, its first great search and seizure case, the Supreme Court placed an even

with the lenient approach he took in such cases as Sibron v. New York, 392 U.S. 40, 79 (1968) (Black, J., concurring and dissenting).

16. The amendment reads: "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." U.S. Const. amend. IV.

17. See text accompanying notes 52-53 infra.

18. Chimel v. California, 395 U.S. 752 (1969) (arresting officer may search without a warrant only the area within the "immediate control" of the person arrested); Weeks v. United States, 232 U.S. 383 (1914) ("It is not an assertion of the right ... to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime.").


20. Warden v. Hayden, 387 U.S. 294 (1967) (permitted officers in pursuit of a suspected armed felon to enter and search the house which he had entered only minutes before they arrived).

21. 116 U.S. 616 (1886). This case involved the seizure and forfeiture under the custom revenue laws of thirty-five cases of plate glass. The United States alleged that the plaintiffs fraudulently misrepresented these goods on papers submitted to the Government, making them subject to a statute which could compel the production of their records. The plaintiffs sought protection from this compulsory production under the fourth and fifth amendments.
broader meaning on the term "unreasonable" by holding that a search for private papers is unconstitutional, so that even a warrant meeting all the enumerated requirements cannot be issued for such a search.\(^2\)

Conversely, it is possible to regard the two-clauses as independent of each other, the reasonableness of a search being determined without reference to whether or not a warrant has been obtained, but on "the facts and circumstances—the total atmosphere of the case."\(^2\) In this interpretation, the term "unreasonable" becomes in effect a free-floating standard unrelated to the specific requirements in the second clause (or to the amendment's history) and depends for its meaning on whatever content the judges will pour into its shapeless form.

The difference between these vastly dissimilar approaches is particularly acute in cases of search incidental to arrest. The need to remove from the suspect's possession evidence which he might destroy, and weapons which he might use to escape or endanger the arresting officers, quite properly constitutes exigent circumstances justifying a warrantless search. But the scope of the search will, under the first approach, be limited to the need which gave rise to the emergency, and must, therefore, not extend beyond the body of the person arrested and the area within his immediate reach.\(^2\) However, if the meaning of reasonableness is not controlled by the warrant requirement, it is possible for the Justices to regard even the search of an entire dwelling as reasonable, as they have indeed done on several occasions, because "[s]ome flexibility will be accorded law officers engaged in daily battle with criminals . . . ."\(^2\) Prior to 1947 when *Harris v. United States*\(^2\) was decided, the Court, with one exception,\(^2\) applied the first in-

\(^2\) See text accompanying notes 62-72 infra. In *Gouled v. United States*, 255 U.S. 298 (1921), the Court extended the Boyd rule to embrace not only private papers but all kinds of evidentiary materials, as opposed to contraband and the fruits and instruments of crime, which are seizable. The Gouled "mere evidence" rule, as it came to be called, was overturned in *Warden v. Hayden*, 387 U.S. 294 (1967). That testimonial materials such as private papers remain immune to seizure was subsequently made clear in *United States v. Dionisio*, 410 U.S. 1 (1973). But see *Andressen v. Maryland*, 96 S. Ct. 2737 (1976); *Fisher v. United States*, 96 S. Ct. 1569 (1976).


\(^2\) 331 U.S. 145 (1947) (a search incidental to an arrest may extend beyond the person of the one arrested to the entire premises under his "control").

\(^2\) *Marron v. United States*, 275 U.S. 192 (1927). The dictum in the earlier case of *Agnello v. United States*, 269 U.S. 20, 30 (1925), that police may "search the place where the arrest is made," was probably loosely drawn and not intended to authorize search of the entire dwelling. That Judge Learned Hand did not consider this language as authorizing an extensive search is
interpretation almost without discussion, as if its correctness were self-evident.\textsuperscript{28} The period 1947-50 was one of oscillation, as first one and then the other of these interpretations was employed.\textsuperscript{29} From 1950 until the 1969 decision in \textit{Chimel v. California},\textsuperscript{30} the second interpretation predominated.\textsuperscript{31} In the \textit{Chimel} case, the Court, over the dissenting votes of only Justices Black and White, returned to the original interpretation—so the matter formally stands today. However, extensive changes in the Court's personnel, as well as the direction taken in some recent decisions,\textsuperscript{32} serve to cast doubt on the continued durability of this interpretation of reasonableness in the Court's fourth amendment cases.

During his tenure on the Court, Justice Black almost invariably cast his vote with those Justices, more often than not in the majority, who sanctioned extensive warrantless searches conducted incidental to arrest. An exceptional case was \textit{United States v. Rabinowitz}\textsuperscript{33} in 1950, where Black dissented not on substantive grounds but because he objected to the Court's having overruled a case\textsuperscript{34} which was decided but two years earlier and thereby compounded the uncertainty existing in the field. So far as the record shows, this was the only search and seizure case in which Black refused, on grounds of precedent, to vote for a decision with which he in principle agreed.\textsuperscript{35}

Nowhere is Black's idea of what constitutes a reasonable search conducted incidental to arrest better revealed than in the 1968 case of

\begin{enumerate}
\item United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (officers with only an arrest warrant were not authorized to search defendant's office following his arrest there); Go-Bart Importing Co. v. United States, 282 U.S. 344, 356-57 (1931) (general search performed by officers falsely claiming to have an arrest warrant held unreasonable).
\item 395 U.S. 752 (1969). Police officers with an arrest warrant but without a search warrant searched his entire house. Items taken in the search were admitted in the burglary trial of \textit{Chimel}. Id. at 754.
\item E.g., \textit{Ker v. California}, 374 U.S. 23 (1963).
\item See, e.g., \textit{United States v. Edwards}, 415 U.S. 800 (1974), where in a 5-4 decision the Court upheld a warrantless search of the arrestee's clothing after he was taken into custody, saying in language reminiscent of that in \textit{United States v. Rabinowitz}, 393 U.S. 56 (1950), that the test is "not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable . . . ." 415 U.S. at 807.
\item 339 U.S. 56 (1950), overruled, \textit{Chimel v. California}, 395 U.S. 752 (1969). Rabinowitz was arrested pursuant to a warrant for selling and possessing forged stamps. Police without a search warrant searched defendant's desk, safe and file cabinets. Stamps were seized during this warrantless search and admitted into evidence. Id. at 59.
\item 339 U.S. at 67.
\end{enumerate}
Dissenting from the Court's finding that there was no probable cause to justify Recznik's warrantless arrest for operating a gambling establishment, Black maintained that, following the arrest, the officer then had the authority to search the "remainder of the building without a warrant." The building in question consisted of two connected units, with different entrances and street numbers, an upstairs suite in which the arrest was made, and a downstairs suite which contained a cigar store and basement that were locked and dark at the time of the arrest. Still, Black thought it entirely reasonable for the police to unlock and search the downstairs unit and he would even have sanctioned the admission at trial of the evidence uncovered.

At the same time, Black went further than any other member of the Court in sanctioning warrantless searches of automobiles on probable cause as determined by the police. He approved not only searches on the road—concerning which there was little disagreement on the Court—but searches of vehicles which, after being stopped on the road, were taken into custody and removed to the police station. In his dissent from the 1971 decision in *Coolidge v. New Hampshire*, Black went so far as to approve the seizure on probable cause of the suspect's automobile which was parked in his driveway, and he was the only Justice to hold valid two searches of this car made many months after the seizure. He even asserted that since the automobile had been "knowingly expose[d] to the public," it was "not a subject of Fourth Amendment protection."

From first to last, Black with unswerving tenacity clung to the view that "[s]earches, whether with or without a warrant, are to be judged by whether they are reasonable, and . . . common sense dictates that reasonableness varies with the circumstances of the search." This was so, he held, because of the fourth amendment's peculiar phrasing. Unlike other Bill of Rights' amendments where the prohibitory language is specific, the fourth, "by its terms, necessitates a judicial
decision as to what is an 'unreasonable' search or seizure."43 Only an unreasonable search, as judicially defined, was "absolutely prohibited"44 by the amendment, as was the issuance of a warrant without probable cause.

This position seems irreconcilable with Black's general position on constitutional interpretation. He opposed the traditional mode of fourteenth amendment due process adjudication, and insisted on an interpretation which would make that term synonymous with the provisions in the Bill of Rights,45 partly because in his view the amorphous due process clause was being defined as "whatever the judge construing it wanted it to mean."46 Likewise, the "idea that there can be no 'absolute' constitutional guarantees in the Bill of Rights" was, for Black, too "frightening to contemplate."47 If, as Black maintained, the framers were indeed animated by the intention of reducing judicial discretion in the field of individual liberties to the extent of "absolutizing" the guarantees in the remainder of the Bill of Rights, would they have singled out the one amendment that is at the heart of the individual's security against the totalitarian "knock on the door" for a grant of virtually unfettered discretion to the judiciary as to its definition and application?

One of the oddest features in Black's fourth amendment opinions is his complete avoidance of historical discussion despite the fact that the amendment is the only procedural provision in the Bill of Rights which has a rich background in American, as well as English, history, and of whose drafting we have a reasonably full account. Are we to believe that this is the same Justice from whose pen flowed historical discourses on such subjects as reapportionment48 and first amendment freedoms,49 where the historical materials are far more scanty, not to say ambiguous, as well as a famous 32-page essay on the history of the

44. Black, The Bill of Rights, 35 N.Y.U.L. Rev. 865, 873 (1960) [hereinafter cited as Black]. "The use of the word 'unreasonable' in this Amendment means, of course, that not all searches and seizures are prohibited. Only those which are unreasonable are unlawful. There may be much difference of opinion about whether a particular search or seizure is unreasonable and therefore forbidden by this Amendment. But if it is unreasonable, it is absolutely prohibited." Id. (emphasis in original).
45. See Griswold v. Connecticut, 381 U.S. 479, 525 (1965) (Black, J., dissenting); Adamson v. California, 332 U.S. 46, 91 (Black, J., dissenting) ("to pass upon the constitutionality of the statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is another.").
47. Black, supra note 44, at 876.
fourteenth amendment? 50 Black's emphasis on the language of the fourth amendment to the neglect of its history seems even less convincing when one considers that in construing the similarly flexible language of the "cruel and unusual punishments" provision in the eighth amendment, he insisted that its meaning was not defined by contemporary standards but by what the framers had regarded as cruel and unusual. 51

The antecedent history of the fourth amendment is, to be sure, not as clear as we should like it to be—no segment of constitutional history ever is—but it is sufficient to shed a beam of light that illuminates the underlying purpose and allows us to select the interpretation that best realizes that purpose. The main object behind the drafting of the amendment was to prevent the recurrence of the detested general warrant 52 which had been employed by the British in an attempt to stamp out smuggling in the American colonies, particularly from about 1760 onward. There was also a considerable use of general warrants in seventeenth and eighteenth century England in the government's relentless search for religious and political dissidents. This important phase of English history was well understood in the colonies. The warrant was in effect a lifetime hunting license in the hands of the officer, requiring neither probable cause nor particularity of description of persons or premises, nor even judicial approval prior to the search. The fourth amendment, on the other hand, requires all these things; it places the magistrate as a buffer between the police and the citizenry, so as to prevent the police from acting as judges in their own cause. 53 As I have argued elsewhere, it would be strange if the amendment were to mandate stringent warrant requirements, after having in effect negated them by authorizing judicially unsupervised searches without warrant. If the first clause were detached from the requirements of the second, there would be grave risk that the second would become virtually useless. 54

Worse yet, while Black advocated a balancing process for the fourth amendment—it "require[s] courts to choose between competing policies" 55—the factors to be considered and weighed are never even identified. One is reminded of Black's own caustic comment concerning the balancing of first amendment rights. He stated that the Court

52. This was known as a writ of assistance.
had in effect ruled that "‘on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised.’”56 Black did concede that “the opportunity to obtain a warrant is one of the factors to be weighed in determining reasonableness,”57 but if this factor was ever accorded any weight in his opinions, there is no evidence of it.

History aside, several reasons compel the balance to fall in the direction requiring a warrant where time permits. In the first place, it is not enough to assert that the validity of the search will later be scrutinized by a magistrate, for the case might never come to trial, and the innocent would be victimized together with the guilty. Nor can one say that probable cause to arrest automatically establishes probable cause to search. It might not. There may be probable cause to believe that the person arrested has committed a crime, but none that evidence related to the crime was actually on the premises where the arrest was made; moreover, the probable cause needed to obtain a search warrant must be “fresh,”58 while in the case of arrest, no matter how far in the past probable cause was established, the felon remains subject to apprehension. Finally and most tellingly, a search warrant places strict limits on the scope of search while an incidental search of the type authorized by Black places virtually none. Why, it might be asked, should a search under warrant be constitutional only if its scope is restricted, through the particularity requirement, to the area for which probable cause was established, while a search without benefit of warrant is considered reasonable even when it blankets the entire dwelling?

II. THE EXCLUSIONARY RULE

Nowhere are the contradictions in Justice Black’s fourth amendment philosophy more manifest than in his discussion on the derivation of the exclusionary rule.59 Black’s advocacy of the rule as a constitutionally authorized instrument for the enforcement of fourth amendment standards, seemed to wax and wane in proportion to his approval of the Court’s interpretation of the amendment’s scope.60 To some extent, the confusion in Justice Black’s opinions mirrors that of the Court as a whole.61 No single other Justice, however, has taken as many different positions as Black on this issue.

60. See notes 86-172 infra and accompanying text.
61. See text accompanying notes 73-85 infra.
By way of introduction to Justice Black's views on the exclusionary rule, we must first discuss in some detail the 1886 decision, *Boyd v. United States*, which forms the backbone of Black's most significant opinions on this subject. This was the Court's first important search and seizure case, and one that produced a bold and imaginative interpretation of the fourth amendment. Involved in this case were two New York merchants against whom the federal government had instituted a forfeiture proceeding for allegedly evading duties on a shipment of imported glass. In order to prove his case, the prosecutor demanded certain invoices from the Boyds, which the district court directed them to turn over for inspection, in conformity with a provision of an act of Congress. The Boyds complied under protest, the jury found against them, and the glass was forfeited to the government.

At first glance, the fourth amendment would not appear to pose serious obstacles to this procedure. To begin with, no actual search and seizure had taken place and, furthermore, since the prosecutor did not seek criminal penalties, the forfeiture was essentially a civil proceeding—to which, the Court had ruled in 1855, the protections of the fourth amendment do not extend. Finally, even granting a violation of the fourth amendment, under the common law rule then in operation, competent evidence was admissible in a judicial proceeding regardless of the lawfulness of its acquisition.

In an opinion of great eloquence and ingenuity, which Justice Brandeis later predicted would "be remembered as long as civil liberty lives in the United States," Justice Bradley swept aside the objections. The forced production of papers fell within the scope of the fourth amendment, for the amendment should be construed as granting protection not only against actual searches, but also against other procedures which, as in the *Boyd* case, seek to accomplish the object of a search without affording the stipulated constitutional safeguards. Similarly, forfeiture "though technically a civil proceeding, is in substance and effect a criminal one," and must therefore be designated as a "quasi-criminal" proceeding. Lastly, and most importantly, not only was this a search in fourth amendment terms; it was, moreover,

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62. 116 U.S. 616 (1886).
65. The leading case asserting this rule is Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841) (although illegal lottery tickets were not described in the search warrant, they were pertinent and, therefore, admissible).
67. 116 U.S. at 634.
an unreasonable search because it involved private papers, which the
government is not entitled to seize even under warrant, as opposed to
contraband such as smuggled goods and counterfeit coin, which it is.
This was so, explained Justice Bradley, because one test of the
reasonableness of a search is whether or not its purpose is to uncover
incriminating evidence:

[The Fourth and Fifth Amendments] throw great light on each other. For the
"unreasonable searches and seizures" condemned in the Fourth Amendment are almost
always made for the purpose of compelling a man to give evidence against himself,
which in criminal cases is condemned in the Fifth Amendment; and compelling a man
"in a criminal case to be a witness against himself." which is condemned in the Fifth
Amendment, throws light on the question as to what is an "unreasonable search and
seizure" within the meaning of the Fourth Amendment. And we have been unable to
perceive that the seizure of a man's private books and papers to be used in evidence
against him is substantially different from compelling him to be a witness against
himself. We think it is within the clear intent and meaning of those terms. 68

The order enforcing production of the records therefore fell under the
condemnation of the fourth and fifth amendments, which in this
regard "run almost into each other." 69 Under the former it was
unauthorized, and admission of the records was prohibited by the
latter. The act was declared unconstitutional and the judgment of
forfeiture reversed.

Actually, there was no need for the Court to press the fourth
amendment into service. The same result might have been reached by
use of the fifth amendment alone, since the Boyds had been compelled
to incriminate themselves under legal process. This was the position of
Justice Miller who, in a concurring opinion joined by Chief Justice
Waite, argued that the term search ought to be confined to its
traditional meaning of physical entry. 70 The difference between the
two approaches was cardinal. In holding the forced production of the
invoices to be an unreasonable search rather than an incrimination,
and at the same time ordering exclusion of the evidence, the Court was
assigning the wrong reason for the right decision. It had, consciously
or not, paved the way for discarding the common law rule of admissi-
bility, and for requiring the exclusion of evidence obtained through
illegal search from criminal trials.

The grandeur of Bradley's opinion, for all its logical and historical
inconsistencies, 71 lies in its attempt to shape a right of individual
security and privacy not confined to the exact wording of the fourth

68. Id. at 633.
69. Id. at 630.
70. Id. at 640-41.
amendment; in its concern with underlying principles rather than the precise text. It is this feature, and not alone the exclusionary principle, which entitles the opinion to a prominent place in constitutional history. As Bradley summed up the philosophy which had animated the Court:

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.\textsuperscript{72}

When the exclusionary rule was formally adopted by the Court in 1914 in \textit{Weeks v. United States},\textsuperscript{73} Justice Day's opinion did not specifically rely on any constitutional provision, but pointed to the considerations which made the rule necessary: if evidence taken in violation of the fourth amendment were to be admitted at trial, the "right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution."\textsuperscript{74} Moreover, by admitting such evidence the courts would themselves by implication become parties to the lawless conduct, for they would "manifest neglect if not an open defiance of the . . . Constitution."\textsuperscript{75} Exclusion of the evidence would thus serve as a deterrent to unlawful searches and as an expression of the community's interest in maintaining constitutional standards of law enforcement.

In the light of the Court's failure in the \textit{Weeks} case to enumerate a constitutional basis for the exclusionary rule, it was of course possible to consider its action as no more than the promulgation of a rule of evidence in its supervisory capacity over the federal courts, as a rule which Congress might nullify by legislation. An alternative view of the rule is that it is derived from the Constitution, either from the privilege against self-incrimination, as suggested in the \textit{Boyd} case, or from the fourth amendment itself. While it contains no express requirement of exclusion, it can reasonably be construed as authorizing the Court to apply such sanctions as are deemed necessary in order to ensure compliance with its provisions.

In the event the rule is constitutionally derived and not merely one of evidence, the issue as to whether it is based on the fourth or the fifth

\textsuperscript{72} Boyd v. United States, 116 U.S. 616, 635 (1886).
\textsuperscript{73} 232 U.S. 383 (1914). In this case defendant was arrested at his place of business. Simultaneously and without a warrant officers searched his home and took possession of some papers. Later another warrantless search was conducted and more papers were taken. Defendant sought a return of his property pursuant to the fourth and fifth amendments. This was denied by the court below and papers were admitted into evidence. Id. at 386, 389.
\textsuperscript{74} Id. at 393.
\textsuperscript{75} Id. at 394.
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amendment is significant. If the fifth amendment forms the basis of the rule, then exclusion of evidence is a right of the defendant, and is not dependent on the rule's deterrence of unlawful searches. If, on the other hand, it is the fourth amendment itself which justifies the rule, the question of deterrence is crucial, since the defendant has no constitutional right to exclusion of the evidence. Thus, if it were to be convincingly proved that exclusion is a poor deterrent; or if violation of the fourth amendment were to become sufficiently rare as not to require a sanction; or if an adequate alternative deterrent were to be fashioned by the legislature, the Court would be free to discard the rule. Similarly, the Court could, if it wished, distinguish between a deliberate, calculated violation and an honest mistake; the former requiring exclusion, the latter not.

Although, in Justice Brennan's words, the Weeks decision appears "to rest most heavily on the Fourth Amendment itself," all three interpretations find support in subsequent judicial opinions. Throughout the 1920's and 1930's the Court generally took the position of the Boyd case and advanced the fifth amendment as the basis for the exclusionary rule. In 1949, however, in Wolf v. Colorado, which extended "the core" of the fourth amendment's protection to the states, but not the exclusionary rule itself Justice Frankfurter's opinion for the Court hinted that the rule was one of evidence and subject to abrogation by Congress. In a later case Frankfurter specifically referred to the rule as having been fashioned "under this Court's peculiarly comprehensive supervisory power." More recently, and particularly since Mapp v. Ohio was decided in 1961, the Court has

76. For example, a workable suit in tort.
79. 338 U.S. 25 (1949). In this case the Court considered the question: "Does a conviction by a State court for a State offense deny the 'due process of law' required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law . . . because there deemed to be an infraction of the Fourth Amendment . . . ." Id. at 25-26.
80. Id. at 27.
81. See id. at 28.
82. Elkins v. United States, 364 U.S. 206, 240 (1960) (Frankfurter, J., dissenting). The majority of the Court overturned the "silver platter" doctrine. Id. at 208. Justice Frankfurter asserted that such a decision was unwarranted and unjustified. Id. at 233-34.
consistently viewed the exclusionary rule as "an essential part" of the fourth amendment, which does not need to depend for its enforcement on any other constitutional amendment. Concomitantly, emphasis has been placed on the rule as a deterrent rather than as a right; it is, the Court said in 1960, "calculated to prevent, not to repair."

In his first statement on the subject, in 1949, Black referred to the rule as "an extraordinary sanction, judicially imposed." Since Black was spokesman for the Court on this occasion, this conclusion, taken alone, would not be definitive regarding his own position. That Black did indeed regard the exclusionary rule as no more than a judicially formed rule of evidence was made plain later that year in Wolf, where he concurred in the Court's refusal to impose the exclusionary rule on state process, despite its designation of fourth amendment rights as "basic to a free society" and therefore falling within the ambit of the fourteenth amendment's due process clause. The decision was largely based on considerations of federalism for the Court, speaking through Justice Frankfurter, refused to "preclude the varying solutions" which the states might wish to choose in order to deal with the problem of unlawful search. No such consideration animated Justice Black's opinion. Reaffirming his forcefully advocated position in Adamson v. California that the entire Bill of Rights applies to the states, Black argued that the exclusionary rule "is not a command of the Fourth Amendment but . . . a judicially created rule of evidence which Congress might negate." Thus, he parted company with his closest allies on the Court, Justices Douglas, Murphy and Rutledge, all of whom regarded the rule (at least in the absence of a viable alternative) as an integral part of the fourth amendment since, as Justice Rutledge wrote, "the Amendment without the sanction is a dead letter."

In 1950 Black restated this position. Exclusion of unlawfully seized evidence was not constitutionally commanded and represented "no more than a question of what is wise judicial policy." Black emphat-
ically approved the exclusionary policy. Even though guilty parties might "now and then . . . escape conviction" through invocation of the rule, it was to be remembered that the fourth amendment's framers had considered search and seizure limitations as "not too costly a price to pay for protection against . . . overzealous and oppressive" officers.95

Justice Black's change of mind concerning the constitutional basis of the exclusionary rule took place in 1961 in Mapp v. Ohio,96 the watershed case which marked the beginning of the Warren Court's revolution in the field of criminal law. In this case the Court repudiated the Wolf doctrine and imposed the exclusionary rule on the states. Concurring once again, Black reiterated his opposition to an exclusionary policy based on the fourth amendment, which neither "contain[s] any provision expressly precluding the use of [unlawfully seized] evidence," nor allows such an inference "from nothing more than the basic command against unreasonable searches and seizures."97 But, continued Black, when one considers the fourth amendment's standard in conjunction with the fifth amendment's ban against compulsory self-incrimination—as Justice Bradley had done in Boyd—"a constitutional basis emerges which not only justifies but actually requires the exclusionary rule."

What is quite confusing was Black's candid acknowledgement that even the Boyd doctrine was "perhaps not required by the express language of the Constitution strictly construed . . . ."99 It was, rather, "amply justified from an historical standpoint, soundly based in reason"100 because consistent with the correct approach to the interpretation of the Bill of Rights, namely, Justice Bradley's dictum that "constitutional provisions for the security of person and property should be liberally construed."101 It was the element of liberal construction, Black was to say in a later case, that made Boyd "one among the greatest constitutional decisions of this Court [for] [o]bviously the Court's interpretation was not completely supported by the literal language of the Fifth Amendment."102

95. Id. at 67-68.
96. 367 U.S. 643 (1961). Police sought a suspect, believed to be hiding in appellant's apartment, in connection with a bombing and for hiding "policy paraphernalia." The police broke into appellant's home, handcuffed her, searched her apartment, and discovered obscene materials which were admitted at trial. Id. at 644-46.
97. Id. at 661-62 (Black, J., concurring).
98. Id. at 662.
99. 367 U.S. at 662.
100. Id.
101. Id. at 663, quoting Boyd v. United States, 116 U.S. 616, 635 (1886).
The question of course arises why Black was satisfied in basing the exclusionary rule on a "liberal" rendering of the fifth amendment while requiring nothing less than an "express" provision in order to locate the rule in the fourth amendment; why, in short, the fifth amendment, liberally construed, "requires" the exclusionary rule, while the fourth amendment, in the absence of an express provision, does not even "justify" it.

Black's dissent in the 1965 case of Linkletter v. Walker\textsuperscript{103} marked the high tide of his new-found and short-lived attachment to the Boyd principle. In sharp disagreement with the Court's refusal to apply the rule retroactively to cases in which judgment of conviction had become final prior to the Mapp decision, Black once again treated the fourth and fifth amendments as "inseparable from the standpoint of the exclusionary rule."\textsuperscript{104} If the sole justification of the rule, asserted Black, was its efficacy in preventing lawless conduct—"a mere punishing rod," as he put it—and not an unequivocal "right or privilege" of the defendant, "the Court's action in adopting it sounds more like law-making than construing the Constitution."\textsuperscript{105} The Court, Black admonished, should not be deterred from enforcing constitutional rights merely because they make it more difficult to obtain convictions, for it is true of all procedural provisions of the Bill of Rights that their enforcement makes it easier for guilty persons to escape punishment. Black confessed himself puzzled by the "disparaging view of the Fourth Amendment"\textsuperscript{106} taken by the Court, and he regarded the promise of the Mapp decision as having been "to a great extent broken"\textsuperscript{107} by the refusal to accord it retroactive enforcement. By its decision the Court had "degrade[d] the search and seizure exclusionary rule to a position far below that of the rule excluding evidence obtained by coerced confessions;"\textsuperscript{108} it had inexcusably given "different dignity and respect"\textsuperscript{109} to the fourth and fifth amendments. As we have seen, and shall have occasion to see again, this is a criticism which can be directed with even greater justification at Black himself.\textsuperscript{110}

However, Black's enthusiasm for an exclusionary rule, even one modeled on the Boyd principle, began to peter out as the Warren

\textsuperscript{103} 381 U.S. 618 (1965).
\textsuperscript{104} Id. at 648 (Black, J., dissenting).
\textsuperscript{105} Id. at 649.
\textsuperscript{106} Id. at 645.
\textsuperscript{107} Id. at 653.
\textsuperscript{108} Id. at 648.
\textsuperscript{109} Id. at 647.
\textsuperscript{110} See notes 96-102 supra and 144-46, 163-67 infra and accompanying text.
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Court embarked on what he considered a disastrous course of expansive interpretation of the fourth amendment. As he found himself embroiled in ceaseless conflict with the majority of the Court on such matters as eavesdropping, a the standards for affidavits on warrant applications, and search incidental to arrest, Black's exasperation came to be reflected in his continual revision of the exclusionary rule. A good example is his dissenting opinion in Berger v. New York, by all odds his fiercest in the field of search and seizure. In objecting to the Court's striking down a conviction obtained through the use of eavesdropping evidence, Black stressed the "obvious guilt" of the petitioner, a consideration which he had never found material in cases of coerced confession. Now, he seemed to turn his back completely on the exclusionary rule, even in federal cases, by pointing out that while under the common law an unlawful search might give rise to a suit for damages, it was not grounds for exclusion of evidence, and that "this evidentiary rule"—of admission rather than exclusion—"is well adapted to our Government." No longer did Black stress the linkage of the fourth and fifth amendments as a basis for exclusion. Instead, he again rebuked the Court for invoking the fourth amendment, since it does not "speak in clear unambiguous prohibitions or commands" on behalf of exclusion. The Weeks case, which he had previously designated as a progeny of Boyd and which "established the federal exclusionary rule... by relying greatly on the Boyd case," now was demoted to his earlier conception of it as a non-constitutional, supervisory decision: "that rule rested on the Court's supervisory power over

114. 388 U.S. 41 (1967). An order pursuant to a New York State statute was granted, permitting installation of a recording device in petitioner's offices. The statute provided an ex parte order to be granted upon oath or affirmation of the attorney general, district attorney or officer above the rank of sergeant stating that there were reasonable grounds to believe evidence of a crime might be obtained. The duration of the tap was to be specified and a new order obtained after two months. Petitioner was convicted on the basis of the evidence obtained by the eavesdropping. Id. at 44-45.
115. Id. at 70 (Black, J., dissenting).
116. Id. at 72 (emphasis added).
117. Id. at 74.
118. 232 U.S. 383 (1914). See notes 73-78 supra and accompanying text.
119. 116 U.S. 616 (1886).
Black cited his concurring opinions in *Wolf* and *Mapp* as if they were in alignment either with each other or with his existing views. In a footnote he attempted to explain his *Mapp* concurrence as applying solely "to the facts of that case," a meaningless statement unless he meant to convey the view that the exclusionary rule should be enforced only against violations of the fourth amendment as construed by himself.

The guilt of defendants now began to color Black's fourth amendment opinions in a sustained fashion. In *Simmons v. United States*, the Court held that testimony given in an unsuccessful motion to suppress evidence on fourth amendment grounds could not be admitted at trial, because it was "intolerable that one constitutional right [the privilege against self-incrimination] should have to be surrendered in order to assert another." Black, outraged by the decision, asserted that the Court was encouraging defendants to swear falsely at trial, by repudiating their sworn testimony at the suppression hearing. It was "permit[ting] lawless people to play ducks and drakes with the basic principles of the administration of criminal law," and thus to "hobble law enforcement in this country." Black protested the "wide-ranging, uncontrollable power" with which the Court had vested itself, and went on to say: "For me the importance of bringing guilty criminals to book is a far more crucial consideration than the desirability of giving defendants every possible assistance in their attempts to invoke an evidentiary rule which itself can result in the exclusion of highly relevant evidence."

Likewise, in *Bumper v. North Carolina*, a case in which the Court reversed the conviction of an obviously guilty and incredibly brutal rapist because his grandmother, with whom he lived, had been tricked into consenting to the search which yielded the evidence, Black called for discarding the exclusionary rule "where other evidence conclusively demonstrates . . . guilt." Deterrence of unlawful searches was the Court's "primary reason" for the rule. Black, who no longer stressed the defendant's right to exclusion, did not believe the

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126. Id. at 394.
127. Id. at 398 (Black, J., concurring and dissenting).
128. Id. at 395 (Black, J., concurring and dissenting).
129. Id. at 397 (Black, J., concurring and dissenting).
131. Id. at 560 (Black, J., dissenting).
police would be influenced by a rule which served to release defendants whose guilt was plainly established even by the lawfully admitted evidence in the case, a "per se rule" which required "blind adherence to a mechanical formula." Black did not in so many words invoke the doctrine of "harmless error" though he seemed to be alluding to it. Justice Harlan's concurring opinion, in a passage critical of Black, denied that admission of the challenged evidence was harmless in the sense that it "could not have affected the result," but harmless rather "in the sense that petitioner got what he deserved." This seems to sum up Black's view perfectly.

In *Kaufman v. United States*, Black's already heightened rhetoric in opposition to the Court's application of the exclusionary rule was escalated further. In this case the Court allowed a federal prisoner's post-conviction claim of a denial of his constitutional rights because of admission of evidence which undermined his defense of insanity. Black strongly attacked the decision, arguing that where a claim of innocence is not even advanced, a conviction which has become "final" is not challengeable collaterally through either a statutory action or a habeas corpus proceeding. The element of possible innocence was crucial "for the great historic role of the writ of habeas corpus has been to insure the reliability of the guilt-determining process." Since evidence obtained in violation of the fourth amendment—unlike that taken in violation of other constitutional rights—"can in no way have been rendered untrustworthy by the means of its seizure," the Court's enforcement of the rule should be made to correspond with its declared

132. Id.
134. Bumper v. North Carolina, 391 U.S. 543, 553 (1968) (Harlan, J., concurring) An even stranger example of Black's application of the harmless error doctrine to search and seizure cases is to be found in Coolidge v. New Hampshire, 403 U.S. 443 (1971). One of the issues raised concerned the validity of a search warrant issued by the state attorney general, acting in his capacity as a justice of the peace, though he was in charge of the investigation. Black argued that even if the warrant was, as the Court held, invalid because the attorney general was not an impartial magistrate, his participation constituted harmless error since the police had made a strong showing of probable cause. "There was no possibility of prejudice because there was no room for discretion." Id. at 501 (Black, J., concurring and dissenting). In other words, if it can retrospectively be demonstrated that there was sufficient probable cause to support issuance of a warrant, the evidence is admissible despite the lack of one. Black, it may be noted, considered attorney general an impartial magistrate and would have upheld the warrant.
136. 28 U.S.C. § 2255 (1970). This provision allows a prisoner under sentence by a federal court who claims "that the sentence was imposed in violation of the Constitution or laws of the United States," to petition that court for relief.
"one primary and overriding purpose, the deterrence of unconstitutional searches and seizures by the police." 138 This purpose was in no way served by allowing a prisoner to litigate collaterally claims of unreasonable search and seizure after the conviction had been upheld by reviewing courts. It was "becoming more and more difficult," charged Black, "to gain acceptance for the proposition that punishment of the guilty is desirable, other things being equal." 139 Justice Brennan, for the Court, correctly observed that Black had brought "into question the propriety of the exclusionary rule itself," since its application "is not made to turn on the existence of a possibility of innocence." 140

The matter of a defendant's guilt also came to the fore in Black's dissent from the stop-and-frisk decision in *Sibron v. New York.* 141 He vehemently protested the Court's reversal of the conviction of a narcotics addict, cautioning his colleagues against overturning state court judgments on such matters as reasonableness and probable cause from their sanctuary in "the marble halls of the Supreme Court Building in Washington, D.C.," except for "the most extravagant and egregious errors." 142 Unless the Court mends its ways, Black warned, "many will rue the day when Mapp was decided." 143

Once again the confession cases stand in stark contrast. Black's dissents in the cases just discussed read, in important ways, like the dissents in *Miranda v. Arizona* 144 where Black had allied himself with the majority. There too a severe burden was imposed on law enforcement; there too there was no express language in the Constitution mandating the result. 145 On the contrary, in a subsequent decision Black conceded that it was not a literal rendering of the fifth amendment, but "a broad and liberal construction in line with the wholesome admonitions in the Boyd case," 146 that required the exclusion in *Miranda* of an admission made during an interrogation because the suspect was denied the opportunity to consult with counsel.

Justice Black's final position on the exclusionary rule was formulated in his 1971 dissent in *Coolidge v. New Hampshire,* 147 one of his

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139. Id. at 240-41.
140. Id. at 229.
142. Id. at 81-82 (Black, J., concurring and dissenting).
143. Id. at 82 (Black, J., concurring and dissenting).
145. Id. at 458.
147. 403 U.S. 443, 493 (1971) (Black, J., concurring and dissenting). In this case, while petitioner, a murder suspect, was at the police station confessing guilt to a theft, officers
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last opinions on the Court and one of the most amazing documents he ever penned. Black, who previously had oscillated between forcefully advocating an exclusionary rule linked to the fourth and fifth amendments on the model of Boyd and attempting to disassociate the rule from any constitutional tie, not to mention his apparent rejection of the rule altogether in Berger, now brought his strange odyssey to an end by rudely disparaging Justice Bradley's opinion in Boyd for its "novel reading" of the fourth amendment to which he had previously subscribed with enthusiasm, even reverence. After reiterating the one consistent theme in his exclusionary opinions, that the "Fourth Amendment . . . nowhere provides for the exclusion of evidence," and that by no "mere process of construction" could such a rule be inserted into the amendment, Black went on to charge Bradley and the Boyd majority with having "preferred to formulate a new exclusionary rule from the Fourth Amendment rather than rely on the already existing exclusionary rule contained in the language of the Fifth Amendment." The Court in Weeks had also erroneously "stated that the Fourth Amendment itself barred the admission of evidence seized in violation of the Fourth Amendment." Was it not "strange," wondered Black, "that it took this Court nearly 125 years to discover the true meaning of those words"? Black called attention to the "striking contrast" between the fifth amendment's "express, unambiguous" prohibition against self-incrimination which "in and of itself directly and explicitly commands its own exclusionary rule," and the fourth amendment, which "did not when adopted, and does not now, contain any constitutional rule barring the admission of illegally seized evidence." With these words, Black repudiated the majority doctrine of the Boyd case as a viable source for the exclusionary rule, and announced his agreement with "the point so ably made in the concur-


151. Id. at 496.

152. Id. at 497.

153. 232 U.S. 383 (1914); see notes 73-77, 118-21 supra and accompanying text.


155. Id.

156. Id. at 497-98.
ring opinion of Justice Miller . . . in Boyd,"\textsuperscript{157} to the effect that the fifth amendment, unaided, required the exclusion of the Boyds' papers from evidence. It was Miller's view, said Black, in yet another reconstruction of history, that had provided "the thrust of my concurring opinion in \textit{Mapp v. Ohio}."\textsuperscript{158}

Notwithstanding Black's statements, neither the \textit{Boyd} nor the \textit{Weeks} case clearly based the exclusionary rule on the fourth amendment. The \textit{Boyd} case linked the fourth and fifth amendments to create a mystical union which required exclusion, while the \textit{Weeks} case did not enunciate the constitutional origin, if any, of the rule.\textsuperscript{159} Black himself, originally in \textit{Wolf},\textsuperscript{160} and as recently as \textit{Berger}, had considered the \textit{Weeks} rule as one based on the Court's supervisory power. Black's capacity for reading into previous judicial opinions, including his own, no matter how inconsistent they were with his current views, whatever he happened to be espousing at the moment, bordered on the extraordinary. His opinion in \textit{Mapp} was based not on Miller's concurring opinion in \textit{Boyd}, but on Bradley's opinion for the majority\textsuperscript{161} which Black, as we have seen, continued to treat with veneration in \textit{Linkletter v. Walker}.\textsuperscript{162} Worse yet, Bradley's doctrine was precisely the one Black was in reality employing, even while attributing it to Miller, for it was Bradley, rather than Miller, who had suggested that evidence taken through unreasonable search was subject to exclusion on fifth amendment grounds.\textsuperscript{163} Miller, by emphasizing the fifth amendment and avoiding reliance on the fourth, wished to confine \textit{Boyd} to its peculiar facts, and \textit{prevent} its extension into the realm of search and seizure. The \textit{Boyd} case, it will be recalled, dealt not with a search in the usual sense but with a compelled production of private papers under legal process. In that setting the fifth amendment by itself was an appropriate constitutional instrument for it prohibits any form of testimonial compulsion whether oral or documentary.\textsuperscript{164} If the fifth amendment is to serve as the backbone of the exclusionary rule in ordinary search cases because the use at trial of the evidence \textit{incriminates} the defendant, the fourth amendment would have the odd

\begin{thebibliography}{99}
\bibitem{157} Id. at 498. See text accompanying note 70 supra.
\bibitem{158} Id.
\bibitem{159} See notes 73-76 supra and accompanying text.
\bibitem{161} 367 U.S. 643, 666 (1961) (Black, J., dissenting) ("I fully agree with Mr. Justice Bradley's opinion . . . .").
\bibitem{162} 381 U.S. 618 (1965).
\bibitem{163} See notes 68-69 supra and accompanying text.
\bibitem{164} See 8 Wigmore, \textit{Evidence in Trials at Common Law} § 2259c, at 363-64 (McNaughton ed. 1961).
\end{thebibliography}
function of merely stating an exception to the fifth amendment's prohibition. The fourth amendment is generally regarded as a limitation on the search power, and not as a grant of authority for searches which otherwise would fall under the ban of the fifth amendment.

Nor is it at all clear why Black felt constrained to regard the fifth amendment's prohibition against forced incrimination as providing an express, unambiguous requirement for exclusion of evidence taken in violation of its terms. To be sure the words of the fifth amendment are directed to government agents, whereas the fourth amendment focuses on "[the right of the people," but neither amendment directly addresses the question of exclusion. On its face, the fifth amendment says no more concerning the use which may be made in court of compelled evidence than the fourth amendment does of evidence obtained through unreasonable search. To the extent that incriminating evidence might be extracted from a defendant in the courtroom under judicial process, to forbid its extraction is, of course, tantamount to forbidding its use. But what of forced incrimination at the hands of grand juries, prosecutors, and policemen? Black himself once explained the matter this way: "And if the Federal Government does extract incriminating testimony . . . the immunity provided . . . should at the very least prevent the use of such testimony in any court . . . ."165 Certainly this reasoning can be applied with equal force to evidence taken in violation of the fourth amendment.

As an historical matter it is true that the common law forbade courtroom use of compelled testimony, even as it countenanced use of unlawfully seized physical evidence. Forced testimony was inadmissible because it was considered untrustworthy, while evidence taken in violation of search and seizure law was considered just as reliable as that taken under warrant. Black's continual claim that the fourth amendment did not, when adopted, contain an exclusionary rule, thus scarcely rises to the dignity of an argument, for neither did the fifth amendment, when adopted, contain an exclusionary rule for unreasonable search. The common law rule of admissibility in search cases was unassailed in this country prior to the \textit{Boyd}166 decision. Surely it was no more surprising that the Court in the \textit{Weeks}167 case should have located the rule in the fourth amendment after 125 years than it was that Justice Miller (in reality, Justice Bradley) should have located it after 100 years in the fifth amendment. But Black ignored the claims of history. As with so many other constitutional provisions, he took

\begin{itemize}
  \item 165. Irvine v. California, 347 U.S. 128, 141 (1954) (Black, J., dissenting)
  \item 166. Boyd v. United States, 116 U.S. 616 (1886).
\end{itemize}
his stand on the text, and in this instance the text does not support him.

Thus, in the course of his opinions on the exclusionary rule, Black had taken nearly every possible position on the rule's derivation: that it was required by the fifth amendment; that it was required by the fourth and fifth amendments in combination; or conversely, that it was not required at all by the Constitution. Every position, that is, except that most consonant with his general approach to search and seizure interpretation: that the rule is required, or at any rate authorized, by the fourth amendment alone. It is paradoxical that Black, who regarded the fourth amendment as virtually adrift with no mooring in history and dependent entirely on the contemporary judge's determination of reasonableness, viewed the amendment as unable to accommodate a theory of exclusion, even if this should be considered necessary to maintain reasonable police conduct in the sphere of search and seizure.

An exclusionary rule squarely based on the search and seizure provision and with the avowed purpose of reducing the incidence of unlawful police conduct can provide the Court with much needed flexibility to deal with situations where considerations of policy might militate against its invocation. For instance, where judicial error in issuing a defective warrant, rather than police misconduct, resulted in an unlawful search. It is true that the Court has taken anything but a flexible approach to the exclusionary rule and that its decisions do in fact bear out Black's criticism of the rule as a "mechanical" and "per se" construct, applied at times without regard to the policeman's culpability or its potential for deterrence. According to the Court's approach, as Justice Harlan noted, "the evidence lawfully obtained under a lengthy series of valid warrants might . . . be lost by the haste of a single magistrate. The rule applied in that manner would not encourage police officers to adhere to the requirements of the Constitution . . . ." Black himself, in an important but neglected opinion on the exclusionary rule—his first on the subject—stressed its limitations. In United States v. Wallace & Tiernan Co., the appellant claimed that documents surrendered in response to a subpoena issued

169. Chief Justice Burger has called on the Court to offer "rationally graded responses" in dealing with unlawful searches and not treat "vastly dissimilar cases as if they were the same." Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting). It is questionable whether recent decisions limiting the scope of the exclusionary rule can be properly considered the beginning of a serious attempt on the part of the Court to rationalize policy in this field. See Stone v. Powell, 96 S. Ct. 3037 (1976); United States v. Janis, 96 S. Ct. 3021 (1976); United States v. Colandra, 414 U.S. 338 (1974).
by an illegally constituted grand jury were inadmissible. Black declared: "The Fourth Amendment, important as it is in our society, does not call for imposition of judicial sanctions where enforcing officers have followed the law with such punctilious regard . . . ."\textsuperscript{171}

Unlike the fifth amendment which grants a constitutional immunity in unqualified terms and, therefore, renders irrelevant such questions as the degree and source of the illegal conduct and the value of the exclusionary rule as a deterrent, the fourth amendment provides a standard of reasonableness which, for Black, was the key to the amendment's meaning. Flexibility is implied in and is indeed the essence of the term reasonable, as Black was quick to point out in other situations.\textsuperscript{172} But by his intransigence in insisting that the fifth amendment, either alone or together with the fourth amendment, was the proper constitutional vehicle for implementing the exclusionary rule, Black wedged himself between the horns of a self-created dilemma, and in effect helped to defeat the very policy of flexibility and pragmatism which he strongly advocated.

### III. Mechanical Eavesdropping

It is not entirely surprising, when one considers his views in other areas of search and seizure, that Justice Black seemed oblivious to the dangers which judicially-unsupervised mechanical eavesdropping creates for society—dangers that have been so well documented by recent events that additional commentary would merely be superfluous. As the Court said in 1967, "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices."\textsuperscript{173} The constitutional problem is novel in the sense that, unlike many other issues raised under the fourth amendment, mechanical eavesdropping was unknown to the framers and could scarcely have been anticipated in the eighteenth century. The fourth amendment, thus, does not directly address the matter.

When the Court was first confronted with the issue of wiretapping in \textit{Olmstead v. United States},\textsuperscript{174} the issue was disposed of by the narrowest of margins through an extremely literal rendering of the amendment. Wiretapping was considered neither a "search" as com-

\begin{footnotesize}
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\item \textsuperscript{171} United States v. Wallace & Tiernan Co., 336 U.S. 793, 800 (1949)
\item \textsuperscript{172} See text accompanying notes 42-44 supra.
\item \textsuperscript{173} Berger v. New York, 388 U.S. 41, 63 (1967).
\item \textsuperscript{174} 277 U.S. 438 (1928), overruled in part, Katz v. United States, 389 U.S. 347 (1967). Incriminating telephone conversations were intercepted by warrantless wire taps on Olmstead's phones. These taps were made without trespass upon defendant's property and this evidence was introduced at defendant's trial for conspiracy to violate the National Prohibition Act. Id. at 456-57.
\end{itemize}
\end{footnotesize}
prehended by the amendment, unless accompanied by a trespass upon
the premises, nor a "seizure," since in using the terms "persons,
houses, papers and effects," the amendment contemplated only the
taking of tangible items. Justice Brandeis, urging the Court to look to
the underlying objectives of the Constitution rather than the dictionary
meaning of its words, dissented. He would have considered wiretap-
ing an ordinary search as far as the fourth amendment is concerned.
The method of search was, to his mind, less significant than the
intrusion on the individual's privacy and security. This was, if any-
thing, more serious in the case of wiretapping than in that of conven-
tional search.175

A decade later, following changes in its membership, the Court
reversed directions without, however, overruling the Olmstead prece-
dent. In an ingenious piece of statutory construction, the Court read
section 605 of the Federal Communications Act of 1934,176 which
banned "intercept[ion] and divulge[nce]" of communications unless
"authorized by the sender," as forbidding wiretapping and requiring
the exclusion of evidence so obtained from the federal courts. Though
this provision was in reality directed at the interception of telegraph
messages,177 in a series of decisions, to which Black subscribed, the
Court in effect attributed to Congress the intention to grant the same
protection against wiretapping as the fourth amendment provided
against ordinary searches.178

This solution served the Court admirably for awhile, but technological
advance soon began to overtake its capacity to devise inventive
solutions which could co-exist with Olmstead. The development of
sophisticated electronic devices, able to intercept conversations
through walls without the aid of telephone wires, meant that section
605 could no longer serve as a substitute for the re-examination of the
Olmstead doctrine. Such a re-examination was now urgently required
if the law was to keep pace with the advance of scientific knowledge.
Two cases, spaced a decade apart, squarely presented the constitu-

175. Justice Holmes, in another dissent, left the constitutional question open, but would have
reversed the particular convictions under review on supervisory grounds because the eavesdropping constituted an offense against the law of the state (Washington) where it took place. It is in
this context that his often quoted and much misunderstood description of wiretapping as "dirty
business" was given. Id. at 470 (Holmes, J., dissenting). Justices Butler and Stone, in separate
opinions, agreed with Justice Brandeis that wiretapping fell under the fourth amendment.
176. 47 U.S.C § 605 (1970). Section 605 has been superseded by Title III of the Omnibus
electronic "bugging" under court order by federal and state officials in the investigation of
specified offenses.
177. See Landynski, supra note 53, at 206-09.
178. See notes 232-36 infra and accompanying text.
tional issue anew. In *Goldman v. United States*,\(^7\) decided in 1942, the evidence had been obtained through use of a listening device which picked up conversations in an adjoining office. In *On Lee v. United States*,\(^8\) decided in 1952, an informer with a microphone in his pocket entered the suspect's laundry, engaged him in conversation, and obtained incriminating statements which were recorded on a receiving set by an agent stationed outside the place. On each occasion the Court, over strong dissent, sustained admission of the evidence. Black joined the majority in *Goldman* but dissented, on unexplained supervisory grounds, in a one-sentence opinion in *On Lee*.\(^9\) *Olmstead* thus continued to lead a charmed life as the court temporized.

New doctrine, however, began to emerge in 1961, when in *Silverman v. United States*\(^1\) the Court ordered the exclusion of evidence obtained through use of a "spike mike," a device whose tip was placed under a suspect's floor by police stationed in an adjoining house, although legally this action did not constitute a trespass. Then, in 1963, in *Wong Sun v. United States*,\(^2\) a non-eavesdropping case, the Court held that a confession made by a suspect while he was under illegal arrest is inadmissible because it was directly derived from the unlawful act, stating significantly: "It follows from our holding in *Silverman v. United States* . . . that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.'"\(^3\) Both times Black was in the majority. *Olmstead*'s lingering life finally drew to a close in 1967, in *Berger v. New York*,\(^4\) though not till several months later in *Katz v. United States*,\(^5\) were the last rites officially observed. *Berger* and *Katz* were the only eavesdropping cases for which Black wrote full-scale opinions.\(^6\) Since his opinion in *Katz* largely dupli-

181. Id. at 758 (Black, J., dissenting). The sentence reads as follows: "Mr. Justice Black believes that in exercising its supervisory authority over criminal justice in the federal courts (see McNabb v. United States, 318 U.S. 332, 341) this Court should hold that the District Court should have rejected the evidence here challenged."
184. Id. at 485.
187. Black wrote relatively brief dissenting opinions in Lee v. Florida, 392 U.S. 378, 387 (1968) and Irvine v. California, 347 U.S. 128, 139 (1954). The Irvine dissent was, however, based on the ground of self-incrimination. Other than these, Black merely wrote a series of one or two sentence opinions, generally for the purpose of indicating his continued adherence to the views he had expressed in *Berger* and *Katz*. See, e.g., Desist v. United States, 394 U.S. 244, 254 (1969) (Black, J., concurring).
icates the views he had expressed previously in Berger, the discussion in this section centers principally on Black's elaborate and heated dissent to the Berger case, one of the most abrasive opinions he ever wrote. Not only is this the most thorough exposition available of Black's approach to eavesdropping as a constitutional problem, it also illuminates his views on fourth amendment interpretation in general, and the warrant requirements in particular.

The Berger case brought before the Court the bribery conviction of a high New York official. The evidence was secured through a judicially authorized wiretap as provided for under a state law.188 In a decision which quite obviously spelled the doom of the Olmstead doctrine, the majority, speaking through Justice Clark, held the statute invalid on its face because the language was so "broad in its sweep"189 as to constitute an authorization for a general warrant. Clark found the statute wanting in several respects: (1) it granted a "broadside authorization"190 that required neither a showing of probable cause for the commission of a specific crime nor a particular description of the conversations sought; (2) the two-month authorization on a single-finding of probable cause, with extensions permitted on little more than the original justification, was excessive;191 (3) it failed to stipulate that the eavesdropping must terminate once the evidence sought had been obtained;192 (4) there was no requirement of notice, as in the case of a conventional search, or, to overcome the defect, proof of exigent circumstances which necessitated the invasion of privacy.193 While not enumerated by him among the statute's major defects, Clark also objected to the failure to require a return on the warrant, "thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties."194 In sum, the act authorized a far greater intrusion on privacy than was justified in the circumstances.

This Article will not deal at length with the majority's view of the constitutional conditions which must be met for the issuance of valid wiretap warrants, or the correctness of its understanding of the statute, something that was sharply questioned by Justices Harlan, Stewart, and White in separate opinions. Suffice it to say that Clark's opinion left much to be desired on a number of matters. To begin with, it

189. 388 U.S. at 44.
190. Id. at 58.
191. Id. at 59.
192. Id. at 59-60.
193. Id. at 60.
194. Id.
failed to consider the validity of the warrant issued in the *Berger* case quite apart from the provisions of the New York statute. Even if the statute was riddled with defects of constitutional magnitude, it was still appropriate to ask whether this particular warrant had met fourth amendment standards. Justices Harlan and White, who dissented, believed it had, and Justice Stewart, who concurred in the result, would have upheld the warrant but for his misgivings as to whether probable cause had been established. Furthermore, in discussing the particularity requirement, Justice Clark seemed not to take into account the flexibility with which the Court has traditionally endowed this standard, depending on the nature of what it is the police are seeking. A search for reading materials, for example, which brings the first amendment into play, has been held to require particularity of "scrupulous exactitude," unlike a search for other kinds of evidence, where a more lenient rule has been deemed sufficient. What is essential, from the standpoint of the fourth amendment, is that as little discretion as possible be left to the searching officer. There is no reason, as Harlan put it, why the fourth amendment should be regarded as "a roadblock to the use, within appropriate limits, of law enforcement techniques necessary to keep abreast of modern-day criminal activity."

Justice Black's dissent was not limited to the pinpointing of flaws in Clark's majority opinion. Reaching for the jugular, Black challenged the basic constitutional philosophy underlying the Court's decision. Even though wiretapping can be compared to a conventional type of search, such a "word-search" is not forbidden by the fourth amendment, he asserted in reiteration of the position taken by the *Olmstead* majority, because the "literal language imports tangible things," and only an indefensible expansion of its meaning through "the ingenuity of language-stretching judges" could make it cover the spoken word. He once more called attention to what he regarded as the Court's inconsistency in interpreting the fourth and fifth amendments, having excluded that very day all but testimonial evidence from the embrace of the latter, even as it magnified the former to include

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196. The description "cases of whiskey" was regarded as sufficient in a search for contraband liquor. Steele v. United States, 267 U.S. 498, 504 (1925).
197. 388 U.S. 41, 95 (1967) (Harlan, J., dissenting).
what the framers had never intended. Further, since the reasonable-
ness clause was now considered, despite its language, to refer to
intangible items, so must the warrant clause. Since in a "word-search"
it was impossible to meet the requirement for particularity of descrip-
tion—one cannot precisely describe something not yet in existence—
did the majority intend to undermine that standard, or to apply it
literally so as to make issuance of warrants impossible?202

The Court had arrived at its decision, according to Black, by
treating the fourth amendment as if it were a clear-cut prohibition of
invasion of privacy which must, therefore, logically embrace eaves-
dropping as well as physical search. But, he objected, the amendment
was specific in its reference to unreasonable searches and seizures,
"and not to a broad undefined right to 'privacy' in general."203 In
transforming the constitutional meaning, the Court was playing
"sleight-of-hand tricks" with the amendment. The framers did not,
and the Court should not, consider the amendment a synonym for
right to privacy because "[t]hat expression, like a chameleon, has a
different color for every turning."204 In making privacy the amend-
ment's "keyword," the Court, in Black's view, was merely providing
itself with a "useful new tool . . . both to usurp the policy-making
power of the Congress and to hold more state and federal laws
unconstitutional when the Court entertains a sufficient hostility to
them."205

Turning to the statute, Black asserted that the wiretapping stan-
dards which the Court purported to derive from the Constitution were
sheer fabrication, because the New York law contained "many more
safeguards than the Fourth Amendment itself."206 Indeed, imprecision
was the hallmark of the amendment, for it does not define probable
cause, nor state by whom the oath shall be taken, nor what it should
contain. Nor does it "impose any precise limits on the spatial or
temporal extent of the search or the quantitative extent of the sei-
zure."207 The statute, unlike the amendment, (1) specifically required
that the authorization be granted by a magistrate; (2) stipulated that

point somewhat cryptically but elaborated it in Katz v. United States, 389 U.S. 347, 365-66
(1967) (Black, J., dissenting). Later in apparent contradiction, Black stated in Berger: "the only
way to describe future conversations is by a description of the anticipated subject matter of the
conversation. When the 'purpose' of the of eavesdropping is stated, the subject of the conversa-
tion sought to be seized is readily recognizable." 388 U.S. at 85.
203. 388 U.S. at 77.
204. Id.
205. Id.
206. Id. at 83.
207. Id. at 75.
the oath be executed by those seeking the warrant; (3) placed a limitation of two months on the warrant. Why must that length of time, regardless of circumstances, be considered unreasonable? Where in the fourth amendment, for that matter, is provision made for a return on the warrant, or a termination of the search once its object is attained? In fact, Black concluded with heavy sarcasm, "from the deficiencies the Court finds in the New York statute, it seems that the Court would be compelled to strike down a state statute which merely tracked verbatim the language of the Fourth Amendment itself."208

Black attributed the decision on the New York law in part to the "Court's hostility to eavesdropping as 'ignoble' and 'dirty business' and in part [to] fear that rapidly advancing science and technology is making eavesdropping more and more effective."209 He was unimpressed with either reason. While eavesdropping admittedly is "not ranked as one of the most learned or most polite professions,"210 nor its practitioners regarded "as the most desirable and attractive associate[s],"211 it is yet a vitally necessary technique if crime is to be kept in check.

The very effectiveness of the technique, continued Black, made it more, rather than less, acceptable in serving the ends of justice. "The machine does not have to depend on a defective memory to repeat what was said in its presence for it repeats the very words uttered."212 In fact, the real danger mechanical eavesdropping poses to a defendant is not that it infringes upon his rights, but that it is "so unerringly accurate that it is practically bound to bring about a conviction."213 It should not on this account be considered contemptible, since to reach a "correct judgment" is "the basic and always-present objective of a trial."214

In his opinion for the Court, Justice Clark had peremptorily dismissed the considered judgment of the President's Commission on Law Enforcement and Administration of Justice, that wiretapping is an important technique in combatting organized crime, which thrives on bribery of public officials, and emphasized instead the lack of empirical evidence on the subject. Black regarded Clark's suggestion that more scientific, and less obtrusive, procedures than wiretapping could

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208. Id. at 85.
209. Id. at 71 (footnote omitted). The quoted characterization of wiretapping is by Justice Holmes. See note 175 supra.
210. 388 U.S. at 71.
211. Id.
212. Id. at 73.
213. Id. at 74.
214. Id.
be developed for apprehending criminals, as no more than wishful thinking:

It is always easy to hint at mysterious means available just around the corner to catch outlaws. But crimes, unspeakably horrid crimes, are with us in this country, and we cannot afford to dispense with any known method of detecting and correcting them unless it is forbidden by the Constitution . . . 215 And it needs no empirical studies or statistics to establish that eavesdropping testimony plays an important role in exposing criminals and bands of criminals who but for such evidence would go along their criminal way with little possibility of exposure, prosecution, or punishment . . . 216 No man's privacy, property, liberty, or life is secure, if organized or even unorganized criminals can go their way unmolested, ever and ever further in their unbounded lawlessness. However obnoxious eavesdroppers may be they are assuredly not engaged in a more "ignoble" or "dirty business" than are bribers, thieves, burglars, robbers, rapists, kidnappers, and murderers, not to speak of others. And it cannot be denied that to deal with such specimens of our society, eavesdroppers are not merely useful, they are frequently a necessity. 217

Black also scoffed at the intimation in Clark's majority opinion218 that section 605 of the Federal Communications Act was designed by Congress to circumvent the Olmstead decision by prohibiting unauthorized interception and divulgence of telephone communications:219 "The Court cites no authority for this strange surmise, and I assert with confidence that none can be recited."220 Nor, in Black's view, did the Silverman221 or Wong Sun222 decisions rest on the fourth amendment. Those rulings were, he claimed, based exclusively on the Court's supervisory power. Had he thought otherwise he would not have joined in the Court's opinions.

His difference with the majority on eavesdropping, said Black in summary, really was reduced to a difference concerning the proper manner of construing the Constitution. His brethren had taken upon themselves a "duty to go further than the Framers did on the theory that the judges are charged with responsibility for keeping the Constitution 'up to date,' " whereas he believed it was the Court's duty to "carry out as nearly as possible the original intent of the Framers."223 He did not mean to suggest that the Constitution was in all circumstances a static document, frozen in its eighteenth century mold.

215. Id. at 73.
216. Id. at 72.
217. Id. at 72-73.
218. See notes 191-94 supra and accompanying text.
219. See text accompanying notes 176-78 supra.
223. 388 U.S. at 87.
He fully agreed that government power to regulate business under the
commerce clause, for example, was not confined to original modes of
commerce but that Congress was granted the power "to regulate
commerce between the States however it may be carried on, whether
by ox wagons or jet planes." This was so because "where the
Constitution has stated a broad purpose to be accomplished under any
circumstances, we must consider that modern science has made it
necessary to use new means in accomplishing the Framers' goal." But the fourth amendment did not fit into the category because it
"gives no hint that it was designed to put an end to the age-old practice
of using eavesdropping to combat crime."

Black's opinion in Berger failed to come to grips with the concerns
with which it should have dealt because it treated them cavalierly. At
no point did Black concede that unrestricted wiretapping constituted a
magnification of the general problem of search and seizure, or even
that it created a threat to any law abiding person. Yet unlike an
ordinary search which usually terminantes in a matter of hours, if not
minutes, a single 60-day wiretap may enable the police to overhear
thousands of conversations involving not merely the suspect, but
dozens of other people, most of whom are likely to be above suspicion
of wrongdoing.

The opinion tells us much about Black's conception of reasonableness, which becomes an autonomous principle in his hands. Even
when a search has run its intended course it may yet be continued in
the hope of finding additional evidence of crime. This may help
explain why Black refused to place realistic limits on the scope of
search incidental to arrest. And his casual approach to probable
cause is evident in his willingness to tolerate a 60-day search (with
extensions virtually as requested) on a single showing of probable
cause, without any proof of special circumstances which would make
such a lengthy intrusion necessary. It is difficult to believe that Black
thought the oath could be taken by someone other than the person
seeking the warrant, yet this is what he seemed to say. Indeed, given
his emphasis on the exact text of the amendment, one is led to wonder
why Black conceded that a warrant may be issued only by a neutral
and detached authority, something concerning which the amend-
ment has nothing explicit to say.

224. Id.
225. Id.
226. Id.
227. See text accompanying notes 23-37 supra.
conception of a neutral magistrate, see note 134 supra.
Black's insistence on unswerving adherence to the language of the fourth amendment leads to another question. If his literalness were as extreme in first amendment cases as it was in fourth amendment cases, would it have been possible for him to regard motion pictures, for example, as immune to censorship?\textsuperscript{229} Surely the term "search and seizure" is no less connotive of eavesdropping to secure evidence than "speech" or "press" is of the showing of motion pictures. There was, it seems certain, a dualism in Black's approach. He regarded the freedoms of the first amendment as so central that he was willing to construe the amendment in terms of its purposes as he understood them, and to allow it to shelter even such forms of communication as libel and obscenity.\textsuperscript{230} The fourth amendment's protection was, however, of a significantly lower order of priority and therefore to be construed in a more literal—and limited—fashion. Nowhere is his niggardly conception of the fourth amendment's scope more evident than in his argument that since the framers knew of eavesdropping, which was an "age-old practice"\textsuperscript{231} in combatting crime, and did not clearly word the fourth amendment to deal with it, the Court was precluded from treating eavesdropping as a search. This contention will scarcely stand the light of day. The type of eavesdropping the framers were familiar with, which was carried out by the unaided human ear, was even further removed from the sophisticated electronic devices in use today than was the ox cart from the airplane. It took no great ingenuity, only reasonable precautions, for one to be on guard against the human eavesdropper, whereas the ordinary citizen is virtually defenseless against the resources available to the mechanical eavesdropper.

In truth, Black's record in previous eavesdropping cases fore-shadowed neither his vote nor the outrage he expressed in the Berger case. For example, the surmise may indeed be strange, as Black claimed, that the legislative draftsmen of section 605 intended to "overrule" Olmstead,\textsuperscript{232} but at one time he had obviously shared this view. How else explain that Black helped form the majority in the first Nardone case,\textsuperscript{233} which applied section 605 to unauthorized interception of interstate telephone messages and ordered the conversations excluded from evidence; or that Black was part of the unanimous

\textsuperscript{232} See text accompanying notes 219-20 supra.
\textsuperscript{233} Nardone \textit{v}. United States, 302 U.S. 379 (1937).
Court which, in the second *Nardone* case, required the exclusion, again on section 605 grounds, of evidence obtained derivatively from the original wiretapping; or that Black subscribed to the decisions in *Weiss v. United States* and *Schwartz v. Texas* which held, respectively, that section 605 made illegal the interception of intrastate as well as interstate calls, but that exclusion of intercepted calls was not required in intrastate cases? Though the Court, in these and other cases, had clearly interpreted section 605 to grant the kind of protection against wiretapping which the *Olmstead* case would have provided had it been decided the other way, not once was Black to be found in dissent. Then, too, Black had acquiesced in the *Silverman* and *Wong Sun* decisions which, despite his later disclaimer, were specifically rooted in the fourth amendment, thus making substantial inroads on the *Olmstead* doctrine. If, as Black asserted in *Berger*, he had understood these decisions to be supervisory rather than constitutional, the question still arises why Black wished to exclude eavesdropping evidence on supervisory grounds in *Silverman*, and not in such later federal cases as *Katz*.

That Black was capable of taking a purposive approach to unconventional fourth amendment issues is demonstrated in his treatment of another type of modern “search” unknown to the framers, the administrative inspection conducted by health, building, fire and sanitation officials. The eighteenth century search, it may be observed, consisted of two elements: (1) physical entry into the dwelling, (2) for the purpose of obtaining evidence of crime. Black would have granted constitutional sanction to eavesdropping because it lacks the first element; though its purpose is to gather evidence, there is no entry into the dwelling. Administrative inspections, by contrast, lack the second element; entry into the building is made for the purpose of detecting health and safety hazards, not to seize evidence for use in a prosecution. The threat of prosecution comes only when a violation is detected and the warning to correct it goes unheeded. The right at stake in the case of an administrative inspection is that of personal privacy per se.

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or as Justice Frankfurter termed it, "the right to shut the door on officials of the state unless their entry is under proper authority of law."\(^{242}\)

In his opinion for the Court in *Frank v. Maryland*,\(^ {243}\) sustaining inspections without warrant, Frankfurter asserted that while the safeguarding of privacy was one object of the fourth amendment's framers, their other, and principal, object was to insure "self protection" against the long arm of the police: "[H]istory makes plain . . . that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle [against the general warrant and] for fundamental liberty was fought."\(^ {244}\) The inspection procedure was therefore required to conform only to considerations of reasonableness rather than to the specific requirements of the warrant clause.

Justice Douglas' dissent,\(^ {245}\) which Black joined, considered the Court's approach a substitution of historical circumstance for basic principle: the specific abuses which were responsible for bringing the fourth amendment into being should not be confused with the idea of a broader right of privacy from governmental intrusion which, Douglas and Black were convinced, the framers wished to secure for the citizen. Though this is the very value which according to Black's eavesdropping opinions is not the concern of the fourth amendment except in the context of an eighteenth century type of search, the only proper authority under which inspections can be conducted, so far as Black was concerned, is a judicial warrant. Even if an inspection can be considered a "search" in the literal sense, it does not of course give rise to a "seizure." Yet Black clearly read the two words in conjunction where eavesdropping was concerned: only such a search as could result in a seizure was forbidden by the amendment. The reverse position, taken by Frankfurter, that eavesdropping is proscribed by the amendment\(^ {246}\) but that inspections are not, seems far more logical. Most logical of all is the interpretation currently maintained by the Court, banning both eavesdropping and inspections without warrant.\(^ {247}\) To view the fourth amendment as forbidding a rodent inspec-

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\(^ {243}\) 359 U.S. at 366.

\(^ {244}\) Id. at 365.

\(^ {245}\) Id. at 374 (Warren, C.J., Douglas, Black, Brennan, JJ., dissenting).

\(^ {246}\) See, e.g., On Lee v. United States, 343 U.S. 747, 758-62 (1952) (Frankfurter, J., dissenting).

tion and, at the same time, as allowing eavesdropping without limitation, is to subscribe to a peculiar hierarchy of constitutional values.

IV. CONCLUSION

One cannot explain the striking contrast between Justice Black's generally regressive fourth amendment opinions, and the libertarian, at times extreme views he expressed in other civil liberties cases as due to his peculiar brand of literal construction. Charles A. Reich, who once served as Justice Black's law clerk has made a considerable attempt to show that in some areas, at any rate, one motivating force behind Black's constitutional interpretation was responsiveness to social change. For all Black's incessant emphasis on literalism, his conception of the Bill of Rights, argues Reich, was essentially dynamic, for he understood that it "must keep changing in its application or lose even its original meaning."248 Black, in truth, believed "the language and history of the Bill of Rights [was] its spirit and purpose, and these he has tried to keep constant."249

Indications are not wanting in Black's civil liberties opinions that he perceived the judicial task to be, in some measure, creative rather than mechanical. Thus, in protesting against a denial of bail to aliens being held in custody pending a determination as to whether they were subject to deportation, he declared, in language that might be considered highly descriptive of his own interpretation of the fourth amendment: "Maybe the literal language of the framers lends itself to this weird, devitalizing interpretation when scrutinised with a hostile eye. But... it has been the judicial practice to give a broad, liberal interpretation to those provisions of the Bill of Rights obviously designed to protect the individual from governmental oppression."250 Similarly, in holding that the first amendment protects amplified, no less than ordinary, speech against legislative abridgement, Black asserted: "The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition."251 Again, in defending the inflexibility with which he had endowed the fourteenth amendment's due process clause (so that it would be perfectly coextensive with the specific provisions in the Bill of Rights), Black argued that evils unforeseen by the framers could be guarded against by expanding the perimeters of the Bill of Rights. He would enforce its basic purposes "so as to afford continuous protection

249. Id. at 736.
against old, as well as new, devices and practices which might thwart those purposes." These examples can be multiplied.

Sylvia Snowiss, in a comprehensive analysis of Justice Black's constitutional legacy, attempts to explain Black's position on the fourth amendment by stressing his dissent in the 1944 case of Feldman v. United States, where "he drew a distinction between the dissenter or heretic who was caught in the criminal processes as punishment for dissenting views and the 'ordinary criminal'":

He made it clear that constitutional guarantees were intended for the benefit of the former, not the latter. . . . The crucial corollary of this position was that he saw the protections surrounding the criminal process primarily as protection for the innocent rather than as standards to establish, maintain, and continually upgrade the general operation of the criminal law . . . .

The Fourth Amendment contributes little toward enhancing the reliability of the fact-finding process or of separating the innocent from the guilty.

It is indeed true that Black conspicuously omitted the fourth amendment from his list of Bill of Rights' provisions which elsewhere he defined as "essential supplements to the First Amendment." The pertinent passage in Feldman reads as follows:

[H]istory teaches that attempted exercises of the freedoms of religion, speech, press, and assembly have been the commonest occasions for oppression and persecution. Inevitably such persecutions have involved secret arrests, unlawful detentions, forced confessions, secret trials, and arbitrary punishments under oppressive laws. Therefore it is not surprising that the men behind the First Amendment also insisted upon the Fifth, Sixth, and Eighth Amendments, designed to protect all individuals against arbitrary punishment by definite procedural provisions guaranteeing fair public trials by juries. . . . If occasionally these safeguards worked to the advantage of an ordinary criminal, that was a price they were willing to pay for the freedom they cherished.

Yet shrewd as Professor Snowiss' observation is, it is unconvincing as an explanation. Whether or not Black's omission of the fourth amendment in Feldman was deliberate, he made amends a few years later in Lustig v. United States, and in United States v.

254. Snowiss, supra note 3, at 220.
255. Adamson v. California, 332 U.S. 46, 71 (1947) (Black, J., dissenting). Black continued to hold the position that the procedural amendments are supplemental to the first amendment, even after arriving at the view that the amendment conferred absolute rights. See Black, supra note 44, at 880. Since Black was not literalist enough to confine the term "Congress" in the first amendment to the legislature, but considered it as embracing the executive and judiciary as well, see New York Times Co. v. United States, 403 U.S. 713, 716 (1971) (Black, J., concurring), one wonders why procedural restraints to prevent judicial suppression of first amendment rights are necessary: those rights are in any event beyond the power of the judiciary to abridge.
257. 338 U.S. 74, 80 (1949) (Black, J., concurring in the judgment).
Rabinowitz\textsuperscript{258} by pointedly citing the Feldman dissent as embodying his views on search and seizure as well. In any event, if Black ever believed that the first amendment’s philosophical links to the fourth amendment were more tenuous than its links to the other amendments, he would have been gravely mistaken. The history of the fourth amendment—which Black, uncharacteristically, all but ignored—amply demonstrates the truth of the Court’s remark that “the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power. . . . The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.”\textsuperscript{259} Indeed, it passes understanding that a Justice for whom the first amendment was “truly the heart of the Bill of Rights,”\textsuperscript{260} could not bring himself to recognize the “chilling” effect that unrestricted eavesdropping, or even the fear of it, might have on the exercise of free speech.\textsuperscript{261}

Any appraisal of Justice Black’s position on the fourth amendment must take into consideration the fact that his narrowest interpretations of the rights it grants, as well as his most strident opinions, with their extraordinary range of high-velocity, corrosive language, were reserved for his last years. In the first half of the 1960’s, Black’s views underwent at least a moderate liberalization. He not only accepted the exclusionary rule\textsuperscript{262} but appeared to be moving, together with the majority of the Court, in the direction of extinguishing the Olmstead doctrine and banning warrantless eavesdropping.\textsuperscript{263} To say that the great cleavage which developed between Black and his colleagues in the post-1965 period can be accounted for by the Court’s swift expansion of the fourth amendment’s guarantees beyond their previously marked boundaries, is to view only one side of the coin. To an equal extent the explanation lies in Black’s simultaneous retreat from the promise implicit in some of his earlier votes in search and seizure cases. What motivated Black’s about-face?

It is at least plausible to suggest that Black’s dissent in \textit{Berger v. New York}\textsuperscript{264} may have reflected his deep and overriding concern about the Court’s fashioning of a broadly based concept of privacy in other

\textsuperscript{258} 339 U.S. 56, 68 (1950) (Black, J., dissenting).
\textsuperscript{260} Black, supra note 44, at 881.
\textsuperscript{262} See text accompanying notes 96-110 supra.
\textsuperscript{263} See text accompanying notes 239-41 supra.
\textsuperscript{264} 388 U.S. 41, 70 (1967) (Black, J., dissenting).
than fourth amendment situations—a development that began in 1965 and which Black deplored—rather than distress at the destruction of the Olmstead\textsuperscript{265} doctrine. This concern may also explain Black's rejection of the Boyd\textsuperscript{266} approach to the exclusionary rule, which began to manifest itself shortly after the Court embarked on the delineation of a general right to privacy. Over and over again, in his post-1965 search and seizure opinions, Black cited the Court's initial decision regarding a right to privacy, in \textit{Griswold v. Connecticut}\textsuperscript{267}—which he insisted on labelling as a fourth amendment case\textsuperscript{268}—as a prime example of reckless judicial lawmaking.\textsuperscript{269} This case may well have marked a great divide in Black's conception of the fourth amendment's protection.

One of Justice Black's objectives in the long struggle he waged to secure incorporation of the entire Bill of Rights into the fourteenth amendment, as he made clear in his \textit{Adamson}\textsuperscript{270} and \textit{Griswold}\textsuperscript{271} dissents, was to prevent the Court from resuming the role which it had assumed in the heyday of substantive due process, functioning as "a day-to-day constitutional convention."\textsuperscript{272} He therefore sought not only to expand the fourteenth amendment to include the Bill of Rights, but also, and of equal importance, to limit its application to those rights. The doctrine of selective incorporation, which triumphed in the 1960's, as one after another most of the procedural provisions of the Bill of Rights were absorbed, undiluted, into due process,\textsuperscript{273} meant that Black had won half his battle. But the very development he feared and had tried to ward off, was now coming to pass, as the Court elaborated a right to marital privacy, not linked to any particular article in the Constitution, but derived by invisible radiation from a

\textsuperscript{266} 116 U.S. at 630.
\textsuperscript{267} 381 U.S. 479 (1965).
\textsuperscript{269} See, e.g., Coolidge v. New Hampshire, 403 U.S. 443, 500 (1971) (Black, J., concurring and dissenting).
\textsuperscript{270} Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting).
\textsuperscript{272} Id. at 520.
"penumbra"\(^{274}\) surrounding various constitutional articles. The unlimited potential for judicial employment of this newly formed right, which was bitterly protested by Black who regarded the eavesdropping decision as a similar example of "clever word juggling,"\(^{275}\) has been extended to non-marital situations,\(^{276}\) and has even been held to embrace a woman's right to an abortion.\(^{277}\) Justice Bradley's dictum in the *Boyd* case that the principles of the fourth amendment "apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life,"\(^{278}\) began to bear bitter fruit for Black, as he belatedly recognized its potentialities for judicial lawmaking. It is ironic that Black's criticism of the Court for endowing itself with "unlimited power"\(^{279}\) in *Griswold*, was in turn followed by his own exercise of far greater judicial discretion, through his interpretation of the reasonable clause, in the area of warrantless searches.\(^{280}\)

Yet the point should not be overstated. At no time during his years on the Court did Black's fidelity to the guarantees in the fourth amendment match his devotion to other provisions in the Bill of Rights. His sensitivity always seemed to take a quantum leap where the first, fifth, and sixth amendments were concerned. Justice Black once told the present writer, in the course of a discussion of the fourth amendment, that he did not regard the method of catching a thief as very important, provided he got a fair trial afterwards.\(^{281}\) This attitude is surely a far cry from Justice Brandeis' famous dictum that the amendment grants "the most comprehensive of rights and the right most valued by civilized men."\(^{282}\) Why Black, unlike such Justices as Frankfurter, refused to regard the fourth amendment as "second to none in the Bill of Rights"\(^{283}\) and relegated it to a secondary position in the hierarchy of constitutional safeguards, awaits a full exploration at other hands; it is a question to which we may never have a satisfactory answer.\(^{284}\) But it seems certain that the metaphysical wasteland of his

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\(^{278}\) Boyd v. United States, 116 U.S. 616, 630 (1886) (emphasis added).


\(^{280}\) See text accompanying notes 36-41 supra.

\(^{281}\) His exact words were: "The method of getting him [the suspect] is not the supreme thing; what happens to him after that is supreme." Interview with Justice Black, Washington, D.C., December 5, 1961.


\(^{283}\) Harris v. United States, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting).

\(^{284}\) Professor David Fellman has suggested to me that a close study of Black's first period of
fourth amendment opinions cannot be simply rationalized in terms of his unique mode of constitutional interpretation. Black himself maintained that "language and history" were the "crucial factors" influencing his exposition of the Constitution, but in fourth amendment cases he seemed to treat these as mutually exclusive categories. Black's emphasis on the naked text of the amendment to the deliberate exclusion of its history and purpose obliterated the accumulated meaning concealed within its words. For all his criticism of the Court's "unlimited" exercise of power, Black, too, proved to be a shaper of constitutional policy rather than an oracle of revealed constitutional truth.

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public service (1901-11), as a police court magistrate in Birmingham, Alabama, may yield valuable clues. Of all constitutional provisions it is the fourth amendment that impinges most directly on police work. Black's search and seizure opinions repeatedly show his great sympathy for the police, who confront great problems and danger in a society as lawless as our own. Unfortunately, the splendid biography of Black's Alabama years, V. Hamilton, Hugo Black (1972), sheds little light on the matter.