Uninvited Ear: The Fourth Amendment Ban on Electronic General Searches, The Fourth Amendment

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FOURTH AMENDMENT SYMPOSIUM

THE UNINVITED EAR: THE FOURTH AMENDMENT BAN ON ELECTRONIC GENERAL SEARCHES

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I. INTRODUCTION

The thesis of this article is that the fourth amendment ban on general searches, correctly understood, is applicable to extended electronic surveillance of citizens by government officials and that such surveillance should, therefore, be restricted to rare situations involving highly unusual public need. For purposes of analysis, electronic surveillance (bugs, wiretaps, etc.) may be divided into two categories. First, there are so-called “rifle-shot” electronic interceptions, which involve surveillance of a specific conversation. Second, there are “extended” electronic interceptions, which involve continuing surveillance of conversations over a period of time. Only rifle-shot surveillance is consistent with the United States Constitution. Extended electronic surveillance is a general search condemned by the fourth amendment.

The author realizes that the thesis of this article is decidedly “against the wind” of recent developments. Many recent electronic surveillance decisions simply assume the constitutionality of extended surveillance without directly addressing the issue. But the underlying constitutional issue has not been settled, and the article is written with the hope that the approach of 1984 will cause the nation to re-evaluate recent trends and return to sound fourth amendment principles. If not the 1984 Court, perhaps some future Supreme Court will

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once again enforce the ban on electronic general searches.

The article has three major sections. The first section reviews the historical development of fourth amendment law: first, to show that a core purpose of the fourth amendment was to ban general searches and second, to establish the functional characteristics of general searches. Next, the article shows that extended electronic surveillances are paradigmatic general searches. Finally, the article focuses on the dangers of electronic surveillance, and concludes that enforcement of the fourth amendment ban on extended electronic surveillance is sound social policy.

II. HISTORICAL DISCUSSION OF GENERAL SEARCHES

A. The Fourth Amendment Ban on General Searches

One core purpose of the fourth amendment is to prohibit general searches. The United States Supreme Court has so held, consistently and unmistakably, in a long series of cases. For example, in Boyd v. United States,1 the earliest of the Supreme Court's landmark decisions on the fourth amendment, the Court reviewed the historical events that led to the adoption of the fourth amendment and concluded that a core purpose of the framers and ratifiers was to ban general searches pursuant to writs of assistance (warrants to search for smuggled goods) and general warrants (warrants to search for seditious writings).

These things [events concerning writs of assistance in the colonies and general warrants in England] ... were fresh in the memories of those who achieved our independence and established our form of government. ... [The legal rules banning such general searches] were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.2

Thirty years later, in Weeks v. United States,3 the Court returned to the theme of general searches.

[The fourth amendment] took its origin in the determina-

1. 116 U.S. 616 (1886).
2. Id. at 625-27.
3. 232 U.S. 383 (1914). This was the landmark fourth amendment decision imposing the exclusionary rule on federal courts.
tion of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people, among other things, those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under the authority of the Government. . . . Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded by any general authority to search and seize his goods and papers. 4

The Court confirmed the ban on general searches in many subsequent cases. In *Marron v. United States,* 5 for example, the Court stated, "General searches have long been deemed to violate fundamental rights. It is plain that the [fourth] Amendment forbids them." 6 In *Go-Bart Importing Co. v. United States,* 7 the Court stated, "[The second clause of the fourth amendment] emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. . . . The need of protection against them is attested alike by history and present conditions." 8 In *Harris v. United States,* 9 Justice Murphy stated that a "general exploratory search" is "a type of search which is most roundly condemned by the Constitution." 10 "[T]he Fourth Amendment," Murphy continued, "was designed in part, indeed perhaps primarily, to outlaw such general warrants . . . ." 11

The Warren Court repeatedly invoked the fourth amendment ban on general searches. Here are some characteristic passages:

[W]e think it is clear that this warrant was of a kind which it was the purpose of the Fourth Amendment to

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4. *Id.* at 390.
5. 275 U.S. 192 (1927).
6. *Id.* at 195.
8. *Id.* at 357.
10. *Id.* at 189 (Murphy, J., dissenting).
11. *Id.* at 191.
forbid—a general warrant. . . .” [T]he Fourth and Fourteenth Amendments guarantee to John Stanford that no official of the State shall ransack his home and seize his books and papers under the unbridled authority of a general warrant.18

We have examined on many occasions the history and purposes of the Amendment. It was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of the sanctity of a man’s home and the privacies of life, . . . from searches under indiscriminate, general authority.14

Opposition to general searches is a fundamental of our heritage and of the history of Anglo-Saxon legal principles. Such searches, pursuant to “writs of assistance,” were one of the matters over which the American Revolution was fought. The very purpose of the Fourth Amendment was to outlaw such searches.18

The [fourth] Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence.16

In recent years, the Burger Court has invoked the fourth amendment prohibition against general searches many times. In Andresen v. Maryland,17 for example, Justice Blackmun, for the majority, said, “General warrants, of course, are prohibited.”18 Justice Brennan, in dissent, made the same point: “General warrants are especially prohibited by the Fourth Amendment.”19 In Stone v. Powell,20 Justice White’s majority opinion stated,

The [fourth] Amendment was primarily a reaction to the evils associated with the use of the general warrant in England and the writs of assistance in the Colonies . . .

13. Id. at 486.
15. Id. at 312 (Fortas, J., concurring).
16. Chimel v. California, 395 U.S. 752, 761 (1969). A dissenting Justice stated, “This view . . . would not authorize the general search against which the Fourth Amendment was meant to guard.” Id. at 780-81 (White, J., dissenting).
18. Id. at 480.
19. Id. at 492 (Brennan, J., dissenting).
and was intended to protect the sanctity of a man's home and the privacies of life . . . from searches under unchecked general authority.\(^1\)

Recently, in *Lo-Ji Sales, Inc. v. New York*,\(^2\) Chief Justice Burger said, "This search warrant and what followed the entry on petitioner's premises are reminiscent of the general warrant or writ of assistance of the 18th century against which the Fourth Amendment was intended to protect."\(^3\)

The list of authorities is by no means exhaustive.\(^4\) Taken together, the cases clearly establish that one core purpose of the fourth amendment was to ban general searches. What are general searches? What are the functional characteristics of the searches that fall under this constitutional prohibition?

**B. Two Types of General Searches**

General searches banned by the fourth amendment fall into two major classes.\(^5\) First, there are searches which are general with regard to the places and persons to be searched. Searches for smuggled goods pursuant to writs of assistance are typical of this class. These searches will be referred to as "dragnet" searches. Second, there are searches which are general with regard to things to be searched for and/or seized and

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21. *Id.* at 482 (footnote omitted).
23. *Id.* at 325.
25. For example, in *Stanford v. Texas*, 379 U.S. 476 (1965), the Supreme Court acknowledged the two classes of general searches. After discussing writs of assistance and early general warrants which authorized dragnet searches of unspecified persons, the Court described a second class of general searches which are specific as to the individual but general as to items to be searched for and seized.

In later years warrants were sometimes more specific in content . . . and [authorized] seizure of all the papers of a named person thought to be connected with a libel . . .

It was in the context of the latter kinds of general warrants that the battle for individual liberty and privacy was finally won. *Id.* at 482-83 (footnote omitted).
thus involve indiscriminate prying into a person's private effects. Searches for seditious writings pursuant to general warrants are typical of this class. These searches will be referred to as "general rummaging." A brief examination of each of these classes is appropriate.

1. **Dragnet searches**

One of the primary purposes of the framers and ratifiers of the fourth amendment was to ban dragnet searches, *i.e.*, searches undertaken pursuant to warrants which do not specifically identify the persons and/or places to be searched. Opposition to general searches of this type developed primarily in response to the hated colonial writs of assistance. These writs authorized customs officials to enter and search all premises at any time until six months after the death of the present king in order to locate goods smuggled into the colonies without payment of import duties. Opposition to dragnet searches also derived, in part, from dislike of English general warrants authorizing searches of the dwellings of unspecified persons suspected of publishing seditious writings.

The characteristic that makes dragnet searches "general" is the claim of authority to search unspecified persons and/or places. The warrant does not particularly describe, and thus limit, the persons and places to be searched. Instead, it allows the executing officers to search randomly among the general population. The courts have long recognized that dragnet searches are prohibited by the fourth amendment. The government's constitutional authority to search is normally restricted to situations where probable cause exists to believe that the search of specific individuals or locations will produce evidence of criminal activity. The search must be limited, not general, with regard to persons and places to be

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26. See, e.g., N. Lasson *supra* note 24, at 51-78.
28. See, e.g., United States v. United States Dist. Court, 407 U.S. 297, 327 (1972) (Douglas, J., concurring). "[T]he recurring desire of reigning officials to employ dragnet techniques to intimidate their critics lies at the core of [the fourth amendment's] prohibition. For it was such excesses that led to the ratification of the Fourth Amendment." *Id.* See also Stanford v. Texas, 379 U.S. 476, 482 (1965). "[T]he Fourth Amendment was most immediately the product of contemporary revulsion against a regime of writs of assistance . . . ." *Id.* N. Lasson, *supra* note 24, at 51-78.
searched.

2. General rummaging

The fourth amendment was also intended to ban a second class of general searches, namely general rummaging. Opposition to general searches of this type developed primarily in response to the efforts of the English government during the 1760's to locate and seize seditious writings. The opposition came to a focus in the celebrated English case, Entick v. Car- rington,29 which held that general paper searches were contrary to the common law. The framers of the Constitution incorporated the doctrines of this case into the fourth amendment, and the Supreme Court has invoked them in many subsequent cases.30

On numerous occasions, the Court has explicitly stated that the constitutional "evil" of this second category of general searches is the rummaging. In Coolidge v. New Hampshire,31 for example, Justice Stewart said, "[T]he specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of the intrusion per se, but of a general, exploratory rummaging in a person's belongings."32 In Andre- sen v. Maryland,33 precisely the same point was made by both Justice Blackmun, speaking for the majority, and Justice Brennan, dissenting. Blackmun stated, "General warrants, of course, are prohibited. . . . '[T]he problem is . . . a general, exploratory rummaging in a person's belongings.' "34 Brennan agreed that, "General warrants are especially prohibited by the Fourth Amendment. The problem to be avoided is '. . . a general, exploratory rummaging in a person's belongings.' "35

The characteristic that makes general rummaging a "gener-
eral” search is the unrestricted examination of the contents of an individual’s papers and/or effects. Some of the seditious libel warrants, for example, required the seizure of all the books and papers of named individuals. Such warrants were general in that they did not specifically limit the seizure to items connected with criminal conduct. Obviously, in order to execute such a warrant, the officer must undertake an unrestricted search of the individual’s most private domain—his desks, cabinets, closets, files, chests of drawers, etc.—in order to locate and seize all documents.

However, general rummaging is a functional necessity, even when the warrant authorizes only the seizure of documents specifically found to be seditious or otherwise criminal. In such cases, the effort to locate the documents is no less pervasive, and the officer must examine all documents in order to determine whether they contain criminal writings. The vice is the unrestricted examination of the individual’s most private possessions. This is the characteristic that makes the search for seditious writings “general,” “unreasonable,” and hence unconstitutional.

The thesis of this article is that extended electronic surveillance has characteristics comparable to both dragnet searches and general rummaging and thus amounts to an unconstitutional general search on both counts.

III. EXTENDED ELECTRONIC SURVEILLANCE AS A GENERAL SEARCH

This section will demonstrate that extended electronic surveillance inherently involves general searches banned by the fourth amendment. Such surveillance normally involves dragnet searches of communications by suspects and nonsuspects alike. Moreover, it characteristically includes general auditory rummaging through private oral communications.

36. The Supreme Court has held that exploratory rummaging through personal papers or effects constitutes an unconstitutional general search. In this article, we focus on rummaging in an individual’s papers for two reasons. First, the ban on general rummaging originated with the Entick paper search, and there can be no doubt that general paper searches remain within the core area covered by the ban. Second, the general paper search is a form of rummaging that is directly analogous to the rummaging of oral communications involved in extended electronic surveillance.

37. The Supreme Court has specifically held that electronic surveillance is, in some circumstances, an unconstitutional general search. Berger v. New York, 388 U.S. 41 (1967). See infra notes 82-91 and accompanying text.
Indeed, extended electronic surveillance is an aggravated general search which is far more intrusive than traditional general searches. It is therefore contrary to the fourth amendment ban on general searches and should be allowed, if at all, in only the most critical and compelling cases.

One must recognize, at the outset, that electronic interceptions of oral communications are "searches" within the meaning of the fourth amendment. The leading case on point is Katz v. United States. Police, acting without a warrant, placed a bug on the top of a telephone booth. Katz went into the booth and placed calls. The bug was activated and Katz's oral statements were transmitted to auditors. The Court held that the interception was a search and seizure within the meaning of the fourth amendment. Absent exigent circumstances, the fourth amendment requires a search warrant. Therefore, the bugging of Katz's conversations was unconstitutional.

Since electronic interception of oral communications is a search and seizure within the meaning of the fourth amendment, it obviously is subject to fourth amendment rules concerning general searches. If extended electronic surveillance is a general search or seizure, it should be banned as unconstitutional, except in the most extraordinary circumstances.

A. Electronic Dragnets

In nearly all cases, extended electronic surveillance unavoidably involves dragnet interceptions of oral communications, sweeping up the private utterances of the innocent as well as the guilty. This is so obvious that it is difficult to discuss without lapsing into truisms. Obviously a wiretap transmits the communications of everyone using the line—trade secrets of business acquaintances, confidential communications to and from psychiatrists, financial and personal secrets of friends, communications subject to the attorney-client privilege—everything. Obviously a bug transmits oral communications of everyone within its range, in particu-
lar, the intimate, private utterances that are not spoken even over the telephone—personal confessions, the privacies of love and sex, words spoken in anger and pain, words spoken when one is asleep, words spoken to oneself when one is alone—everything, even when spoken in a whisper.40

Perhaps the best way to illustrate the inherent dragnet qualities of extended electronic surveillance is to describe a fact situation involved in a recent case.41 Pursuant to a federal warrant, wiretaps were installed on two telephones in order to listen to narcotics-related conversations of “Bynum and others yet unknown.” The agents recorded all conversations during a thirty-four day period, including seventy-one calls made by Bynum’s child’s babysitter, Donna, who was totally innocent of any knowledge of . . . [the] criminal enterprise . . . . The other party in each of these conversations . . . was not a member of the narcotics conspiracy, and the conversations, which were sometimes the subject of jokes by the monitoring agents, were often of a highly personal and intimate nature.42

Similarly, the agents listened to forty-seven innocent conversations between one of the conspirators and “personal friends who were not members of the conspiracy” and “a substantial number of calls involving attorneys.”43 Justice Brennan noted, “[T]he record fairly bristles with apparent instances of indiscriminate and unwarranted invasions of privacy of nontargets of the surveillance.”44

The “dragnet” quality of wiretapping was pointed out as early as 1928 in Brandeis’ classic Olmstead dissent, where he stated:

40. It is no answer that the government auditor may, in his or her discretion, choose not to listen. Because no one can prove whether the oral communication was overheard or not, the matter is left solely to the discretion of the auditor. Such discretion in the hands of petty government officials has long been recognized as one strong indicator that an illegal general search is present. James Otis, in his renowned 1761 oration in Boston, said, “It is a power that places the liberty of every man in the hands of every petty officer.” 2 LEGAL PAPERS OF JOHN ADAMS 141-42 (Wroth & Zobel ed. 1965). This statement has been cited with approval on innumerable occasions, and it has become axiomatic that the protection of fourth amendment rights may not be left to the discretion of executing officials.


42. 423 U.S. at 954-55 (Brennan J., dissenting).

43. Id. at 955.

44. Id. at 953.
Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded . . . . Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping.45

Much later, in Berger v. New York,46 the leading case concerning the constitutional limits on electronic surveillance, Justice Clark pointed out that extended electronic surveillance inherently involves dragnet searches. Clark stated that "[d]uring such a long [two months] and continuous (twenty-four hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation."47 Justice Douglas, in his separate concurrence, underlined Justice Clark's point: "The traditional wiretap or electronic eavesdropping device constitutes a dragnet, sweeping in all conversations within its scope—without regard to the participants or the nature of the conversations. It intrudes upon the privacy of those not even suspected of crime and intercepts the most intimate of conversations."48

Justice Douglas described the dragnet characteristics of extended electronic surveillance in several other opinions filed during the final decade of his long career. Dissenting in Osborn v. United States,49 he wrote:

The invasion of privacy . . . extends . . . to anyone who happens to talk on the telephone with the suspect or who happens to come within the range of the electronic device. Their words are also intercepted; their privacy is also shattered. Such devices lay down a dragnet which indiscriminately sweeps in all conversations within its scope, without regard to the nature of the conversations, or the participants. A warrant authorizing such devices is no different from the general warrants the Fourth Amend-

46. 388 U.S. 41 (1967).
47. Id. at 59.
48. Id. at 65 (Douglas, J., concurring) (emphasis added).
ment was intended to prohibit.\textsuperscript{50}

Again, dissenting in \textit{United States v. Kahn},\textsuperscript{51} Douglas wrote:

\begin{quote}
To construe the warrant as allowing a search of the conversations of anyone putting in calls on the Kahn telephone amounts, as the Court of Appeals said, "to a virtual general warrant. . . ."
\end{quote}

\ldots

Under today's decision a wiretap apparently need specify but one name and a \textit{national dragnet} becomes operative. Members of the family of the suspect, visitors in his home, doctors, ministers, merchants, teachers, attorneys, and everyone having any possible connection with the Kahn household are caught up in this web.\textsuperscript{52}

In short, extended electronic surveillance is indubitably a dragnet search. It should be restricted on this ground alone. It is a general search and, as such, should be banned by the fourth amendment except in the most unusual situations. But this is not all. Extended electronic surveillance is also a quintessential general search of the general rummaging variety, an ongoing monitoring of the spoken words and thoughts of its targets.

\textbf{B. General Rummaging of Oral Communications}

Extended electronic surveillance is a general search because it involves general rummaging of oral communications. Earlier portions of this article have demonstrated that one traditional category of general searches involves paper-searches and that the constitutional "evil" in such searches is the rummaging, the unrestricted examination of one's private written expressions.\textsuperscript{53} Extended electronic surveillance is directly analogous to general paper searches. It involves unrestricted examination of an even more private and intimate category of expressions than personal writings, namely spontaneous oral utterances.\textsuperscript{54}

\begin{footnotes}
\item[50.] \textit{Id.} at 353 (Douglas, J., dissenting) (emphasis added).
\item[51.] 415 U.S. 143 (1974).
\item[52.] \textit{Id.} at 160-63 (Douglas, J., dissenting) (emphasis added) (footnote omitted).
\item[53.] See supra note 29-36 and accompanying text.
\item[54.] Indeed, extended electronic surveillance would appear to involve a general \textit{seizure}, since, in most cases, all or nearly all communications are recorded. Since some Supreme Court Justices have argued that the recording of a conversation is not a seizure, primary reliance will not be placed on this theory.
\end{footnotes}
The fact that extended electronic surveillance unavoidably involves general rummaging through oral communications hardly requires extensive proof. Even if government officials have probable cause to suspect that oral communications about crime will occur, monitoring and recording of all or nearly all conversations is necessary, in most cases, in order to locate and preserve the ones which contain admissible evidence. This is particularly true because, unlike physical evidence, oral communications do not exist at the time the warrant is issued. The government must wait and listen until they occur. Moreover, unless communications are monitored and recorded when they occur, they are forever lost. To be effective, the uninvited ear must be always alert, and some government official must listen to the content of each conversation. This is general rummaging in its most intrusive form, a random monitoring of one's most intimate expressions.

This is a key point in the analysis and it merits further consideration. The characteristic shared by general rummaging of papers and general rummaging of oral communications by electronic surveillance is that government officials examine the content of one's private expressions. In the general paper search, the official must read an individual's private books and papers in an effort to locate writings containing evidence that someone has committed a crime. The content of the individual's private written expressions is examined. In extended electronic surveillance, the official must listen to an individual's conversations in an effort to locate statements containing evidence that someone has committed a crime. The content of the individual's private oral expressions is examined. In both cases, the government intrudes into and exposes the substance of one's most private thoughts and expressions.

The fact that the fourth amendment bans government surveillance of the contents of one's private expressions has been discussed on many occasions. Consider, for example, the following succinct explanation by Chief Judge Friendly of the Second Circuit: “[T]he vice lies in the unlimited search. The

55. The recognition that paper searches, in most cases, require government officials to read the suspect’s writings goes all the way back to Entick v. Carrington, 95 Eng. Rep. 807, 808 (K.B. 1765), where defendants admitted that they “did necessarily read over, pry into, and examine the said private papers, books, &c. of the plaintiff...”
reason why we shrink from allowing a personal diary to be the object of a search is that the entire diary must be read to discover whether there are incriminating entries . . . .”

Precisely the same characteristic is present in bugging and wiretapping. One must listen to the entire content of the oral communications in order to discover anything incriminating.

Justice Stewart has also provided a clear explanation of this point in Zurcher v. Stanford Daily. The warrant in the Zurcher case authorized the search of a newspaper office and the seizure of photographs of demonstrators who had attacked police officers. In response to Justice White’s contention that a general search ("rummage at large") could be avoided by a specific description of the property to be seized, Justice Stewart pointed out that "rummaging" is necessary to locate the specific items to be seized. The police, pursuant to the Zurcher warrant, were forced to view all the documents to locate those described in the warrant. Such rummaging is similarly unavoidable in extended electronic surveillance.

The rummaging through innocent private conversations which unavoidably accompanies extended electronic surveillance was graphically illustrated in a recent Supreme Court case, Scott v. United States. Eighteen U.S.C. § 2518(5) requires that electronic surveillance "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception . . . ." The question in

56. United States v. Bennett, 409 F.2d 888, 897 (2d Cir. 1969) (emphasis added); cf. ISRAEL & LAFARGE, CRIMINAL PROCEDURE 96 (1974) ("It may sometimes be unreasonable to permit search for and seizure of certain items, e.g., a diary, in that even if they are specifically described the result will be a rummaging through and official scrutiny of private writing unconnected with crime.").


58. A search warrant allows police officers to ransack the files of a newspaper, reading each and every document until they have found the one named in the warrant . . . . The Court says that "if the requirements of specificity and reasonableness are properly applied, policed and observed" there will be no opportunity for the police to "rummage at large in newspaper files." But in order to find a particular document, no matter how specifically it is identified in the warrant, the police will have to search every place where it might be—including, presumably, every file in the office—and to examine each document they find to see if it is the correct one. I thus fail to see how the Fourth Amendment would provide an effective limit to these searches.

Id. at 573 (Stewart, J., dissenting) (emphasis added).

Scott was whether the actual interceptions of nonpertinent calls were “reasonable” in view of this statutory duty to minimize. In many situations, the Court concluded, such interceptions are reasonable.

Many of the nonpertinent calls may have been very short. Others may have been one-time only calls. Still others may have been ambiguous in nature or apparently involved guarded or coded language. In all these circumstances agents can hardly be expected to know that calls are not pertinent prior to their termination.  

The Court continued, “During the early stages of surveillance the agents may be forced to intercept all calls to establish categories of nonpertinent calls which will not be intercepted thereafter.” Moreover, where clear categories of nonpertinent calls do not appear, “it may not be unreasonable to intercept almost every short conversation because the determination of relevancy cannot be made before the call is completed.” On the basis of this analysis, the Court concluded that it was reasonable for the agents to intercept “all the phone conversations over a particular phone for a period of one month.”

The indiscriminate rummaging in Scott involved total electronic surveillance of all oral communications, guilty and innocent alike, and the Court’s analysis shows why such exploratory rummaging is a functional necessity inherent in electronic surveillance. Extended electronic surveillance is a classic general search of the second (“general rummaging”) type and thus is subject to the fourth amendment ban on general searches.

In short, extended electronic surveillance is an unconstitutional general search on two counts. It is a dragnet search, catching the oral communications of all persons within reach. It is general rummaging, exposing one’s most private speech to government review. But the case does not stop there. Extended electronic surveillance is an aggravated general search

60. Id. at 140 (emphasis added).
61. Id. at 141 (emphasis added).
62. Id. (emphasis added); cf. Bynum v. United States, 423 U.S. 952, 954 (1975) (“[A]gents must inevitably listen briefly to all calls in order to determine the parties to and the nature of the conversation.”).
63. 436 U.S. at 130-31 (emphasis added). Note that sixty percent of the calls were found to be nonpertinent.
having intrusive features far exceeding those associated with traditional general searches.

C. Aggravating Features of Electronic General Searches

First, electronic surveillance invades an even more intimate sphere of privacy than general paper searches, namely the spontaneous oral utterances which occur in the course of one’s personal and family life. It does not take much imagination to picture the indignity that may result when the most secret communications of one’s private life, communications so secret that they are not even reduced to writing, are broadcast at the police station.

Consider, for example, the facts of Irvine v. California. Police, seeking evidence of gambling activities, broke into the Irvines’ home on three occasions and planted a bug in the hall, the bedroom where the Irvines slept, and the bedroom closet. They then listened to the Irvines’ conversations for more than a month. The Court was appalled.

Science has perfected amplifying and recording devices to become frightening instruments of surveillance and invasion of privacy, whether by the policeman, the blackmailer, or the busybody. That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment . . . .

In separate opinions, Justice Clark called the police conduct “incredible” and Justice Frankfurter called it “repulsive.”

Second, government electronic surveillance has a strong chilling effect on freedom of expression. In fact, the rule against general searches developed largely in response to police activities which threatened this freedom. Entick v. Carn-
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rington, for example, involved efforts by officers of the British king to suppress criticism by political opponents. Similarly, Stanford v. Texas, involved efforts by Texas police to suppress pro-communist literature. The Court repeatedly has recognized its constitutional duty to prevent the government from using general searches to suppress free speech. Justice Brennan has vividly pointed out the chilling effect of electronic surveillance on freedom of expression.

[W]e must bear in mind that historically the search and seizure power was used to suppress freedom of speech . . . . “Under Hitler, when it became known that the secret police planted dictaphones in houses, members of families often gathered in bathrooms to conduct whispered discussions of intimate affairs, hoping thus to escape the reach of the sending apparatus.” . . . Electronic surveillance strikes deeper than at the ancient feeling that a man’s home is his castle; it strikes at freedom of communication, a postulate of our kind of society. . . . 

Freedom of speech is undermined where people fear to speak unconstrainedly in what they suppose to be the privacy of home and office. . . . If electronic surveillance by government becomes sufficiently widespread, and there is little in prospect for checking it, the hazard that as a people we may become hagridden and furtive is not fantasy.

Third, electronic surveillance—especially bugging—has a new feature that makes it much more intrusive than writs of assistance and seditious libel warrants, namely duration. Even the old general warrants contemplated an intrusion limited to the time needed to conduct a physical search. The government intruded for a brief period, then left. The citizen’s privacy was once again intact. But, a bug never sleeps. The uninvited ear stays on and listens to everything that is said for as long as it remains active. This is much more intrusive than a normal physical search.

68. 95 Eng. Rep. 807 (K.B. 1765).
71. We have here, however, a more powerful and offensive control over the Irviners’ life than a single, limited physical trespass. Certainly the conduct of the police here went far beyond a bare search and seizure. The
The problem is compounded by another aggravating characteristic of electronic searches, namely their secrecy. Traditional searches and seizures put the citizen on notice that his privacy is being invaded. The individual is aware that the police are present, and he can guard against the exposure of his secret thoughts. Electronic surveillance, on the contrary, must be secret to be effective. The individual has no way of knowing that an uninvited ear is listening. Electronic surveillance leaves the individual with the delusion that his privacy is intact and gives him no opportunity to screen out nonpertinent private communications that the police have no business hearing. In total innocence, the individual is allowed to pour out his most secret, intimate thoughts.

The combination of duration and secrecy leaves the individual without a shred of privacy. Twenty-four hours a day for weeks or months, all spontaneous oral utterances made in the privacy of one's home and office are exposed. An invisible government spy is, in effect, assigned to live in one's home and listen to everything. The most intimate secrets are exposed to public view.

Electronic surveillance has traits in common with another practice condemned by the ratifiers of the Bill of Rights, namely quartering of soldiers in colonists' houses. The live-in soldier or government official destroys the privacy of the home. One may no longer speak freely. Understandably, therefore, the third amendment banned such quartering. The bug, however, is far more insidious than a person quartered in the home. One does not even know it is there. There is no way of guarding one's utterances against an unknown, invisible spy. Here is how Justice Douglas described this phenomenon:

> If a statute were to authorize placing a policeman in every home or office where it was shown that there was probable cause to believe that evidence of crime would be obtained, there is little doubt that it would be struck down as a bald invasion of privacy, far worse than the general warrants prohibited by the Fourth Amendment. I can see

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72. U.S. Const. amend. III.
no difference between such a statute and one authorizing
electronic surveillance, which, in effect, places an invisible
policeman in the home. If anything, the latter is more of-
fensive because the homeowner is completely unaware of
the invasion of privacy.\footnote{73}

For all these reasons, extended electronic surveillance
should be unconstitutional in all but the most exceptional cir-
cumstances. It is a general search three times over. It is a
dragnet. It involves general rummaging of private thoughts. It
is far more intrusive and repressive than earlier kinds of gen-
eral searches. It is, in short, abhorrent to a nation that wishes
to preserve the privacy, liberty, and dignity of its citizens.

D. The Constitutionality of Rifle-Shot Electronic
Surveillance

Rifle-shot surveillance, in contrast, does not involve a
general search and is therefore constitutionally permissible
when conducted pursuant to a warrant. Rifle-shot surveillance
intercepts a specific conversation; it is not a dragnet rummag-
ing of all oral communications over a period of time. Where
the police have probable cause to believe that a specific future
oral communication will involve criminal activity—\textit{e.g.}, a
bribe offer, transmission of wagers, communication of classi-
fied information to a foreign government, planning of a bank
robbery, ordering of narcotics—it makes sense to allow the
limited interception of that particular communication. In such
a case, there is no dragnet interception of conversations of in-
ocent persons and no general exploratory rummaging among
private utterances. Nor are the aggravating characteristics of
extended surveillance present. The chilling effect on private,
nonpertinent conversations is minimized. No one is subjected
to the presence of an invisible government spy in the home or
office for extended periods.

In such a situation, a warrant for electronic interception
can provide protections comparable to those demanded of
traditional warrants for searches and seizures of physical ob-
jects. The thing to be seized is particularly described. No dis-
cretion is left to the executing officer. The invasion of privacy
is brief. The government gets in and out quickly, leaving the

individual's privacy intact. Searches of this nature are consistent with the fourth amendment.


Past United States Supreme Court cases confirm the analysis presented above. Traditionally, electronic interception of oral communications was not subject to the fourth amendment. In the 1960's, the Court reversed itself and held that electronic surveillance is a "search and seizure" within the meaning of the fourth amendment. Thus, the Court had to decide which electronic surveillance the fourth amendment allows, and which it prohibits. The guidelines were worked out in a series of cases decided in the mid-sixties.

The stage for the discussion was set in Lopez v. United States, where Justice Brennan's dissent articulated the fears of law enforcement officials over the application of the fourth amendment to wiretaps. Police officials believed wiretaps would not be permissible if subjected to fourth amendment analysis since they would not be construed as reasonable searches. Brennan reiterated this view by stating, "For one thing, electronic surveillance is almost inherently indiscriminate, so that compliance with the requirement of particularity in the Fourth Amendment would be difficult." Brennan, however, was not convinced that all electronic surveillance was unconstitutional. He suggested, without deciding, that in some limited cases electronic surveillance might be consistent with the fourth amendment. He continued:

If in fact no warrant could be devised for electronic searches, that would be a compelling reason for forbidding them altogether. The requirements of the Fourth Amendment . . . are the bedrock rules without which there would be no effective protection of the right to per-

74. The leading case, Olmstead v. United States, 277 U.S. 438, 465-66 (1928), held that wiretapping does not involve a search or seizure because (1) there is no trespass into a constitutionally protected area and (2) there is no examination or seizure of a physical object.
77. Id. at 463 (Brennan, J., dissenting).
Brennan concluded his discussion by warning, once more: "This is not to say that a warrant that will pass muster can actually be devised."79

Next, in Osborn v. United States,80 the Court explicitly considered the constitutionality of electronic surveillance pursuant to a warrant for the first time. Based on information that Jimmy Hoffa's attorney was trying to bribe a prospective juror, federal law enforcement officers obtained a warrant authorizing a secret agent to record a particular conversation with the attorney. When the equipment malfunctioned, a second warrant was obtained to record another particular conversation. The tape was admitted at trial, and the attorney was convicted of attempting to bribe a juror. In affirming the conviction, the Court stressed the narrowly limited nature of the judicial authorization. "The issue here," the Court emphasized, "is . . . the permissibility of using such a device under the most precise and discriminate circumstances . . . "81 Such rifle-shot electronic surveillance, the Court held, is permissible. There is no suggestion in the opinion, that extended surveillance can be squared with the fourth amendment. Indeed, the Court's emphasis on the restrictions involved in the Osborn wiretap strongly implied that extended surveillance would not be allowed.

The next year, in Berger v. New York,82 the Court again indicated that the restriction of the Osborn warrant to rifle-shot surveillance was critical to the warrant's constitutionality. The Court stressed that Osborn allowed surveillance only under "the most precise and discriminate circumstances."83 Moreover, the Court indicated that it was precisely those restrictions which made the warrant acceptable under the fourth amendment. "Through these 'precise and discriminate' procedures the order authorizing the use of the electronic device afforded similar protections to those that are

78. Id. at 464 (emphasis added).
79. Id. at 465.
81. Id. at 329 (emphasis added).
82. 388 U.S. 41 (1967).
83. Id. at 56 (quoting Osborn, 385 U.S. at 329).
present in the use of conventional warrants authorizing the seizure of tangible evidence.”84 The implication is clear: without these restrictions, the authorization would not provide protection comparable to conventional warrants and would therefore violate the fourth amendment.

The Court’s intent to limit Osborn to rifle-shot surveillance was evidenced in the following important language: “[T]he order authorized one limited intrusion rather than a series or a continuous surveillance. . . . Moreover, the order was executed . . . with dispatch, not over a prolonged and extended period.”85 Thus, when the Supreme Court first considered the constitutional limits of electronic surveillance pursuant to warrant, it concluded that only rifle-shot surveillance was consistent with the fourth amendment.

Berger v. New York, the leading case in which the Supreme Court explained the fourth amendment restrictions on electronic surveillance, merits further attention. The issue was the constitutionality of a New York statute authorizing electronic surveillance pursuant to judicial warrants. The Court held the statute unconstitutional and, in the course of its opinion, strongly suggested that extended electronic surveillance is per se unconstitutional:

New York's broadside authorization rather than being “carefully circumscribed” so as to prevent unauthorized invasions of privacy actually permits general searches by electronic devices, the truly offensive character of which was first condemned in Entick v. Carrington . . . . We believe the statute here is equally offensive . . . . Authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. . . . During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation.86

In short, although the Court mentioned other problems with the New York statute as well, it apparently felt that extended electronic surveillance is itself a general search and seizure

84. Id. at 57 (emphasis added).
85. Id. (emphasis added).
86. Id. at 58-59 (emphasis added).
prohibited by the fourth amendment.

The Court was fully aware that it was placing substantial constitutional limits on electronic surveillance. The majority acknowledged and accepted this reality: “It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment’s requirements. If that be true then the ‘fruits’ of eavesdropping devices are barred under the Amendment.”\(^87\) However, rifle-shot surveillance is permitted. The Court continued:

[T]his Court has in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices. . . . In [Osborn v. United States] . . . the eavesdropping device was permitted where the “commission of a specific offense” was charged, its use was “under the most precise and discriminate circumstances”, and the effective administration of justice in a federal court was at stake.\(^88\)

But the New York statute was different. It authorized general searches and therefore violated the fourth amendment: “Our concern with the statute here is whether its language permits a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment. As it is written, we believe that it does.”\(^89\)

The intent of the Berger majority to impose far-reaching constitutional restrictions on electronic surveillance was pointed out by Justice Black’s dissenting opinion:

[I]t seems obvious to me that . . . [the majority’s] holding, by creating obstacles that cannot be overcome, makes it completely impossible for the State or the Federal Government ever to have a valid eavesdropping statute. . . .

. . .[T]he Court’s purpose is clear: it is determined to ban all eavesdropping . . . [T]he Court means to inform the Nation there shall be no eavesdropping—period.

. . .[W]hat the Court does today is . . . the erecting out of it [the fourth amendment] a constitutional obstacle

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\(^87\) Id. at 63.

\(^88\) Id. Justice Douglas’ concurring opinion stressed that the Osborn case allowed only selective wiretaps that do not involve “rummaging around, collecting everything in the particular time and space zone.” Id. at 64.

\(^89\) Id. at 64.
against electronic eavesdropping that makes it impossible
for lawmakers to overcome.°°

Justice White, also dissenting, wrote:

The Court appears intent upon creating . . . new consti-
tutionally mandated warrant procedures carefully tailored
to make eavesdrop warrants unobtainable.

. . .

. . . Today's majority does not, in so many words,
hold that all wiretapping and eavesdropping are constitu-
tionally impermissible. But by transparent indirection it
achieves practically the same result by striking down the
New York statute and imposing a series of requirements
for legalized electronic surveillance that will be almost
impossible to satisfy.°°

The principle that warrants for electronic surveillance
must be limited to rifle-shot interceptions was strongly rein-
forced in the landmark case, Katz v. United States,°° also de-
cided in 1967. As was previously discussed, K FBI agents, act-
ing without a warrant, installed a bug on top of a public
telephone booth. Katz's calls were recorded and resulting evi-
dence was used to convict him of sending wagers by tele-
phone. The Supreme Court reversed. The Court held the in-
terception was an unconstitutional search and seizure because
there was no warrant.

Discussing the warrant requirement, the Court stated:

[T]he surveillance was limited, both in scope and in du-
ration, to the specific purpose of establishing the contents
of the petitioner's unlawful telephonic communications.
The agents confined their surveillance to the brief peri-
ods during which he [Katz] used the telephone booth,
and they took great care to overhear only the conver-
sations of the petitioner himself.

Accepting this account of the Government's actions
as accurate, it is clear that this surveillance was so nar-
rowly circumscribed that a duly authorized magistrate,
properly notified of the need for such investigation, spe-

90. Id. at 71, 86, 88 (Black, J., dissenting). Justice Black was overstating the
matter since the majority explicitly reaffirmed the constitutionality of rifle-shot
surveillance.
91. Id. at 111, 113 (White, J., dissenting).
93. See supra note 38 and accompanying text.
This insistent repetition of the theme was no accident. The purpose was to reemphasize the strictures on extended electronic surveillance laid down in Berger.

The message of Lopez, Osborn, Berger, and Katz is unmistakable. Electronic surveillance by government agents is a search and seizure. It is subject to the fourth amendment. It is permissible only when conducted pursuant to a warrant providing “similar protections to those of . . . conventional warrants.” Rifle-shot surveillance of specific conversations is constitutionally permissible. On the other hand, extended electronic surveillance is a general search, and therefore, banned by the fourth amendment.

94. 389 U.S. at 354 (emphasis added) (footnote omitted).
95. Id. at 354-56 (emphasis added) (footnote omitted).
96. It bears repeating that constitutional bans are rarely absolute. Thus, extended electronic surveillance may be reasonable in highly unusual circumstances involving compelling public need. Like prior restraints on expression, however, such general searches should be allowed only in rare and extraordinary circumstances.
Of course, subsequent Supreme Court cases provide little support for the constitutional principles established in *Lopez, Osborn, Berger, and Katz*. In the year following *Berger* and *Katz*, the same year as Richard M. Nixon's successful “law and order” presidential campaign, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968. That Act provides statutory authorization for extended electronic surveillance. Within the next four years, Nixon appointed four "law and order conservatives" to the Court. Relevant Supreme Court decisions since 1968 have merely interpreted the Crime Control Act. These decisions, by and large, have eviscerated even the limited protections provided by the Act, opened the door to indiscriminate electronic surveillance and suggested that the Court is not at all inclined to enforce the fourth amendment ban on general electronic searches. Still, it must be recognized that the constitutionality of the Act has not been decided, and remains an open question.

A core purpose of the fourth amendment is to prohibit general searches. Dragnet searches and general rummaging through a person's papers are general searches and thus prohibited. Similarly, extended electronic surveillance should be prohibited because it involves a dragnet search and general rummaging through spontaneous oral statements. Indeed, secret, extended electronic surveillance is an aggravated general search. Therefore, it normally is banned by the fourth amendment. In fact, the United States Supreme Court held such surveillance banned by the fourth amendment when it first confronted the issue in the 1960's.


IV. WHY THE FOURTH AMENDMENT BAN ON EXTENDED ELECTRONIC SURVEILLANCE SHOULD BE ENFORCED

Numerous Supreme Court Justices have warned about the dangers of electronic surveillance. At times the warnings have come from liberal dissenters such as Brandeis, Warren, Brennan, and Douglas. At other times, the warnings have come from the majority or from conservative spokesmen such as Clark, Harlan, and Powell. In the next few pages, a few of the more notable passages will be reviewed. They add up to an urgent notice of potential danger to privacy, liberty, and political democracy.99

Justice Brennan, the senior member of the present Court, has argued the case against extended electronic surveillance on many occasions. In a major 1963 opinion, for example, he said:

[T]he risk [involved in electronic surveillance] . . . is of a different order. It is the risk that third parties . . . who cannot be shut out of a conversation as conventional eavesdroppers can be, merely by a lowering of voices, or withdrawing to a private place—may give independent evidence of any conversation. There is only one way to guard against such a risk, and that is to keep one’s mouth shut on all occasions.

. . .

. . . I believe that there is a grave danger of chilling all private, free, and unconstrained communication. . . . In a free society, people ought not to have to watch their every word so carefully.

. . . [A]s soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy. . . .

99. Even before extended electronic surveillance had emerged, the idea that the fourth amendment throws a shield about the citizen’s private expressions had been invoked by Supreme Court Justices. Stephen J. Field, for example, a tower of the Court’s conservative wing from the 1860’s to the 1890’s, wrote:

Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value.

_In re Pacific Ry. Comm’n_, 32 F. 241, 250 (1887).
Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscernible, more truly obnoxious to a free society.¹⁰⁰

In Berger v. New York¹⁰¹ the Court, speaking through a more conservative spokesman, again stressed the dangers of electronic surveillance. In his majority opinion, Justice Clark said: "The need for particularity . . . is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope . . . . Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices."¹⁰² These are strong words, and note that Clark was a former United States Attorney General who had ordered increased electronic surveillance by federal investigators in 1947 when he was in charge of the Justice Department.¹⁰³ Clark’s concern about electronic surveillance was based on first-hand knowledge and is entitled to great weight.¹⁰⁴

A warning of the dangers of electronic surveillance is even more persuasive when it comes from the Court’s conservative wing. Thus, the following statement by Justice Harlan, the conservative conscience of the Warren Court, is particularly worth noting:

The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between

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¹⁰⁰. Lopez v. United States, 373 U.S. 427, 450-52, 465-66 (1963) (Brennan, J., dissenting) (emphasis added). In a separate opinion, Chief Justice Warren said, “I also share the opinion of Mr. Justice Brennan that the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual . . . .” Id. at 441. Warren was well aware of the danger from first-hand experience. When he took over as Governor of California in 1947, he found that his predecessor had bugged the Governor’s offices in Sacramento in a manner comparable to Richard M. Nixon’s White House bugging system. “I had always had an abhorrence of such systems of surveillance,” Warren wrote in describing the incident. E. Warren, The Memoirs of Earl Warren 169 (1977).


¹⁰². Id. at 56, 63 (emphasis added).


¹⁰⁴. Justice Clark’s warning was reinforced by Justice Douglas in his concurring opinion. Electronic surveillance, Douglas stated, “is the greatest of all invasions of privacy. It places a government agent in the bedroom, in the business conference, in the social hour, in the lawyer’s office—everywhere and anywhere a ‘bug’ can be placed.” 388 U.S. at 64-65 (emphasis added).
citizens of a free society. . . .

Authority is hardly required to support the proposition that words would be measured a great deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life. 105

The warning against electronic surveillance has also been raised by Nixon appointees. Consider, for example, the following statement by Justice Powell:

But a recognition of these elementary truths does not make the employment by Government of electronic surveillance a welcome development—even when employed with restraint and under judicial supervision. There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens. . . . The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society. 106

In the end, however, the strongest arguments against extended electronic surveillance were made by Justice Douglas, a member of the Court's liberal wing and one of the greatest civil libertarians of modern America. A complete catalogue of pertinent statements would be beyond the scope of this article. Here are only a few of the most noteworthy examples:

We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government.

. . . .{T}here begins to emerge a society quite unlike any we have seen—a society in which the government may intrude into the secret regions of man's life at will.


The dangers posed by wiretapping and electronic surveillance strike at the very heart of the democratic philosophy.

Such practices can only have a damaging effect on our society. Once sanctioned, there is every indication that their use will indiscriminately spread. The time may come when no one can be sure whether his words are being recorded for use at some future time; when everyone will fear that his most secret thoughts are no longer his own, but belong to the Government; when the most confidential and intimate conversations are always open to eager, prying ears. When that time comes, privacy, and with it liberty, will be gone. When such conditions obtain, our citizens will be afraid to utter any but the safest and most orthodox thoughts; afraid to associate with any but the most acceptable people. Freedom as the Constitution envisages it will have vanished.107

What the ancients knew as "eavesdropping," we now call "electronic surveillance"; but to equate the two is to treat man's first gunpowder on the same level as the nuclear bomb. Electronic surveillance is the greatest leveler of human privacy ever known.

... Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances.

... [M]ust everyone live in fear that every word he speaks may be transmitted or recorded and later repeated to the entire world? I can imagine nothing that has a more chilling effect on people speaking their minds and expressing their views on important matters. The advocates of that regime should spend some time in totalitarian countries and learn firsthand the kind of regime they are creating here.108

Douglas warned of the inherent dangers in electronic surveillance.109 If limited to rifle-shot surveillance of a specific

109. The only significant argument in favor of extended electronic surveillance is that our society must be able to use it to combat crime. Several responses are appropriate. First, we survived without it for a century. Second, recent studies suggest that it has proved far less useful than its advocates in 1968 claimed. See, e.g., H.
communication by a criminal suspect, electronic surveillance is tolerable. Extended surveillance, in contrast, is "the greatest of all invasions of privacy." It is the "greatest leveler of human privacy ever known." It "strikes at the heart of the democratic philosophy." It leaves "not even a residuum of true privacy." As a matter of sound social policy, it should be eliminated, or at least restricted to the most compelling situations. The fourth amendment ban on general searches provides a ready legal justification for imposing the necessary restrictions. The ban should be enforced.

Enforcement of the fourth amendment ban on extended electronic surveillance is more than sound social policy. Viewed in a broad historical perspective, it is one of the most important challenges our society faces. A basic axiom of the framers of the Constitution was that government should be weak, so that the people might be free. During the Great Depression, however, the nation opted for large-scale government intervention in economic affairs. As a result, "big government" is here to stay. With it comes the threat that government control will expand from the economic arena into the sphere of personal liberty and privacy. The greatest vigilance is necessary to insure that the individual's intimate life is protected from the uninvited ear and intruding eye of the new and powerful government apparatus which we have created.

V. Conclusion

The case is clear. A core purpose of the fourth amendment is to ban general searches. Extended electronic surveil-

Schwartz, Taps, Bugs, and Fooling the People (1977); H. Schwartz, Reflection on Six Years of Legitimated Electronic Surveillance (1974). Third, and most basic, it is simply not worth the price. It is far better that some criminals remain uncaught than that we live under a regime of general electronic surveillance.

114. It is ironic in this day of tax revolts and anti-government sentiment that the demands for reduction of government power seem to focus on social benefit programs and not on the growing power of law enforcement institutions to obliterate personal privacy and liberty. We seem intent on creating a government stripped of all power to help those in need but all-powerful in the field of surveillance and repressive social control.
lance is a general search since it inherently involves both a dragnet search and general rummaging through private speech. Indeed, it is the quintessential, paradigmatic general search, far more insidious and repressive than traditional general searches. It is subject to the fourth amendment ban, and, as a matter of sound constitutional law and social policy, it should be restricted drastically. Except in cases of extraordinary need, extended electronic surveillance is intolerable in a nation committed to freedom of speech and personal privacy.
APPENDIX: Boyd Is Dead Again. Long Live Boyd!

Boyd v. United States is by all odds the most celebrated of all United States Supreme Court cases construing the fourth amendment. A leading fourth amendment scholar has described the status of the case as follows:

Not only was the Boyd case the first Fourth Amendment case of real consequence, but it remains to this day a landmark of constitutional interpretation. ... [T]he ringing tones of its message and the grandeur of its passages assure it a prominent place among the Court's most historic pronouncements.

... The Supreme Court itself, in later years, even when departing from the letter, and occasionally the spirit, of the Boyd case, never failed to refer to it reverently.118

Despite Boyd's fame, Justices who are not committed to a liberal construction of constitutional liberties have recurrently attacked the decision. Before it had reached the age of twenty, for example, Boyd was declared moribund by the Court. "Seventeen years later, however, in Adams v. New York, the Supreme Court handed down an opinion which seemed effectively to overrule the doctrine on the Boyd case."117

Boyd rose from its premature burial. In the landmark case of Weeks v. United States, the court in effect overruled Adams v. New York, by restricting it to its specific facts and reinstated the doctrines of Boyd.

Thereafter, the Court repeatedly praised Boyd. In 1925, the Court called it "the leading case on the subject of search and seizure . . . ."120 Justice Brandeis, in his Olmstead dissent, called Boyd "a case that will be remembered as long as civil liberty lives in the United States."121 In 1963, Justice Brennan wrote, "The authority of the Boyd decision has never been impeached."122

115. 116 U.S. 616 (1886).
117. Id. at 110.
118. 232 U.S. 383 (1914).
119. 192 U.S. 585 (1904).
In recent years, *Boyd* has once again been repudiated by a Court that is less than wholly committed to the fourth amendment. In *Fisher v. United States*,[123] for example, the Court, while weakening the rule against compulsory production of incriminating documents, said, “Several of Boyd’s express or implicit declarations have not stood the test of time. . . . [Here the Court listed five areas in which Boyd has been eroded in recent years.] It would appear that . . . the precise claim sustained in *Boyd* would now be rejected . . . .”[124] *Boyd*, in other words, is dead once again, and the smoking gun is in the hand of the current United States Supreme Court.

*Boyd* will be born again. The doctrines of the case are among the cornerstones of our nation’s program for protecting the individuality and privacy of its citizens. The government has no authority to compel the production of self-incriminating documents. The government has no authority to seize and examine the private papers of citizens. By analogy, the government has no authority to engage in extended electronic surveillance of citizens. These government activities should be prohibited. They are contrary to the most fundamental rules of political democracy. They are unreasonable searches and seizures. They involve compulsory self-incrimination. They strangle freedom of expression. They kill spontaneity. They stifle the very thoughts that society needs to adapt present institutional forms to new conditions. Extended electronic surveillance is fundamentally wrong and should be constitutionally taboo. We will always return to these basic values in sane periods. That is why *Boyd* must resurface. *Boyd* is dead again. Long live *Boyd*.

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124. *Id.* at 407-08.