



Administrative Searches

From Frank to the Patriot Act

[More Information on Administrative Searches](#)



Where do we learn about searches?

- Most laypersons, and many lawyer's perceptions of search law are created by the popular media
 - Every police show has a recurring plot line about the evidence obtained with the questionable warrant or without a warrant
 - Every courtroom drama has its fights over the exclusion of improperly obtained evidence
- These are criminal law searches, but they are all that most people know about
- Have Homeland and 24 changed this?



Searches in Law School Teaching

- Law students typically learn about administrative searches in criminal law
 - Burger and the doctrine of pervasively regulated industries
 - Seen as an exception to the general rule that a search must be based on a 4th Amendment warrant
- In reality, the 4th Amendment warrant requirement is better seen as a fairly narrow exception to the right to search on a general warrant or no warrant at all.



Fourth Amendment

- "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."



Criminal Law

- What does the 4th Amendment require for searches to find evidence in criminal prosecutions?
 - Warrant that specifically describes the premises to be searched and what is being sought
 - Probable cause based on reliable information
 - Independent magistrate approval



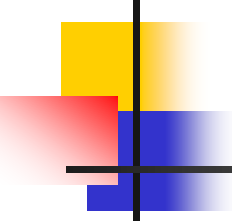
What are examples of traditional exceptions?

- No expectation of privacy
 - Telephoto lenses?
 - Space cameras?
 - Infrared?
- Special circumstances
 - Border check points
 - Securing the scene to prevent injuries



Silver Platter Doctrine Revisited

- Private individual, not a state actor, can collect evidence without a warrant, or even illegally, and give to the police without triggering the exclusionary rule.
- *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960)
 - State police illegally obtain evidence and hand it to federal police
 - No silver platter doctrine, both are state actors



Frank v. Maryland, 359 U.S. 360 (1959)

The First 158 Years of Admin Searches

- What is Frank about?
 - http://biotech.law.lsu.edu/cases/searches/frank_v_maryland.htm
- This is a criminal conviction for refusing to allow a warrantless administrative inspection of a private home.



The Enabling Act

- "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars."



Is a Man's Home His Castle?

- "In 1765, in England, what is properly called the great case of *Entick v. Carrington*, 19 Howell's State Trials, col. 1029, announced the principle of English law which became part of the Bill of Rights and whose basic protection has become imbedded in the concept of due process of law. It was there decided that English law did not allow officers of the Crown to break into a citizen's home, under cover of a general executive warrant, to search for evidence of the utterance of libel."



Does the 4th Amendment Bar all Warrantless Searches?

- "Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments to realize what history 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 for fundamental liberty was fought. "



Does History Matter?

- "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it," *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31. (Holmes)



Have Times Changed?

- The power here challenged rests not only on a long history of its exercise. It is a power which was continually strengthened and applied to wider concerns through those very years when the right of individuals to be free from peremptory official invasion received increasing legislative and judicial protection. Nor is this a situation where a new body of knowledge displaces previous premises of action. *There is a total want of important modification in the circumstances or the structure of society which calls for a disregard of so much history.*



Are These Searches Still Necessary?

- "The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few. Certainly, the nature of our society has not vitiated the need for inspections first thought necessary 158 years ago, nor has experience revealed any abuse or inroad on freedom in meeting this need by means that history and dominant public opinion have sanctioned."



Why Not Require a Warrant?

- "If a search warrant be constitutionally required, the requirement cannot be flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue. A loose basis for granting a search warrant for the situation before us is to enter by way of the back door to a recognition of the fact that by reason of their intrinsic elements, their historic sanctions, and their safeguards, the Maryland proceedings requesting permission to make a search without intruding when permission is denied, do not offend the protection of the Fourteenth Amendment."



The Dissent

Douglas, Black, Warren, and Brennan



What was *Entick v. Carrington* Really About?

- "In the effort to destroy the freedom of the press, by a strained exercise of the prerogative a general warrant was issued in 1763 for the discovery and apprehension of the authors and printers (not named) of the obnoxious No. 45 of the North Briton, which commented in severe and offensive terms on the King's Speech at the prorogation of Parliament and upon the unpopular Peace of Paris recently (February 10, 1763) concluded. Forty-nine persons, including Wilkes, were arrested under the general warrant; and when it was ascertained that Wilkes was the author, an information for libel was filed against him on which a verdict was obtained."



Another View of History

- "The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization... It belonged to all men, not merely to criminals, real or suspected..."
- *To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity."*



Are Health Inspections so Threatening?

- "One invasion of privacy by an official of government can be as oppressive as another. Health inspections are important. But they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers, and other criminal elements. As we have seen, searches were once in their heyday when the government was out to suppress the nonconformists...*Many today would think that the search for subversives was even more important than the search for unsanitary conditions.*"



Do Most People Cooperate?

- "Figures submitted by the Baltimore Health Department show that citizens are mostly cooperative in granting entrance to inspectors. There were 28,081 inspections in 1954; 25,021 in 1955; 35,120 in 1956; 33,573 in 1957; and 36,119 in 1958. *And in all these instances the number of prosecutions was estimated to average one a year.* Submission by the overwhelming majority of the populace indicates there is no peril to the health program. One rebel a year (cf. Whyte, *The Organization Man*) is not too great a price to pay for maintaining our guarantee of civil rights in full vigor."



Is the Dissent Right?

- Does the low number of resisters really tell us the administrative cost of a warrant requirement?
 - What might make that number too low?
- Does the Majority's separation of criminal and administrative searches make sense?
- This sets up *Camera and See*.



Camara v. Municipal Court, 387 U.S. 523 (1967)

- Where did this happen?
 - San Francisco
- What violations were the housing inspectors looking for?
 - Violation of the occupancy permit
- What crime was defendant charged with?
 - Not allowing the inspection
 - Factually the same as *Frank*



The Municipal Ordinance

- **"Sec. 503 RIGHT TO ENTER BUILDING.**

Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."



The Writ of Prohibition

- What are the defendant's allegations of unconstitutional actions?
 - Unconstitutional search under the 4th Amendment, as applied to the states by the 14th Amendment
- Not granted by the state courts



Are the Times Changing?

- What else is going on at the court and in the country in the late 1960s?
- Can administrative violations lead to criminal prosecution?
- What bind does this put a property owner in who wants to challenge the authority of the inspector?
- How does the *Camara* court think this changes the *Frank* balancing factors?
- Could administrative searches be abused?



Why is the Intent of the Search Critical?

- Since the inspector does not ask that the property owner open his doors to a search for "evidence of criminal action" which may be used to secure the owner's criminal conviction, historic interests of "self-protection" jointly protected by the Fourth and Fifth Amendments are said not to be involved, but only the less intense "right to be secure from intrusion into personal privacy." (*Camara*)



Does a Warrant Requirement Mean No Searches?

- In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon *whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.* (Camara)
- A precedent for *Matthews*?



Standards for Criminal Probable Cause

- "For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. *Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.*"



Government Interest in Public Health Searches

- The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. *Because fires and epidemics may ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and enforce such minimum standards even upon existing structures.*



General Versus Specific Probable Cause

- There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures.
- It is here that the probable cause debate is focused, for the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building.



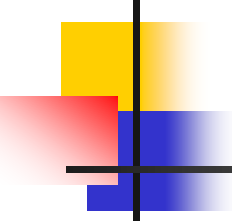
Factors Supporting General Probable Cause

- First, such programs have a long history of judicial and public acceptance.
- Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results.
- Finally, because the inspections are neither personal in nature *nor aimed at the discovery of evidence of crime*, they involve a relatively limited invasion of the urban citizen's privacy.



The Frank Consensus

- "Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts."



Preventing Harm versus Punishing Criminals

- "The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few. Certainly, the nature of our society has not vitiated the need for inspections first thought necessary 158 years ago, nor has experience revealed any abuse or inroad on freedom in meeting this need by means that history and dominant public opinion have sanctioned."



Standards for an Area Warrant

- Such standards, which will vary with the municipal program being enforced, may be based upon:
 - the passage of time
 - the nature of the building (e. g., a multi-family apartment house)
 - the condition of the entire area
- [T]hey will not necessarily depend upon specific knowledge of the condition of the particular dwelling.



Emergency Exceptions

- [N]othing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations



Examples of Emergencies

- North American Cold Storage Co. v. City of Chicago, 211 U.S. 306
 - (seizure of unwholesome food);
- Jacobson v. Massachusetts, 197 U.S. 11
 - (compulsory smallpox vaccination);
- Compagnie Francaise v. Board of Health, 186 U.S. 380
 - (health quarantine);
- Kroplin v. Truax, 119 Ohio St. 610, 165 N. E. 498
 - (summary destruction of tubercular cattle)



Practical Considerations

- When does the Court say is the time to get an area warrant?
- Why would this be burdensome to the agency?
- What would you suggest as an alternative?
 - Would this be consistent with the dissent in *Frank*?



See v. Seattle, 387 U.S. 541 (1967)

- Routine fire inspection of a commercial warehouse
- Done as part of a city-wide sweep
- Owner was prosecuted for refusing to allow the inspection



Key Question

- Do business establishments have a diminished expectation of privacy under the 4th Amendment?
 - "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. "



Further Gloss on Area Warrant

- "But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field. "



The Dissent

- Today the Court renders this municipal experience, which dates back to Colonial days, for naught by overruling *Frank v. Maryland* and by striking down hundreds of city ordinances throughout the country and jeopardizing thereby the health, welfare, and safety of literally millions of people.



Predicted Impact

- But this is not all. It prostitutes the command of the Fourth Amendment that "no Warrants shall issue, but upon probable cause" and sets up in the health and safety codes area inspection a newfangled "warrant" system that is entirely foreign to Fourth Amendment standards. It is regrettable that the Court wipes out such a long and widely accepted practice and creates in its place such enormous confusion in all of our towns and metropolitan cities in one fell swoop.



State Law Limitations

- *See* and *Camara* only deal with the US Constitutional Issues
- Some state constitutions have greater protections and the legislatures can enact greater protections
- *City of Seattle v. McCready*, 123 Wash. 2d 260, 868 P.2d 134 (Wa. 1994)
 - Rejects general area warrants



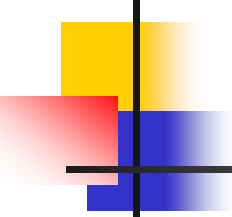
U.S. v. Biswell, 406 U.S. 311 (1972)

- Federally licensed gun dealer
- Police officer and federal treasury agent show up and ask to see the books and the storeroom
- Owner consents and they find an illegal weapon
- Owner is prosecuted and attacks the search as not having even an area warrant



Pervasively Regulated Industries

- When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.
- Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority. The dealer is not left to wonder about the purposes of the inspector or the limits of his task. (Biswell)



OSHA - *Marshall v. Barlow's*, 98 S. Ct. 1816, 436 U.S. 307 (1978)

- OSHA conducts searches of OSHA regulated businesses to assure compliance with worker health and safety laws
- Employer refused entry to an OSHA inspector who did not have a warrant to inspect the business
- United States Supreme Court found that merely being subject to Interstate Commerce Clause regulation does not make a business pervasively regulated
- OSHA inspector must get an area warrant if refused entry.
 - No probable cause is necessary
 - Congress could probably give OSHA the authority



Legitimate Administrative Search or Subterfuge?

- *Matthews* tells us that in administrative matters, everything is a cost benefit analyses.
- The only exception are the criminal law due process protections.



Limiting What Criminal Means

- *Addington v. Texas* – mental health
- *Bell v. Wolfish* – pretrial detention
- *Barefoot v. Estelle* – future dangerousness for death penalty determinations
- *Schall v. Martin* – juvenile detention
- *Allen v. Illinois* – locking up the criminally insane
- *Hilton v. Braunskill* – habeas corpus after a conviction was overturned
- *United States v. Salerno* – Bail Reform Act



New York v. Burger, 482 U.S. 691 (1987) Companion to *Hilton* and *Salerno*

- Search of junk yard for stolen goods
- Lower court excluded the evidence in the criminal trial:
 - "the fundamental defect [of 415-a5] . . . is that [it] authorize[s] searches undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme. *The asserted 'administrative schem[e]' here [is], in reality, designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property.*"



Does the History of the Regulations Matter?

- Firearms and alcohol have always been regulated
- We pointed out that the doctrine is essentially defined by "the pervasiveness and regularity of the federal regulation" and the effect of such regulation upon an owner's expectation of privacy. See *id.*, at 600, 606. We observed, however, that "the duration of a particular regulatory scheme" would remain an "important factor" in deciding whether a warrantless inspection pursuant to the scheme is permissible. (United States Supreme Court in *Burger*)



Alternative Standard

- ...where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment. (Burger)



Criteria for Searches of Regulated Industries



Substantial Government Interests

- First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made.
 - ("substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines");
 - (regulation of firearms is "of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders");
 - (federal interest "in protecting the revenue against various types of fraud").



"Necessary to further [the] regulatory scheme."

- "For example, in *Dewey* we recognized that forcing mine inspectors to obtain a warrant before every inspection might alert mine owners or operators to the impending inspection, thereby frustrating the purposes of the Mine Safety and Health Act -- to detect and thus to deter safety and health violations."



Must be a constitutionally adequate substitute for a warrant

- In other words, the regulatory statute must perform the two basic functions of a warrant:
 - it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope,
 - and it must limit the discretion of the inspecting officers.



What is necessary to substitute for a warrant?

- To perform this first function, the statute must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."
- In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be "carefully limited in time, place, and scope."
- *Reasonable expectation of privacy controls.*



How Do These Apply to Burger?



One

- First, the State has a substantial interest in regulating the vehicle-dismantling and automobile-junkyard industry because motor vehicle theft has increased in the State and because the problem of theft is associated with this industry.



Two

- Second, regulation of the vehicle-dismantling industry reasonably serves the State's substantial interest in eradicating automobile theft. It is well established that the theft problem can be addressed effectively by controlling the receiver of, or market in, stolen property.



Three

- Finally, the "time, place, and scope" of the inspection is limited
- The officers are allowed to conduct an inspection only "during [the] regular and usual business hours."
- The inspections can be made only of vehicle-dismantling and related industries.
- And the permissible scope of these searches is narrowly defined:
 - the inspectors may examine the records, as well as "any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises."



Licenses and Permits

- Restaurant license, elevator license, shellfish processing license
 - Issued on set criteria established through stature or regulation
- Can require consent to searches as a condition of licensure
 - Restaurant licenses - any time during regular business hours



Are these pervasively regulated industries?

- Substantial Government Interests?
- Necessary to further the regulatory scheme?
- Is there a constitutionally adequate substitute for a warrant?



Does the Exclusionary Rule Apply? - *Trinity Industries v. OSHA*, 16 F.3d 1455 (6th Cir. 1994)

- OSHA used an employee complaint as the basis for a probable cause warrant for a specific inspection, as provided in the OSHA Act.
 - Inspector also did a general search, claiming it was part of an area warrant type search
 - Court found that a complaint driven search does not meet the neutral selection criteria for an area warrant
- Court allowed the use of the improperly obtained records for administrative actions to correct risks, but not as a basis for punishing (fining) the employer



What about Evidence of Unrelated Crime?

- What if the housing inspector finds your stash of stolen DVD players?
- What if the restaurant inspector finds the cook's stash of cocaine?
- What did Camara say?
 - Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.



Administrative Searches and Terrorism

- How has administrative search theory been used in the searches done for terrorist activities?
- What is the constitutional justification for such searches, under the *See* and *Camara* rulings?
- What implications would such searches have for later criminal prosecutions?
 - This has been playing out in criminal trials for the Guantanamo detainees.



FISA

- Foreign Intelligence Surveillance Act (FISA) uses a secret court to approve warrants and must assume that everything in the warrant is correct.
- These are warrants for pre-crime, so there is limited specificity - They resemble administrative warrants
- If regular crime is found with FISA, the evidence can be used for prosecution.