Environmental Law & Property Rights

Searching Private Businesses and Other Property Without a Warrant:

When Does Fourth Amendment Jurisprudence Make it the Rule Rather Than the Exception?

*By Gregory D. Page**

When the police or other Executive Branch officers conduct searches under civil and environmental statutes, settled Fourth Amendment jurisprudence provides them with substantially more constitutional authority to search private businesses without a search warrant than to so search private homes. The Supreme Court developed the jurisprudence allowing government officers to conduct a warrantless "administrative search" by construing two independent clauses of the Fourth Amendment: the Fourth Amendment protects the "persons, houses, papers, and effects" of the people from (1) "unreasonable searches and seizures" ("unreasonable search clause") and (2) government overreaching pursuant to search warrants issued for less than traditional "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" ("warrant clause").[1] In construing these clauses, the Court has determined that they both authorize and limit different searches under different circumstances.

Generally, the Supreme Court construes the warrant clause to require a stricter burden of proof than the unreasonable search clause. Under the warrant clause's probable cause requirement, the government must submit evidence that a given search should be conducted at a particular place because a particular individual or entity may be guilty of or complicit in wrongdoing. Accordingly, the warrant clause requires more evidentiary suspicion particularized to a given individual than the general legislative or other societal standards presumptively available under the unreasonable search clause to define reasonableness according to desirable majoritarian goals. Thus, in comparing the reasonableness standards governing warrantless administrative searches of private property to traditional probable cause, the Supreme Court has determined that certain administrative searches are limited not by traditional probable cause, but "merely to a requirement of reasonableness."[2]

To decide whether to apply the unreasonable search clause or the warrant clause's stricter evidentiary requirements, the Supreme Court has analyzed the extent to which a given search would contravene a reasonable expectation of privacy. In Justice Harlan's famous balancing formulation, a protected Fourth Amendment interest exists where (1) an individual exhibits an "actual (subjective) expectation of privacy and (2) that expectation is "one that society is prepared to recognize as 'reasonable.'"[3] Thus, where the expectation of privacy is deemed either traditional or otherwise reasonable, the Court generally reviews a disputed search by applying the warrant clause's stricter probable cause standard. Conversely, where the privacy expectation is deemed unreasonable or diminished, the Court frequently construes the unreasonable search clause by applying more malleable definitions of societal reasonableness.

Under the Supreme Court's reasonable and individual expectations standard, the expectation that the possessions and other things in a private house are private and inviolate has been deemed both fundamental and eminently reasonable. Accordingly, absent consent, an applicable criminal sentence necessitating a subsequent search of a parolee, or exigent circumstances, such as the imminent destruction of evidence, a private home may not be searched or otherwise entered to effect arrest without a warrant.[4] Similarly, absent such circumstances, government officers may not search businesses or commercial property for either contraband or evidence of crime without a warrant.[5]

However, where the government searches business or other commercial property pursuant to certain types of environmental or other administrative statutes, the Supreme Court generally deems most individual expectations of absolute privacy either unreasonable or otherwise diminished. Thus, the Court has held that individual owners of commercial properties have a "reduced expectation of privacy" that "may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections."[6] Plainly, the Fourth Amendment's text does not distinguish between a private dwelling and a private business, perhaps because significantly more people lived and worked in the same place in the 18th Century than in the 20th and 21st. However, the Framers arguably used different words in different clauses of the Fourth Amendment to distinguish between permissible searches that were not "unreasonable" and valid searches authorized by a warrant for which there is "probable cause." Thus, these words do not expressly prohibit judges from distinguishing between valid searches conducted by warrant and searches that are otherwise reasonable.

In construing the word "unreasonable" in the unreasonable search clause, the Supreme Court has held that environmental or other administrative statutes of which the property owner is or could have been aware may define the standards for conducting a constitutionally reasonable warrantless search. Generally, the Supreme Court deems warrantless searches of commercial property reasonable and therefore permissible if (1) "warrantless searches [are] necessary to further [the] regulatory scheme" of an environmental or other administrative statute; (2) this regulatory scheme advances "substantial" government interests; (3) the relevant statute both supplies reviewable standards for the scope

and frequency of searches and tailors those searches to its regulatory rationale; (4) these standards confer something less than "unbridled discretion" on government officers; and (5) the statute accommodates special "privacy concerns," for example, by prohibiting forcible entries and requiring the government to obtain injunctive relief.[7] The Supreme Court has held that a statute meeting these reasonableness standards is a "constitutionally adequate substitute for a warrant" and, therefore, may authorize a search without the probable cause mandated by the warrant clause.[8]

There are at least three actual or potential consequences of authorizing a given warrantless search of commercial property under these comparatively flexible reasonableness standards First, unlike the constitutional liberties of free speech and free religion, this variable privacy standard allows Congress, in conjunction with the Executive Branch, to use flexible legislative standards to define and redefine the very constitutional right of privacy by which both legislatures and executive officials, under the Bill of Rights, are intended to be constitutionally restrained. By definition, rational legislative standards authorizing warrantless searches, even those tailored to a specific regulatory goal, are comparatively easy for rational legislatures to formulate and enact. Thus, Congress is comparatively free to expand the scope of governmental searches by substituting general legislative standards not requiring particularized evidence of individual guilt or wrongdoing for the warrant clause's probable cause requirement. Because these legislative standards give the police and other Executive Branch officials more discretion to balance individual privacy rights against the societal interests protected by Congress, the Court's administrative search requirements transfer power from judges, who otherwise would weigh particularized evidence of individual guilt in considering a search warrant request, to the legislative or executive officials authorizing or conducting warrantless administrative searches.

Second, the Court's application of the unreasonable search clause makes it easier for government officials to use administrative searches as a pretext to avoid or "crossover" the warrant clause's probable cause requirement for obtaining evidence of criminality. Where general legislative standards properly authorize an administrative search, "the discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect."[9] Finally, where an environmental or other administrative statute authorizes administrative officers to issue search warrants themselves, supported by the same legislative standards that also authorize warrantless searches, it also empowers government officials who may be less neutral than federal judges to authorize searches without probable cause. As Justice Scalia has noted, the "'neutral officer'...envisioned by our administrative search cases is not necessarily the 'neutral judge.'"[10]

Despite these risks, Justice Scalia and his brethren have decided that, if the Framers intended to describe the same type of valid government search in the Fourth Amendment's unreasonable search and warrant clauses respectively, they would not have used different words in different clauses to describe potentially different searches. Thus, a more realistic basis for evaluating administrative searches may be to inquire whether a given legislative or adjudicative standard protects the same privacy and concomitant liberty interests that the warrant clause protects, without needlessly impairing the environmental and other regulatory interests underlying the Supreme Court's decision to interpret the unreasonable search clause by applying more contemporaneous legislative definitions of reasonableness.

Plainly, legislative standards that narrowly tailor the scope and duration of administrative searches to particular environmental or other goals can advance one of the Fourth Amendment's contextual goals: eliminating the arbitrary discretion of executive officers "to decide where to search and whom to seize."[11] Arguably, narrow legislative standards of which property owners know well in advance can provide more advance notice than the sudden outcome of a judicial warrant, generally sought in camera by police and, therefore, frequently unexpected until served. Legislative standards could also protect individuals from the "cross-over" problem, by which executive officers conduct a warrantless administrative search solely to obtain criminal evidence, thereby circumventing the warrant clause's stricter evidentiary requirements. The same civil statute, for example, that authorizes a warrantless administrative search could also provide a separate cause of action for those demonstrating that a particular administrative search was actually a pretext to obtain criminal evidence without probable cause.

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Footnotes

[1]U.S. Const. amend. IV.

[2]*Griffen v. Wisconsin*, 483 U.S. 868, 877 n.4 (1987).

[3]*Katz v. United States*, 389 U.S. 347 (1967).

[4]*See e.g., Steagald v. United States*, 451 U.S. 204 (1981).

[5]*G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352-359 (1977).

[6]*New York v. Burger*, 482 U.S. 691, 702 (1987); *Donovan v. Dewey*, 452 U.S. 594, 598-599 (1981).

[7]*New York v. Burger*, 482 U.S. 691, 702-704; *Donovan v. Dewey*, 452 U.S. 594, 599, 604.

[8]*Burger*, 482 U.S. at 711; *Donovan v. Dewey*, 452 U.S. at 603.

[9]*Burger*, 482 U.S. at 716..

[10]*Griffen v. Wisconsin*, 483 U.S. 868, 878, 878 n.4 and n.5 (1987).

[11]Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. Rev. 199, 296-297 (1993).