

THE ADMINISTRATIVE SEARCH DOCTRINE: ISN'T THIS EXACTLY WHAT THE FRAMERS WERE TRYING TO AVOID?

"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."

- The Fourth Amendment.

In the 1961 landmark case of *Mapp v. Ohio*,¹ the Supreme Court held that the exclusionary rule of *Weeks v. United States*² applied to state criminal proceedings. This case opened the flood gates to a deluge of Fourth Amendment litigation. The exclusion of evidence, due to an unconstitutional search and seizure by the government, has such an allure that few criminal defense attorneys neglect to raise a Fourth Amendment issue at a criminal trial.

The considerable mass of critical commentary is evidence of the confusion and uncertainty which has characterized the Court's interpretation and application of the Fourth Amendment. The quest for bright line rules and uniform applications has been virtually impossible. This is due in part to the seemingly infinite factual variations, combinations and possibilities of search and seizure problems. A consequence of this quest through the maze of facts, and its most serious problem, is that the Court has been building its Fourth Amendment jurisprudence case by case, using fact situations to redefine rights instead of drawing upon fundamental jurisprudential presuppositions that formed the very backbone of the Fourth Amendment.

Throughout the 1950s and 1960s, the Warren Court actively engaged Fourth Amendment questions. The common theme of the Court was the constitutional imperative of the judicial warrant. The most clear and convincing example of this preference

1. 367 U.S. 643 (1961).

2. 232 U.S. 383 (1914).

was occasioned in *Katz v. United States*.³ Justice Stewart's often quoted statement can be considered a talisman of the Warren Court's Fourth Amendment jurisprudence. "(S)earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment - subject only to a few specially established and well delineated exceptions."⁴

One of the ever growing number of exceptions to the general requirement of a warrant is the administrative search doctrine. As the federal and state governments and their agencies have grown (almost exponentially), legislatures have delegated an increasing amount of regulatory authority. Administrative agencies have promulgated not only regulations, but also the means of enforcing them. Consequently the judiciary has effectively been removed from the decision to search or not. Executive agencies and legislatures have enjoyed this new found freedom from judicial scrutiny and have extended their powers past lines drawn by the constitutional system of checks and balances. Random inspection schemes have been the weapon of choice to enforce health and safety, environmental, revenue and other regulations within the scope of governmental authority.

A recent manifestation of the administrative search doctrine, which has yet to reach the Supreme Court, is the case of the gun sweeps by the Chicago Housing Authority. Police made random, warrantless and suspicionless searches of entire public apartment buildings.⁵ The prime objective of the sweeps was to seize guns. Judge Wayne Anderson of the U.S. District Court for the Northern District of Illinois ruled that these searches were unconstitutional. Emotions and frustrations ran high amidst the outcry that followed, and President Clinton quickly proposed a policy aimed at making the housing projects of America safer.⁶ The recommended policy gave police greater power to search without a warrant. Also included in this proposal was a plan to require tenants of the housing projects to waive their "privacy" rights and consent to the warrantless searches.⁷

3. 389 U.S. 347 (1967).

4. *Id.* at 357.

5. *Gun Sweeps: No Model for Cities*, N.Y. TIMES, Apr. 20, 1994, at A18. See also Comment, *Operation Clean Sweep: Is the Chicago Housing Authority 'Sweeping' Away the Fourth Amendment?*, 86 NW. U. L. REV. 1103 (1992).

6. *Gun Sweeps: No Model for Cities*, N.Y. TIMES, Apr. 20, 1994, at A18.

7. *Id.*

This is a classic example of the aphorism "bad facts make bad law." It is indeed tragic that innocent poor inner city children must live in such a war zone. That sentiment is universal and undeniable. But obfuscated by the cloud of emotion is the fact that the government intends to coerce underprivileged citizens into forsaking their constitutional rights. It is a choice of lesser evils.

As with all governmental searches, administrative searches are subject to Fourth Amendment requirements. However, as the doctrine has evolved over the last thirty years, the Court's test for the constitutionality of administrative searches bears almost no resemblance to the Fourth Amendment text or its historical context. Concepts such as probable cause, the requirement of particularity in a warrant and judicial intervention have been eroded in the administrative search doctrine. Principles of property rights and separation of powers have been forgotten, forsaken or ignored. The executive and legislative branches will continue to extend their powers, encroaching into the domain of individual liberty. The decisions of the Supreme Court have yielded too much power to law enforcement officials in their administrative search jurisprudence. Perhaps it is time for the Court to take back some of the ground it has relinquished over recent years. Perhaps, in the interest of restoring fading liberties, the Fourth Amendment should be read today as it was read by the Framers some two hundred years ago.

The objective of this article is: (1) to review the history and development of the administrative search doctrine; (2) to analyze its deviation from the dictates of the Fourth Amendment; (3) to suggest and analyze the causes of this deviation; and (4) to propose a framework, based on procedural due process, upon which a more constitutionally sound administrative search doctrine can be built.

I. HISTORICAL ORIGINS OF ADMINISTRATIVE SEARCHES⁸

Regardless of one's perspective, whether it is original intent or pragmatic instrumentalism, historical review is always an

8. This section is based largely on: NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937), and TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* (1969).

important prerequisite when engaging a constitutional issue.⁹ To understand the concerns of the Framers of the Constitution in the late eighteenth century, it is necessary to investigate the development of the laws of search and seizure in England.¹⁰

The common law was the law of early America and thus words spoken and written by the Framers must be taken in that context. For the "originalist," this is a required exercise. For the pragmatic instrumentalist, it may be a laborious wasted journey into anachronistic theories as extinct as the dinosaur, and as irrelevant with respect to modern societal concerns as the buggy whip. The flaws of the English system which so infuriated the colonies were indelibly inscribed in the memories of the Framers. The similarity between a list of remedies for the abuses of the English system in comparison with the Bill of Rights is too close to be considered coincidence. A substantial motivation for the constitutional convention and the subsequent ratification of the first ten amendments was to ensure that those abuses never happened again.

A. *Statutory and Common Law Warrants*

Professor Telford Taylor separated the origin of search warrants into three sources from English legal history: (1) common law warrants to search for stolen goods¹¹; (2) executive warrants that were originally statutory in authority but continued after expiration of the statute and were justified "on the ground of long-established practice;"¹² and (3) legislative statutory warrants based on revenue and customs laws.¹³

1. Common Law Warrants

The origin of common law warrants is unknown but the practice is described in writings which date back to the middle

9. "The study of law, properly conceived, cannot be separated from a study of the law's history. Without that perspective, today's decision is an isolated point on a graph, with no indication where the line progressing from it will proceed." Antonin Scalia, *Historical Anomalies in Administrative Law*, YEAR BOOK 110 (Supreme Court Historical Society) (1985).

10. After all, the colonies imported the English common law with its strengths and weaknesses, and formed this new country with the intent of perfecting the English system of justice.

11. TAYLOR, *supra* note 8, at 24.

12. *Id.* at 30.

13. *Id.* at 26.

of the seventeenth century.¹⁴ These search warrants were constrained by many of the procedural safeguards found in the laws of today. The victim of a theft was required to make an oath before a justice of the peace, with probable cause to believe the stolen goods would be found in the specific place to be searched. These were the standard elements of a legal search. The victim would be accompanied by a constable and, if the goods were in fact found at the specific place designated on the warrant, would return to the justice with the goods and the suspected felon for a hearing.¹⁵ It is important to note the requirements of suspicion, particularity of places and items to be searched and seized, and the presence of a judicial officer as the granting authority and a check against abuse. The requirements of the common law warrant are unmistakably similar to the text of the Fourth Amendment.

2. Executive Statutory Warrants

In contrast to the common law warrant were the statutory warrants. The executive form of these searches and warrants can be traced as far back as 1335. Innkeepers in English ports were authorized to search guests for counterfeit money.¹⁶ In the fifteenth century, statutes authorized searches by trade organizations to enforce trade standards.¹⁷

In 1566, the Court of Star Chamber passed a decree to authorize the Stationers' Company to enforce laws against sedition.¹⁸ Licensing of books and restrictions on printing were strict and "messengers" of the Court of High Commission and the Star Chamber were equipped with increasingly general and oppressive powers to search and seize via the statutory warrant.¹⁹ The safeguards of the common law warrant were absent.

The Star Chamber and the High Commission were abolished in 1641, but the Restoration Parliament subsequently enacted the Licensing Act to regulate the press.²⁰ Officers of the crown were granted the same oppressive powers to search and seize.²¹ The

14. *Id.* at 24 (citing HALE, PLEAS OF THE CROWN, 149-50) (published after Sir Matthew Hale's death in 1676)).

15. *Id.* at 24-25.

16. LASSON, *supra* note 8, at 23.

17. TAYLOR, *supra* note 8, at 25. See also LASSON, *supra* note 8, at 24-25.

18. TAYLOR, *supra* note 8, at 25.

19. *Id.*

20. *Id.*

21. *Id.*

Licensing Act expired in 1695 but warrants continued to be issued in seditious libel cases through the accession of George III in 1760.²² This questionable transference of power from statutory authority (which expired with the Licensing Act in 1695) to custom²³ remained unchallenged until the 1760s.

3. Legislative Statutory Warrants

Also in contrast to the common law warrant were the statutory search warrants issued by the legislature, which date back only as far as the seventeenth century. These warrants were issued to enforce revenue and customs laws. Parliament promulgated laws in 1660 and 1662 which authorized the Court of Exchequer to issue "writs of assistance" for the seizure of "prohibited or uncustomed" goods.²⁴ These writs conferred power on the constables to break and enter houses, shops and "other [p]lace[s]."²⁵

While the common law search warrant was sanctioned by a judicial magistrate and with procedural safeguards, both requirements designed to prevent abuse, the statutory general warrants were issued by executives and legislators without judicial intervention. With the general warrant, there were no requirements of probable cause or oath, and there was no requirement that the particular places to be searched and persons or things to be seized be described. Writs of assistance, which were authorized by Parliament to aid in the enforcement of customs laws, were imported to the colonies where they were a major source of dissention and discontent. In the 1760s, courts in England and America heard challenges to the lawfulness of these oppressive statutory searches. The outcomes of these historic cases clearly influenced the Framers of the Constitution as they constructed this new nation.

B. The Challenge of General Warrants in England: The Wilkes and Entick Cases

In 1762 John Wilkes, a member of Parliament, began publication of a series of anonymous pamphlets of political commen-

22. *Id.* at 26.

23. The warrants did not contain the safeguards of the common law warrant and thus could not draw upon that authority. Yet they were still issued, presumably according to custom, even though the statutory authority was dead.

24. TAYLOR, *supra* note 8, at 26. See also LASSON, *supra* note 8, at 37.

25. TAYLOR, *supra* note 8, at 26.

tary. They were critical of government policies and specifically condemned the excise tax on cider, enacted in 1763.²⁶ To enforce the tax, broad powers to search and seize were given to the authorities. After a speech by George III defending the tax, Wilkes published a biting critique that offended the government enough to order the writers and printers prosecuted for seditious libel.²⁷ Calling upon the old statute against seditious libel that had expired in 1695, Lord Halifax issued a general warrant to four messengers to search for and seize the perpetrators. Over forty people, including Wilkes, were arrested and masses of private papers were seized.²⁸

Many of the arrestees sued the messengers. The defense justified its position by pointing to the warrants issued by Lord Halifax.²⁹ The petitioners challenged the validity of the warrants because their statutory authority had expired in 1695. The Lord Chief Justice of the Court of Common Pleas, Charles Pratt, overruled the justification of reliance on the Halifax warrant, and the juries awarded substantial judgments to the petitioners.³⁰

John Wilkes noticed the court's rulings and decided to bring suit himself. Lord Chief Justice Pratt was the presiding judge again. The defense attempted to use the same justification and even Lord Halifax himself testified in support of the defendants. Halifax urged that the warrant was justified "by long practice."³¹ Pratt ruled that the warrants were defective and that they promoted executive action "that was totally subversive of the liberty of the subject."³²

The messengers appealed the decisions to the Court of King's Bench. The case was heard by the Lord Chief Justice Mansfield and Justices Wilmot, Yates and Ashton.³³ In affirming the judgments, Mansfield ruled that the warrant was invalid because it was too general. Because there was no statutory authority sup-

26. *Id.* at 29. See also LASSON, *supra* note 8, at 41-44.

27. TAYLOR, *supra* note 8, at 30.

28. *Id.* See also LASSON, *supra* note 8, at 44.

29. TAYLOR, *supra* note 8, at 30. These warrants did not specify places to be searched or persons to be seized. Additionally, they were not supported by probable cause that any one person or group of persons committed the "crime."

30. *Id.* at 30-31.

31. *Id.* at 31.

32. *Id.* (citing *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (1763)). Lord Chief Justice Pratt stated: "To enter a man's house by virtue of a nameless warrant, . . . in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour." LASSON, *supra* note 8, at 44.

33. TAYLOR, *supra* note 8, at 31.

porting it, the warrant had to uphold the safeguards imposed by the common law, which in this case it did not.³⁴

The last and most important of these cases was *Entick v. Carrington*.³⁵ Lord Halifax issued a warrant for the arrest of John Entick and the seizure of his books and papers. Entick was subsequently arrested and his papers seized. Upon his release, he sued the messengers in trespass, and the jury awarded judgment to Entick. The appeal was then argued before Lord Camden (formerly Lord Chief Justice Charles Pratt, who had held the general warrant defective in *Wilkes*) and the Court of Common Pleas.³⁶

Lord Camden affirmed the lower courts judgment on the ground that, even assuming the warrant to be valid, the messengers failed to meticulously obey the terms of the warrant when they returned with Entick and his papers before Halifax's assistant rather than Halifax.³⁷ Lord Camden then expounded on the reasons he found the warrant to be deficient: (1) the statutory authority had expired with the Licensing Act in 1695; (2) the warrant was too general in that it authorized the seizure of all of Entick's papers not just the libelous ones; (3) no oath of probable cause had been given; and (4) no record was made of the items that were seized.³⁸

Lord Camden recognized that warrants issued needed judicial safeguards to prevent abuse. As a pro-colonialist, he resigned from his position of Lord Chancellor in 1770 because of the English government's policies toward the colonies. Undoubtedly his opinions were familiar and well respected by the Founding Fathers.

C. *The Writs of Assistance Cases: Catalysts of Independence*

In an effort to protect its industry and commerce, England enacted various trade regulations and restrictions applicable to the colonies.³⁹ The objective of these acts was to "encourage" the merchants and traders in the colonies to buy goods solely from British territories. Trade laws were promulgated to ensure

34. *Id.* at 32. The warrant in question was not supported by oath or probable cause and did not specify the places to be searched or the persons and papers to be seized.

35. How. St. Trials, XIX, 1029 (1765).

36. *Id.*

37. *Id.* at 1033.

38. *Id.* at 1034.

39. LASSON, *supra* note 8, at 51.

colonial compliance through customs procedures. Customs officers in America had the authority via general warrants, known as writs of assistance, to search any house or shop, break open any doors or locks and seize any uncustomed goods.⁴⁰

The writs of assistance originated in the 1662 statute enacted by Parliament.⁴¹ In 1692, Parliament granted jurisdiction to customs officials in the colonies to utilize "the same powers and authorities" available to English customs officials.⁴² Perhaps the most offensive characteristic of the writ of assistance was its continuous duration. With no requirement of suspicion or particularity, customs officials in the colonies were free to search the homes of the colonists whenever they pleased. In 1702, a statute was passed that limited the life of the writ. All writs issued during the life of a sovereign expired six months after the death of that sovereign.⁴³ At that time, application could be made for extension of the writ. Like their cousins the general warrants, the writs of assistance were not supported by oath, did not require judicial intervention, did not require probable cause and did not specify places to be searched nor things to be seized.

At first, enforcement of the trade laws was lax, but in 1756, with the outbreak of the French and Indian War, the British tightened their grip on colonial trade. Tensions mounted as the colonists were subjected to intrusions sanctioned by these general warrants. Relief seemed to be at hand when, in October of 1760, King George II died. All writs issued during his reign were to expire in early 1761.

A group of Boston merchants petitioned the Massachusetts Superior Court to prevent the granting of new writs of assistance.⁴⁴ The Attorney General, Jeremiah Gridley, represented the customs officials supporting the issuance of new writs. His argument was simply that under the statutes of 1662 and 1696, authority and jurisdiction were granted by Parliament to colonial customs officials; therefore the writs should issue.⁴⁵

James Otis and Oxenbridge Thatcher argued for the merchants against the issuance of new writs. While Thatcher ques-

40. *Id.* at 53.

41. *Id.*

42. 7 and 8 Wm. III, ch. 22, § 6 (1696) (cited in LASSON, *supra* note 8, at 53, n.13).

43. TAYLOR, *supra* note 8, at 35.

44. LASSON, *supra* note 8, at 57.

45. TAYLOR, *supra* note 8, at 36.

tioned the statutory interpretation of the acts of 1662 and 1696,⁴⁶ Otis attacked them on grounds of unconstitutionality and incompatibility with the fundamental principles of the common law.

Otis used the common law warrant as a standard for the protection of "one of the most essential branches of English liberty, . . . the freedom of one's house."⁴⁷ He emphasized the deficiencies of the writs of assistance when compared to the safeguards encompassed in the common law warrants. His second argument was that the writs were tyrannical and arbitrary. They were "repugnant to the Magna Carta" and as a result of their unconstitutional nature, the writs should be void.⁴⁸

John Adams was present at the proceedings. On the Eve of Independence, July 3, 1776, he recollected Otis's argument and considered it the "commencement of the controversy between Great Britain and America."⁴⁹ In later years he would write in reference to Otis' plea: "Then and there, the child of Independence was born."⁵⁰

The Chief Justice of the Superior Court, Thomas Hutchinson, declined to rule on the petition at that time. Instead he sent to England for counsel on the current practices of the Court of Exchequer.⁵¹ Informed that it was a regular practice of that English court to issue writs of assistance, the Superior Court unanimously ruled in favor of the customs officers. In December 1761, one month after the decision, new writs were issued in Boston.⁵²

D. The Effect of the English General Warrants and Writs of Assistance Cases

These cases, in England and in Boston, were very familiar to the Framers. Their memories of British tyranny and the legal arguments in opposition to general warrants by Mansfield, Camden and Otis were carried into the Constitutional Convention. If

46. Thatcher argued that the statute of 1662 only authorized the Court of Exchequer to issue writs of assistance. Therefore, due to the absence of express Parliamentary authorization, there was no legal method of issuance in the colonies. Although Thatcher's argument did not persuade the Superior Court, in 1766 the Attorney General of England concurred in his interpretation. LASSON, *supra* note 8, at 61-62.

47. TAYLOR, *supra* note 8, at 37.

48. LASSON, *supra* note 8, at 59-60.

49. *Id.* at 61 (quoting MABEL HILL, LIBERTY DOCUMENTS at 188-89 (New York, 1901)).

50. *Id.* at 59 (quoting WORKS OF JOHN ADAMS, X, 247-248).

51. TAYLOR, *supra* note 8, at 37-38.

52. LASSON, *supra* note 8, at 63.

one wants to discover the original intent behind the Fourth Amendment, the evidence is clear.⁵³ For the Framers of the Constitution, the warrant was a procedural device that threatened essential liberties. The warrant was a tool that could be used arbitrarily by unscrupulous or vengeful executives and legislators to bypass common law procedural and judicial safeguards. The warrant was a device that was feared, not revered. A warrant was valid only if it upheld the procedural safeguards prescribed by the common law: (1) The warrant must be issued under oath; (2) It must be supported by a sufficient level of suspicion or cause; and (3) It must particularly describe the places to be searched and the things to be seized, and it must be returned to the magistrate after execution.

The resemblance of these words to the elements listed in the text of the Fourth Amendment is not an accident. That the text itself is not more clear is unfortunate, but the Framers' fear of governmental intrusion was obvious.

A study of some of the preceding state constitutions sheds more light onto the Framers' intentions. By directly attacking general warrants, the Virginia Bill of Rights was the first state constitution to establish in writing the rights of citizens against oppressive search and seizure.⁵⁴ The State of Pennsylvania adopted its Declaration of Rights soon after Virginia did. The text in the Pennsylvania Bill transcended mere assaults on the general warrants of the past by first acknowledging a fundamental right of the citizen to be free from search and seizure.⁵⁵ Therefore warrants that did not abide by procedural safeguards were not to be issued.⁵⁶ Another important development in American search

53. For an exhaustive analysis on the original intent behind the Fourth Amendment, see LASSON, *supra* note 8, at 79-105.

54. The Virginia clause reads: "That general warrants whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted." LASSON, *supra* note 8, at 79 n.3.

55. The Pennsylvania Bill reads: "That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmation first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, are contrary to that right, and ought not to be granted." LASSON, *supra* note 8, at 81 n.11.

56. *Id.* The Constitution of Tennessee, drafted in 1796, expressed a concern that searches via general warrants without procedural safeguards were "dangerous to liberty." 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3422, (Francis N. Thorpe ed., 1909 & photo. reprint 1977). Section 7 reads: "That the

and seizure law was Article 14 of the Massachusetts Declaration of Rights, in which the phrase "unreasonable searches and seizures" was used for the first time.⁵⁷

On June 8, 1789, James Madison submitted his proposal for a bill of rights to Congress.⁵⁸ The search and seizure provision read as follows:

The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, *shall not be violated by warrants* issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.⁵⁹

This language is similar to the language of Massachusetts Article 14 in that a warrant issued without common law safeguards was *per se* unreasonable and therefore a violation of the people's rights. The phrase "unreasonable searches and seizures," as read in the Massachusetts Bill and Madison's first draft, is synonymous with defective warrants. While the language may have evolved through the debate process,⁶⁰ the substance of

people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures, and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty, and ought not to be granted." *Id.*

57. The Massachusetts Declaration of Rights reads: "Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, [and without] a special designation of the person or objects of search, arrest, or seizure; and no warrant ought to be issued, but in the cases, and with the formalities prescribed by the laws." LASSON, *supra* note 8, at 82 n.15.

58. RICHARD PERRY, SOURCES OF OUR LIBERTIES 421 (1978).

59. *Id.* at 423 (emphasis added). The Constitution of Vermont was similar to the Massachusetts Declaration in that it concluded that defective warrants were a violation of the peoples' right against illegal government intrusion. "That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure; and therefore warrants, without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person . . . or his . . . property not particularly described, are contrary to that right, and ought not to be granted." PERRY, *supra* note 58, at 366.

60. In fact, the substitution of the words "and no warrant shall issue" for "by warrants issuing," was intended to strengthen the prohibition against general warrants. Mr. Benson, chairman of the committee of three charged with arranging the amendments, made this proposed change but it was actually rejected by the House. Thus the approved version of the Fourth Amendment contained the "by warrants issuing" language. Somehow the clause was changed before submission to the Senate and the discrepancy was never noticed. LASSON, *supra* note 8, at 101-02.

Article 14 is identical to the final ratified text of the Fourth Amendment.⁶¹ If the Massachusetts Declaration of Rights was as great an influence on Mr. Madison and the Congress as it appears,⁶² a harmony of phrases united against a common foe is suggested, rather than a disjointed dichotomy between the warrant and reasonableness clauses. As originally written, the reasonableness clause of the Fourth Amendment was the standard by which the rights of the people were protected, and the warrant clause gave specific protection against defective warrants. The enemy sought to be terminated by the Fourth Amendment of the United States Constitution was not the warrantless search but the general warrant.⁶³

E. Property Rights: Backbone of the Fourth Amendment

British oppression and the colonial reaction give strong insights into the intent behind the Fourth Amendment. But this historical review would be woefully inadequate if the fundamental basis for the writing of the Fourth Amendment were not explored. Modern search and seizure opinions inevitably visit the extent to which an individual's privacy rights were violated. Today, a person's right to privacy is what keeps the police out of his home. Until 1967, however, the fundamental right which the Fourth Amendment secured was the right to property.⁶⁴

This distinction is important because the modern right to privacy has been balanced into a significantly weaker status than the right to property in eighteenth century America. In fact, property was more than a fundamental right, it was an inalienable right. In the Declaration of Independence, the charter document upon which the Constitution was constructed, Thomas Jefferson and his committee proclaimed this immutable canon:

We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with

61. TAYLOR, *supra* note 8, at 42.

62. *Id.*

63. "To summarize, our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. . . far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches, and sought to confine its issuance and execution in line with the stringent requirements applicable to common-law warrants. . ." TAYLOR, *supra* note 8, at 41.

64. See *infra*, at II.C.3 for a discussion on *Warden v. Hayden*, 387 U.S. 294 (1967), and the change from property to privacy as the basis of Fourth Amendment protection.

certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.⁶⁵

The mere fact that the word "property" is absent from the list of rights endowed by God does not destroy the reality of the inalienable right to property.⁶⁶ Such a cursory and convenient conclusion ignores linguistic evidence and contemporary thought of the Framers. Words so meticulously chosen over two hundred years ago had great significance then and may have a different meaning today. The phrase "pursuit of happiness" encompassed the inalienable right to property as well as other economic rights.⁶⁷ Lockean and Blackstonian notions of property rights were written in many different terms and phrases.⁶⁸ The use of the phrase "pursuit of happiness" was an effort, by means of literary economy, to avoid redundancy—not to exclude property as an inalienable right.⁶⁹

A survey of many state constitutions which were contemporaneous with the Declaration and the Constitution, reveals the importance of property rights and their inalienable nature for the colonists.⁷⁰ Additionally, attention should be paid to the

65. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). For an excellent and extensive study of the Declaration, see GARY T. AMOS, *DEFENDING THE DECLARATION* (1989).

66. The understanding that the right of property is inalienable has endured. It is not just an anomaly in American jurisprudence attributable to outdated feudal views. In *Boyd v. United States*, 116 U.S. 616, 630 (1886), Justice Bradley stated: "It is not the breaking of his doors, . . . that constitutes the essence of the offense; but it is the invasion of his indefeasible right of . . . private property, where that right has never been forfeited by his conviction of some public offense."

67. Gerald R. Thompson, *The Unalienable Right to Property: Examining the Fourth and Fifth Amendments*, 8 *JOURNAL OF CHRISTIAN JURISPRUDENCE* 189, 190 (1990). In reference to the phrase "pursuit of happiness," Thompson states that "[n]ot only property rights, but also the rights of contract, inheritance and choice of occupation were included within its meaning." *Id.* at 190-91.

68. Richard A. Huenefeld, *The Unalienable Right of Property: Its Foundation, Erosion and Restoration*, 8 *JOURNAL OF CHRISTIAN JURISPRUDENCE* 147: 151-58 (1990). See also Thompson, *supra* note 67, at 190-93.

69. Huenefeld, *supra* note 68, at 151-58; Thompson, *supra* note 67, at 190-93. The similarity between the Declaration of Independence and the Virginia Bill of Rights (see *infra* note 70 for the text of the relevant provision) is explored in Thompson, *supra* note 67. Thompson concluded that "[f]ar from expressing a different meaning, the Declaration's enumeration of 'Life, Liberty and the pursuit of Happiness' was intended to convey the same meaning as the Virginia Bill of Rights, but in a more shorthand way." *Id.* at 190. The phrase "pursuit of Happiness" "said more in fewer words." *Id.*

70. Constitution of Pennsylvania (1776): "That all men . . . have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." PERRY, *supra* note 58, at 329.

Constitution of Massachusetts (1780): "All men are born free and equal and have

Declaration and Resolves of the First Continental Congress, which claimed in protest the right of property in 1774:⁷¹

That the inhabitants of the English colonies in North-America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS: . . . That they are entitled to life, liberty, and property. . . . [The American colonists] do claim, demand, and insist on, as their indubitable rights and liberties; which cannot be legally taken from them, altered or abridged by any power whatever, without their own consent.⁷²

An inalienable right is one conferred by God.⁷³ Such a right transcends the civil government. The government is charged with the duty of protecting and preserving inalienable rights; they have no jurisdiction to dispose of them.⁷⁴ This is the fundamental presupposition upon which the Fourth Amendment was written. Its importance cannot be overstated although it is an essentially forgotten concept in modern legal thought. To understand the intent of the Framers behind the Fourth Amendment, one must understand the concept of the inalienable right of property.

B. Separation of Powers and Judicial Intervention

The requirement of judicial intervention in the warrant process is a classic example of the doctrine of separation of

certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness. *Id.* at 374.

Delaware Declaration of Rights (1776): "That every member of society hath a right to be protected in the enjoyment of life, liberty and property. . . ." *Id.* at 339.

Constitution of New Hampshire (1784): "All men have certain natural, essential, and inherent rights; among which are - the enjoying and defending life and liberty - acquiring, possessing and protecting property - and in a word, of seeking and obtaining happiness." *Id.* at 382.

Constitution of Vermont (1777): "That every member of society hath a right to be protected in the enjoyment of life, liberty and property. . . ." *Id.* at 365.

Constitution of Virginia (1776): "That all men. . . have certain inherent rights, . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." *Id.* at 311.

71. *Declaration and Resolves of the First Continental Congress* (1774), reprinted in PERRY, *supra* note 58, at 286.

72. *Id.* at 287-88 (emphasis in original).

73. See generally, Gary T. Amos, *Unalienable Rights: The Biblical Heritage*, 8 JOURNAL OF CHRISTIAN JURISPRUDENCE 9 (1990).

74. See AMOS, *supra* note 65, at 103-26.

powers at work.⁷⁵ The neutral, detached judge serves to check the power of the enforcement agency requesting the search. This is a crucial protection against government violation of rights. When the legislature, or in modern times the executive agency, makes the law and subsequently enforces it without judicial intervention, the citizen who is the object of the search has no protection but the discretion of the enforcer.

The concept of separation of powers was of the highest concern for the Framers. The abuses of Parliament and the Court of Star Chamber were fresh in the memories of the colonists.⁷⁶ James Madison was acutely aware of the necessity of separation of powers. "The accumulation of powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."⁷⁷ Madison was so concerned with this concept that in his proposed amendments to the Constitution, he offered a "separation of Powers" provision to be inserted after Article VI.⁷⁸

Alexander Hamilton conceded that the judiciary was the weakest of the branches, but he realized its importance in the protection of liberty.⁷⁹ He echoed Madison's concerns:

For I agree that 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone,⁸⁰ but would have everything to fear from its union with either of the other departments.⁸¹

75. For an excellent and eminently readable exposition on separation of powers, see L. Riccardo Giuliano, Note, *The 1993 Rule 11 Amendments - Oops! There Go Retribution and Separation of Powers - A Lower Perspective*, 4 REGENT U. L. REV. 117, 128-37 (Spring 1994) (apologies to the esteemed author for defeating the purpose of his unique style). The author of this note demonstrates the influences of Locke, Montesquieu and Blackstone on the Framers, with respect to separation of powers, in a fiendishly persuasive manner.

76. See PERRY, *supra* note 58, at 125-42.

77. THE FEDERALIST No. 47 (James Madison).

78. Madison's proposal read as follows: "The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislature Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments." PERRY, *supra* note 58, at 424.

79. THE FEDERALIST No. 78 (Hamilton).

80. Mr. Hamilton obviously had no concept of judicial activism as it exists in the twentieth century.

81. THE FEDERALIST No. 78 (Hamilton).

The most important function of the common law requirement of judicial intervention is to divest an overreaching legislature or executive agency of total power. The judge is the last obstacle for the tyrant, and the last defense of liberty. As the concept of separation of powers has faded from modern political and jurisprudential discourse, a fundamental lesson in the preservation of rights has been obscured. When the Fourth Amendment was written, that lesson was firmly grasped.

II. MODERN ADMINISTRATIVE SEARCHES

A. *Frank, Camara and See*

The present state of the administrative search doctrine originated in *Frank v. Maryland*⁸² in 1959. Under the Baltimore City Code, health inspectors were granted the authority to demand entry into private homes without a warrant. A minimal level of suspicion permitted these inspectors to search for violations of the City Health Code.

The Court avoided a confrontation with the Fourth Amendment by claiming that health inspections of this kind only "touch at most upon the periphery of the important interests safeguarded" by constitutional search and seizure provisions.⁸³ This dubious claim avoided the need to embark on a lengthy justification for the creation of an exception to the Fourth Amendment requirements of a warrant and probable cause. To legitimize its result, the Court cited numerous factors. Among them were the long public acceptance of health inspections, the lack of concern of the homeowners about imminent criminal prosecution, and the impracticality of achieving city health standards by adhering to the traditional warrant requirements.⁸⁴

In 1967, the Court overruled *Frank* in *Camara v. Municipal Court*.⁸⁵ Justice White, writing for the majority, reclaimed the intended protection of the Fourth Amendment for homeowners by rejecting "*Frank's* rather remarkable premise" that only individuals suspected of crimes are afforded full constitutional protection against government intrusions.⁸⁶

82. 359 U.S. 360 (1959).

83. *Id.* at 367.

84. *Id.* at 366-73.

85. 387 U.S. 523 (1967).

86. *Id.* at 531.

After apparently disposing of *Frank's* weakening effect on the Fourth Amendment, Justice White proceeded to redefine the issue of health inspections. He proclaimed the government interest in, and the necessity of area health inspections, and conceded that the judicial preference for warrants was not conducive to effective regulation of private homes.⁸⁷ With the warrant clause rendered ineffective, he then proceeded to use the "reasonableness clause" as the justification.⁸⁸

Justice White used many of *Frank's* legitimatizing factors as one side of his balancing test, set against the privacy interests of homeowners, to conclude that "the area inspection is a 'reasonable' search of private property within the meaning of the Fourth Amendment."⁸⁹ Content with this conclusion, he then stated: "[I]t is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."⁹⁰

The Court ruled that a valid public interest could substitute for the probable cause requirement.⁹¹ Although *Camara* created only a narrow exception to this requirement, a dangerous precedent was established for the further dilution of Fourth Amendment protections against random administrative searches. In *See v. City of Seattle*,⁹² argued together with *Camara*, the Court applied the same probable cause standards to searches of businesses for safety reasons. The Court noted that businesses might

87. *Id.* at 534-36.

88. *Id.* at 536-37. The Warrant Clause was rendered ineffective because the level of suspicion required to meet the probable cause standard was decreased to meet the necessity of the government search. The requirement of probable cause for the issuance of a warrant is the most effective deterrent against government intrusion. Once the probable cause requirement is significantly attenuated, the protection of a warrant is minimal.

89. *Id.* at 538. The Court listed three major factors: (1) long acceptance of health inspections by the public; (2) its doubt that any other canvassing technique, in compliance with traditional warrant requirements, would achieve an acceptable level of success; and (3) a lesser expectation of privacy for the homeowner because the inspections are not personal in nature. It is not surprising that commentators readily attacked these premises. See LAFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1.

90. 387 U.S. 523, 538 (1967). Probable cause is for the judge to decide, not a reasonable legislature or executive. That is precisely why the concept of separation of powers is so important. When all the decisions, power and evaluations rest with one branch, separation of powers is violated.

91. *Id.* at 539.

92. 387 U.S. 541 (1967).

be reasonably searched in many more situations than private homes, but that a warrant was necessary.⁹³

Professor Stephen Schulhofer analogizes *Camara's* exception to the probable cause requirement with the exigent circumstances exception to the warrant requirement.⁹⁴ This comparison is sound with respect to Justice White's emphasis on "the controlling standard of reasonableness."⁹⁵ An argument could be made that, in terms of rights of the people against search and seizure, health inspections were not a concern of, nor even a consideration of, the Framers of the Constitution. One might postulate that restricted safety inspections were, in fact, considered "reasonable" and therefore not in violation of the Fourth Amendment. However, at common law, warrantless searches were generally only permitted incident to the arrest of a felon or a person who committed a misdemeanor in the presence of the constable.⁹⁶ It is difficult to imagine that a warrantless search, with no suspicion and no violent felon lurking at the peril of the public, would be considered reasonable. It is also difficult to imagine the Framers granting expansive discretion to the government when the abuses of the British authorities were so fresh in their memories, and the possibility of pretext so real.

At its genesis, the administrative search exception was valid only when: (1) reasonable statutory or regulatory safeguards were in place; (2) the search was necessary; (3) there were no workable alternatives to the circumvention of full Fourth Amendment protections; and (4) there was a lesser expectation of privacy.⁹⁷

B. After *Camara* and *See*

In *Colonnade Catering Co. v. United States*,⁹⁸ the Supreme Court ruled that a warrantless search of a business storeroom and seizure of liquor found therein was illegal. The incident occurred when U.S. Treasury agents demanded entry into the storeroom. When the owner insisted upon production of a warrant, the agents broke the lock and seized the liquor pursuant to a Federal excise tax law applicable to liquor licensees. How-

93. *Id.* at 546.

94. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87.

95. 387 U.S. 523, 539 (1967).

96. TAYLOR, *supra* note 8, at 27-29. *See also* U.S. v. Watson, 423 U.S. 411, 419 (1976).

97. *See* Schulhofer, *supra* note 94, at 93.

98. 397 U.S. 72 (1970).

ever, this was no great victory for Fourth Amendment standards. The reason the search was illegal was because, by statute, the only sanction for refusal of entry was a \$500 fine.⁹⁹ The warrantless search was simply not authorized in the statute, thus a lengthy balancing test was not necessary on the issue. The Court ruled that *See* was not applicable in the case at hand, and the implication from the opinion is that, had the statute authorized a warrantless search, it would have been legal.

Although the Court held the seizure illegal, it acknowledged that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand."¹⁰⁰ Justice Douglas, writing for the majority, supported this assertion by noting the long history of Congressional regulation of the liquor industry. The cause for concern from this statement is that the Court relaxed its requirement, as held in *Camara* and *See*, that the inspections be pursuant to health or safety concerns.

In *United States v. Biswell*,¹⁰¹ a Federal Treasury agent, accompanied by a policeman, inspected a pawn shop and requested entry into a storeroom.¹⁰² The owner asked for a warrant. The Treasury agent showed him a copy of the code section authorizing the search. With the owner's consent after reading the statute, the agent inspected the storeroom and seized illegal firearms. The Court upheld the search.

In his analysis of the question of forced entry without a warrant, Justice White analogized the pawn shop owner's submission to the displayed code section to that of a homeowner acquiescing to a search warrant. In effect, he gave the code section the same power as a warrant by reasoning that the owner was on notice as to the agent's identity and statutory authority to search the business premises.¹⁰³ Thus, as the reasoning goes, if person starts a business in an industry that is regulated by a random warrantless search scheme, that person has consented to

99. *Id.* at 77.

100. *Id.* at 76.

101. 406 U.S. 311 (1972).

102. *Id.* (The owner of the pawn shop was federally licensed to deal in sporting weapons. The Gun Control Act of 1968 authorized official inspection of any firearm dealer for the purpose of examining required records and documents and inspecting guns and ammunition.).

103. This circumvention of review by a neutral and detached judicial officer is ominously similar to a Parliamentary general warrant.

all future searches of his premises. This notice or "implied consent" theory would be important in future decisions.¹⁰⁴

The Court's ruling in *Biswell* was based on two key factors: (1) Federal regulation of firearms dealers was extensive and pervasive and thus rendered the licensee's expectation of privacy substantially diminished; and (2) the warrant requirement was untenable due to the need for surprise for effective enforcement. "(T)he prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible."¹⁰⁵

The second justification fails for two reasons. The only frustration caused by a warrant would be the time spent by the officer in procuring one. The element of surprise would be preserved because the government could obtain the warrant ex parte. If the warrant is indeed the judicial safeguard as advertised since the Warren Court, then should mere administrative convenience be a sufficient cause to abandon the requirement? That is precisely what has occurred.

In the second part of the quote from *Biswell*, Justice White refers to the protection provided by a warrant. According to the Fourth Amendment, "no warrant shall issue, but upon probable cause..." The statute at issue in *Biswell* mandated no requirement of suspicion to support its regulatory searches. When the primary itemized protection of the Fourth Amendment warrant, the requirement of probable cause, has been eviscerated the entire stature of the warrant has been tainted.

Marshall v. Barlow's, Inc. addressed the issue of administrative inspections under the Occupational Safety and Health Act of 1970 (OSHA).¹⁰⁶ The owner of an electrical and plumbing installation business denied an OSHA inspector access to non-public areas of his business without a warrant. Citing *Camara* and *See*, the Court ruled that it was necessary to obtain a warrant before the search in this case and that the statutory authorization for this warrantless search was unconstitutional.¹⁰⁷ Justice White distinguished *Barlow's* from *Colonnade* and *Biswell* by noting the

104. Consider the lease provisions that require forfeiture of rights in the housing project gun sweep situations (*see supra*, note 5 and accompanying text). The slope is sufficiently slippery to cause genuine alarm.

105. 406 U.S. at 316.

106. 436 U.S. 307 (1978).

107. *Id.* at 310.

absence in the former case of the same degree of close government regulation.

The assumption of the "closely regulated" business requirement is that participants in this type of business, particularly those that require a license, "accept the burdens as well as the benefits of their trade."¹⁰⁸ The fact that the particular type of business is extensively regulated acts as a form of notice. Entry into such a business is per se acquiescence to the regulations and implied consent to the searches. Where there is consent, a warrant is not necessary. This is just an extension of the implied consent theory that arose in *Biswell*. In *Barlow's*, the derivation of the consent broadened from a particular statute (fire arm regulations in *Biswell*) to an entire class of businesses.

In *Donovan v. Dewey*,¹⁰⁹ the Court upheld a warrantless search of a mining facility made pursuant to the Federal Mine Safety and Health Act of 1977.¹¹⁰ Justice Marshall invoked the ubiquitous Commerce Clause to condone the "broad authority to regulate commercial enterprises engaged in or affecting interstate commerce."¹¹¹ The warrantless search was held to be constitutional due to the specificity in the language of the Act. He cited *Colonnade* and *Biswell* as precedent and distinguished *Barlow's* on the ground that OSHA did not have the requisite specificity in its search provisions for the statute to be a constitutionally adequate substitute for a warrant.¹¹²

This concept of the constitutionally adequate substitute was clarified and solidified as an element of administrative search analysis in *Dewey*. This reasoning is troublesome because the

108. *Id.* at 313, (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973)).

109. 452 U.S. 594 (1981).

110: Section 103(a) of the Federal Mine Safety and Health Act mandates that federal mine inspectors search underground mines at least four times a year and surface mine at least two times a year. 30 U.S.C. § 813(a) (Supp. III 1976). The statute requires "no advance notice of an inspection . . . to any person." *Dewey*, 452 U.S. at 596.

111. 452 U.S. at 599. Under the current congressional definition of "affecting interstate commerce" (see *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981)), it is difficult to imagine a business that would not be subject to Congress' broad authority.

112. 452 U.S. at 600-03. The Federal Mine Safety and Health Act sets the frequency of intervals at which all mines must be inspected and the standards with which the mine operator must comply, and prohibits forcible entry. Justice Marshall analyzed this scheme and found it "difficult to see what additional protection a warrant requirement would provide." *Id.* at 604-05. However, the Fourth Amendment guarantees that "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." These are the protections that a warrant would provide.

primary objective of the warrant procedure is to temper the zeal of law enforcement officers by subjecting the proposed search to the discretion of a neutral detached judicial officer. Circumvention of the judicial branch is repugnant to the concept of separation of powers. The argument that federal agents acting under statutory authority are not technically law enforcement officers, and thus are not subject to the rigors of the Fourth Amendment, is equally repugnant because it concedes that the legislative branch is acting as an enforcer, which is the function of the executive branch. The concept of separation of powers is essential in the preservation and protection of individual liberties. However, the constitutionally adequate substitute test remains intact, regardless of its inherent inconsistency with that concept.

C. *New York v. Burger: State of the Art in Administrative Searches*

*New York v. Burger*¹¹³ has defined the administrative search doctrine more clearly than any other case in *Camara's* progeny. Justice Blackmun, writing for the majority, developed a three-prong test to determine the constitutional validity of warrantless administrative searches of businesses:

- (1) There must be a "substantial government interest" supporting the regulatory scheme pursuant to which the search was made.¹¹⁴
- (2) The warrantless searches must be "necessary to further the regulatory scheme."¹¹⁵
- (3) "The statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant."¹¹⁶

In *Burger*, the Court upheld the validity of a New York statute sanctioning random police searches of automobile junk yards.¹¹⁷ The statute required that junk yard owners be licensed and keep records of the automobiles and parts located on their properties. The purpose of the statute was to deter the illegal business of dealing in stolen vehicle parts. As the Court recognized, the stolen vehicle "industry" had caused a tremendous financial and human resource drain on the state.¹¹⁸

113. 482 U.S. 691 (1987).

114. *Id.* at 702.

115. *Id.* at 702 (quoting *Dewey*, 452 U.S. at 600).

116. *Id.* at 703 (quoting *Dewey*, 452 U.S. at 600).

117. *Id.* at 717-18.

118. 482 U.S. 691, 708-09 (1987).

Joseph Burger, owner of a junk yard, was the target of a random search. When he indicated to the police that he had neither a license nor a record book, the police searched his business premises without a warrant pursuant to the New York vehicle dismantler statute. He was subsequently arrested and charged with possession of stolen property and unregistered operation as a vehicle dismantler pursuant to the statute.¹¹⁹

Justice Blackmun began his analysis by restating previous Court holdings that the expectation of privacy in a business is less than that of a home.¹²⁰ He further qualified that the expectation was "particularly attenuated" in a closely regulated industry.¹²¹ Because of this reduced expectation of privacy, he reasoned that the warrant and probable cause requirements of the Fourth Amendment "have lessened application in this context."¹²² In conjunction with these basic presuppositions, Justice Blackmun used the balancing test he formulated in his concurring opinion in *New Jersey v. T.L.O.*¹²³ Where the government has "special needs beyond the normal need for law enforcement," a warrantless administrative search is reasonable under the Fourth Amendment.

Two major criticisms have surfaced against the Court's ruling in *Burger*: (1) the application of the facts of the case to the tests stated; and (2) the pretext purpose behind the New York statute that in reality was used for criminal law enforcement.

Concerning the first criticism, the third prong of Justice Blackmun's test, the constitutionally adequate substitute requirement, was satisfied when the New York statute mandated that auto dismantlers would be inspected on a regular basis, but only during business hours. This is a dramatic shift from *Barlow's* in which the Court held that the comparatively more extensive standards set out in the OSHA regulations did not pass the same test.

The Court in *Burger* also relied on an "implied notice" theory.¹²⁴ It reasoned that, because the owner must obtain a license in order to operate his business, and therefore knows that he will be subject to inspections, he has impliedly consented

119. *Id.* at 695-96.

120. *Id.* at 700.

121. *Id.*

122. *Id.* at 702.

123. 469 U.S. 325 (1985) (Blackmun, J., concurring) (administrative search of a student's purse which produced illegal drugs).

124. 482 U.S. 691, 711 (1987).

to the searches. An analogy to Fifth Amendment jurisprudence would not work using this logic. The Fourth Amendment secures a right against unreasonable searches just as the Fifth Amendment protects criminal defendants against self-incrimination. To consent to give possibly self-incriminating answers to questions during interrogation, is to waive one's Fifth Amendment right. In order for the waiver of one's Fifth Amendment rights to stand, the Court imposes a strict test that makes the government prove that the defendant waived his rights voluntarily, knowingly and intelligently.¹²⁵ That same test would not be upheld if applied to the theory of implied consent in the context of Fourth Amendment rights. Simply going into business does not translate into a voluntary, knowing and intelligent waiver of one's right against unreasonable search and seizure.

The "constitutionally adequate substitute" test is illusory in any event. Even if a warrant were obtained, if the Court allows the warrant to be issued without probable cause or particularly describing places to be searched or things to be seized, the warrant is perfunctory and impotent. Such a warrant only serves to legitimize the search in the eyes of the courts and in reality provides none of the protections prescribed by the Fourth Amendment.

In the second wave of criticism, commentators have chastised the Court for validating an administrative search that was obviously intended to enforce criminal law. Justice Brennan, dissenting in *Burger*, cited numerous opinions and stated: "In the law of administrative searches, one principle emerges with unusual clarity and unanimous acceptance: the government may not use an administrative inspection scheme to search for criminal violations."¹²⁶

The majority dismissed this criticism by noting that the States may address social problems by both administrative and criminal procedures, and the mere fact that they overlap in application and enforcement does not constitutionally invalidate the administrative procedure.¹²⁷ The Court acknowledged a difference in Fourth Amendment protection but denied that the coincidental objectives in the *Burger* case necessitated the use of more strict criminal law levels of suspicion.¹²⁸

125. See *Miranda v. Arizona*, 384 U.S. 436, 444, 475 (1966); *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

126. 482 U.S. at 724 (1987) (Brennan, J. dissenting).

127. *Id.* at 712.

128. For example, probable cause.

These arguments, both for and against the pretext issue, have one glaring fault. In *Camara*, the Court dismissed *Frank's* "rather remarkable premise" that individuals and their private property do not receive the full extent of Fourth Amendment protection as a criminal defendant does.¹²⁹ By making a distinction between the rights of the criminally accused and those of the ordinary law abiding citizen, an implication is made that the Fourth Amendment provides varying levels of protection in favor of criminal defendants. This view was buried in *Camara* and should remain six feet under. To the Framers of the Constitution, the writs of assistance were the evil to be avoided. These general warrants were regulatory in nature and not for criminal prosecution. There is no evidence that the Framers intended to create a tiered system of rights against government search and seizure dependant upon the legal status of the one who invokes the right. The Fourth Amendment protects law abiding citizens as well as the criminally accused.

D. The 1986 Term

The Court decided three other administrative search cases in the 1986 term. The *Burger* decision was joined by *Griffin v. Wisconsin*,¹³⁰ *O'Connor v. Ortega*,¹³¹ and *Illinois v. Krull*¹³² in this pivotal year for the doctrine.

In *Ortega*, the Court upheld a warrantless search of a public employee's office, desk and file cabinets by his employer. It was determined that the employee was entitled to some Fourth Amendment protection in his desk and file cabinets. However, his expectation of privacy was diminished enough to have the balancing test sway in favor of his employer's need to search without a warrant. The personal element of *New Jersey v. T.L.O.* was extended into the workplace.¹³³ The minimal (if any) requisite level of suspicion in *T.L.O.* was satisfied in *Ortega*.

129. 387 U.S. 523, 530-31 (1967).

130. 483 U.S. 868 (1987).

131. 480 U.S. 709 (1987).

132. 480 U.S. 340 (1987).

133. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), a high school official searched the purse of a student without a warrant. This case has become the seminal case in the branch of the administrative search or "special needs" doctrine that addresses the issue of administrative searches of the individual person. In this case, the Court balanced the requirement of suspicion into oblivion.

In *Griffin*, the Court used the level of suspicion required in *T.L.O.* and *Ortega* to uphold a warrantless search of a probationer's home on a tip that there may be firearms inside. The fortress of the home was penetrated due to the legal standing of the owner, with a minimal level of suspicion not amounting to probable cause. Justice Scalia wrote for the majority. He added the state's operation of probation programs to the "special needs" family. Basing his decision on reasonableness, he finally put to rest the argument that such searches required a warrant even if probable cause was not required. "This . . . is a combination that neither the text of the Constitution nor any of our prior decisions permits. . . . [W]here the matter is of such a nature as to require a judicial warrant, it is also of such a nature as to require probable cause."¹³⁴

In *Krull*, the Court empowered the administrative search doctrine from a different, but equally dangerous angle. The Court extended the good faith exception to the exclusionary rule of *United States v. Leon*¹³⁵ to administrative searches. Under the rule in *Leon*, "the Fourth Amendment exclusionary rule does not apply to evidence obtained by police officers who acted in objectively reasonable reliance upon a search warrant issued by a neutral magistrate, but where the warrant was ultimately found to be unsupported by probable cause."¹³⁶ Applied to administrative searches, the exclusionary rule will not effect the admissibility of evidence obtained by officials who "relied in objective good faith" on a statute that appeared to authorize constitutionally adequate warrantless searches, even if the statute is subsequently declared unconstitutional.

III. ANALYZING THE ROOTS OF THE PROBLEM

After reviewing the troubled state of the administrative search doctrine, it is appropriate to investigate the reasons for the confusion, contradiction and criticism. There are three different topics that have served as roots of the turmoil: (1) defects in the judicial analytical process (the balancing test); (2) essentially semantic application difficulties (Warrant Clause v. reasonableness standard); and (3) conflicts in fundamental jurisprudential presuppositions.

134. 483 U.S. at 877.

135. 468 U.S. 897 (1984).

136. 480 U.S. at 342 (Justice Blackmun quoting the rule of *United States v. Leon*).

A. *The Balancing Test*

The balancing test, which has come to dominate constitutional reasoning by the Supreme Court, was not in consideration when the Fourth Amendment was written.¹³⁷ Professor Aleinikoff traces the origins of constitutional balancing to the late 1930's and early 1940's.¹³⁸ This form of analysis, the battle of competing interests, was an offspring of the pragmatic instrumentalist movement. Blackstonian natural law, which endured from the Framers through Justices Marshall, Story and Taney, had given way to the theories of Holmes, Brandeis, Cardozo, Pound and other social pragmatists.¹³⁹ Immutable standards of right and wrong conduct for the government and individuals, proved to be too harsh and distasteful to the new "modern society." Therefore a new method of constitutional analysis was created to accompany the rising new mode of evolutionary constitutional interpretation.¹⁴⁰

Balancing has shaped many constitutional topics including most notably the Commerce Clause,¹⁴¹ the First Amendment,¹⁴² and substantive due process.¹⁴³ Fourth Amendment balancing has its origin in *Camara*, and as a method of search and seizure analysis, it has grown to prominence. As stated in *Tennessee v. Garner*, "'the balancing of competing interests' [is] 'the key principle of the Fourth Amendment.'"¹⁴⁴ The rise in balancing is ominously correlated with the decrease in Fourth Amendment protection. Professor Aleinikoff, a critic of balancing, observed that "[b]alancing has been a vehicle primarily for weakening earlier categorical doctrines restricting governmental power to search and seize."¹⁴⁵

137. See generally, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (general history and criticism of the balancing test), and Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988) (critique on the use of balancing in Fourth Amendment cases).

138. Aleinikoff, *supra* note 137, at 948.

139. *Id.* at 949-59.

140. See Aleinikoff, *supra* note 137, at 958-63. "The balancing judge could assume the role of a social scientist, trading deductive logic for inductive investigation of interests in a social context." *Id.* at 961.

141. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

142. See Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

143. See, e.g., *Griwold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992).

144. 471 U.S. 1, 8 (1985) (quoting *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981)).

145. Aleinikoff, *supra* note 137, at 965. Justice White wrote in *New Jersey v. T.L.O.*:

Criticism of the balancing test centers around a few basic themes: (1) the inaccuracy of identification and comparison of the interests involved, and the inherent subjectivity of the judicial determination; (2) the diminished precedential value of ad hoc balancing; and (3) the wavering role of the judiciary in the system of checks and balances.¹⁴⁶

In administrative search cases, the classic interests being weighed are those of the government in assuring the health and safety of the citizens against the privacy right of the individual.¹⁴⁷ Under the guise of objectivity and empirical analysis, balancers try to settle the conflicts of interests. Cardozo and Pound, two of the founders of the balancing theory, however, acknowledged the futility of this task.¹⁴⁸ Justice Scalia recently stated that the balancing process is like "judging whether a particular line is longer than a particular rock is heavy."¹⁴⁹ The crux of the problem is that there is no way to quantify the intrusiveness of a search to an individual or the importance of that search to society.¹⁵⁰ If

"Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." 469 U.S. 325, 341 (1985). The Court has also apparently not hesitated to adopt a standard that stops so short of probable cause, that the search is essentially suspicionless and random.

146. See Aleinikoff and Strossen, both *supra* note 137, for exhaustive criticisms of the balancing test.

147. While the government's interest started in *Camara* and *See* as health and safety, other interests have increasingly been recognized. *New York v. Burger*, 482 U.S. 691, 708 (1987) (government interest in regulating the vehicle dismantling and automobile junkyard because of the increase in auto theft); *United States v. Biswell*, 406 U.S. 311, 315 (1972) (regulation of firearms); *Colonnade Corp. v. United States*, 397 U.S. 72, 75 (1970) (federal interest in regulating liquor establishments to "protect[] the revenue against various types of fraud"); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (maintaining security and order in schools, and a "legitimate need to maintain an environment in which learning can take place").

148. Justice Cardozo wrote: "In the present state of our knowledge, the estimate of the comparative value of one social interest and another . . . will be shaped for the judge . . . by his experience of life; his understanding of the prevailing canons of justice and morality; his study of the social sciences; at times, in the end, by his intuitions, his guesses, even his ignorance or prejudice." B. CARDOZO, *THE GROWTH OF THE LAW* 85-86 (1924) (as quoted in Strossen, *supra* note 137, at 1184 n.52). Roscoe Pound wrote: "But however common and natural it is for . . . jurists to seek [a scientific method of determining and valuing competing interests], we have come to think today that the quest is futile. 3 R. POUND, *JURISPRUDENCE* at 330-31 (1959) (footnote omitted) (as quoted in Aleinikoff, *supra* note 137, at 973-74).

149. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (dormant commerce clause case).

150. Professor Aleinikoff points out that interests are not always easily separated. For instance, the government will always have the dual interests of apprehending

an empirical value on the interests to be weighed against each other cannot be determined, then the decision of the judge is based on his or her best estimate.¹⁵¹ Obviously there will be a subjective component in most if not all decisions made by a human sitting on the bench. However, the Bill of Rights was written to remove as much of the subjective component as possible to protect those most basic of rights.¹⁵²

When a bright line test can be found and implemented, judges and commentators alike are much contented. Judges are happy because they can avoid tough decisions by simply applying established law. Commentators are delighted because they have a clear focal point to attack. But in the context of constitutional criminal procedure, judicially created bright lines such as the *Miranda* test, and "constitutionally mandated" bright lines such as the Fourth Amendment's "requirement" of a warrant, have added to the confusion. Fourth Amendment cases are particularly fact specific and often arise where exigencies at the "scene of the crime" cloud the picture. The balancing test draws upon precedents with unavoidably varying underlying fact situations, and sets a rule which is readily applied only to a similar fact situation. The difficulty that the balancer has with using his or her available precedential authority is then passed on to the balancer of the next case. With such fluctuating standards, ad hoc balancing not only makes it difficult for the judge to make decisions and follow the law, but also for the policeman in the street.¹⁵³

Perhaps the most serious of the flaws with balancing is the effect it has on the judiciary's role with respect to the separation of powers. With questions of the extent of federal power, as in

criminals and protecting the privacy of citizens. "[T]here is little sense in seeing the balance in terms of individual versus governmental interests." Alienikoff, *supra* note 137, at 981.

151. See *New Jersey v. T.L.O.*, 469 U.S. at 369 (1985) (Brennan, J., dissenting) ("[B]alancing tests' amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will.").

152. See *Hudson v. Palmer*, 468 U.S. 517, 556 n.33 (1984) (Stevens, J., dissenting in part and concurring in part) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials. . .") (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

153. See *Strossen*, *supra* note 137, at 1193-94.

Commerce Clause cases, arguments have been made that the judiciary has usurped the power of the legislature. Detractors assert that the balancing should have occurred on the Congressional floors, debated by elected representatives of the people, not by an appointed judge with life tenure. The bicameral system of our legislature adds another internal check for the balancing of interests.¹⁵⁴ This extension into the domain of the legislature is nothing but the imposition of judicial will. The combination of executive, legislative and judicial power is a recipe for tyranny.¹⁵⁵

In Fourth Amendment cases, the problem seems to be the opposite. Professor Strossen argues that the Court has become too deferential to the legislative and executive branches by subjecting their actions to an insufficient level of scrutiny.¹⁵⁶ Because search and seizure cases involve governmental infringement of the rights of an individual or a small group who are often undesirable or unpopular in the public conscience, the democratic process may not be sufficient protection of their interests. When ad hoc balancing is the standard, and concrete guidelines are ignored, the legislative and executive branches are free to exercise power to ever extending limits until the judiciary finally halts the encroachment.¹⁵⁷

The Fourth Amendment appears to be the victim of discrimination. Whenever a fundamental right is protected by the other amendments of the Bill of Rights, the government action denying that right is subject to strict judicial scrutiny. Extensions of the Bill of Rights and the Fourteenth Amendment encompassed under a "penumbra,"¹⁵⁸ or derived from the necessities "implicit in the concept of ordered liberty,"¹⁵⁹ tradition, or "reasoned judgment,"¹⁶⁰ also give rise to strict scrutiny. However, the govern-

154. Aleinikoff, *supra* note 137, at 984.

155. THE FEDERALIST No. 47 (James Madison).

156. Strossen, *supra* note 137, at 1185-1188. "[W]hen an issue is framed in terms of balancing the decreased protection of constitutional right against the increased protection of some societal interest, judges are required at least to consider, and in many cases to defer to, the conclusions of the other governmental branches." *Id.* at 1185. *See also* Aleinikoff, *supra* note 137, at 991.

157. In administrative search cases, the government has already bypassed the probable cause and particularity requirements for warrants, and has ignored the general requirement of a sufficient level of suspicion in warrantless searches. When will the Court step in to plug the crumbling dike?

158. *Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965).

159. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

160. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2797 (1992).

ment is given great deference in Fourth Amendment cases. Recall the argument of James Otis as he defended "one of the most essential branches of English liberty, . . . the freedom of one's house."¹⁶¹ There can be no justification for the relegation of the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," to second class status within the text of the Constitution.

Professor Strossen, acquiescing that balancing is here to stay, offers a solution to the problem. She would include an analysis of the "least intrusive alternative" to the balancing equation to ensure that individual rights are impinged upon only as a last resort. Unfortunately this would only put a band-aid on the gaping laceration caused by balancing. Words and phrases like "least intrusive alternative," "compelling interest," and "expectation of privacy" are all instruments of balancing. Adding more variables to any equation rarely has the effect of simplification or clarification. Until the Court remembers why the Fourth Amendment was written—to protect individuals from government intrusion without suspicion and the proper procedural safeguards—the right to be free from unreasonable searches and seizures will remain weakened and in constant jeopardy. When the essential right to be free from unreasonable governmental searches is bombarded with exceptions and balancing justifications, individual liberty is in peril.

B. Reasonableness v. Warrant Clause

In the Warren Court, the Warrant Clause of the Fourth Amendment was interpreted as superseding the Reasonableness Clause with the latter functioning in a reserve capacity. The Court expressed a clear preference for warrants in all but a few situations. The defining statement of Warren Court Fourth Amendment jurisprudence was the often-quoted passage from *Katz v. United States* in which Justice Stewart asserted that all warrantless searches were "per se unreasonable, subject only to a few specially established and well-delineated exceptions."¹⁶²

161. See *supra* note 47 and accompanying text. Justice Brandeis stated: "[The Framers] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

162. 389 U.S. 347, 357 (1967).

The adherence to Warrant Clause preeminence has been foundational with respect to the administrative search doctrine. Both the Warren Court and the Burger Court were predominantly sold on the supremacy of the Warrant Clause. This may precisely be the problem. The emphasis has been on reconciling administrative searches with the requirement of a warrant instead of using the warrant clause to protect the rights of citizens against illegal searches. As the number of exceptions to the warrant requirement has grown, it has become more difficult to establish the principles (if there are any) upon which the Court is deciding Fourth Amendment cases.

The administrative search doctrine was born in the heyday of Warrant Clause supremacy since *Camara* and *See* were both written in the same term as *Katz*. While the rule in *Camara* regarding the requirement of a warrant for area searches of homes remains intact, the corresponding rule of *See* that is applicable to businesses has all but evaporated.

Considerable amounts of paper and ink have been used while the Court has tried to justify both the warrantless, suspicionless search and the search requiring a warrant with only a minimal level of suspicion. The reason for the difficulty with these justifications is that, regardless of the eloquence or brilliance of the Justices, these searches are historically and textually irreconcilable with the true meaning of the Fourth Amendment.

The administrative search doctrine has proven to be a major battleground in the war between the clauses. What began as one of the "few specially established and well delineated exceptions" to the warrant requirement, has become the cornerstone of a rapidly expanding class of cases forsaking *Katz* in favor of reasonableness.¹⁶³ In 1984, Professor Silas J. Wasserstrom wrote

163. See e.g. *Chimel v. California*, 395 U.S. 752 (1969) (search of an arrestee extended to areas within his immediate control); *Maryland v. Buie*, 494 U.S. 325 (1990) (expanded *Chimel* to a protective sweep of the premises); *United States v. Edwards*, 415 U.S. 800 (1974) (search incident to arrest did not have to be made contemporaneously); *United States v. Robinson*, 414 U.S. 218 (1973) (search of person incident to arrest); *New York v. Belton* 453 U.S. 454 (1981) (*Chimel* extended to automobiles); *United States v. Cotton*, 751 F.2d. 1146 (10th Cir. 1985) (*Belton* extended to incidences where the arrestee is outside of the car when the search of the car is made); *Horton v. California*, 496 U.S. 128 (1990) (plain view doctrine: where police have lawful right to be, any immediately apparent incriminating evidence may be seized); *Carroll v. United States*, 267 U.S. 132 (1925) (automobile exception); *Chambers v. Maroney*, 399 U.S. 42 (1970) (automobile exception extended to impoundment of the vehicle); *United States v. Chadwick*, 433 U.S. 1 (1977) (moveable property inside a car allowed to be seized but a warrant required to search the moveable property); *United States v. Ross*, 456 U.S. 798 (1982) (where there is

that it was "clear that the Court now tests a widening variety of police practices against some sort of standard of general reasonableness."¹⁶⁴ Five years later, he reaffirmed his findings and declared that the "Court's turn away from the specific commands of the warrant clause and toward a balancing test of general reasonableness is now evident."¹⁶⁵

As the composition of the Court continues to change, the future of the war of the clauses is unpredictable. A return to strict adherence to the warrant requirement is the least likely of the possible outcomes. In *California v. Acevedo*,¹⁶⁶ the Court tinkered with the automobile exception to the warrant requirement. Justice Scalia concurred in the judgment but based his decision on reasonableness: "The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'unreasonable.' What it explicitly states regarding warrants is by way of limitation upon their issuance rather than requirement of their use."¹⁶⁷

probable cause to search the car (suspicion of hidden drugs; for example, warrantless search of moveable property within the car is permitted); *California v. Acevedo*, 500 U.S. 565 (1991) (warrantless search of moveable property allowed after it was placed in an automobile, but before it was placed in the trunk, the officer would have had to have a warrant to search the moveable property!); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (roadside sobriety checkpoints (administrative in nature)); *United States v. Martinez-Fuentes*, 428 U.S. 543 (1976) (suspicionless road stops at checkpoints removed from the border, administrative in nature); various exigent circumstances cases such as *Terry v. Ohio*, 392 U.S. 1 (1968) (stop and frisk); *Michigan v. Tyler*, 436 U.S. 499 (1978) (fire scene exigency); *United States v. MacDonald*, 916 F.2d. 766 (2d Cir. 1990) (risk of destruction of evidence).

164. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 309 (1984) (lamenting the demise of probable cause). See *id.* at 304-09 for a persuasive defense of the probable cause requirement.

165. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 129 (1989). Professor Wasserstrom was more encouraged at this time because, although reasonableness was becoming the analysis of choice with the Court, there were signs that probable cause was making a comeback.

166. 111 S. Ct. 1982 (1991).

167. *Id.* at 1992. In *Warden v. Hayden*, 387 U.S. 294 (1967) (discussed more extensively, *infra* note 176 and accompanying text), the Court addressed the 'mere evidence' rule. Justice Brennan, a disciple of Warrant Clause supremacy dogma, reasoned that "(t)he 'mere evidence' limitation (on the scope of government searches and seizures) has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection." 387 U.S. at 309. (If you substitute the word "warrant" for the phrase "mere evidence," this quote is ironically similar to Justice Scalia's quote from *Acevedo* in the text accompanying this note.). The mere evidence rule was consequently overruled in *Warden v. Hayden*.

Justice Scalia emphasized the inconsistencies created by the warrant requirement, which “had become so riddled with exceptions that it was basically unrecognizable.”¹⁶⁸ The most glaring, constitutionally repugnant anomaly in the administrative search doctrine has been the requirement of a warrant, but with only a negligible level of suspicion needed to support it.¹⁶⁹ However, no great victory for liberty is won if the Court decides to adjudicate administrative search cases solely by a reasonableness standard. Then the Court would be free to balance away rights until the Fourth Amendment is rendered impotent for law abiding property owners. The warrant clause, while not the basis of Fourth Amendment protection, nevertheless serves an invaluable function. It restrains the government from making general searches without judicial intervention, without probable cause and without particularity.

While the prominence of Warrant Clause supremacy may be dimmed from its day in the Warren Court, *Katz* has remained persuasive throughout the life of the administrative search doctrine as the Court has struggled to apply it. Trying to fit administrative searches into one of the “few specially established and well delineated exceptions” to the warrant requirement has proven to be as easy as the proverbial square peg in the round hole exercise.

Regardless of one’s preference for either clause, the argument may be a waste of intellectual energy in the context of administrative searches. A warrant devoid of Fourth Amendment protections¹⁷⁰ is almost meaningless, and perhaps merely a semantical device stubbornly used to add credibility to the overall Warrant Clause supremacy theory. Warrants, issued upon request, without suspicion or particularity, provide no more pro-

168. 111 S. Ct. at 1992.

169. See *Camara v. Municipal Court*, 387 U.S. 523 (1967) (Clark, J. dissenting). “It prostitutes the command of the Fourth Amendment that ‘no Warrant shall issue, but upon probable cause’ and sets up . . . a newfangled ‘warrant’ system that is entirely foreign to Fourth Amendment standards.” *Id.* at 547. Justice Clark further predicted that “[t]hese boxcar warrants will be identical as to every dwelling in the area, save the street number itself. I daresay they will be printed up in pads of a thousand or more—with space for the street number to be inserted—and issued by magistrates in broadcast fashion as a matter of course.” *Id.* at 554.

170. The Fourth Amendment requires probable cause, particularity and judicial intervention for a warrant to issue.

tection than a weakened reasonableness test. The Warren Court created the Miranda test as a prophylactic safeguard for the Fifth Amendment right against involuntary confessions. It is plausible that the warrant requirement was used in the same per se capacity (consciously or subconsciously) to protect the Fourth Amendment right to be free from unreasonable searches. In administrative search cases, where suspicion levels are subjectively manipulated to "satisfy" the warrant requirement, just as with the numerous "few specially established and well delineated" exceptions¹⁷¹ (usually driven by subjective determinations of exigency), the Reasonableness Clause is the actual standard being implemented. If this is true, the war of the clauses is essentially a semantic waste of time, paper and ink.

Supporters of Reasonableness Clause preeminence would be premature to celebrate a victory. If reasonableness were the test, it is true that pages of confused analysis regarding the requirement of a warrant would not be necessary. However, even if reasonableness would presently win the day in the fragmented Rehnquist Court, a pivotal question remains: From whose perspective do we judge reasonableness—modern society's current point of view or that of the Framers of the Constitution?

The answer to this question obviously depends upon one's mode of constitutional interpretation. For the original intent school, a treacherous and often Sisyphean journey into legal history is the method prescribed. For the pragmatic instrumentalist, legal positivist or "nonoriginalist,"¹⁷² a survey of contemporary conventional wisdom, or a glance at the latest *U.S.A. Today* "factoid" will answer the question. A Bork v. Tribe, originalist v. nonoriginalist, or an interpretivist v. non-interpretivist debate is beyond the scope of many law libraries, not to mention this article.¹⁷³ I concede that it is not my purpose to convert

171. *Katz v. United States*, 389 U.S. 347, 357 (1967).

172. Justice Scalia used the term "nonoriginalism" reluctantly in Scalia, *Originalism: The Lesser Evil*, 57 CINN. L. REV. 849, (1989). "I know no other, more precise term by which this school of exegesis can be described." *Id.* at 855.

173. See generally, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1991); LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988); OLIVER WENDEL HOLMES, JR., *THE COMMON LAW* (1887); JOHN C.H. WU, *FOUNTAIN OF JUSTICE: A STUDY IN THE NATURAL LAW* (1955); JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF LAW* (2d ed. 1921); BERNARD SCHWARTZ, *THE ASCENT OF PRAGMATISM* (1990); Bork, *Natural Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Scalia, *Originalism: The Lesser Evil*, 57 CINN. L. REV. 849 (1989).

Holmesian evolutionary law devotees to original intent or natural law philosophy;¹⁷⁴ however, as evidenced by the volumes of critical commentary,¹⁷⁵ often scathing, from all colors on the spectrum of constitutional interpretation, the administrative search doctrine is “broken” and contemporary legal analysis has only added to the confusion, much less fixed it. When all else fails, and there is nothing to lose, perhaps an investigation into history is a sensible exercise for Constitutional scholars from all exegetical schools.¹⁷⁶

C. *The Intent of the Framers and the Common Law*

To examine the intent of the Framers with respect to the Fourth Amendment, it is important to establish as a cornerstone presupposition that the common law reigned in early America. The *Wilkes* and *Entick* cases were fresh in the memories of the Constitutional Congress.¹⁷⁷ The impassioned speech of James Otis would be remembered for years to come.¹⁷⁸ Blackstone’s *Commentaries*, and the writings of Sir Matthew Hale and Lord Coke were known, respected and foundational throughout the legal profession. Therefore it is necessary to examine the basic principles of the common law as they existed and were known by the Framers in the late eighteenth century.

1. Property Rights and “Mere Evidence”

In *Entick v. Carrington*,¹⁷⁹ Lord Camden emphasized the importance of the English maxim that a man’s home is his castle: “The great end for which men entered into society was to secure

174. See generally, CHARLES H. RICE, 50 QUESTIONS ON THE NATURAL LAW: WHAT IS IT AND WHY WE NEED IT, (1993); HERBERT W. TITUS, GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES (1994).

175. See generally Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87; Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383 (1988); LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1; McAninch, *Unreasonable Expectations: The Supreme Court and the Fourth Amendment*, 20 STETSON L. REV. 435 (1991); Note, *The ‘Administrative’ Search From Dewey to Burger: Dismantling the Fourth Amendment*, 16 HASTINGS CONST. L.Q. 261 (1989); Comment, *The ‘Junking’ of the Fourth Amendment: The Closely Regulated Industry Exception to the Warrant Requirement*, *New York v. Burger*, 107 S. Ct. 2636 (1987), 25 AM. CRIM. L. REV. 791 (1987).

176. “It is most certain, that time and long experience is much more ingenious subtle and judicious, than all the wisest and acutest wits in the world co-existing can be.” SIR MATTHEW HALE, printed in 1 F. HARGRAVE, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 254 (1787).

177. See *supra* note 26 and accompanying text.

178. See *supra* note 47 and accompanying text.

179. How. St. Trials, XIX, 1029 (1765).

their property.”¹⁸⁰ Property rights were the foundation of common law search and seizure jurisprudence. A property owner held the supreme interest in his property. The government had no right to enter, search, or seize private property until the owner was defensed of the property by breaking the law.¹⁸¹ Government officials could only search and seize property, to which the possessor no longer had superior title (*i.e.* he committed a crime with the property or it was illegal to possess the property). Such property generally could be classified in three categories: (1) instruments used to commit a crime; (2) fruits of the crime; or (3) contraband. Warrants were not to be issued in the hope of securing some evidence that *might* incriminate the person who was to suffer the search. This became known as the “mere evidence” rule.

To obtain a search warrant at common law, a government official acting pursuant to some positive law or a citizen who has had goods stolen had to comply with the appropriate procedures. They had to make a “showing . . . before a judicial officer, under oath, that a crime had been committed, and that the party complaining had reasonable cause to suspect that the offender, or the property which was the subject or the instrument of the crime, was concealed in some specified house or place.”¹⁸² There was no such legal procedure as a random common law search to discover as yet unknown evidence.

The Fourth Amendment requirement that a warrant “particularly describ[e] the place to be searched and the persons or things to be seized” has not been stressed as often or strenuously as the need for probable cause in modern criminal procedure. However, when the common law rule against issuing warrants for “mere evidence” is considered, the requirement of “particu-

180. *Id.* at 1066. (quoted in *Boyd v. U.S.*, 116 U.S. 616, 627 (1886)). See also COOLEY, CONSTITUTIONAL LIMITATIONS 72 (8th ed. 1927).

181. See *Boyd v. United States*, 116 U.S. 616, 627 (1886); *Gouled v. United States*, 255 U.S. 298, 309 (1921); Cooley, *supra* note 180, at 610-25.

182. Cooley, *supra* note 180, at 618. In *Gouled*, 255 U.S. at 309, the Court cited *Boyd*, *Weeks v. United States*, 232 U.S. 383 (1914), and the common law and declared that warrants

may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.

larity” becomes a potent safeguard against oppressive general warrants.¹⁸³ For a magistrate to issue a warrant at common law, the officer had to state, with particularity, the object of the search. In the context of administrative searches, the rules of *Camara* and its progeny are irreconcilable with the particularity requirement of the Fourth Amendment. A search for safety or health code violations is essentially a search for mere evidence. A “police record book” required by law as in *New York v. Burger* would satisfy the common law requirements, but the ensuing search of the premises would not.

2. Conjunction With the Fifth Amendment

Lord Camden’s opinion in *Entick* fused the concepts of search and seizure and self-incrimination into the same analysis. After reviewing the foundations in property, restating the rule against searches for “mere evidence,” and harshly criticizing the Star Chamber for originating the general warrants at issue, he asserted:

It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for [“mere”] evidence is disallowed upon the same principle.¹⁸⁴

In *Boyd v. United States*, the Court used this very quote and later stated: “(A)ny compulsory discovery by . . . compelling the production of [one’s] private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government.”¹⁸⁵

Though this analysis seems strange in the 1990s, it survived into the twentieth century.¹⁸⁶ The Supreme Court ruling that the Fifth Amendment privilege “protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a *testimonial* or *communicative* nature,” severely weakened the involuntary confession justification for

183. “The Fourth Amendment addresses the problem [of general warrants] by requiring a ‘particular description’ of the things to be seized.” *Andresen v. Maryland*, 427 U.S. 463, 480 (1976) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)).

184. *How. St. Trials*, XIX, 1029, 1073 (1765).

185. 116 U.S. 616, 631-32 (1886).

186. *See Gouled*, 255 U.S. 298, 311 (1921).

the mere evidence rule.¹⁸⁷ Under the "testimonial or communicative" test, few items of mere evidence would qualify for Fifth Amendment protection.

3. *Warden v. Hayden*

The mere evidence rule is not just a relic that is totally inapplicable to modern society. Only as recently as 1967, in *Warden v. Hayden*,¹⁸⁸ did the Court overturn the rule. Justice Brennan, writing for the majority, quickly dismissed the premise that property rights were the basis of the right against unreasonable search and seizure.¹⁸⁹ After years of commingling the terms, the Court recognized that privacy had been the focus of Fourth Amendment protections, not anachronistic notions of English property law.

The Court used "the government's interest in solving crime" as its primary justification for the abolition of the mere evidence rule.¹⁹⁰ It continued to state that privacy interests would be equally protected whether the search was for fruits, instrumentalities, contraband or mere evidence.¹⁹¹ Although the Court expanded the scope of Fourth Amendment searches with the elimination of the disparity between mere evidence and "hard" evidence, Justice Brennan insisted that all reasonable searches, nonetheless, must be founded on probable cause, particularity and judicial intervention.¹⁹²

Justice Douglas emphatically dissented in *Warden v. Hayden*. He recalled the tyranny of the Star Chamber, Lord Camden's rebuke of general warrants, and the fight of the colonists in Boston against the writs of assistance. He enlisted the likes of Patrick Henry, Cooley, Lawson, Judge Hand, and Justices Holmes and Brandeis in support of the mere evidence rule.¹⁹³ Even the

187. *Schmerber v. California*, 384 U.S. 757, 761 (1966) (emphasis added). The Court specifically rejected the conjunction between Fourth and Fifth Amendment rights in *Andresen v. Maryland*, 427 U.S. 463, 477 (1976).

188. 387 U.S. 294 (1967).

189. *Id.* at 304 (With the confidence and efficiency of a Chief Justice John Marshall opinion, Justice Brennan proclaimed; "The premise that property interests control the right of the government to search and seize has been discredited. . . . We have recognized that the principle object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.")

190. 387 U.S. at 306.

191. *Id.* at 306-07.

192. *Id.* at 309.

193. *Id.* at 312:25 (Douglas, J., dissenting).

concurrence of Justice Fortas (with Chief Justice Warren) expressed reservations about the new expanse of the Fourth Amendment,¹⁹⁴ but the mere evidence rule was defeated, and the ground was tilled to plant the seeds of the administrative search doctrine.¹⁹⁵

4. The Court of Star Chamber

The abolition of the Court of Star Chamber in 1641 was one of the most significant victories for individual liberty in English legal history. An offshoot of the King's Council, this executive tribunal was formed to supplement justice where the common law courts were deficient.¹⁹⁶ While its beginnings were prestigious and praised by such distinguished authorities as Coke and Bacon,¹⁹⁷ it became oppressive in the early seventeenth century.

The Court of Star Chamber became a despotic administrative court because it wielded the swords of the legislature, the executive and the judiciary all at the same time. Without the separation of powers, there was no check against abuse and the court was free to extort confessions from the unwilling, try the accused without juries, persecute for religious reasons, regulate printing, torture those in contempt, cut the ears off of libelous scaliwags, and invade the sanctity of the home to search for the perpetrators of sedition.¹⁹⁸ The objections to the Star Chamber that led to its abolition read like the direct antitheses of the First, Fourth, Fifth, Sixth, Seventh and Eighth Amendments to the United States Constitution. The evils of this court were fresh in the memories of the Framers as evidenced by the unmistakable correlation between the protections, checks and balances enumerated in the Constitution and the offenses of the Star Chamber.

Professor Perry notes that the most significant effect of the demise of the Star Chamber was “[the establishment] in England [of] a system of justice administered by the courts instead of by the administrative agencies of the executive branch of the gov-

194. *Id.* at 312 (Fortas, J., concurring).

195. *Id.* at 309-10.

196. *See generally*, PERRY, *supra* note 58, at 125-42.

197. PERRY, *supra* note 58, at 129.

198. *Id.* at 129-32.

ernment.”¹⁹⁹ The abolition “thus constituted an important reaffirmation of the concept of due process of the law.”²⁰⁰

D. The Real Identity of the Modern Administrative Search

The Fourth Amendment to the Constitution was written to ensure that the practice of governmental issuance of general warrants or writs of assistance would be forever proscribed due to their offensiveness to individual liberty. As a result of the abandonment of the mere evidence rule, the emergence of balancing as the analysis of choice, the transformation from property to privacy based search and seizure rights, the rise in power of the administrative agency, and Warrant Clause supremacy, general warrants have crept back into America. The concepts that define modern Fourth Amendment jurisprudence would have been foreign to the Framers. It is no surprise that original intent is undetectable in the current administrative search doctrine when the fundamental presuppositions of search and seizure law have all changed.

The elements of the English general warrants were: (1) issuance by an administrative agency of the executive branch, or under the authority of a legislative statute; (2) no requirement of judicial intervention; (3) no requirement of oath or a level of suspicion; and (4) no requirement of particular description of the place to be searched or the property or person to be seized.

These elements were all addressed by the Fourth Amendment, but unfortunately they have resurrected to form the basis of the current administrative search doctrine. A legislative or administrative code that authorizes a search defined by the aforementioned elements is in reality a general warrant. Modern general warrants are as offensive to individual liberty now as they were before this country existed. The same Fourth Amendment that eliminated the issuance of general warrants is now being interpreted as permitting the existence of administrative

199. *Id.* at 132.

200. *Id.* Perry also stresses the importance of the emergence of the right against self-incrimination as a result of the abolition of the Star Chamber. *Id.* at 132-37. The close nexus between the right against unreasonable searches and the right against self-incrimination that existed at the time of the Constitutional Convention is more important when the influence of the Star Chamber is considered.

searches. A general warrant by any other name is still a general warrant (apologies to Mr. Shakespeare).

IV. PROPOSAL: A RETURN TO THE BASICS OF PROCEDURAL DUE PROCESS

While a dramatic paradigm shift in Fourth Amendment jurisprudence is unlikely, positive steps must be made if individual rights are to regain the ground they have lost in the administrative search cases since *Camara*.²⁰¹ However, the creation of new judicial prophylactic safeguards may not be the best medicine for what ails the administrative search doctrine. The clash between government interests and individual rights is not likely to subside due to the recommendations of one law review article, yet there are themes and guidelines that, if implemented in remedial solutions, can help resurrect some of the liberties that were victims of the current administrative search doctrine.

The first place to look for a solution to constitutional problems is within the text of the document itself. In a warrantless, suspicionless search and seizure, a person is being deprived by violation of the Fourth Amendment right, without due process of law. One way to stem the tide of government intrusion is to subject administrative search schemes to the Due Process Clauses of the Fifth and Fourteenth Amendments.²⁰²

Before the government deprives a person of a fundamental right, the person must receive due process of the law.²⁰³ Traditional procedural due process is based on the concepts of notice and the opportunity to be heard at a judicial hearing.²⁰⁴ If the administrative search doctrine can be reworked within this frame-

201. See discussion beginning at note 84 and accompanying text.

202. "No person shall. . . be deprived of life, liberty, or property, without due process of law;" U.S. Const. amend. V. "Nor shall any State deprive any person of life, liberty, or property without due process of law;" U.S. CONST. amend. XIV § 1.

203. In substantive due process cases, the controlling word to identify which interests are protected from arbitrary government intrusions is "liberty." See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2804 (1992). (It would be hard to justify a position that the liberty of one's home cannot be encompassed within the word "liberty" in the Fourteenth Amendment.)

204. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), Justice Stewart wrote: "For more than a century the central meaning of procedural due process has been clear: 'parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Id.* at 80 (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863)). He then added: "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

work, many of the incursions into the rights of individuals may be avoided.

The usual context in which procedural due process protection is required is the deprivation of property. The *Fuentes v. Shevin* case considered state replevin statutes.²⁰⁵ A proponent of the administrative search doctrine may argue that the Fourth Amendment provides sufficient protection for property owners and residents and that procedural due process is not mandated outside of civil property seizures. Notwithstanding *Burger*,²⁰⁶ most administrative searches are civil in nature. Warrantless, suspicionless searches are as egregious as seizures of property without notice and opportunity to be heard. In both situations, procedural due process acts as a protector of the individual against the government.

The administrative search doctrine is an example of what happens when history is forgotten or ignored. The purpose of this article was to draw attention to the growing distortion and diminution of Fourth Amendment protections from *Camara* through *Burger* to the present. The problem goes beyond constitutional interpretation to changing concepts of federalism, jurisprudence and the accepted power and extent of an elected government.²⁰⁷ There is no single reason for the weakening of the Fourth Amendment via administrative searches. A conglomeration of sometimes unrelated factors has strengthened the government's power to search. The rise of balancing, the broadening scope of reasonableness, the confusion created by Warrant Clause supremacy and the attenuation of the probable cause requirement have all contributed to the malaise gripping the right against unreasonable search and seizure. But the raging cancer behind these symptoms has been the change in emphasis from property to privacy interests, the fall of the mere evidence rule, and the disregard of the concept of separation of powers.

It is most likely up to the judiciary to restore the administrative search doctrine to a system more respectful of individual liberties. It is quite fair to ask the digger of the hole to fill it back up. Executives and legislatures naturally guard their powers

205. 407 U.S. 67 (1972).

206. See *supra* note 112 and accompanying text.

207. Notice that Justice Scalia, a proponent of historical analysis in constitutional interpretation (see *supra* note 9), wrote for the Court in *Griffin v. Wisconsin*, joined the majority in *Burger*, and concurred in the result in *Ortega*. (See *supra* notes 112, 125, 126 and their respective texts.) This indicates that the problem is more than just a failure of history lessons.

jealously, and even though they are accountable to the electorate, the subject of administrative searches has yet to be included in a *C.N.N.* poll of the most important voting issues.

It is still a general belief that the Constitution is supreme. Perhaps the best way to recapture some of the lost Fourth Amendment rights is to use some of the words in the document itself, such as "due process." Maybe the Court could tighten up its standard of reasonableness. Also, another fifty critical law review articles might help affect the conscience of the legal community and the Court. Perhaps the Court should learn how to "just say no" to administrative searches. There is no magical solution, but an admission that there is a problem would be a good start.

Imagine trying to explain the late twentieth century judicial acquiescence to the administrative search doctrine to Madison, Jefferson, Adams, Washington, Hamilton, Jay, and James Otis. How would they react?

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