ERODING THE FOURTH AMENDMENT: THE BURGER COURT AND THE WARRANTLESS SEARCH EXCEPTION: SOME POST-1970 DEVELOPMENTS

by

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CHAPTER 1

INTRODUCTION

The importance of the Fourth Amendment[1] is underscored by Landynski when he observes,

> Few decisions of the United States Supreme Court have generated as much powerful controversy over the past few decades as those dealing with issues raised under the fourth amendment. Since the provisions of the amendment cover some of the most crucial areas of criminal investigation--arrest, search and seizure, and even, in some circumstances, interrogation--the issues bring into sharp focus the classic dilemma of order versus liberty in the democratic state.[2]

In essence, it is this conflict between the rights of the individual citizen as opposed to the rights of society as a whole which underlies this thesis.

This conflict between individual liberty and societal order was examined by John Stuart Mill in his Essay on Liberty written over one hundred years ago. Mill was concerned with the relationship between the individual citizen and organized government and the extent to which the individual's liberty might be properly limited in the interests of a greater societal need. Regardless of whether the means used to control an individual's liberty were in the form of legal penalties or in the moral coercion inherent in public opinion, society, according to Mill, was not justified in curtailing an individual's liberty ex-

cept in those instances in which an individual's actions served to bring harm upon other members of society. In other words, society could only legitimately interfere with a person's freedom when there was a danger that an individual's actions might harm other persons thereby justifying such intervention as might be required to prevent such harm. Under Mill's view, society would not be justified in interfering with an individual's liberty even in those circumstances in which that person might be engaged in a course of action which might well result in harm to that person alone as opposed to other members of society.[3] Societal intervention to promote individual security and well-being would not be approved by Mill. An individual can not be compelled to do or forbear from some course of action because it will serve to further his best interests, because it will make that person happier, because, in the opinion of others, to do so would be wise or even right. These may be good reasons for persuading the individual to or not to do a certain act, however, they are not sufficient to compel that person to comply or for subjecting that person to any penalty should he fail to engage in or forbear from a certain course of conduct deemed to have adverse consequences for that individual alone. The only part of the conduct of any person to which he is amenable to society is that which impacts upon or concerns others. In his conduct which merely concerns himself, his

independence is, of right, absolute in nature.[4]

Insomuch as the Fourth Amendment is intimately connected with the criminal law process, it seems clear that the underlying purpose behind the criminal law is directed primarily toward the idea that there are certain standards of behavior or moral principles which society requires to be observed, and that the breach of these principles and standards constitutes an offense against not merely the person who is injured but against society as a whole. As such, two fundamental principles underpinning the criminal law are the preservation of societal order and the protection of citizens from anti-social conduct which threatens harm or injury to these individuals. According to Patrick Devlin,

> ...society means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil, they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.[5]

If society has the right to make judgments on moral issues and, after having made such a judgment, determines that a morality is as necessary to a society as some

organized governmental authority, then society may then employ the law to preserve morality in the same way that it might use such a legal structure to safeguard anything else which it deems essential to its existence. Hence, if society has depicted certain conduct as being anti-social, it should then be empowered to take those measures necessary to protect its citizens from such unlawful conduct. Such anti-social or other such immoral conduct, for the purpose of the law, is presumably, according to Devlin, ". . .what every right-minded person is presumed to consider to be immoral."[6]

Obviously society can not control the entire life of its individual members and, likewise, the individual can not be expected to surrender to the judgment of society the whole conduct of his life. "It is the old and familiar question of striking a balance between the rights and interests of society and those of the individual."[7] Such an accommodation can not be made, in many instances, by designating certain kinds of anti-social conduct as constituting instances of private as opposed to public immortality or criminality as has been suggested by Mill. In recognizing that society should endeavor to promote the maximum individual liberty that is consistent with the integrity of the larger social order, it should also be observed that no conduct or activity may legitimately be punished by the law if such activity does not exceed the

limits of tolerance set by society as a whole. Before such a society may put a practice beyond the limits of tolerance there must be a deliberate judgment that the practice is injurous to society. Put in somewhat different terms, an individual's right to privacy is something to be balanced against the need for effective law enforcement. As observed by Devlin,

> When the help of the law is invoked by an injured citizen, privacy must be irrelevant; the individual cannot ask that his right to privacy should be measured against injury criminally done to another. But when all who are involved in the deed are consenting parties and the injury is done to morals, the public interest in the moral order can be balanced against the claims of privacy.[8]

The historical origins underlying the Fourth Amendment have been of some significance insofar as they have served to shape the parameters of many of the modern Supreme Court decisions in the search and seizure area. As noted by Landynski, ". . .history can shed a beam of light to illuminate the underlying purposes of the amendment and thereby provide some guidance for a selection from the possible interpretations of the one that would best realize these purposes."[9] Justice Frankfurter's opinions frequently relied on the historical origins underlying the Fourth Amendment as a basis for framing Supreme Court decisions. Frankfurter believed that the Fourth Amendment had its roots in the desire to prevent the recurrence of a particular historical evil, that being, the so-called

writs of assistance which had been employed by the early English authorities to legitimate general searches without a warrant.

A broad power to search and seize was first introduced into England by the Tudors. This power was continuously expanded ". . . as an important instrument in the enforcement of the state licensing system for printed matter."[10] The desire of the Crown to regulate seditious and nonconformist publications had become a matter of intense state concern by 1525. Henry VIII instituted a system of prior state censorship making it mandatory for all publications to be licensed by the Crown beginning in 1538. This licensing system survived virtually intact until 1694, after which more subtle means were utilized to accomplish essentially these same objectives.

For nearly a hundred years from 1557 to the decline and fall of the monarchy in the 1640's, this licensing system was enforced by the Stationers' Company, a private guild organization. In return for monopoly control over printing granted to its members, this organization was granted broad powers of search and seizure which it employed to enforce this licensing system. Its motivation was purely one of self-interest since its desire to ferret out violators of the licensing system coincided with its desire to protect and enhance its monopoly position within the printing trade. In addition, three closely affiliated

tribunals were also associated with the enforcement of this state licensing system and, as such, were generally accorded broad powers relative to the issuance of writs directed toward the search and seizure of seditious documents. These tribunals were the King's or Queen's Privy Council, its principal judicial off-shoot, the Court of Star Chamber, initially created in 1487, but accorded new power and prominence under Queen Elizabeth and her successors, and the ecclesiastical Court of High Commission created by Queen Elizabeth in 1558. Together these three tribunals developed and promoted the law of search and seizure to a fine art. Their efforts were directed primarily against those involved in the publication of seditious materials.

An Order in Council issued in 1566 expanded the powers accorded to the Stationers' Company.[11] Likewise, an edict issued by Star Chamber in 1586, evidencing a concern for widespread evasions of previous enactments, again expanded the powers of the Stationers' Company. Stricter censorship was ordered along with more severe penalties for those found guilty of violating the law.[12] Under the reign of James I, he ordered the Court of High Commission "to inquire and search for. . . all heretical, schismatical, and seditious books, libels and writings, and all other books, pamphlets and portraitures offensive to the State or set forth without sufficient and lawful authority."[13] It was

during the reign of James I that the development of the so called writs of assistance came into being, according to Lasson. These writs of assistance were general search warrants which authorized agents of the Crown to search and seize smuggled goods or other such material prohibited under the law. Officers authorized to execute these writs could call on any officer of the Crown to help them apprehend those in violation of the law. It is interesting to note that, contrary to Lasson, most historians attributed the development of these writs of assistance to the reign of Charles II where such writs were specifically authorized by Parliament.[14]

The Courts of Star Chamber and High Commission were abolished by the Long Parliament when it convened in 1640. Although the period from 1641 to 1643 was a very tumultuous one, given the decline of the English monarchy, the freedom of the press was short-lived. Once the new Parliament had consolidated its position, it commenced to pass legislation which closely paralleled the kind of laws enforced by Star Chamber during previous years. The coming to power of Oliver Cromwell in the mid-1640's brought little relief to the beleaguered members of the press. Although Cromwell abolished the Stationers' Company, he replaced it with a Council of State which served as his chief enforcement agency to put into effect the numerous censorship and sedition laws.[15] The Restoration Parliament which convened in

1660 continued this trend. The passage of the Regulation of Printing Act in 1662 made provision for warrantless searches which were very similar to the kinds of regulations issued by Star Chamber. These restrictive practices were largely continued by Charles II in 1679 after the lapse of the Regulation of Printing Act.

The coming of the Glorious Revolution in 1688 marked a turning point in the development of search and seizure law in England.[16] According to Landynski, "The growth of a two-party system made it too risky a business for Parliament to entrust a Government of one party with the enforcement of a licensing system that could be manipulated for political advantage."[17] Beginning with the reign of William of Orange in 1688, a movement was instituted which sought to restrict those instances in which a warrantless search could be conducted. The English Parliament repealed one specific tax due to its enforcement provisions which authorized searches into a man's home by those empowered to collect such taxes. According to the Act issued by Parliament which repealed this tax, such searches constituted "a badge of slavery upon the whole People, exposing every man's house to be entered into, and searched by persons unknown to him."[18] This same rationale was evident in William Pitt's celebrated condemnation of the cider tax and its enforcement provisions in an address before Parliament in 1766 wherein he noted that

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.[19]

This whole problem involving the issuance and execution of these so-called general warrants as a means of controlling libelous and seditious printers and authors and their criticism against the English Crown came to the forefront of public attention in the infamous Wilkes[20] and Entick[21] cases. In 1762, John Wilkes, a member of Parliament began to publish anonymously the famous North Briton pamphlets, which were very critical of the current government. The English Secretary of State, Lord Halifax, issued a general warrant to search for the authors, printers, and publishers responsible for these pamphlets and to seize their papers once they had been apprehended. This effort on behalf of the government ultimately resulted in the arrest of forty-nine individuals, including Wilkes, who charged that the general warrant issued by Halifax was "a ridiculous warrant against the whole English nation." Wilkes' papers were subsequently seized by the government. Wilkes and his associates then brought suit in the courts against the government charging Halifax with false imprisonment whereupon Wilkes ultimately prevailed and received substantial monetary damages against those responsible for issuing the writ, including Lord Halifax.[22] At about this

same time, the papers of another author, John Entick, were seized under the authority of another general warrant, and a successful suit for damages was instituted. On appeal, Lord Camden, who had presided over the earlier Wilkes case, delivered an opinion which is considered a milestone in the history of the right to privacy.[23] He condemned the general nature of the warrants, but went on to indicate that since these warrants had been issued to search for evidence, they not only violated an individual's right to be free from unreasonable searches and seizures but also that person's privilege against self-incrimination. Thus, Lord Camden ruled, first, that general warrants were odious to a free society due to their uncertain nature, and that their use as a means of searching for evidence against an individual violated that person's right against self-incrimination. The decisions of the judges were later ratified by the House of Commons, in 1766, when they adopted a resolution, vigorously sponsored by William Pitt, which condemned the use of these general warrants. This Entick case was very influential on the subsequent development of search and seizure law in the United States.

In America, the biggest controversy among the colonies with England arose over the use of these general warrants, called writs of assistance, which were employed by British customs officials in their search for goods smuggled into the country in violation of the English trade laws. A

particularly offensive aspect of these writs of assistance surrounded the fact that they could be utilized to authorize British customs officials to search any house or ship, to open boxes or trunks, and break down doors in order to seize contraband goods at will. The passage of the Townshend Revenue Act of 1767 specifically authorized the issuance of these writs of assistance. Subsequently the First Continental Congress cited this Townshend Act as one of the acts which violated the rights of the colonists. A Boston town meeting led by Samuel Adams in November, 1772 adopted "A List of Infringements and Violations of Rights" which was aimed, in part, at protesting the appointment of new tax officers by the British Crown who would be armed with powers of general search and seizure without specific warrants. The meeting went on to declare,

> These officers are by their commission invested with powers altogether unconstitutional, and entirely destructive to that security which we have a right to enjoy; and to the last degree dangerous, not only to our property, but to our lives....Thus our houses and even our bed chambers are exposed to be ransacked, our boxes, chests, and trunks broke open, ravaged and plundered by wretches, whom no prudent man would venture to employ even as menial servants; whenever they are pleased to say they suspect there are in the house wares, etc., for which the duties have not been paid. Flagrant instances of the wanton exercise of this power, have frequently happened to this and other seaport towns. By this we are cut off from that domestick security which renders the lives of the most unhappy in some measure agreeable.[24]

The rule against general warrants received its first formal constitutional statement in the Virginia Bill of Rights of June 12, 1776, the tenth section which declared

> 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.[25]

Other states soon followed Virginia's lead and adopted similar constitutional provisions[26] regarding search and seizure though these various enactments differed, especially in that some clauses required an oath or affirmation for the issuance of the warrants, while others did not. However, it was Article 14 of the Massachusetts Declaration of Rights of 1780 which was the first provision to contain the phrase "unreasonable searches and seizures," thereby going beyond merely prohibiting the issuance of general warrants.[27] The language of the Fourth Amendment is almost identical with this Massachusetts' clause.

Following the Constitutional Convention of 1787, there developed a great deal of controversy over the failure of the delegates to incorporate a Bill of Rights into this newly proposed Constitution. This failure served to engender rather protracted debate throughout many of the colonies when the proposed Constitution was submitted for ratification. Individuals such as Patrick Henry

of Virginia voiced their concern over the failure of the delegates to address the need for such a Bill of Rights, particularly the desirability and even the necessity of giving the citizen some constitutional protection from unlawful and unreasonable searches and seizures by government officials.[28] Following ratification, James Madison, who had been actively involved in constructing the Constitution, sought to address this particular problem and he proposed the following provision as a means of dealing with the need for some kind of constitutional protection which would restrict the government's search and seizure power. Madison suggested that,

> The rights of the people to be secure 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 person or things to be seized.[29]

When Madison's provision was referred to committee for further action, it was altered as follows,

> The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized.[30]

Once submitted to the Full House for action, Elbridge Gerry of Massachusetts noticed two errors in the draft amendment and these were corrected. First, the word "secured" was changed to read "secure," and, secondly, the

phrase "unreasonable searches and seizures," inadvertently omitted in the committee's draft, was inserted. Representative Benson of New York felt the draft amendment should be further modified to the extent that the words "by warrants issuing" was not sufficiently strong and he proposed that the phrase be changed to read "and no warrant shall issue," however, this revision was voted down by a large majority.[31] Benson's amendment, however, was reported by him to the full House as the final draft version of this amendment even though it had been previously rejected in committee. No one apparently noticed the difference and Benson's modified version of the Fourth Amendment passed both the House and the Senate and was subsequently ratified by the states.[32]

The problems surrounding the Fourth Amendment are many and varied, but one of the principal problems associated with this constitutional guarantee revolves around the numerous ways in which this particular amendment might be interpreted. Funston addresses himself to this point when he observes,

> The amendment clearly possesses both the virtue of brevity and the vice of ambiguity. Neither is the term 'unreasonable' defined, nor is the relationship between the reasonableness requirement and the warrant provision clarified. Given the conjunction of the two clauses, at least three interpretations are possible on the face of the text. First, the warrant provision and the reasonableness requirement might be conceived of as synonymous. Any search conducted with a search warrant would

> be constitutionally reasonable; any search conducted without such a warrant would be constitutionally unreasonable. Or, secondly, the reasonableness requirement might be interpreted as providing an additional restriction on the warrant provision, implying that some searches are unreasonable, even when conducted under the authority of a search warrant. Any search conducted in the absence of a warrant would be unreasonable, but the reasonableness of a search conducted under a warrant would turn on the validity of the warrant. Or, thirdly, the first clause might be read as providing an additional search power. Any search conducted with a warrant would be reasonable, but so too might be a search conducted without a warrant. The reasonableness of a police search perpetrated in the absence of a warrant would turn upon the facts of the particular case. In practice, the Supreme Court has adopted an amalgam of the second and third possible readings of the Fourth Amendment.[33]

To the extent that the Supreme Court has been willing to expand those instances in which law enforcement officers may conduct a search without a warrant, ". . .the potential protection to privacy afforded by the Fourth Amendment is narrowed."[34] Some observers have indicated that this particular constitutional guarantee only meant to codify one specific aspect of previously existing legal jurisprudence, that being, the right of the citizen to be free from the unlawful and arbitrary invasion upon his personal privacy interests by governmental authorities. As such, the Fourth Amendment, as finally adopted, did not seek to confer or create any right. Its objective was more than likely aimed at strengthening the requirement for a search warrant as indicated in the second clause of this

amendment. In this sense, the second clause of the amendment is aimed at clarifying the first clause to the extent that it endeavors to set forth the kind of search which is not unreasonable and thereby not forbidden, that being, the type of search conducted in accordance with the safeguards specified in the second clause of the amendment. The modern day Supreme Court interpretation of the Fourth Amendment, at least since the second half of the twentieth century has, according to Landynski, ". . .moved to the position that the first clause confers a search power of independent potency, one that is not restricted by the specific requirements of the second clause."[35] Justice Black would tend to agree with this view of the Fourth Amendment, although his interpretation is not supported by the weight of historical evidence. Black would tend to view the warrant requirement of the second clause as absolute in nature and not susceptible to modification, but he also felt that a search may nonetheless be validated if it was conducted in a "reasonable" manner, regardless of whether it was undertaken pursuant to a search warrant. Under Black's view, this concept of "reasonableness," therefore, becomes the controlling criterion for judging the legality of any particular search.[36] The problem with Black's interpretation of the Fourth Amendment is highlighted by Landynski as he notes that the warrant requirement assures that a "neutral and detached" judicial officer