Government Dragnets

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Richard Worf, The Case for Rational Basis Review of General Suspicionless Searches and Seizures, 23 Touro Law Review 93 (2007).

All commentators agree that the Fourth Amendment's second, "Warrant Clause"—providing that search and arrest warrants be based on probable cause and describe with particularity the place to be searched and person or items to be seized—was meant to do away with general warrants. The general warrant is still very much with us today, however. Without any individualized suspicion, homes and businesses are subject to health and safety inspections, school children must undergo drug testing, motorists are stopped at roadblocks and checkpoints, important documents maintained by banks, credit card companies and other entities are mined for data, pedestrians in our major cities are monitored by camera systems, and everyone's personal effects are uniformly scanned and searched at borders, airports, and various other major travel hubs.

The Supreme Court has pretty much allowed all of this to go on without any constitutional restriction. In the case of drug interdiction, roadblocks, and drug testing of pregnant mothers, it has declared that individualized suspicion is needed. But otherwise the Court has either held that the Fourth Amendment does not apply because the government action is not a search (as with data mining) or concluded, in effect, that any government search and seizure program that avoids irrationality is permissible. Many commentators have deplored this state of affairs and proposed a number of alternatives, usually either requiring some sort of individualized suspicion (which would probably put an end to all general searches and seizures) or adopting a variant of strict scrutiny analysis, which would require courts to determine whether the program is narrowly tailored to meet a compelling state need (and would involve some very difficult, and arguably improper, judicial calculations about programmatic costs and benefits).

An alternative approach to the problem of group searches and seizures is proposed by Richard Worf in *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*. In this article Worf applies John Hart Ely's political-process theory to government dragnets. Political-process theory attempts to mediate the interbranch tension caused by challenges to legislation under indeterminate constitutional provisions. It does so by telling courts that such challenges should succeed only if the legislative pronouncement is the result of a significant defect in the democratic process. According to Worf, "The theory respects our society's presumption of democratic decision making and simply holds that judicial review should always be affirmatively justified by some representation-reinforcing rationale."

Worf ties this idea to Fourth Amendment jurisprudence by asserting that, when search and seizure of a group rather than of an individual is involved, representation of the relevant interests is often possible. If so, he argues, courts owe the results of democratic decisionmaking deference. As Worf notes, courts have long trusted legislative balancing of government and individual interests in other constitutional arenas involving groups (consider, for instance, equal protection, due process and takings cases). Thus, he contends, we should be equally willing to trust legislatures to balance those interests in Fourth Amendment cases involving general searches and seizure. Worf concludes that, "[w]here only groups are affected, very important, disputed questions can safely be left to the political process." He adds that the text of the Fourth Amendment says as much, for it is framed in terms of reasonableness, an inquiry

into “social welfare maximization” that judges are no better equipped to address than legislatures, at least when groups rather than individuals are involved. In short, Worf argues, general searches and seizures authorized by legislatures should usually merely have to pass a rationality test, in which case they are normally valid as a constitutional matter.

Worf also recognizes, however, that many searches and seizures cannot be said to result from even the generous concept of democratic functioning that underlies rational-basis review. He identifies three principal process defects: (1) an absence of authorizing legislation, (2) legislation that delegates too much power to the executive branch, and (3) legislation that prejudices a discrete and insular minority. In these situations, Worf states, the Court should apply strict scrutiny rather than rational-basis review.

The first defect most obviously occurs in the run-of-the-mill search and seizure based on individualized suspicion. These types of actions are not authorized by legislation, but rather involve the exercise of police-officer discretion. A good example, Worf notes, is *Delaware v. Prouse*, in which the Supreme Court pointed out that the officer “was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks.” Another variant of this defect arises when some type of upper-level authorization exists, but it comes from an unelected body; here Worf points to *Ferguson v. City of Charleston*, where hospital officials and local police created a policy for testing pregnant women for drug abuse.

A second process defect occurs when authorizing legislation is enacted, but it fails to impose any meaningful constraints on officer discretion, thus in effect replicating the absence-of-legislation defect. Worf suggests that this defect was present in the statute upheld in *Burger v. New York*, which permitted officers to inspect junkyards for stolen vehicle parts whenever they chose.

The third type of process flaw that Worf identifies, well-known to all constitutional-law buffs, occurs when the law generated by democratic decisionmaking discriminates against a group that is precluded from significant participation in the political process. Prisoners and aliens fit in this category, as would racial groups in some situations. Worf also suggests that a statute that authorized checkpoints in high-crime neighborhoods, although facially neutral, would be suspect if those neighborhoods are generally composed of minorities. Although disparate-impact analysis has faded from other areas of constitutional law, Worf acknowledges it could have a place in Fourth Amendment jurisprudence given the history of racial profiling in policing.

I found this article to be thought-provoking and quite useful in dealing with an extremely knotty problem. I rely on it heavily (with significant tweaks, of course) in several upcoming pieces, including one entitled *Government Dragnets*. I highly recommend Worf’s article.

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