Encyclopedia of the American Constitution

Supplement I

LEONARD W. LEVY, Editor-in-Chief
The Claremont Graduate School, Claremont, California

KENNETH L. KARST, Associate Editor
University of California, Los Angeles

JOHN G. WEST, JR., Assistant Editor
The Claremont Graduate School, Claremont, California

MACMILLAN PUBLISHING COMPANY
NEW YORK
MAXWELL MACMILLAN CANADA
TORONTO
MAXWELL MACMILLAN INTERNATIONAL
NEW YORK • OXFORD • SINGAPORE • SYDNEY

Macmillan Publishing Company
866 Third Avenue, New York, NY 10022

Maxwell Macmillan Canada, Inc.
1200 Eglinton Avenue East, Suite 200
Don Mills, Ontario M3C 3N1

Library of Congress Catalog Card No.: 86–3038

Printed in the United States of America

printing number
1 2 3 4 5 6 7 8 9 10

Macmillan, Inc., is part of the Maxwell Communication Group of Companies.

Library of Congress Cataloging-in-Publication Data
(Revised for Supplement I)

Encyclopedia of the American Constitution.

Supplement I edited by Leonard W. Levy, Kenneth L. Karst, John G. West, Jr.
Accompanied by: Supplement I, 1991.
Includes bibliographies and indexes.
1. United States—Constitutional law—Encyclopedias.
I. Levy, Leonard Williams, 1923– . II. Karst, Kenneth L. III. Mahoney, Dennis J.
KF4548.E53 1986 342.73'023'03 86–3038
ISBN 0–02–918610–2 347.3022303
ISBN 0–02–918678–1 (Supplement : red version : $90.00)
ISBN 0–02–918675–7 (Supplement : blue version : $90.00)

Editorial and Production Staff:

Philip Friedman, *Publisher*
Elly Dickason, *Editor in Chief*
Martha Goldstein, *Senior Project Editor*
Lynn Constantinou, *Production Manager*
Karin K. Vanderveer, *Assistant Editor*

The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials. ANSI Z39.48–1984.

tory. "Legality" in agency administration is not the correctness of an outcome but rather the proper taking of factors or values into account in the making of a decision. There is little or no finality in administration: Decisions frequently remain open to revision and to justified reversal. There is no real distinction between agency action and agency inaction. The effects of agency decisions are examined and reexamined far beyond the bipolar limits of the judicial case. Values are routinely recognized—sometimes identified as noneconomic—to which no private claim can be made. In these respects, even though administrative law is evidently molded by constitutional concerns, administrative agencies may be considered seeds of anticonstitutional thought, for standard constitutional doctrine has maintained a markedly different structure of presuppositions and dichotomies. In judicial review of agencies the strong emphasis on the actualities of agency decision making, in contrast to acceptance of formal regularity in constitutional review of other decision-making bodies, contains further fundamental challenge. In large perspective, there is in administrative law a vision of agencies and courts joined with each other and with Congress in pursuit of evolving public values. This vision sits uneasily with an inherited vision, still alive in much constitutional thought, of government as invader of a private sphere of rights that it is the duty of courts to guard. The future of constitutional law will be guided in substantial part by the way these competing visions and modes of thought are integrated.

JOSEPH VINING

(SEE ALSO: *Appointing and Removal Power (Presidential)* [1].)

Bibliography

MASHAW, JERRY L. 1983 *Bureaucratic Justice*. New Haven, Conn.: Yale University Press.

STEWART, RICHARD B. and SUNSTEIN, CASS R. 1982 Public Programs and Private Rights. *Harvard Law Review* 95:1193–1322.

VINING, JOSEPH 1978 *Legal Identity: The Coming of Age of Public Law*. New Haven, Conn.: Yale University Press.

ADMINISTRATIVE SEARCH
(Update)

The Supreme Court has placed fewer checks on government searches pursuant to administrative schemes (health and safety inspections, for example) than it has placed on searches aimed at gathering evidence of criminal wrongdoing. Moreover, under current doctrine, government officials are less likely to need a SEARCH WARRANT [4] for administrative searches of businesses than for similar searches of homes.

It is not at all obvious why this should be so. The FOURTH AMENDMENT [2,I], by its terms, protects people "in their persons, houses, papers, and effects, against unreasonable searches and seizures." The language of the amendment gives no indication that the reasonableness of a search should turn on whether the object of the search is evidence of a crime or of a safety code violation. Nor does it suggest that less protection is due papers and effects that are located in businesses rather than in homes. Nonetheless, the Supreme Court has shown a marked discomfort with the notions that safety inspections are to be subject to the same constitutional standard as criminal investigations and that businesses are entitled to the same protections as homes.

The Court first considered the administrative search in *Frank v. Maryland* (1959), holding that a homeowner could be arrested and fined for refusing a WARRANTLESS SEARCH [4] of his home for health code violations. The majority made the remarkable assertion that the fundamental liberty interest at stake in the Fourth Amendment was the right to be free from searches for evidence to be used in criminal prosecutions, not a general RIGHT OF PRIVACY [3,I] in one's home. The safety inspection, they said, touched "at most upon the peripery" of the interests protected by the Constitution. Justice WILLIAM O. DOUGLAS [2], writing for the four dissenters, argued that the Fourth Amendment was not designed to protect criminals only. He pointed out that, historically, much of the government action to which the Fourth Amendment was directed involved searches for violations of shipping regulations, not criminal investigations.

Justice Douglas was eventually vindicated, at least in part. CAMARA V. MUNICIPAL COURT (1967) [1] held that Fourth Amendment protections do apply to administrative housing inspections and that such inspections require a warrant supported by PROBABLE CAUSE [3]. While this is nominally the same standard as for criminal investigations, the Court explained that probable cause must itself depend upon a balancing of the need to search and the degree of invasion the search entails. To establish probable cause for administrative searches, government officials need satisfy only some reasonable legislative or administrative standard applicable to an entire area; they need not have specific information about a particular dwelling. The area warrant, as it is called, is thus based on a notion of probable cause very different from the traditional concept applicable in criminal cases. There is no probable cause for a search for evidence of a crime unless it is more likely than not that relevant evidence will be found at the specific dwelling searched. *See v. City of Seattle* (1967), the companion case to *Camara*, applied the area warrant requirement to the administrative inspection of businesses.

In arriving at its new balance for administrative searches, the *Camara* Court relied on three factors, none of which is wholly satisfactory. "First, [area inspections] have a long history of judicial and public acceptance." As an empirical matter, this statement was probably incorrect, as few of these cases had been to court, and none had previously made it to the Supreme Court. More important, the Court generally has found such historical justification insufficient to sustain government action that otherwise violates the Constitution.

"Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results." Is the same not true of criminal law enforcement? Could government officials justify searching an entire block looking for a crack house on the theory that "[no] other canvassing technique would achieve acceptable results"? Surely not.

"Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." This reasoning has much in common with the majority's argument in *Frank*. Although the *Camara* language does support a more general right to privacy under the Fourth Amendment than *Frank* recognized, the Court apparently continues to see protection from unwarranted criminal investigation as more central to the amendment. Why this should be so remains a mystery; the individual's right to privacy and property protected by the Fourth Amendment should not vary according to the nature of the government's interest in the intrusion.

Another problem with the administrative search–criminal search distinction is that it is often difficult to tell one from the other. In many instances, health and safety regulations call for criminal penalties against offenders, and much administrative regulation of business is aimed at preventing criminal activity. A case in point is *New York v. Burger* (1987). When two police officers arrived to conduct an administrative inspection of Burger's automobile junkyard, Burger was unable to produce the required license and records. Proceeding without the traditional quantum of probable cause for a criminal investigation, the officers searched the yard and uncovered stolen vehicles, evidence used against Burger in a subsequent criminal prosecution. The Court held that the evidence could be used against Burger as the fruit of a valid administrative search, notwithstanding that the regulatory scheme was directed at deterring criminal behavior. By way of explanation, the Court offered a rather confusing distinction between administrative schemes, which set forth rules for the conduct of a business, on the one hand, and criminal laws, which punish individuals for specific acts of behavior, on the other.

The diminished safeguards applicable to administrative searches have been further eroded in cases involving businesses. Although *See* applied the area warrant requirement equally to searches of businesses and searches of homes, the Court has subsequently elaborated a distinction between the two. *Burger* is the present culmination of that line of cases. In *Burger*, not only was the search conducted with less than traditional probable cause, but the police officers did not have a warrant.

The Court began its move away from the *See* warrant requirement in *Colonnade Catering Corporation v. United States* (1970), where it upheld a conviction for turning away a warrantless inspection of a liquor storeroom. *United States v. Biswell* (1972) allowed a warrantless search of a gun dealer's storeroom. *Biswell* made it clear that the balancing approach of *Camara* and *See* would be applied not only in determining the quantum of probable cause necessary to support a warrant but also in deciding whether a warrant was necessary at all. In *Biswell* the Court argued that the effectiveness (and hence reasonableness) of the firearm inspection scheme depended on "unannounced, even frequent, inspections," which a warrant requirement could frustrate. No doubt we could reduce crime of all sorts if police were allowed to make "unannounced, even frequent, inspections" of everyone's home and business.

In addition to the familiar balancing approach, *Colonnade* and *Biswell* introduced another element into administrative search jurisprudence. The Court excused the warrant requirement, in part because those engaging in "closely regulated businesses," such as liquor vendors and firearms dealers, have a reduced expectation of privacy.

The Court at first seemed to limit the reach of *Colonnade* and *Biswell*, explaining in MARSHALL V. BARLOW'S, INC. (1978) [3] that the closely regulated business exception to the warrant requirement was a narrow one. *Barlow's* established an area warrant requirement for searches pursuant to the federal Occupational Safety and Health Act, which applies to a wide range of businesses not necessarily subject to extensive government regulation.

The closely regulated exception returned, however, in *Donovan v. Dewey* (1981), which allowed warrantless inspection of mines pursuant to the federal Mine Safety and Health Act. The Court also returned to a balancing approach. Quoting *Biswell*, the Court stressed the need for unannounced and frequent inspection of mines, where "serious accidents and unhealthful working conditions" are "notorious."

In *Burger*, the most recent business search case, the Court summarized its case law and brought together the closely regulated and balancing approaches. Administrative searches of closely regulated businesses may be made without a warrant if three criteria are met: (1) there is a

substantial government interest that informs the regulatory scheme; (2) warrantless inspections are necessary to further the regulatory scheme; and (3) the inspection program is of sufficient certainty and regularity as to limit the discretion of the inspecting officer and advise the business owner that the search is within the scope of the regulatory law.

Despite this latest attempt to refine the exception to the warrant requirement, the closely regulated distinction remains troubling. In essence, it is a form of implied consent theory: By voluntarily engaging in certain businesses, or seeking government licenses, business owners have agreed to give up a measure of their privacy. This line of reasoning is in apparent conflict with the doctrine of UNCONSTITUTIONAL CONDITIONS [4], where the Court, in other cases, has frowned upon the conditioning of government privileges on the surrendering of a constitutional right. There is indeed something anomalous in the notion that the government, by its own intrusive actions, can create a reduced expectation of privacy.

ALEX KOZINSKI

(SEE ALSO: *Reasonable Expectation of Privacy* [I]; *Search and Seizure* [4,I].)

Bibliography

KRESS, JACK M. and IANNELLI, CAROLE D. 1986 Administrative Search and Seizure: Whither the Warrant? *Villanova Law Review* 31:705–832.

LAFAVE, WAYNE R. 1987 *Search and Seizure: A Treatise on the Fourth Amendment*. St. Paul, Minn.: West Publishing Co.

ADVERSARY TRIAL

See: Rights of the Criminally Accused [I]

ADVERTISING

See: Commercial Speech [1,I]

ADVICE AND CONSENT TO SUPREME COURT NOMINATIONS

The proper scope of the SENATE'S [I] role in confirming Supreme Court nominees has been the subject of recurring and often heated debate. The Constitution provides simply that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . Judges of the Supreme Court." Although the Senate also has the constitutional responsibility of advising on and consenting to presidential appointments of ambassadors, lower federal court judges, and many executive branch officials, debates over the nature of the Senate's role have generally arisen in the context of Supreme Court nominations.

The central issues of controversy have concerned the criteria the Senate should consider in making confirmation decisions and the appropriate range of questions that may be posed to and answered by a nominee. Debated points regarding appropriate criteria for confirmation have included the degree to which the Senate should defer to the President's preferred choice and whether it is appropriate to take a nominee's political views or judicial philosophy into account. The debate about the scope of questioning has centered on whether it is appropriate for senators to ask and nominees to answer questions about the nominee's political views and judicial philosophy and how these views and philosophy would apply to issues that may come before the Court.

Presidents and some members of the Senate have argued that selecting Justices is the President's prerogative and that, although the President may take a judicial prospect's philosophy into account, the Senate must limit its inquiry to whether the nominee has the basic qualifications for the job. These commentators maintain that the Senate should defer to the President's nomination of any person who is neither corrupt nor professionally incompetent. Others have contested this view and argued that the Senate, when it decides whether to consent to a nomination, is permitted to take into account the same range of considerations open to the President and to make its own independent determination of whether confirmation of a particular nominee is in the best interests of the country.

Presidents have often taken the position that the Senate should defer to the President's choice. President RICHARD M. NIXON [3], for example, claimed in 1971 that the President has "the constitutional responsibility to appoint members of the Court," a responsibility that should not be "frustrated by those who wish to substitute their own philosophy for that of the one person entrusted by the Constitution with the power of appointment." This view was echoed by President RONALD REAGAN [3,I], who asserted that the President has the "right" to "choose federal judges who share his judicial philosophy" and that the Senate should confirm Presidents' nominees "so long as they are qualified by character and competence."

Many of those who agree with Presidents Nixon and Reagan believe that the proper standard for Senate review of Supreme Court nominees is the deferential standard that the Senate has typically accorded to presidential nominations of executive officials, whose confirmation is gener-