

# ADVISORY OPINION

## BEWARE: YOUR RIGHTS COULD BE CRIMES (PART II)

by Timothy Lynch

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The federal government has acquired the power to trespass upon the premises of businesspeople. While it is perfectly legal for drug lords and mafia dons to demand a search warrant before they admit the police into their compounds, businesspeople can and jailed for exhibiting such obstinateness. This extraordinary assumption of power is another example of how the government is criminalizing basic constitutional rights.

The Fourth Amendment to our Constitution provides, “The right of the people to be secure in their 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 purpose of that amendment is to limit official entry on to private property. But year after year, government attorneys seek court rulings that will facilitate investigations and prosecutions. All too often, courts reason that the Fourth Amendment rights of private individuals and organizations must yield to the needs of law enforcement.

Nowhere has that trend been more evident than in the context of commercial property. The general rule is that “a search of private property without consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.” An important precedent was set, however, in *Davis v. United States* (1948) when the Supreme Court upheld a governmen-

tal seizure of rationing coupons at a gasoline station. The Court’s opinion emphasized that the filling station was a place of business, not a private residence. The obvious implication was that the ruling might have been different if the seizure had taken place on noncommercial property.

The Fourth Amendment was diluted further in the 1970s when the Supreme Court ruled that the premises of certain “closely regulated industries” were exempt from the already lax rule concerning searches of commercial premises. In *United States v. Biswell* (1972), the Court considered the constitutionality of a gun control law that authorized federal agents to inspect the premises of federally licensed gun dealers without search warrants. The Court reasoned that pervasive regulation of firearms essentially put those engaged in the business on notice of the government’s sweeping inspection powers.

At first, the doctrine of closely regulated industries was limited to businesses with a long history of pervasive regulation, but the list has expanded over the years as the Supreme Court has deferred to legislative judgments as to which industries are in fact “closely regulated.” Such a posture is not unlike deferring to the judgment of a censor with respect to the scope of the First Amendment’s free speech guarantee. Justice Potter Stewart aptly described the “peculiar logic” of the Supreme Court’s search and seizure jurisprudence when he remarked that “the scope of the Fourth Amendment diminishes as the power of governmental regula-

tion increases.”

Congress has taken full advantage of the Supreme Court’s lackadaisical standard of review. Many federal environmental laws, for example, explicitly authorize warrantless inspections of commercial premises. Section 7414 of the Clean Air Act, for example, provides: “the Administrator [of the EPA] or his authorized representative, upon presentation of his credentials—shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located.”

The Clean Air Act makes it a crime for a company to refuse entry to EPA investigators; even to facilities not open to the public. Such statutes can withstand constitutional challenges because of the closely regulated industry doctrine. Agriculture, food sales, commercial fishing, and hazardous waste disposal have already been designated closely regulated industries by the courts for purposes of Fourth Amendment analysis.

This distressing trend must be reversed. Congress should repeal every federal law authorizing warrantless entry onto private property. Absent consent or exigent circumstances, government agents should be required to obtain a search warrant. Judicial magistrates, in turn, should not issue warrants unless there is probable cause to believe that a law has been violated. If those Fourth Amendment procedures can be honored when the FBI is attempting to apprehend America’s “most wanted,” they can surely be followed by the regulatory police in OSHA and the EPA.