

Supreme Court Rejects Unlimited Government Access to Hotel Records

6/25/2015

The default rule under the [Fourth Amendment's](#) prohibition against “unreasonable searches and seizures” is that the government must get a warrant to compel an individual to turn over his or her “papers,” unless an exception applies. One such exception is for so-called administrative searches, which generally must have a regulatory, as opposed to criminal, purpose. While administrative searches do not require a traditional probable cause warrant, they still require some avenue for the individual to contest the search beforehand. In a narrower set of cases, “closely regulated” industries that are subject to pervasive government regulation are entitled to no expectation of privacy whatsoever in certain business records and therefore are not entitled to access to the courts to challenge a government search.

In a purported effort to clamp down on prostitution, drug dealing, sex trafficking, and other criminal elements, the City of Los Angeles passed a law requiring hotels to maintain a record of their guests and permit officers of the L.A. Police Department (LAPD) to immediately access these records upon demand. Failure to permit inspection was made a misdemeanor punishable by up to six months in jail and a \$1,000 fine. The apparent thinking behind that law was that periodic and unannounced inspections would provide sufficient incentive for hotel owners to keep complete and accurate records of their guests. The hotel owners challenged the law as an unreasonable invasion of their privacy and property rights under the Fourth Amendment. In a closely divided 5-4 decision in [City of Los Angeles v. Patel](#), the Supreme Court held that this inspection requirement was unconstitutional on its face because it lacked “any opportunity for precompliance review.”

The majority opinion, written by Justice Sotomayor, and joined by Justices Kennedy, Ginsburg, Breyer, and Kagan, proceeded in two parts. First, it addressed whether the hotel owners could bring a facial challenge to the law—that is, whether the law as written, and not as applied to a specific set of facts, was constitutional. Facial challenges are extremely difficult to win as [prevailing case law](#) requires plaintiffs to demonstrate that the “law is unconstitutional in all of its applications.” The Fourth Amendment is even less susceptible to facial challenges due to the inherent flexibility and indeterminacy of the Fourth Amendment’s general reasonableness requirement. Nonetheless, the majority noted that “facial challenges under the Fourth Amendment are not categorically barred or especially disfavored.”

Second, the Court addressed the merits of the Fourth Amendment question: whether the government can demand access to the hotel registries without a warrant or any suspicion. Again, the Fourth Amendment generally requires the government to obtain a warrant to conduct a search. However, where it has a “special need” that goes beyond traditional law enforcement purposes, the warrant requirement can be relaxed for lesser process, such as a subpoena coupled “with an opportunity to obtain precompliance review before a neutral decisionmaker.” These are known as administrative searches. Here, the Court accepted that these inspections served a special need—they ensured compliance with the record-keeping requirement. However, the lack of any opportunity to contest the reasonableness of the search compelled the majority to find the administrative search exception inapplicable.

The city had argued that hotels fall within the so-called “closely regulated” business rule which holds that certain businesses which are subject to pervasive regulation are entitled to *no* expectation of privacy in various business records. The Supreme Court has applied this rule to four sets of industries: liquor sales, firearms dealing, mining, and automobile junkyards. Justice Sotomayor observed that unlike these four examples, hotels do not pose a “clear and significant risk to the public,” and that extending this exception to hotels would allow “a narrow exception to swallow the rule.” Moreover, the majority noted that regulations requiring hotels to maintain a license, collect taxes, and meet certain sanitary requirements were not enough to bring them within this exception. In dissent, Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, disagreed, pointing out that the lower courts had applied this exception to a much broader class of businesses, including pharmacies, massage parlors, commercial-fishing operations, day-care facilities, nursing homes, jewelers, barbershops, and rabbit dealers.

Now the question is whether these cases remain good law after *Patel*. The answer will depend largely on the specific industry being regulated and the specific regulatory regime being challenged. Justice Sotomayor’s opinion relied heavily on her understanding that the four previous “closely regulated” cases hinged on the fact that the businesses were “intrinsically dangerous” and “pose[d] a clear and significant risk to the public.” While perhaps a *sufficient* condition, those four opinions do not appear to have made dangerousness a *necessary* condition. This new gloss on the closely regulated test may send a signal to the lower courts to assess more stringently whether certain businesses should qualify as closely regulated and may trigger new challenges to the authority of federal agencies that have various warrantless search authority (e.g., [Food and Drug Administration](#), [Environmental Protection Agency](#)).

Moreover, even if a business is closely regulated, in order to conduct warrantless searches of such business, there must be a substantial government interest; the inspections must be necessary to further that scheme; and the inspection program must have certainty and regularity to justify foregoing the warrant requirement. Justice Sotomayor observed that the second and third elements were not met, as officers had other means to ensure the registries were not tampered with by the owners (such as obtaining a warrant beforehand or guarding the registry while the hotel owner contests access to the records), and the law failed to constrain the officer’s absolute discretion about which hotels to inspect.

At least at first glance, what may be most noticeable about the Court’s ruling is what it did not directly address. In its *en banc* decision, the Ninth Circuit held that LA’s inspection scheme constituted a Fourth Amendment search under both a property-based and privacy-based theory of the Fourth Amendment. Moreover, at oral argument, several of the Justices questioned whether the hotel owners were entitled to privacy in such business records with Justice Kennedy pondering out loud whether the author of the opinion would have to use the phrase “reasonable expectation of privacy.” However, Justice Sotomayor appears to have assumed that the government activity invaded the hotel owner’s privacy rights as she did not address it in the opinion (and necessarily had to hold as such as she moved on to the reasonableness analysis of the Fourth Amendment).

Additionally, the Court did not address what privacy rights, if any, the hotel *guests* have in the records that LA’s ordinance required to be stored and accessed. This analysis would have necessarily required the Justices to consider the continuing vitality of the [third-party doctrine](#), a confused area of Fourth Amendment jurisprudence left to the lower courts to sort out for the last several decades.

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