

THE LIMITS OF FOURTH AMENDMENT INJUNCTIONS

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INTRODUCTION

On July 21, 2006, a District Court Judge in Ohio entered a remarkable injunction in a civil case called *Warshak v. United States*.¹ Stephen Warshak ran a massive fraud scheme selling a “male enhancement” pill named Enzyte that was widely advertised online.² During the criminal investigation of his company, federal agents obtained Warshak’s personal e-mail from his Internet service provider with a court order obtained under 18 U.S.C. § 2703(d), a provision of the Stored Communications Act that permits orders to be issued with less than probable cause. Warshak responded with a civil suit seeking both damages and injunctive relief on the ground that obtaining his e-mails with less process than a warrant violated his Fourth Amendment rights. District Judge Susan Dlott granted Warshak’s request for injunctive relief with the following order:

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1. See *Warshak v. United States*, No. 1:06-CV-357, 2006 WL 5230332, at *1 (S.D. Ohio July 21, 2006).

2. Warshak has since been convicted and sentenced. Conrad de Aenlle, *Heading to Prison*, N.Y. TIMES, Aug. 31, 2008, at BU2.

The United States is accordingly ENJOINED, pending final judgment on the merits of Plaintiffs' claims, from seizing, pursuant to court order under 18 U.S.C. § 2703(d), the contents of any personal email account maintained by an Internet Service Provider in the name of any resident of the Southern District of Ohio without providing the relevant account holder or subscriber prior notice and an opportunity to be heard on any complaint, motion, or other pleading seeking issuance of such an order.³

The rationale behind Judge Dlott's order was that the injunction was needed to ensure that the government did not obtain the contents of personal e-mail accounts in ways that violated the Fourth Amendment. On appeal, the Sixth Circuit modified the injunction slightly but agreed with the basic approach of the district court.⁴ In the Sixth Circuit's view, the court's job was to craft an injunction designed to ensure that procedures used to compel e-mail complied with the Fourth Amendment. It therefore considered all of the ways that the government could obtain e-mail from an account, and then crafted the injunction in a way that satisfied the court that no Fourth Amendment rights could be infringed.⁵

The approach of the district court and circuit panel in *Warshak* did not ultimately stand: The *en banc* court disagreed with the original panel and reversed.⁶ At the same time, the district court and panel decision raise interesting questions of Fourth Amendment law that have received surprisingly little scholarly attention. When is injunctive relief appropriate in Fourth Amendment cases? Should courts feel free to craft injunctive relief to avoid Fourth Amendment defects? Or is there something wrong, either as a matter of doctrine or policy, with crafting injunctions in Fourth Amendment cases?

This essay will provide answers to these questions. The first part argues that as a matter of history and practice, injunctive relief has been quite rare in Fourth Amendment cases. Fourth Amendment injunctions are permitted, but they have always stayed limited to a very specific set of facts. As a practical matter, injunctive relief has been used as an on-off switch for carefully-defined practices: courts ruling on the injunction either allow the specific practice or prohibit it. The most significant doctrinal hook for this limitation is Article III standing: Injunctive relief requires a "real and immediate threat" of future injury to establish a case

3. See *Warshak*, 2006 WL 5230332 at *8.

4. *Warshak v. United States*, 490 F.3d 455, 460 (6th Cir. 2007).

5. See *id.*

6. *Warshak v. United States*, 532 F.3d 521, 534 (6th Cir. 2008).

or controversy.⁷ The precise meaning of that requirement remains murky, but it arguably means that a plaintiff must show a real and immediate threat of a highly specific set of facts occurring.

My second point is that as a matter of normative policy, any ambiguity in the current state of the law should be resolved against imposing broad Fourth Amendment injunctions. At first blush, it may seem that crafting a broad injunction to avoid Fourth Amendment violations appropriately shapes the remedy to the wrong. However, crafting broad injunctive relief forces courts to assume duties that they are not competent to handle. Fourth Amendment doctrine is tremendously fact-specific: every fact pattern is different, and even the exceptions to the exceptions have their own exceptions. Courts are poorly suited to design broad injunctive relief in this setting: they lack the ability to predict how the government may act and the fact patterns that may arise. Courts should therefore decline to craft Fourth Amendment injunctions involving hypothetical facts. Courts should apply the same Fourth Amendment standards in cases seeking injunctive relief that they apply elsewhere: courts should rule on one set of facts rather than classes of facts.

I. THE LAW AND PRACTICE OF FOURTH AMENDMENT INJUNCTIONS

A defining characteristic of Fourth Amendment doctrine is that it develops in a case-by-case fashion.⁸ Every decision is based on concrete facts.⁹ In the usual context of a motion to suppress, the defendant files a motion to suppress after the search or seizure has occurred, and the government must show that the exact search that occurred satisfied the Constitution. The parties and the judge all look back to a specific moment when a specific law enforcement officer took a specific step that uncovered specific evidence.¹⁰

When the facts are made clear, either on the papers or in a hearing, the court applies the complex framework of Fourth Amendment doctrine to that specific set of facts. It runs through the usual questions of Fourth Amendment law: Did any searches occur? Any seizures? If so, was a valid warrant obtained? If not, did a specific exception to the warrant

7. *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 (1983).

8. *Saucier v. Katz*, 533 U.S. 194, 205-06 (2001); *United States v. Brown*, 635 F.2d 1207, 1211 (6th Cir. 1980).

9. *See v. City of Seattle*, 387 U.S. 541, 546 (1967).

10. *See, e.g., Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 448-49 (1990) (noting the “extensive testimony” heard to determine the constitutionality of a highway checkpoint program).

requirement apply, such as exigent circumstances or consent that rendered the warrantless search or seizure reasonable? The court then issues an opinion concluding whether the Fourth Amendment was violated, and in some cases, whether the Fourth Amendment violation should lead to suppression of the evidence.

In civil cases seeking injunctive relief, the remedy is necessarily prospective rather than retrospective. That is, courts prohibit future acts rather than impose liability for past ones. In this environment, injunctive relief is quite rare. Courts have generally limited injunctive relief to ongoing programs such as a drug testing policies or road blocks. Although the injunctive remedy technically is prospective, as a practical matter it acts just like a retrospective remedy. Courts typically limit the relief to the specific established the facts of the ongoing program.

Two roadblock cases provide helpful illustrations of this narrow use of injunctive relief. In *Michigan Dept. of State Police v. Sitz*,¹¹ a group of Michigan drivers filed a civil action against the Michigan Department of State Police seeking declaratory and injunctive relief from potential subjection to drunk driving checkpoints. The trial court “heard extensive testimony”¹² about Michigan’s drunk driving checkpoints, and then held that on balance the program violated the Fourth Amendment and should be prohibited. The U.S. Supreme Court disagreed, holding that the drunk driving checkpoints were constitutionally reasonable and therefore consistent with the Fourth Amendment.¹³

In contrast, in another road block case, *City of Indianapolis v. Edmond*,¹⁴ a class of Indianapolis motorists filed a lawsuit seeking injunctive relief against an Indianapolis check point designed to find drugs. The two sides stipulated to the facts as to exactly how the program worked,¹⁵ and the U.S. Supreme Court ruled that, as stipulated, the program was unconstitutional and should be enjoined.¹⁶ We can see the same approach with cases involving drug testing. A typical example is *Skinner v. Railway Labor Executives’ Ass’n*,¹⁷ a labor union of railway employees sued to enjoin detailed regulations that governed drug and alcohol testing of railroad employees. The Court ruled that the specific procedures permitted were reasonable and therefore constitutional.

11. See generally *id.* at 448.

12. *Id.*

13. *Id.* at 455 (“In sum, the balance of the State’s interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment.”).

14. See generally *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

15. *Id.* at 35-36.

16. *Id.* at 48.

17. See generally 489 U.S. 602 (1989).

The basic idea, both in the drug testing and the road block cases, is that the fact-sensitivity of Fourth Amendment law does not prohibit injunctive relief so long as the facts can be either stipulated or found at trial or otherwise established with reasonable detail. The court can take the facts of an existing or proposed program and treat it as a past set of facts rather than a current or future one. It can then rule on whether these sets of facts are within the Fourth Amendment or beyond it.

The constitutional doctrine forcing Fourth Amendment injunctions into this narrow role is the Article III “case or controversy” requirement.¹⁸ The case or controversy requirement limits the power of the federal courts by prohibiting federal courts from acting in the absence of actual injury. The federal courts cannot reach out and decide issues without an actual dispute before them; they cannot act based merely on an “[a]bstract injury.”¹⁹ Under the case or controversy requirement, the federal courts cannot act based on hypothetical facts; they need specific facts (or at least allegations of specific facts²⁰) before announcing how the law applies.

Applying the case or controversy to injunctive relief raises a difficult question: How can a plaintiff prove an actual injury based on something that hasn’t happened yet? Injunctions are prospective in nature: the court orders a party not to do something in the future. But it’s hard to predict the future, and it’s therefore often hard to prove that a specific injury will occur. We might know that a type of harm will occur without knowing its precise circumstances. The key question is, how clearly does the plaintiff need to prove a specific set of facts likely in the future to satisfy the case or controversy requirement? Is a likelihood of the general category of harm enough? Or must the plaintiff prove the very specific set of facts?

The case law hasn’t settled this issue definitively. However, the Supreme Court’s cases suggest that the plaintiff must show a likelihood of a *specific set of facts*, rather than a likelihood of a general category of facts. That is, the plaintiff must show that the relevant facts that are needed to assess the constitutionality of the act are likely to occur. For example, in *City of Los Angeles v. Lyons*,²¹ Lyons sued the City of Los Angeles after a city police officer had subjected him to a “chokehold” that rendered him unconscious. Lyons sought damages and also

18. See *Lyons*, 461 U.S. at 95.

19. See *id.* at 101.

20. The federal courts do have the power to act on alleged facts that may or may not prove accurate. For example, if a plaintiff alleges facts in a complaint, the court will take those alleged facts as true for the purposes of a dismissal under FED. R. CIV. P. 12(b)(6).

21. See *Lyons*, 461 U.S. at 95.

injunctive relief; the injunctive relief asked the Court to block the LA police force from using chokeholds “except in situations where the proposed victim of said control reasonably appears to be threatening the immediate use of deadly force.”²² The district court found that the LA police department had authorized its officers to use chokeholds “in situations where no one is threatened by death or grievous bodily harm,”²³ and that the officers were insufficiently trained, and that the chokeholds were very dangerous. The district court then, enjoined the use of chokeholds “under circumstances which do not threaten death or serious bodily injury.”²⁴

The Supreme Court overturned the injunction on the ground that Lyons had not established a case or controversy. To establish a case or controversy permitting injunctive relief, the Court held, Lyons had to show “a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.”²⁵ It wasn’t enough that Lyons might be stopped, or that he might be subject to a chokehold. Nor was it enough that someone in Los Angeles might be subject to an illegal chokehold. To establish standing, Lyons needed to show a real and immediate threat that he himself would be stopped and would be subject to a chokehold that rendered him unconscious without any provocation or resistance. In other words, Lyons had to show a likelihood of all of the relevant facts that had established the illegality of the first act occurring again to him.

Lyons echoed and relied on an earlier decision, *Rizzo v. Goode*,²⁶ which offers a less clear holding but provides helpful context to understand *Lyons*. In *Rizzo*, a district court judge in Philadelphia had entered a broad injunctive order in a class action lawsuit against the mayor, the City Managing Director, and the Police Commissioner designed to reform the conduct of the Philadelphia police.²⁷ The plaintiffs had alleged widescale lawbreaking by the police, and the district court judge heard 250 witnesses over 21 days of hearings to assess the problem.²⁸ During the trial, the court documented about 20 specific cases in which individual officers had violated the law.²⁹ The district court judge concluded that a comprehensive program of equitable relief was necessary to reform police practices among the Philadelphia police.

22. *Id.* at 98 (quoting the complaint).

23. *Id.*

24. *Id.* at 100.

25. *Id.* at 96.

26. *See* 423 U.S. 362 (1976).

27. *Id.* at 362-63.

28. *Id.* at 367.

29. *Id.* at 373.

When the case came before the Supreme Court, the Court ruled that the district court had no Article III power to enter such an injunction because the claim for a case or controversy was based only on proof of about 20 past incidents in a city with 7,500 policemen and 3 million inhabitants.³⁰ This evidence did not directly implicate the Mayor, the police chief, or the City Managing director: they were not actually responsible for the wrongdoing. More broadly, the principles of federalism did not permit a federal court to interfere so directly with the internal operations of state law enforcement agencies: “The scope of federal equity power” could not “be extended to the fashioning of prophylactic procedures for a state agency designed to minimize this kind of misconduct on the part of a handful of its employees.”³¹ Equitable relief, the Court stressed, was “to be used sparingly, and only in a clear and plain case.”³²

Rizzo and *Lyons* show that injunctive relief needs to be narrow in police conduct cases, but they do not clearly settle just how specific a plaintiff’s claims must be to trigger injunctive relief. I will therefore turn to the policy question: How should courts construe the case and controversy requirement in Fourth Amendment cases? Should they require proof that the very specific set of facts alleged will reoccur, or only that general class of facts?

II. THE DIFFICULTY WITH BROAD FOURTH AMENDMENT INJUNCTIONS

From a policy standpoint, the fact-specific nature of Fourth Amendment rulemaking counsels strongly against broad Fourth Amendment injunctions. Fourth Amendment rules are almost always fact-specific: most rules have exceptions, and the exceptions have their own exceptions. As a result, it is difficult for a court to pronounce how the Fourth Amendment might apply to a general set of facts. To do so successfully, a court would need to both predict all of the factual scenarios that might arise and answer exactly how the Fourth Amendment would apply to all of them.

Courts are not competent to do this accurately. In litigation, litigants present competing arguments as to how the law applies to a specific set of facts. But courts and litigants are poorly suited to identify the full range of fact patterns that might arise and then apply the law to it. Efforts to do so likely will lead to injunctions that are vastly

30. *Id.*

31. *Id.* at 378.

32. *Id.* at 378 (citing *Irwin v. Dixion*, 50 U.S. 10, 33 (1850)).

underinclusive, vastly overinclusive, or hopelessly vague. As a district court judge once noted in rejecting a claim for broad injunctive relief under the Fourth Amendment, “the myriad factual situations in which [Fourth Amendment] issues can arise are so varied, and the boundaries in some areas of the law are so nebulous, that any attempt at broad-spectrum injunctive relief should be avoided. Courts are simply not equipped to supervise the day-to-day operations of police officers by injunction.”³³

Perhaps the best way to prove this point is with an example. Imagine Peter Plaintiff’s house was raided by the local police without a warrant. Peter believes that the police may do this again, so he brings a Fourth Amendment claim against the police seeking an injunction against the warrantless entry of his home. At first blush, this might seem reasonable: After all, the Fourth Amendment normally requires the police to obtain a warrant before entering a home. Imagine you are a federal district court judge, and you want to make sure the police don’t violate Peter Plaintiff’s Fourth Amendment rights any more. You decide you will grant the injunction.

But what should the injunction say? For your first draft, you write out the following sentence: “The government is enjoined from entering Plaintiff’s home without a valid warrant.” But wait, you think, that’s too broad. There are several exceptions to the warrant requirement, such as exigent circumstances³⁴ and consent.³⁵ These exceptions allow the police to enter the home without a warrant. So a second draft might try to track the Supreme Court’s decisions on those exceptions and say the following: “The government is enjoined from entering a home without a valid warrant unless exigent circumstances exist or the police have actual or apparent authority from an individual with common authority to consent.”

But that’s too broad as well. The Supreme Court has allowed warrantless home inspections for regulatory reasons.³⁶ Plus, there is no constitutional prohibition on entry into a home when the home is open to the public, and therefore, protected by the Fourth Amendment.³⁷ The third draft might try to take account of these doctrines and say something like the following: “The government is enjoined from entering a home without a valid warrant unless exigent circumstances

33. *Hughes v. Rizzo*, 282 F.Supp. 881, 885 (E.D.Pa. 1968).

34. *See, e.g., Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006).

35. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990).

36. *See Camara v. Municipal Court*, 387 U.S. 523 (1967).

37. *See Katz v. United States*, 389 U.S. 347, 351 (1967) (Harlan, J., concurring) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”).

exist; or the police have actual or apparent authority from an individual with common authority to consent; or the home is being inspected by housing inspectors in a reasonable way; or the home is open to the public.”

Does that do the job? No, it doesn't. The Supreme Court has allowed warrantless entry into a home to escort an individual who has just been arrested outside the home and needs to obtain materials for jail.³⁸ Lower courts have also allowed warrantless entry into homes when the resident does not have permission from the property owner to be there, such as the case with a squatter or a person who has stopped paying rent and has been evicted.³⁹ In addition, courts have allowed warrantless entries into homes when the homeowner invites an undercover officer or confidential informant inside to buy drugs; the undercover sees illegal drugs inside and signals to the officers; and the undercover invites others to enter the home.⁴⁰ Any injunction would have to recognize these exceptions, too.

You can see where this is going. If a court wants to draft an injunction that accurately maps how the Fourth Amendment applies to home searches, it needs to answer a seemingly limitless set of hypothetical situations addressing a seemingly limitless set of possible exceptions to whatever default rule the court creates. To reflect the scope of Fourth Amendment protections accurately, the proposed injunction would have to reach a conclusion on the precise scope of every possible exception to the warrant requirement, whether recognized already by the courts or not. For example, consider the plausible argument that the Fourth Amendment does not require a warrant to search a home to conduct foreign intelligence from agents of foreign powers—and if so, what kinds of warrants are permitted.⁴¹ Right now, there are no cases on the question. However, the injunction presumably would need to rule on this issue, as otherwise it might end up blocking warrantless searches that the Fourth Amendment would permit.

Judges are smart people. But not even the smartest judge could craft such rules prospectively in a clear and accurate way. The case-by-case development of Fourth Amendment law normally requires extensive briefing from parties as to how the Fourth Amendment applies to a *single*

38. *See* *Washington v. Chrisman*, 455 U.S. 1 (1982).

39. *Zimmerman v. Bishop Estate*, 25 F.3d 784, 787-88 (9th Cir. 1994).

40. *See, e.g., United States v. Paul*, 808 F.2d 645 (7th Cir. 1986). The legality of this technique is currently before the Supreme Court in *Pearson v. Callahan*, 07-751 (cert. granted by 128 S.Ct. 1702), a case in which I represent the petitioners.

41. *See, e.g., United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc); *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980). *But see* *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975).

set of facts. But to craft a broad Fourth Amendment injunction, courts would have to devise rules covering an essentially *infinite* set of facts. They would need to identify each of these facts and then apply the Fourth Amendment to them with little if any briefing on even the most obvious doctrinal categories. Further, the court's Fourth Amendment rules would not be merely dicta. Because they would shape the injunction and be binding on the executive, the court's rulings would be holdings that would often become binding on other courts.

The District Court and initial panel opinions in *Warshak v. United States*⁴² that I discussed in the introduction to this essay provide a textbook demonstration of these problems. Warshak sought an injunction regulating when and how the federal government could obtain e-mail of residents of the Southern District of Ohio from ISPs.⁴³ The initial Sixth Circuit panel devised the following set of rules to regulate access to e-mail:⁴⁴

(a) When the government seeks to compel the contents of personal e-mails from an Internet service provider, it may obtain the e-mail from the Internet service provider only in the following circumstances:

(1) Pursuant to a subpoena, if the government can establish, "based on specific facts," "that the ISP or other intermediary clearly established and utilized the right to inspect, monitor, or audit the contents, or otherwise had content revealed to it,"⁴⁵ or:

(2) Pursuant to a subpoena, if the government provides prior notice to the e-mail subscriber and permits the subscriber an opportunity to challenge the constitutional reasonableness of the subpoena before the e-mails are disclosed, or:

(3) Pursuant to a search warrant based on probable cause that "target[s] e-mails that could reasonably be believed to have some connection to its specific investigation," if neither the circumstances in subsections (1) or (2) are satisfied.⁴⁶

(b) Subsection (a) shall not apply to computer scanning of e-mail for key words, types of images or "similar indicia of wrongdoing" in a way that does not disclose contents to an

42. *Warshak v. United States*, 2006 WL 5230332 (S.D. Ohio 2006), *vacated in part*, 490 F.3d 455 (6th Cir. 2007), *rev'd en banc*, 532 F.3d 521 (6th Cir. 2008).

43. *Warshak v. United States*, 2006 WL 5230332 (S.D. Ohio 2006).

44. *Warshak v. United States*, 490 F.3d 455, *474-76 (6th Cir. 2007). The rules which follow are indented and formatted for clarity; they are not an exact quotation from the case.

45. *Id.* at 475.

46. *Id.* at 476.

actual person.⁴⁷

In crafting these rules, the *Warshak* panel tried to account for some of the major possible distinctions in government and ISP practices. Working without any particular facts, the panel concluded that screening for keywords was different than full content monitoring; prior notice should trigger a different and less protective set of rules; and significant monitoring by an ISP should lead to different rules as well. The panel then devised rules to account for each of these different distinctions.

As I have detailed in depth elsewhere, the *Warshak* panel's rules were highly creative and made several doctrinal category errors.⁴⁸ Most of the distinctions were not actually briefed at any length by the parties; the panel essentially invented them. But even on the decision's own terms, notice how much the panel left out. First, there is the question of definitions. First, what is a "personal" e-mail account, and what is a nonpersonal one? What is an "ISP" for Fourth Amendment purposes? Second, notice how many Fourth Amendment questions the panel ignored. For example, what about access pursuant to consent or exigent circumstances? What about access when the server is located outside the United States? What about screening for contraband images of child pornography, which may or may not implicate a reasonable expectation of privacy?⁴⁹

By attempting to resolve every application of how the Fourth Amendment applies to personal e-mail, the *Warshak* panel bit off more than it could chew. The *en banc* panel took the better approach by reversing on the ground of ripeness.⁵⁰ Stephen Warshak had not established a real and immediate prospect that his e-mail would be accessed again in the same way it was accessed before. The original panel should not have used his request for injunctive relief as a springboard to devise a new world of Fourth Amendment rules.

CONCLUSION

Accurate rulemaking benefits from case-by-case attention. As the Supreme Court has stressed, "[a]lthough passing on the validity of a law

47. *Id.* at 474.

48. See Posting of Orin S. Kerr to Volokh Conspiracy, *The Procedural Errors of Warshak v. United States*, <http://www.volokh.com/posts/1182446445.shtml> (June 21, 2007); Posting of Orin S. Kerr to Volokh Conspiracy, *Warshak and Fourth Amendment Standards for Orders to Compel*, <http://www.volokh.com/posts/1182840096.shtml> (June 26, 2007).

49. See generally Richard P. Salgado, *Fourth Amendment Search And The Power Of The Hash*, 119 HARV. L. REV. F. 38 (2005).

50. See *Warshak v. United States*, 532 F.3d at 526-28 (6th Cir. 2008).

wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks.”⁵¹ This difficulty is particularly acute in the Fourth Amendment setting. Fourth Amendment decisions are too fact-sensitive for courts to use injunctive relief to craft broad-ranging injunctions.

The Article III case or controversy requirement should be read to forbid such broad rulemaking. Courts should require a “real and immediate threat” that a very specific set of facts will occur – so specific that the Court does not need to create rules for various possible variations in those facts. When it comes to injunctive relief, courts should apply the same Fourth Amendment standards that they apply elsewhere: they should rule on one set of facts rather than classes of those facts. This limitation will both comply with Article III standing and recognize the institutional limitations of judicial rulemaking in the area of search and seizure law.

51. *Sabri v. United States*, 541 U.S. 600, 608-09 (2004).