

Quick Hit: Search Warrants

Podcast | The Bracewell Sidebar

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On this episode of The Bracewell Sidebar, hosts [Matthew Nielsen](#) and [Seth DuCharme](#) discuss how one goes about getting a search warrant in light of recent events, including what is required and what inferences can be fairly drawn from the existence of a warrant.

Let's talk a little bit about the process of getting a search warrant, what is required, and how you would go about getting one in the federal system?

The starting point is with the Fourth amendment to the Constitution; that you have a right to be free of unreasonable searches and seizures. There is no general warrant under the US Constitution. Law enforcement authorities cannot go into a person's residence and search for evidence without that search being blessed by a judge. That requires a showing of probable cause and that evidence of specific crimes are likely to be found in the residence. So, it is a particularized requirement. There's judicial oversight. You have to state what crimes particularly are being investigated and the facts that you allege that amount to probable cause. And then there is a limitation to the scope of that search. It can be expanded if certain events unfold, but initially a warrant can only be executed within the scope that the judge authorizes.

Why does one go to the level of doing a search warrant?

The burden of proof by which the government must establish cause to use the instrument of the search. Whether it's a grand jury subpoena or a search warrant, the burden is lower on the government to issue a grand jury subpoena, much lower than it is to issue a search warrant. That relates to both the intrusiveness of the search and also the richness of the contents of material that you're likely to obtain through the process, and also who holds the information. For example, grand jury subpoenas are most often used for things

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like phone records, where a third party — the phone company — holds those records. The information may be limited, it may be numbers called or numbers received. And so the scope of the intrusion is limited. The reasonable expectation of privacy on the part of the subject is less because of the involvement of a third party, and the substance of the information is less. You can certainly draw inferences from who called whom when, but you don't see deeply into the life of the subject.

A search warrant requires probable cause. How do you go about establishing that and procedurally, how do you get a judge to sign a search warrant?

It's important in saying at the outset that probable cause to believe that evidence of a crime will be found at a premise is different from saying there's probable cause to believe that the resident committed the crime. Sometimes they can overlap. They often do, but sometimes they don't. It's really important to stay focused on what a search warrant is and what it is not. A search warrant is probable cause to believe that evidence of a crime will be found in the premises to be searched. Whether or not the perpetrators of that crime are present is a related but different question. Sometimes you will see the government execute contemporaneously, search warrants and arrest warrants. There may be overlapping facts in those affidavits in support of those instruments, but they are not the same thing. When the government proceeds step by step, what they are doing is they are in orderly sequential fashion, collecting evidence to then determine if that evidence meets a charging standard and if that evidence supports allegations against a particular individual as being a perpetrator of the crime.

Have questions about government investigations, including search warrants? Email [Matthew Nielsen](#) or [Seth DuCharme](#).

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