

論「藉故行政搜索」

張 瑋 心*

目 次

壹、問題之提出

貳、美國「藉故行政搜索」之裁判

一、Donovan v. Dewey (1981)

二、Russo v. Massullo (1991)

三、Swint v. City of Wadley (1995)

四、Bruce v. Beary (2007)

五、Club Retro, LLC v. Hilton (2009)

參、系爭爭點與裁判要旨

肆、行政搜索之歷史沿革

一、行政檢查附帶搜索之特性

二、行政檢查與令狀原則

三、行政搜索與令狀例外

(一)權衡法則 (balancing test)

(二)特殊需求法則 (special need)

伍、結論

關鍵詞：行政搜索、行政檢查、片面檢查、特殊需求、權衡法則。

Keywords：Administrative Search, Administrative Inspection, Pretextual Inspection, Special Need, Balancing Test.

責任編輯：黃右瑜

* 中國文化大學法律學系副教授，法官學院、司法官學院講座。

摘要

按我國大法官釋字第 535 號解釋所揭：「人民之有犯罪嫌疑而須以搜索為蒐集犯罪證據之手段者，依法尚須經該管法院審核為原則（參照刑事訴訟法第一百二十八條、第一百二十八條之一），其僅維持公共秩序、防止危害發生為目的之臨檢，立法者當無授權警察人員得任意實施之本意。」旨在強調行政檢查與刑事搜索有別，不容混淆，然有關行政搜索之權限範圍，大法官並未加以定義說明。美國法則認為行政檢查之行為具附帶搜索特性；亦即行政檢查與行政搜索乃相容之概念。換言之，行政檢查搜索相對於刑事偵查搜索，乃兩個不同之法系統的強制處分。惟，行政搜索與刑事搜索，在權衡法則與特殊需求法則的操作下，出現兩者界限模糊之缺失；例如，藉口行政檢查，實際對商業處所從事犯罪證據蒐集之活動時，該搜索就變成一種「藉故行政搜索」（*pretextual administrative search*），不僅違背美國憲法增修條文第四條之精神，同時牽動實施藉故搜索之警方有無免責條款適用之問題。本文爰介紹美國聯邦上訴審法院對於「藉故檢查」（*pretextual inspection*）新近判決之觀點，又行政搜索於令狀例外之適用，及其如何演變為犯罪偵查手段之始末深入探討，希冀提供我國對於檢視類似不正檢查行為之參考。

An Introduction to Pretextual Administrative Search

Wei-Hsin Chang

Abstract

According to the Taiwan judicial interpretation 535, people to be searched because of crime suspects, is under the law with the principle of warrant. Thus, the law enforcement is not authorized by legislators to carry out on-site check anytime for the mere purpose of ensuring public order (referring to the article of 128 and 28-1 of Taiwan Criminal Procedure). It stresses that the difference between the administrative check and criminal search should be separated; however, the competence of administrative search has not yet been properly defined by justices. An administrative check would unavoidably include search, in which both of the concept is compatible. In other words, the administrative check and criminal search initially belongs to two different legal enforcement systems, only when the administrative check and criminal search involve the activities of crime investigation, would it appear obscure in both boundaries of search. For example, a commercial premise, under the name of administrative check but actually is engaged in crime-evidence search, makes the search a pretextual administrative search. It is not only against the 4th Amendment of spirit of U.S. Constitution, but also arouses the waive terms of the police's responsibilities. This study introduces the case of *Club Retro v. Hilton* in Louisiana State in which the recent points of views delivered by the federal appellate court, and the administrative search under the applicability of warrantless search exceptions, and as well as how it evolved to be a crime investigative means, hoping provide reference for our law enforcement on reviewing similar action of vice check.