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# THE INSPECTOR KNOCKS: ADMINISTRATIVE INSPECTION WARRANTS UNDER AN EXPANDED FOURTH AMENDMENT\*

by

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and Robert G. Pinco\*\*\*

ON JULY 14, 1969, President Nixon sent to the Congress a comprehensive message on drug abuse.<sup>1</sup> That message set forth a ten-point plan for combating the expanded increase of drug abuse in the United States. The second point of the message states:

To more effectively meet the narcotic and dangerous drug problems at the Federal level, the Attorney General is forwarding to the Congress a comprehensive legislative proposal to control these drugs. This measure will place in a single statute, a revised and modern plan for control. Current laws in this field are inadequate and outdated.

I consider the legislative proposal a fair, rational and necessary approach to the total drug problem . . . [T]his proposal creates a more flexible mechanism which will allow quicker control of new dangerous drugs before their misuse and abuse reach epidemic proportions. I urge the Congress to take favorable action on this bill.<sup>2</sup>

The following day the Administration introduced into Congress the Controlled Dangerous Substances Act of 1969.<sup>3</sup> That bill, in addition to unifying the fifty public laws which have been promulgated by Congress in the narcotics and dangerous drugs field since 1914, added several new features relating to search and seizure. Because of the complexity and somewhat controversial nature of one of these features, administrative inspection warrants,<sup>4</sup> it is believed that a thorough, in-depth explanation

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\* The views expressed herein are not necessarily the views of the Department of Justice in general, or the Bureau of Narcotics and Dangerous Drugs in particular.

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<sup>1</sup> MESSAGE TO CONGRESS FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING PROPOSALS FOR COMBATTING DRUG ABUSE, JULY 14, 1969, H.R. DOC. NO. 91-138, 91st Cong., 1st Sess. (1969).

<sup>2</sup> *Id.* at 2.

<sup>3</sup> The bill was introduced as S. 2637, but passed the Senate on Jan. 28, 1970, as S. 3246 by a vote of 82-0.

<sup>4</sup> ADMINISTRATIVE INSPECTIONS AND WARRANTS. Sec. 703.

(a) Issuance and Execution of Administrative inspection warrants shall be as follows:

- (1) Any judge of the United States or of a State court of record, or any United States Magistrate may, within his jurisdiction, and upon proper oath or affirmation showing probable cause, issue warrants for the purpose of conducting administrative inspections of controlled premises authorized by this Act or regulations thereunder, and seizures of property appropriate to such inspections. For the purposes of this section, 'probable cause' means a valid public interest in the effective enforcement of the Act or regulations sufficient to justify administrative inspection of the area, premises, building or conveyance in the circumstances specified in the application for the warrant.
- (2) A warrant shall issue only upon an affidavit of an officer or employee duly designated and having knowledge of the facts alleged, sworn to before the judge or

of that provision would be timely. It is the intent of this Article to review the historical precedents, and then to focus on the administrative inspection warrant section in the new drug legislation. That section contains the first serious statutory proposals for administrative inspection warrants since the

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magistrate and establishing the grounds for issuing the warrant. If the judge or magistrate is satisfied that grounds for the application exist or that there is probable cause to believe they exist, he shall issue a warrant identifying the area, premises, building, or conveyance to be inspected, the purpose for such inspection, and, where appropriate, the type of property to be inspected, if any. The warrant shall identify the item or types of property to be seized, if any. The warrant shall be directed to a person authorized by section 701 to execute it. The warrant shall state the grounds for its issuance and the name of the person or persons whose affidavit has been taken in support thereof. It shall command the person to whom it is directed to inspect the area, premises, building, or conveyance identified for the purpose specified, and, where appropriate, shall direct the seizure of the property specified. The warrant shall direct that it be served during normal business hours. It shall designate the judge or magistrate to whom it shall be returned.

- (3) A warrant issued pursuant to this section must be executed and returned within ten days of its date. If property is seized pursuant to a warrant, the person executing the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return of the warrant shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person executing the warrant and of the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the person making such inventory, and shall be verified by the person executing the warrant. The judge or magistrate, upon request, shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.
- (4) The judge or magistrate who has issued a warrant under this section shall attach to the warrant a copy of the return and all papers filed in connection therewith and shall file them with the clerk of the district court of the United States for the judicial district in which the inspection was made.
- (b) The Attorney General is authorized to make administrative inspections of controlled premises in accordance with the following provisions:
  - (1) For purposes of this title only, 'controlled premises' means:
    - (a) places where persons registered or exempted from registration requirements under this Act are required to keep records; and
    - (b) places including factories, warehouses, establishments, and conveyances where persons registered or exempted from registration requirements under this Act are permitted to hold, manufacture, compound, process, sell, deliver, or otherwise dispose of any controlled dangerous substance.
  - (2) When so authorized by an administrative inspection warrant issued pursuant to subsection (a) of this section, an officer or employee designated by the Attorney General, upon presenting the warrant and appropriate credentials to the owner, operator, or agent in charge, shall have the right to enter controlled premises for the purpose of conducting an administrative inspection.
  - (3) When so authorized by an administrative inspection warrant, an officer or employee designated by the Attorney General shall have the right—
    - (a) to inspect and copy records required by this Act to be kept;
    - (b) to inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, containers and labeling found therein, and, except as provided in subsection (b) (5) of this section, all other things therein (including records, files, papers, processes, controls, and facilities) bearing on violation of this Act; and
    - (c) to inventory any stock of any controlled dangerous substance therein and obtain samples of any such substance.
  - (4) This section shall not be construed to prevent the inspection without a warrant of books and records pursuant to an administrative subpoena issued in accordance with section 606 of this Act, nor shall this section be construed to prevent en-

landmark decisions of *Camara v. Municipal Court*<sup>5</sup> and *See v. City of Seattle*.<sup>6</sup> It is apparent that if the section is approved by the Congress and accepted by the Supreme Court, it will pave the way for a general federal administrative inspection warrant statute.

Search and seizure problems arising under the fourth amendment<sup>7</sup> have proved most vexing to scholars of the Constitution, judges, and law enforcement personnel. Justice Frankfurter once described the case law interpreting the fourth amendment by stating that "the course of true law pertaining to search and seizure has not—to put it mildly—run smooth."<sup>8</sup> In the minds of many people, the fits, spurts, and occasional digressions into the land of Oz that characterize the case law of search and seizure have not created a reasonable development of this area, or a development that can be relied upon with any certainty or constancy. It is fair comment to say that the history of decision-making in this field has been at times inconsistent, at times difficult to interpret, and at times an exasperating experience.

Nowhere has this inconsistency been more evident than in the course of decisions relating to administrative inspections by public health and safety officials. These decisions, which have spanned a period of over 200 years, represent a constantly changing attitude toward the nature of such inspections. Whether government administrative inspections are civil, quasi-criminal, or criminal in nature, and whether penalties which arise from failure to accede to such searches are civil or quasi-criminal in nature are points that have been debated by leading jurists up to the present day.<sup>9</sup>

tries and administrative inspections (including seizures of property) without a warrant—

- (a) with the consent of the owner, operator, or agent in charge of the controlled premises;
  - (b) in situations presenting imminent danger to health or safety;
  - (c) in situations involving inspection of conveyances where there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant;
  - (d) in any other exception or emergency circumstance where time or opportunity to apply for a warrant is lacking; and
  - (e) in all other situations where a warrant is not constitutionally required.
- (5) Except when the owner, operator, or agent in charge of the controlled premises so consents in writing, no inspection authorized by this section shall extend to—
- (a) financial data;
  - (b) sales data other than shipment data; or
  - (c) pricing data.

Proposed Controlled Dangerous Substances Act, S. 3246, 91st Cong., 2d Sess. § 703 (1970).

<sup>5</sup> 387 U.S. 523 (1967).

<sup>6</sup> 387 U.S. 541 (1967).

<sup>7</sup> U.S. CONST. amend. IV: "The right of the people to be secure in their persons, 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."

<sup>8</sup> Quoted in Speech by John F. Atkinson, National Association of Boards of Pharmacy Annual Meeting, May 6, 1968.

<sup>9</sup> E.g., Comment, *Administrative Inspection Procedures Under the Fourth Amendment—Administrative Probable Cause*, 32 ALBANY L. REV. 155 (1967); Comment, *Administrative Inspection Without a Warrant: Camara v. Municipal Court and See v. Seattle*, 42 CONN. B.J. 255, 257-58 (1968).

## I. HISTORICAL PRECEDENTS

A. *English Origin*

Two opposing views on administrative procedures have juxtaposed each other in the American courts since the mid-nineteenth century.<sup>10</sup> One view is that *Entick v. Carrington*,<sup>11</sup> the early English case upon which all recent American decisions hinge, never contemplated the constitutional basis upon which the American judicial system lavishes so much attention. Other courts have argued that such cases as *Entick*, whether resting upon English or American constitutional law, are so fundamental to our legal thinking as to be ageless in their meaning and intent, and that the mere span of time has not removed the need to guard individual rights of privacy in administrative inspections. These latter courts have viewed all governmental inspections, whether they were by the agents of the Crown in 1765 or by state building or health inspectors in 1970, as being substantially similar.

Either view may be plausibly supported by reference to the classic English case of *Entick v. Carrington*, usually cited as the starting point for any discussion in this area.<sup>12</sup> This case involved issuance of a general warrant by the secretary of state in order to seize an allegedly libelous pamphlet. Lord Camden, who announced what was to become a basic principle of English and American law, held that the basic concept of common law did not allow officers of the Crown to break into a citizen's home under cover of a general executive warrant to search for evidence of the utterance of libel.

Whatever Lord Camden actually meant by holding that the state had no authority to search for and seize an individual's private papers on mere suspicion of "libel" probably will never be known with any real degree of certainty. If he meant that "as the common law withheld from all the right to search for and seize evidence to support a civil action, so [the court intended to withhold] from Crown and commoner a similar right in relation to a criminal prosecution,"<sup>13</sup> then the rationale applied in the landmark American cases of *Boyd v. United States*<sup>14</sup> and *Frank v. Maryland*,<sup>15</sup> which distinguish the protection of the fourth amendment in civil versus criminal searches and seizures, is logical and reasonable.<sup>16</sup> However, if Lord Camden meant that with the exception of a search for stolen goods, all searches by government officials authorized by general warrants or writs of assistance were per se unreasonable regardless of the limitations or checks

<sup>10</sup> *Boyd v. United States*, 116 U.S. 616 (1886); *United States v. Three Tons of Coal*, 28 F. Cas. 149 (No. 16,515) (E.D. Wis. 1875); *United States v. Distillery No. Twenty Eight*, 25 F. Cas. 868 (No. 14,966) (D. Ind. 1875); *In re Strouse*, 23 F. Cas. 261, 262 (No. 13,548) (D. Nev. 1871); *In re Platt*, 19 F. Cas. 815 (No. 11,212) (S.D.N.Y. 1874); *In re Meador*, 16 F. Cas. 1294, 1299 (No. 9,375) (N.D. Ga. 1869).

<sup>11</sup> 19 Howell's State Trials Col. 1029, 95 Eng. Rep. 807 (K.B. 1765).

<sup>12</sup> Comment, *Administrative Inspection Procedures Under the Fourth Amendment—Administrative Probable Cause*, 32 ALBANY L. REV. 155, 156 n.5 (1967).

<sup>13</sup> Waters, *Rights of Entry in Administrative Officers*, 27 U. CHI. L. REV. 79, 81 (1959).

<sup>14</sup> 116 U.S. 616 (1886).

<sup>15</sup> 359 U.S. 360 (1959).

<sup>16</sup> Comment, *Administrative Inspection Without a Warrant: Camara v. Municipal Court and See v. Seattle*, 42 CONN. B.J. 255, 257 (1968).

which may have been imposed upon them,<sup>17</sup> then *Entick* fully supports<sup>18</sup> the District of Columbia court of appeals in *District of Columbia v. Little*,<sup>19</sup> the dissent of Justice Douglas in *Frank v. Maryland*,<sup>20</sup> and the decisions in *Camara v. Municipal Court*<sup>21</sup> and *See v. City of Seattle*.<sup>22</sup> Whatever Lord Camden's original intent might have been, this classic English constitutional case has created a major conflict in the American case law as to the applicability of the fourth amendment to administrative inspection searches and seizures where harsh civil or quasi-criminal penalties are invoked.

### B. Early American Cases

Just before the *Entick* decision, a substantially similar case was decided in what was then the colony of Massachusetts. This case, now referred to as *Paxton's Case*,<sup>23</sup> involved an attempt by agents of the collector of customs to use the notorious writs of assistance, which allowed unlimited powers of search for evidence of a crime, to enforce collection of the cider tax, which was a civil, rather than a criminal, matter. James Otis, the former Massachusetts advocate general who had resigned that post rather than defend the Writs of Assistance, argued that such writs had the effect of abridging an individual's common law right to privacy.<sup>24</sup> Both *Entick* and *Paxton* have often been referred to as the cases that greatly influenced the adoption of the fourth amendment.<sup>25</sup>

No further cases of significance were reported until around the 1860's and 70's when a series of lower court federal cases held the fourth amendment to apply only to criminal cases and not to civil forfeitures.<sup>26</sup> But these cases were all negated in 1886 by *Boyd v. United States*,<sup>27</sup> which held that the fourth amendment applied to forfeiture proceedings which the Court considered as having been converted to criminal actions in substance, even though they were couched in the form of civil proceedings by lower federal courts.<sup>28</sup> *Boyd* involved a statute which authorized a government agency to require a businessman to produce any books, invoices, and papers which would tend to prove any allegation made by the United States that

<sup>17</sup> Comment, *State Health Inspections and "Unreasonable Search": The Frank Exclusion of Civil Searches*, 44 MINN. L. REV. 513, 526 n.51 (1960).

<sup>18</sup> See also Comment, note 16 *supra*, at 257 n.19.

<sup>19</sup> 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).

<sup>20</sup> 359 U.S. 360, 374 (1959).

<sup>21</sup> 387 U.S. 523 (1967).

<sup>22</sup> 387 U.S. 541 (1967).

<sup>23</sup> Quincy's Mass. Rep. 51 (1761).

<sup>24</sup> See Comment, *Warrantless Administrative Inspections, Although for the General Welfare, Are Violative of the Fourth Amendment*, 37 CINC. L. REV. 243, 244 n.7 (1968).

<sup>25</sup> See Comment, note 16 *supra*, at 258 n.20. See also Comment, note 24 *supra*, at 245.

<sup>26</sup> See Comment, note 12 *supra*, at 157 n.13.

<sup>27</sup> 116 U.S. 616 (1886).

<sup>28</sup> Compare *Boyd* with the deportation cases which, although they are civil in nature, apply those constitutional guarantees afforded to U.S. citizens in criminal matters to resident aliens: *Shaughnessy v. United States*, 345 U.S. 206, 212 (1953); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50 (1950); *Yamataya v. Fisher*, 189 U.S. 86 (1903). See also *Stansic v. United States Imm. & Nat. Serv.*, 393 F.2d 539 (9th Cir. 1968), and *Klissas v. United States Imm. & Nat. Serv.*, 361 F.2d 529 (D.C. Cir. 1966), which allude to the fact that such constitutional guarantees may also apply to non-resident aliens.

the defendant had in fact violated the revenue laws. On April 7, 1874, E. A. Boyd and Sons received a shipment of plate glass from Liverpool, England, through the port of New York. An information was filed by the United States District Attorney for the Southern District of New York, alleging an attempt to defraud the Collector of Revenue, and asking for relief in the form of seizure and forfeiture of the thirty-five cases of glass. Under protest, E. A. Boyd and Sons supplied the invoices for the glass as required by statute. On the basis of the invoices, the jury found for the United States, and the glass was forfeited. Although the seizure was couched in terms of a civil proceeding, a violation of the statute carried with it not only a forfeiture, but also a fine of up to \$5,000 and a prison sentence of up to two years. The Supreme Court held that the alleged civil penalties imposed by the customs laws had been converted in substance to criminal penalties, and thus the seizures in question were in violation of the fourth amendment. The Court reasoned that compulsory production of a private individual's papers to be used as evidence against him was tantamount to compelling him to be a witness against himself in violation of the fifth amendment. Thus, the Court held that when the very thing forbidden in the fifth amendment—compelling a man to be a witness against himself—is itself the object of a search or seizure, then the search or seizure is unreasonable within the meaning of the fourth amendment.<sup>29</sup> As the fifth amendment is only applicable to criminal cases, the somewhat questionable nexus between the fourth and fifth amendments set forth by the Court in *Boyd* was to become the basis for strong contention that *Boyd* and *Entick* only applied to criminal matters. Thus, it has been reasoned by extrapolation that the fourth amendment applies only to criminal searches and seizures.<sup>30</sup> Even as the Supreme Court set forth *Boyd*, it considered that the problem had long been settled. Referring to *Entick v. Carrington*, the Court stated:

Lord Camden pronounced the judgment of the court in Michaelmas term, 1765, and the law as expounded by him, has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British constitution, and is quoted as such by the English authorities on that subject down to the present time.

As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.<sup>31</sup>

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<sup>29</sup> 116 U.S. at 641.

<sup>30</sup> *Contra*, Comment, note 12 *supra*, at 157-58. See also *Frank v. Maryland*, 359 U.S. 360 (1959).

<sup>31</sup> 116 U.S. at 626-27.

After *Boyd*, it was generally considered settled that the fourth amendment applied solely to criminal proceedings, and that civil administrative inspections, searches, and seizures were not within the purview of its protection. In *Flint v. Stone Tracy Co.*<sup>32</sup> and lower federal court cases relating to civil searches generally,<sup>33</sup> and to the Food and Drug Act<sup>34</sup> specifically,<sup>35</sup> the fourth amendment was held not to apply.

During the period from *Flint* in 1911, until *Frank v. Maryland*<sup>36</sup> in 1959, a trend toward a much broader interpretation of the fourth amendment developed. This trend, generally seen in dicta, began to set the stage for fourth amendment interpretations which would restrict civil, as well as quasi-criminal, governmental inspections, searches, and seizures.<sup>37</sup>

In 1949 the District of Columbia court of appeals held the fourth amendment to apply to both civil and criminal proceedings in *District of Columbia v. Little*.<sup>38</sup> The case involved the defendant's refusal to unlock her front door at the command of a health department inspector who was without a search warrant. Judge Prettyman, rejecting the *Boyd* nexus between the fourth and fifth amendments, held that the fourth amendment alone was broad enough to protect the rights of an individual home owner against warrantless intrusions by government officials.<sup>39</sup> He reasoned that "the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home, a right [protected by the fourth amendment's prohibition against unreasonable searches, and] which is one of the indispensable ultimate essentials of our concept of civilization."<sup>40</sup> Referring to the narrowness of the fourth

<sup>32</sup> 220 U.S. 107 (1911). Citing *Boyd*, the Court stated:

It is urged in a number of the cases that in a certain feature of the statute there is a violation of the Fourth Amendment of the Constitution, protecting against unreasonable searches and seizures. This Amendment was adopted to protect against abuses in judicial procedure under the guise of law, which invade the privacy of persons in their homes, papers and effects, and applies to criminal prosecutions and suits for penalties and forfeitures under the revenue laws. . . . It does not prevent the issuing of process to require attendance and testimony of witnesses, the production of books and papers, etc."

*Id.* at 174-75.

<sup>33</sup> *United States v. 62 Packages*, 48 F. Supp. 878, 884 (W.D. Wis. 1943), *aff'd*, 142 F.2d 107 (7th Cir. 1944).

<sup>34</sup> 21 U.S.C. §§ 321a-321c (1964).

<sup>35</sup> *United States v. Eighteen Cases of Tuna Fish*, 5 F.2d 979 (W.D. Va. 1925).

<sup>36</sup> 359 U.S. 360 (1959).

<sup>37</sup> The principal authority for the proposition that the Fourth Amendment is not limited in application is that the United States Supreme Court has made many statements to the effect that the Fourth Amendment is to be broadly interpreted. For example, in *Weeks v. United States*, [232 U.S. 383, 391-92 (1914)], the Court said, "The effect of the Fourth Amendment is . . . to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not . . . ." In *Agnello v. United States*, [269 U.S. 20 (1925)], it was stated that "it has always been assumed that one's house cannot lawfully be searched without a search warrant except as an incident to a legal arrest . . . . The protection of the Fourth Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws."

Comment, note 12 *supra*, at 558. See also Comment, CONSTITUTIONAL LAW—ADMINISTRATIVE SEARCHES AND SEIZURES, 7 WASHBURN L.J. 385, 388 (1968).

<sup>38</sup> 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).

<sup>39</sup> 178 F.2d at 16.

<sup>40</sup> *Id.* at 16-17.



amendment protection as given by the *Boyd* and *Flint* cases, he stated: "To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of a crime has no such protection, is a fantastic absurdity."<sup>41</sup>

It should be noted that although *Little* was only an appellate case, it was the first case expressly applying the fourth amendment to administrative inspections.<sup>42</sup> *Little* contained a thread that bound all later inspection cases. That thread—"the fear of uncontrolled, oppressive police-type actions, undertaken by the agent in the field, without review by higher headquarters or by an impartial reviewing authority"<sup>43</sup>—has been repeated in all the inspection cases.

Yet, even as Judge Prettyman set forth what was eventually to become the view of the Supreme Court, he was opposed by Judge Holtzoff, who, in his dissent, advocated the continued non-applicability of the fourth amendment in civil searches. Judge Holtzoff cited *Entick v. Carrington*, *Boyd v. United States*, *United States v. Eighteen Cases of Tuna Fish*,<sup>44</sup> and *United States v. 62 Packages*<sup>45</sup> as the bases for his reasoning.<sup>46</sup> Unfortunately, Judge Holtzoff's dissenting view was sustained by the Supreme Court, not in *Little*, which it affirmed on other grounds,<sup>47</sup> but in *Frank v. Maryland*,<sup>48</sup> decided in May 1959.

The *Frank* case involved a warrantless health inspection of Aaron Frank's home based on a complaint of a nearby resident. A Baltimore City statute imposed a twenty-dollar forfeiture for each refusal to allow an authorized inspector entry.<sup>49</sup> The inspector had no authority to force entry, but each refusal subjected the homeowner to another fine.<sup>50</sup> Frank was arrested, tried, and fined the requisite twenty dollars. On appeal, he was granted a trial de novo, at which he was again convicted. Certiorari was refused by the Maryland court of appeals<sup>51</sup> but was granted by the Supreme Court.<sup>52</sup> In a five-to-four decision,<sup>53</sup> the Court upheld Frank's conviction. The Court agreed that the fourth amendment guaranteed the individual's right to be secure from unauthorized intrusions by government officials into his "personal privacy," and it agreed that the individual has the right to resist

<sup>41</sup> *Id.* at 17.

<sup>42</sup> See Comment, note 16 *supra*, at 258.

<sup>43</sup> Gottlieb, *Inspection Bounds and the Constitution*, 32 ASS'N OF FOOD & DRUG OFFICIALS Q.B., Oct. 1968, at 183.

<sup>44</sup> 5 F.2d 979 (W.D. Va. 1925).

<sup>45</sup> 48 F. Supp. 878 (W.D. Wis. 1943).

<sup>46</sup> 178 F.2d at 23.

<sup>47</sup> See note 38 *supra*.

<sup>48</sup> 359 U.S. 360 (1959).

<sup>49</sup> "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars." BALTIMORE, MD., CITY CODE art. 12, § 120.

<sup>50</sup> Waters, note 13 *supra*, at 88, which contends that the Baltimore ordinance was intended to authorize forcible entry.

<sup>51</sup> 359 U.S. at 362.

<sup>52</sup> 358 U.S. 863 (1958).

<sup>53</sup> The majority consisted of Justices Stewart, Clark, Harlan, and Frankfurter, who wrote the opinion of the Court. Justice Whittaker wrote a concurring opinion. Justice Douglas wrote the dissent, and was joined by Chief Justice Warren and Justices Black and Brennan.

an unauthorized entry for the purpose of securing evidence of criminal action.<sup>54</sup> However, it distinguished the inspection situation from the gathering of evidence for the purposes of demonstrating criminal activity. The Court stated that municipal fire, health, and housing inspection programs "touch at most upon the periphery of the important interests safeguarded by the [fourth amendment as applied through the] fourteenth amendment's protection against official intrusion . . . ."<sup>55</sup> Using a balancing-of-interests test, the Court weighed "the nature of the demand being made on individual freedom . . . [against] the justification of social need on which the demand rests."<sup>56</sup> It went on to find that such administrative inspections were merely to determine whether the physical conditions which existed complied with the minimum standards set forth by local ordinances, and that inspections to disclose those conditions were "hedged about with safeguards designed to make the least possible demand on the individual occupant, and to cause only the slightest restriction on his claims of privacy."<sup>57</sup> The Court reviewed at length the historical background of the fourth amendment,<sup>58</sup> and concluded that the searches from which the framers of the Constitution had sought to protect the citizenry were those in which goods were subject to confiscation, or the primary purpose was to seek evidence of a crime. Touching upon the "reasonableness" aspect of administrative inspections, the majority seemed to require some "cause" for suspicion in order to render an inspection constitutionally reasonable. However, the final determination of such "cause" was left in the total discretion of the inspector himself. The Court justified this view by pointing to the long history of public acceptance of such warrantless inspections and to their importance in protecting the interests of society.<sup>59</sup> In *Frank* Justice Douglas' dissent<sup>60</sup> closely followed the holding in *Little*.<sup>61</sup> He was sharply critical of nearly all of the premises laid down as the basis for the majority opinion. Setting forth several propositions to justify the inclusion of administrative inspections by health and safety officials within the restrictions of the fourth amendment, he argued that distinctions between criminal and civil searches were invalid because the failure to abate the nuisance usually gave rise to criminal prosecution. He reasoned that except in emergency situations, decisions to invade an individual's right of privacy should be made by an impartial judicial officer, and not be subject to the whim of the administrative official out in the field. These arguments were later to be cited with approval by the majority in *Camara v. Municipal Court*,<sup>62</sup> which overruled the *Frank* decision.

Shortly after the decision in *Frank v. Maryland*, the Court again ad-

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<sup>54</sup> 359 U.S. at 365. See also Comment, note 12 *supra*, at 160.

<sup>55</sup> 359 U.S. at 367. See also Comment, note 12 *supra*, at 160.

<sup>56</sup> 41 TEMPLE L.Q. 134, 136 (1967).

<sup>57</sup> 359 U.S. at 367.

<sup>58</sup> It should be noted that the Court quoted extensively from *Boyd* and also cited *Entick* as a basis for its belief that the fourth amendment was intended only to apply to criminal situations.

<sup>59</sup> 359 U.S. at 371.

<sup>60</sup> See note 53 *supra*.

<sup>61</sup> See note 39 *supra*, and accompanying text.

<sup>62</sup> 387 U.S. 523 (1967).

dressed itself to the problem of administrative searches in *Eaton v. Price*.<sup>63</sup> The closeness of the two decisions represented in part a move by the dissenters to embarrass the majority.<sup>64</sup> Also, the dissenters knew that because a member of the *Frank* majority, Justice Stewart, would almost certainly disqualify himself, the way would be paved for a tie vote on the issue.<sup>65</sup> Factually, *Eaton v. Price* was similar to *Frank*, except in *Frank* a half-ton of straw, trash, and rat feces were found in the defendant's yard and a neighbor complained of dead rats,<sup>66</sup> while in *Eaton* there was no reason to believe that there had been a violation of the health codes on the premises of the defendant.<sup>67</sup> In *Eaton* habeas corpus had been denied a home owner arrested for refusing to allow a housing inspector to search without a warrant. The inspector's request was not based on a complaint, nor was it part of an area-wide inspection. Not only was the inspector unable to show the credentials required by the statute the first two times he knocked on the door, but he was also unable to give any valid reason to justify his search. In his dissent, Justice Brennan suggested that the inspection was the result of either "personal or political spite,"<sup>68</sup> or a whim of the inspector. Instead of creating a conflicting decision, the Court held *Frank v. Maryland* to be controlling and merely reaffirmed it to make it abundantly clear to the dissenters that the *Frank* decision was not an anomaly. However, since the "probable cause" element found in *Frank* was almost non-existent in *Eaton*, the latter case represented a broadening of the *Frank* doctrine.

From *Eaton* in 1950, until *Camara v. Municipal Court*<sup>69</sup> in 1967, the High Court did not consider the constitutionality of warrantless administrative inspections by government officials. Yet several incidents occurred which signaled a change in the attitude of the Court. First, Justice Douglas had argued in *Frank* that such warrantless inspections might be used by police in collusion with inspectors to search for evidence of a crime.<sup>70</sup> Such a threat became reality in *Maryland v. Pettiford*,<sup>71</sup> in which a police officer, attached to the Baltimore Sanitation Department, gained entrance to a residence ostensibly to conduct a health inspection, but in reality to secure evidence of a lottery. The seized lottery slips were admitted over the objection of the defendant in a criminal trial, and he was convicted.<sup>72</sup> Although the conviction was later reversed on appeal, Justice Douglas cited the *Pettiford* case in 1960, in *Abel v. United States*,<sup>73</sup> to show the kind of problem which the *Frank* doctrine had generated.

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<sup>63</sup> 364 U.S. 263 (1960).

<sup>64</sup> 29 MONT. L. REV. 81, 84 n.17 (1967).

<sup>65</sup> Justice Stewart's father was a member of the Ohio supreme court that had decided *Eaton v. Price*, 168 Ohio St. 123, 151 N.E.2d 523 (1958).

<sup>66</sup> 359 U.S. at 361.

<sup>67</sup> 364 U.S. at 270-71.

<sup>68</sup> *Id.* at 271.

<sup>69</sup> 387 U.S. 523 (1967).

<sup>70</sup> 359 U.S. at 374.

<sup>71</sup> Supreme Bench of Baltimore City, Daily Record (Dec. 16, 1959).

<sup>72</sup> The evidence was later suppressed on appeal by the Supreme Bench of Baltimore City, and the conviction was reversed.

<sup>73</sup> 362 U.S. 217, 243 & n.2 (1960) (dissenting opinion).

The second signal was a change in the composition of the Court. Justices Whittaker and Frankfurter were replaced by Justices White and Fortas,<sup>74</sup> so that the Court was composed of a greater number of individuals with a more liberal view towards the application of the Constitution in cases involving confrontations of private citizens with government officials.<sup>75</sup>

### C. Recent American Developments

By the mid-sixties, the changes in the personnel of the Court had already become evident in the line of decisions which flowed from the bench. So, it was no surprise when on June 5, 1967, the Court handed down the twin decisions of *Camara v. Municipal Court*<sup>76</sup> and *See v. City of Seattle*,<sup>77</sup> expressly overruling *Frank v. Maryland*.

The *Camara* case involved an annual area health inspection of apartment houses. An inspector was informed that the plaintiff was using the rear portion of his rental unit as his personal residence and not as a store, contrary to the building's occupancy permit. The inspector made three unsuccessful attempts to inspect the premises without a search warrant. After the plaintiff failed to honor a citation to appear at the district attorney's office, a complaint was filed in municipal court by the city, charging the plaintiff with a misdemeanor in violating the San Francisco Municipal Code.<sup>78</sup> After a series of appeals, the Supreme Court granted certiorari.<sup>79</sup> The Court, in a six-to-three decision, held that such inspections, when conducted without an administrative inspection warrant, unlawfully weakened traditional safeguards afforded by the fourth amendment.

The Court re-examined the basic arguments in *Frank v. Maryland* and concluded that it should be overruled insofar as it had differentiated between the application of the fourth amendment in criminal, as opposed to civil, searches and seizures. The Court agreed with the *Frank* majority's view that routine, periodic inspections of premises for the purpose of maintaining public health and safety are an important governmental function and a necessary concomitant of modern life.<sup>80</sup> However, when it applied the *Frank*-type "balancing of interests" test, it found that for several reasons the scales had tipped in favor of the individual's rights of privacy and security from governmental intrusions. First, it disagreed with the *Frank* conclusion that the interests involved in such inspections were merely

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<sup>74</sup> Justice Goldberg replaced Justice Frankfurter in 1962, and was himself replaced by Justice Fortas in 1965.

<sup>75</sup> E.g., *Mapp v. Ohio*, 367 U.S. 643 (1961), which overruled *Wolf v. Colorado*, 338 U.S. 25 (1949); *Gouled v. United States*, 255 U.S. 298 (1921), which was superseded by *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967); promulgation of the lineup trilogy: *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); and *Stovall v. Denno*, 388 U.S. 293 (1967); *Escobedo v. Illinois*, 378 U.S. 478 (1964); and *Miranda v. Arizona*, 384 U.S. 436 (1966); and *Chimel v. California*, 395 U.S. 752 (1969), which expressly overruled both *Harris v. United States*, 331 U.S. 145 (1947), and *United States v. Rabinowitz*, 339 U.S. 56 (1950).

<sup>76</sup> 387 U.S. 523 (1967).

<sup>77</sup> 387 U.S. 541 (1967).

<sup>78</sup> See 387 U.S. at 527.

<sup>79</sup> 385 U.S. 808 (1966).

<sup>80</sup> See *Waters*, *supra* note 13, at 79.

“peripheral” to the fourth amendment.<sup>81</sup> Paralleling the reasoning of Judge Prettyman in *District of Columbia v. Little*,<sup>82</sup> the Court stated: “It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”<sup>83</sup> Second, the Court said that even though inspections are “hedged about with safeguards [and are] designed to make the least possible demand on the individual occupant,” he has “no way of knowing of the lawful limits of the inspector’s power to search, and no way of knowing if the inspector himself is acting under proper authorization.”<sup>84</sup> Further, the court stated that “the practical effect of this system is to leave the occupant subject to the discretion of the officer in the field,”<sup>85</sup> and to require that the individual who wishes to determine the inspector’s authority do so only by exposing himself to possible civil and criminal penalties. Finally, the Court stated that the need for warrantless administrative searches was not absolutely essential to the continued effectiveness of fire, health, and safety codes, and that such inspection programs could achieve their goals within the confines of a reasonable search warrant requirement. The Court, citing *Schmerber v. California*,<sup>86</sup> rejected the “public need” argument for warrantless inspections, since it felt that a warrant would not frustrate the governmental purpose behind the municipal searches in question.

The Court then addressed itself to the “probable cause” element of inspection warrants. It rejected the general “probable cause” test<sup>87</sup> normally employed in searches for evidence of a crime. Noting with approval the *Frank* Court’s characterization of these inspections as “unique,” the Court set forth the ground rules for a new definition of “administrative probable cause.” These rules are designed to achieve the goals of the particular inspection while at the same time remaining “reasonable” within the limitations of the fourth amendment. The Court felt that such “administrative probable cause” requires not reasonable belief that a crime has been committed, but proof of a “valid public interest [which] justifies the intrusion contemplated . . . .”<sup>88</sup> The Court further stated that administrative “probable cause to issue a warrant to inspect *must* exist if reasonable legislative or administrative standards for conducting an area inspection are to be satisfied with respect to a particular dwelling.”<sup>89</sup> Thus, where a search warrant in a criminal action must particularly describe the place to be searched and the things to be seized, administrative inspection warrants aimed at secur-

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<sup>81</sup> 387 U.S. at 530.

<sup>82</sup> See notes 38-41 *supra*, and accompanying text.

<sup>83</sup> 387 U.S. at 530.

<sup>84</sup> *Id.* at 531-32.

<sup>85</sup> *Id.* at 532.

<sup>86</sup> 384 U.S. 757 (1966).

<sup>87</sup> “Probable cause exists where the facts and circumstances within their [the officers’] knowledge and over which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that” an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 162 (1925). See also *Brinegar v. United States*, 338 U.S. 160 (1949); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

<sup>88</sup> 387 U.S. at 539.

<sup>89</sup> *Id.* at 538 (emphasis added).

ing general compliance with minimum fire, health, and safety standards need only set out such general standards as "the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area . . . ."<sup>90</sup> Consequently, "probable cause" for issuance of administrative inspection warrants does "not necessarily depend upon specific knowledge of the condition of the particular dwelling."<sup>91</sup> The Court brought up and summarily rejected the *Frank* view that a lesser form of "probable cause" would lead to synthetic or "rubber stamp" warrants. It stated that even though a lesser standard for such inspections would be employed, even that reduced standard would carry the inherent limitations necessary for meeting the fourth amendment requirement of "reasonableness." By allowing a neutral party—a judicial officer—to pass upon the scope and "probable cause" for such a warrant, the home owner could be assured that the inspector was acting within his authority and not on a personal whim.<sup>92</sup>

As a final point, the Court excepted from the administrative warrant requirement those emergency situations in which the law had traditionally allowed warrantless searches.<sup>93</sup> But it noted that in the bulk of the routine inspections contemplated there was "no compelling urgency to inspect at a particular time or on a particular day."<sup>94</sup> It should be noted that the emergency situation was in fact the Court's second exception to the requirement of an administrative inspection warrant. The first exception, "consent," had been noted cryptically early in the opinion in the following general statement: "Except in certain carefully defined classes of cases, a search of private property without *proper consent* is 'unreasonable' unless it has been authorized by a valid search warrant."<sup>95</sup> The Court, though it fully intended to do so, never explained whether its term, "proper consent," was the same as valid informed consent, and never was it expressly stated that such consent was an exception to the requirement of an administrative inspection warrant. However, it would seem that if the Court assumed "proper consent" to be an exception to the requirement of a valid conventional search warrant, then a fortiori such consent would also be an exception to the requirement of an administrative inspection warrant.

Thus, the Court in *Camara* established the right of an individual to require an administrative inspector to obtain his consent to search,<sup>96</sup> or in

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> The fact that a warrant issues and must be returned to the court also creates psychological restraints on the inspector conducting the inspection, and has the added advantage of engendering self-imposed caution on the part of the inspector during such inspections.

<sup>93</sup> 387 U.S. at 539.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 528-29 (emphasis added).

<sup>96</sup> In order to obtain such consent, there must be knowledge of the individual's right to refuse the inspection and then a waiver of this right. *Bumper v. North Carolina*, 391 U.S. 543 (1968). Some courts have explored the issue of whether or not the warnings required in *Miranda v. Arizona*, 384 U.S. 436 (1966), are required in order to obtain a valid consent. Two courts, *State v. Forney*, 181 Neb. 757, 150 N.W.2d 915 (1967), and *People v. McCarty*, 199 Kan. 116, 427 P.2d 616 (1967), have held that the *Miranda* warnings are not required for valid consent. In *United States v. Kushing*, 18 U.S.C.M.A. 298 (1967), the United States court of military appeals held that it did not feel that such warnings were required as the Supreme Court had not

the alternative, to require the inspector to obtain an administrative inspection warrant which would limit the search to those areas authorized in that warrant.

*See v. City of Seattle*,<sup>97</sup> which was argued with *Camara* and decided on the same day, involved an attempt by an inspector to gain entrance to a locked warehouse not open to the public. After the inspector was refused entrance, the defendant was arrested and fined for violating a city ordinance. On appeal, the Washington supreme court affirmed his conviction.<sup>98</sup> The Supreme Court reversed the conviction, and extended the *Camara* decision to prohibit inspection of any private area of a commercial establishment without a warrant. The Court noted that with mushrooming governmental control, official entry upon commercial property by government agencies to enforce a variety of regulatory laws requires some minimal limitations to safeguard the individual businessman's fourth amendment rights of privacy. In concluding that warrantless administrative inspections were unconstitutional absent consent, the Court distinguished between public and non-public areas of a commercial establishment, holding that only non-public areas come within the fourth amendment protections.<sup>99</sup> The Court stated: "We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure."<sup>100</sup> The Court in *See* was careful to note that it did not "imply that business premises may not reasonably be inspected in many more situations than private homes," or that administrative inspection requirements were applicable to "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product."<sup>101</sup>

Not long after *Camara* and *See*, two district court cases were decided which distinguished similar warrantless searches from the holdings in *Camara* and *See*. In *United States v. Sessions*<sup>102</sup> the United States District

yet extended the test to consent searches. This case split the three-man court, with the concurring majority opinion resting principally on the lack of direction by the Supreme Court. *See also* *Virgin Is. v. Berne*, 412 F.2d 1055 (3d Cir.), cert. denied, 396 U.S. 837 (1969). In *United States v. Moderachi*, 280 F. Supp. 633 (D. Del. 1968), the Court required such warnings. It appears that the *Miranda* rule is expanding to some degree. *See* *Lee v. Florida*, 392 U.S. 378 (1968); *Mathis v. United States*, 391 U.S. 1 (1968). *See also* *United States v. Wallace*, 272 F. Supp. 841 (S.D.N.Y. 1967); BUREAU OF NARCOTICS AND DANGEROUS DRUGS, AGENTS' MANUAL § 6071.4 (1969).

<sup>97</sup> 387 U.S. 541 (1967).

<sup>98</sup> *See v. City of Seattle*, 67 Wash. 2d 475, 408 P.2d 262 (1966).

<sup>99</sup> There is a real question as to whether the Court intended to stick by this distinction between public and non-public areas of a commercial establishment. Such arbitrary distinctions blurred in the more recent decision of *Katz v. United States*, 389 U.S. 347 (1967), where the distinction was made between the fourth amendment's protection of "persons, not places."

<sup>100</sup> 387 U.S. at 545.

<sup>101</sup> *Id.* at 546-47. *See also* H.R. REP. NO. 708, 83d Cong., 1st Sess. (1953); U.S. CODE CONG. & AD. NEWS 2198 (1953) (reporting the "factory inspection" amendments to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 374 (1962)); Handler, *The Constitutionality of Investigations by the Federal Trade Commission* (pts. I & II), 28 COLUM. L. REV. 708, 905 (1928); Note, *Constitutional Aspects of Federal Tax Investigations*, 57 COLUM. L. REV. 676 (1957).

<sup>102</sup> 283 F. Supp. 746 (N.D. Ga. 1968). The case involved the owner of an Atlanta night club known as "The Nitory Club." She was indicted for having sold liquor in violation of INT. REV. CODE of 1954, § 5301(c). She was also indicted for possession of liquor bottles whose contents had been altered, and for having carried on the business of a retail liquor dealer without having

Court for the Northern District of Georgia upheld the right of entry by liquor inspectors upon the premises of a night club serving liquor without a liquor license, where the inspectors entered solely upon statutory authority<sup>103</sup> and without a search warrant. The district court, distinguishing *Sessions* from *See v. City of Seattle*,<sup>104</sup> stated that the final paragraph of the *See* decision impliedly approved the search in question. In *United States v. Duffy*<sup>105</sup> the United States District Court for the Southern District of New York, ruling on the defendant's motion to suppress six liquor bottles seized during a warrantless inspection, held that the defendant's statement, "Go ahead," in reply to an inspection request by investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, amounted to consent.<sup>106</sup> By way of dictum, the court, citing *Sessions* and the last paragraph of the *See* decision, stated that *Camara* and *See* did not apply to the instant situation.

Other lower court federal cases, however, have broadened the administrative warrant protection in *Camara* and *See*. In *United States v. Stanack Sales Co.*<sup>107</sup> the Third Circuit court of appeals reversed the conviction of the appellants in a situation in which the Food and Drug inspector had proceeded to carry out his inspection of the defendant's drug factory without a subpoena or search warrant and with only a written notice of inspection filled out by himself. Noting that the officers of Stanack had permitted the inspector to enter the factory but had refused to allow him access to receipt and distribution records, and further had refused to permit the inspector to obtain samples of the drugs on hand, the Court stated that a

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paid the special tax levied on such dealers in accord with INT. REV. CODE of 1954, § 5212. Defendant made several pre-trial motions, one of which was for the suppression of the evidence based on an illegal search in violation of the fourth amendment by investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, who entered the premises of the night club solely under the authority of INT. REV. CODE of 1954, § 5146, and without a search warrant.

<sup>103</sup> (a) Preservation and inspection of records.—Any records or other documents required to be kept under this part or regulations issued thereto shall be preserved by the person required to keep such records or documents, as the Secretary or his delegate may by regulation prescribe, and shall be kept available for inspection by any internal revenue officer during business hours.

(b) Entry of premises for inspection.—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

INT. REV. CODE of 1954, § 5146.

<sup>104</sup> We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure. We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness.

387 U.S. at 545.

<sup>105</sup> 282 F. Supp. 777 (S.D.N.Y. 1968).

<sup>106</sup> There is a question as to the validity of this "consent" where a law enforcement officer by claiming authority to search a particular premises is in effect announcing to the occupant that he has no right to resist the search. *Bumper v. North Carolina*, 391 U.S. 543 (1968).

<sup>107</sup> 387 F.2d 849 (3d Cir. 1968).



waiver of an individual's fourth amendment rights in an administrative inspection had to be clear and intentional. The court then stated that it was hesitant to find a waiver for both inspection of books and the area searched, where it was not even clear that consent to search the entire area had been given. About a year later, in January 1969, the United States District Court for the Eastern District of Arkansas, in *United States v. J. B. Kramer Grocery Co.*,<sup>108</sup> reiterated the *Stanack Sales* doctrine by stressing the necessity of voluntariness of consent to waive fourth amendment protections in administrative inspection situations.

In reversing an appeals court decision which restricted *Camara* and *See*, the Supreme Court itself, in February 1970, amplified the doctrine of those cases. In *Colonnade Catering Corp. v. United States*<sup>109</sup> the Second Circuit had cited *Duffy* and *Sessions* as justification for carving out an exception to the requirements of *Camara* and *See*.<sup>110</sup> The facts of the case were that on the afternoon of May 18, 1968, three special investigators of the Internal Revenue Service, accompanied by a Nassau County policeman, entered Colonnade's premises while a party was in progress and liquor was being served. Their purpose was to determine if Colonnade possessed any liquor bottles which had been illegally refilled or altered. After inspecting the ballroom, the agents checked the basement. Finding a locked storeroom in the basement, the agents stated that they wanted to inspect it. Colonnade's president was called to the scene. Upon his refusal to open the door, the agents broke the lock, entered, and seized liquor and funnels. The United States district court suppressed the evidence as having been obtained through a forcible warrantless inspection of the type prohibited under the fourth amendment as interpreted in *Camara* and *See*. The court of appeals reversed the decision suppressing the evidence, distinguishing *Camara* and *See* on four grounds: first, the scope of the search authorized by the statutes in *Colonnade* was much narrower than the statutory grant in *Camara* and *See*; second, dealers in a heavily regulated business, such as liquor distribution, are aware of the nature and limits of the inspector's authority; third, the public interest in alcohol tax inspections would be hindered or prejudiced by the warrant procedure; and fourth, the narrowly drawn statute itself imposes the restrictions that a warrant imposes on other searches.<sup>111</sup> On February 25, 1970, the Supreme Court reversed.<sup>112</sup> The Court held that, absent emergency or exceptional circumstances, and *absent specific congressional mandate*, forced warrantless administrative inspections were in violation of the fourth amendment's "reasonableness" limitation on searches and seizures. After the promulgation of *Colonnade* by the court of appeals, it was felt that the *Camara* and *See* decisions were to be very narrowly construed by the lower courts in an attempt to leave discretion as to the reasonableness of the inspection in the inspectors.<sup>113</sup>

<sup>108</sup> 294 F. Supp. 65 (E.D. Ark. 1969).

<sup>109</sup> 410 F.2d 197 (2d Cir. 1969).

<sup>110</sup> See text accompanying notes 102-06 *supra*.

<sup>111</sup> 410 F.2d at 200-02.

<sup>112</sup> *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

<sup>113</sup> *United States v. Duffy*, 282 F. Supp. 777 (S.D.N.Y. 1968).

However, the Supreme Court's decision in *Colonnade* made it quite clear that, beyond those set forth in *Camara*, only a few exceptions to the requirement of an administrative inspection warrant would be tolerated. The Court, however, did add one further exception by stating that if Congress clearly set forth not only its intention under the liquor laws to authorize warrantless inspections in order to "meet the evils at hand," but also set forth the procedure by which inspectors were obliged to carry out such inspections, then the restrictions inhering in the fourth amendment requirement of "reasonableness" would be deemed to have been satisfied.<sup>114</sup>

It must be noted, however, that in *Colonnade* the Supreme Court was addressing itself primarily to the situation where there was a possibility that a forcible entry, no matter how slight, might have to be made. It was such a situation that the Supreme Court wished to protect with a warrant-type procedure. And although the Court seemed to be saying that Congress could, by appropriate legislative mandates, eliminate administrative warrants in all situations, it must be realistically assumed that they did not intend to exclude from the situations in which a warrant is required those in which force might possibly come into play.<sup>115</sup> The Court, quoting from the *See* decision, stated with respect to situations like *Colonnade*, in which force is contemplated, that "this Nation's traditions are strongly opposed to using force without definite authority to break down doors. . . . Congress has broad authority to fashion standards of reasonableness for searches and seizures. Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant."<sup>116</sup>

Since administrative inspections involving narcotics and dangerous drugs also carry with them the possibility of forcible entry, the most logical constitutional approach would be to require administrative inspection warrants in all situations where voluntary informed consent is not given, or where the "emergency circumstances" alluded to by the Supreme Court in *Camara* do not exist. To clarify the perimeters of the administrative inspection area when the proposed Controlled Dangerous Substances Act was being drafted, it was felt necessary to establish a clear procedure for obtaining entry to inspect inventories and records of registrants under the federal narcotic and dangerous drug laws and, at the same time, to establish the limits of the scope and timing of such searches.<sup>117</sup> The need for clarification

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<sup>114</sup> 397 U.S. at 76-77.

<sup>115</sup> See *See v. City of Seattle*, which stated, "We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution of physical force within the framework of a warrant procedure." 387 U.S. 523, 545 (1967).

<sup>116</sup> 397 U.S. at 77.

<sup>117</sup> The Controlled Dangerous Substances Act has passed the Senate as S. 3246 by a vote of 82-0, and is presently pending in the House of Representatives. The original administration version, introduced into the Senate as S. 2637, was also introduced into the House of Representatives as H.R. 13743 (Dangerous Drugs) and H.R. 13742 (Narcotics and Marihuana). [The House bill was bifurcated due to the fact that the House Ways and Means Committee had original jurisdiction over all narcotics and marihuana laws, and the House Interstate and Foreign Commerce Committee had original jurisdiction over dangerous drugs under the Drug Abuse Control Amendments of 1965.] While no action has been taken on S. 3246, hearings have been completed on H.R. 13743 by the House Interstate and Foreign Commerce Subcommittee on Public Health, and a vote is imminent.

was clear in light of the trend of various district court decisions such as *Sessions* and *Duffy*, and also in light of the hesitancy in the face of uncertainty as to the real intent of *Camara* and *See*, to grant this special breed of warrant. The *Colonnade* case laid to rest any doubts with regard to the Court's direction, and added impetus to the need for clear congressional direction in this area.

## II. ADMINISTRATIVE INSPECTION WARRANTS UNDER THE PROPOSED CONTROLLED DANGEROUS SUBSTANCES ACT OF 1969

The proposed Controlled Dangerous Substances Act contemplates a closed system of drug manufacture, import and export, and distribution, and a closed system of research on narcotics and dangerous drugs. While a

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The general purpose of the proposed Controlled Dangerous Substances Act is to consolidate and rationalize the patchwork of existing legislation and to bring about some needed changes so that our basic federal statutory tool is as effective and as up-to-date as possible. The bill represents a codification, a modernization, and a simplification of existing federal narcotic and drug laws. The bill consists of nine titles.

Title I sets out the constitutional basis on which this legislation is to be grounded, namely, the authority of Congress to control interstate and foreign commerce. In addition, title I also contains the many definitions necessary for the successful implementation of the bill.

Title II of the bill vests the authority to control those drugs enumerated as controlled dangerous substances in the Attorney General. He may add, delete, or reschedule a drug within any one of the four schedules listed, either upon his own motion or that of any interested party. However, before undertaking to bring a drug under control or remove a drug from control, the Attorney General must first consider the advice of the Secretary of Health, Education, and Welfare and that of the Scientific Advisory Committee established under title VI of the bill. As well as providing for the necessary scientific and medical input into the Attorney General's determination to control a drug, nine criteria are set out which he must consider before bringing any substance under control. All the drugs subject to control are listed in one of four schedules. Each schedule has its own set of criteria and any drug must meet these criteria before it can be included within the particular schedule.

Title III sets forth the provisions which govern the legitimate manufacture, distribution, and dispensing of controlled dangerous substances. All persons, except those few specifically exempted, who manufacture, distribute, or dispense controlled dangerous substances must register with the Attorney General. There are also provisions allowing for a suspension or revocation of a registration by the Attorney General.

Title IV sets out the provisions relating to the importation and exportation of drugs under control. In addition, new and stiffer restrictions are imposed upon the exportation of any controlled dangerous substance. Such restrictions are aimed at decreasing the flow of illicit drugs at this country's borders, especially in the situation which exists now where drugs are legitimately exported from this country only to be smuggled back in and distributed into illicit channels.

Title V sets out the penalties imposed for violations of the various provisions of the Act. It should be noted that section 502 of Title V relates to offenses committed by registrants. If the offense is committed unknowingly or unintentionally, only civil fines are imposed. However, for willful violations, criminal sanctions will be imposed.

Title VI sets out the administrative provisions necessary for the successful implementation of the bill. Of key importance are the sections authorizing the Attorney General to conduct educational and research programs and establish cooperative arrangements between federal, state, and local law enforcement agencies. Other provisions provide for the establishment of the Scientific Advisory Committee, which will advise the Attorney General as to the merits of bringing a particular drug under control, administrative hearings, the issuance of subpoenas, and judicial review.

Title VII contains perhaps the most controversial provision in the entire bill, namely the provisions authorizing officers under certain circumstances to execute a search warrant without knocking or announcing their authority and purpose. Other provisions which provide for administrative inspections and warrants and for the forfeiture of the vehicles used by the drug trafficker will contribute most significantly to the effective enforcement of this bill.

Title VIII calls for the establishment of a Committee on Marihuana to carry out a study on all phases of marihuana use. This committee is to be composed of experts with diversified professional backgrounds.

Title IX, the last title of the bill, sets out the various technical provisions such as repealers, conforming amendments, sections continuing pending proceedings and regulations, a section for authorization of appropriations, and a severability clause.

closed system of registration has always been the purpose of narcotic drug legislation, the same is not true under the Drug Abuse Control Amendments of 1965,<sup>118</sup> which exempted certain individuals and distributors and did not require registration.<sup>119</sup> Under the proposed legislation, all persons other than ultimate users<sup>120</sup> and employees, agents,<sup>121</sup> and common carriers<sup>122</sup> will register annually<sup>123</sup> and are subject to inspection, both prior to, and after, registering.<sup>124</sup> The purposes of such inspections are to keep tabs on the flow of these drugs, to allow law enforcement personnel to spot points of diversion into the illicit drug traffic, and to insure that there are adequate safeguards to protect against theft.

Section 703 of the proposed Controlled Dangerous Substances Act provides for an administrative inspection warrant procedure for inspection of legitimate registrants under the narcotic and dangerous drug laws.<sup>125</sup> It was drafted to ensure adequate regulation of all registrants, including such groups as the drug manufacturers, wholesalers, pharmacists, dispensing physicians, hospitals, and researchers. It carefully delineates what is needed to obtain administrative inspection warrants; it assures that a uniform standard will be applied by the courts when administrative inspection warrants are sought; and, most importantly, it sets out, in language which lends a degree of certainty to those registrants being inspected, exactly what their rights and obligations are under the law and the scope of the inspection that can be conducted. Because criminal penalties as well as civil sanctions may be imposed upon the refusal of a registrant to allow his office or establishment to be inspected,<sup>126</sup> as was the case in the *See* and *Colonnade*

<sup>118</sup> 21 U.S.C. §§ 360, 360a, 360b (1964).

<sup>119</sup> *Id.* § 360(g) sets out the following persons who need not register:

(1) pharmacies which maintain establishments in conformance with any applicable local laws regulating the practice of pharmacy and medicine and which are regularly engaged in dispensing prescription drugs, upon prescriptions of practitioners licensed to administer such drugs to patients under the care of such practitioners in the course of their professional practice, and which do not manufacture, prepare, propagate, compound, or process drugs for sale other than in the regular course of their business of dispensing or selling drugs at retail;

(2) practitioners licensed by law to prescribe or administer drugs and who manufacture, prepare, propagate, compound, or process drugs solely for use in the course of their professional practice;

(3) persons who manufacture, prepare, propagate, compound, or process drugs solely for use in research, teaching, or chemical analysis and not for sale;

(4) such other classes of persons as the Secretary may by regulation exempt from the application of this section upon a finding that registration by such classes of persons in accordance with this section is not necessary for the protection of the public health.

<sup>120</sup> Proposed Controlled Dangerous Substances Act, S. 3246, 91st Cong., 2d Sess., § 302(b)(3) (1970).

<sup>121</sup> *Id.* § 302(b)(1).

<sup>122</sup> *Id.* § 302(b)(2).

<sup>123</sup> *Id.* § 302(a).

<sup>124</sup> *Id.* §§ 302(e), 703(b).

<sup>125</sup> See note 4 *supra*.

<sup>126</sup> Prohibited Acts B, §§ 502(a)(7), (c), which provide for both civil and criminal penalties for refusal to allow administrative inspections, read as follows: § 502(a)(7): "to refuse any entry into any premises or inspection authorized by this Act." § 502(c):

Any person who violates this section is punishable by a civil fine of not more than \$25,000: *Provided*, That if the violation is prosecuted by an information or indictment which alleges that the violation was committed knowingly or intentionally, and the trier of fact specifically finds that the violation was committed knowingly or intentionally, such person is punishable by imprisonment for not more than one year,

cases, the fourth amendment limitation of "reasonableness" is applied to administrative inspections under section 703. A section 703 administrative inspection will be constitutionally "reasonable" under the *Camara, See, or Colonnade* line of reasoning, because section 703 provides for an inspection warrant to be issued only upon a finding by a judge or United States magistrate of "administrative probable cause," defined as "a valid public interest in the effective enforcement of the Act or regulations sufficient to justify administrative inspection of the area, premises, building or conveyance in the circumstances specified in the application for the warrant."<sup>127</sup>

This part of section 703 has been patterned very closely after rule 41 of the Federal Rules of Criminal Procedure.<sup>128</sup> However, section 703 is not

or a fine of not more than \$25,000, or both.

S. 3246, 91st Cong., 2d Sess. §§ 502(a)(7), (c) (1970).

<sup>127</sup> Compare this language with the Court's statement in *Camara v. Municipal Court*, 387 U.S. 523, 535 (1967), which stated: "In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for inspection must be weighed in terms of these reasonable goals of code enforcement." And *id.* at 539: "If a valid public interest justifies the intrusion contemplated, then there is *probable cause* to issue a suitably restricted search warrant." (Emphasis added.)

<sup>128</sup> FED. R. CRIM. P. 41:

Search and Seizure. (a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth, or territorial court of record or by a United States commissioner within the district wherein the property sought is located. (b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property (1) Stolen or embezzled in violation of the laws of the United States; or (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or (3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., § 957. (c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned. (d) Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. (e) Motion for Return of Property and To Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary

directed solely toward gathering evidence of a crime, as is rule 41. Rather, its primary aim is to allow a periodic check on registrants' activities, such as manufacturing, storing, recordkeeping, processes, controls, and inventory. Thus, the "probable cause" element has been modified. Using the *Camara* and *See* reasoning, this section does not require the inspector to state what he intends to search for or seize, but rather allows him to show that he intends to search solely to maintain the minimal health and safety standards imposed by the proposed act.<sup>129</sup> Under rule 41, the affiant must establish "grounds" for issuance of a search warrant.<sup>130</sup> But under the *Camara-See* rationale, there are already statutory "grounds" for the warrant, and so specific findings are not necessary.

Section 703 also differs from rule 41 in that administrative inspection warrants can only be served during normal business hours, whereas under the conditions specified by rule 41 (c), a nighttime warrant can be issued.<sup>131</sup> The reason for this is that administrative searches are far more restricted in scope than the routine searches for evidence of criminal activity or conduct. The administrative inspections are necessarily tied to business hours so that the records can be properly inspected.

Section 703 (a) (3), which is identical to rule 41 (d), pertains to execution of the warrant and special procedures by which questionable inventory is to be seized.<sup>132</sup> There is no apparent reason for differing from accepted practice for routine search warrants. Conforming to the usual pattern will avoid court administrative problems, since the inspection warrant will be filed and handled in the same manner as other warrants. Section 703 (a) (4), which speaks to the return of the warrant after service, and of the inventory after completion, is also identical to rule 41.<sup>133</sup> The same considerations mentioned above dictated the similarity in this area.

Section 703 (b) of the proposed act attempts to invoke the spirit of *Camara*, *See*, and *Colonnade* by carefully setting forth the perimeters of

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to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing. (f) Return of Papers to Clerk. The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized. (g) Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term 'property' is used in this rule to include documents, books, papers and any other tangible objects.

<sup>129</sup> See *Camara v. Municipal Court*, 387 U.S. 531, 535-37 (1967).

<sup>130</sup> See note 128 *supra*.

<sup>131</sup> The "positivity" requirement for nighttime warrants in rule 41 reads as follows: "[I]f the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." FED. R. CRIM. P. 41(c).

<sup>132</sup> FED. R. CRIM. P. 41(d).

<sup>133</sup> FED. R. CRIM. P. 41(e), *supra* note 128. It should be noted that while no one but authorized inspectors may avail themselves of § 703(a), any law enforcement officer charged with enforcement of the Act may obtain a conventional search warrant under rule 41 to search the premises of a registrant if he has the required grounds for inspection under rule 41(b), or has criminal "probable cause" to so search. See *Carroll v. United States*, 267 U.S. 132, 162 (1925).

an administrative inspection warrant. For example, it will limit by congressional mandate the premises which can be inspected to "places where persons registered or exempted<sup>134</sup> from registration requirements under [the] Act are required to keep records; and places including factories, warehouses, establishments, and conveyances where persons who are registered or exempted from registration requirements under [the] Act are permitted to hold, manufacture, compound, process, sell, deliver, or otherwise dispose of any controlled dangerous substance." This narrowing of the application of administrative inspection warrants will preclude the use of these warrants as "door-opening" devices against non-registrants who are illegally manufacturing, distributing, or dispensing controlled dangerous substances.<sup>135</sup> It will also place the "controlled premises" owners or managers on notice that they are subject to periodic, routine inspections. Sections 703(b)(2) and 703(b)(3) explain to the owner of the "controlled premises" the administrative inspector's authority and limitations. This language, which closely parallels in intent the language in subsections 360a(d)(2)(A) and (B) of the Drug Abuse Control Amendments of 1965,<sup>136</sup>

<sup>134</sup> There are some establishments and persons that will be exempted from registering, such as military doctors overseas. Also, during domestic emergency situations, such as floods or other natural disasters, persons normally not involved in distributing these drugs may be authorized to so distribute them by the federal government without their having to meet the registration criteria.

<sup>135</sup> This represents a full turnabout from the several pre-*Colonnade* cases which had used administrative inspectors' authority to secure evidence of failure to register. This section also expressly limits the application of administrative inspection warrants for any other purpose than inspection, contrary to fears expressed by the American Civil Liberties Union at *Hearings on S. 3246 Before the Subcomm. on Public Health of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. (1970). *E.g.*, *United States v. Sessions*, 283 F. Supp. 746 (N.D. Ga. 1968). In addition, this section does not severely inhibit law enforcement, since conventional search warrants are still obtainable if *Carroll*-type probable cause to search can be shown. *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>136</sup> Sections 360a(d)(2)(A), (B) of the Food, Drug, and Cosmetic Act are part of the Drug Abuse Control Amendments of 1965, which now regulate amphetamines, barbiturates, and hallucinogenic substances, and reads as follows:

Every person required by paragraph (1) of this subsection to prepare or obtain, and keep, records, and any carrier maintaining records with respect to any shipment containing any depressant or stimulant drug, and every person in charge, or having custody, of such records, shall, upon request of an officer or employee designated by the Secretary permit such officer or employee at reasonable times to have access to and copy such records. For the purposes of verification of such records and of enforcement of this section, officers or employees designated by the Secretary are authorized, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, to enter, at reasonable times, any factory, warehouse, establishment, or vehicle in which any depressant or stimulant drug is held, manufactured, compounded, processed, sold, delivered, or otherwise disposed of and to inspect, within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle, and all pertinent equipment, finished and unfinished material, containers and labeling therein, and all things therein (including records, files, papers, processes, controls, and facilities) bearing on violation of this section or section 331(q) of this title; and to inventory any stock of any such drug therein and obtain samples of any such drug. If a sample is thus obtained, the officer or employee making the inspection shall, upon completion of the inspection and before leaving the premises, give to the owner, operator, or agent in charge a receipt describing the sample obtained. (B) No inspection authorized by subparagraph (A) shall extend to (i) financial data, (ii) sales data other than shipment data, (iii) pricing data, (iv) personnel data, or (v) research data, which are exempted from inspection under the third sentence of section 374(a) of this title.

21 U.S.C. §§ 360a(d)(2)(A), (B) (1964).

to the Food, Drug, and Cosmetic Act, and section 374 of the same Act,<sup>137</sup> which provides:

(2) When so authorized by an administrative inspection warrant issued pursuant to subsection (a) of this section, an officer or employee designated by the Attorney General, upon presenting the warrant and appropriate credentials to the owner, operator, or agent in charge, shall have the right to enter controlled premises for the purpose of conducting an administrative inspection.

(3) When so authorized by an administrative inspection warrant, an officer or employee designated by the Attorney General shall have the right—

- (a) to inspect and copy records required by this Act to be kept;
- (b) to inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, containers and labelling found therein, and, except as provided in subsection (b) (5) of this section, all other things therein (including records, files, papers, processes, controls, and facilities) bearing on violation of this Act; and
- (c) to inventory any stock of any controlled dangerous substance therein and obtain samples of any such substance.

Although section 374 of the Food, Drug, and Cosmetic Act has not itself been directly tested constitutionally, it has been held to be reasonable in *Durovic v. Palmer*.<sup>138</sup> This case involved an inspection of Promak Laboratories and a request for samples of the drug "Krebiozen." Instead of supplying the drug, Durovic sought a mandatory injunction requiring the inspectors to discontinue their inspections and investigation of the drug. The Seventh Circuit court of appeals, upholding the grant of a summary judgment against Durovic, stated that the wording of 21 U.S.C. 374, which authorized inspections to be conducted "at reasonable times and within reasonable limits in a reasonable manner," did not interfere with Durovic's fourth amendment rights, as those rights compelled a strict application of the statutory "reasonableness" requirements.<sup>139</sup> In addition, section 374 is similar to an earlier version of the same section which was generally held constitutional in *United States v. Crescent-Kelvan Co.*,<sup>140</sup> and was specifically held not to violate the fourth amendment in *United States v. Cardiff*.<sup>141</sup> *Cardiff*, a 1951 case, involved the defendant's refusal to submit to an inspection of his factory. The court stated that "the inspections must

<sup>137</sup> Inspection—Right of agents to enter premises; notice; promptness (a) For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein . . . .

21 U.S.C. § 374 (1962).

<sup>138</sup> 342 F.2d 634 (7th Cir.), cert. denied, 382 U.S. 820 (1965).

<sup>139</sup> *Id.* at 636.

<sup>140</sup> 164 F.2d 582 (3d Cir. 1948).

<sup>141</sup> 95 F. Supp. 206 (E.D. Wash. 1951).



be made at reasonable times but the right to inspect is necessary to carry out the purposes of this Act. Without it, there is no positive protection to the public.<sup>142</sup> The court went on to hold that section 374, which contains the reasonableness limitations for inspections under the Food, Drug, and Cosmetic Act, did therefore not violate the fourth amendment. In addition, section 360a has been generally held to be constitutional in *United States v. Erlin*.<sup>143</sup>

It should also be noted that section 703(b)(5) of the proposed act includes provisions similar to those found in sections 374 and 360a(d)(2) of the Food, Drug, and Cosmetic Act, which prohibit inspection of financial data, sales data other than shipment, or pricing data, which the owner of the "controlled premises" has not authorized in writing.<sup>144</sup>

Finally section 703(b)(4) of the proposed act sets forth those situations in which an administrative inspection warrant is not required.<sup>145</sup> Section 703(b)(4)(a) allows the owner, operator, or agent in charge of a "controlled premises" to consent to an inspection. Obviously, as noted earlier, this consent must be voluntary, and it must be informed.<sup>146</sup> Based on the Supreme Court's past actions in requiring voluntariness of consent in various criminal cases, it would seem that in extending the protections of the fourth amendment to the administrative inspection situation, the Court is going to be fairly strict in requiring a voluntary informed consent. Even though the potential for criminal sanctions exists, it is doubtful whether the Court will require *Miranda*<sup>147</sup> warnings for such inspection. It is assumed that the Court will restrict the full *Miranda* warnings to custodial situations and not get back into the difficult area of "focus on the accused."<sup>148</sup>

Section 703(b)(4)(c), which involves inspections of conveyances "where there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant," recognizes a long series of cases beginning with *Carroll v. United States*.<sup>149</sup> In that case, the United States Supreme Court determined that the fourth amendment allowed distinctions as to the need for warrants in searches of private dwellings and in searches of automobiles. The Court set up a "reasonable grounds" rule for the search and seizure of an automobile. That case was followed by *Brinegar v. United States*, which stated: "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim

<sup>142</sup> *Id.* at 208.

<sup>143</sup> 283 F. Supp. 396 (N.D. Cal. 1968).

<sup>144</sup> See notes 136-37 *supra*.

<sup>145</sup> 21 U.S.C. § 374 (1962).

<sup>146</sup> 387 F.2d at 853; 294 F. Supp. 65 (E.D. Ark. 1969). See generally Baumgartner, *The Effect of Drugs on Criminal Responsibility, Specific Intent, and Mental Competency*, 8 AM. CRIM. L.Q. 118 (1970).

<sup>147</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>148</sup> *Id.* at 477.

<sup>149</sup> 267 U.S. 132 (1925).

or caprice."<sup>150</sup> The Court went on to state that no problem of searching the home or any other place of privacy was presented in either *Carroll* or the instant case. The Court said the instant case turned on whether there was a right to be unmolested by investigation and searches in the use of public highways in swiftly moving vehicles dealing in contraband. The Court stated that the citizen that has given no good cause for believing that he is engaged in that sort of activity is entitled to proceed on his way without interference, but one who recently has given *substantial ground* for believing that he is engaging in the forbidden transportation in the area of his usual operations has no such immunity. *Brinegar* was reinforced by *Cooper v. California*<sup>151</sup> and *Dyke v. Taylor Implement Manufacturing Co.*<sup>152</sup> All four cases serve as the basis for section 703(b)(4)(c) of the proposed Controlled Dangerous Substances Act.

Sections 703(b)(4)(b) and 703(b)(4)(d) speak of exceptions to the administrative warrant inspection procedure in situations presenting imminent danger to health and safety and in any other exceptional or emergency circumstances where time or opportunity to apply for a warrant is lacking. This is really a codification of the "emergency" exception set forth in *Camara*: "Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations."<sup>153</sup>

Lastly, section 703(b)(4)(e) includes as an exception to the administrative warrant requirement "all other situations where a warrant is not constitutionally required." This part has been included to make the proposed act extensible with changing attitudes of the Supreme Court. If the Court grants further exceptions to the fourth amendment requirements of administrative inspection warrants, then the statute, through this clause, will not be limited by its own inflexible rules. Instead, it will retain that flexibility which is part of the entire concept of the proposed Controlled Dangerous Substances Act.

### III. CONCLUSION

This then is an explanation of section 703 of the proposed Controlled Dangerous Substances Act. Its design is predicated on the Supreme Court's ground-breaking decisions in *Camara* and *See*, which have been further cemented by the *Colonnade* case. The proposed act in its section on administrative inspection warrants meets constitutional requirements and permits both the inspected and the inspectors knowledge of the availability and

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<sup>150</sup> 338 U.S. 160, 176 (1949).

<sup>151</sup> 386 U.S. 58 (1967).

<sup>152</sup> 391 U.S. 216 (1968).

<sup>153</sup> 387 U.S. at 539. The Court cited the following cases as examples of emergency situations where a compelling urgency required that the inspection be made without an administrative inspection warrant: *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Compagnie Francaise de Navigation à Vapeur v. Louisiana State Bd. of Health*, 186 U.S. 380 (1902); *Kroplin v. Trough*, 119 Ohio St. 610, 165 N.E. 498 (1929).

scope of administrative inspections. The very presence of the section deflates the common belief that the establishment of a rule<sup>154</sup> which makes failure to allow inspection of records a criminal offense means that a person must allow inspection upon request. This belief has persisted despite *Camara* and *See*. By establishing an administrative inspection warrant procedure, it becomes clear to all that the individual's mere failure to consent to inspection will not invoke the prohibition. Only when there is a refusal to allow inspection after a warrant is obtained is there the possibility of civil or criminal action.<sup>155</sup>

Several questions however still remain unanswered. In deciding *Camara* and *See*, the Court did not really discuss the applicability of other search and seizure doctrines. What, for example, will be the result when the inspector observes the commission or evidence of the commission of other crimes? In such instances, especially when dealing with mere evidence of another crime, does the inspector have the same rights to seize as he would under a routine search warrant<sup>156</sup> or is he precluded from exercising those rights by the far looser "probable cause" needed to obtain the administrative warrant? Would seizure of such items give rise to the cry of using the administrative warrant with its lower standard to conduct "fishing expeditions"? This is an issue that has been raised, and, while it is assumed such seizure would be permitted under general search and seizure principles,<sup>157</sup> it is still unclear whether the Court will further isolate administrative inspections and separate them from such principles, as it did in the case of redefining "probable cause" for such inspections.

Other questions remain as to the observance by the inspector in the course of his inspection of technical violations of the proposed Controlled Dangerous Substances Act. One such question is whether the inspector, upon finding a technical violation of the Act, is required to recite the *Miranda* warnings, even though he may not arrest the individual. Two factors militate against such warnings. First, while there is the possibility of a criminal sanction for the knowing or intentional violation of section 502, normally only a civil action would be brought against the individual under section 502. Second, the Bureau of Narcotics and Dangerous Drugs would usually conduct a preliminary administrative, noncriminal, hearing against the individual under section 706. Section 706 reads:

Before any violation of this Act is reported by the Director of the Bureau of Narcotics and Dangerous Drugs to any United States Attorney for institu-

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<sup>154</sup> 21 U.S.C. § 331(f) (1962); INT. REV. CODE of 1954, § 4773. The Controlled Dangerous Substances Act has a similar provision (§ 502(a)(6)), but it is conditioned on that Act's § 703.

<sup>155</sup> The proposed Controlled Dangerous Substances Act provides for civil penalties for refusal to allow inspection unless such refusal is with criminal intent, which must be proved. In such cases the penalties are imprisonment of up to one year, a fine of \$25,000, or both. Under existing law (21 U.S.C. § 333 (1960)), covering dangerous drugs other than narcotics and marihuana, criminal penalties imposed are imprisonment of up to one year, a fine of \$1,000, or both. As for narcotics and marihuana, INT. REV. CODE of 1954, § 7203 provides that refusal to allow inspection or supply information as required by the Harrison Narcotic Act, INT. REV. CODE of 1954, §§ 4704-05, subjects the registrant to a fine of \$10,000, imprisonment for not more than one year, or both.

<sup>156</sup> See generally *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

<sup>157</sup> *Harris v. United States*, 390 U.S. 234 (1968).

tion of a criminal proceeding, the Director may require that the person against whom such proceeding is contemplated be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding.<sup>158</sup>

If either of the two aforementioned routes are contemplated by the inspector, there seems to be no need for the *Miranda* warnings unless and until it becomes clear to him that his only course of action is criminal prosecution.

These two considerations are offset by *Mathis v. United States*,<sup>159</sup> which states that when, in an investigation of a civil matter, there exists the possibility of criminal sanctions even though not contemplated, the person being interrogated must receive the *Miranda* warnings. Nowhere in *Camara* or *See* does the Court speak on the point at which *Miranda* safeguards must be invoked. The fourth amendment search and seizure limitation is applied solely because of the potential imposition of criminal sanctions. It is, therefore, a source of puzzlement for the Supreme Court to have addressed itself to the need for constitutional safeguards and yet to have failed to contemplate at what point such safeguards must be invoked. As a practical matter, however, most compliance investigations carried on by the Bureau of Narcotics and Dangerous Drugs are of the accountability survey type, in which the investigator has no idea of culpability, or lack thereof, by a registrant until he has completed actual inspection and begins to organize the raw data. But, where the inspector, during the course of an inspection, becomes suspicious of activity which could possibly lead to criminal action, or where he begins an inspection based on some prior knowledge of misdoings, then *Mathis* would seem to require that the individual being inspected receive the *Miranda* warnings.<sup>160</sup>

One final question remains. If, during the course of a consent inspection, the inspector observes criminal conduct relating to the Controlled Dangerous Substances Act and takes appropriate action by arresting the registrant on the spot, is the consent then vitiated and must the inspector withdraw and secure an administrative inspection warrant or a conventional search warrant to continue the investigation? Is consent vitiated when the inspector observes criminal activity unrelated to the Controlled Dangerous Substances Act? If, as noted earlier, the Supreme Court continues to include administrative inspections within a broadened area of fourth amendment protections, then it appears that voluntary, informed consent for an admin-

<sup>158</sup> Section 706 of S. 3246 is almost identical to 21 U.S.C. § 335 (1938) (Food, Drug, and Cosmetic Act) with one exception. Where 21 U.S.C. § 335 (1938) bases the mandatory language "shall be given appropriate notice and an opportunity to present his views," § 706 of S. 3246 uses the term "may." This is because a 1943 case, *United States v. Dotterweich*, 320 U.S. 277 (1943), held that the term "shall" in 21 U.S.C. § 335 (1938) was not mandatory language and did not require an administrative hearing as a prerequisite to a criminal prosecution for violations of the Food, Drug, and Cosmetic Act. Section 706 of S. 3246 by using the term "may" makes the *Dotterweich* decision clear.

<sup>159</sup> 391 U.S. 1 (1968).

<sup>160</sup> Based on this reasoning, the Bureau of Narcotics and Dangerous Drugs, in its *Agents' Manual*, requires *Miranda* warnings to be given to a registrant even when he is interrogated before an administrative hearing. See BUREAU OF NARCOTICS AND DANGEROUS DRUGS, *AGENTS' MANUAL* § 6071.4 (1969).

istrative inspection will be vitiated when *any* criminal sanctions by the inspector become a possibility.

It would seem that in raising these questions, as yet unanswered or focused upon by the Supreme Court, we have come full circle. While *Camara*, *See*, and *Colonnade* attempt to set up the macroscopic parameters relating to administrative inspection warrants, this area of the law is still far from settled. What is needed now is a more intensive examination by the Court of these types of questions so that the inspector in the field can fill in the blanks of his authority while operating within the framework of the Court's already-established, administrative inspection procedures.