

Warrantless Administrative Inspections After *Marshall v. Barlow's, Inc.*

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Administrative inspections are indispensable: without them there is no practical way to determine whether there is compliance with the plethora of health, sanitary, safety, and building regulations that ensure that living and working conditions remain tolerable.¹ The need for administrative agencies to have this power does not, however, immunize inspections from the requirements of the fourth amendment.² Administrative inspections "are subject to the governing principle that a search of private property, in the absence of consent, is 'unreasonable' unless authorized by a valid search warrant."³ Nevertheless, when this principle was announced in *Camara v. Municipal Court*⁴ and *See v. City of Seattle*⁵ the Supreme Court reserved comment on inspections of businesses in highly regulated industries:

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 . . . on a case-by-case basis under the general Fourth Amendment standard of reasonableness.⁶

This language served as the basis for two Supreme Court decisions that defined an exception to the *Camara-See* rule.⁷ In *Colonnade Catering Corp. v. United States*⁸ and *United States v. Biswell*,⁹ the Court held that

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1. B. SCHWARTZ, ADMINISTRATIVE LAW § 37, at 92 (1976).

2. The fourth amendment provides:

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 person or things to be seized.

U.S. CONST. amend. IV.

3. B. SCHWARTZ, *supra* note 1, § 37, at 93.

4. 387 U.S. 523 (1967). The basic purpose of the fourth amendment's prohibition against unreasonable searches "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Id.* at 528.

5. 387 U.S. 541 (1967).

6. *Id.* at 545-46.

7. Commentators have pointed out that the *See* decision apparently established three exceptions to the warrant requirement: (1) "where there is consent"; (2) "where the workplace is open to the public view"; and (3) "where there is an inspection conducted pursuant to a valid licensing program." Rothstein & Rothstein, *Administrative Searches and Seizures: What Happened to Camara and See?*, 50 WASH. L. REV. 341, 347 (1975).

8. 397 U.S. 72 (1970).

9. 406 U.S. 311 (1972).

the warrant requirement is not applicable to strictly regulated or licensed businesses when Congress has determined that the search is necessary to carry out a regulatory scheme and has given specific statutory authorization for the search.¹⁰ Subsequently, lower federal courts and state courts expansively interpreted the *Colonnade-Biswell* exception to the *Camara-See* rule in upholding a variety of warrantless administrative inspection procedures.¹¹ The policy behind *Camara* and *See* seemed to be in jeopardy;¹² the *Colonnade* and *Biswell* decisions, along with the Supreme Court's decision in *Wyman v. James*,¹³ indicated that the Court was returning to the approach it had followed in *Frank v. Maryland*,¹⁴ which had upheld a warrantless administrative health inspection procedure.¹⁵

This prognosis of the effects of *Colonnade* and *Biswell* was not, however, borne out. In *Almeida-Sanchez v. United States*¹⁶ and *G.M. Leasing Corp. v. United States*,¹⁷ for example, the Supreme Court emphatically reemphasized its statement in *Camara* that "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."¹⁸ Most recently, in *Marshall v. Barlow's, Inc.*,¹⁹ a majority of the Justices held that administrative inspections of business premises under the Occupational Safety and Health Act of 1970²⁰ violated the fourth amendment unless such inspections were authorized by a warrant or its equivalent.

10. See B. SCHWARTZ, *supra* note 1, § 38 at 98. In such businesses the legislature has broad authority to fashion standards of reasonableness for searches, including authorizing warrantless inspections by the relevant regulatory or licensing agency. *Id.* These two decisions had the effect of holding businesses in certain heavily regulated industries to a type of constructive consent to warrantless administrative searches as a prerequisite to doing business in that industry. See Note, *Warrantless Inspection in Enforcement of Federal Gun Control Act is Constitutional Under the Fourth Amendment*, 43 Miss. L. J. 562, 567 (1972).

11. See cases cited at note 75 *infra*. Since *Camara* and *See*, the Court has emphasized the exceptions to the warrant requirement rather than its strictures. Rothstein & Rothschein, *supra* note 7, at 341; notes 76-108 and accompanying text *infra*.

12. Rothstein & Rothstein, *supra* note 7, at 366.

13. 400 U.S. 309 (1971). See notes 60-73 and accompanying text *infra*.

14. 359 U.S. 360 (1959). See generally Note, *Wyman v. James: Welfare Home Visits and a Strict Construction of the Fourth Amendment*, 66 Nw. U.L. REV. 714 (1971).

15. The appellant in *Frank* was arrested and fined for refusing entry to a health inspector who was acting on a neighbor's complaint of rat infestation in the neighborhood. The inspector found evidence of such infestation near appellant's house. Appellant was convicted for resisting inspection under a provision of the Baltimore City Code that entitled the health commissioner to demand entry to any dwelling where he had cause to suspect a nuisance existed. The Court upheld the conviction and concluded that no warrant was required for a health inspector to enter a private residence in order "to determine whether conditions exist which the [city's] Health Code proscribes." 359 U.S. at 366. In its opinion, the Court distinguished between civil and criminal investigations for fourth amendment purposes and noted that the attempted inspection was merely to determine whether the proscribed conditions existed, and if so, to give notice to the owner to remedy the infringing conditions. *Id.* This distinction between civil and criminal investigations was repudiated in *Camara* and *See*.

16. 413 U.S. 266 (1973).

17. 429 U.S. 338 (1977).

18. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

19. 436 U.S. 307 (1978).

20. 29 U.S.C. §§ 651-678 (1976).

Despite this strong reaffirmation of the necessity of a warrant for most administrative inspections, the *Colonnade* and *Biswell* decisions have not been overruled.²¹ There is no doubt that the essence of *Camara* and *See*—that nonconsensual administrative inspections of commercial and noncommercial premises require a warrant—is the rule and not the exception,²² but it cannot be said that all warrantless administrative inspection programs are now constitutionally infirm.²³ Congress still has power to enact laws authorizing warrantless searches in certain carefully defined situations.²⁴ The Supreme Court's recent decisions have clarified the classes of cases that constitute the exceptions to the warrant requirement for administrative inspections, but its reaffirmation of *Camara* and *See* has not clearly defined the scope of the *Colonnade-Biswell* exception.²⁵

Congress will continue to extend federal regulation of various industries and common commercial and industrial practices. Inspection procedures are a critical part of many regulatory programs; the courts, as the final arbiters of the reasonableness of administrative inspections, will again be required to examine the constitutionality of warrantless inspections. It is thus necessary to determine how the Supreme Court's post-*Biswell* decisions, culminating in *Barlow's*, have affected the law of administrative inspections and the fourth amendment. This article discusses the continuing vitality of the *Colonnade-Biswell* exception to the warrant requirement after *Marshall v. Barlow's, Inc.*, explains the elements of the exception, and examines the classes of cases in which a warrantless administrative search of private property is valid under the fourth amendment.

I. THE *Camara-See* RULE AND ADMINISTRATIVE INSPECTIONS

A. *Camara v. Municipal Court* and *See v. United States*

Prior to 1967 the case law on administrative searches limited fourth

21. See notes 156-62 and accompanying text *infra*.

22. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978): "The clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception. The Secretary would make it the rule."

23. This concern was voiced by the Secretary of Labor, the petitioner in *Barlow's*, who urged "that requiring a warrant for OSHA inspectors will mean that, as a practical matter, warrantless search provisions in other regulatory statutes are also constitutionally infirm." *Id.* at 321. The Court's response accepted the validity of his concern but implicitly indicated that some schemes might withstand scrutiny: "The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute." *Id.* In essence, the Court was repeating Justice White's statement in *See* that "[a]ny 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. 541, 546 (1976).

24. *Marshall v. Reinhold Constr., Inc.*, 441 F. Supp. 685, 693 (M.D. Fla. 1977).

25. The issue of the validity of warrantless inspection programs is still in a state of flux because it is uncertain how the factors that determine the constitutionality of such inspections are to be weighed. See Weissberg, *Marshall v. Barlow's, Inc.: Are Warrantless Routine OSHA Inspections a Violation of the Fourth Amendment?*, 6 ENV'TL AFF. 423, 432-33 (1978).

amendment protection to inspections associated with criminal prosecutions.²⁶ *Frank v. Maryland*,²⁷ decided in 1959, affirmed this principle by holding that no warrant was required for a health inspector to enter private dwellings suspected of statutory violations. The Supreme Court's 1967 decisions in the companion cases of *Camara v. Municipal Court*²⁸ and *See v. City of Seattle*²⁹ overruled *Frank* and held that "the governmental intrusion accompanying an administrative search is within the scope of the fourth amendment's protection and requires the authorization of a search warrant."³⁰ Under *Camara* and *See*, however, a magistrate may issue such a warrant on a showing that is less stringent than probable cause in the criminal law sense,³¹ although the reasonableness of the search "is still the ultimate standard."³²

In *Camara* the Court held that the fourth amendment barred prosecution of an individual who refused to permit a warrantless municipal housing inspection of his private residence. The Court said that the fourth amendment's protection of the individual and his property was not limited to instances in which he is suspected of criminal behavior.³³ Rather, it concluded that "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."³⁴ The traditional showing of probable cause required for obtaining a warrant was relaxed, however, for instances in which a legitimate public interest justified the inspection.³⁵

The decision in *See v. City of Seattle* extended the bar against

26. See, e.g., *Boyd v. United States*, 116 U.S. 616 (1886); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855). Only *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950), had held that a warrant was required for an administrative entry. The doctrine was well established that the warrant requirement of the fourth amendment did not apply to administrative inspections. Rothstein & Rothstein, *supra* note 7, at 344.

27. 359 U.S. 360 (1959). See note 15 *supra*.

28. 387 U.S. 523 (1967).

29. 387 U.S. 541 (1967).

30. Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CALIF. L. REV. 1011, 1012 (1973). See *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967).

31. *Id.* at 534-39; see Greenburg, *supra* note 30, at 1012.

32. 387 U.S. at 539.

33. *Id.* at 530.

34. *Id.* at 528-29.

35. Instead of requiring a showing that a housing code violation would be found in a particular dwelling before a warrant could issue, the Court in *Camara* authorized warrants on an area-wide basis. This was considered a reasonable search of private property under the fourth amendment because probable cause "standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building . . . , or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling." *Id.* at 538. If a valid public interest was demonstrated that justified the inspection, then there was probable cause to issue a warrant. *Id.* at 539. In effect, the Court recognized that "[t]o impose a blanket requirement of the safeguards necessary for a search of criminal evidence would hobble inspection power." B. SCHWARTZ, *supra* note 1, § 37, at 93-94 (footnote omitted). See also Comment, *The Validity of Warrantless Searches Under the Occupational Safety and Health Act of 1970*, 44 U. CINN. L. REV. 105, 106 (1975).

warrantless administrative searches to commercial establishments.³⁶ In *See* the Court stated that “[t]he businessman . . . has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.”³⁷ It concluded 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.”³⁸ The Court also adhered to the flexible probable cause standard delineated in *Camara*.³⁹ “The agency’s particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved.”⁴⁰

In *Camara* and *See* the Court faced the problem of extending traditional fourth amendment protections to administrative inspection situations. Instead of taking an all-or-nothing view of the fourth amendment, the Court balanced the government’s need for inspections against the citizen’s interest in privacy.⁴¹ The Court’s relaxation of the probable cause showing required before a warrant authorizing an administrative inspection could issue is evidence of this balancing.⁴² These decisions did not, however, bar all warrantless administrative inspections. The Court noted that businesses were not shielded from warrantless searches in emergency situations⁴³ and that business premises might “reasonably be inspected in many more situations than private homes”⁴⁴ In addition, the Court reserved comment on the constitutional validity of warrantless inspections of businesses engaged in highly regulated industries:

[N]or 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 standards of reasonableness.⁴⁵

This dictum proved significant because “of its potential for broad exception to the *Camara-See* rule.”⁴⁶

36. 387 U.S. 541 (1967). In *See*, the owner of a commercial warehouse refused to admit a fire inspector conducting a routine, periodic city-wide canvass to obtain compliance with the fire code.

37. *Id.* at 543.

38. *Id.* at 545.

39. *See* note 35 and accompanying text *supra*.

40. 387 U.S. at 545.

41. *See* notes 163-65 and accompanying text *infra*.

42. Greenberg, *supra* note 30, at 1012-14.

43. *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967). *See* notes 166-74 and accompanying text *infra*.

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

45. *Id.*

46. Greenberg, *supra* note 30, at 1016; *see* Comment, *supra* note 35, at 107; *see also* Note, *The*

B. *The Colonnade-Biswell Exception*

An exception to the *Camara-See* rule, based on the language quoted above, quickly developed as warrantless inspections pursuant to licensing programs were held permissible under the fourth amendment. In *Colonnade Catering Corp. v. United States*,⁴⁷ a retail liquor dealer had resisted a warrantless search of his locked storeroom by agents of the Internal Revenue Service. The agents requested access to the storeroom; after the dealer refused to admit them they broke the lock and entered. Their warrantless entry was allegedly authorized by sections 5146(b) and 7606 of the Internal Revenue Code.⁴⁸ The Court reversed the dealer's conviction for the crime of refusing to admit a federal inspector on the ground that the exclusive sanction for refusal to allow entry was a \$500 fine,⁴⁹ but the Code provisions authorizing warrantless inspections of liquor dealers were not held unconstitutional. Rather, the Court accepted the government's contention that the absence of a warrant was not fatal to the legality of administrative searches specifically authorized by statute. In this case the long history of the special treatment afforded inspection laws dealing with the liquor industry provided the basis for the majority's opinion that *See's* rule was not applicable. Since the liquor industry had long been "subject to close supervision and inspection . . . Congress ha[d] broad authority to fashion standards of reasonableness for searches and seizures" in the liquor industry.⁵⁰

Colonnade's exception to the warrant requirement for inspections of licensed liquor dealers was expanded in *United States v. Biswell*⁵¹ to include warrantless inspections of licensed firearms dealers. In *Biswell*, a United States Treasury agent inspected defendant's pawnshop pursuant to

Law of Administrative Inspections: Are Camara and See Still Alive and Well?, 1972 WASH. U.L.Q. 313, 327-28 (1972). Two district court decisions used this language to hold that inspections pursuant to licensing programs controlling established liquor businesses were excluded from fourth amendment protection. See *United States v. Duffy*, 282 F. Supp. 777 (S.D.N.Y. 1968); *United States v. Sessions*, 283 F. Supp. 746 (N.D. Ga. 1968).

47. 397 U.S. 72 (1970).

48. I.R.C. § 5146(b) provides:

The Secretary 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.

I.R.C. § 7606 provides:

(a) Entry during day.

The Secretary may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.

(b) Entry at night.

When such premises are open at night, the Secretary may enter them while so open, in the performance of his official duties.

49. 397 U.S. at 77. Section 7342 of the Internal Revenue Code imposes a fine of \$500 for every refusal to admit an agent acting under the authority of § 7606. I.R.C. § 7342. Although the use of force in carrying out the search was improper, Congress had authority to provide for such action.

50. 397 U.S. at 77.

51. 406 U.S. 311 (1972).

an inspection procedure authorized by the Gun Control Act of 1968.⁵² The agent presented proper identification, looked over defendant's books, and asked for permission to inspect a locked storeroom. The defendant asked for a search warrant, and the agent responded by showing him the provisions of the statute that authorized inspection. The dealer read the statute and then unlocked the storeroom where the agent found evidence that led to defendant's conviction for the unlicensed possession of two sawed-off rifles.⁵³ The court of appeals overturned this conviction, holding that the Act was unconstitutional and that the evidence seized had to be suppressed,⁵⁴ but the Supreme Court reversed and reinstated the conviction.

The Court held that the entry in *Biswell* was valid because it was not forcible and was made under lawful authority. The statutory scheme was upheld on the basis that unannounced inspections were essential if inspections were to be effective and serve as a credible deterrent to violation of the laws relating to the control of firearms.⁵⁵ The defendant's challenge that he had involuntarily consented to the search was rejected as inapposite. The Court drew an analogy between one who voluntarily submits to a lawful, statutorily authorized regulatory inspection and one who acquiesces in a search of his dwelling authorized by a valid warrant. In both cases, said the Court, the person accepts the mandate of legal process rather than face criminal sanctions. The legality of a search that is carefully regulated by statute, therefore, depends upon the authority of valid legislation and not on consent.⁵⁶ The Court further reasoned that when a businessman chooses to deal in a heavily regulated industry and accept a federal license, he is held informed of the necessity, expectability, and limits of governmental inspections. Under such regulatory statutes, the dealer's right to privacy is not unjustifiably interfered with by inspections performed without a warrant.⁵⁷

The Court's analysis in *Biswell* was not, however, limited to

52. 18 U.S.C. § 923(g) (1976). The inspection provision authorized official entry during business hours into "the premises . . . of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises."

53. 406 U.S. at 312-13.

54. 442 F.2d 1189 (10th Cir. 1971).

55. 406 U.S. at 314-16. *See* was distinguished on the ground that the conditions that were the subject of inspection in *See* could not be easily concealed or corrected in a short period of time and that any delay for obtaining a warrant would not lessen the effectiveness of the regulatory program. *Id.* at 316. In the circumstances presented by *Biswell*, however, a warrant requirement would frustrate regulation of firearms because of the portability of the goods. *Id.*

56. *Id.* at 315. The householder acquiesces to a search pursuant to a warrant because the alternative is a possible criminal prosecution for refusing entry or a forcible entry. The firearms dealer acquiesces because Congress has made it a crime to violate any provisions of the Gun Control Act. *See id.* at 315 & n.4.

57. *Id.* at 316. The Court also noted that requiring a warrant under conditions that preserved needed flexibility would not give to the citizen greater protection from unreasonable searches than the statute already provided. *Id.*

businesses with long histories of governmental regulation.⁵⁸ Instead, the Court announced an exception to the *Camara-See* rule that included all regulatory searches that furthered urgent federal interests: "We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interests, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute."⁵⁹

C. *Welfare Visits*

A third case that limited the scope of the *Camara-See* warrant requirement for administrative inspections was *Wyman v. James*.⁶⁰ *Wyman* dealt with the extent to which welfare recipients are protected by the fourth amendment against home visits of welfare workers. The decision arose out of an action challenging the constitutionality of a New York statute requiring the termination of welfare payments if the beneficiary refused to allow the warrantless home visits.⁶¹ Plaintiff claimed she had a right to refuse a home visit without losing her assistance on the ground that the home visit was a search, and that when this search was neither consented to nor supported by a warrant, it violated her fourth amendment rights.⁶²

The Supreme Court rejected plaintiff's claim on alternate holdings:⁶³ first, that there was no search within the meaning of the fourth amendment because her refusal to allow the visit did not result in a forced entry, did not give rise to a criminal penalty, and was more rehabilitative than investigative;⁶⁴ and, second, that even if this visit was a search, it did not descend to the level of unreasonableness, even though it was not accompanied by a warrant or by any determination of probability.⁶⁵ In support of its second holding the Court listed several factors that made the warrantless visitation procedure reasonable. In particular, the Court emphasized the public's interest in the correct use of welfare funds and the benign purpose of the visit.⁶⁶

58. "Federal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, but close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime" *Id.* at 315.

59. *Id.* at 317. See Note, *Administrative Search Warrants*, 58 MINN. L. REV. 607, 618 (1974).

60. 400 U.S. 309 (1971).

61. *Id.* at 311-12 & nn.2-4.

62. B. SCHWARTZ, *supra* note 1, § 39, at 100.

63. Thus, the opinion, which reversed the decision of a three-judge district court, *James v. Goldberg*, 303 F. Supp. 935 (S.D.N.Y. 1969), is not clear with regard to the fourth amendment theory relied on in resolving the issue. Greenberg, *supra* note 30, at 1028.

64. 400 U.S. at 316-18.

65. *Id.* at 318.

66. *Id.* at 318-25. The following circumstances supported the reasonableness of the search: (1) motivation in benevolent interest in the child; (2) fulfillment of a public trust in ensuring that funds are properly spent; (3) the unobtrusive, friendly nature of the search; (4) the lack of other methods for acquiring the needed information; and (5) the lack of any purpose to conduct the visit in aid of a

The *Wyman* decision was heavily criticized⁶⁷ even though the Court suggested that unreasonable inspection procedures would be held unconstitutional.⁶⁸ The Court was not dealing with specialized and highly regulated businesses, as it had in *Colonnade* and *Biswell*, but rather with the broad field of public welfare. The Court's opinion seemed to provide the basis for another exception to the *Camara-See* rule⁶⁹ by focusing on the nature of the penalty (forfeiture of benefits) rather than on the type of premises being searched.⁷⁰ Taken together, therefore, the *Colonnade*, *Biswell*, and *Wyman* decisions reflected a trend that seemed to negate, or at least threaten, the *Camara-See* rule that nonconsensual administrative inspections of commercial and noncommercial premises require warrants.⁷¹ It seemed as if there had been a partial reaffirmation of the doctrine of *Frank v. Maryland*,⁷² and that *Camara* and *See* had been the high water marks in the Supreme Court's application of the fourth amendment to protect privacy interests in the administrative context.⁷³

D. *Developments After Biswell and Colonnade*

The Supreme Court's holdings in *Colonnade* and *Biswell*, if narrowly

criminal proceeding. The Court observed that a warrant could be harmful in inducing a hostile arm's length element when an atmosphere of trust should be fostered. In addition, if a warrant were obtained it would give more authority than is needed or desired. Also, a warrant would justify entry by force and permit a greater scope of inspection than simply allowing the caseworker to see the child in the home and assure that the child is receiving the benefit of the aid. *Id.*

67. See, e.g., Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James*, 69 MICH. L. REV. 1259 (1971); Greenberg, *supra* note 30, at 1027-35; Note, *The Implications of Wyman v. James: The Burger Court, The Fourth Amendment and the Privacy of the Home*, 48 DEN. L.J. 87 (1971). Note, *AFDC Caseworker's Visit to Home of Nonconsenting Welfare Recipient Not Prohibited by Fourth Amendment*, 24 VAND. L. REV. 821 (1971) [hereinafter cited as Note, *Caseworker's Visit*]; Note, *supra* note 46, at 338-45.

68. 400 U.S. at 326.

69. One commentator has noted that the decision provided two ways to get around *Camara* and *See*. First, one could determine that the warrantless "intrusion upon privacy is not a search within the meaning of the fourth amendment because it is 'benevolent' rather than investigative, notwithstanding the fact that evidence of crime can be uncovered." Note, *supra* note 14, at 734 (1971). Second, the opinion's discussion of reasonableness arguably provided the basis for a new exception to the warrant requirement: "In a non-criminal context the interest of privacy may be outweighed by a reasonable governmental interest," and the test of reasonableness would focus not on the "relative ease with which a warrant could be obtained" but on "the reasonableness with which the search is conducted and the reasonableness of the factors which motivated the search." *Id.*

70. Comment, *Fourth Amendment Implications of Warrantless Occupational Safety and Health Act Inspections*, 82 DICK. L. REV. 773, 780 (1978) [hereinafter cited as Comment, *Fourth Amendment Implications*]. "In distinguishing *Camara*, the Court created an exception that applies when the only possible sanction for refusing to permit inspection is a loss of a government benefit rather than the criminal sanctions that ensued in the *Camara* case." *Id.* See also Comment, *The Constitutionality of Warrantless OSHA Inspections*, 22 VILL. L. REV. 1214, 1219 (1976-77).

71. Rothstein & Rothstein, *supra* note 7, at 382; Note, *Inspections By Administrative Agencies: Clarification of the Warrant Requirement*, 49 NOTRE DAME LAW. 879, 890 (1974).

72. 359 U.S. 360 (1959). The emphasis in *Wyman* on the beneficial purpose of the visit indicated reaffirmation of *Frank v. Maryland*, which had posited the idea that there is a constitutional distinction between civil and criminal investigations. See *Wyman v. James*, 400 U.S. 309, 323 (1971); Note, *supra* note 14, at 734.

73. See Note, *Caseworker's Visit*, *supra* note 67, at 827; Note, *Administrative Investigations of Welfare Recipients*, 22 CASE W. RES. L. REV. 581, 588 (1971).

limited to firearms and liquor inspections, were not out of line with earlier state and federal decisions.⁷⁴ Several post-*Biswell* cases,⁷⁵ however, showed that the Supreme Court's lack of precision in delineating the extent of the *Colonnade-Biswell* exception to the *Camara-See* rule led to its expansion in the lower courts to include unlicensed but regulated industries.⁷⁶ Such expansion was nevertheless consistent with the *Biswell* majority's reasoning "that the exception to the *Camara-See* rule included all regulatory searches that furthered urgent federal interests."⁷⁷ Whether urgent federal interests were present was determined on a case-by-case basis "by a showing that unique circumstances, such as concealability or portability of the object of the inspection, would frustrate the regulatory scheme if the guidelines for inspections outlined in *Camara* and *See* had to be followed."⁷⁸

In *United States ex rel. Terraciano v. Montanye*,⁷⁹ the Second Circuit followed *Biswell* and upheld a warrantless search of a pharmacy under a procedure authorized by the New York Public Health Law.⁸⁰ The court emphasized that this inspection was limited by statute to the business records and goods of an industry that was properly subject to intensive regulation in the public interest.⁸¹ A warrant was unnecessary because it would merely "track the statute" and give the person objecting to the search no more protection than he already had.⁸²

The *Terraciano* holding did not expand the exception to the *Camara-See* rule announced in *Biswell*. Although the court did not expressly state that requiring a warrant would frustrate the regulatory scheme, it did

74. State and federal cases decided prior to *Biswell* and *Colonnade* had upheld the validity of warrantless licensing inspections for a variety of commercial enterprises, ranging from funeral homes to convalescent homes. Rothstein & Rothstein, *supra* note 7, at 362-63 & nn. 116-26. A number of the pre-*Biswell* cases were decided on the theory of implied consent. *Id.* at 362 n.115.

75. See, e.g., *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974) (warrantless safety inspection as a condition of airplane boarding); *United States v. Schafer*, 461 F.2d 856 (9th Cir. 1972) (warrantless search of luggage in furtherance of an agriculture quarantine); *United States v. One (1) 43 Foot Sailing Vessel*, 405 F. Supp. 879 (S.D. Fla. 1975) (warrantless safety inspection of a licensed boat by United States Coast Guard); *State v. Dailey*, 209 Kan. 707, 498 P.2d 614 (1972) (warrantless inspection of liquor dealer); *State v. Wybierala*, 305 Minn. 455, 235 N.W.2d 197 (1975) (warrantless inspection of junkyard); *Uzzillia v. Commissioner of Health*, 47 App. Div. 2d 492, 367 N.Y.S.2d 795 (1975) (warrantless safety inspection of licensed nursing home); *People v. Curco Drugs, Inc.*, 76 Misc. 2d 222, 350 N.Y.S.2d 74 (1973) (warrantless inspection of pharmacy); *State v. Felger*, 19 Or. App. 39, 526 P.2d 611 (1974) (warrantless safety inspection immediately after fire).

76. Rothstein & Rothstein, *supra* note 7, at 363-66. See *Youghioghny & Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973); *United States v. Montrom*, 345 F. Supp. 1337 (E.D. Pa. 1972), *aff'd mem.*, 480 F.2d 918 (3d Cir. 1973). *Contra*, *United States v. Hart*, 359 F. Supp. 835 (D. Del. 1973).

77. Comment, *supra* note 35, at 108.

78. *Id.*

79. 493 F.2d 682 (2d Cir. 1974), *cert. denied*, 419 U.S. 875 (1974).

80. N.Y. PUB. HEALTH LAW § 3385 (McKinney 1977). The inspection in question was of the pharmacist's records concerning narcotics and other controlled substances.

81. 493 F.2d at 685. The search was not unreasonable because the statute limited its scope and notified the owner of its lawful restrictions.

82. *Id.* The statute served the purposes of a warrant by preventing a general search. *Id.* at 685.

recognize an urgent federal interest in controlling narcotics.⁸³ The decision, however, contained dictum indicating that the court believed that the *Camara-See* rule had been negated.⁸⁴ It said that those holdings "were rather promptly narrowed, as, indeed, had been foreshadowed by *Camara* and *See* themselves," in *Colonnade* and *Biswell*.⁸⁵

Federal courts also upheld warrantless administrative inspections under provisions of the Federal Food, Drug, and Cosmetic Act.⁸⁶ In *United States v. Business Builders, Inc.*,⁸⁷ the court noted that the Act's inspection provision permitted inspection at reasonable times of warehouses containing food, drugs, or cosmetics, and that the statute in effect took the place of a valid search warrant.⁸⁸ Upholding the statutory inspection procedure was consistent with the *Colonnade-Biswell* exception. As the court pointed out: "It would be an affront to common sense to say that the public interest is not as deeply involved in the regulation of the food industry as it is in the liquor and firearms industries."⁸⁹ Similarly, in *United States v. Del Campo Baking Manufacturing Co.*,⁹⁰ the Delaware district court held that the inspection of Del Campo's facilities was entirely proper under *Biswell* despite the defendant's contention that *Biswell* was inapplicable because the baking company was not federally licensed.⁹¹ The *Biswell* decision was not to be so narrowly construed because

[t]he fact that *Biswell* was federally licensed . . . was not the rationale for upholding the warrantless inspection under the Fourth Amendment. The thrust of [*Biswell*] is that there is no issue of consent to a regulatory inspection conducted without a warrant when such a compliance inspection is authorized by federal statute in a "pervasively regulated business."⁹²

Even though Del Campo was not required to obtain a federal license to operate, the court considered the business as "pervasively regulated" by the

83. See Comment, *supra* note 35, at 109.

84. See Note, *Warrantless Nonconsensual Searches Under the Occupational Safety and Health Act of 1970*, 46 GEO. WASH. L. REV. 93, 98 (1977).

85. 493 F.2d at 684.

86. 21 U.S.C. §§ 301-392 (1976). The inspection provision, 21 U.S.C. § 374(a) (1976), provides in part:

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 . . . are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which foods, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or after such introduction . . . 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 . . . Each such inspection shall be commenced and completed with reasonable promptness.

87. 354 F. Supp. 141 (N.D. Okla. 1973).

88. *Id.* at 143.

89. *Id.*

90. 345 F. Supp. 1371 (D. Del. 1972).

91. *Id.* at 1377.

92. *Id.* at 1376.

Federal Food, Drug, and Cosmetic Act as if it were federally licensed.⁹³

The *Biswell* exception to the warrant requirement was construed in *Youghioghery and Ohio Coal Co. v. Morton*⁹⁴ to include the unlicensed but heavily regulated coal industry.⁹⁵ In *Youghioghery* the court upheld the constitutionality of provisions in the Federal Coal Mine Health and Safety Act of 1969⁹⁶ that directed and required the Secretary of the Interior and his authorized representatives to make warrantless searches of coal mines.⁹⁷ The court noted that the coal industry had long been held subject to Congress' powers under the commerce clause and that businesses in this pervasively regulated industry appeared to have consented, "by implication at least, to reasonable intrusions by federal authorities."⁹⁸ Whether the inspection scheme was constitutional depended upon "whether warrantless searches, in the context of mine safety investigations, are reasonable."⁹⁹ Reasonableness was determined by (1) "whether the government had a valid and important interest in this area," (2) whether resort to a magistrate for a warrant would frustrate attainment of the statute's goals, (3) whether the coal mine owner had a reasonable expectation of privacy, and (4) whether a grave danger of abuse was created by allowing warrantless entry.¹⁰⁰ The court found the investigative scheme reasonable under these criteria and accordingly held permissible the legislative determination

that probable cause or exigent circumstances exist in the coal industry so as to make warrantless searching of its mines reasonable In the Fourth Amendment area, where the essence of the right hinges on a concept of reasonableness, the Congressional definition is entitled to great weight. In the case at bar . . . we refuse to second guess its determination.¹⁰¹

After the *Youghioghery* decision, legislative determinations of reasonableness within the meaning of the fourth amendment were given even greater weight when a federal district court in Georgia upheld the

93. *Id.* at 1377.

94. 364 F. Supp. 45 (S.D. Ohio 1973).

95. Rothstein & Rothstein, *supra* note 7, at 364-65.

96. 30 U.S.C. §§ 801-960 (1976).

97. *Id.* §§ 813, 814, 819. Section 813(a), for example, provides:

Authorized representatives of the Secretary shall make frequent inspections and investigations in coal mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under this subchapter. In carrying out the requirements of clauses (3) and (4) of this subsection, no advance notice of an inspection shall be provided to any person. In carrying out the requirements of clauses (3) and (4) of this subsection in each underground coal mine, such representatives shall make inspections of the entire mine at least four times a year.

98. 364 F. Supp. at 49-50.

99. *Id.* at 50.

100. *Id.*

101. *Id.* at 52.

constitutionality of warrantless inspections by the Occupational Safety and Health Administration (OSHA) pursuant to provisions of the Occupational Safety and Health Act of 1970.¹⁰² In *Brennan v. Buckeye Industries, Inc.*,¹⁰³ the Secretary of Labor was granted an order compelling an inspection after Buckeye refused to permit a warrantless inspection of its business premises even though there had been neither citations for alleged violations nor any complaints by employees of Buckeye to OSHA.¹⁰⁴ The court reasoned that the regulatory powers of the federal government and the compelling need for unannounced inspections made the entry reasonable,¹⁰⁵ and that requiring a probable cause showing "would serve to destroy the object of the legislation."¹⁰⁶ The decision thus sanctioned warrantless safety and health inspections for the nation's estimated five million business establishments and sixty million employees covered by OSHA without a compelling reason and without regard to whether the businesses were regulated or licensed.¹⁰⁷ With *Buckeye Industries*, the *Biswell* exception for licensing a business or marketing a product became so far reaching that it threatened to nullify the *Camara-See* rule.¹⁰⁸

II. THE RENAISSANCE OF *Camara* AND *See*

Despite the emphasis placed on the *Biswell* exception to the warrant requirement and its expansion by several lower court decisions, the Supreme Court has emphatically reaffirmed its holding in *Camara* that "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."¹⁰⁹ It is now very clear that *Camara* and *See* state the rule with regard to administrative searches and inspections.¹¹⁰

In *Almeida-Sanchez v. United States*,¹¹¹ border patrol agents searching for illegal aliens on a roving patrol twenty-five miles north of the Mexican border stopped a car and conducted a warrantless search

102. 29 U.S.C. §§ 651-678 (1976).

103. 374 F. Supp. 1350 (S.D. Ga. 1974).

104. *Id.* at 1351.

105. *Id.* at 1354.

106. *Id.*

107. See also BUREAU OF NATIONAL AFFAIRS, THE JOB SAFETY AND HEALTH ACT OF 1970, at 1 (1971) [hereinafter cited as BUREAU]; Robbins, *Truth and Rumor About OSHA*, 33 FED. B.J. 149 (1974).

108. See Rothstein & Rothstein, *supra* note 7, at 366. The *Buckeye* case was heavily criticized almost immediately after it was decided. See Comment, *OSHA v. The Fourth Amendment: Should Search Warrants Be Required for "Spot Check" Inspections?*, 29 BAYLOR L. REV. 282 (1977); Note, *Brennan v. Buckeye Industries, Inc.: The Constitutionality of an OSHA Warrantless Search*, 1975 DUKE L.J. 406; Comment, *supra* note 35; Note, *supra* note 84.

109. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

110. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

111. 413 U.S. 266 (1973).

allegedly authorized by section 1357 of the Immigration and Nationality Act.¹¹² The search of the automobile uncovered marijuana, and the petitioner was subsequently convicted for having knowingly received and facilitated the transportation of illegally imported marijuana in violation of federal law. The Supreme Court held that the search, made without probable cause or consent, violated the fourth amendment and reversed the conviction.

In *Almeida-Sanchez* the government argued that the cases dealing with administrative inspections supported the validity of the search.¹¹³ The Court rejected this contention, however, because the search in question "embodied precisely the evil the Court saw in *Camara* when it insisted that the 'discretion of the official in the field' be circumscribed by obtaining a warrant prior to the inspection."¹¹⁴ The Court also stated that *Biswell* and *Colonnade* were inapposite:

A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him.¹¹⁵

The Court's analysis indicated that the *Biswell-Colonnade* holdings were limited in scope¹¹⁶ and that the *Camara-See* rule, which requires that a search be carried out pursuant to either a warrant, a finding of probable cause, or consent,¹¹⁷ would continue to have vitality.

In *G.M. Leasing Corp. v. United States*,¹¹⁸ the Court again reaffirmed the *Camara-See* principle. In this case the Internal Revenue Service (IRS) had investigated the tax liability of an individual taxpayer who was a fugitive from justice, determined deficiencies for two years, and made jeopardy assessments pursuant to the Internal Revenue Code.¹¹⁹ The IRS determined that the petitioner was the taxpayer's alter ego and then made a warrantless, forced entry of petitioner's office for the purpose of levying

112. 8 U.S.C. § 1357 (1976). Section 1357(a)(3) gives to the Immigration and Naturalization Service power without a warrant to search any vehicle within a reasonable distance of the border. A reasonable distance is construed by the Attorney General's regulation to mean within one hundred miles of the border. 8 C.F.R. § 287.1(a)(2) (1978).

113. 413 U.S. at 269. Since there was no probable cause for the search, "[n]o claim was made, nor could one be, that the search of the . . . car was constitutional under [*Carroll v. United States*, 267 U.S. 132 (1925)]."

114. *Id.* at 270.

115. *Id.* at 271. The Court also emphasized that in *Biswell* and *Colonnade* the inspecting officers knew that the premises searched were used for the sale of liquor or guns, while in the border search in controversy "there was no reason whatever to believe that [defendant] or his automobile had even crossed the border, much less that he was guilty of the commission of an offense." *Id.* at 271-72.

116. The Court's statement, however, seems to acknowledge that the *Biswell-Colonnade* exception includes unlicensed but pervasively regulated industries.

117. *Id.* at 270.

118. 429 U.S. 338 (1977).

119. I.R.C. § 6861(a).

property subject to seizure. No initial seizures were made, but two days later the IRS agents again entered the office without a warrant and seized books, records, and other property. The Supreme Court held that this warrantless entry violated the fourth amendment.¹²⁰ Its analysis of the warrant requirement began with *Camara*: "one governing principle . . . has consistently been followed: 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."¹²¹

The Court acknowledged that "a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context."¹²² In this case, however, the intrusion was not based on the nature of petitioner's business, its license or any specific regulation of its activities.¹²³ Rather, the search was based merely on the fact that petitioner's assets were seizable to satisfy tax assessments. Thus, there was no reason to treat petitioner differently simply because it was a corporation, and fourth amendment protections were available to it.¹²⁴

It stretched the *Biswell* exception too far to say that the federal interest in tax collection was sufficient to justify warrantless intrusions into our private and business lives. Individuals and businesses, simply because they are taxpayers, should not be subject to intrusions of this nature. Otherwise, the fourth amendment would become meaningless. Nor, with a federal interest as generalized in its application as taxation and the collection of taxes, can it be said that taxpayers impliedly consent to warrantless IRS inspections. Expectations of privacy are not so low. In the taxation context the federal interest in collection is outweighed by the taxpayer's privacy interest, which can only be protected by the warrant requirement. Thus, the Court was correct in its unwillingness to say that section 6331 of the Internal Revenue Code exempted from the warrant requirement "every intrusion into privacy made in furtherance of any tax seizure."¹²⁵ This type of search had to be authorized by a valid warrant.¹²⁶

120. 429 U.S. at 359. In *G.M. Leasing* the Supreme Court considered the history of enforcement of the tax laws, the scope of the Internal Revenue Code provisions authorizing "distrain and seizure by any means," I.R.C. §§ 6331, 7701(a)(21), the burden on the government of having to obtain a warrant, and the urgent federal interest in the collection of taxes. 429 U.S. at 356-57. The government argued that this urgent interest brought the case within the *Colonnade-Biswell* rationale, but the Court distinguished those cases as presenting "voluntary participation in a highly regulated activity," whereas the Code section in question "covers all defaults on all taxes." The Court was "unwilling to hold that the mere interest in the collection of taxes is sufficient to justify a statute declaring *per se* exempt from the warrant requirement every intrusion into privacy made in furtherance of any tax seizure." *Id.* at 357-58.

121. *Id.* at 352-53 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967)).

122. *Id.* at 353.

123. *Id.* at 354.

124. *Id.*

125. *Id.* at 358 (emphasis added).

126. *Id.*

III. *Marshall v. Barlow's, Inc.*

A. *The Holding*

The Occupational Safety and Health Act of 1970 (Act)¹²⁷ was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."¹²⁸ Characterized as the "most all encompassing piece of legislation since the income tax,"¹²⁹ the Act covers over five million employers and nearly sixty million employees.¹³⁰ The key to its enforcement is the authority vested in the Secretary of Labor to make periodic inspections of business premises¹³¹ and to issue citations for any violations discovered during the investigation.¹³² It authorizes inspections to take place without consent of the owner and without a search warrant.¹³³ With over 2200 agency employees conducting thousands of inspections each year, the Act affects almost every business in the country.¹³⁴

The Act's inspection provisions have been the topic of scholarly comment and criticism,¹³⁵ and several companies have challenged this

127. 29 U.S.C. §§ 651-678 (1976).

128. *Id.* § 651.

129. *The Effects of the Administration of the Occupational Safety and Health Act on Small Business: Hearings Before the Subcomm. on Environmental Problems Affecting Small Business of the Permanent Select Comm. on Small Business*, 93d Cong., 2d Sess. 2 (1974) (statement of Rep. William L. Hungate).

130. Robbins, *supra* note 107, at 149.

131. 29 U.S.C. § 657(a) (1976). This subsection provides:

In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

132. 29 U.S.C. § 658 (1976).

133. There was a controversy over whether Congress intended to permit warrantless OSHA inspections. Aside from the statute's silence on the need to obtain a warrant prior to inspection, the only suggestion that the statute contemplates warrantless searches is a passing remark to that effect in the minority views on a rejected version of the bill. *See* H.R. REP. NO. 91-1291, 91st Cong., 2d Sess. 55 (1970). Section 8(a) of the Act directs inspectors to enter "without delay" upon presentation of credentials. This language does not necessarily mean that an inspector may enter business premises without a warrant, but a warrant requirement would be inconsistent with immediate entry. On the other hand, during debate in the House of Representatives one of the Act's sponsors stated that inspectors would have to follow applicable constitutional guidelines. 116 CONG. REC. 38,709 (1970) (remarks of Rep. Steiger). *See* Note, *supra* note 84, at 102-04; Comment, *supra* note 70, at 1222-23. The existence of this controversy was also shown by the several results reached by district courts considering the Act's inspection provisions. *See* notes 135-39 and accompanying text *infra*.

134. Corn, *A New Posture for the Occupational Safety and Health Administration*, 27 LAB. L.J. 259 (1976). An "employer" is defined in 29 U.S.C. § 652(5) (1976) as any person engaged in a business affecting commerce who employs one or more workers. Administrative directives now exempt employers of fewer than ten employees from certain of the Act's requirements. [1977] O.S.H. REP. (BNA) 235.

135. *See, e.g.*, Weissberg, *supra* note 25; Note, *supra* note 84; Comment, *supra* note 71.

authority in the courts.¹³⁶ Three different conclusions were reached in the lower courts: (1) without deciding whether or not the Act's inspection provisions were constitutional several courts held that Congress intended that OSHA function within a constitutionally acceptable warrant procedure;¹³⁷ (2) two courts held that warrantless, nonconsensual OSHA inspections were reasonable and not proscribed by the fourth amendment;¹³⁸ and (3) one court held that warrantless inspections were authorized by the Act but were unconstitutional.¹³⁹ This controversy was ultimately resolved by the Supreme Court's decision in *Marshall v. Barlow's, Inc.*,¹⁴⁰ which held that warrantless inspections pursuant to section 8(a) of the Act¹⁴¹ violated the fourth amendment.

The *Barlow's* case dealt with the refusal of Bill Barlow, a plumbing contractor, to admit an OSHA inspector to the nonpublic employee areas of his business. The inspector entered the company's customer-service area, presented credentials, and informed Mr. Barlow that he wished to inspect the company's working areas. Mr. Barlow asked the inspector if he had a search warrant, the answer was no, and admission was refused. Subsequently, a district court issued an order compelling Mr. Barlow to admit the inspector, but he again refused and sought injunctive relief against the warrantless inspection.¹⁴² A three-judge court was convened; it concluded that under *Camara* and *See* the fourth amendment required a warrant for the search and that section 8(a) was unconstitutional.¹⁴³

The Supreme Court affirmed.¹⁴⁴ The Court noted that it had already held warrantless searches to be generally unreasonable for commercial premises as well as homes "except in certain carefully defined classes of cases."¹⁴⁵ Therefore, "unless some recognized exception to the warrant requirement applies" the *See* decision requires a warrant to conduct

136. *Marshall v. Reinhold Constr., Inc.*, 441 F. Supp. 685 (M.D. Fla. 1977); *Usery v. Centrif-Air Mach. Co.*, 424 F. Supp. 959 (N.D. Ga. 1977); *Marshall v. Shellcast Corp.*, 5 O.S.H.C. 1689 (N.D. Ala. 1977); *Alaska Truss & Millwork v. Alaska*, 5 O.S.H.C. 1530 (Alaska 1977); *Barlow's, Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho 1976) (three-judge court), *aff'd sum nom.* *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Dunlop v. Hertzler Enterprises*, 418 F. Supp. 627 (D. N.M. 1976); *Brennan v. Gibson's Prods., Inc.*, 407 F. Supp. 154 (E.D. Tex. 1976); *In re Rupp Forge Co.*, 4 O.S.H.C. 1487 (N.D. Ohio 1976); *Dunlop v. Able Contractors Inc.*, 4 O.S.H.C. 1110 (D. Mont. 1975); *Brennan v. Buckeye Indus., Inc.*, 374 F. Supp. 1350 (S.D. Ga. 1974).

137. *See, e.g., Usery v. Centrif-Air Mach. Co.*, 424 F. Supp. 959 (N.D. Ga. 1977); *Dunlop v. Hertzler Enterprises*, 418 F. Supp. 627 (D. N.M. 1976); *Brennan v. Gibson's Prods., Inc.*, 407 F. Supp. 154 (E.D. Tex. 1976).

138. *Dunlop v. Able Contractors Inc.*, 4 O.S.H.C. 1110 (D. Mont. 1975) (citing *Brennan v. Buckeye Indus., Inc.*, 374 F. Supp. 1350 (S.D. Ga. 1974)).

139. *Barlow's, Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho 1976) (three-judge court), *aff'd sub nom.* *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

140. 436 U.S. 307 (1978).

141. The text of this section is set forth at note 131 *supra*.

142. 436 U.S. at 310.

143. *Barlow's, Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho 1976) (three-judge court), *aff'd sub nom.* *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

144. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

145. *Id.* at 312 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967)).

OSHA inspections.¹⁴⁶ The Court acknowledged that *Biswell* and *Colonnade* are exceptions to the *Camara-See* rule, but said that they were responses to virtually unique circumstances concerning industries with such a history of governmental oversight that no reasonable expectation of privacy could exist for the proprietors.¹⁴⁷ When one engaged in such a business he voluntarily chose "to subject himself to a full arsenal of governmental regulation."¹⁴⁸ To the Court the clear import of its decisions was that these closely regulated industries are the exception and not the rule.¹⁴⁹

The government had argued that the Act's inspection provision should be upheld because all businesses that were engaged in interstate commerce had long been subjected to close supervision of employee safety and health conditions and therefore fit within the *Colonnade-Biswell* exception. In response the Court stated:

But the degree of federal involvement in employee working circumstances has never been of the order of specificity and pervasiveness that OSHA mandates. It is quite unconvincing to argue that the imposition of minimum wages and maximum hours on employers who contracted with the government under the Walsh-Healy Act prepared the entirety of American interstate commerce for regulation of working conditions to the minutest detail. Nor can any but the most fictional sense of voluntary consent to later searches be found in the single fact that one conducts a business affecting interstate commerce; under current practice and law, few businesses can be conducted without having some effect on interstate commerce.¹⁵⁰

Thus businessmen had not, by utilizing employees in their enterprises, thrown open their private working areas to the warrantless scrutiny of government agents,¹⁵¹ and the fact that employees were free to report violations of the Act was no justification for agents to enter restricted areas to conduct warrantless inspections.¹⁵²

The Court was not convinced that requiring warrants would impose serious burdens on the inspection system or the courts. Nor did the majority believe that requiring warrants would prevent inspections necessary to enforce the statute or make inspections less effective.¹⁵³ Furthermore, the Court did not agree that the incremental privacy protections afforded by a warrant were so marginal that they did not justify the administrative burdens obtaining a warrant might entail.¹⁵⁴ It

146. 436 U.S. at 313.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 314.

151. *Id.* at 315.

152. *Id.*

153. *Id.*

154. *Id.* at 322. "A warrant . . . would provide assurances from a neutral officer that the inspection is reasonable . . . , is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." *Id.* at 323. A warrant would also "advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed." *Id.*

concluded that the government's numerous concerns did not suffice to justify warrantless OSHA inspections or "vitiating the general constitutional requirement that for a search to be reasonable a warrant must be obtained."¹⁵⁵

B. *The Effect on the Colonnade-Biswell Exception*

Marshall v. Barlow's, Inc. signaled that the fourth amendment is not in general retreat before an administrative advance.¹⁵⁶ Nevertheless, it cannot be said that all statutorily authorized warrantless administrative inspection schemes are now invalid.

In *Barlow's* the Secretary of Labor argued that requiring a warrant for OSHA inspections would mean that warrantless search schemes in other regulatory statutes are also constitutionally infirm.¹⁵⁷ The Supreme Court rejected this argument indirectly. It said that its opinion was based "on the facts and law concerned with OSHA," and that it would "not retreat from a holding appropriate to that statute because of its real or imagined effect on other, different administrative schemes."¹⁵⁸ It indicated that future determinations would be made on a case-by-case basis: "The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute."¹⁵⁹

Marshall v. Barlow's, Inc. left intact the *Colonnade-Biswell* exception to the warrant requirement for closely regulated industries; however, such industries were found to be the exception and not the rule.¹⁶⁰ Furthermore, despite emphatic reaffirmation of the policy behind *Camara* and *See*, the Court indicated that other inspection programs may be constitutional when "regulations [are] already so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply."¹⁶¹

The questions that remain after *Barlow's* are (1) what is the scope of this exception and (2) how does one determine whether a particular statutory inspection scheme is reasonable and thus within this valid exception to the warrant requirement. The answers are necessarily to be found by scrutinizing fourth amendment interpretations and examining the diverse circumstances under which warrantless searches have been held reasonable. Reasonableness is the ultimate standard, and the reasonableness of a search depends on the legitimacy of the privacy interests at stake.¹⁶² These issues will be examined in the context of

155. *Id.* at 324.

156. Two district courts reached the same conclusion prior to *Barlow's*. See *Usery v. Centrif-Air Mach. Co.*, 424 F. Supp. 959, 961 (N.D. Ga. 1977); *Brennan v. Gibson's Prods., Inc.*, 407 F. Supp. 154, 161 (E.D. Texas 1976).

157. 436 U.S. at 321.

158. *Id.* at 321-22.

159. *Id.* at 321.

160. *Id.* at 313.

161. *Id.* at 321.

162. Conflicts in the case law leave unsettled the question whether a search may constitutionally be measured against a reasonableness standard alone or whether a warrant is mandatory. Determining

determining the exceptions to the *Camara-See* rule after *Marshall v. Barlow's, Inc.*

IV. EXCEPTIONS TO THE *Camara-See* RULE AFTER *Marshall v. Barlow's, Inc.*

In delineating the constitutional safeguards applicable to particular administrative inspections the Supreme Court has balanced the governmental interest against the fourth amendment interest of the individual or entity subject to the challenged inspection.¹⁶³ This balancing process is evident in the line of administrative inspection cases from *Camara* and *See* to *Barlow's*.¹⁶⁴ Two principles govern this balancing of the government's need to inspect against the intrusion into privacy that

whether a warrantless search is unreasonable per se or merely presumptively unreasonable requires a balancing of the fourth amendment's prohibition of unreasonable searches and its requirements for the issuance of a warrant. Conflicting conclusions result from different views of the dependency between the fourth amendment's two clauses. Carden, *Federal Power to Seize and Search Without Warrant*, 18 VAND. L. REV. 1 (1964), finds the clauses completely dependent so that the second clause, which establishes the standards for issuing warrants, provides the exclusive method for initiating a reasonable search. See also Comment, *Cause to Search and Seize*, 26 LA. L. REV. 302 (1966); Note, *supra* note 59, at 611-12 & n.14. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921), asserts that because the amendment was drafted in two parts, the phrase "unreasonable searches" must cover more than the form of the warrant.

Among the cases concerning administrative inspections, *Camara* asserted a strict dependency view of the fourth amendment's clauses, stating that except in very narrowly defined classes of cases, a search of private property without consent is unreasonable unless it has been authorized by a valid search warrant. 387 U.S. at 528-29. *See* held that warrantless searches of homes are presumptively unreasonable. 387 U.S. at 542. Yet in *Wyman v. James*, 400 U.S. 309 (1971), the Court held that a warrantless visit to a welfare recipient's dwelling was reasonable. In *Katz v. United States*, 389 U.S. 347, 357 (1967) the Supreme Court held that all searches must be reasonable and those without a warrant are presumptively unreasonable, yet in *Terry v. Ohio*, the Court deemed the two clauses independent and posited different requirements for a reasonable search as compared to a search based strictly on probable cause. 392 U.S. 1, 20 (1968). The Court has asserted the "[t]he ultimate standard set forth in the Fourth Amendment is reasonableness." *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973); accord, *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950) ("The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.")

163. *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976). In *Camara* and *See* the Court's balancing process is reflected in the adoption of a flexible probable cause standard for obtaining the administrative search warrant. See notes 31-35 & 39-40 and accompanying text *supra*; see also Greenberg, *supra* note 30, at 1012.

164. Prior to *Camara* and *See* the Court used a balancing approach only in cases calling for immediate action. These exceptional situations required balancing governmental necessity against citizens' privacy and resulted in the abandonment of the fourth amendment's warrant requirements. Greenberg, *supra* note 30, at 1012. In *Camara* the Court held that the individual's right to privacy must be balanced against the reasonable and valid purpose of inspections to ensure public health and safety. 387 U.S. at 535. According to *Camara*, issuance of a warrant is based on satisfaction of a flexible probable cause standard. The need to search is weighed against the invasion the search entails; the resulting balance may vary from inspection to inspection, depending upon the public need for effective enforcement in a particular area, the nature of the search proposed, the legislative and administrative standards under which particular regulatory inspections are to be conducted, an agency's experience with particular facilities, and the length of time that has passed without inspection. *Id.* at 535-39.

A balancing approach was also taken in *Marshall v. Barlow's, Inc.* See 436 U.S. 307, 315-18 (1978). In *Barlow's* the government suggested that the Court decide whether a warrant is needed by arriving at a sensible balance between the administrative necessities of warrantless OSHA inspections and the protection of privacy a warrant would afford. *Id.* at 315-16. Its position was that a decision exempting OSHA from the warrant requirement would give full recognition to the competing public and private interests at stake. *Id.* at 316. These arguments were rejected by the court. See notes 160-62 and accompanying text *supra*.

inspection entails: (1) warrantless searches are the exception and not the rule; and (2) the exceptions that operate to negate the warrant requirement for nonconsensual searches apply only in certain carefully defined classes of cases.¹⁶⁵ By using these two governing principles as a starting point for balancing the competing interests at stake, four general classes of exceptions to the *Camara-See* rule can be defined: (1) emergency inspections; (2) consensual inspections; (3) inspections of objects in plain view; and (4) the *Colonnade-Biswell* exception for pervasively regulated industries.

A. *Emergency Inspections*

In *Camara* the Supreme Court specifically recognized the exception to the warrant requirement for emergency situations: “[N]othing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations.”¹⁶⁶ Under a balancing analysis, “exigent circumstances eliminate the warrant requirement because the urgency of an immediate search outweighs the right to privacy.”¹⁶⁷ This exception is applicable only in extreme situations such as seizures of unwholesome food, compulsory smallpox vaccinations, health quarantines, and summary destruction of tubercular cattle.¹⁶⁸

The continuing vitality of the emergency exception is evident from the Supreme Court’s recent decision in *Michigan v. Tyler*.¹⁶⁹ There the Court said that “[a] burning building clearly presents an exigency of sufficient proportions to render a warrantless entry ‘reasonable.’”¹⁷⁰ Once the firefighters are in the building to put out a fire, and for a reasonable time thereafter, they may investigate the causes of the fire and seize evidence of arson that is in plain view.¹⁷¹ Subsequent entries to inspect the cause of the blaze must be made pursuant to warrant procedures governing administrative searches.¹⁷² If the investigators find probable cause to believe that arson has occurred and further access is required to obtain evidence for possible prosecution, then the traditional showing of probable cause applicable to searches for evidence of a crime must be met to obtain the warrant.¹⁷³

165. See *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

166. *Id.* at 539.

167. Rothstein & Rothstein, *supra* note 7, at 351.

168. *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967). See *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (unwholesome food); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (smallpox vaccination); *Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health*, 186 U.S. 380 (1902) (health quarantine); *Kroplin v. Truax*, 119 Ohio St. 610, 165 N.E. 498 (1929) (destruction of cattle).

169. 436 U.S. 499 (1978).

170. *Id.* at 509.

171. *Id.* For a discussion of the “plain view” exception, see notes 187-97 and accompanying text *infra*.

172. 436 U.S. at 511.

173. *Id.* at 511-12.

The Court's balancing approach to the fourth amendment issues relating to administrative inspections is shown by this exception to the warrant requirement. The privacy interest and the attendant warrant requirement must give way to administrative necessity when compelled by exigent circumstances.¹⁷⁴

B. *Consensual Inspections*¹⁷⁵

Valid consent operates as a waiver of the fourth amendment right against warrantless searches.¹⁷⁶ Most administrative inspections are conducted on the basis of consent because it is questionable whether a firm should withhold consent unless there is some genuine doubt about the validity of the inspection. In *Marshall v. Barlow's, Inc.*, the Supreme Court recognized that "the great majority of businessmen can be expected in normal course to consent to inspection without warrant."¹⁷⁷

The standard of consent for administrative inspections is less stringent than that required for criminal searches.¹⁷⁸ In *United States v. Thriftmart, Inc.*,¹⁷⁹ the Ninth Circuit held that consent to an administrative inspection does not have to be express and that failure to object to a known search constitutes consent.¹⁸⁰ By contrast, the inherently coercive police presence and the element of surprise that attend criminal searches strongly suggest that consent in the criminal context should be express and voluntary.¹⁸¹ In the administrative context, consent "is not only not suspect but is to be expected . . . [I]nspection itself is inevitable. Nothing is to be gained by demanding a warrant except that the inspectors have been put to trouble—an unlikely aim for the businessman anxious for administrative good will."¹⁸² After all, the probable cause standard for obtaining an administrative search warrant is more flexible

174. See Rothstein & Rothstein, *supra* note 7, at 353.

175. See generally *id.* at 353-58.

176. *Id.* at 353.

177. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 316 (1978). The exception was also delineated in *See v. City of Seattle*: "We therefore conclude that administrative entry, *without consent* . . . may only be compelled through prosecution or physical force within the framework of a warrant procedure." 387 U.S. 541, 545 (1967) (emphasis added).

178. Rothstein & Rothstein, *supra* note 7, at 354-55.

179. 429 F.2d 1006 (9th Cir. 1970), *cert. denied*, 400 U.S. 926, *rehearing denied*, 400 U.S. 1002 (1971).

180. In *Thriftmart*, Food and Drug Administration inspectors presented notices of inspection to warehouse managers and requested permission to enter and inspect. The managers said "go ahead" even though the inspectors did not have search warrants. The inspectors did not advise the managers that they had a right to insist on search warrants, 429 F.2d at 1008; nevertheless, the consent was held valid. See also *United States v. Hammond Milling Co.*, 413 F.2d 608 (5th Cir. 1969), *cert. denied*, 396 U.S. 1002 (1970) (consent found although it was not actually expressed and despite unawareness of the right to refuse consent).

181. See Rothstein & Rothstein, *supra* note 7, at 354 & n.79 (citing *Schenckloth v. Bustamonte*, 412 U.S. 218 (1973)).

182. 429 F.2d at 1009.

than the showing required for a criminal search warrant.¹⁸³ Demanding a warrant usually will not prevent an inspection, only delay it.

In *Thriftmart* the court also held that the failure of the inspector to warn a company's managers of their right to insist on a warrant did not render consent unknowing or involuntary.¹⁸⁴ If asked, however, inspectors must indicate that there is a right to refuse a warrantless inspection,¹⁸⁵ and when there is any evidence of intimidation, coercion, or misrepresentation, the alleged consent will be invalid.¹⁸⁶

C. Plain View, Public View, and Open Fields

The third exception to the *Camara-See* rule applies when the object of the inspection is open to public view.¹⁸⁷ This exception was expressly referred to in *See*: "[A]dministrative 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."¹⁸⁸ It follows that a warrant is not required for an administrative inspection of premises that are open to the public.¹⁸⁹ This is consistent with the traditional view that merely observing what is open to public view does not constitute a search.¹⁹⁰

This exception was expressly applied to administrative inspections by the Supreme Court in *Air Pollution Variance Board v. Western Alfalfa Corp.*¹⁹¹ A state inspector entered a company's outdoor premises without its knowledge or consent in order to conduct a test of the plumes of smoke coming out of the company's chimneys.¹⁹² The inspector did not have a warrant and state law at that time did not require one.¹⁹³ The company argued that this inspection was unreasonable under *Camara* and *See* and

183. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978):

Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara v. Municipal Court*, 387 U.S. at 538.

184. 429 F.2d at 1010. *See also* *United States v. Robson*, 477 F.2d 13 (9th Cir. 1973) (not necessary for Internal Revenue Service agents to tell a taxpayer that he could demand a warrant for their search of his private tax records).

185. *United States v. Anile*, 352 F. Supp. 14 (N.D. W.Va. 1973) (inspection of drugstore by agents of the Bureau of Narcotics and Dangerous Drugs).

186. *United States v. J. B. Kramer Grocery Co.*, 418 F.2d 987 (8th Cir. 1969).

187. *See generally* *Rothstein & Rothstein*, *supra* note 7, at 366-70.

188. *See v. City of Seattle*, 387 U.S. 541, 545 (1967).

189. *Rothstein & Rothstein*, *supra* note 7, at 366.

190. *Id.* at 366-67 (citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)).

191. 416 U.S. 861 (1974).

192. *Id.* at 862-63. The test was authorized by Colorado law, which required a trained inspector to stand where he had an unobstructed view of the smoke, observe it, and rate it according to a pollution chart. 416 U.S. at 863 & n.1.

193. *Id.* at 863.

violated the fourth amendment.¹⁹⁴ The Supreme Court held those cases inapplicable because the field inspector did not enter the plant or its offices, but merely observed what everyone in the area near the plant could see—plumes of smoke.¹⁹⁵ Accordingly, the Court was unwilling to extend the fourth amendment to sights seen in the open fields.¹⁹⁶

If privacy is invaded by inspections of objects in plain view or open fields, the incursion is abstract and theoretical.¹⁹⁷ When such a privacy interest is weighed against the government's need to inspect, the balance tips sharply toward the government since the invasion of privacy is almost nonexistent.

D. *The Colonnade-Biswell Exception*

Governmental inspections of pervasively regulated industries may not require warrants because the regulatory policies at work will outweigh the limited expectations of privacy of the owner of the business. In order for warrantless inspections of this nature to pass constitutional muster, certain criteria must be satisfied. Before *Barlow's*, a three-judge federal district court summarized the criteria as follows:

First, the enterprise sought to be inspected must be engaged in a pervasively regulated business Second, warrantless inspection must be a crucial part of a regulatory scheme designed to further an urgent federal interest. And third, the inspection must be conducted in accord with a statutorily authorized procedure, itself carefully limited by statute as to time, place, and scope.¹⁹⁸

194. *Id.* at 864.

195. *Id.* at 864-65. The Court emphasized that the inspector did not enter any part of the plant and that even though he was on the company's property, he was not advised that the public was excluded from that area.

196. *Id.* at 865. See *Hester v. United States*, 265 U.S. 57, 59 (1924).

197. 416 U.S. at 865.

198. *Dunlop v. Hertzler Enterprises*, 418 F. Supp. 627, 631-32 (D. N.M. 1976) (three-judge court). Satisfaction of the first criterion ensures that warrantless inspection will pose only a minimal threat to justifiable expectations of privacy; the third criterion guards against the possibility that any inspection right will be abused. *Id.* The second criterion limits the type of governmental interest that justifies suspension of that warrant requirement. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 270-71 (1973); *United States v. Biswell*, 406 U.S. 311, 315-17 (1972). For a discussion of the Supreme Court's use of these criteria in *Biswell*, see notes 55-59 and accompanying text *supra*.

Since *Biswell* the Supreme Court has not provided guidance concerning the definition and relationship of these criteria, but it seems clear that the criteria are dependent and that all must be present for the exception to apply. See, e.g., *Usery v. Centrif-Air Mach. Co.*, 424 F. Supp. 959, 961 (N.D. Ga. 1977); *Dunlop v. Hertzler Enterprises*, 418 F. Supp. 627, 631 (D. N.M. 1976); *Brennan v. Gibson's Prods., Inc.*, 407 F. Supp. 154, 161 (E.D. Tex. 1976). Other courts have described the exception as having four elements that must be satisfied: (1) whether there is pervasive federal regulation to further a valid governmental interest; (2) whether the owners or occupants of the premises have a reasonable expectation of privacy; (3) whether a warrant requirement would frustrate the purpose of the inspection; and (4) whether the statute is sufficiently limited to curtail the discretion of the inspector. See generally *Usery v. Centrif-Air Mach. Co.*, 424 F. Supp. 959, 961 (N.D. Ga. 1977); *Weissberg, supra* note 24, at 932. The elements overlap; whether the interpretation lists three or four is not significant. In order for a statutorily authorized inspection scheme to be valid, a court must be able to conclude that the inspection furthers an urgent federal interest and that the possibilities of abuse and the threat to privacy are not of impressive dimensions. *United States v. Biswell*, 406 U.S. 311, 316 (1972).

These criteria seem to have been left intact in *Marshall v. Barlow's, Inc.*¹⁹⁹ Each will be examined in order to determine the scope of the *Colonnade-Biswell* exception under the balancing approach suggested in recent Supreme Court cases dealing with administrative searches.

1. *Ascertaining Pervasive Regulation*

Pervasive regulation is the most important of the three criteria. This requirement is defined restrictively; the inspection scheme must be directed at a pervasively regulated aspect of a specific industry in order to be reasonable. If it is determined that the inspection scheme is not part of the pervasive regulation of a specific industry, administrative inspection without a warrant contravenes justifiable expectations of privacy and violates the fourth amendment.²⁰⁰ One who elects to engage in a pervasively regulated business is necessarily aware that the applicable regulations may include effective inspection.²⁰¹ The intrusiveness of inspection is thereby diminished because the expectation of privacy in a pervasively regulated industry is presumed to be less than in a nonregulated business. The heavily regulated business accepts the "burdens as well as the benefits" of the trade and in effect consents to the restrictions placed upon it.²⁰² In this context, warrantless inspections do not pose a significant threat to privacy.

To satisfy the pervasive regulation criterion, the warrantless inspection procedure must be part of a detailed regulatory statute aimed at a particular aspect of a specific industry.²⁰³ By contrast, warrantless statutory inspection procedures aimed at a particular aspect of doing business common to many industries will not be upheld even if the statute authorizing the inspection is specific and even if there is an urgent federal interest at stake. A less rigid view of regulation, which might weigh the cumulative effect of federal regulations dealing with trade practices, the environment, civil rights, and labor relations in its determination of pervasiveness, would subject the entirety of American businesses engaged in interstate commerce to warrantless inspection schedules aimed at any

199. See notes 157-62 and accompanying text *supra*.

200. *Dunlop v. Hertzler Enterprises*, 418 F. Supp. 627, 631 (D. N.M. 1976). See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313-15 (1978).

201. See *United States v. Biswell*, 406 U.S. 311, 316-17 (1972).

202. *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973). See also *Youghioghny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 51 (S.D. Ohio 1973).

203. The dissent in *Barlow's*, written by Justice Stevens, reads the majority's opinion this way. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 336 (1978) (Stevens, J., dissenting). Justice Stevens maintained that the pertinent inquiry is not whether the inspection program is authorized by a regulatory statute directed at a single industry, but whether Congress has limited the exercise of the inspection power to those commercial premises where the evils at which the statute is directed are to be found. *Id.* at 337. Contrary to Stevens' view the majority found that OSHA was not so limited and their opinion indicated that both inquiries are pertinent. *Id.* at 320. For example, an inspection program aimed at a particular industry but directed at an "evil" not likely to be found in that industry would be unreasonable.

number of congressionally perceived urgent federal interests. Under such a multistatute view of pervasive regulation, all businesses (and arguably every individual) would be pervasively regulated.²⁰⁴

Conditions that determine whether a particular industry is pervasively regulated include the regulatory statute in question, the nature of the industry, the presence of a license, the history of governmental supervision of the industry, and the object of the particular regulatory scheme. Longevity and licensing are relevant, but their presence should not decisively determine the existence of pervasive regulation.

In *Biswell*, for example, the Supreme Court found that the Gun Control Act of 1968 provided for pervasive regulation of firearms in the detailed requirements that the Act placed on licensed firearms dealers.²⁰⁵ The regulations were "industry specific," and therefore it was certain that the object of the inspection—firearms—would be found on the premises. In *Youghioghney and Ohio Coal*,²⁰⁶ which upheld warrantless inspections under the Federal Coal Mine Health and Safety Act of 1969, the existence of several federal statutes governing the coal industry constituted pervasive regulation, even though that issue was not litigated.²⁰⁷ Those statutes were also industry specific, and since coal mines were reasonably presumed to be dangerous, it was quite likely that the object of the inspection—dangerous working conditions—would be found at the premises. The pervasive regulation of business in each of these cases limited the privacy expectations of the owners, who in effect were held to have consented to the regulation.

Whether a business is licensed is relevant to the issue of pervasive regulation but not decisive. In *Del Campo Baking*²⁰⁸ the district court found no valid distinction between a licensed business and one that is unlicensed but heavily regulated.²⁰⁹ The court upheld a warrantless Federal Food, Drug, and Cosmetic Act inspection of the baking company because the defendant's "business of manufacturing, processing, packing, and distributing food . . . [was] as 'pervasively regulated' by the Federal Food, Drug, and Cosmetic Act, and the regulations promulgated thereunder, as if it were federally licensed."²¹⁰ This conclusion is reasonable because the presence of pervasive regulation in the industry-specific sense, like the requirements for obtaining and maintaining a

204. *Accord*, Comment, *Fourth Amendment Implications*, *supra* note 70, at 785-86. *Contra*, Weissberg, *supra* note 25, at 435-36 (arguing that it is possible for one statute to be part of an overall picture of multistatute pervasive regulation).

205. *United States v. Biswell*, 406 U.S. 311, 312 n.1 (1972).

206. *Youghioghney and Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973). *See* notes 94-101 and accompanying text *supra*.

207. 364 F. Supp. at 49-50 & n.3.

208. *United States v. Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371 (D. Del. 1972). *See* notes 90-93 and accompanying text *supra*.

209. *Id.* at 1377.

210. *Id.*

license to operate, ensures that a warrantless inspection will pose only a minimal threat to justifiable expectations of privacy.²¹¹

The longevity of a regulatory program for an industry can also reduce a business' reasonable expectation of privacy and is therefore relevant in determining whether pervasive regulation exists.²¹² In *Colonnade* the long history of regulation of the liquor business included special treatment of inspection laws; this history provided a basis for the Court to uphold Congress' authority to fashion standards of reasonableness for administrative searches in the liquor industry.²¹³ Nevertheless, *Biswell* makes it clear that the absence of a history of regulation is not dispositive of the power to search without a warrant. In *Biswell*, the urgency of the industry-specific federal interest in regulating the traffic in firearms was sufficient to sustain the validity of the search procedures in the then-recently enacted Gun Control Act.²¹⁴

In *G.M. Leasing Corp. v. United States*,²¹⁵ on the other hand, the Internal Revenue Code provision authorizing the warrantless search of the petitioner's premises covered all defaults on all taxes. The government's justification for the search was that the petitioner's assets were seizable to satisfy tax assessments against an individual.²¹⁶ The intrusion was not based on the nature of petitioner's business, its license, or any regulation of its activities (other than the fact it had to file returns and pay taxes). Thus, the Court was unwilling to hold that the "mere interest in the collection of taxes" was sufficient to exempt this kind of search from the warrant requirement.²¹⁷ The collection of taxes could not amount to "pervasive regulation" within the meaning of *Biswell* because the effect of income taxation is so generalized that it does not diminish a taxpayer's expectations of privacy with regard to his records and property.²¹⁸

*Marshall v. Barlow's, Inc.*²¹⁹ presented a more difficult situation in

211. *Dunlop v. Hertzler Enterprises*, 418 F. Supp. 627, 631-32 (D. N.M. 1976).

212. See *Marshall v. Barlow's, Inc.* 436 U.S. 307, 313 (1978). Justice Stevens, however, argued in his dissenting opinion in *Barlow's* that the longevity of a regulatory program does not have any bearing on the reasonableness of routine inspections and is not a controlling factor in determining whether a warrantless inspection scheme fits within the *Colonnade-Biswell* exception. *Id.* at 336. The critical factor for Justice Stevens is "the Congressional determination that federal regulation would further significant public interests, not the date that determination was made." *Id.* at 337. Congress' conception of what constitutes an urgent federal interest is not static. *Id.* at 336-37. The fact that a particular industry was not subject to any federal supervision for many years should not prevent Congress from determining that a need for much closer scrutiny now exists, and perhaps deciding that warrantless inspections are a crucial part of this new regulatory scheme. *Id.* at 337.

213. See note 50 and accompanying text *supra*.

214. *United States v. Biswell*, 406 U.S. 311, 315 (1972).

215. 429 U.S. 338 (1977). See notes 118-24 and accompanying text *supra*.

216. *Id.* at 354.

217. *Id.* at 354, 358.

218. The fact that the Internal Revenue Code is a highly specific statute with great detail and complexity did not bring this search within the *Colonnade-Biswell* exception. *Contra*, Note, *OSHA Inspections and the Fourth Amendment: Balancing Private Rights and Public Need*, 4 *FORDHAM URB. L.J.* 101, 116 (1977). Everyone does not, by reason of status as a taxpayer, effectively consent to warrantless IRS searches and the Internal Revenue Code is not industry specific.

219. 436 U.S. 307 (1978).

which to determine the presence of pervasive regulation. It was clear to the Court that previous federal regulation of working conditions had never been as comprehensive as under OSHA and that the mere imposition of minimum wages and maximum hours on employers under federal laws relating to government contracts did not prepare "the *entirety* of American interstate commerce for regulation of working conditions to the minutest detail."²²⁰ Nor did the various federal laws dealing with the general welfare of the American worker amount to pervasive regulation within the meaning of *Colonnade* or *Biswell*, even though it was argued that such laws had long affected the entirety of businesses engaged in interstate commerce, had pervasively regulated the safety of the work place and the health of the worker prior to the establishment of OSHA, and had prepared American business for OSHA's specific regulation of employee working circumstances.²²¹

The Court's holding in *Barlow's*, therefore, was consistent with *G.M. Leasing*, which indicated that the *Colonnade-Biswell* exception would not extend to an inspection procedure aimed at a general aspect of doing business common to virtually all industries.²²² Moreover, one had not consented to OSHA's warrantless inspections simply by having employees. In contrast, *Colonnade* and *Biswell* referred to closely regulated "business[es]" or "industries," certain "industries" having a history of government oversight, or a single "industry" in which regulation might already be pervasive.²²³

From the foregoing it can be inferred that a warrantless inspection scheme will be upheld only if it is narrow in scope and part of a statute

220. 436 U.S. at 314 (emphasis added).

221. The Department of Labor argued that OSHA

is not the first congressional regulation of employee safety and health in industry as a whole rather than in particular types of businesses. It is but the most recent expression of congressional concern that began with the Walsh-Healy Act. . . . Thus, at least two generations of employers have been subjected to extensive federal regulation of employee safety and health. The limited intrusion here into appellee's privacy was therefore based upon longstanding regulation in the limited sphere of employee safety and health and not simply upon appellee's generalized status as a business establishment.

Brief for Appellant, Department of Labor at 43-44, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (footnotes omitted). Furthermore, it was asserted that Congress is fully empowered to authorize limited warrantless inspections so long as they do not impede legitimate expectations of privacy and when a magistrate's evaluation would not afford meaningful protection. The Department of Labor urged that it is difficult to believe that Congress and the states during the last 70 years would have enacted such a large number of regulatory statutes providing for warrantless inspections if the rule were understood to be otherwise, or even subject to substantial uncertainty. *Id.* at 48-50. An amicus brief filed by eleven states in support of OSHA's inspection provisions similarly urged that workplace safety and health has long been subject to pervasive regulation. Brief for Eleven States as Amicus Curiae at 8 n.12, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

222. See *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352-59 (1977).

223. *United States v. Biswell*, 406 U.S. 311, 316 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74, 77 (1970). OSHA, however, is not industry specific; its provisions apply to all employee-staffed businesses affecting interstate commerce. 29 U.S.C. § 651(b)(3)(1976). "The Court, however, concludes that the deference accorded Congress in *Biswell* and *Colonnade* should be limited to situations where the evils addressed by the regulatory statute are peculiar to a specific industry and that industry is one which has been long subject to Government regulation." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 336 (Stevens, J., dissenting).

addressed to a particular aspect of a specific industry that is the object of intense governmental concern.²²⁴ The governing statute must be industry-specific;²²⁵ the history of regulation or the presence of a licensing requirement in the industry may be relevant to the inquiry. The scope of the OSHA inspection was circumscribed by statute,²²⁶ but the regulatory scheme did not have the necessary narrow focus²²⁷ that would have ensured that expectations of privacy were not threatened and that the inspection would advance the urgent federal interests upon which the regulatory scheme was premised.²²⁸

2. Urgent Federal Interests

In order to fit within the *Colonnade-Biswell* exception, a "warrantless inspection must be a crucial part of a regulatory scheme designed to further an urgent federal interest."²²⁹ Warrantless inspections may be considered vital to a regulatory scheme only if requiring a warrant would frustrate the purpose of the inspection.

In determining the urgency of the federal interest and the justification for warrantless inspection, the *Biswell* Court examined the purposes of the regulatory scheme, congressional findings, legislative history, and the nature of the particular business operations to be inspected. The Court concluded that the regulation of interstate traffic in firearms furthered an urgent federal interest because

close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders Large interests are at stake and inspection is a crucial part of the regulatory scheme, since it assures that weapons are distributed through regular channels and in a traceable manner and makes possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms.²³⁰

The Court also relied upon detailed congressional findings and Con-

224. See *Dunlop v. Hertzler Enterprises*, 418 F. Supp. 627, 633 (D. N.M. 1976).

225. A regulatory statute that is pervasive in the industry-specific sense essentially serves the same function as a valid administrative search warrant because there in effect is probable cause to believe that the object of the inspection will be found on the premises searched. See Note, *supra* note 71, at 890.

226. 29 U.S.C. § 657(a)(2) (1976) and 29 C.F.R. §§ 1903.1 & 1903.7 (1977) limited the inspection to areas, materials, and machines with which employees have contact, and to records directly relevant to the purpose of the inspection: detecting safety and health hazards.

227. *Dunlop v. Hertzler Enterprises*, 418 F. Supp. 627, 633 (D. N.M. 1976).

OSHA's sweep is broad, and Congress' findings supporting it are slender. Made subject to its warrantless inspection is every private concern engaged in a business affecting commerce which has employees and all "environments" where these employees work. It thus embraces . . . the whole spectrum of unrelated and disparate activities which compose private enterprise in the United States.

Brennan v. Gibson's Prod., Inc., 407 F. Supp. 154, 161 (E.D. Tex. 1976).

228. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 271-72 (1973). *Contra*, *Weissberg*, *supra* note 25, at 438.

229. *Dunlop v. Hertzler Enterprises*, 418 F. Supp. 627, 632 (D. N.M. 1976).

230. *United States v. Biswell*, 406 U.S. 311, 315-16 (1972).

gress' declaration of the purposes of the Gun Control Act of 1968.²³¹

After determining that the Act's regulatory scheme furthered urgent federal interests and that inspection was a crucial part of the scheme, the Court reasoned that warrantless inspections were necessary and reasonable because

if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.²³²

See was distinguished because there the warrant requirement was not a threat to the effectiveness of the inspection system. In *See* the objects of the inspection—building code violations—were difficult to conceal or correct in a short time. On the other hand illegal firearms were not difficult to conceal in a short time, and requiring a warrant could frustrate achieving the goals of inspection.²³³

In *Youghioghney*²³⁴ detailed congressional findings and declarations pursuant to the Federal Coal Mine Health and Safety Act of 1969 provided a showing that urgent federal interests were at stake in the regulation of the mines.²³⁵ The court deferred to this judgment of Congress in upholding warrantless inspections as a crucial part of this regulatory scheme.

The health, safety and the very lives of coal miners are jeopardized when mandatory health and safety laws are violated. Congress had reason to believe that past regulatory experience compelled a more comprehensive statutory scheme which depends, for its successful implementation, upon frequent, unannounced inspections. Granting the assumptions of this approach, Congress may have had cause to conclude that resort to a judicial officer, prior to every inspection, could tend to frustrate its legislative purpose.²³⁶

The *Barlow's* decision, however, held OSHA's warrantless inspection power unconstitutional even though Congress apparently had determined

231. *Id.* at 315. *See* 18 U.S.C.A. § 921 Historical Note (1976).

232. 406 U.S. at 316.

233. *Id.* at 316-17.

234. *Youghioghney and Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973). *See* notes 94-101 and accompanying text *supra*.

235. 364 F. Supp. at 47, 50. The Act specifically authorized frequent inspections, without advance notice, at least four times a year to implement its mandatory health and safety standards. *See* 30 U.S.C. § 813 (1976).

236. 364 F. Supp. at 50. Courts have shown similar deference to congressional determinations of urgent federal interest in cases concerning warrantless Food and Drug Administration (FDA) inspections. They have acknowledged that the importance of such regulations to the public health puts FDA inspections "within the same category of highly scrutinized endeavors which justifiably includes both the liquor and firearms industries." *United States v. Litvin*, 353 F. Supp. 1333, 1336 (D.D.C. 1973). *See also* *United States v. Business Builders, Inc.*, 354 F. Supp. 141, 143 (N.D. Okla. 1973). The imposition of a warrant requirement would tend to frustrate the purpose of the Federal Food, Drug, and Cosmetic Act because the effectiveness of FDA inspections depends on their being frequent and unannounced.

that such a power was crucial to achieving the urgent governmental interest that underlay the Act—assuring safe working conditions for every worker.²³⁷ The rejection of the Act's inspection scheme was not, however, based on a determination that there was not an urgent federal interest at stake. Rather, the Court concluded that requiring warrants would not prevent inspections necessary to enforce the statute or make inspections less effective.²³⁸ Achievement of the statute's goals would not be frustrated by requiring a warrant.²³⁹

The Supreme Court was willing to second guess Congress because of the general rule against warrantless inspections and because of its conclusion that the administrative necessities of OSHA did not outweigh the privacy interests at stake.²⁴⁰ The health and safety conditions upon which OSHA focuses are unlikely to disappear during the time it takes to obtain a warrant.²⁴¹ Unlike contraband guns or liquor, the objects of an OSHA inspection—unsafe machinery, environmental hazards, and the like—are not easily concealed or removed from premises during the time required to obtain a warrant,²⁴² nor are they always as inherently dangerous as coal mines, drugs or adulterated food.²⁴³ Having to obtain an inspection warrant does not frustrate the effectuation of the Act's purposes.

3. *Statutory Limitations on the Search*

In *Camara* the Supreme Court expressed concern about possible abuses of the power to conduct warrantless searches. It noted the function a magistrate plays in delimiting the scope of a search:

Under the present system [of unannounced warrantless entries by housing code inspectors], when the inspector demands entry, the occupant

237. In support of the urgency of this interest it has been pointed out that one out of every four American workers is exposed on the job to some substance capable of causing death or disease. N.Y. Times, Oct. 3, 1977, at 1, col. 2. One hundred thousand workers die each year from job related injuries and diseases. *Id.* Dec. 20, 1976, at 1, col. 4. The Department of Health, Education, and Welfare estimates that some 390,000 new cases of occupational diseases occur each year, and as many as 100,000 deaths. N. ASHFORD, *CRISIS IN THE WORKPLACE* 3-4 (1976). OSHA was Congress' response to the problems of workplace safety and health. Its stated purpose was "to assure so far as possible every working man and woman in the nation safe and healthful working conditions." 29 U.S.C. § 651 (1976). In considering the Act, Congress faced these facts and found that "this grim current scene . . . represents a worsening trend." S. REP. No. 91-1282, 91st Cong., 2d Sess. 2 (1970). See also Brief for Eleven States as Amicus Curiae at 4, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

238. 436 U.S. at 312-21. The Court pointed out that most businessmen will consent to a search without a warrant, that the Act contemplates surprise searches, and that procedures are available to obtain *ex parte* warrants after a refusal. *Id.* at 316-17.

239. *Contra*, Weissberg, *supra* note 25, at 439-41.

240. Justice Stevens vigorously disagreed with the majority's regard for congressional judgment. "While one may question the wisdom of pervasive governmental oversight of industrial life, I decline to question Congress' judgment that the inspection power is a necessary enforcement device in achieving the goals of a valid exercise of regulatory power." 436 U.S. at 339 (Stevens, J., dissenting).

241. This is disputed. Some have argued that OSHA violations can easily be concealed or temporarily corrected while the inspector procures a warrant. See Weissberg, *supra* note 25, at 439-42.

242. Note, *supra* note 84, at 110.

243. See *id.* at 99 n.47.

has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization.²⁴⁴

This concern about abuse explains the third criterion that must be satisfied before a warrantless inspection scheme fits within the *Colonnade-Biswell* exception. The inspection must be conducted in accordance with a statutorily authorized procedure that carefully limits time, place, and scope in order to guard against possible abuse of an inspection right.²⁴⁵

The most important consideration is the language of the statute, as noted in *Biswell*: "In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute."²⁴⁶ The warrantless inspections authorized by the Gun Control Act of 1968 and upheld in *Biswell* were statutorily limited to the dealer's business hours, his premises (including places of storage), and to required records or documents and firearms or ammunition kept or stored there.²⁴⁷ In addition to these limitations, the Court pointed out that each licensed dealer is given a compilation of ordinances describing his obligations and the inspector's authority²⁴⁸ so that "[t]he dealer is not left to wonder about the purposes of the inspector or the limits of his task."²⁴⁹

Similarly, in *Youghioghenny* the district court considered the purposes of the inspection provisions of the Federal Coal Mine Health and Safety Act of 1969²⁵⁰ and concluded that there was only a slight danger of any abuse of power flowing from the Act's authorization of warrantless entry.²⁵¹ The Act did not expressly limit the time of inspections, but made it very clear that frequent (at least four times a year) unannounced inspections were necessary to implement its mandatory health and safety standards.²⁵² Even though the scope of these frequent inspections included every aspect of mine health and safety conditions, the court felt that there was no real danger that the inspector would exceed his authority.²⁵³ This broad investigative scope was necessary because health and safety conditions are "coterminous with the operation of the mine" by reason of

244. *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967).

245. *Dunlop v. Hertzler Enterprises*, 418 F. Supp. 627, 632 (D. N.M. 1976).

246. *United States v. Biswell*, 406 U.S. 311, 315 (1972). Language in *Colonnade Catering Corp. v. United States* also suggests that "[w]here Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." 397 U.S. 72, 77 (1970).

247. See 18 U.S.C. § 923(g) (1976).

248. 406 U.S. at 316 (citing 18 U.S.C. § 921(a)(19) (1976)).

249. *Id.* at 316.

250. 30 U.S.C. § 813 (1976).

251. *Youghioghenny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 51 (S.D. Ohio 1973).

252. *Id.* at 47-48 (citing 30 U.S.C. § 813(a), 813(b)(1)(1976)).

253. 364 F. Supp. at 51.

the fact that no other operations are carried out at a site. The court also noted that mine owners must know and comply with the Act's standards, that they are aware of the limits on the inspector's powers, and that they know inspectors act under lawful authority.²⁵⁴

The language of a provision authorizing warrantless inspections must be reasonably precise in its limitations. Section 923(g) of the Gun Control Act of 1968, upheld in *Biswell*, sets a reasonable standard of precision.²⁵⁵ The *Del Campo* decision upheld less precise language that authorized inspection "at reasonable times," within "reasonable limits," of warehouses containing food products subject to regulation under the Federal Food, Drug, and Cosmetic Act.²⁵⁶ This language is more precise than the ordinance struck down in *See*,²⁵⁷ which was an expansive grant of authority that allowed an inspector to roam at will throughout the premises without the "owner being able to determine the need for the inspection, its purpose and its lawful limits."²⁵⁸ At a minimum, a statutory inspection provision by its terms must be limited with sufficient precision so that it serves the purposes of a warrant and prevents a general search.²⁵⁹

V. CONCLUSION

The Supreme Court has not announced any far reaching exceptions to the warrant requirement since its decisions in *Camara* and *See*. In *Marshall v. Barlow's, Inc.* it emphatically reaffirmed its earlier holdings in *Camara* and *See* that "except in certain carefully defined classes of cases, a search of

254. *Id.*

255. 18 U.S.C. § 923(g) (1976) provides in part:

Each . . . licensed dealer . . . shall maintain such records of importation, production, shipment, receipt, sale, or other disposition, of firearms and ammunition at such place, for such period, and in such form as the Secretary may by regulations prescribe. Such . . . dealers . . . shall make such records available for inspection at all reasonable times, and shall submit to the Secretary such reports and information with respect to such records and the contents thereof as he shall by regulations prescribe. The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition . . . dealer, . . . for the purpose of inspecting or examining (1) any records or documents required to be kept by such . . . dealer, . . . under the provisions of this chapter or regulations issued under this chapter, and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises.

256. *United States v. Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371 (D. Del. 1972). The inspection provision held to be constitutional is 21 U.S.C. § 374 (1976).

257. *See v. City of Seattle*, 387 U.S. 541 (1967). At issue was the following inspection provision in the Seattle Fire Code:

Inspection of Buildings und Premises. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards.

Seattle, Wash., Fire Code § 8.01.050. *See also* Note, *supra* note 71, at 889.

258. *United States ex rel. Terraciano v. Montanye*, 493 F.2d 682, 684-85 (2d Cir. 1974) (quoting *Colonnade Catering Corp. v. United States*, 410 F.2d 197, 201 (2d Cir. 1969)).

259. The statutory provision authorizing warrantless searches should be limited with adequate precision with respect to time, place, and scope so that a warrant, if issued, would simply track the statute and give the person objecting to the search nothing more than he already had. *See id.*

private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."²⁶⁰ Four distinct classes of cases are the recognized exceptions to the rule of *Camara-See*: emergency inspections, plain view, consensual inspections, and the *Colonnade-Biswell* exception for pervasively regulated industries. The decision also serves to clarify the definition and scope of the *Colonnade-Biswell* exception by limiting the exception to circumstances in which the challenged statutory inspection procedure is a crucial part of a detailed regulatory scheme aimed at a pervasively regulated aspect of a specific industry. The regulatory scheme must further an urgent federal interest, and the inspection procedure must be carefully limited with respect to time, place, and scope.

Satisfaction of the foregoing criteria indicates that expectations of privacy are limited and that the regulatory statute itself functions as a valid administrative search warrant. Under those circumstances, warrantless administrative inspections do not interfere with fourth amendment rights.

260. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).