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ADMINISTRATIVE SEARCHES AND SEIZURES: WHAT HAPPENED TO *CAMARA* AND *SEE*?

Mark A. Rothstein* and Laura F. Rothstein**†

In recent years the Government's efforts in promoting health, safety and welfare have necessitated an increased number of administrative inspections of commercial and noncommercial premises. Although such inspections were previously held to be excluded from the fourth amendment's ban on unreasonable searches and seizures, the Supreme Court held in *Camara v. Municipal Court*¹ and *See v. Seattle*² that administrative inspections must comply with the warrant provision of the fourth amendment. Since those decisions, the Court has emphasized the exceptions to, rather than the strictures of, the warrant requirement. This article analyzes developments in the law concerning administrative searches and seizures and offers some observations on future trends.

I. ADMINISTRATIVE INSPECTIONS BEFORE *CAMARA* AND *SEE*

Although the concept of administrative inspections of commercial and noncommercial premises is not a new one, the notion that such inspections must comply with the fourth amendment's prohibition against unreasonable seizures is a relatively recent development.³ Beginning in 1869, the lower federal courts held consistently that the

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† The opinions expressed in this article are solely those of the authors and do not necessarily represent the position of the Occupational Safety and Health Review Commission or the Department of Justice.

1. 387 U.S. 523 (1967).

2. 387 U.S. 541 (1967).

3. See, e.g., *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).

fourth amendment applied only to criminal investigations and refused to bring persons subjected to administrative searches within the ambit of its protections.⁴ Similarly, at the state level, attacks on the constitutionality of warrantless administrative inspections were rejected.⁵

It was not until 1949 that warrantless administrative inspections were seriously questioned by the courts. In *District of Columbia v. Little*,⁶ a defendant homeowner refused entry to a health inspector without a warrant. As a result, the homeowner was convicted of having "hindered, obstructed, and interfered" with an inspector of the health department in the performance of his duties. In reversing the conviction, Judge Prettyman of the District of Columbia Circuit rejected the ancient notion that only searches directed at criminal conduct are protected by the fourth amendment. He emphasized the right of privacy which must be accorded the home.⁷

The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home, a right which is one of the . . . essentials of our concept of civilization. . . . It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity.

The Supreme Court avoided the constitutional issue in the case and affirmed the circuit court's reversal of the conviction on the ground that the defendant's refusal to unlock her door was not "interference" within the meaning of the statute.⁸

During the next ten years, no federal cases affecting the legality of warrantless administrative inspections were decided. Those cases decided at the state level merely reaffirmed the existing doctrine.⁹ It was

4. *In re Meador*, 16 F. Cas. 1294, 1299 (No. 9375) (N.D. Ga. 1869); *In re Strouse*, 23 F. Cas. 261, 262 (No. 13,548) (D. Nev. 1871). See generally Note, *The Law of Administrative Inspections: Are Camara and See Still Alive and Well?*, 1972 WASH. U.L.Q. 313 (1972).

5. See, e.g., *Hubbell v. Higgins*, 148 Iowa 36, 126 N.W. 914 (1910); *Dederick v. Smith*, 88 N.H. 63, 184 A. 595 (1936).

6. 178 F.2d 13 (D.C. Cir. 1949).

7. *Id.* at 16-17.

8. 339 U.S. 1 (1950).

9. See, e.g., *Perry v. Birmingham*, 38 Ala. App. 460, 88 So. 2d 577 (1956); *Givner v. State*, 210 Md. 484, 124 A.2d 764 (1956); *Richards v. Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955).

not until 1959 that the Supreme Court definitively decided whether the fourth amendment's warrant requirements encompassed administrative inspections. In *Frank v. Maryland*,¹⁰ a five-to-four decision, the Court answered in the negative, holding that a search warrant was not necessary to enter a residence to investigate sanitary conditions. In *Frank*, an inspector from the Baltimore City Health Department requested permission to inspect Mr. Frank's basement area because the Department had evidence of rodent infestation in the home. The time and extent of the search were reasonable, but Mr. Frank refused entry to the inspector for lack of a warrant. As a result of Mr. Frank's resistance, a fine was imposed.¹¹ The Court upheld the fine and clearly established the rule that the fourth amendment does not require a search warrant for administrative inspections of premises where health and safety considerations are involved.

The rule announced in *Frank* endured until 1967. In 1960, for example, an equally divided Supreme Court affirmed a lower court ruling which held that a search warrant was not required where an authorized housing inspector examined a home at a reasonable hour.¹² The lead opinion stated it was not necessary that there be probable cause of a housing violation in order to justify the inspection. At the state level, similar cases permitted a warrantless inspection by an authorized agent of the Building Commissioner of St. Louis to survey a building with respect to its occupancy permit;¹³ a warrantless investigation of a building by a number of city officials, both immediately following a fire and several times thereafter, to determine its cause and origin;¹⁴ and a warrantless inspection of a private dwelling by a board of health inspector to insure compliance with sanitation and safety laws.¹⁵ A warrantless administrative inspection was not upheld,

10. 359 U.S. 360 (1959).

11. The Baltimore City Code provided the following:

Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars.

359 U.S. at 361.

12. *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960). This appeal from the Ohio Supreme Court was decided by an evenly divided Court, Justice Stewart taking no part in the decision.

13. *St. Louis v. Evans*, 337 S.W.2d 948, 951 (Mo. 1960).

14. *State v. Rees*, 258 Iowa 813, 139 N.W.2d 406 (1966).

15. *Commonwealth v. Hadley*, 351 Mass. 439, 222 N.E.2d 681 (1966).

however, where it was conducted by a village building inspector who was investigating an alleged violation of the building zone ordinance.¹⁶ This case was distinguished from *Frank* on the grounds that the administrative search did not involve a "hazard immediately dangerous to health and public safety."¹⁷ Thus, in *Camara* and *See* the Court was confronted with a well established doctrine: The warrant requirement of the fourth amendment did not apply to administrative inspections.

II. THE *CAMARA* AND *SEE* DECISIONS

By 1967, however, the composition of the Supreme Court had changed and the Court's two new members, by siding with the four *Frank* dissenters, were able to overrule *Frank* by a six-to-three majority.¹⁸ In *Camara v. Municipal Court*¹⁹ and the companion case, *See v. Seattle*,²⁰ the Court held that administrative inspections of commercial and noncommercial premises are generally subject to the warrant requirements of the fourth amendment.²¹

In *Camara*, an inspector of the Division of Housing Inspection of the San Francisco Department of Public Health entered an apartment building to make a routine annual inspection. The building's manager informed the inspector that Mr. Camara, lessee of the ground floor, was using the rear of the premises as a personal residence. Claiming that a personal residence was not permitted on the ground floor under the building's occupancy permit, the inspector demanded to examine the premises. Mr. Camara refused to allow the inspection because the

16. *People v. Laverne*, 14 N.Y.2d 304, 200 N.E. 2d 441, 251 N.Y.S.2d 452 (1964).

17. *Id.* at 442. Compare the holding in this case with the exception for emergency. See Part IV-A *infra*.

18. Justices Whittaker and Frankfurter, who had sided with the *Frank* majority in 1959, were no longer on the Court in 1967. They were replaced by Justices White and Fortas (who had succeeded Justice Goldberg), both of whom voted with the *Frank* dissenters, thereby becoming the majority in *Camara* and *See*.

19. 387 U.S. 523 (1967).

20. 387 U.S. 541 (1967).

21. These decisions have been the subject of considerable legal writing. See, e.g., LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1; Note, 33 ALBANY L. REV. 64 (1968); Note, 22 BAYLOR L. REV. 268 (1970); Note, 17 DE PAUL L. REV. 207 (1967); Note, 3 HARV. CIV. RTS.-CIV. LIB. L. REV. 209 (1967); Comment, 47 NEB. L. REV. 613 (1968); Comment, 36 U. MO. K.C.L. REV. 111 (1968); Note, 77 YALE L.J. 521 (1968).

inspector did not have a search warrant.²² After his refusal on two later occasions to permit a warrantless inspection, Mr. Camara was arrested and charged with violating § 507 of the San Francisco Municipal Code, which provided for a fine of up to \$500 and up to six months imprisonment for refusal to comply with an order of the Director of Public Health.²³ After his release on bail, Mr. Camara sought a writ of prohibition to block his prosecution.

The Supreme Court reversed the lower court's denial of the writ. Writing for the majority, Justice White stressed that the basic purpose of the fourth amendment's prohibition against unreasonable searches and seizures is "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."²⁴

The opinion emphasized four fundamental principles. First, the Court clearly stated that except in certain narrowly defined situations, any search of private property without proper consent is unreasonable unless authorized by a valid search warrant.²⁵ The Court quoted from *Johnson v. United States*:²⁶

The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

The Court stated that citizens subjected to administrative inspections are entitled to the same protections as individuals subjected to searches directed at criminal behavior.²⁷

The second principle enunciated by the Court was that the degree of probable cause needed for the issuance of an administrative inspection warrant is considerably less than that required for a criminal

22. This inspection was similar to that in *People v. Laverne*, 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964), inasmuch as both involved searches related to the improper use of premises. In *Laverne* a residential area was being used for business purposes.

23. 387 U.S. at 526-27.

24. *Id.* at 528.

25. *Id.* at 528-29.

26. *Id.* at 529, quoting 333 U.S. 10, 14 (1948).

27. *Id.* at 530. *Cf.* *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), *aff'd. on other grounds*, 339 U.S. 1 (1950).

search.²⁸ In holding that the individual's right to privacy must be balanced against the reasonable and valid purpose of inspections to insure public health and safety,²⁹ the Court stated that probable cause to issue a warrant to inspect exists "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."³⁰ Third, the Court specifically ruled that area code-enforcement inspections³¹ are prima facie reasonable. The permissibility of such inspections was founded upon these premises: (1) area code-enforcement inspections have a long history of judicial and public acceptance; (2) the public interest demands that all dangerous conditions be prevented or abated; and (3) these inspections constitute a limited invasion of the "urban citizen's" privacy because they are neither personal nor criminal in nature.³² Fourth, the Court stated that prompt, warrantless inspections in response to an emergency are not proscribed.³³ To dispel the administrative nightmare of having to procure a warrant for each structure in the city, the Court indicated that, in normal cases, a warrant need be sought only after entry is refused.³⁴

In the companion case of *See v. Seattle*,³⁵ a representative of the City of Seattle Fire Department sought to enter and inspect a locked commercial warehouse as part of a routine city-wide program to obtain compliance with the city's fire code. The inspector had neither a

28. 387 U.S. at 538. The majority quoted at length from Justice Douglas' dissent in *Frank v. Maryland*, 359 U.S. 360 (1959).

29. 387 U.S. at 535.

30. *Id.* at 538. This raises the question of what standards the magistrate is to apply: Is he to determine what type of inspection is reasonable; is he to accept the legislative judgment insofar as it appears in the statute; or is he to look to past practices of the agency? See LaFave, *supra* note 21, at 20-27.

31. An area code-enforcement inspection is a routine, periodic inspection of structures in a geographic area to ensure that they meet safety, sanitation or other standards.

32. 387 U.S. at 537. Although the Court used the words "urban citizen's," the holding of the case is neither limited to citizens, nor to urban residents. The meaning of this third factor, however, is not clear. As is pointed out in LaFave, *supra* note 21, at 13-20, this may mean either that: (1) probable cause may be demonstrated by a lesser quantum of evidence when the objective is not prosecution; or (2) this lesser quantum is needed when the search is less intrusive than one conducted pursuant to a criminal investigation. LaFave expresses dissatisfaction with the former line of reasoning suggesting that it is a "perversion of the exclusionary rule" to view the fourth amendment as extending greater rights to criminals than to other citizens.

33. 387 U.S. at 539. For a complete discussion of the emergency exception, see Part IV-A *infra*.

34. 387 U.S. at 539-40.

35. 387 U.S. 541 (1967).

warrant nor reasonable cause to believe that any fire code violations existed in the warehouse. After refusing to permit the inspection, Mr. See was convicted of violating the Seattle Fire Code and received a suspended fine of \$100.³⁶ The Supreme Court of Washington affirmed the conviction.³⁷

In reversing the conviction, Justice White, again writing for the majority of a divided Court, relied heavily on the rationale of *Camara*, noting that the same fourth amendment protections that apply to searches of a residence also apply to searches of commercial premises: "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."³⁸

In addition to extending fourth amendment protections to commercial premises, the *See* Court apparently established three additional "exceptions" to the warrant requirement: where there is consent, where the workplace is open to the public view, and where there is an inspection conducted pursuant to a valid licensing program.³⁹

Justice Clark, writing a joint dissent to both cases,⁴⁰ strenuously objected to the extension of the warrant requirement to administrative inspections:⁴¹

It prostitutes the command of the Fourth Amendment that "no warrants shall issue, but upon probable cause" and sets up in the health and safety codes area inspection a newfangled "warrant" system that is entirely foreign to Fourth Amendment standards.

The dissent also expressed the view that the warrant requirement was constitutionally unfounded, impractical, and seriously obstructive to the enforcement of basic safety and health programs.⁴²

36. The Seattle Fire Code provided for maximum penalties of 90 days in jail, a \$300 fine or both, for anyone failing to comply with a lawful order of the Fire Chief. SEATTLE, WASH., CODE § 8.01.140 (1958).

37. *Seattle v. See*, 67 Wn. 2d 475, 408 P.2d 262 (1965).

38. 387 U.S. at 543. Searches of businesses in connection with criminal activities have long been subject to the restrictions governing searches of residences in the same connection. *See Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *Amos v. United States*, 255 U.S. 313 (1921); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

39. 387 U.S. at 545-46. The inspection of premises open to the public view does not constitute a search and, therefore, is not an exception per se. For a complete discussion of all of the exceptions, see Part IV *infra*.

40. 387 U.S. at 546-55. Justice Harlan and Justice Stewart, both of whom were a part of the majority in *Frank*, joined the dissent of Justice Clark. *See* note 18 *supra*.

41. 387 U.S. at 547.

42. *Id.* at 546-55.

III. IMPLEMENTING THE WARRANT REQUIREMENT

The Supreme Court's holdings in *Camara* and *See* are based upon two related concepts: administrative probable cause and administrative inspection warrants. In many instances courts and commentators have failed to appreciate the significance of these two concepts, thus contributing to a misunderstanding of the rulings in *Camara* and *See*, and thereby threatening the vitality of these two decisions.

In *Camara*, the Court held that the probable cause standard for the issuance of a warrant was demonstrably less stringent in administrative inspections than in criminal investigations.⁴³ Where reasonable legislative or administrative standards have been adopted, the probable cause requirement imposed by the fourth amendment will, without more, be satisfied.⁴⁴ In other words, an administrative inspection warrant may issue despite the absence of probable cause to believe that a specific violation has occurred so long as the inspection is pursuant to valid statutory authorization.⁴⁵ For example, in *United States v. Blanchard*,⁴⁶ the defendants were convicted of violating a statute that proscribed possession of any liquor bottle containing distilled spirits other than those in the bottle at the time of stamping. The defendants contended that a search warrant obtained by agents of the Federal Bureau of Alcohol, Tobacco and Firearms was issued without sufficient facts to establish probable cause. In affirming the convictions, the Court of Appeals for the First Circuit noted that the application

43. At least two commentators have suggested that the variation between the two standards is based on probability:

[I]n looking to the probabilities, or the percentage chance that the search will be successful, the average building may be likely to contain a violation while the average person is not likely to be a criminal. . . . [I]n dealing with criminal matters, there is a fairly strong presumption that the average citizen is not a felon and therefore additional facts must be adduced before it can be said that the percentage chance for a successful search has been met and that criminal probable cause exists. . . .

Reister and McMillen, *Administrative Inspection Procedures Under the Fourth Amendment—Administrative Probable Cause*, 32 ALBANY L. REV. 155, 172 (1967).

44. 387 U.S. at 538. Several state statutes enacted after *Camara* have limited the times of inspection. See, e.g., CAL. CIV. PRO. CODE § 1822.56 (West 1972) (8 a.m. to 6 p.m.); N.C. GEN. STAT. § 15-27.2(e) (Supp. 1974) (8 a.m. to 8 p.m.); N.D. CENT. CODE § 29-29.1-04 (1974) (8 a.m. to 8 p.m.); R.I. GEN. LAWS ANN. § 45-24.3-15 (Supp. 1973) (8 a.m. to 5 p.m.). Where there has been no specific statutory provision for the issuance of warrants, courts have held that warrant issuance must be reasonable. See, e.g., *Owens v. Las Vegas*, 85 Nev. 105, 450 P.2d 784 (1968).

45. The statute need only authorize the inspection; it need not provide for the issuance of warrants. See note 44 *supra*.

46. 495 F.2d 1329 (1st Cir. 1974).

for the warrant disclosed: (1) that an agent's personal examination indicated the tavern was serving liquor without the required tax stamp; and (2) that the defendants' premises had not been inspected within the last year. The court stated that "a warrant issuing upon either of these two operative facts would easily comport with existing administrative and legislative inspection criteria, and would thus be reasonable under the fourth amendment."⁴⁷ Similarly, in *United States v. Greenberg*,⁴⁸ it was held that a narcotics agent's affidavit stating the defendant-druggist had been purchasing extraordinary quantities of certain controlled substances, was sufficient to obtain an administrative inspection warrant under the Comprehensive Drug Abuse Prevention and Control Act of 1970.⁴⁹

If an administrative inspection warrant may be issued upon a mere showing that the inspection is authorized by statute or a reasonable administrative regulation, then why require a warrant at all?⁵⁰ The importance of the warrant requirement can be seen if one compares the impact of an inspection on an individual homeowner or businessman with and without a warrant. When a citizen is confronted by an administrative official demanding to inspect without a warrant, the individual has no way of ascertaining whether the demanded inspection is valid and pursuant to a statute or administrative regulation, whether the time and manner of the search satisfied the legal requirements for reasonableness, or whether the inspection is arbitrary, unnecessary, harrasing, or otherwise unlawfully motivated.⁵¹ Yet, only by refusing entry and risking a criminal conviction can the occupant present a challenge to the inspection. As the majority in *Camara* indicated:⁵²

47. *Id.* at 1331. See 26 U.S.C. §§ 5146(b), 7606 (1970). It has been held that no warrants are required in order to inspect for liquor violations. See notes 99-103, 116, and accompanying text *infra*.

48. 334 F. Supp. 364 (W.D. Pa. 1971). See also *United States v. Ciaccio*, 356 F. Supp. 1373 (D. Md. 1972).

49. 21 U.S.C. § 878(2) (1970).

50. Indeed this was the essence of the *Camara* dissent:

These boxcar warrants will be identical as to every dwelling in the area, save the street number itself. I daresay they will be printed up in pads of a thousand or more—with space for the street number to be inserted—and issued by magistrates in broadcast fashion as a matter of course.

387 U.S. at 554 (Clark, J., dissenting).

51. The presentation of official credentials may be insufficient to protect individual rights. An individual citizen has no way of determining whether even a bona fide member of a public agency has the legal right to demand entrance.

52. 387 U.S. at 532-33.

The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.

On the other hand, by requiring warrants, an individual knows that he or she must comply when presented with a warrant. The warrant serves to insure that inspections are conducted at a reasonable time and in a reasonable manner.⁵³ Furthermore, any citizen suspicious of a warrantless inspection can refuse the inspection without fear of sanction.⁵⁴ Finally, it should be pointed out that as a practical matter the vast majority of administrative inspections are conducted by consent, with warrants unnecessary.⁵⁵

The Supreme Court has not directly ruled on all the effects of an illegal administrative inspection. It has expressly held in *Camara* and *See* that prosecutions will not lie for failure to permit an unreasonable, warrantless administrative inspection.⁵⁶ The exclusionary rule will apply where a criminal or quasi-criminal action is brought on the basis of evidence seized during an unlawful administrative inspection.⁵⁷ Although the applicability of the exclusionary rule was previously unclear when only a civil proceeding resulted from such an inspection, the great weight of recent authority supports the application of the rule in civil cases as well.⁵⁸

53. See note 41 *supra*.

54. Although the *Camara* and *See* decisions do not directly address this point, the validity of an administrative warrant can always be attacked. See notes 46-49 and accompanying text *supra*.

55. See Part IV-B *infra*; see especially *United States v. Thriftmart*, 429 F.2d 1006 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970), *rehearing denied* 400 U.S. 1002 (1971).

56. The word "unreasonable" refers to a warrantless inspection that is not permitted under one of the exceptions discussed at length in Part IV *infra*.

57. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (forfeiture proceeding); *Bilokumsky v. Tod*, 263 U.S. 149 (1923) (*semble*) (deportation proceeding). Cf. *NLRB v. South Bay Daily Breeze*, 415 F.2d 360 (9th Cir. 1969), *cert. denied*, 397 U.S. 915 (1970). See generally Note, 34 ALBANY L. REV. 465 (1970); Note, 2 CONN. L. REV. 648 (1969).

58. See, e.g., *United States v. McSurely*, 473 F.2d 1178 (D.C. Cir. 1972) (legislative hearing); *Knoll Associates v. FTC*, 397 F.2d 530 (7th Cir. 1968) (administrative agency hearing); *FTC v. Page*, 378 F. Supp. 1052 (N.D. Ga. 1974) (administrative agency hearing); *Caldwell v. Cannady*, 340 F. Supp. 835 (N.D. Tex. 1972) (high school disciplinary proceeding); *E.T. Suarez*, 58 T.C. 792 (1972) (civil tax proceeding); *People v. Moore*, 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968) (civil narcotics commitment proceeding).

IV. THE EXCEPTIONS

A. *Emergency*

The Supreme Court in *Camara* specifically provided an 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.”⁵⁹ According to this traditional view, exigent circumstances eliminate the warrant requirement because the urgency of an immediate search outweighs the right to privacy. The emergency exception, however, can be invoked only in the most extreme cases.⁶⁰ The Court in *Camara* cited the following situations as constituting genuine emergencies: seizures of unwholesome food,⁶¹ compulsory smallpox vaccination,⁶² health quarantine⁶³ and summary destruction of tubercular cattle.⁶⁴

The emergency exception has been applied to justify warrantless searches in a variety of other situations as well. In *United States v. Dunavan*,⁶⁵ for example, a man who was later determined to be a diabetic, was unconscious in a hospital. The police, in attempting to obtain his identification or information related to the cause of his condition, opened the man’s briefcase without first securing a warrant. The briefcase contained stolen money. The Court of Appeals for the Sixth Circuit, in upholding Mr. Dunavan’s subsequent conviction for bank robbery, recognized the lawfulness of a search where the true motive was to aid the individual in an emergency.

In *Scherer v. Brennan*,⁶⁶ a firearms dealer known to possess large quantities of firearms, and whose home was located near a hotel

59. 387 U.S. at 539.

60. *McDonald v. United States*, 335 U.S. 451 (1948).

61. *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908).

62. *Jacobson v. Massachusetts*, 197 U.S. 11 (1904).

63. *Compagnie Francaise de Navigation a Vapeur v. La. Bd. of Health*, 186 U.S. 380 (1902).

64. *Kroplin v. Truax*, 119 Ohio St. 610, 165 N.E. 498 (1929).

65. 485 F.2d 201 (6th Cir. 1973).

66. 379 F.2d 609 (7th Cir. 1967), *cert. denied*, 389 U.S. 1021 (1967). *Cf.* *United States v. Miles*, 480 F.2d 1217 (9th Cir. 1973) (weapons and explosives search of moving van prior to entering U.S. Army base upheld); *Downing v. Kunzig*, 454 F.2d 1230 (6th Cir. 1972) (briefcase search of attorney before entry into federal building upheld). Both of these cases were decided, in part, on the basis of the emergency exception.

where President Johnson was staying, was prevented by Secret Service agents from entering his home unless he allowed an inspection of the house. Mr. Scherer refused to permit the inspection and later brought suit against the Secret Service agents, claiming that the agents trespassed on his property and interfered with his access to his home. The Court of Appeals for the Seventh Circuit affirmed a motion for summary judgment based on the emergency exception and sovereign immunity and upheld the district court's finding that the Secret Service had the right to make warrantless inspections in protecting the President from physical harm.

Finally, in *Steigler v. Anderson*,⁶⁷ the Court of Appeals for the Third Circuit held that evidence of the commission of arson was properly admitted into court because it was initially discovered during a fireman's emergency entry into the arsonist's home in order to extinguish the fire and rescue victims. Additional evidence was removed shortly thereafter in a warrantless search. The court noted that some of the evidence, including containers filled with gasoline, was highly volatile; thus, there was an urgent need to seize immediately what later turned out to be the evidence of a crime. As to other evidence which had not been previously noticed by the firemen, the court termed its admission "clearly harmless beyond a reasonable doubt."⁶⁸

The emergency exception, as enunciated in *Camara*, provides a good illustration of the reasonableness approach to the fourth amendment. The interest of privacy and its concomitant fourth amendment warrant requirement will give way where exigent circumstances compel it. Although such situations arise infrequently, the need for an

67. 496 F.2d 793 (3d Cir. 1974). See also *Root v. Gauper*, 438 F.2d 361, 364-65 (8th Cir. 1971); *United States v. Barone*, 330 F.2d 543, 545 (2d Cir. 1964), cert. denied, 377 U.S. 1004 (1964); *Bennett v. Commonwealth*, 212 Va. 863, 188 S.E.2d 215 (1972). Cf. *People v. Dajnowicz*, 43 Mich. App. 465, 204 N.W.2d 281 (1973) (fire marshal may not enter burned property without a warrant except in cases of emergency). See also Note, 30 WASH. & LEE L. REV. 133 (1973).

68. 496 F.2d at 796 n.6. The test of harmless constitutional error is expressed in *Harrington v. California*, 395 U.S. 250 (1969), where the majority stated that the judgment as to the error's harmlessness would be based upon the Court's own reading of the record and its own assessment of the impact of the evidence on the mind of the average juror. Cf. *Chapman v. California*, 386 U.S. 18 (1967), in which the Court seemed to require a stricter standard, i.e., that the error must have been harmless beyond a reasonable doubt.

Evidence seized in violation of the fourth amendment and introduced in a number of cases has been held to be harmless. See, e.g., *United States v. Steinkoenig*, 487 F.2d 225, 230 (5th Cir. 1973); *United States v. West*, 486 F.2d 468, 473 (6th Cir. 1973).

emergency exception where human life or safety is imperiled is obvious.

B. Consent

The second exception to the warrant requirement is consent, the basis for the majority of administrative searches. When valid consent is given, it operates as a waiver of the fourth amendment right against unreasonable searches and seizures.⁶⁹ This exception was explicitly delineated by the Court in *See* in the context of inspections of commercial premises, but it also applies to noncommercial inspections. The Court stated:⁷⁰

We therefore conclude that administrative entry, *without consent*, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.

The most immediate question related to consent concerns the standard of consent which is to be applied. In the field of criminal law, a very high standard must be met in order to establish valid consent.⁷¹ As noted earlier, valid consent operates as a waiver, and although waivers of constitutional rights traditionally have not been easily inferred,⁷² the Court recently distinguished waiver of fourth amendment rights from waiver of other constitutional rights.⁷³

69. This is true in criminal searches as well as administrative inspections. *See generally* Laing, *The Criminal Waiver Rule—A Reappraisal*, 33 FED. B.J. 239 (1974); Note, *Doctrine of Waiver and Consent Searches*, 49 NOTRE DAME LAW. 891 (1974).

This raises the additional question whether the inspector should be required to advise the occupant of the right to demand a warrant. *See* Note, 77 YALE L.J. 521 (1968); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (not necessary for the state to establish that the person consenting knew of the right to refuse such consent). It has also been held that, after arrest, one must be advised of the right not to consent to a search. *United States v. Fisher*, 329 F. Supp. 630 (D. Minn. 1971).

70. 387 U.S. at 545 (footnotes omitted) (emphasis added).

71. *See* notes 89–91 and accompanying text *infra*.

72. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). A waiver of a constitutional right must be clear and positive. There is every presumption against such a waiver and the burden of proof is on the party claiming that there was a waiver. *Emspak v. United States*, 349 U.S. 190 (1955); *United States v. Payne*, 429 F.2d 169 (9th Cir. 1970); *Rigby v. United States*, 247 F.2d 584 (D.C. Cir. 1957). *But cf. Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), in which the Court set a lower standard for waiver of fourth amendment rights than for waiver of other constitutional rights.

73. In *Schneckloth v. Bustamonte*, the Court distinguished the waiver of fourth

In the leading case on consent to an administrative inspection, *United States v. Thriftmart, Inc.*,⁷⁴ the Court of Appeals for the Ninth Circuit adopted a standard less stringent than that required for determining consent in criminal cases. In this case, inspectors of the Food and Drug Administration (FDA) arrived at four warehouses and presented their notices of inspection to the managers. In response to requests for permission to enter and inspect, the managers in each case replied "Go ahead," or words of similar import.⁷⁵ The inspectors did not have search warrants, nor did they advise the warehouse managers that they had a right to insist on search warrants.⁷⁶

It is clear that the "casual" consent that was given by the warehouse managers would be insufficient if measured by the criminal law standard.⁷⁷ Nevertheless, the Ninth Circuit determined that a different standard of consent should be applied in administrative inspections than in criminal searches. The court noted three significant differences between the two types of searches. In criminal searches there is the element of coercion due to the presence of uniformed, armed police;⁷⁸ a surprise factor is present in criminal searches because the searches are not routine; and as a result, the consent to a criminal search is inherently suspect.⁷⁹

On the other hand, the court stated that⁸⁰

the consent to an [administrative] inspection is not only not suspect but is to be expected. The inspection itself is inevitable. Nothing is to

amendment rights from waiver of other rights "guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial." 412 U.S. 218, 241 (1973). In referring to the fourth amendment, the Court held that "there is nothing constitutionally suspect in a person's voluntarily allowing a search." It continued: "And, unlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to be indulged against voluntary relinquishment." *Id.* at 243.

74. 429 F.2d 1006 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970), *rehearing denied*, 400 U.S. 1002 (1971).

75. *Id.* at 1008.

76. *See* note 69 *supra*.

77. A failure to take any action in response to a request for a search, or even a peaceful submission, is not consent; it is merely a demonstration of regard for the supremacy of the law. *United States v. Rutheiser*, 203 F. Supp. 891 (S.D.N.Y. 1962); *See generally* Note, *Silence—Can it Waive a Constitutional Right?* 10 WASHBURN L.J. 321 (1970). *See also* notes 71 & 72 and accompanying text *supra*.

78. But query whether an inspector is in a better position than a police officer to gain entry by coercion. *See* Note, 77 YALE L.J. 528 (1968).

79. *Cf. Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

80. 429 F.2d at 1009.

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.

The court in *Thriftmart* held that the failure of the inspectors to warn the warehouse managers of their right to insist on a warrant did not render their consent unknowing or involuntary:⁸¹

Their manifestation of assent, no matter how casual, can reasonably be accepted as waiver of warrant.

In conclusion, we hold that in the context of the exclusionary rule a warrantless inspectorial search of business premises is reasonable when entry is gained not by force or misrepresentation, but is, with knowledge of its purpose, afforded by manifestation of assent.

The rule enunciated in *Thriftmart*, that consent to an administrative inspection need not be express, has been applied in a number of other cases involving FDA inspections of business premises or records. In *United States v. Hammond Milling Co.*,⁸² a pre-*Thriftmart* case, the Court of Appeals for the Fifth Circuit ruled that a routine FDA inspection was validly consented to by the company's vice president who did not refuse the inspection, although he did not explicitly consent to it.⁸³ Similarly, in *United States v. Robson*,⁸⁴ the Ninth Circuit held that it was not necessary for Internal Revenue Service (IRS) agents to tell a taxpayer that he could demand a warrant to search his private tax records.⁸⁵

Where there is evidence of intimidation, coercion or misrepresentation, however, courts will find consent to be invalid. In *United*

81. *Id.* at 1010.

82. 413 F.2d 608 (5th Cir.), *cert. denied*, 396 U.S. 1002 (1969).

83. The holding in *Thriftmart* was expressly followed in other FDA cases. See *United States v. Alfred M. Lewis, Inc.*, 431 F.2d 303 (9th Cir.), *cert. denied*, 400 U.S. 878 (1970); *United States v. Litvin*, 353 F. Supp. 1333 (D.D.C. 1973); *United States v. Kendall Co.*, 324 F. Supp. 628 (D. Mass. 1971). See also *United States v. Business Builders, Inc.*, 354 F. Supp. 141 (N.D. Okla. 1973).

84. 477 F.2d 13 (9th Cir. 1973).

85. *Cf. Mathis v. United States*, 391 U.S. 1 (1968) (*Miranda* warnings must be given to persons who are the object of tax investigations when the person is questioned while incarcerated). The trend of decisions involving investigations under normal circumstances is that *Miranda* does not apply. See *Cohen v. United States*, 405 F.2d 34 (8th Cir. 1968) and cases collected therein. The IRS has directed its agents, however, that such warnings be given. IRS News Release IR-949, Nov. 26, 1968, *quoted in Cohen v. United States*, 405 F.2d 34, 39 (8th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969).

States v. Kramer Grocery Co.,⁸⁶ for example, an FDA inspector *insisted* on his right to inspect and *demand*ed certain records and information, even though the owner objected. The Court of Appeals for the Eighth Circuit held that the owner's relenting to the inspection did not constitute consent. In *United States v. Anile*,⁸⁷ agents of the Bureau of Narcotics and Dangerous Drugs entered a drugstore, presented the owner with a written notice of inspection, and informed him of their desire to make an inspection. When the owner asked, "Do I have a choice?" the agents said "No." The court ruled that the owner's subsequent submission to the inspection did not constitute valid consent.⁸⁸ Thus, the law appears to be that the agents need not inform the individual of his or her right to refuse a warrantless regulatory inspection, but when asked the agent must inform the occupant that a warrant may be demanded.

Equally important to valid consent is the authority of the person who gives the consent. It is well settled in the criminal law that consent to search can only be given by someone with authority;⁸⁹ such authority cannot be implied or presumed.⁹⁰ There have been very few cases involving third party consent to administrative searches, and it is not clear whether the same rigid criminal law standards pertaining to the authority to consent will be required. In cases involving a search

86. 418 F.2d 987 (8th Cir. 1969).

87. 352 F. Supp. 14 (N.D. W.Va. 1973).

88. Cf. *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); *Bumper v. North Carolina*, 391 U.S. 543 (1968). The airport cases cited in notes 179-81 and accompanying text *infra* suggest that, at least in airport searches, there is a duty to inform the passenger of his right to refuse the search.

89. *Stoner v. California*, 376 U.S. 483 (1964). Cf. *Frazier v. Cupp*, 394 U.S. 731 (1969). See generally Note, *Relevance of the Absent Party's Whereabouts in Third Party Consent Searches*, 53 B.U.L. REV. 1087 (1973); Note, *Consent and the Constitution After Bumper v. North Carolina*, 6 CAL. WESTERN L. REV. 316 (1970); Note, *Third Party Consent to Search and Seizure: A Re-examination*, 20 J. PUB. L. 313 (1971); Comment, *Third Party Consent Searches: An Alternative Analysis*, 41 U. CHI. L. REV. 121 (1973); Note, *Family Consent to an Unlawful Search*, 28 WASH. & LEE L. REV. 207 (1971); Note, *Third Party Consent to Search and Seizure*, 1967 WASH. U.L.Q. 12 (1967).

90. Courts have found alleged consent invalid where a hotel clerk consented to the search of a guest's room, *Stoner v. California*, 376 U.S. 483 (1964); where a landlady consented to the search of tenant's room, *Cunningham v. Heinze*, 352 F.2d 1 (9th Cir. 1965); where a lessor consented to a search of the lessee's premises, *Drummond v. United States*, 350 F.2d 983 (8th Cir. 1965); and where a "handyman" consented to the search of his employer's residence, *United States v. Block*, 202 F. Supp. 705 (S.D.N.Y. 1962). As Justice Stewart stated in *Stoner*: "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" 376 U.S. at 488.

of a personal nature, it seems that the courts would adhere to the rationale in *Stoner v. California*.⁹¹ It is the *Camara* and *See* area code-enforcement inspection cases which present the problem. It may be contended that the limited nature of the search (which justifies warrants upon lesser cause than is required in criminal matters) would cause relaxation of the consent requirement as well. Such reasoning seems unsound, however.

Relaxation of the warrant requirement in no way affects the question of consent; that is, the fact that one may obtain a warrant with less than probable cause does not give one the right to search without a warrant and without the occupant's consent. The better view seems to be that the inspector must obtain the consent of the occupant or one authorized by him or her, and, if such is not available, a warrant must be secured.

A final issue related to consent involves searches that allegedly exceed the bounds of a limited consent. Where a search merely reveals a different offense than the one contemplated at the start of the search, the consent is still valid.⁹² Similarly, there are no consent limitations on the plain view doctrine: Merely observing that which is open to view by one properly present does not constitute a search;⁹³ consequently, the question of consent cannot arise.

With respect to criminal searches, courts have invalidated those which exceeded the confines of the initial consent.⁹⁴ In administrative

91. Compare the IRS inspection in *United States v. Robson*, 477 F.2d 13 (9th Cir. 1973) with the general warehouse inspection in *United States v. Thriftmart*, 429 F.2d 1006 (9th Cir.), cert. denied, 400 U.S. 926 (1970). Cf. *Oilan v. Yee Loy Loong*, 69 Misc. 2d 108, 329 N.Y.S.2d 531 (N.Y. Civ. 1972). In this case, the 20-year-old son of an apartment lessee, who was acting as a translator during a conversation between the tenant and a Building Department inspector, indicated that the apartment was being occupied by the tenant and seven infant children. After measuring the premises and determining that there were too many people living in the apartment, the landlord was notified and began a civil eviction proceeding. The tenant moved to exclude the evidence of over-occupancy on the grounds that it was the product of an illegal administrative search. The New York Civil Court rejected this argument and ruled that the tenant had knowingly consented to the inspection.

92. "A search is not invalidated because it reveals an additional and different offense." *Gullett v. United States*, 387 F.2d 307, 310 (8th Cir. 1967), cert. denied, 390 U.S. 1044 (1968), citing *inter alia* *United States ex rel. Boucher v. Reincke*, 341 F.2d 977, 980 (2d Cir. 1965).

93. *Ker v. California*, 374 U.S. 23, 43 (1963). See also *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). For a complete discussion of the "plain view" doctrine, see text accompanying notes 153-62 *infra*.

94. For example, in *Strong v. United States*, 46 F.2d 257 (1st Cir. 1931), consent was given to search a barn, but the court ruled that there was no consent to search a root cellar near the side of the barn. In *Davis v. California*, 341 F.2d 982 (9th Cir.

inspections, it is unclear whether inspectors will be held to the strict standards of consent applicable in criminal investigations. As in the third-party consent cases noted above, it is not apparent whether the relaxed fourth amendment standards for probable cause would apply as well to instances where the search exceeds the bounds of consent. The better view seems to be that it does not, since there is no rational basis for concluding that a lower standard of probable cause carries with it the power to search beyond the bounds of consent. A case recognizing this in principle is *Finn's Liquor Shop, Inc. v. State Liquor Authority*.⁹⁵ In this case, a liquor store owner gave permission to a state liquor agent to search the premises. During the inspection, the agent searched the pockets of a coat hanging in a back room, where he found slips showing liquor sales on credit, a violation of the state law. The New York court held that the search of the personal clothing was beyond the bounds of the consent.

C. Licensing

Although the vast majority of warrantless administrative searches are based upon consent, the licensing exception has recently undergone a substantial expansion. In the last five years, a series of Supreme Court and lower court decisions have extended that exception in a manner which seriously threatens to nullify the basic holding in *See* that administrative inspections of business premises must generally comply with the warrant requirement of the fourth amendment.

The Court's language in *See* that purportedly created this exception is not explicit:⁹⁶

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.

1965). the court held that consent to search a room did not include the people in the room. In *Drummond v. United States*, 350 F.2d 983 (8th Cir. 1965), however, the court upheld the search of a garage where consent was given to search the adjoining house.

95. 31 App. Div. 2d 15, 294 N.Y.S.2d 592 (1968), *aff'd*, 24 N.Y.2d 647, 289 N.E.2d 440, 301 N.Y.S.2d 584, *cert. denied*, 396 U.S. 840 (1969).

96. 387 U.S. at 545-46.

While the Court indicated the initial licensing inspections were valid,⁹⁷ it did not state that these inspections could be made without a warrant. Nevertheless, by 1969 the Court of Appeals for the Eighth Circuit in *United States v. Kramer Grocery Co.* so held,⁹⁸ and only one year later the Supreme Court implicitly sanctioned a warrantless licensing inspection.

In *Colonnade Catering Corp. v. United States*,⁹⁹ a federal agent, who was a member of the Alcohol and Tobacco Division of the IRS, was a guest at a party in the catering facility of Colonnade. The agent noted a possible violation of the federal excise law. When federal agents revisited the establishment, another party was in progress during which liquor was being served. Without the manager's consent they inspected the cellar and then asked the manager to open a locked liquor storeroom. The manager stated that the only person authorized to open the storeroom was Colonnade's president who was not present. Upon arriving at the premises, the president refused to open the storeroom and asked if the agents had a warrant. The agents replied that they did not need one. After further refusals to unlock the room, an agent broke the lock, entered the storeroom, and seized bottles of liquor suspected of being illegally refilled.

The Supreme Court held that the seizure of the liquor bottles was unlawful. The majority¹⁰⁰ recognized the long history of government regulation of the liquor industry and noted that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand."¹⁰¹ Nevertheless, the Court concluded that because Congress did not exercise its power to authorize forcible, warrantless searches, the fourth amendment requirements are applicable.¹⁰² This standard prohibits the use of unreasonable

97. *Camara* and *See* were specifically concerned with area code inspections.

98. 418 F.2d 987, 998 n.3 (8th Cir. 1969).

99. 397 U.S. 72 (1970).

100. Justice Douglas wrote for a majority of six. Chief Justice Burger, along with Justices Black and Stewart, dissented on the ground that seizure of the liquor was lawful under the statute.

101. 397 U.S. at 76. The government argued that the regulation of the liquor industry in England and colonial America actually pre-dated the fourth amendment. Because the fourth amendment only bans unreasonable searches and seizures, the argument goes, it was not designed to cover the presumed accepted regulatory inspections of the liquor industry. *See id.* at 75.

102. Liquor inspections are authorized by 26 U.S.C. §§ 5146(b), 7606 (1970). This statute, however, does not authorize forcible warrantless searches. Rather, it im-

force to effect an entry. The Court stated that the remedy for a failure to permit an inspection is not force, but prosecution.¹⁰³

It is ironic that the Supreme Court's decision in *Colonnade* which prohibited the use of forced entry for liquor inspections, served as the genesis for a series of decisions that permitted warrantless inspections of a variety of industries. Only two years later, in *United States v. Biswell*,¹⁰⁴ the Supreme Court extended the *Colonnade* reasoning, over the vigorous dissent of Justice Douglas, to hold that a warrantless search during business hours as part of an inspection procedure authorized by the Gun Control Act of 1968,¹⁰⁵ did not violate the fourth amendment.

In *Biswell*, a pawn shop operator who was federally licensed to deal in sporting weapons was visited by a city policeman and a Federal Treasury agent. The agent identified himself, inspected the shop's books, and requested entry into a locked gun storeroom. The shop operator asked whether the agent had a search warrant and was told that he did not, but that inspections were authorized by § 923 of the Act, a copy of which was shown to the shopkeeper. After reading the applicable section of the statute, the gun dealer stated: "Well, that's what it says so I guess it's okay." Upon inspecting the storeroom, the agent found and seized two sawed-off rifles which the pawn shop was not licensed to possess.¹⁰⁶

poses the exclusive sanction of a \$500 fine for dealers who refuse to permit a search to be conducted. *Id.* § 7342 (1970).

Moreover, the clear implication of the Court's decision in *Colonnade* is that it is within the discretion of Congress to apply or not apply the fourth amendment to liquor inspections. The basis for this implication is that at the time the fourth amendment was adopted, it was accepted that warrantless searches were reasonable where the liquor laws were involved.

103. Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector.
397 U.S. at 77. The policy of imposing fines for a refusal to permit an inspection was struck down in both *Camara* and *See* in the context of area code-enforcement inspections, but approved for use in liquor inspections. The essential holding in *Colonnade* is that even though forcible entry is illegal because it was not provided for by Congress, a warrant is not necessary for liquor inspections.

104. 406 U.S. 311 (1972).

105. 18 U.S.C. § 923(g) (1970).

106. The gun shop was licensed under 18 U.S.C. § 923 (1970) to sell certain sporting weapons as defined in 18 U.S.C. § 921 (1970). The sawed-off rifles, however, were defined as "firearms" under 26 U.S.C. § 5845 (1970).

The Supreme Court upheld the validity of the search. In holding that the issue of consent was irrelevant,¹⁰⁷ the Court based its decision on the overriding governmental interest in the close monitoring of the gun industry.¹⁰⁸

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 and to assist the States in regulating the firearms traffic within their borders.

The Court advanced two other reasons, which have been used extensively in post-*Biswell* cases, for its decision as to the validity of the search. The first reason not to require search warrants is that unannounced inspections promote effective enforcement. A warrant requirement may frustrate the congressional purpose in regulating a specified activity.¹⁰⁹

Here, 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.

The second reason suggested by the Court is of even greater significance. The Court implied that by engaging in a “pervasively regulated business,” the individual has waived fourth amendment rights and implicitly consented to warrantless administration inspections.¹¹⁰

107. The Tenth Circuit had ruled that the shopkeeper’s “consent” was invalid under *Bumper v. North Carolina*, 391 U.S. 543 (1968).

108. 406 U.S. at 315.

109. *Id.* at 316. This argument is subject to two basic criticisms. First, unannounced warrantless searches are obviously more likely to disclose violative or criminal conditions. Traditionally, however, the expediency of a warrantless inspection has been outweighed by the individual’s right to privacy under the fourth amendment. A search “is good or bad when it starts and does not change character from its success.” *United States v. Di Re*, 332 U.S. 581, 595 (1948). Secondly, in instances where entry may be expected to be refused or where surprise is essential, a warrant can be secured in advance of the inspection.

110. 406 U.S. at 316. This is the second major development in the *Colonnade-Biswell* line of cases. *Colonnade* held that warrantless licensing inspections for liquor were valid. *Biswell* extended warrantless licensing inspections to gun control, suggesting that engaging in these businesses constituted implied consent to the inspections. Referring to *Biswell*, the court in *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973), stated: “The businessman in a regulated industry in effect consents to the restrictions placed upon him.” See generally Note, *Constitution and Privilege*

Justice Douglas, the author of the *Colonnade* decision, was the lone dissenter in *Biswell*.¹¹¹ He dissented on two grounds: first, the regulation of firearms traffic "is not as deeply rooted in history as is governmental control of the liquor industry";¹¹² second, even if the firearms industry were subject to the same type of regulation as the liquor industry, Congress, in this instance, has "selected a standard that does not include forcible entries without a warrant."¹¹³ Since the search was conducted over the objection of the owner of the premises, Justice Douglas found it to be "forcible" and contrary to the dictates of the fourth amendment.¹¹⁴

Although the Court in *Colonnade* and *Biswell* seemed quite cautious in limiting its holding to liquor and firearms inspections, a large number of earlier state and federal cases had upheld the validity of warrantless licensing inspections for a variety of commercial enterprises. Most of these cases were decided on a theory of implied consent;¹¹⁵ they permitted the warrantless search of such licensed premises or individuals as liquor dealers,¹¹⁶ a firearms dealer,¹¹⁷ a funeral home,¹¹⁸ a horse trainer,¹¹⁹ a multifamily dwelling,¹²⁰ an employment

Holder's: Conditioning the Issuance of a Liquor License Upon Consent to a Warrantless Search, 48 IND. L.J. 117 (1972). The "regulated business" concept should also be kept in mind. This language is the keystone of the most recent administrative inspection cases. See, e.g., *Youghioghny & Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973). But see Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CAL. L. REV. 1011, 1026 (1973) (*Biswell* not an implied consent situation).

111. Justice Blackmun concurred, stating that had he been a member of the Court when *Colonnade* was decided he would have joined the dissent. Thus, he would have found the forcible entry and seizure in *Colonnade* to be legal.

112. 406 U.S. at 318, quoting from the majority opinion, *id.* at 315.

113. *Id.* at 318.

114. Justice Douglas would then have considered whether there was a valid consent to the search. He would have applied *Bumper v. North Carolina*, 391 U.S. 543 (1968), to determine whether the consent was, "in fact, freely and voluntarily given." 406 U.S. at 319.

115. See, e.g., *People v. White*, 259 Cal. App. 2d 936, 65 Cal. Rptr. 923 (Los Angeles County Super. Ct. 1968) (convalescent home).

116. *State Liquor Comm'n v. Gilbert*, 270 A.2d 876 (Me. 1970); *Clark v. State*, 445 S.W.2d 516 (Tex. Crim. App. 1969).

117. See, e.g., *United States v. Golden*, 413 F.2d 1010 (4th Cir. 1969) (also decided on grounds that items were open to public view). For discussion of searches in areas open to public view, see Part V-A *infra*.

118. *Cooley v. State Bd. of Funeral Directors*, 141 Cal. App. 2d 293, 296 P.2d 588 (1956).

119. *Lanchester v. State Horse Racing Comm'n*, 325 A.2d 648 (Pa. Commonwealth Ct. 1974) (because plaintiff executed waiver when granted horse trainer license, warrantless search of trailer on racing grounds not violation of fourth amendment).

agency,¹²¹ a food and drug dealer,¹²² a convalescent home,¹²³ a bar,¹²⁴ a trucking company,¹²⁵ and a fishing licensee.¹²⁶ Thus, it is not clear whether the Supreme Court's emphasis on the activity which was the object of the regulation had any impact on adjudication of licensing cases.¹²⁷

The Supreme Court's lack of precision in delineating the extent of the licensing exception has not been shared by the lower federal courts in the post-*Biswell* cases.¹²⁸ In a significant licensing case, *United States ex rel. Terraciano v. Montanye*,¹²⁹ the Court of Appeals for the Second Circuit upheld the validity of a warrantless inspection and seizure of a pharmacist's records, when both were conducted pursuant to state law. The court held that the New York statute was not unconstitutional because it failed to limit the inspection to business hours or to confer authority on agents to use force,¹³⁰ the scope of the search was

120. *John D. Neumann Properties, Inc. v. District of Columbia Bd. of Appeals & Review*, 268 A.2d 605 (D.C. 1970).

121. *Karr v. Baldwin*, 57 F.2d 252 (N.D. Tex. 1932).

122. *United States v. Crescent-Kelvan Co.*, 164 F.2d 582 (3d Cir. 1948); *but cf. United States v. Kramer Grocery Co.*, 418 F.2d 987 (8th Cir. 1969).

123. *People v. White*, 259 Cal. App. 2d 936, 65 Cal. Rptr. 923 (Los Angeles County Super. Ct. 1968).

124. *People v. Lisner*, 249 Cal. App. 2d 637, 57 Cal. Rptr. 674 (1967).

125. *Cooper's Express, Inc. v. ICC*, 330 F.2d 338 (1st Cir. 1964).

126. *Paladini v. Superior Court*, 178 Cal. 369, 173 P. 588 (1918). *Cf. State v. Marconi*, 309 A.2d 505 (N.H. 1973) (lobster license). This case was decided after *Biswell*.

127. *See generally Greenberg, The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CAL. L. REV. 1011 (1973). Several post-*Camara-See* cases held that there was no warrant requirement for a licensing inspection. *See, e.g., United States v. Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371, 1376-77 (D. Del. 1972).

128. The exact holding in *Biswell* itself was construed as not including firearms dealers without licenses. In *United States v. Hart*, 359 F. Supp. 835 (D. Del. 1973), the court held that only records of firearms licensees are subject to inspection without a warrant and that a warrant was required to inspect the records of a dealer who had lost his license. The court stated that the specific statutory authorization is limited to licensed dealers. "[I]n *Colonnade*, the Court made it clear that congressional intent to dispense with warrant requirements must be explicit and not merely implied." 359 F. Supp. at 839. This interpretation of *Colonnade*, however, appears to represent a distinctly minority view.

129. 493 F.2d 682 (2d Cir. 1974). *Cf. United States v. Montrom*, 345 F. Supp. 1337 (E.D. Pa. 1972), *aff'd mem.*, 480 F.2d 918 (3d Cir. 1973).

130.

[W]e do not find the statutes here at issue so seriously deficient as to render unconstitutional this non-forcible inspection and seizure, during business hours, by a narcotics agent, of records of a licensed pharmacist, maintained on the premises as required, relating to narcotics and stimulant or depressant drugs. 493 F.2d at 685.

The district court in *Terraciano* had found the statute defective: "Unlike the statute in *Biswell*, [the searches] are not carefully limited in time and place and

sufficiently limited by the statute to orders, prescriptions or records relating to narcotic, depressant and stimulant drugs (which were required by statute to be kept on the premises). Therefore, the court found a warrant unnecessary:¹³¹ “[T]he warrant, which would be issued for the asking, would simply track the statute and would give the person who was the object of the search nothing more than he already had.”

The licensing exception, already construed by the courts to include a variety of business endeavors,¹³² was further extended in *Youghieny & Ohio Coal Co. v. Morton*¹³³ to include an unlicensed, but “regulated,” industry. In this case, the coal company sought to enjoin the Secretary of the Interior from conducting unannounced warrantless inspections of its mines pursuant to the Federal Coal Mine Health and Safety Act of 1969.¹³⁴ The court held that the warrantless inspection and the statutory provision authorizing it¹³⁵ were constitutional for three reasons. First, the mining industry, with its long history of government regulation, had impliedly consented to warrantless inspections under the *Colonnade-Biswell* concept of “pervasively regulated business.”¹³⁶ Second, warrantless inspections in the context of mine safety investigations were reasonable, in that there was a valid and important governmental interest in the inspections; a warrant requirement would frustrate the purpose of the inspections; there was no reasonable expectation of privacy; and there was no grave danger of abuse of the authority.¹³⁷ Finally, and least persuasive, the mine employees serve the public interest and that interest demands that the employees, the “most precious resource” of the coal industry, be protected with adequate safety standards. The governmental interest in promoting mine

therefore are not the functional equivalent of a warrant.” 360 F. Supp. 1377, 1380 (W.D.N.Y. 1973).

131. 493 F.2d at 685. Cf. *People v. Curco Drugs*, 76 Misc. 2d 222, 350 N.Y.S.2d 74 (Kings County Crim. Ct. 1973), wherein the court held that obtaining a search warrant in order to conduct a search of a pharmacy would have been a “meaningless formality”; the *Camara* and *See* dissent, quoted and discussed in text accompanying notes 40–42 *supra*.

132. See notes 115–27 and accompanying text *supra*.

133. 364 F. Supp. 45 (S.D. Ohio 1973).

134. 30 U.S.C. § 801 *et seq.* (Supp. III, 1973).

135. 30 U.S.C. § 813 (1970).

136. 364 F. Supp. at 49–50.

137. *Id.* at 50–51.

safety was found to far outweigh any interest the mine operators may have in privacy.¹³⁸

As one might expect after the court in *Youghiogheny* upheld warrantless safety inspection of mines, the licensing exception was soon extended to include inspections pursuant to the Occupational Safety and Health Act of 1970 (OSHA)¹³⁹ by a federal district court in *Brennan v. Buckeye Industries, Inc.*¹⁴⁰ In this case, the Secretary of Labor sought an order compelling an inspection after Buckeye had refused to permit a warrantless inspection of its workplace.¹⁴¹ The statutory provision which authorized the inspections¹⁴² makes no mention of warrantless inspections, but limits the inspections to "regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner . . ." ¹⁴³ The legislative history also contains the following statement of Congressman Steiger, cosponsor of the Act: "I would add that in carrying out inspection duties under this act, the Secretary, of course, would have to act in accordance with applicable constitutional protections."¹⁴⁴

The court held that the "applicable constitutional protections" did not include the right to demand that an inspector obtain a warrant. The court reviewed the decisions since *Camara* and *See*¹⁴⁵ and noted

138.

Mine employees, whose interests are protected by the Act, enter such mines daily. They there perform work which is important to this nation's seemingly insatiable demands for energy. In essence then, the plaintiff's mines are open to representatives of the public and the public has every right to ensure that the working conditions of these same mines meet certain safety standards. It might be said that the plaintiff waives any rights to privacy it may otherwise have in these facilities by operating a business which requires the daily labor of large numbers of miners, who have understandably been characterized by Congress as the "most precious resource" of the coal industry.

Id.

139. 29 U.S.C. § 651 *et seq.* (1970).

140. 374 F. Supp. 1350 (S.D. Ga. 1974).

141. It is not clear why the Secretary of Labor sought an order compelling the inspection when he had issued detailed regulations concerning the procedures to be followed in securing inspection warrants. *See* U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., COMPLIANCE OPERATIONS MANUAL, ch. V-D-2 at V-6-8 (Jan. 1972). *See also* 29 CFR § 1903.4 (1972).

142. 29 U.S.C. § 657(a) (1970).

143. 29 U.S.C. § 657(a)(2) (1970). Other acts have similar provisions. *See, e.g.,* The Food, Drug and Cosmetic Act, 21 U.S.C. § 374 (1970), *discussed in* *United States v. Thriftmart*, 429 F.2d 1006 (9th Cir. 1970).

144. STAFF OF SUBCOMMITTEE ON LABOR, SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, 92d CONG., 1st SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 1077 (Comm. Print 1971).

145. The court relied heavily on *United States ex rel. Terraciano v. Montanye*,

the necessity and limited scope of the inspection, but it did not advance any compelling reason why the warrantless mine safety inspections upheld in *Youghioghney* should be extended to all businesses, regulated or not. The court concluded by stating that, "Buckeye Industries is, constitutionally speaking, marching to the beat of an antique drum."¹⁴⁶ With those few words, the court summarily sanctioned warrantless safety and health inspections of the nation's estimated 4.1 million business establishments and 57 million employees that are covered by OSHA.¹⁴⁷ Thus, the *Camara-See* exceptions for licensing a business or marketing a product have reached far beyond what seems to have been the Court's original intent. From the questionable extensions in *Colonnade* and *Biswell*, the exceptions now threaten to outflank the rule.

V. OTHER LAWFUL SEARCHES

A. *Open to Public View*

In addition to the three primary exceptions to the *Camara-See* rule,¹⁴⁸ the courts have recognized other exceptions in upholding several other types of warrantless administrative searches. The first of these, where the object of the inspection is open to public view, is based on the express language of *See* and traditional criminal law analysis. The Supreme Court stated in *See*:¹⁴⁹

[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.

The obverse of the quoted passage, that a warrant is not required where the premises are open to the public, is consistent with the well-settled rule that merely observing what is open to public view does not

493 F.2d 682 (2d Cir. 1974), and *Youghioghney & Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973).

146. 374 F. Supp. at 1356.

147. BUREAU OF NATIONAL AFFAIRS, *THE JOB SAFETY AND HEALTH ACT OF 1970*, at 1 (1971).

148. The exceptions are emergency, consent and licensing.

149. 387 U.S. at 545 (emphasis added). The same analysis applies to noncommercial premises, but this factual situation is less frequent.

constitute a search.¹⁵⁰ An important factor to consider is whether an individual or business has a reasonable expectation of privacy, even if the individual or business is in an area that is open to the public. In *Katz v. United States*,¹⁵¹ the Supreme Court reversed a conviction for interstate gambling in which the government's evidence was obtained by electronic eavesdropping of a telephone conversation made from an enclosed, coin-operated phone booth. The Court stated:¹⁵²

What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

In general, open view searches may be divided into two classes, "plain view" searches and "open fields" searches.¹⁵³ The plain view doctrine holds that an officer or other official may lawfully obtain any evidence that is within plain view if the officer or official had a legal right to be in the location from which the observations were made.¹⁵⁴ This type of search may involve viewing from public property, private property that is open to the public, or private property onto which the officials have lawfully entered. For example, in *United States v. Various Gambling Devices*,¹⁵⁵ the Court of Appeals for the Fifth Circuit upheld an FBI agent's seizure of thirty-one pinball machines pursuant to the Gambling Devices Act of 1962.¹⁵⁶ The agent observed one of the machines while standing in a public area of a private warehouse and looking into a back room through an open door. The court stated

150. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). For this reason, the open to public view "exception," is really not an exception per se, because there is no search.

151. 389 U.S. 347 (1967).

152. *Id.* at 351 (citations omitted). *Accord*, *United States v. White*, 401 U.S. 745, 752 (1971).

153. These classes are not clearly defined and may sometimes overlap, although the classification is generally helpful in analyzing the facts of each case. In addition, there have been relatively few administrative search cases decided on open view grounds. Consequently, an analogy may, in certain instances, be drawn from criminal cases to clarify the probable scope of the "open fields" doctrine as it applies to administrative searches.

154. "A search warrant is unnecessary if evidence seized is within the plain view of an officer who is present in a place where he has a right to be." *United States v. Rodriguez*, 375 F. Supp. 589, 594 (S.D. Tex. 1974), *citing* *Harris v. United States*, 390 U.S. 234 (1968).

155. 478 F.2d 1194 (5th Cir. 1973).

156. 15 U.S.C. § 1171 *et seq.* (1970).

that "[t]he federal courts have consistently held that a law enforcement officer may enter commercial premises open to the public and observe what is in plain view."¹⁵⁷ Similarly, in *United States v. Golden*,¹⁵⁸ the Fourth Circuit upheld a conviction for selling firearms without a federal license. The court permitted the warrantless search because the evidence seized consisted of guns that were on display in a store open to the public.¹⁵⁹

The plain view search has also been validated where the observations are made from public property or property owned by a third person. In *State v. Pontier*,¹⁶⁰ for example, the Supreme Court of Idaho affirmed a conviction for illegal possession of marijuana that was observed growing in the defendant's backyard. The officers sighted the marijuana plants from the yard of defendant's neighbor by looking over a waist high picket fence and through some overhanging foliage. The court held that the defendant had no reasonable expectation of privacy in an open backyard.¹⁶¹ Also in the context of plain view observation, it should be noted that courts have long sanctioned the use of binoculars,¹⁶² although the law respecting other scientific equipment is less clear.

157. 478 F.2d at 1200, *citing* *Lewis v. United States*, 385 U.S. 206 (1966) and *On Lee v. United States*, 343 U.S. 747 (1952).

158. 413 F.2d 1010 (4th Cir. 1969).

159. *Cf. Finn's Liquor Shop, Inc. v. State Liquor Authority*, 31 App. Div. 2d 15, 294 N.Y.S.2d 592 (1968), *aff'd*, 24 N.Y.2d 647, 249 N.E.2d 412, 301 N.Y.S.2d 647, *cert. denied*, 396 U.S. 840 (1969), in which the court ruled that a state liquor inspector who was given consent to search a liquor store, did not have consent to search the pockets of a coat, even though it was in plain view.

160. 95 Idaho 707, 518 P.2d 969 (1974).

161. "Planting marijuana plants in a backyard enclosed only by a picket fence and intermittent vegetation is not an action reasonably calculated to keep the plants from observation . . ." 518 P.2d at 973. The court also declined to apply the plurality opinion of four Justices in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), that the discovery of evidence in plain view must be inadvertent. *See* Justice Stewart's lead opinion in *Coolidge*, *id.* at 469. The use of adjacent property raises two other issues worthy of mention, but beyond the scope of this article. First, the use of adjacent property may be so unusual that the defendant will be found to have a valid expectation of privacy. *Cohen v. Superior Court*, 5 Cal. App. 3d 429, 85 Cal. Rptr. 354 (1970) (police officer's use of fire escape on fourth floor to peer into defendant's apartment); *contra*, *State v. Clarke*, 242 So. 2d 791 (Fla. App. 1970). Second, the defendant may have no expectation of privacy as to his immediate neighbors, but he may assert such an expectation as to the police. *See State v. Stanton*, 7 Ore. App. 286, 490 P.2d 1274 (1971).

162. *See United States v. Lee*, 274 U.S. 559 (1926); *United States v. Minten*, 488 F.2d 37 (4th Cir. 1973).

The second theory that has been used to validate open view searches is the “open fields” doctrine,¹⁶³ recently applied by the Court of Appeals for the Seventh Circuit in *United States v. Cain*.¹⁶⁴ In this case, the defendants were convicted of violating the Migratory Bird Act Treaty¹⁶⁵ and a regulation promulgated thereunder. On appeal, the defendants argued that the warrantless search of their hunting club violated the fourth amendment. In affirming the convictions, the court quoted the following from *McDowell v. United States*:¹⁶⁶

Although the Supreme Court has recently expanded the Fourth Amendment protection of the business enterprise, . . . it has not expanded such protection beyond that which a private dwelling and the curtilage thereof is likewise entitled. Therefore, a search of open fields, without a search warrant, even if such fields are construed as part of a commercial enterprise, is not constitutionally “unreasonable.”

The trend in open fields cases has been to uphold the seizure of any evidence either on or in the ground, even if concealed or hidden, unless the particular area in question is so intimately related to a protected area that it comes within the concept of curtilage. In *United States v. Brown*,¹⁶⁷ the open fields doctrine was applied to admit evidence that the FBI obtained by digging under a chicken coop in an open field. Similarly, in *Conrad v. State*,¹⁶⁸ the Supreme Court of Wisconsin held that the evidence of a corpse was admissible under the open fields doctrine, even though it was discovered by a sheriff who used a backhoe to dig numerous holes on the defendant’s property.¹⁶⁹ This warrantless trespassory search eventually uncovered the body approximately 450 feet from the defendant’s house.

163. This approach was first used in *Hester v. United States*, 265 U.S. 57, 59 (1924).

164. 454 F.2d 1285 (7th Cir. 1972).

165. 16 U.S.C. § 701 *et seq.* (1970).

166. 383 F.2d 599, 603 (8th Cir. 1967), *quoted in* 454 F.2d at 1287. *See also* *United States v. Sorce*, 325 F.2d 84, 86 (7th Cir. 1963).

167. 473 F.2d 952 (5th Cir. 1973).

168. 63 Wis. 2d 616, 218 N.W.2d 252 (1974).

169. The open fields doctrine has also been applied when there were not even any open fields. In *State v. Murdock*, 160 Mont. 95, 500 P.2d 387 (1972), the Supreme Court of Montana used the open fields doctrine to uphold a warrantless inspection of a burned-out dwelling by a fire marshal. The court stated: “[I]t can hardly be contended that the right to privacy in a partially burned dwelling after a fire is paramount

The most important case involving an administrative inspection under the open fields doctrine was decided in 1974. In *Air Pollution Variance Board v. Western Alfalfa Corp.*,¹⁷⁰ an inspector of a division of the Colorado Department of Health entered the outdoor premises of the company without its knowledge or consent in order to take readings of smoke coming from the plant's chimneys. In subsequent proceedings, the company argued that the inspection violated the fourth amendment. The Supreme Court unanimously disagreed. In an opinion by Justice Douglas, the Court emphasized that the inspector did not enter the plant or offices; the inspector sighted what anyone in the city who was near the plant could see; it was not shown that the inspector was in an area from which the public was excluded.¹⁷¹

B. *Airport Security Searches*

The current airport security system includes a number of administrative procedures.¹⁷² Every passenger is required to pass through a metal-detecting passageway. A passenger who activates the magnetometer and shows characteristics of the hijacker behavioral profile,¹⁷³ is requested to undergo a voluntary "pat-down" for weapons. If the passenger refuses to permit this search, access to the aircraft is denied. Any item that is carried on board is also subject to voluntary search by hand or magnetometer. Refusal to allow this search also results in denial of the passenger's right to board.

to the right of the public to a reasonable inspection of premises damaged by fire" 500 P.2d at 391. Cf. *People v. Sanchez*, 2 Cal. App. 3d 457, 82 Cal. Rptr. 582 (1970) (warrantless search of an abandoned household on theory that its common use made it an area that was, constitutionally speaking, open to the public).

170. 416 U.S. 861 (1974).

171. Cf. *United States v. Colgate-Palmolive Co.*, 375 F. Supp. 962 (D. Kan. 1974) (sampling of industrial waste by EPA representatives did not violate the fourth amendment).

172. See cases cited in *United States v. Albarado*, 495 F.2d 799, 801 n.1 (2d Cir. 1974). See also Gora, *Fourth Amendment at the Airport: Arriving, Departing or Cancelled?* 18 VILL. L. REV. 1036 (1973); McGinley & Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORDHAM L. REV. 293 (1972); Note, *Airport Searches and the Right to Travel: Some Constitutional Questions*, 23 CLEVE. ST. L. REV. 90 (1974); Note, *The Antiskjack System—A Matter of Search—Or Seizure*, 48 NOTRE DAME LAW. 1261 (1973); Note, *Validity of Airport Boarding Gate Search Based Upon Mere or Unsupported Suspicion*, 8 SUFFOLK U.L. REV. 783 (1974).

173. The use of the magnetometer may be considered a search. See *United States v. Epperson*, 454 F.2d 769 (4th Cir. 1972). In 1968 the Federal Aviation Administration task force developed a profile of objective characteristics to identify potential

There are three primary bases upon which airport searches have been justified.¹⁷⁴ The first, the consent theory, was delineated in *United States v. Davis*.¹⁷⁵ There the defendant, attempting to board a plane, approached the boarding gate where a check-in employee informed him that a security check was required. The employee proceeded to open the defendant's briefcase, in which a gun was found. The defendant was later convicted of carrying a concealed weapon and appealed the denial of his motion to suppress the evidence as fruits of an unconstitutional search. The Court of Appeals for the Ninth Circuit remanded the case for a determination of whether, in fact, consent had been given, and if given, whether voluntarily so.¹⁷⁶ Because "the nature and scope of airport searches was not widely known"¹⁷⁷ in 1971 when the incident occurred, the court of appeals specifically rejected the district court's holding that an attempt to board a plane constituted implied consent to a search.¹⁷⁸

It is not yet clear from the cases in this area whether notice must be given that passengers need not consent to a search, and if required, what kind of notice is sufficient. Notice of a preboarding search and the right of refusal may take any of several forms, *e.g.*, warnings printed on the ticket, conspicuous signs placed in the boarding area, and *Miranda*-type warnings given by search personnel. In *United States v. Meulener*,¹⁷⁹ the court held that prospective passengers must be advised that only those who submit to a search will be permitted to board the plane. On the other hand, in *Schneekloth v. Bustamonte*,¹⁸⁰ which involved a criminal search, the Supreme Court held that there is no duty to warn of a right to refuse a search. It is not clear at the

hijackers, which was subsequently used as part of the anti-hijacking system. A passenger meeting the hijacker profile and activating the magnetometer is referred to as a "selectee." The "profile" is not used on international flights. See *United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974). The application of the profile itself may be considered a search. See *United States v. Slocum*, 464 F.2d 1180 (3d Cir. 1972).

174. See Wright, *Hijacking Risks and Airport Frisks: Reconciling Airline Security with the Fourth Amendment*, 9 CRIM. L. BULL. 491 (1973).

175. 482 F.2d 893 (9th Cir. 1973).

176. *Id.* at 914.

177. *Id.*

178. *Id.* Query, however, whether attempting to board would not now be considered consent since airport searches are now common knowledge. See ILL. ANN. STAT. ch. 38, § 84-3 (Smith-Hurd 1970), which states that purchase of a ticket operates as consent to be searched by aircraft personnel if the purchaser desires to board the aircraft.

179. 351 F. Supp. 1284 (C.D. Cal. 1972).

180. 412 U.S. 218 (1973).

present time whether *Schneckloth* is controlling where airport searches are involved.¹⁸¹

Moreover, the consent rationale applied by the Ninth Circuit in *Davis* is not uniformly accepted. The court in *United States v. Lopez*¹⁸² stated that there is an element of coercion in airport consent.¹⁸³ In theory, an individual's right to travel is not violated when a passenger who refuses a search is denied passage because alternate means of transportation are available.¹⁸⁴ In reality, however, the significant convenience and time saving of long distance air travel, as compared with any other means, suggests that the consent may not be voluntary.¹⁸⁵

The second basis for airport searches is reasonable suspicion, similar to the situation in stop and frisk cases.¹⁸⁶ Some circuit courts have held that where the prospective passenger has activated the magnetometer and meets the hijacker profile, there is reasonable suspicion that the passenger might be armed and dangerous.¹⁸⁷ Under these circumstances, the stop and frisk rationale controls. The Ninth Circuit, however, rejects the stop and frisk analogy as inapposite by pointing out that there is no isolation of a few genuine, potential hijackers, such that reasonable suspicion would exist: "To justify a stop-and-frisk, the government must focus on each person and demonstrate that as to that individual there is specific cause to fear the justifying harm."¹⁸⁸

181. With respect to whether actual knowledge of the ability to withdraw is required, compare *United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974), with *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973). See generally Note, *Airport Anti-Hijack Searches After Schneckloth: A Question of Consent or Coercion*, 34 OHIO ST. L.J. 879 (1973).

182. 328 F. Supp. 1077 (E.D.N.Y. 1971).

183. *Id.* at 1093. See also *United States v. Rothman*, 492 F.2d 1260, 1265 (9th Cir. 1973).

184. See Beichman, *Whose Rights?* N.Y. Times, Dec. 15, 1972, at 47, col. 2, quoted in Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 414 (4th ed. 1974).

185. "To make one choose between flying to one's destination and exercising one's constitutional right appears to us . . . in many situations a form of coercion, however subtle." *United States v. Albarado*, 495 F.2d 799, 806-07 (2d Cir. 1974), citing *United States v. Kroell*, 481 F.2d 884, 886 (8th Cir. 1973).

186. See *Terry v. Ohio*, 392 U.S. 1 (1968).

187. *United States v. Moreno*, 475 F.2d 44, 46 (5th Cir.), cert. denied, 414 U.S. 840 (1973); *United States v. Dalpiaz*, 494 F.2d 374, 377 (6th Cir. 1974).

188. *United States v. Davis*, 482 F.2d 893, 906 (9th Cir. 1973) (footnote omitted). In addition, the Second Circuit pointed out in *United States v. Albarado*, 495 F.2d 799, 805 (2d Cir. 1974), that as many as 50 percent of the passengers have activated the magnetometer, whereas only one tenth of one percent of all passengers meet the profile. Under these circumstances it cannot be said that there is equivalent reasonable suspicion in all cases.

Administrative Searches

The final rationale for airport searches is the "reasonableness of the total circumstances." This approach, recently expressed in *United States v. Albarado*,¹⁸⁹ takes into account the compelling need for the search, the minimal and reasonable invasion of privacy in most cases, and the non-compulsory, if not voluntary, nature of the consent. There is also some precedent, at least in airport customs searches, that the valid public interest to be protected is adequate justification, and thus administrative probable cause exists.¹⁹⁰

The unquestioned need to provide effective airline security has raised a number of problems related to passengers' right of privacy and the possible abuse of security searches.¹⁹¹ It has even been suggested that only weapons could be seized as a result of these searches.¹⁹² In the immediate future, the courts should insist on actual knowledge of the right not to submit to a search before finding that there was consent.¹⁹³

C. Border Searches

The term "border search" actually encompasses two related but different types of administrative searches. The first type of border search is an immigration check in order to prevent illegal aliens from entering the country. The second type is a customs inspection, which is basically a simple baggage and vehicle inspection at the point of entry in order to determine citizenship, collect duty on certain goods, and prevent the importation of contraband. Although the power of the

189. 495 F.2d 799 (2d Cir. 1974).

190. Cf. *United States v. Schafer*, 461 F.2d 856 (9th Cir.), cert. denied, 409 U.S. 881 (1972). The Ninth Circuit held that in the context of an airport customs search the lack of particular knowledge on the part of inspectors did not mean that no probable cause existed to justify the inspections. *Id.* at 869, citing *Camara*, 387 U.S. at 539.

191. See Note, *Airport Searches and the Exclusionary Rule—Valid Police Work or Prosecution by Windfall?* 26 U. FLA. L. REV. 329 (1974); Note, *Skyjacking: Constitutional Problems Raised by Anti-Hijacking Systems*, 63 J. CRIM. L.C. & P.S. 356 (1972).

192. See *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973), especially at 1279 (Simpson, J. concurring) and at 1281 (Aldrich, J., dissenting).

The fear expressed by some is that the weapons search will develop into use as a general shake-down. Consider the report of Attorney General Kleindienst in 11 BNA CRIM. L. REP. 2368 (1972), which states that 2766 persons have been arrested for other offenses since the program's inception and that \$16.7 million in narcotics has been seized.

193. See generally Note, *Passengers Must Be Given Option of Not Boarding Plane Before Search*, 20 WAYNE L. REV. 209 (1973).

government to conduct these inspections is well settled,¹⁹⁴ the heightened influx of illegal aliens and narcotics, along with the government's efforts to control these problems, have brought the issue of border searches to the fore.¹⁹⁵

1. *Immigration checks*

The most significant border search case in recent years was decided by the Supreme Court in 1973. In *Almeida-Sanchez v. United States*,¹⁹⁶ border patrol agents, searching for illegal aliens on a roving patrol¹⁹⁷ 25 miles north of the Mexican border, stopped a car and conducted a warrantless search. In the course of the search a large quantity of marijuana was discovered.¹⁹⁸ The Court held the search illegal and reversed a conviction for marijuana possession. Justice Stewart, writing for a divided Court, ruled that searches by roving border patrols violated the fourth amendment when conducted without a warrant, consent or probable cause.

Justice Powell, in his concurring opinion, discussed the government's contention that because only three percent of aliens apprehended are prosecuted, roving patrol searches are purely administrative and thus require a lesser degree of probable cause.¹⁹⁹ The govern-

194. See, e.g., *Boyd v. United States*, 116 U.S. 616 (1886); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895). Border searches are also authorized by statute. See 8 U.S.C. § 1357(a); 19 U.S.C. §§ 482, 1581, 1582 (1970).

195. The court in *United States v. Baca*, 368 F. Supp. 398, 402 (S.D. Cal. 1973), estimated that there are approximately 800,000 to over 1 million illegal aliens in the United States, 85 percent of whom are citizens of Mexico. See generally Ittig, *Rites of Passage: Border Searches and the Fourth Amendment*, 40 TENN. L. REV. 329 (1973); Note, *In Search of the Border: Searches Conducted by Federal Customs and Immigration Officers*, 5 N.Y.U.J. INT'L L. & POL. 94 (1972).

196. 413 U.S. 266 (1973).

197. The Court noted that there are three types of alien searches. The first type, permanent checkpoint searches, are conducted at "nodal intersections" along the international border, or its "functional equivalent." *Id.* at 268, 272. According to the Court, a functional equivalent could be an established station near the border, the confluence of two roads that extend from the border, or an airport after an international flight. *Id.* at 272-73. The second type of search is at a temporary checkpoint, "established from time to time at various places." *Id.* at 268. Finally, roving patrols conduct searches of automobiles and other conveyances in the vicinity of the border. *Id.* The Immigration and Nationality Act, 8 U.S.C. § 1357(a) (1970) provides for warrantless searches within a reasonable distance from the border. This has been construed by the Attorney General's regulation at 8 C.F.R. § 287.1(a)(2) (1974) to be within 100 miles of the border.

198. The officers discovered 161 pounds of marijuana while looking under the rear seat of the car, a place sometimes used to hide illegal aliens.

199. 413 U.S. at 278-79.

ment also argued that warrantless roving patrol searches were the only feasible way to check illegal immigration. Although conceding that warrantless roving searches might be reasonable if certain standards were met,²⁰⁰ Justice Powell emphasized that a rational search warrant procedure is feasible and should have been utilized in the present case.

In his dissenting opinion,²⁰¹ Justice White focused on the long history of immigration regulation, the severity of the problem of illegal aliens, and the difference between immigration and contraband searches. He quoted with approval from *Fumagalli v. United States*,²⁰² wherein the Ninth Circuit stated that “probable cause is not required for an *immigration* search within approved limits but is generally required to sustain the legality of a search for *contraband* in a person’s automobile conducted away from the international borders.”²⁰³

The holding in *Almeida-Sanchez* was extended by a majority of the Ninth Circuit in *United States v. Bowen*²⁰⁴ to include searches at temporary checkpoints.²⁰⁵ The court adopted the *Almeida-Sanchez* rationale that a warrantless search without probable cause must be at either the border or its “functional equivalent.”²⁰⁶ In addition, in *United States v. Brignoni-Ponce*,²⁰⁷ the Ninth Circuit held that *Almei-*

200. *Id.* at 279. Justice Powell listed the four relevant factors as the frequency of illegal entry in a particular area, the proximity of the area to the border, the extensiveness and geographic characteristics of the area, and the probable degree of interference with the rights of innocent people. *Id.* at 283–84. Although there is disagreement as to the weight to be given these factors, the four dissenters do agree that such a warrant would satisfy the fourth amendment requirements. *Id.* at 288.

201. Chief Justice Burger, Justice Blackmun and Justice Rehnquist joined in the dissent.

202. 429 F.2d 1011 (9th Cir. 1970).

203. *Id.* at 1013 (citations omitted), *quoted in* 413 U.S. at 295–96.

204. 500 F.2d 960 (9th Cir. 1974) (en banc), *cert. granted*, 43 U.S.L.W. 3208 (U.S. Oct. 9, 1974). *Accord*, *United States v. Speed*, 489 F.2d 478, 480 (5th Cir. 1973), in which the court stated, “The distinction between a checkpoint and a roving patrol is not important.” (Having subsequently ruled that the *Almeida-Sanchez* standard would not be applied to searches which occurred before the date of that Supreme Court decision, *United States v. Miller*, 492 F.2d 37 (5th Cir. 1974), the Fifth Circuit affirmed its prior result in *Speed* but abjured its earlier reliance on *Almeida-Sanchez*. *United States v. Speed*, 497 F.2d 546 (5th Cir. 1974), *rehearing* 489 F.2d 478 (1973).)

205. *See note* 197 *supra*.

206. 500 F.2d at 960. Both the majority and dissenting justices quote with approval dictum from *Carroll v. United States*, 267 U.S. 132 (1925), which states that, for reasons of national security (if nothing else), persons may be searched *at the border*. Compare 19 U.S.C. § 1581(a) (1970), which provides that the search may occur “at any place in the United States. . . .” This may present a problem as to what is the “functional equivalent” of the border.

207. 499 F.2d 1109 (9th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3208 (U.S. Oct. 9, 1974). *Accord*, *United States v. Esquer-Rivera*, 500 F.2d 313 (9th Cir. 1974).

da-Sanchez also applied to immigration stops for the purpose of interrogating persons about their citizenship.²⁰⁸

2. Customs inspections

The second main type of border search is the customs inspection at the border. It is well settled that neither a warrant nor probable cause is required for a search at the border, whether the search of an automobile, the search of personal effects, or an outer garment pat-down.²⁰⁹ In an effort to prevent the importation of narcotics, customs agents also use the strip search and the body cavity search.²¹⁰ In both searches the central issues are whether the specific circumstances of a case justify such an onerous search and whether the overall preventive and deterrent effects of such a policy outweigh the gross invasion of the privacy of vast numbers of innocent persons.²¹¹ Because the most extreme incursions upon personal privacy are involved in these searches, the courts have required a "real suspicion" of illegal activity.²¹²

208. *But cf.* *United States v. Nevarez-Alcantar*, 495 F.2d 678 (10th Cir. 1974). In this case the Tenth Circuit upheld the search by border patrol agents of an alien's locked suitcase on the grounds that it was incident to his arrest for drunkenness. *See also* *United States v. Clark*, 501 F.2d 492 (9th Cir. 1974), in which the Ninth Circuit Court held that an authorized officer may stop an automobile and conduct a limited investigative inquiry of its occupants without probable cause if he has "reasonable grounds" or a "founded suspicion"—anything to indicate that the stop was more than harassment. *Accord*, *United States v. Jaime-Barrios*, 494 F.2d 455 (9th Cir. 1974); *United States v. Lincoln*, 494 F.2d 833 (9th Cir. 1974).

In *Clark*, the court found a stop to be valid because of the proximity to the border (one mile), radio information about an illegal alien-crossing in the area and the fact that the investigated camper was the only one in the area. After the camper was stopped, the driver's extreme nervousness and the existence of a blanket-covered bunk provided probable cause to search the vehicle. Judge Koelsch dissented; in his view, nervousness is a normal reaction to a stop at night on an isolated road by an agent in plain clothes and in an unmarked car. He stated that "[C]ourts should not tolerate officer-created probable cause." 501 F.2d at 494.

209. *See, e.g.*, *Carroll v. United States*, 267 U.S. 132, 154 (1925); *Boyd v. United States*, 116 U.S. 616 (1886); *Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967).

210. *See generally* Note, *From Bags to Body Cavities: The Law of Border Search*, 74 COLUM. L. REV. 53 (1974); Comment, *Intrusive Border Searches—Is Judicial Control Desirable?* 115 U. PA. L. REV. 276 (1966); Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968).

211. It has been suggested that those border searches requiring a medical examination be conducted only with a warrant. *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966) (Ely, dissenting). *See also* Note, *At the Border of Reasonableness: Searches by Customs Officials*, 53 CORNELL L.Q. 871 (1968); Note, *Search and Seizure at the Border—The Border Search*, 21 RUTGERS L. REV. 513 (1967).

212. In *United States v. Mastberg*, 503 F.2d 465, 467 (9th Cir. 1974), the Ninth Circuit recently quoted with approval the definition announced in *United States v. Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970):

"Real suspicion" justifying the initiation of a strip search is subjective suspi-

In *United States v. Guadalupe-Garza*, the Ninth Circuit stated that in order to justify a strip search there must be a²¹³

subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law.

A body cavity search requires an even higher degree of probable cause. In a leading case, *Henderson v. United States*,²¹⁴ the court held that a body cavity search requires a "clear indication" or a "plain suggestion" of attempted smuggling. In *United States v. Sosa*,²¹⁵ customs officials observed a man under the influence of drugs, with constricted eyes and fresh needle marks on his arms. According to the Ninth Circuit, these facts justified the strip search of the suspect; the observation of grease-like substances on his buttocks warranted a rectal probe that revealed a packet of heroin.²¹⁶

The difficulty in establishing a "real suspicion" is indicated by *United States v. Holtz*²¹⁷ in which a female, traveling with two male companions, was stopped at the border. All three were nervous, unkempt and "strung out"; none had luggage or identification; there was a condom in the woman's purse; the men had fresh needle marks on their arms; one man vomitted; a computer inquiry of the names and addresses given by the individuals indicated that at least one was an associate of a known heroin dealer. Strip searches of the men revealed nothing; but during a strip search of the woman, the inspector saw

cion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law.

But see *United States v. Chase*, 503 F.2d 571 (9th Cir. 1974), in which removal of a boot was held to be a standard border search procedure, not a strip search which need be justified by "real suspicion."

213. 421 F.2d 876, 879 (9th Cir. 1970). *Accord*, *United States v. Price*, 472 F.2d 573 (9th Cir. 1973); *United States v. Carter*, 480 F.2d 981 (9th Cir. 1973); *United States v. Gil de Avila*, 468 F.2d 184 (9th Cir. 1972), *cert. denied*, 410 U.S. 958 (1973).

214. 390 F.2d 805 (9th Cir. 1967).

215. 469 F.2d 271 (9th Cir. 1972), *cert. denied*, 410 U.S. 945 (1973).

216. In addition to rectal searches (*see, e.g., Rivas v. United States*, 368 F.2d 703 (9th Cir. 1966)), body cavity searches also include vaginal searches (*see, e.g., Henderson v. United States*, 390 F.2d 805 (9th Cir. 1967); *United States v. Mason*, 480 F.2d 563 (9th Cir.), *cert. denied*, 414 U.S. 941 (1973)) and stomach pumps (*see, e.g., Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966)).

217. 479 F.2d 89 (9th Cir. 1973).

part of a rubber prophylactic, later found to contain heroin, protruding from the suspect's vaginal area.²¹⁸ This inspection was upheld by the Court of Appeals for the Ninth Circuit.²¹⁹

In his dissent, Judge Ely noted that of 1800 women stripped and searched during a specific time only 285 (approximately 16 percent) had contraband and few were concealing it in a body cavity.²²⁰ With respect to the facts in *Holtz*, he stated:²²¹

Appellant was, in effect, stripped and searched because of her nervousness, her choice of companions, and her decision not to buy any souvenirs in Mexico. If these be objective, articulable facts sufficient to justify one of the most overwhelming personal incursions allowable under law, then the dignity and sanctity of the individual in our society stand gravely threatened.

Border searches, then, though unquestionably justified in most instances, involve several inherent problems. Apart from the question of what is the "border," the most compelling problem concerns the nature of the cause required for the search. The interest of the government in a *limited* search of persons and property crossing the border, both for aliens and contraband, is manifest and there is no question as to this procedure's continued validity. However, when more extensive searches of the individuals and their property are sought, constitutional problems arise. Although such searches may serve a function when illegal aliens are sought,²²² the rationale of *Camara* and *See* breaks down in other searches at the border, because the invasions are often extensive and personally intrusive and, although ostensibly di-

218. As a customary part of a strip search, the woman suspect was required to bend over and spread her buttocks. The court specifically held that this did not constitute a body cavity search because there was no manual opening of the vagina. Although strip searches of female suspects are performed by woman inspectors and body cavity searches by medical personnel, the courts have upheld a male agent's presence in the room with his face against the wall where the suspect had struck the inspectress. *See United States v. Carter*, 480 F.2d 981 (9th Cir. 1973).

219. Almost all these types of border searches occur along the Mexican border and are decided by the Ninth Circuit, although there are some cases in this area from the Fifth and Tenth Circuits.

220. 479 F.2d at 94. Judge Ely also expressed concern about reports that body cavity probes were conducted by nonmedical personnel under unsanitary conditions. *Id.*

221. *Id.* at 96-97 (footnote omitted).

222. Justice Powell demonstrates the efficacy of the *Camara-See* rationale in border searches for aliens in his concurring opinion in *Almeida-Sanchez*, 413 U.S. at 275. He would authorize an area-wide warrant upon giving due consideration to the factors listed in note 200 *supra*.

rected at public health and safety, are in fact usually aimed at securing contraband and detecting criminal violations. It would be a mistake to extend the *Camara-See* rationale beyond visual searches of the person and inspections of property. The small amount of contraband seized cannot justify the price paid in loss of human dignity and usurpation of constitutional rights.

D. Government Gratuities

The final type of search to be discussed is an inspection conducted in the administration of a government gratuity. Although such searches could seemingly arise under a variety of governmental programs,²²³ the leading case, *Wyman v. James*,²²⁴ involved the home visitation requirement of New York's Aid to Families with Dependent Children (AFDC) program.

In *Wyman* a welfare recipient with a minor child sought injunctive and declaratory relief to prevent the termination of her benefits for failing to permit a home visitation as required by New York statutes. A three judge District Court held the home visitation requirement unconstitutional.²²⁵ The Supreme Court, by a six-to-three vote, reversed.

Justice Blackmun wrote the majority opinion in which he presented five main reasons why the requirement of a home visitation once every three months was reasonable. First, the Court noted that the primary

223. In addition to programs involving tangible gratuities, one area of governmentally conferred "benefits" having serious search and seizure implications is the supervision of probationers and parolees. The trend of the cases is to uphold searches and seizures on less than probable cause by finding that the person searched may not object; that is, the person searched is still a prisoner for this purpose and may not invoke the protections of the fourth amendment. Thus, the question of the necessary cause is not reached. See *People v. Hernandez*, 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964); *People v. Randazzo*, 15 N.Y.2d 526, 202 N.E.2d 549, 254 N.Y.S.2d 99 (1964). See generally White, *Fourth Amendment Rights of Parolees and Probationers*, 31 U. PITT. L. REV. 167 (1969). But cf. *Morrissey v. Brewer*, 408 U.S. 471 (1972), in which the Court extended certain due process rights to parolees, and which may cast doubts on the holdings in cases like *Hernandez* and *Randazzo*. It may be, however, that *Morrissey* is distinguishable because of the nature of the right involved.

224. 400 U.S. 309 (1971). This decision has been the subject of considerable controversy. See, e.g., Note, 40 FORDHAM L. REV. 150 (1971); Note, 17 N.Y.L.F. 856 (1971); Note, 66 NW. U.L. REV. 714 (1971); Note, 24 VAND. L. REV. 821 (1971).

225. Specifically, the court held the following to be unconstitutional: N.Y. Soc. SERV. LAW § 134 (McKinney Supp. 1974); N.Y. Policies Governing the Administration of Public Assistance § 175; 18 N.Y. CODES, RULES & REGULATIONS §§ 351.10, 351.21 (1962). See *James v. Goldberg*, 303 F. Supp. 935 (S.D.N.Y. 1969).

focus of the program is the child and that a home inspection furthered the "paramount needs" of the dependent child. The second justification for home visitation is to determine whether public funds were being properly used. As the Court stated:²²⁶

One who dispenses purely private charity naturally has an interest in and expects to know how his charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same.

The Court's third reason for upholding these inspections is that the visitation is not an unnecessary intrusion on the beneficiary's rights in her home. The Court noted that the visitation was by appointment, at a reasonable hour, with no forcible entry and no snooping. Fourth, the Court found, that the search provides essential information not obtainable from secondary sources.²²⁷ Finally, the Court stated that the visit was not oriented toward a criminal investigation. With respect to this last point, the Court distinguished *Frank, Camara* and *See* because those cases provided for criminal prosecution for failure to permit an inspection:²²⁸

The only consequence of her refusal is that the payment of benefits ceases. Important and serious as this is, the situation is no different than if she had exercised a similar negative choice initially and refrained from applying for AFDC benefits.

The Court did suggest, however, that unreasonable inspection procedures would be held unconstitutional.²²⁹

Justice Douglas, in his dissent, emphasized that vast sums of money are spent on social welfare each year on such varied programs as veterans benefits, subsidies to farmers and unemployment insurance. Only in welfare payments, however, has a pervasive policing program been established.²³⁰ Moreover, the inspection procedures involve an

226. 400 U.S. at 319.

227. Mrs. James had offered to answer all questions and furnish all relevant documents, even while refusing the home visit. *Id.* at 313.

228. *Id.* at 325.

229. *Id.* at 326. See *Parrish v. Civil Serv. Comm'n*, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967); Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963).

230. Justice Douglas quoted the following from Judge J. Skelly Wright of the Court of Appeals for the District of Columbia:

Welfare has long been considered the equivalent of charity and its recipients have been subjected to all kinds of dehumanizing experiences in the government's

invasion of the home of the individual recipient.²³¹ Justice Douglas stated that the acceptance of a government gratuity should in no way waive an individual's fourth amendment rights: "Whatever the semantics, the central question is whether the government by force of its largesse has the power to 'buy up' rights guaranteed by the Constitution."²³²

Justice Marshall filed a separate dissent in which Justice Brennan joined. Among other things, this dissent criticized the majority for distinguishing *Camara* and *See* from *Wyman* on the grounds that the earlier cases involved criminal prosecutions for refusal to permit a search.²³³

Even if the magnitude of the penalty were relevant, which sanction for resisting the search is more severe? For protecting the privacy of her home, Mrs. James lost the sole means of support for herself and her infant son. For protecting the privacy of his commercial warehouse, Mr. See received a \$100 suspended fine.

Although no cases after *Wyman* have dealt directly with the issue of warrantless welfare inspections, *United States v. Cogwell*²³⁴ involved related issues. In this case, several participants in a program funded by the Office of Educational Opportunity (OEO) were charged with conspiring to defraud the government by falsifying records to show increased attendance in a program that was designed to teach educational and vocational skills to gang members in Chicago. On several occasions uniformed police visited the training centers and discovered a lack of attendance and instruction that was directly contrary to the records. In holding that the inspection by the police was valid, the

effort to police its welfare payments. In fact, over half a billion dollars are expended annually for administration and policing in connection with the Aid to Families with Dependent Children program. Why such large sums are necessary for administration and policing has never been adequately explained. No such sums are spent policing the government subsidies granted to farmers, airlines, steamship companies, and junk mail dealers, to name but a few. The truth is that in this subsidy area society has simply adopted a double standard, one for aid to business and the farmer and a different one for welfare.

Wright, *Poverty, Minorities, and Respect for Law*, 1970 DUKE L.J. 425, 437-39 (1970), quoted, 400 U.S. at 331-32.

231. "It is the precincts of the *home* that the Fourth Amendment protects; and their privacy is as important to the lowly as to the mighty." 400 U.S. at 332-33 (footnote omitted).

232. *Id.* at 327-28 (footnote omitted).

233. *Id.* at 341.

234. 486 F.2d 823 (7th Cir. 1973).

Court of Appeals for the Seventh Circuit ruled that there was no reasonable expectation of privacy in the centers and that there was consent to the inspection. In addition, the court relied on an argument similar to that used in the majority opinion in *Wyman*: "Investigation necessary to ensure proper effectuation of a tax-supported program is regarded as so essential to the fulfillment of a public trust that it is deemed reasonable."²³⁵

Thus, the standards regarding searches pursuant to the administration of government gratuities is somewhat unsettled. Even if the Court has justified the monitoring of a recipient's use of welfare funds through a program of home visitations, the Court has not presented any compelling reason why these inspections need not comport with the warrant requirement of the fourth amendment as noted in *Camara* and *See*.²³⁶ Moreover, application of this type of extensive policing program only to welfare recipients out of the many classes of persons who receive government gratuities and subsidies is highly suspect.

VI. THE STATE OF ADMINISTRATIVE SEARCH AND SEIZURE: SUMMARY AND CONCLUSION

Professor Kenneth Davis has suggested that the Supreme Court's holdings in *Camara* and *See* only represented a slight shift from the earlier position expressed in *Frank v. Maryland*.²³⁷ Although this view was not shared by the dissenters in *Camara* and *See*, in less than ten years the courts have enlarged upon the exceptions to *Camara* and *See* so tremendously that the very essence of those decisions—that nonconsensual administrative inspections of commercial and noncommercial premises require a warrant—is seriously threatened.

Regarding commercial premises, it is relatively easy to summarize the state of the law and its trends. After *Western Alfalfa*, there is every indication that outdoor administrative inspections will be upheld under the open fields doctrine. As to all administrative inspections, a

235. *Id.* at 836.

236. On the facts of *Wyman*, where the visitations were conducted by pre-arranged appointments at a reasonable hour and were a pre-condition to the continuation of benefits, a warrant may seem a mere formality. Nevertheless, the need for protection afforded by the warrant requirement is apparent when one considers the possibility that another jurisdiction may permit visitations which are unannounced, unreasonable as to time or imposing in their frequency. *See* Part III *supra*.

237. K. DAVIS, ADMINISTRATIVE LAW TEXT § 3.06 (3d ed. 1972).

standard less stringent than in criminal cases is used to determine if there is express consent to a search. Implied consent is irrebutably presumed where there is an inspection of a regulated or licensed industry pursuant to statutory provisions.²³⁸ In addition, at least one court has held that OSHA inspections do not require a warrant. Finally, anything observed in plain view in a public area or a search for emergency life-saving purposes will be held valid.

At first glance, it might appear that only the holding in *See*, relating to commercial premises, has been weakened and that *Camara's* ban on warrantless administrative inspections of noncommercial premises is still intact. Nevertheless, if the holding in *See* has been undermined, the *Camara* rule is also likely to be eroded rapidly. If the *Biswell* Court, with only one dissenter, could hold that a licensed firearms dealer had impliedly consented to a warrantless inspection of his shop, then a later court may well decide that an individual with a firearms license has impliedly consented to a warrantless search of his home. If the Supreme Court in *Wyman v. James* could hold that welfare benefits can be terminated because of a recipient's refusal to permit a warrantless inspection of her home, then it is not inconceivable that another court might uphold warrantless home inspections of recipients of unemployment compensation, workmen's compensation, veterans benefits or other governmental gratuities.²³⁹

If the preceding postulations seem implausible, it should be recalled that the law of administrative search and seizure is very new and rapidly changing. *Camara* and *See* were decided in 1967. *Colonnade*, *Biswell*, *Wyman*, *Almeida-Sanchez* and *Western Alfalfa* were all decided since 1970. Moreover, the holding in *Wyman*, when read together with the airport and border search cases, clearly suggests that the law is tending toward a "benefit conferred" justification for warrantless personal inspections. That is, the individual, by receiving a benefit from the government—whether it is a welfare payment or the

238. Nearly every business, from a barber shop to a television station, is regulated or licensed to some degree.

239. Conceivably, such inspections could be used to determine if the recipients continued to meet eligibility requirements. See also *Harkey v. deWetter*, 443 F.2d 828 (5th Cir. 1971), cert. denied, 404 U.S. 858 (1971), in which the Fifth Circuit upheld a city ordinance providing that acceptance of a permit to have animals constituted consent to inspection of all parts of the premises except those used for human dwelling.

right to cross a border or board an airplane—is expected to relinquish certain rights in return.

The trend in airport and border searches is particularly alarming. The fundamental distinction between an administrative and a criminal search is that an administrative search involves a routine inspection of a class of persons or businesses in order to secure compliance with various regulations or statutes. A criminal search, on the other hand, connotes that the search has been focused on a single or a few individuals or entities suspected of having been involved in criminal activity. When an administrative search becomes focused on an individual suspected of failing to comply with some statutory or regulatory provision for which criminal sanctions are provided, the search is no longer purely administrative and should comply with the more stringent criminal law standards.²⁴⁰ Such compliance has been lacking in extensive airport and border searches, as well as in nonroutine regulatory inspections.

The disruptive social effects of unreasonable and oppressive searches and seizures was well recognized by Justice Jackson, when he stated:²⁴¹

These [fourth amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among [the] deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror into every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

In *Camara* and *See* the Court sought to protect these “indispensable freedoms” by holding that administrative searches and seizures must comply with the fourth amendment. The recent trend which threatens this protection should be reconsidered before *Camara* and *See* and our indispensable freedoms fall prey to administrative expediency.

240. The court in *United States v. Anile*, 352 F. Supp. 14, 18 (N.D. W. Va. 1973), stated:

The court recognizes that on many occasions it can be successfully argued that suspicion does not convert an administrative investigation into a traditional criminal investigation. The problem is, of course, one of degree. The prime consideration must be the protection of recognized basic individual rights, and these individual rights should not be affected by mere labels . . .

See also note 43 *supra*; see generally Note, *Administrative Search Warrants*, 58 MINN. L. REV. 607, 639-45 (1974).

241. *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting), quoted in *Almeida-Sanchez v. United States*, 413 U.S. 266, 274 (1973).