Boston College Environmental Affairs Law Review

Volume 18 | Issue 1 Article 14

9-1-1990

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DRAWING THE LINE BETWEEN ADMINISTRATIVE AND CRIMINAL SEARCHES: DEFINING THE "OBJECT OF THE SEARCH" IN ENVIRONMENTAL INSPECTIONS

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I. INTRODUCTION

An environmental agency's inspector decides to inspect a factory on the basis of an anonymous tip that the factory is illegally disposing of toxic waste. When the factory owner refuses to consent to the inspection, the inspector obtains an administrative search warrant from a local magistrate authorizing the inspection. On the basis of information obtained from this and subsequent inspections, the environmental agency decides to seek criminal rather than civil penalties. In response, the factory owner argues that the court should exclude all evidence obtained during the original search on the basis that the search violated the fourth amendment[1] because the original search warrant was not supported by criminal probable cause.[2] Furthermore, the factory owner argues that evidence obtained during subsequent inspections, even if conducted pursuant to criminal search warrants, also should be excluded as fruits of the original illegal search.[3]

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* Executive Editor, 1990–1991, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

[1] The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[2] *See infra* text accompanying notes 112–19.

[3] *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (courts must exclude illegally seized evidence). The government, however, may use illegally seized

The above scenario illustrates the tension between a polluter's fourth amendment rights and society's need to effectively enforce environmental statutes in order to prevent irreparable or costly harm to the environment. Many environmental statutes contain both civil and criminal penalties for the same conduct.[4] Environmental enforcement agencies usually have discretion to pursue civil penalties or criminal penalties, or both.[5]

An agency's principal investigatory tool is an inspection.[6] Depending on the circumstances and the relevant statute involved, an agency may conduct its inspection pursuant to consent,[7] to a criminal search warrant,[8] to an administrative search warrant,[9] or to no warrant at all.[10] Because of limited resources, an agency often focuses inspections on individuals or businesses that are suspected of violating the relevant statute rather than randomly inspecting all individuals or businesses pursuant to a neutral inspection scheme.[11]

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evidence to impeach a defendant's statements made during direct or cross-examination. *See* United States v. Havens, 446 U.S. 620, 627 (1980).

[4] Frequently, the distinction between civil and criminal penalties is a knowing violation. *See* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136*l*(a), (b) (1988) (civil penalties for violations; criminal penalties for knowing violations); Toxic Substances Control Act, 15 U.S.C. § 2615(a), (b) (1988) (civil penalties for violations; criminal penalties for knowing violations); Clean Water Act, 33 U.S.C. § 1319(c), (d) (Supp. V 1987) (civil penalties for violations; criminal penalties for negligent violations, knowing violations, knowing endangerment, and false statements); Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), (g) (1982 & Supp. V 1987) (civil penalties for violations; criminal penalties for knowing violations); Clean Air Act, 42 U.S.C. § 7413(b), (c) (1982) (civil penalties for non-compliance; criminal penalties for knowing violations); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9603(b), 9609(a)–(d) (1982 & Supp. V 1987) (civil penalties for violations; criminal penalties for knowingly failing to notify).

[5] *Memorandum on Criminal Enforcement Priorities from EPA Associate Administrator Robert M. Perry*, 13 Env't Rep. (BNA) 859, 859 (Oct. 22, 1982) [hereinafter *Perry Memorandum*].

[6] *See* OFFICE OF ENFORCEMENT & COMPLIANCE MONITORING, U.S. ENVTL. PROTECTION AGENCY, GUIDELINES ON INVESTIGATIVE PROCEDURES FOR PARALLEL PROCEEDINGS 5 (1989) (prepared by Paul R. Thomson, Jr., Deputy Assistant Administrator for Criminal Enforcement) [hereinafter EPA GUIDELINES]. The Supreme Court has noted the importance of searches as an investigatory tool in See v. City of Seattle, 387 U.S. 541, 543–44 (1967) ("Official entry upon commercial property is a technique commonly adopted by administrative agencies at all levels of government to enforce a variety of regulatory laws . . . .").

[7] *See* Andersen, *Technology, Pollution Control, and EPA Access to Commercial Property: A Constitutional and Policy Framework*, 17 B.C. ENVTL. AFF. L. REV. 1, 28–31 (1989); Kress & Iannelli, *Administrative Search and Seizure: Whither the Warrant?*, 31 VILL. L. REV. 705, 714 (1986).

[8] *See infra* text accompanying notes 12–19.

[9] *See infra* text accompanying notes 23–54.

[10] *See infra* text accompanying notes 55–59.

[11] For example, Occupational Safety and Health Administration (OSHA) officials often

This Comment addresses the question of whether the mere existence of criminal penalties for the same violation that gives rise to civil penalties requires that the agency obtain a criminal search warrant. Section II discusses the rationale behind the traditional criminal search warrant, the administrative search warrant, and the "pervasively regulated industry" exception. Section III examines how the courts have determined the dividing line between administrative and criminal search warrants. Section IV then analyzes how to apply these principles to environmental inspections where the same violation may lead to either civil or criminal penalties.

II. INSPECTIONS AND THE FOURTH AMENDMENT

A. The Traditional Criminal Search Warrant

The fourth amendment protects individual interests and privacy concerns against unjustified intrusions by law enforcement officials.[12] It accomplishes this protection through both the reasonableness clause, which provides that all searches must be reasonable, and the warrant clause, which provides that all warrants must be supported by probable cause.[13] A search without a warrant is per se unreasonable, subject to a few, narrowly drawn exceptions.[14] The warrant

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inspect after receiving employee complaints. *See* Rothstein, *OSHA Inspections After* Marshall v. Barlow's, Inc., 1979 DUKE L.J. 63, 85.

[12] The fourth amendment was written largely in response to 18th century British writs of assistance that permitted searches unlimited in scope, without judicial supervision, and without probable cause. *See* Henry v. United States, 361 U.S. 98, 100 (1959) (probable cause requirement was a reaction to British general warrants); Bloom, *Warrant Requirement—The Burger Court Approach*, 53 U. COLO. L. REV. 691, 693–96 (1982) (discussion of the British writs of assistance and the adoption of the fourth amendment).

[13] Before finding the fourth amendment applicable, the court must decide that an individual or business has an expectation of privacy that society is prepared to recognize as valid. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). If the fourth amendment is applicable, there is some debate as to whether the warrant clause and the reasonableness clause should be read together or separately. *See* C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE § 4.03(a) (2d ed. 1986). Courts that read the clauses together will ask: "[U]nder the circumstances of this case, was it reasonable for the police to have failed to procure a warrant before conducting the search and seizure?" *Id.* at 136. Courts that read the clauses separately, however, will ask: "[W]hether or not the police had a warrant, was their conduct in this particular search reasonable?" *Id.* at 137. At the present time, courts in the first category appear to prevail. *Id.*

[14] *See* Johnson v. United States, 333 U.S. 10, 14–15 (1948). In Camara v. Municipal Court, 387 U.S. 523 (1967), the Court affirmed that "one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Id.* at 528–29.

The Supreme Court has recognized that in some circumstances, obtaining a warrant would

requirement ensures that a neutral official checks police discretion and arbitrariness by requiring a threshold standard of probable cause.[15]

In the criminal context, probable cause refers to the quantum of evidence necessary to justify a particular search.[16] The probable cause requirement limits police discretion by requiring that police have "reasonable grounds to believe" that a search will yield evidence of a crime at a particular place, and that an invasion of privacy is, therefore, justified.[17]

In recent years, the Supreme Court has emphasized that probable cause is a flexible concept.[18] Magistrates and courts must apply the

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be unfeasible or unnecessary. *See, e.g.*, Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 631 (1989) (no warrant required if special law enforcement needs make warrant impracticable); New York v. Burger, 482 U.S. 691, 699–703 (1987) (no warrant required if pervasively regulated industry); Schneckloth v. Bustamonte, 412 U.S. 218, 227–29, 248–49 (1973) (no warrant required if search authorized by voluntary consent); United States v. Robinson, 414 U.S. 218, 235 (1973) (no warrant required to conduct search incident to a lawful arrest); Coolidge v. New Hampshire, 403 U.S. 443, 467–68 (1971) (no warrant required to seize items in plain view); Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (no warrant required to conduct a frisk after a valid stop); Warden v. Hayden, 387 U.S. 294, 298–99 (1967) (no warrant required to search a home if in hot pursuit of a suspected felon); Carroll v. United States, 267 U.S. 132, 153 (1925) (no warrant required to search an automobile). One commentator has noted that this proliferation of exceptions has emasculated the warrant requirement. *See* Note, *Addressing the Pretext Problem: The Role of Subjective Police Motivation in Establishing Fourth Amendment Violations*, B.U. L. REV. 223, 224 (1983).

The usual remedy for an unreasonable search is the exclusion of the evidence at trial. *See* Mapp v. Ohio, 367 U.S. 643, 655–56 (1961) (applying the exclusionary rule to the states). In recent years, the Supreme Court has cut back on the use of the exclusionary rule. *See, e.g.*, United States v. Leon, 468 U.S. 897, 913 (1984) (creating the good faith exception to the exclusionary rule because burdens of exclusion outweigh benefits). In *Leon*, the Court held that exclusion of evidence will not deter an officer who reasonably relies on a warrant issued by a detached and neutral magistrate. *See id.* Presumably then, a court will not exclude evidence when an inspector relies in good faith on an administrative warrant, even though the inspector should have obtained a criminal warrant.

[15] *See* Johnson v. United States, 333 U.S. 10, 14 (1948). The warrant clause also limits the scope of a search by requiring that police describe with particularity the place to be searched and the things to be seized. *See* Andresen v. Maryland, 427 U.S. 463, 480 (1976).

[16] Probable cause is a more stringent standard than mere suspicion, but a less stringent standard than "beyond a reasonable doubt." Brinegar v. United States, 338 U.S. 160, 175 (1949). According to the Supreme Court, "[p]robable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Id.* at 175–76 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

[17] The warrant and probable cause requirements are necessary to limit both police discretion and intrusiveness. *See* Note, *Administrative Agency Searches Since* Marshall v. Barlow's Inc.: *Probable Cause Requirements for Nonroutine Administrative Searches*, 70 GEO. L.J. 1183, 1191 (1982).

[18] Illinois v. Gates, 462 U.S. 213, 231 (1983). The inflexible two-pronged *Aguilar-Spinelli*

requirement of probable cause in a common sense, nontechnical fashion.[19] In making the probable cause determination, magistrates should consider factors such as the veracity and the basis of knowledge of the person supplying the information in the affidavit.[20] For example, when an affiant relies on an informant, the affiant can establish probable cause by giving reasons why the informant is a reliable source and why the information is credible.[21] Thus, probable

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test, which required an affiant to establish both the veracity of an informant and the basis of the informant's knowledge, Spinelli v. United States, 393 U.S. 410, 415–18 (1969); Aguilar v. Texas, 378 U.S. 108, 114 (1964), was abandoned by the Supreme Court in *Gates*. 462 U.S. at 238. Instead, the magistrate must look at the "totality of the circumstances." *Id.* at 230–31.

Many states, however, continue to follow the *Aguilar-Spinelli* test under their state constitutions. *See* State v. Jones, 706 P.2d 317, 322 (Alaska 1985); State v. Kimbro, 197 Conn. 219, 236, 496 A.2d 498, 507 (1985); Commonwealth v. Upton, 394 Mass. 363, 373, 476 N.E.2d 548, 556 (1985); State v. Cordova, 784 P.2d 30, 31 (N.M. 1989); People v. Griminger, 71 N.Y.2d 635, 637, 529 N.Y.S.2d 55, 56, 524 N.E.2d 409, 410 (1988); State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989); State v. Jackson, 102 Wash. 2d 432, 438, 688 P.2d 136, 140 (1984).

[19] *See Gates*, 462 U.S. at 235–36; United States v. Ventresca, 380 U.S. 102, 108 (1965) ("affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a common sense and realistic fashion"). An overly technical or negative attitude by a reviewing court may discourage police from obtaining a warrant, and is inconsistent with the Court's strong preference for a warrant. *Gates*, 462 U.S. at 236. Furthermore, because probable cause is a fact-specific determination, reviewing courts must give substantial deference to the magistrate's decision. Massachusetts v. Upton, 466 U.S. 727, 732–33 (1984) (per curiam). In *Gates*, the Court disapproved of the independence of the veracity and the basis of knowledge prongs of the *Aguilar-Spinelli* test. *Gates* 462 U.S. at 233. Instead, the Court indicated that these factors should be looked at together, so that lack of one may be bolstered by the existence of the other. *Id.* at 233–34.

[20] *Gates*, 462 U.S. at 233–34. Often, the affiant establishes the credibility of the information through independent corroboration. *Id.* at 243–45.

[21] Two cases, *In re* 949 Erie St., 645 F. Supp. 55 (E.D. Wis. 1986), *appeal dismissed*, 824 F.2d 538, 539 (7th Cir. 1987), and United States v. Myers, 553 F. Supp. 98 (D. Kan. 1982), are illustrative of how the traditional criminal probable cause standard functions in an environmental criminal investigation. In *949 Erie St.*, an Environmental Protection Agency (EPA) inspector suspected several environmental consulting companies of falsification of records in violation of various federal statutes. 645 F. Supp. at 59. The inspector's suspicions were predicated on interviews with former employees as well as facts discovered by the agent's own corroborative efforts. *Id.* The agent's affidavit gave detailed accounts of the employee interviews. *Id.* The interviews revealed that many of the reports filed by the companies on behalf of industrial clients were based on tests that were either performed pursuant to unapproved methodology, falsified, or never performed at all. *Id.* The affidavit also detailed the inspector's investigations of 11 separate incidents of the companies' alleged falsification of records. The district court in *949 Erie St.* held that the affidavit established sufficient probable cause to believe that the companies falsified records in the normal course of business. *Id.* at 60. Such detailed accounts and independent corroboration are likely to satisfy credibility questions as well as insure limited enforcement discretion. *Id.*

In *Myers*, the EPA charged the defendant with two misdemeanor counts of violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(j)(1)(A) (1988), for holding an unregistered pesticide for sale and distributing the pesticide to a supermarket. 553 F. Supp. at 101. The EPA inspector based the affidavit on a state agricultural inspector's

cause may be difficult to establish when the affiant initially relies on an anonymous tip.[22]

B. Administrative Probable Cause

An administrative search is one carried out pursuant to an administrative regulatory scheme.[23] Examples of administrative searches include highway safety checks, safety inspections, border patrols, and school disciplinary inspections.[24] The Supreme Court has developed a more lenient standard of probable cause for administrative searches both because such searches are often less intrusive than criminal searches,[25] and because administrative searches are necessary for the protection of public health, safety and welfare.[26]

The Supreme Court first announced the administrative probable cause standard in the 1967 case of *Camara v. Municipal Court.*[27] In *Camara*, the government charged the defendant with a criminal violation of the San Francisco housing code for refusing to permit a

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discovery of the insecticide on the grocery store shelves of a supermarket in April, 1981, and a subsequent telephone call to the distributor of the insecticide in February, 1982. *Id.* at 102 nn.4 & 5. During the phone call, the defendant admitted selling several cases of the insecticide in order to recoup investments. *Id.* at 102 n.5.

The *Myers* court had little difficulty finding that both the informant and the information were sufficiently reliable to support probable cause for the warrant to search for business records. *Id.* at 103. The court, however, held that there was no probable cause to search for the unregistered pesticide more than 11 months after the reported violation. *Id.* at 105. Because an unregistered pesticide is contraband, an individual is likely to dispose of it quickly. *Id.* The staleness of the information, therefore, eliminated the probability that the search would yield the pesticide. *See id.*; United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972) (probable cause dissipates with the passage of time if the criminal enterprise is not continuous).

[22] *See Gates*, 462 U.S. at 232–33.

[23] *See* Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 407 (1988). Not all administrative searches, however, are conducted pursuant to a regulatory scheme. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Court characterized a school search as administrative even though no regulations were relied on. *See id.* at 335–36. In effect, an administrative search is a governmental search that is not a traditional search for evidence of crime. Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since* Camara *and* See, 61 CALIF. L. REV. 1011, 1016 (1973). One commentator has pointed out that such a definition begs the question of whether the lower administrative probable cause standard is justified. Sundby, *supra*, at 407. Furthermore, a definition of an administrative search revolving around the lack of the traditional "street crime setting" would be difficult to limit. *Id.* at 407 n.76.

[24] *See* WHITEBREAD & SLOBOGIN, *supra* note 13, § 13.01, at 267.

[25] *See* LaFave, *Administrative Searches and the Fourth Amendment: The* Camara *and* See *Cases*, 1967 SUP. CT. REV. 1, 18–19.

[26] *See* Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

[27] 387 U.S. 523 (1967).

warrantless inspection of the defendant's residence.[28] The defendant argued that the warrantless inspection scheme was unconstitutional.[29] The Court agreed and, for the first time, announced that administrative inspections implicate the fourth amendment's basic purpose of protecting individual privacy interests against unwarranted intrusions by government officials.[30] An administrative inspector, therefore, must obtain a warrant in order for the inspection to be reasonable.[31]

The Court was troubled, however, with the practical implications of requiring a warrant based on traditional probable cause for routine administrative inspections.[32] The Court realized that it would be impossible to meet the traditional probable cause standard for area-wide housing inspections because such inspections are not based on individualized suspicion.[33] The Court reached a compromise solution by redefining the standard of probable cause in the administrative context.[34] For an administrative search, probable cause exists when a housing inspection program is based on "reasonable legislative or administrative standards."[35] The Court arrived at this reasonable-

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[28] *Id.* at 525.

[29] *Id.*

[30] *Id.* at 530. Eight years earlier, in Frank v. Maryland, 359 U.S. 360 (1959), the Court had stated that the fourth amendment applied only to criminal searches. *Id.* at 365. The Court abandoned this position in *Camara* and noted that it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." 387 U.S. at 530. Furthermore, the Court noted that many administrative regulations contain criminal penalties for noncompliance or for refusal to consent to inspection. *Id.* at 531.

The *Camara* court also indicated that administrative searches involve a limited invasion of privacy because they are "neither personal in nature nor aimed at the discovery of evidence of crime." *Id.* at 537. Professor LaFave notes that this language can be interpreted in two ways: (1) when the object of the search is not criminal, the lesser standard of probable cause is appropriate; or (2) because an administrative search is less intrusive than a criminal search, the lesser standard of probable cause is appropriate. Professor LaFave argues that the first interpretation is incorrect because it implies that criminals deserve more protection than other individuals. 3 W. LAFAVE, SEARCH AND SEIZURE § 10.1(b), at 606 (2d ed. 1987). Other commentators disagree and argue that administrative searches are no less intrusive than criminal searches. *See* Sundby, *supra* note 23, at 408; Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1136–37 (1984).

[31] *Camara*, 387 U.S. at 524. The warrant limits the scope of the search, and assures the occupant that the search is legal. *Id.* at 532.

[32] *Id.* at 537.

[33] *See id.* at 535–36.

[34] *Id.* at 538.

[35] *Id.* The single dissent for both *Camara* and See v. City of Seattle, 387 U.S. 541 (1967), argued that the majority's "newfangled 'warrant' system" has no support in the fourth amendment text. 387 U.S. at 547 (Clark, J., dissenting). The dissent argued that the warrant

ness standard by balancing the government's need for administrative inspections against individual privacy interests.[36]

In the companion case to *Camara*, *See v. City of Seattle*,[37] the Court applied this lesser standard of probable cause to routine inspections of businesses. In *See*, a fire inspector sought warrantless entry into a commercial warehouse.[38] The Court reaffirmed that the fourth amendment protects privacy interests of commercial establishments.[39] An inspector, therefore, must obtain a warrant to conduct an administrative inspection.[40] Such a warrant, however, may be based on the new, more flexible administrative probable cause standard.[41]

The Supreme Court elaborated upon the concept of administrative probable cause necessary for commercial inspections in *Marshall v. Barlow's, Inc.*[42] *Barlow's* involved a warrantless inspection pursuant to the Occupational Safety and Health Act (OSHA).[43] Although the Court invalidated the warrantless inspection,[44] the Court held that, for administrative inspections, "probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are

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requirement would be unduly burdensome, and that the inspection should be judged by reasonableness alone. *Id.* at 549, 554.

[36] The majority in *Camara* explained that "[i]n determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." *Id.* at 535. The majority further noted that "[s]uch an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in the area. It merely gives full recognition to the competing public and private interests here at stake . . . ." *Id.* at 539. Thus, probable cause in the administrative context refers not to a quantum of evidence, but to the reasonableness of a search. Griffin v. Wisconsin, 483 U.S. 868, 877 n.4 (1987). One commentator disagrees and argues that the reasonableness balancing test applied in both *Camara* and *Terry* have weakened the probable cause standard and diluted the fourth amendment's protection. *See* Sundby, *supra* note 23, at 385.

[37] 387 U.S. 541 (1967).

[38] *Id.* at 541.

[39] *Id.* at 543. An owner or operator of a business establishment may have an expectation of privacy that society is prepared to recognize as legitimate. *See* Donovan v. Dewey, 452 U.S. 594, 598–99 (1981). This expectation of privacy, however, is less than a similar expectation of privacy in a residence. *See id.*

[40] *See See*, 387 U.S. at 545–46.

[41] *Id.* at 546.

[42] 436 U.S. 307 (1978).

[43] 29 U.S.C. §§ 651–678 (1982 & Supp. V 1987).

[44] *Barlow's*, 436 U.S. at 325; *see also infra* notes 55–57 and accompanying text (discussing the rationale behind the pervasively regulated industry exception).

satisfied with respect to a particular [establishment].'"[45] Lower courts have interpreted this language as developing a two-prong test for administrative probable cause: first, probable cause may be based on specific evidence of a violation;[46] or second, probable cause may be based on a neutral inspection scheme.[47]

Lower courts consistently have held that an administrative search based on the specific evidence prong of the *Barlow's* criteria does not require traditional criminal probable cause.[48] Although it is unclear exactly what quantum of evidence will satisfy the specific evidence prong of administrative probable cause, courts agree that it is something less than that required to satisfy traditional criminal probable cause.[49]

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[45] 436 U.S. at 320 (quoting Camara v. Municipal Court, 387 U.S. 523, 538 (1967)). Some commentators argue that the Court's reference to "specific evidence" was not meant to allow for the more flexible administrative probable cause standard when the administrative agent suspects a violation. Instead, they argue that inspections pursuant to specific evidence must meet the traditional probable cause standard because such inspections allow for increased discretion and intrusiveness. *See* Welks, *The Fourth Amendment and the Third Warrant*, NAT. ENVTL. ENFORCEMENT J., May, 1987, at 7; Note, *supra* note 17, at 1207.

[46] *See, e.g.*, United States v. Establishment Inspection of Jeep Corp., 836 F.2d 1026, 1027 (6th Cir. 1988) (complaints from employees that unsafe usage of hand tools causes carpal tunnel syndrome); Burkhart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313, 1315 n.1 (7th Cir. 1980) (employee complaints of inadequate plumbing, ventilation, sanitation, eating areas, and fire escapes); National-Standard Co. v. Adamkus, 685 F. Supp. 1040, 1044 (N.D. Ill. 1988), *aff'd*, 881 F.2d 352 (7th Cir. 1989) (EPA geologist's visual observations of potential hazardous wastes); *In re* Alameda County Assessor's Parcel Nos. 537-801-2-4 & 537-850-9, 672 F. Supp. 1278, 1287 (N.D. Cal. 1987) (EPA suspicion that wetlands were being filled); *In re* Stanley Plating Co., 637 F. Supp. 71, 72 (D. Conn. 1986) (environmental engineer's belief that facility was discharging hazardous waste into surface impoundments); Pieper v. United States, 460 F. Supp. 94, 96 (D. Minn. 1978), *aff'd*, 604 F.2d 1131 (8th Cir. 1979) (information that rodent exterminator may be using illegal pesticide); State v. Kelly, 205 Mont. 417, 426, 668 P.2d 1032, 1038 (1983) (some packaging more likely to contain items with diseases and insects may be opened); New Mexico Envtl. Improvement Div. v. Climax Chem. Co., 105 N.M. 439, 440, 733 P.2d 1322, 1323 (1986) (litmus paper test indicated presence of hazardous wastes).

[47] For cases holding that an inspection scheme is neutral, see, *e.g.*, Industrial Steel Prods. Co. v. OSHA, 845 F.2d 1330, 1332 & n.1, 1337–38 (5th Cir.), *cert. denied*, 488 U.S. 993 (1988) (OSHA-programmed health inspection plan); *In re* Texas Tank Car Works, 597 F. Supp. 591, 594, 595 (N.D. Tex. 1984) (OSHA inspection plan); Chicago Zoological Soc'y v. Donovan, 558 F. Supp. 1147, 1152, 1153 (N.D. Ill. 1983) (OSHA accident investigation policy). For cases holding that an inspection scheme is not neutral, see, *e.g.*, Brock v. Gretna Mach. Ironworks, Inc., 769 F.2d 1110, 1113, 1114 (5th Cir. 1985) (OSHA-programmed health inspection plan); United States v. New Orleans Pub. Serv., Inc., 723 F.2d 422, 424, 427 (5th Cir. 1984), *cert. denied*, 469 U.S. 1180 (1986) (Equal Employment Opportunity Commission inspection plan).

[48] *E.g.*, *In re* Establishment Inspection of Gilbert & Bennett Mfg. Co., 589 F.2d 1335, 1339 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979); *In re* Alameda County Assessor's Parcel Nos. 537- 801-2-4 & 537-850-9, 672 F. Supp. 1278, 1287 (N.D. Cal. 1987); Pieper v. United States, 460 F. Supp. 94, 97 (D. Minn. 1978), *aff'd*, 604 F.2d 1131 (8th Cir. 1979).

[49] *See supra* note 48 and cases cited therein.

For example, in order to limit agency discretion, several courts have held that the mere allegation of a violation is insufficient to establish administrative probable cause.[50] Such a conclusory affidavit would render the magistrate a "rubber stamp."[51] If the administrative inspector, however, gives some underlying factual data behind the inspector's suspicion of a violation, such data will probably be sufficient to establish the credibility or basis of knowledge of the informant.[52]

Thus, although the modern trend is to interpret criminal probable cause in a flexible manner,[53] there may be situations where an affidavit will support administrative, but not criminal, probable cause. The determination of which standard to apply, therefore, could be crucial to the preservation of evidence gathered during environmental inspections pursuant to suspected violations.[54]

The determination of the proper standard may be even more crucial when an agency conducts a warrantless inspection pursuant to the pervasively regulated industry exception.[55] According to the

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[50] *See, e.g., Inspection of Jeep Corp.*, 836 F.2d at 1027 (OSHA must show that the proposed inspection is based on a reasonable belief that a violation has occurred or is occurring, and that the inspection is "not based upon a desire to harass the target of the inspection"); Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1225 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 940 (1982) (INS must show "sufficient specificity and reliability to prevent the unbridled discretion by law enforcement officials"); Marshall v. Horn Seed Co., 647 F.2d 96, 101–02 (10th Cir. 1981) (for inspections based on specific evidence, "there must be some plausible basis for believing that a violation is likely to be found" in order to prevent the danger of arbitrary government intrusions). *But see, e.g., Inspection of Gilbert & Bennett Co.*, 589 F.2d at 1339 ("*Camara* and *Barlow's* do not require that the warrant application set forth the underlying circumstances demonstrating the basis for the conclusion reached by the complainant, or that the underlying circumstances demonstrate a reason to believe that the complainant is a credible person."); Pieper v. United States, 460 F. Supp. 94, 98 (D. Minn. 1978), *aff'd*, 604 F.2d 1131 (8th Cir. 1979) (administrative probable cause is established as long as the magistrate is presented with "specific evidence of an existing violation").

[51] *See* Weyerhaeuser Co. v. Marshall, 592 F.2d 373, 378 (7th Cir. 1979) (court invalidates conclusory OSHA warrant application as "unrelieved boilerplate"); National-Standard Co. v. Adamkus, 685 F. Supp. 1040, 1047 (N.D. Ill. 1988), *aff'd*, 881 F.2d 352 (7th Cir. 1989) (court upholds EPA warrant application stating basis of knowledge is not mere boilerplate).

[52] Courts are more likely to infer credibility when the informant is not a professional. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42, 44, 47 (1970) (in determining probable cause to search supposed getaway car, Court does not inquire into the reliability of two witnesses who saw the car).

[53] *See supra* notes 18–20 and accompanying text.

[54] *See, e.g.*, People v. deWit, No. 88-38, slip op. at 8 (N.Y. County Ct., Wayne County Feb. 16, 1989), *aff'd*, 156 A.D.2d 973, 550 N.Y.S.2d 820 (1989) (evidence suppressed because pesticide inspector failed to obtain criminal search warrant); *see also supra* notes 12–22 and accompanying text.

[55] The Supreme Court has upheld warrantless administrative searches pursuant to the pervasively regulated industry exception in several different contexts. *See* New York v.

pervasively regulated industry exception, such warrantless administrative searches are justified by a greater need for frequent, unannounced inspections and a reduced expectation of privacy.[56] Although the relevant statute must set out sufficient administrative standards to limit the time, place, and scope of such warrantless inspections, the inspections need not be conducted pursuant to a neutral inspection scheme and, instead, may be conducted pursuant to specific evidence of a violation.[57] Thus, if a criminal defendant challenges the validity of a warrantless search that was based on a suspected violation, the court must determine whether to apply an administrative or criminal probable cause standard to the factual data supporting the suspected violation.[58] If the court applies criminal probable cause, evidence obtained during a warrantless search will probably be excluded because, with few exceptions,[59] criminal searches must be accompanied by criminal search warrants.

III. THE ADMINISTRATIVE/CRIMINAL BORDERLINE

The determination of whether an environmental inspection is administrative or criminal in nature may be crucial to the outcome of

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Burger, 482 U.S. 691, 712 (1987) (auto junkyards); Donovan v Dewey, 452 U.S. 594, 605 (1981) (mines); United States v. Biswell, 406 U.S. 311, 316 (1972) (firearm industry); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76 (1970) (liquor industry).

At least one court and several commentators have noted that the hazardous waste and pesticide industries may fall within the pervasively regulated industry exception. *See* New Jersey v. Santiago, Crim. App. No. 21-86 (N.J. Super. Ct., Salem County Mar. 5, 1987), *reprinted in Warrantless Administrative Search Upheld as Appropriate Exercise of State Authority*, 1 Toxics L. Rep. (BNA) 1249 (Apr. 8, 1987); Andersen, *supra* note 7, at 25; Welks, *supra* note 45, at 10. Several commentators, however, have suggested that warrantless entry under various environmental statutes may be unconstitutional. *See* Cauley, *Constitutionality of Warrantless Environmental Inspections*, 15 COLUM. J. ENVTL. L. 83, 95–97 (1990); Note, *EPA Inspections of Hazardous Waste Sites: A Valid Exception to the Warrant Requirement for Administrative Searches?*, 65 U. DET. L. REV. 333, 344–45 (1988).

[56] *See* New v. Burger, 482 U.S. 691, 710 (1987) ("frequent" and "unannounced" inspections are necessary to deter auto theft); Donovan v. Dewey, 452 U.S. 594, 603 (1981) (warrant procedure might impede the government's substantial interest in improving safety of mines, and pervasive regulations puts mine owner on notice that periodic inspections will be carried out); United States v. Biswell, 406 U.S. 311, 316 (1972) (warrantless inspections of pawn shops are justified based on the government's need for frequent unannounced inspections and the gun dealer's reduced expectation of privacy).

[57] In Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), an Internal Revenue Service agent had entered a catering establishment as a guest at a party and observed possible federal excise tax violations. *Id.* at 73. The agent later returned, inspected the cellar, and broke into a locked storeroom. Thus, the search in *Colonnade* was pursuant to a suspected violation. *Id.*

[58] *See deWit*, slip op. at 7.

[59] *See supra* note 14 and cases cited therein.

a criminal prosecution. As the EPA Memorandum on Inspection Procedures notes, administrative inspections require only administrative warrants, whereas inspections intended to gather evidence for a possible criminal prosecution require criminal search warrants.[60] The line between administrative and criminal searches, however, is not always clear.[61] Thus, one potentially important question is whether an administrative warrant or a warrantless administrative search is being used as a pretext to search for evidence of a crime.

Several Supreme Court decisions involving fire inspections help draw the line between administrative and criminal searches. Both *Michigan v. Tyler*[62] and *Michigan v. Clifford*[63] involved warrantless fire investigations. In *Tyler*, the Court held that fire officials may use an administrative warrant to investigate the cause of a fire.[64] Further access to gather evidence of arson, however, requires a search warrant based on traditional criminal probable cause.[65]

The Court expanded on the distinction between administrative and criminal searches in *Clifford*. In *Clifford*, fire investigators with the arson section of the fire department investigated a fire at the Cliffords' residence.[66] The investigators, in confirming that the fire

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[60] ENVIRONMENTAL PROTECTION AGENCY MEMORANDUM ON INSPECTION PROCEDURES (Apr. 11, 1979), in [2 Fed. Laws] Env't Rep. (BNA) 2451 (June 8, 1979).

[61] The Court has adopted the administrative balancing standard in many situations that have both civil and criminal elements. *See* Griffin v. Wisconsin, 483 U.S. 868, 873–74 (1987) (search of probationer's home); Illinois v. Lafayette, 462 U.S. 640, 644 (1983) (inventory search of personal effects of arrestee); United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983) (Coast Guard search); Delaware v. Prouse, 440 U.S. 648, 657 (1979) (random automobile stop); United States v. Ramsey, 431 U.S. 606, 616 (1977) (customs search); United States v. Martinez-Fuerte, 428 U.S. 543, 562–63 (1976) (border patrol search). For a discussion of the application of the balancing standard in criminal cases, see Note, *supra* note 30, at 1134–35.

[62] 436 U.S. 499 (1978).

[63] 464 U.S. 287 (1984).

[64] 436 U.S. at 511–12. The dissent, however, argued that the fourth amendment's warrant clause is inapplicable to routine regulatory inspections of commercial premises. Reading the warrant clause and the reasonableness clause separately, therefore, the dissent found the searches to be reasonable. *Id.* at 516–17 (Rehnquist, J., dissenting). For an explanation of the relationship between the warrant clause and the reasonableness clause, see *supra* note 13.

[65] *Tyler*, 436 U.S. at 511–12. Justice Stevens, in his concurring opinion, however, argued that under the majority's rationale, the police have a disincentive to establish probable cause because the less evidence of illegality that an officer gathers, the less justification the officer needs to obtain a warrant. *Id.* at 514 n.4 (Stevens, J., concurring).

[66] 464 U.S. at 290. In fighting the blaze, fire officials had found fuel cans in the basement. *Id.* at 290 n.1. Interestingly enough, neither the fact that the arson section of the fire department was investigating the fire nor the fact that the fuel cans provided the arson investigators with prior suspicion affected the Court's holding that the investigation of the basement could be justified by administrative probable cause.

had originated in the basement, found several fuel cans and a crock pot with attached wires and a timer.[67] The investigators then proceeded to conduct an extensive search of the remainder of the house.[68] The Court, in a plurality decision, invalidated the warrantless search of the basement[69] and noted in dicta that an administrative warrant would suffice so long as the "primary purpose" of the investigation is to discover the cause of the fire.[70] If the "object of the search," however, is to gather evidence of criminal activity, a traditional search warrant based on full probable cause is required.[71] Thus, even if the search of the basement had been a valid administrative search, the subsequent search of the upstairs was a criminal search to gather evidence of arson because the investigators had already determined that the fire originated in the basement.[72]

It is important to distinguish the "object of the search" from the subjective motivation of the searcher. The Supreme Court has consistently asserted that the subjective motivation of the searcher is irrelevant in determining the validity of a search.[73] Inquiries into the subjective intentions of the searcher are inherently unproductive and unreliable.[74] Instead, when the Supreme Court refers to the

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[67] *Id.* at 290.

[68] *Id.* at 291. The investigators, in opening drawers and closets, observed that most of the valuables were missing. *Id.*

[69] *Id.* at 297. The plurality held that the warrantless search of the basement violated the fourth amendment because the search occurred six hours after the fire, and the homeowners had taken steps to secure their home from further intrusion. *Id.* The dissent, however, argued that the warrantless search of the basement could be justified under the exigent circumstances exception. *Id.* at 309 (Rehnquist, J., dissenting).

[70] *Id.* at 297.

[71] The plurality held:

> If a warrant is necessary, the object of the search determines the type of warrant required. If the primary object is to determine the cause and origin of a recent fire, an administrative warrant will suffice . . . .
>
> If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched.

Id. at 294.

[72] *Id.* at 297.

[73] *See, e.g.*, Maryland v. Macon, 472 U.S. 463, 470–71 (1985) (subjective motivation of police officer in seizing obscene materials is irrelevant); United States v. Hensley, 469 U.S. 221, 234–35 (1985) (officer's intention to arrest where an arrest would not be justified does not affect the validity of an objectively reasonable stop); Illinois v. Lafayette, 462 U.S. 640, 646 (1983) (officer's subjective fears are irrelevant as long as inventory search of arrestee's bag is objectively reasonable); Scott v. United States, 436 U.S. 128, 136 (1978) (motivation or intention of officer is irrelevant as long as officer's actions are objectively reasonable); Terry v. Ohio, 392 U.S. 1, 21–22 (1968) (reasonableness of a search must be judged against an objective standard).

[74] *See* United States v. LaSalle Nat'l Bank, 437 U.S. 298, 316 (1978) (inquiries into subjective

"object of the search," it refers to the quantum of evidence necessary to establish criminal probable cause.[75] In other words, an administrative inspector may not use evidence of criminality discovered during the course of a valid administrative search to expand the scope of that administrative search into a search for criminal evidence.[76] If the purpose behind an administrative search has been entirely fulfilled, any further search is a search to gather criminal evidence justifiable only upon obtaining a warrant based on criminal probable cause.[77]

Without any mention of *Tyler* or *Clifford*, however, the Supreme Court appears to have disregarded this very principle in *New York v. Burger*,[78] a recent decision involving the pervasively regulated industry exception. The New York statute at issue in *Burger* authorized warrantless inspections of auto junkyards.[79] Although the owner of the junkyard informed inspectors from the Auto Crimes Division of the New York Police Department that the records the statute required to be kept were not available, the inspectors proceeded with the search and discovered that several vehicles and vehicle parts in the junkyard were stolen.[80] The police then arrested and charged the defendant with five counts of possession of stolen property.[81]

Although none of the reasoning applied to uphold the warrantless search in *Burger* is novel, the decision has generated a substantial amount of criticism.[82] The criticism essentially revolves around the

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motivation of IRS agent will frustrate and delay enforcement); Abel v. United States, 362 U.S. 217, 255 (1960) (Brennan, J., dissenting) (an individual's expectation of privacy should not "fluctuate with the 'intent' of the invading officers").

[75] *See* W. LAFAVE, *supra* note 30, § 10.4(d), at 708; WHITEBREAD & SLOBOGIN, *supra* note 13, § 13.05, at 275.

[76] *Clifford*, 464 U.S. at 294.

[77] *Id.* at 297. In *Clifford*, once the investigator discovered the origin of the fire, the search of the remainder of the house could only be used to gather evidence of arson. *Id.*; *see also* New York v. Burger, 482 U.S. 691, 728 (1987) (Brennan, J., dissenting) (arguing that warrantless administrative search cannot be used as a pretext to search for stolen auto parts); Abel v. United States, 362 U.S. 217, 226 (1960) (use of an administrative search as a pretext to gather evidence for criminal prosecution constitutes governmental bad faith).

[78] 482 U.S. 691 (1987).

[79] N.Y. VEH. & TRAF. LAW § 415-a(5) (McKinney 1986). The avowed purpose behind the statute is to help eradicate motor vehicle theft. *See Burger*, 482 U.S. at 708.

[80] *Burger*, 482 U.S. at 694–95.

[81] *Id.* at 695.

[82] *See generally* Reich, *Administrative Searches for Evidence of Crime: The Impact of* New York v. Burger, 5 TOURO L. REV. 31 (1988); Wax, *The Fourth Amendment, Administrative Searches and the Loss of Liberty*, 18 ENV. L. 911 (1988); Note, *The "Administrative" Search from* Dewey *to* Burger: *Dismantling the Fourth Amendment*, 16 HASTINGS CONST.

majority's determination that the search in *Burger* was a valid administrative search.[83] Although the majority reasserted the accepted principle that the government may obtain criminal evidence in the course of an otherwise valid administrative search, the dissent argued, and many commentators agree, that the search in *Burger* was criminal in nature.[84] Once the defendant informed the inspectors that the required records were not on the premises, every administrative requirement behind the statute had been violated.[85] Any further search, therefore, was a search for criminal evidence.[86]

Although the *Tyler* and *Clifford* decisions attempt to draw a relatively clear line between an administrative search and a criminal search, the *Burger* decision demonstrates that this line can be somewhat murky. This line becomes even cloudier, however, when the

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L.Q. 261 (1989); Casenote, New York v. Burger, 19 ST. MARY'S L.J. 397 (1987); Casenote, New York v. Burger: *Can an Administrative Search Be Used to Uncover Evidence of a Crime*, 56 UMKC L. REV. 617 (1988).

[83] The majority opinion, in which Chief Justice Rehnquist joined, held that "[t]he discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect." *Burger*, 482 U.S. at 716. In his concurring opinion in *Donovan v. Dewey*, 452 U.S. 594 (1981), however, Rehnquist noted that:

> The Court holds that warrantless searches of stone quarries are permitted because the mining industry has been pervasively regulated. But I have no doubt that had Congress enacted a criminal statute similar to that involved here—authorizing, for example, unannounced warrantless searches of property reasonably thought to house unlawful drug activity—the warrantless search would be struck down under our existing Fourth Amendment line of decisions. This Court would invalidate the search despite the fact that Congress has a strong interest in regulating and preventing drug-related crime and has in fact pervasively regulated such crime for a longer period of time than it has regulated mining.

Id. at 608

[84] The dissent argued that:

> [The majority] implicitly holds that if an administrative scheme has certain goals and if the search serves those goals, it may be upheld even if no concrete administrative consequences could follow from a particular search. This is a dangerous suggestion, for the goals of administrative schemes often overlap with the goals of criminal law. Thus, on the Court's reasoning, administrative inspections would evade the requirements of the Fourth Amendment so long as they served an abstract administrative goal, such as the prevention of auto theft. A legislature cannot abrogate constitutional protections simply by saying that the purpose of an administrative search scheme is to prevent a certain type of crime. If the Fourth Amendment is to retain meaning in the commercial context, it must be applied to searches for evidence of criminal acts even if those searches would also serve an administrative purpose, unless that administrative purpose takes the concrete form of seeking an administrative violation.

Burger, 482 U.S. at 728 (Brennan, J., dissenting).

[85] *Id.* at 725–26.

[86] *Id.* at 726.

same conduct or violation can lead to either a civil or a criminal penalty.[87] In *United States v. LaSalle National Bank*,[88] the Supreme Court addressed this issue in the context of an Internal Revenue Service (IRS) summons.[89] In *LaSalle*, a special agent for the IRS was investigating an individual for "the possibility of any criminal violations of the Internal Revenue Code."[90] As part of that investigation, the agency issued two summonses to LaSalle National Bank, the trustee of several of the taxpayer's land trusts.[91] The bank refused to produce any of the materials requested because it argued that the agent's investigation was criminal in nature, and, therefore, the summonses were issued in bad faith.[92]

In holding that the summonses were issued in good faith, the Supreme Court emphasized the dual civil and criminal nature of the Internal Revenue Code.[93] Willful submission of fraudulent tax returns may subject an individual to either criminal or civil penalties.[94] Because the same conduct could lead to either criminal or civil penalties, the subjective motivation of the agent is not dispositive.[95] The Court noted that it would be absurd to attach legal relevance to the motivation of the agent, particularly when layers of review are required before the Justice Department will prosecute.[96]

Instead, the Court held that the relevant inquiry is whether the IRS, as an institution, is pursuing its authorized powers in good faith.[97] The party opposing the summonses, therefore, has the burden of proving that the institution does not have a valid civil purpose in issuing the summonses.[98]

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[87] *See* United States v. Acklen, 690 F.2d 70, 71, 74 (6th Cir. 1982) (title II of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801–971 (1988), provides both civil and criminal penalties for failure of businesses engaged in manufacturing or distributing controlled drugs to maintain required records).

[88] 437 U.S. 298 (1978).

[89] An administrative summons, like a search, is a method of enforcing administrative regulations. A summons or a subpoena, however, does not involve an actual search. One commentator has argued that this difference destroys the analogy. *See* Sundby, *supra* note 23, at 394 n.39. The Supreme Court, however, has drawn the analogy in at least one case. *See* See v. City of Seattle, 387 U.S. 541, 544 (1967).

[90] 437 U.S. at 300.

[91] *Id.* at 301.

[92] *Id.* at 303.

[93] *Id.* at 308–11.

[94] *Id.* at 308. A taxpayer may be subject to criminal penalties, 26 U.S.C. §§ 7206, 7207 (1988), and a 50% civil tax penalty. *Id.* § 6653(b) (1982), *amended by* 26 U.S.C.A. § 6653(b) (West 1989).

[95] *LaSalle*, 437 U.S. at 315.

[96] *Id.*

[97] *Id.* at 316.

[98] *Id.* The majority noted that although this would be a very difficult burden to meet, a

Because the *LaSalle* decision was not based on the fourth amendment, it is not dispositive of an administrative warrant case.[99] Several lower courts, however, have analogized to *LaSalle* in upholding an administrative warrant against challenges that a criminal warrant was required.[100] These courts have disregarded the subjective motivation of the inspector and instead focused on the objective reasonableness of the search.[101] An administrative search is objectively reasonable if the scope of the search is limited to its administrative goals, and if the search is carried out in a reasonable manner.[102]

United States v. Consolidation Coal Co.,[103] an early decision of the Court of Appeals for the Sixth Circuit involving criminal violations of the Federal Coal Mine Health and Safety Act,[104] is illustrative of the validity of an administrative search depending on its objective reasonableness.[105] In *Consolidation Coal*, a mine safety inspector obtained several search warrants to search coal mine offices pursuant to an affidavit stating that an unidentified ex-employee had revealed systematic efforts by the defendant to evade respirable dust concentration standards and monitoring requirements of the Act.[106] The district court, in applying the criminal probable cause standard, held that the warrants were invalid because the information in the affidavits was conclusory and potentially stale.[107]

In reversing, the court of appeals stated that the district court improperly applied the criminal probable cause standard.[108] The court emphasized that the searches were part of a single compliance inspection, reasonable in scope, if not in motivation.[109] The fact that

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defendant can meet the burden by proving delay in submitting a recommendation to the Justice Department when the institutional decision to prosecute has been made. *Id.* at 317.

[99] The IRS summonses in *LaSalle* did not involve a physical inspection. *See supra* note 89.

[100] *See* United States v. Nechy, 827 F.2d 1161, 1167 (7th Cir. 1987); United States v. Gel Spice, 773 F.2d 427, 433 (2d Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986); United States v. Acklen, 690 F.2d 70, 74 (6th Cir. 1982); *cf.* Commonwealth v. Eagleton, 402 Mass. 199, 207, 521 N.E.2d 1363, 1367 (1988) (does not directly analogize to *LaSalle*, but upholds administrative warrant against challenge that criminal warrant was required).

[101] *See, e.g., Acklen*, 690 F.2d at 74.

[102] *See id.*

[103] 560 F.2d 214 (6th Cir. 1977), *vacated and remanded*, 436 U.S. 942 (1978) (for further consideration in light of *Marshall v. Barlow's, Inc.* and *Michigan v. Tyler*), *judgment reinstated*, 579 F.2d 1011 (6th Cir.), *cert. denied*, 439 U.S. 1069 (1979).

[104] 30 U.S.C. §§ 801–962 (1982 & Supp. V 1987).

[105] 560 F.2d at 218.

[106] *Id.* at 216. Section 819 of the Act imposes criminal penalties for willful violations. 30 U.S.C. § 819(b)–(d) (1976) (current version at 30 U.S.C. § 820(d), (f), (h) (1982)).

[107] *Consolidation Coal*, 560 F.2d at 216. The district court suppressed all evidence obtained during the six simultaneous searches. *Id.*

[108] *Id.* at 218.

[109] *Id.* The court applied the *Camara* balancing test in finding that the public need for

the search was predicated on criminal suspicion made the scope of the search no broader.[110]

Although *Consolidation Coal* was decided before *LaSalle*, the court in *Consolidation Coal* noted that it would be absurd to attribute legal significance to the motivation of the inspector when the Secretary of the Interior had considerable discretion to choose either civil or criminal penalties.[111] Instead, the court advocated a single administrative probable cause standard for all warrants in furtherance of the Act, because any administrative warrant issued to insure compliance may have criminal overtones.[112]

Other lower courts, however, have declined to follow this rationale and have applied instead the reasoning of *Tyler* and *Clifford* in order to invalidate administrative search warrants or warrantless administrative searches based on criminal suspicion.[113] Among environmental cases, *People v. deWit*[114] is the most notable. In *deWit*, a New York trial court invalidated a warrantless search of a commercial greenhouse because the pesticide inspector was investigating a tip from an informant that the greenhouse might be using illegal pesticides.[115] The *deWit* court refused to reach the issue of whether pesticide applicators are pervasively regulated.[116] Instead, the court suppressed the evidence discovered during the searches because the inspector suspected illegal activity.[117] The court rejected the government's argument that legal significance should not attach to an inspector's motivations when the decision to prosecute is made by

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effective enforcement outweighed any privacy interests of the owner of the coal mine. *Id.* at 220.

[110] *Id.* at 220.

[111] *Id.* at 221.

[112] *Id.*

[113] *See* United States v. Russo, 517 F. Supp. 83, 86 (E.D. Mich. 1981) (scope of search was not related to its administrative purpose because agent seized patient records unrelated to the administrative audit); United States v. Lawson, 502 F. Supp. 158, 164 (D. Md. 1980) (U.S. Attorney who was conducting a criminal investigation of the defendant requested administrative agent to apply for administrative warrant); United States v. Anile, 352 F. Supp. 14, 18 (N.D.W. Va. 1973) (court invalidated DEA search of pharmacy because it was conducted pursuant to complaints, but noted that mere suspicion does not convert a valid administrative inspection into a criminal search).

[114] People v. deWit, No. 88-38 (N.Y. County Ct., Wayne County Feb. 16, 1989), *aff'd*, 156 A.D.2d 973, 550 N.Y.S.2d 820 (1989).

[115] *Id.* at 8.

[116] *Id.* at 6; *see also* New Jersey v. Santiago, Crim. App. No. 21-86 (N.J. Super. Ct., Salem County Mar. 5, 1987), *reprinted in Warrantless Administrative Search Upheld as Appropriate Exercise of State Authority*, 1 Toxics L. Rep. (BNA) 1249 (Apr. 8, 1987) (pesticide applicators are pervasively regulated); Andersen, *supra* note 7, at 25.

[117] *deWit*, slip op. at 8.

other officials in the New York Department of Environmental Conservation.[118]

The court cited both *Tyler* and *Clifford* as support for the position that the government may not use administrative inspections as a pretext for gathering criminal evidence.[119] The court in *deWit* also relied on several New York state court decisions invalidating warrantless inspections of auto junkyards when the inspector suspects that the junkyard may be trafficking stolen vehicle parts.[120]

IV. Drawing the Line Between Administrative and Criminal Environmental Inspections

Environmental agencies pursuing criminal charges against a defendant can present evidence obtained during an administrative search, as long as the object of the search is not to gather criminal evidence.[121] Courts have taken conflicting views, however, about when the object of a search is criminal rather than primarily administrative. Some courts have looked at the subjective motivation of the searcher in determining what the object of a search was.[122] Other courts have looked at whether a search was objectively reasonable.[123] This Comment argues that the subjective motivation of the environmental inspector is insignificant so long as the search fulfills a valid administrative purpose and is objectively reasonable.

Courts should require criminal probable cause only when an environmental agency has targeted a facility for a criminal investigation and seeks to conduct a search in order to further that criminal investigation.[124] The more lenient administrative probable cause standard should be sufficient in the majority of environmental inspections when the search fulfills an administrative purpose.[125] Requiring full criminal probable cause in such situations would stultify the enforcement of the environmental regulatory scheme.[126]

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[118] *Id.*; *see also supra* text accompanying note 96.

[119] *deWit*, slip op. at 7.

[120] *Id.* at 7; *see* People v. Pace, 101 A.D.2d 336, 475 N.Y.S.2d 443 (App. Div. 1984), *aff'd*, 65 N.Y.2d 684, 481 N.E.2d 250, 491 N.Y.S.2d 618 (1985); People v. Brigante, 131 Misc. 2d 708, 501 N.Y.S.2d 583 (Sup. Ct.), *rev'd on other grounds*, 125 A.D.2d 694, 510 N.Y.S.2d 19 (1986); People v. Sullivan, 129 Misc. 2d 747, 493 N.Y.S.2d 56 (Sup. Ct. 1985), *aff'd*, 121 A.D.2d 663, 503 N.Y.S.2d 1009 (App. Div. 1986).

[121] *See supra* text accompanying notes 62–77.

[122] *See supra* notes 113–20 and accompanying text.

[123] *See supra* notes 100–12 and accompanying text.

[124] *See infra* text accompanying notes 156–69.

[125] *See infra* text accompanying notes 144–53.

[126] *See infra* text accompanying notes 137–43.

At the outset, it is important to note that the potential for criminal prosecution does not increase the discretion of an inspecting official.[127] The reasonableness of a search does not depend upon the potential for criminal enforcement.[128] A search may be unreasonable even if the government pursues no enforcement.[129] Likewise, an administrative search may be reasonable even if the government subsequently prosecutes.[130]

Some commentators, however, are concerned about unbridled discretion of inspecting officials regardless of any potential for criminal enforcement. These commentators would require full criminal probable cause for any nonroutine inspections.[131] This requirement would eliminate the specific evidence prong of the *Barlow's* administrative probable cause standard because it would require full criminal probable cause whenever an inspector suspects a violation.[132]

The specific evidence prong of the administrative probable cause standard should not be eliminated for two reasons. First, any administrative regulatory scheme is predicated on the suspicion that some individuals or businesses may not be complying with certain standards.[133] Otherwise, there would be no need for the regulatory scheme. In support of this aspect of the *Barlow's* standard, some courts and commentators have argued that it is anomalous to suggest that individuals or businesses that are suspected of not being in compliance deserve more constitutional protection than those who are not similarly suspected.[134] In other words, if a more lenient

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[127] *See* Welks, *supra* note 45, at 8.

[128] *See* Marzulla, *Lands Division Confronts the Emerging Need for Civil and Criminal Environmental Enforcement*, NAT. ENVTL. ENFORCEMENT J., Dec., 1987–Jan., 1988, at 7; Note, *supra* note 30, at 1136.

[129] Welks, *supra* note 45, at 8; *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (creating a federal cause of action for damages resulting from violation of fourth amendment).

[130] *See* United States v. Consolidation Coal Co., 560 F.2d 214, 220 (6th Cir. 1977), *vacated and remanded*, 436 U.S. 942 (1978) (for further consideration in light of *Marshall v. Barlow's, Inc.* and *Michigan v. Tyler*), *judgment reinstated*, 579 F.2d 1011 (6th Cir.), *cert. denied*, 439 U.S. 1069 (1979).

[131] *See supra* note 45.

[132] *See supra* notes 46–54 and accompanying text.

[133] *See* People v. Brigante, 131 Misc. 2d 708, 714, 501 N.Y.S.2d 583, 588 (Sup. Ct.), *rev'd on other grounds*, 125 A.D.2d 694, 510 N.Y.S.2d 19 (1986).

[134] *See* United States v. Nechy, 827 F.2d 1161, 1167 (7th Cir. 1987) ("it does rather turn the Fourth Amendment on its head to complain about not the dearth but the plethora of grounds for [suspecting criminal activity]"); *cf.* Burkhart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313, 1318 n.5 (7th Cir. 1980) (quoting Rothstein, *OSHA Inspections After* Marshall v. Barlow's, Inc., 1979 DUKE L.J. 63, 91) (OSHA inspection); *Consolidation Coal*, 560 F.2d at 220 (coal mine inspection).

administrative probable cause standard is sufficient for routine regulatory inspections pursuant to a neutral administrative scheme, a more lenient administrative probable cause standard should also be sufficient for administrative inspections predicated on suspicion of violations.[135] Other courts and commentators, however, argue that the danger of unbridled discretion in nonroutine searches requires a higher standard of probable cause.[136]

Second, requiring full criminal probable cause whenever an agent suspects violations would stultify enforcement of administrative regulations.[137] Limited resources dictate that the EPA and state environmental agencies conduct inspections upon suspicion of violations. If the objective of the environmental regulations is to ensure compliance, it would be wasteful indeed to utilize the limited resources available for inspections randomly rather than against suspected violators.[138]

Requiring full criminal probable cause when violations are suspected could make it extremely difficult to obtain the necessary warrant when the owner or operator of the facility refuses to consent.[139] Although the Supreme Court has directed federal courts to interpret probable cause flexibly, anonymous tips and other potentially unreliable information may not suffice for criminal probable cause.[140] If courts require criminal probable cause whenever violations are suspected, the enforcement of environmental statutes would be particularly difficult in states that continue to apply the more rigid *Aguilar-Spinelli* test.[141]

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[135] *E.g.*, *Consolidation Coal*, 560 F.2d at 220.

[136] *See* Michigan v. Tyler, 436 U.S. 499, 507 (1978) ("In the context of investigatory fire searches, which are not programmatic but are responsive to individual events, a more particularized inquiry may be necessary."); Marshall v. Horn Seed Co., 647 F.2d 96, 101 (10th Cir. 1981) ("Unless it is possible to infer that the complaint was actually made and that it has some modicum of plausibility to it, the danger of arbitrary invasions by government officials exists."); Note, *supra* note 17, at 1207.

[137] According to Professor LaFave, the most acceptable rationale for the lower administrative probable cause standard is that traditional probable cause will not permit an acceptable level of enforcement. *See* LaFave, *supra* note 25, at 15–16. Another commentator, however, argues that "public need" is an insufficient justification for the administrative "balancing" test because both civil and criminal laws respond to such a need. *See* Note, *supra* note 30, at 1138–39.

[138] *See* People v. Brigante, 131 Misc. 2d 708, 714–15, 501 N.Y.S.2d 583, 588 (Sup. Ct.), *rev'd on other grounds*, 125 A.D.2d 694, 510 N.Y.S.2d 19 (1986). In effect, the argument is just an affirmation of the *Camara* balancing principle.

[139] *See supra* text accompanying notes 53–54.

[140] *See supra* notes 18–22 and accompanying text.

[141] *See supra* note 18.

Thus, an environmental inspector would be forced to discover independent factors establishing criminal probable cause in order to enter the property; yet the inspector would have very little means to discover such evidence if the inspector were denied authority to enter the property.[142] The inspector would be forced to rely on the fortuitous event of a disgruntled employee coming forward, or evidence of the violation escaping from the property in order to establish criminal probable cause. In either case, the delay may have dire consequences because early enforcement of environmental statutes is often the key to effective enforcement and response.[143]

It is important to remember that the primary goal behind most environmental statutes is the protection of health, safety, and welfare through compliance with various environmental regulations.[144] Noncompliance typically results in either civil or administrative penalties.[145] Criminal enforcement is the last resort reserved for cases involving egregious misconduct.[146] The environmental agency retains discretion as to which penalty to pursue.[147]

Environmental regulations are not designed to facilitate prosecution of criminal laws. The analogy drawn in *deWit* between the pesticide inspector's suspicions and the police inspector's suspicions in *People v. Pace*[148] is inapposite. The *deWit* court failed to recognize

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[142] *See* Marshall v. Horn Seed Co., 647 F.2d 96, 102 (10th Cir. 1981) ("Health and safety violations are not always readily discernible, or susceptible to proof without sophisticated or detailed testing.").

[143] *See id.* ("[T]he compelling public interest in preventing or speedily abating hazardous conditions . . . demands relaxation of the traditional probable cause test for administrative inspections . . . ."). *But see* Mincey v. Arizona, 437 U.S. 385, 393 (1978) ("[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.").

[144] *See* Reich, *supra* note 82, at 41. According to one commentator, the "common thread" running throughout the Court's administrative search decisions is that searches designed to uncover evidence "unrelated to the regulatory scheme" require the traditional safeguards of a criminal search warrant. *Id.*

[145] *See Perry Memorandum*, *supra* note 5, at 859.

[146] *Id.* Some of the factors that the Agency will consider include the knowledge or willfulness of the defendant, the nature and seriousness of the offense, the need for deterrence, and the compliance history of the defendant. *Id.* at 860.

[147] For example, under the Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251–1387 (West 1986 & Supp. 1989), EPA will typically investigate the violations and then make the decision whether to prosecute. *See* Comment, *Criminal Enforcement of Federal Water Pollution Laws in an Era of Deregulation*, 73 J. CRIM. L. & CRIMINOLOGY 642, 654 (1982).

[148] 101 A.D.2d 336, 475 N.Y.S.2d 443 (App. Div. 1984), *aff'd*, 65 N.Y.2d 684, 481 N.E.2d 250, 491 N.Y.S.2d 618 (1985). In *Pace*, two police officers, who suspected that an automobile junkyard was dealing in stolen vehicles, conducted a warrantless search of the junkyard. 101 A.D.2d at 337, 475 N.Y.S.2d at 444.

that the ultimate purpose behind regulations of auto junkyards is facilitation of criminal enforcement of stolen vehicle laws.[149] Thus, in *Pace* the police did not suspect a violation of any administrative regulation, such as failure to keep required records.[150] Instead, the police suspected that the defendant may be trafficking stolen goods and used the administrative inspection as a pretext to search for stolen goods.[151]

Courts must invalidate such pretextual searches as violations of the fourth amendment. Otherwise, a legislature could circumvent the fourth amendment's criminal probable cause requirement simply by passing a statute setting out various administrative record-keeping requirements.[152] An environmental inspector's suspicion of a violation that could lead to either civil or criminal penalties, however, does not transform the administrative search into a criminal search.[153] Although criminal prosecution may result, the institutional objective of the search is compliance, not criminal enforcement.

Tyler and *Clifford* are also inapplicable, at the outset, to environmental inspections pursuant to suspected violations that could lead to either civil or criminal penalties.[154] The mere existence of a criminal penalty for the suspected violation does not indicate that the "object of the search" is to discover evidence of crime. Any other interpretation would require a criminal search warrant for almost any environmental inspection that could lead to criminal prosecution.[155]

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[149] *See supra* note 79.

[150] 101 A.D.2d at 337, 475 N.Y.S.2d at 444.

[151] *Id.* at 340, 475 N.Y.S.2d at 446.

[152] *See* New York v. Burger, 482 U.S. 691, 728 (1987) (Brennan, J., dissenting); Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) ("no Act of Congress can authorize a violation of the Constitution"). The relevant portion of Justice Brennan's dissent in *Burger* is set out in note 84, *supra*.

[153] When confronted with inspection schemes that could lead to either criminal or civil penalties, the Supreme Court often emphasizes that the primary purpose behind the inspection scheme is regulation, not criminal enforcement. *See* United States v. Villamonte-Marquez, 462 U.S. 579, 590 (1983) (emphasizing regulatory nature of foreign vessel documentation requirements); Almeida-Sanchez v. United States, 413 U.S. 266, 278 (1973) (Powell, J., concurring) (border patrol searches are conducted "primarily for administrative rather than prosecutorial purposes").

[154] *See* United States v. Consolidation Coal Co., 560 F.2d 214, 220 (6th Cir. 1977), *vacated and remanded*, 436 U.S. 942 (1978) (for further consideration in light of *Marshall v. Barlow's, Inc.* and *Michigan v. Tyler*), *judgment reinstated*, 579 F.2d 1011 (6th Cir.), *cert. denied*, 439 U.S. 1069 (1979).

[155] Such a result would be absurd considering the administrative agency's continued duty to protect the public and the environment. *See* Marzulla, *supra* note 128, at 7.

Instead, because the civil and criminal penalties of most environmental statutes are "inherently intertwined,"[156] courts and magistrates should require a criminal search warrant based on traditional criminal probable cause only when an environmental agency has no valid administrative purpose in conducting the investigation. In other words, when an agency conducts the inspections solely to gather evidence of crime, then the "object of the search" is criminal,[157] and the agency must obtain a criminal search warrant.

Such a formulation of the "object of the search" is entirely consistent with the general rule that civil attorneys may share information obtained through civil discovery or informal investigation with prosecutors when there are parallel proceedings.[158] Courts note that the

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[156] United States v. LaSalle Nat'l Bank, 437 U.S. 298, 309 (1978); *see also supra* note 4 and accompanying text.

[157] Several commentators have addressed the question of pretextual fourth amendment searches. Professor Burkoff is the primary proponent of the argument that courts should invalidate searches only when they are purely pretextual; in other words, only when there is no legitimate motivation for the search. *See* Burkoff, *Bad Faith Searches*, 57 N.Y.U.L. REV. 70, 103–04 (1982) [hereinafter *Bad Faith Searches*]; Burkoff, *The Pretext Search Doctrine, Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523, 544–48 (1984). According to Professor Burkoff, the existence of a proper purpose "makes the mixed motive search a far less fit target for deterrence than the purely 'bad faith' search." *Bad Faith Searches*, *supra*, at 104. One student commentator disagrees and suggests instead that a court should invalidate a search in which "bad" motivation is the "but for" prompt for the search. *See* Note, *The Pretext Problem Revisited: A Doctrinal Exploration of Bad Faith in Search and Seizure Cases*, 70 B.U.L. REV. 111, 164–67 (1990). Both Professor Burkoff and the student commentator, however, would inquire into the subjective motivation of a searcher in determining whether a search is pretextual.

Professor LaFave, on the other hand, assesses the existence of subjective pretext analysis on the basis of objective criteria. *See* LaFave, *supra* note 30, § 1.4(e), at 94. According to Professor LaFave, "the proper basis of concern is not *why* the officer deviated from the usual practice in this case but simply that he *did* deviate." *Id.* (emphasis in original). Reliance on objective criteria frees the court from inherently unproductive inquiries into the minds of the searching officers. *See supra* note 30. Professor Haddad also argues that courts should completely ignore motive and ask only "whether an officer acted within the letter of the law." Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REF. 639, 684–85 (1985). In Professor Haddad's "hard choices" approach, courts should focus on the exceptions to the warrant requirement and narrow the scope of an exception if the opportunity for abuse is too great. *Id.* at 652–53.

Several commentators, including Professor Haddad, have noted that the determination of whether the sole motivation behind a search is criminal is a cumbersome task. *See id.* at 684; Note, *supra* note 14, at 257–63. Although proving that an agency conducted a search solely to discover criminal evidence is difficult, it is not impossible. *See* United States v. Lawson, 502 F. Supp. 158, 164–65 (D. Md. 1980) (defendant established that a search was conducted solely to gather criminal evidence by proving that an Assistant United States Attorney, conducting a criminal investigation of the defendant, ordered the search).

[158] Parallel proceedings occur when a transaction or course of conduct gives rise to both civil and criminal proceedings. *See, e.g.*, United States v. Kordel, 397 U.S. 1, 11–12 (1970) (information gained in civil interrogatories in governmental action to condemn quantities of

mere existence of a parallel criminal proceeding does not eliminate the administrative agency's authority or duty to administer the relevant regulations.[159] Information may be shared with the prosecutors subject only to the good faith determination that it was sought for legitimate civil or administrative purposes, and not solely to gather criminal evidence.[160]

The question of when the "object of the search" is solely to gather criminal evidence remains. Unfortunately, no bright line can be drawn.[161] One indication that the sharing of information during a parallel proceeding may be in bad faith is when the Justice Department or the prosecuting attorney directs the scope of the civil discovery.[162] Similarly, if a prosecutor or an attorney from the Envi-

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misbranded products may be used in formulating indictment); United States v. Aero Mayflower Transit Co., 831 F.2d 1142, 1144, 1146 (D.C. Cir. 1987) (Inspector General may issue subpoenas concerning anticompetitive activity of interstate van lines and share the information gained with the Justice Department); United States v. Gel Spice Co., 773 F.2d 427, 432 (2d Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986) (Food and Drug Administration may inspect spice shipments and share information with Justice Department); Securities and Exch. Comm'n v. Dresser Indus., Inc., 628 F.2d 1368, 1375–76 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980) (SEC may enforce subpoena *duces tecum* issued in connection with investigation of questionable foreign payments even though scope of criminal discovery may be expanded).

[159] As the Supreme Court stated in the leading case on parallel proceedings:

> The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. But a rational decision whether to proceed criminally against those responsible for the misbranding may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products. It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.

United States v. Kordel, 391 U.S. 1, 11 (1970); *see also* United States v. Gel Spice Co., 773 F.2d 427, 432 (2d Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986). The Court of Appeals for the Second Circuit also has noted that if the FDA could not continue its civil enforcement responsibilities during a parallel criminal proceeding, "anytime a prosecution was undertaken, the FDA would be precluded temporarily in that particular instance from protecting the health and safety of the public, although this function constitutes the main purpose of the [Federal Food, Drug, and Cosmetic Act]." *Gel Spice*, 773 F.2d at 432.

[160] *See* Securities and Exch. Comm'n v. Dresser Indus., Inc., 628 F.2d 1368, 1387 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980) (upholding SEC cooperation with the Department of Justice).

[161] The Court of Appeals for the Sixth Circuit, in *Consolidation Coal*, advocated a single standard of administrative probable cause regardless of any criminal overtones in the search. 560 F.2d 214, 221 (6th Cir. 1977), *vacated and remanded*, 436 U.S. 942 (1978) (for further consideration in light of *Marshall v. Barlow's, Inc.* and *Michigan v. Tyler*), *judgment reinstated*, 579 F.2d 1011 (6th Cir.), *cert. denied*, 439 U.S. 1069 (1979). According to the court, such a bright line will expedite the magistrate's task and reduce the chances of reversible error. *Id.*

[162] *See* EPA GUIDELINES, *supra* note 6, at 17.

ronmental Crimes Unit (ECU) of the EPA directs the focus of an administrative inspection, the object of that inspection is arguably to unearth evidence needed for criminal prosecution.[163] In recognition of this problem and the potential unfairness to the defendant, the EPA's parallel proceedings policy forbids prosecuting attorneys from directing the scope of administrative inspections.[164]

Another clear indication that the "object of the search" is to gather criminal evidence is found when investigators of the ECU are involved in the investigation.[165] ECU investigators are trained criminal investigators with powers similar to Deputy United States Marshals.[166] Their involvement in the investigation signifies that a potential criminal defendant has been targeted, and that the "object of the search" is to gather evidence to use in a potential criminal prosecution.[167]

Unfortunately, many state environmental agencies do not have the resources to develop a separate unit to investigate environmental crimes.[168] Although the determination of whether the "object of the search" is to discover criminal evidence is more difficult, a court can still look to see if any valid administrative purpose is being fulfilled by the inspection.[169] Furthermore, a court can also note whether a prosecuting attorney has directed the environmental inspector to conduct the search in order to bolster the criminal case.[170]

V. CONCLUSION

The law regarding administrative searches is confusing at best.[171] It is not clear when an administrative warrant is required, when no

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[163] *See* United States v. Lawson, 502 F. Supp. 158, 164–65 (D. Md. 1980); *see also supra* note 156.

[164] EPA GUIDELINES, *supra* note 6, at 17.

[165] The Resource Conservation and Recovery Act, 42 U.S.C. § 6912(c) (Supp. V 1987), actually authorizes separate criminal investigations.

[166] *See* Papa, *Combatting Environmental Crime at EPA's National Enforcement Investigations Center*, ENVTL. F., Mar., 1985, at 37 (investigators of the Environmental Crimes Unit may execute criminal search warrants, make arrests, carry firearms, and serve subpoenas).

[167] *But see* United States v. Showalter, 858 F.2d 149, 152–53 (3d Cir. 1988) (presence of DEA agents and state police officers during inventory search incident to a civil forfeiture proceeding does not indicate pretext).

[168] Four regional environmental enforcement organizations, however, have been established to facilitate prosecution of environmental crimes. *See* Wills & Murray, *State Environmental Enforcement Organizations*, NAT. ENVTL. ENFORCEMENT J., Aug., 1989, at 3.

[169] *See supra* text accompanying notes 156–57.

[170] *See supra* text accompanying notes 162–64.

[171] As one environmental prosecutor noted, "[T]his whole area of administrative inspections,

warrant is required, or when a criminal search warrant is required. Yet the determination of which standard to apply could be crucial to environmental agencies whose principal information-gathering tool is the administrative inspection. It seems clear that the subjective motivation of the inspector is not dispositive of the nature of the search, particularly when the relevant statute assigns civil and criminal penalties to the same conduct.

The overriding goal of most environmental statutes is to protect the health, safety, and welfare of the public through ensuring compliance with minimum environmental regulations. Environmental agencies view criminal prosecution as a method of last resort to be used only in the most egregious circumstances. Environmental regulations are not intended to facilitate the prosecution of criminal laws. Thus, a criminal search warrant should be required only when an inspection fulfills no valid administrative purpose.

Requiring criminal probable cause for environmental inspections that fulfill a valid administrative purpose would stultify the enforcement of environmental regulations. Independent factors supporting criminal probable cause may be difficult for inspectors to establish. Because early enforcement is often the key to an effective response, the more flexible administrative probable cause standard is more appropriate for most environmental inspections.

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administrative warrants, and search warrants is a morass of complicated, conflicting case law. We maintain that just because an inspector gets [a phone call tip] does not turn that regulator into a law enforcement officer." *Court Suppresses Inspection Evidence, Rules Inspector Needed Search Warrants*, Toxics L. Rep. (BNA) 1247 (Mar. 3, 1989).