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# Comment: Maryland's Warrantless Inspection Laws: A Warrantless Expectation of Constitutionality

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# COMMENT

## MARYLAND'S WARRANTLESS INSPECTION LAWS: A WARRANTLESS EXPECTATION OF CONSTITUTIONALITY

*The fourth amendment<sup>1</sup> to the United States Constitution proscribes "unreasonable searches and seizures" and requires that warrants be issued only upon probable cause. There is no distinction drawn between an administrative inspection and a criminal search. Yet, a different treatment has evolved in Supreme Court decisions on these two classifications of searches. This Comment addresses Maryland's warrantless administrative inspection laws in light of the standards that the Court has applied to similar enactments.*

### I. IMMINENCE OF A CHALLENGE TO MARYLAND LAW

On March 23, 1977, the Court of Appeals of Maryland rendered its decision in *Comm'r of Labor & Ind. v. Fitzwater*.<sup>2</sup> The facts were simple and undisputed.<sup>3</sup> In April of 1976, a deputy boiler inspector<sup>4</sup> in Maryland's Division of Labor and Industry<sup>5</sup> learned that a boiler had exploded in the Fitzwater Furniture Company. The exploded boiler was located in an area of the premises not open to the public. The inspector telephoned the proprietor, Fitzwater, to inform him that pursuant to the Maryland Boiler and Pressure Vessel Safety Act (the "Act"),<sup>6</sup> a boiler inspection would be conducted the next day.

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1. U.S. CONST. amend. IV 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.

2. 280 Md. 14, 371 A.2d 137 (1977).

3. *Id.* at 16, 371 A.2d at 138.

4. The Maryland Boiler and Pressure Vessel Safety Act is set forth in MD. ANN. CODE art. 48, §§167-180 (Supp. 1977). Section 176 of the Act addresses the authority of designated state officials to conduct warrantless inspections for compliance purposes and limits that authority to "the chief boiler inspector or any deputy boiler inspector." It was not disputed that the deputy boiler inspector was a duly authorized, state official under the Act.

5. The Division of Labor and Industry is a part of the Licensing and Regulation Department of the State of Maryland. MD. ANN. CODE art. 89, §1 (Supp. 1977).

6. MD. ANN. CODE art. 48, §176 (Supp. 1975) which, at that time, provided:  
Access to premises; frequency of inspections; interpretation and application of inspection requirements; by whom inspections made; hydrostatic tests; inspection during construction or field assembly.

(a) *Access to premises for purpose of inspection.* — The chief boiler inspector or any deputy boiler inspector shall have free access, during reasonable hours, to any premises in the State where a boiler or pressure vessel is being constructed for use in or is being installed in this State for the purpose of ascertaining whether such boiler or pressure vessel is

Upon the inspector's arrival, however, Fitzwater refused him entry because the inspector did not have a search warrant. When the state petitioned the circuit court to issue an injunction ordering Fitzwater to admit the inspector, the court declared the warrantless inspection procedures in section 176 of the Act unconstitutional as an infringement on Fitzwater's fourth amendment rights.<sup>7</sup> The state appealed, and the court of appeals granted certiorari.

The court of appeals never reached the constitutional question. While the state devoted its energies to showing that the Act was in accord with case law regarding permitted, warrantless administrative inspections,<sup>8</sup> the court of appeals focused its attention on the wording of the Act.<sup>9</sup> Section 176 permitted warrantless inspections only in two instances. The first was when a boiler or pressure vessel was being constructed or installed. The second instance arose when the certification of a boiler or pressure vessel expired. Since the requested inspection here was for the purpose of investigating an accident, it fell under neither category; the inspection was consequently not authorized by the Act.<sup>10</sup> It thus became unnecessary for the court of appeals to decide the constitutional issue of the warrantless inspection provisions in the Act. The trial court's denial of the state's petition for an injunction was, therefore, affirmed, but a constitutional test of Maryland's laws authorizing warrantless administrative inspections was postponed.

During the 1977 legislative session, the Maryland General Assembly quickly responded to this newly discovered loophole in the reach of the Act by amending the law to cover incidents such as

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being constructed and installed in accordance with the provisions of this subtitle.

(b) *Time of inspection; interpretation and application of inspection requirements.* — On and after July 1, 1969, each boiler and pressure vessel used or proposed to be used within this State, except boilers and pressure vessels exempt under § 172 of this subtitle, shall be thoroughly [sic] inspected as to their construction, installation and condition, as follows:

(1) Power boilers and high pressure, high temperature water boilers shall receive a certificate inspection annually and shall also be externally inspected annually while under pressure, if possible.

(2) Heating boilers shall receive a certificate inspection biennially.

(3) Pressure vessels subject to internal corrosion shall receive a certificate inspection biennially.

7. 280 Md. at 16, 371 A.2d at 138. The fourth amendment to the United States Constitution applies to the states through the due process clause of the fourteenth amendment. *Wolf v. Colorado*, 338 U.S. 25 (1949).

8. In its *Fitzwater* brief, the state presented only one question: "Does the duty of owners and operators of commercial boilers to submit to periodic inspections of their boilers by state boiler inspectors not having a search warrant violate the Fourth Amendment of the United States Constitution?" Brief for Appellant at 2.

9. Fitzwater raised the argument that the Act was not applicable to this situation involving an exploded boiler. Brief for Appellee at 4-5.

10. 280 Md. at 18, 371 A.2d at 139. See note 6 *supra*.

those in *Fitzwater*.<sup>11</sup> The basic constitutional question, however, remains to be decided. The stage is now set for constitutional scrutiny of the Act's warrantless inspection provisions.

The question of warrantless administrative inspections is not limited merely to the provisions of Maryland's Boiler and Pressure Vessel Safety Act.<sup>12</sup> Also authorized by various Maryland statutes are warrantless inspection procedures relating to such diverse subjects as honey bees, weights and measures, pesticides, sod, fire prevention, mistreated animals, cantaloupes, turf grass, and chickens.<sup>13</sup> Maryland has also enacted an occupational safety law<sup>14</sup>

11. Compare the previous version of § 176 accompanying note 6 *supra* with the following revised version in MD. ANN. CODE art. 48, § 176 (Supp. 1977):

Access to premises; frequency of inspections; interpretation and application of inspection requirements; by whom inspections made; hydrostatic tests; inspection during construction or field assembly; inspection and investigation of accidents and explosions.

(a) *Access to premises for purpose of inspection.* — The chief boiler inspector or any deputy boiler inspector shall have free access, during reasonable hours, to any premises in the State:

(1) Where a boiler or pressure vessel is being constructed for use in or is being installed in that State for the purpose of ascertaining whether such boiler or pressure vessel is being constructed and installed in accordance with the provisions of this subtitle;

(2) Or for the purpose of conducting an inspection or investigation of any accident or explosion involving boilers or pressure vessels;

(3) Or conducting any inspection required under the provisions of this subtitle.

(f) *Inspection and investigation of accidents and explosions.* — The chief boiler inspector or deputy boiler inspector shall inspect and investigate, upon notification or information, accidents and explosions involving boilers or pressure vessels provided for under this subtitle.

12. MD. ANN. CODE art. 48, §§ 167-180 (Supp. 1977).

13. Among the various Maryland provisions authorizing warrantless inspections are the following found in the MD. AGRIC. CODE ANN.:

§§ 3-105(a)(1) and 3-113(a) (1974) (Regulation of Infectious and Contagious Livestock and Poultry Diseases); § 3-405(b) (Supp. 1977) (Importation of Cattle or Swine); § 4-210 (1974) (Maryland Wholesome Meat Act); § 4-215(b) (1974) (Maryland Poultry Products Inspection Act); § 4-310(a) (1974) (Maryland Egg Law); § 5-205 (Supp. 1977) (Pesticide Applicator's Law); § 5-306(a) (Supp. 1977) (Plant Disease Control); § 5-405(a) (1974) (Mosquito Control); § 5-504 (1970) (Honey Bees); § 6-106(a)(e) (1974) (Maryland Commercial Feed Law); § 6-206(a)(e) (1974) (Maryland Commercial Fertilizer Law); § 6-304(b) (1974) (Agricultural Liming Materials and Gypsum); § 9-103(5) (1974) (Maryland Turf Grass Law); § 9-203(a) (1974) (Regulation of Sale and Transportation of Seed); § 9-304(a) (1974) (Potato Seed Inspection Act); § 10-503 (1974) (Trademarks for Farm Products); § 10-705 (1974) (Fruits and Vegetables); § 10-802(a) (1974) (Maryland Apple Grade Law); § 10-903 (1974) (Cantaloupes); § 11-215 (1974) (Weights and Measures); and § 11-412(a) (1974) (Milk and Other Fluid Dairy Products).

See also MD. ANN. CODE art. 27, § 331 (1976); MD. ANN. CODE art. 88A, §§ 67 (Supp. 1977), 67A (1976); MD. ANN. CODE art. 48, § 181 (Supp. 1977). Compare MD. ANN. CODE art. 27, § 294 (1976), which specifies the procedures for procurement of administrative inspection warrants in regulation of controlled dangerous substances.

14. MD. ANN. CODE art. 89, §§ 28 *et seq.* (Supp. 1977).

which, as the federal Occupational Safety and Health Act of 1970 (OSHA)<sup>15</sup> permits, supplants federal enforcement.<sup>16</sup> This law, as does OSHA itself, authorizes broad inspections with no provision for search warrants.<sup>17</sup> Moreover, each of the Maryland counties and Baltimore City are empowered to enact their own ordinances, which may include warrantless inspection provisions and procedures.<sup>18</sup> It was just such a local ordinance that incurred Supreme Court review in the 1959 case of *Frank v. Maryland*.<sup>19</sup>

## II. SUPREME COURT HISTORY OF WARRANTLESS ADMINISTRATIVE INSPECTIONS

*Frank v. Maryland*<sup>20</sup> concerned a Baltimore City health code provision<sup>21</sup> that authorized warrantless inspections of homes. A health department inspector was rebuffed while attempting to enter the Frank residence in order to pinpoint the source of a neighborhood rat infestation. Resistance to inspection was a misdemeanor punishable by fine under the code,<sup>22</sup> and Frank was subsequently charged and convicted for this offense. Frank appealed to the Supreme Court where, in a five-to-four decision, the Court held that the authorized inspection was not prohibited by the fourth amendment. The Court noted the long-standing, governmental regulations regarding health inspections, the strict limits on the inspector's power to search, the indispensable importance of the inspection within a regulatory scheme, and the civil thrust of the penalty in deciding that this warrantless inspection was, at best, on the periphery of fourth amendment protections.<sup>23</sup> Justice Douglas, in his dissent, argued that an administrative inspection differed little from a criminal search in that it was equally intrusive on the right of privacy.<sup>24</sup> He pointed out that the fruits of an administrative inspection could establish the basis for subsequent criminal prosecution and therefore argued for application of fourth amend-

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15. 29 U.S.C. §§ 651 *et seq.* (1970).

16. 29 U.S.C. § 667(b) (1970).

17. Compare MD. ANN. CODE art. 89, § 35 (Supp. 1977) with 29 U.S.C. § 657 (1970).

18. Chartered counties are granted sufficient legislative power to enact warrantless administrative inspection ordinances. See MD. CONST. art. XI-A; MD. ANN. CODE art. 25A, §5(S) (1973); *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 252 A.2d 242 (1969).

19. 359 U.S. 360 (1959).

20. *Id.*

21. BALTIMORE CITY, MD., CODE art. 12, § 120 (1950) provided:

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.

22. BALTIMORE CITY, MD., CODE art. 12, §§ 112, 119 (1950) specified that failure to correct a nuisance was a misdemeanor.

23. 359 U.S. at 372.

24. *Id.* at 375 (Douglas, J., dissenting).

ment protections to all warrantless entry situations.<sup>25</sup> Justice Douglas, however, recognized that "the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken."<sup>26</sup> This flexible standard of probable cause for administrative inspections, he maintained, would safeguard the public interest in health and safety while protecting "even the lowliest home in the land from intrusion on the mere say-so of an official."<sup>27</sup>

#### A. *The Camara-See Rule*

*Frank* stood as the rule until 1967 when, in the companion cases of *Camara v. Municipal Court*<sup>28</sup> and *See v. City of Seattle*,<sup>29</sup> the Supreme Court reexamined the constitutionality of warrantless administrative inspections. In *Camara*, a San Francisco Department of Public Health representative entered an apartment building to make a routine, annual housing code inspection. *Camara*, in violation of the code<sup>30</sup> by making residential use of the ground floor, refused to permit an inspection by the official without a search warrant. This refusal resulted in a criminal complaint. On appeal, the Supreme Court held that the fourth amendment warrant requirement and probable cause standard were applicable to contested administrative inspections of domiciles. Specific disagreement was noted with the *Frank* holding that the fourth amendment applied only peripherally to administrative inspections.<sup>31</sup>

The *See* decision concerned a Seattle, Washington fire code provision<sup>32</sup> that authorized routine, periodic, city-wide inspections without search warrants. *See* had refused to permit access to his locked warehouse unless a fire inspector obtained a search warrant. As a result of this refusal, *See* was convicted of a misdemeanor. In deciding that this attempted warrantless inspection was impermissible under fourth amendment standards,<sup>33</sup> the Supreme Court extended the *Camara* decision to cover commercial premises as well as residences. The Court again found no overriding basis to justify suspension of constitutional safeguards since businessmen were held

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25. *Id.*

26. *Id.* at 383.

27. *Id.* at 383-84.

28. 387 U.S. 523 (1967). *Camara* and *See* were both argued and later decided on the same day; one dissenting opinion applicable to both cases was prepared by Justice Clark, who was joined by Justices Harlan and Stewart.

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

30. The attempted inspection was authorized by §86(3) of the San Francisco Municipal Code. Section 503 of the Code sanctioned the right of entry without a provision for the procurement of a search warrant. Noncompliance with any provision of the Code was punishable as a misdemeanor.

31. 387 U.S. at 530.

32. 387 U.S. at 541.

33. *Id.* at 546.

to have fourth amendment rights that were violated by subversion of the warrant process.<sup>34</sup>

The majority opinions in *Camara* and *See* overruled *Frank* to the extent that it authorized warrantless administrative inspections.<sup>35</sup> In effect, Justice Douglas's dissent in *Frank* was adopted. The starting point of the Court's analysis in both cases was the premise that a warrantless inspection is impermissible except within certain limited exceptions.<sup>36</sup> The Court placed the burden of justifying an exception to the warrant requirement upon the governmental body seeking to conduct a warrantless inspection.<sup>37</sup> In *Camara* and *See* situations, the Court determined that it was not necessary to grant government officials an additional exception to the warrant requirements of the fourth amendment. Instead, the Court opted for a procedure whereby warrants would be required and issued upon probable cause dependent, not on the inspector's belief that a particular building violated the code, but on the reasonableness of the enforcement agency's appraisal of conditions in the area as a whole. A flexible approach to a probable cause standard was to be effected by striking a balance between the need for public safety served by the inspection and the invasion of privacy resulting from the inspection.<sup>38</sup> This accommodation between the individual's right to privacy under the fourth amendment and the government's responsibility to protect public health and welfare resulted in a balancing test that varied from inspection to inspection.<sup>39</sup> Factors that merited consideration in a test for this flexible standard of probable cause included the importance of the public interest protected,<sup>40</sup> the regulatory versus the criminal nature of the inspection,<sup>41</sup> and the necessity for an inspection to effectuate the regulatory objective.<sup>42</sup>

These resultant inspection warrants, attacked by Justice Clark in his dissent in *Camara* and *See* as "a newfangled 'warrant' system

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34. *Id.* at 543.

35. 387 U.S. at 528.

36. *Id.* at 528-29; 387 U.S. at 543. *See also* Jones v. United States, 357 U.S. 493, 499 (1958).

37. *See id.* at 528-29; 387 U.S. at 543.

38. *Id.* at 545. Compare Clark, *Some Notes on the Continuing Life of the Fourth Amendment*, 5 AM. J. CRIM. LAW 275, 279 (1977) ("If we are going to do something to the fourth amendment, let us repeal it. But do not water it down and make people think they have something when they have nothing.") with 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, 1012 (1973) ("The significance of *Camara-See* lies in the Court's recognition for the first time that a balancing of interests approach can be applied to governmental intrusion situations not involving exigent circumstances and that this balance can be reflected in a modification of fourth amendment protection techniques rather than their abandonment.").

39. 387 U.S. at 536-37; 387 U.S. at 545-46.

40. 387 U.S. at 537.

41. *Id.*

42. *Id.* at 534-39; 387 U.S. at 545.

that is entirely foreign to Fourth Amendment standards"<sup>43</sup> and as "boxcar warrants,"<sup>44</sup> had been addressed and dismissed in the *Frank* decision as synthetic search warrants.<sup>45</sup> Seemingly, *Camara* and *See* had effectively obliterated *Frank* as precedent in regard to administrative inspections, civil in thrust, and had made issuance of a search warrant a mandatory component within a comprehensive, regulatory inspection procedure, at least where voluntary compliance with access provisions was not forthcoming.<sup>46</sup> The potential repercussions of this reversal of *Frank* were seen as widespread. Justice Clark noted that the majority decision required "striking down hundreds of city ordinances throughout the country and jeopardizing thereby the health, welfare, and safety of literally millions of people."<sup>47</sup> Yet, less than three years later, the first significant restriction<sup>48</sup> in the scope of the *Camara-See* precedent appeared in a decision authored by Justice Douglas.

### B. The Colonnade-Biswell Exception

*Colonnade Catering Corp. v. United States*<sup>49</sup> involved the use of force<sup>50</sup> by federal Treasury agents to effect a warrantless inspection for, and seizure of, illegal liquor. The inspection was carried out pursuant to a congressionally enacted statute that authorized warrantless inspections of federally licensed dealers in alcoholic beverages.<sup>51</sup> Although the Supreme Court held that the entry was illegal, the rationale for its holding was the lack of a provision in the statute to permit forcible entry by federal agents in the absence of a

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43. 387 U.S. at 547.

44. *Id.* at 554.

45. *Frank v. Maryland*, 359 U.S. 360, 373 (1959).

46. The closest the Court came to specifying that voluntary compliance must first be requested and refused before the warrant process is initiated was when it stated: [A]s a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry.

387 U.S. at 539-40.

47. 387 U.S. at 547 (Clark, J., dissenting).

48. There were other decisions in the interim that began the erosion of a firm policy. See, e.g., *Wyman v. James*, 400 U.S. 309 (1971), wherein the Court held that statutorily required home visits for continued eligibility in welfare programs did not require search warrants.

49. 397 U.S. 72 (1970).

50. The corporation's president refused to open the locked liquor storeroom where the agents believed illegally refilled bottles of liquor were stored. The agents then broke the lock, entered the area, and seized the bottles of suspect liquor.

51. 26 U.S.C. § 7606 (1971) provided:

(a) Entry during day.

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



search warrant.<sup>52</sup> The remedy for refusal to admit a government agent was a fine of \$500.<sup>53</sup> The majority opinion found that Congress had the latitude "to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand,"<sup>54</sup> and indicated that had the federal agents abided by the specifically designated powers in the statute, the warrantless inspection would have been upheld.<sup>55</sup> The dissenting opinions would have gone further by finding implicit authorization in the statute to forcibly inspect for and seize contraband liquor.<sup>56</sup> This deviation from the *Camara-See* rulings was rationalized as falling within a section of the *See* decision which stated that "[w]e 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."<sup>57</sup> The Court declared that these regulatory inspections, constituting a part of licensing programs, were to be adjudicated on a case-by-case basis.<sup>58</sup> In *Colonnade*, both the majority and the dissent agreed with the government that there existed a long history of governmental regulation in the liquor trade, predating even the fourth amendment.<sup>59</sup> This historical regulation eased a finding that the warrantless inspection was reasonable, particularly since the inspection was part of a congressionally fashioned, regulatory plan.<sup>60</sup> Little guidance was provided by the Court in terms of tests or standards to facilitate prediction of what would be acceptable in the future under the "licensing programs" exception. Thus, *Colonnade* served merely to indicate some bounds to the *Camara-See* rule and to set the stage for the next major challenge, as a search for limits to the warrant requirement of *Camara-See* continued.

The next important development occurred in *United States v. Biswell*.<sup>61</sup> There a warrantless search was conducted by a federal Treasury agent under authority of the Gun Control Act of 1968<sup>62</sup> to

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52. 397 U.S. at 77.

53. 26 U.S.C. § 7342 (1971).

54. 397 U.S. at 76.

55. What is most interesting is how the Court stated the rule of this case: "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." 397 U.S. at 77. Application of this statement to Maryland's warrantless inspection laws would have a restrictive result.

56. 397 U.S. at 77-81. Chief Justice Burger and Justices Black and Stewart joined in dissent.

57. 387 U.S. at 545-46.

58. 397 U.S. at 77.

59. *Id.* at 75; *id.* at 80 (Black, J., dissenting).

60. *Id.* at 75-76.

61. 406 U.S. 311 (1972).

62. 18 U.S.C. §§ 921 et seq. (1970). Inspection was attempted under § 923(g), which provided in part:

The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufac-

inspect a pawnbroker's books and locked gun storeroom. In reversing a Tenth Circuit Court of Appeals decision written by Justice Clark,<sup>63</sup> the majority opinion analogized the government's interest in regulating the sale of guns to the government's concern with controlling liquor<sup>64</sup> as in *Colonnade*. The Court concluded that "where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute."<sup>65</sup> The Court noted the crucial importance of administrative inspections in regulating firearms, and further found it "apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment."<sup>66</sup> *See* was distinguished because the purpose of the inspection system there was to uncover fire code violations, which were difficult to conceal or correct in a short time.<sup>67</sup> In *Biswell*, the Court stated that unannounced, frequent inspections were essential to the regulatory scheme, and that a warrant requirement would severely hamper enforcement of the Gun Control Act.<sup>68</sup> Justice Douglas, the author of the *Colonnade* majority opinion, stood alone in dissent in the *Biswell* decision. He sought to distinguish *Biswell* from *Colonnade* on the ground that firearms were not the subject of such pervasive governmental inspection as was the liquor industry.<sup>69</sup>

From *Biswell*, a test of warrantless administrative inspections surfaced. First, the Court required that the inspection be made pursuant to authority carefully delineated by statute. "In the context of a regulatory inspection system of business premises that is

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turer, dealer, or collector for the purpose of inspecting or examining (1) any records or documents required to be kept by such importer, manufacturer, dealer, or collector under the provisions of this chapter or regulations issued under this chapter, and (2) any firearms or ammunition kept or stored by such importer, manufacturer, dealer, or collector at such premises.

63. *United States v. Biswell*, 442 F.2d 1189 (10th Cir. 1971), *rev'd*, 406 U.S. 311 (1972).

64. 406 U.S. at 315.

65. *Id.* at 317.

66. *Id.* at 316.

67. *Id.*

68. [I]f 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.

*Id.*

69. *Id.* at 317-19 (Douglas, J., dissenting). Justice Douglas raised the additional issue that the search conducted was a forcible one, not truly consented to under *Bumper v. North Carolina*, 391 U.S. 543 (1968). He urged that "an *otherwise invalid* search is not legitimated because of the occupant's consent to a law enforcement officer's assertion of authority." 406 U.S. at 319 n. \*(emphasis in original).

carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute."<sup>70</sup> These precise restraints incorporated directly into the regulatory statute itself serve to fulfill the same functions as the warrant and to provide the minimum safeguards required for the law to be constitutional. Second, the inspection could not be accompanied by unauthorized force.<sup>71</sup> Furthermore, pervasive governmental regulation and inspection historically within the industry would be a factor in judging the reasonableness of the inspection.<sup>72</sup> The inspection conducted also must pose only a limited threat to the defendant's justifiable expectations of privacy.<sup>73</sup> Inspection must, in addition, be deemed a known "cost" of doing business within a closely licensed or regulated industry.<sup>74</sup> Finally, the *Biswell* decision approved warrantless inspections when the effectiveness of the inspection system would be severely impaired or frustrated by a warrant requirement and when the protections afforded by a warrant would be negligible.<sup>75</sup>

Following this decision, confusion grew as to the full impact of *Colonnade-Biswell* on *Camara-See*.<sup>76</sup> Were the situations addressed by *Camara-See* and by *Colonnade-Biswell* totally dissimilar? The dichotomy seemed to be that broad health and safety inspections, such as those found in *Frank*, *Camara* and *See*, required a warrant in order to be valid. Conversely, inspections in regulation of licensed enterprises such as those found in *Colonnade* and *Biswell* could be conducted on a warrantless basis pursuant to enabling legislation that incorporated appropriate safeguards. The possibility existed, however, that the Court intended *Colonnade-Biswell* to displace *Camara-See* and give renewed vitality to *Frank*; therein lay the problem.

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70. 406 U.S. at 315.

71. *Id.* at 314.

72. *Id.* at 315.

73. *Id.* at 316.

74. *Id.* This "implied consent" justification in *Biswell* is less of a fiction than that usually encountered. The Gun Control Act provided that each licensee be provided annually with appropriate revised ordinances which affect his obligations while defining an enforcement inspector's authority. 18 U.S.C. § 921(a)(19) (1970). In this context, there is little difference between implied consent and a finding of actual consent. See Note, *Administrative Searches and the Implied Consent Doctrine: Beyond the Fourth Amendment*, 43 BROOKLYN L. REV. 91 (1977), for a discussion of implied consent in administrative search cases.

75. 406 U.S. at 316.

76. See, e.g., Rothstein & Rothstein, *Administrative Searches and Seizures: What Happened to Camara and See?*, 50 WASH. L. REV. 341 (1975); Note, *The Law of Administrative Inspections: Are Camara and See Still Alive and Well?*, 1972 WASH. U.L.Q. 313.

### C. *The Lower Courts' Search for Limits*

After *Biswell*, there was considerable expansion in the interpretation by lower courts of what constituted a regulatory scheme, an urgent federal interest, or a licensed industry. For example, in *United States v. Del Campo Baking Mfg. Co.*,<sup>77</sup> Food and Drug Administration inspectors, operating under a valid statute,<sup>78</sup> were held to be authorized to conduct warrantless inspections of a bakery. Although no federal "licensing" was involved, the court nevertheless considered the baking industry so pervasively regulated by Congress under the authority of the commerce clause<sup>79</sup> as to merit warrantless inspection.<sup>80</sup> The *Del Campo* court refused to narrowly limit *Biswell* to federally licensed businesses, but rather read *Biswell* as permitting such administrative inspections when authorized by a federal statute in a pervasively regulated business.

Likewise, in *Youghiopheny and Ohio Coal Co. v. Morton*,<sup>81</sup> unannounced, warrantless, coal mine inspections authorized by the Federal Coal Mine Health and Safety Act of 1969<sup>82</sup> were upheld. Inclusion under the *Colonnade-Biswell* exception of coal mining, referred to as a business "of a nearly inherently dangerous type,"<sup>83</sup> represented a further expansion of the concept of a pervasively regulated business or an urgent federal interest. Mines were not licensed, but the *Youghiopheny* court labeled mining a pervasively regulated industry and found consent by implication to reasonable intrusions.<sup>84</sup> *Camara* was distinguished because the inspections authorized therein were overly broad, leaving the defendant uncertain of his rights, uncertain of the inspector's authority, and uncertain of the scope of the search.<sup>85</sup> This vagueness was not found in *Biswell* due to the specificity of the Gun Control Act, the dealer's awareness of the Act, and his implicit acceptance of regulation as but one of the burdens that had to be endured while reaping the benefits of the trade. In *Youghiopheny*, the court found "that the mining operators at bar have no such misapprehensions when they are visited by federal mine inspectors. The scope of these inspections

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77. 345 F. Supp. 1371 (D. Del. 1972).

78. 21 U.S.C. §§ 301 *et seq.* (1970). The warrantless inspection itself was conducted under the authorization of 21 U.S.C. § 374(a) (1970).

79. U.S. CONST. art. 1, § 8, cl. 3.

80. 345 F. Supp. at 1377.

81. 364 F. Supp. 45 (S.D. Ohio 1973).

82. 30 U.S.C. §§ 801 *et seq.* (1970). The warrantless inspection was carried out pursuant to 30 U.S.C. § 813(b)(1) (1970).

83. 364 F. Supp. at 52 n.7.

84. *Id.* at 50. "[L]arge governmental interests" were held to be at stake in coal mine regulation. The court observed that the Act itself included congressional findings on the seriousness of the threat to health and safety posed by unregulated mining. *Id.* at 50.

85. *Id.* at 51.

necessarily include [sic] every aspect of mine health and safety conditions.”<sup>86</sup>

In the subsequent case of *United States v. Consolidated Coal Co.*,<sup>87</sup> the Sixth Circuit Court of Appeals limited the *Youghioghenny* holding to “the proposition that only inspections of *underground* portions or ‘active workings’ of coal mines may be performed without search warrants.”<sup>88</sup> In order for records and dust sampling cassettes from office areas to be inspected by federal investigators, valid search warrants were held to be constitutionally required, with the *Camara-See* flexible standard of reasonableness applying.<sup>89</sup> Because of the historically close, federal regulation of coal mining, the court of appeals found that mine operators have a lessened expectation of privacy where their business records are concerned.<sup>90</sup> This limited expectation was found to be sufficiently protected by a warrant issued under the flexible standard of probable cause, considering the importance of the government’s regulatory objectives.<sup>91</sup>

In *United States ex rel. Terraciano v. Montanye*,<sup>92</sup> a warrantless inspection conducted under a New York health statute<sup>93</sup> was upheld. The narcotics records of a pharmacist, a licensed professional, were seized and the *Biswell* warrantless exception was extended once more. There was no analysis by the court of any long-standing, historical regulation in the profession, and the inspection was conducted under a state statute as opposed to the federal statutes found in *Colonnade* and in *Biswell*. The court found that there were sufficient safeguards attendant to the statute and its enforcement mechanism so that fourth amendment rights were not violated. This was the same court that had been overruled by the Supreme Court decision in *Colonnade*.<sup>94</sup> Since, however, “the reversal was based on the view of the majority that the statute there at issue did not confer authority for a forcible entry,”<sup>95</sup> the court felt it was properly following the guidance of *Colonnade* and *Biswell* in giving a narrow reading to *Camara* and *See*.

Speaking for the majority, Justice White in *Camara* observed that although “there has been general agreement as to the

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86. *Id.*

87. 560 F.2d 214 (6th Cir. 1977).

88. *Id.* at 217 (emphasis in original). The *Youghioghenny* court had indicated that mine operators have “no expectation of privacy in the maps, books, and records which are maintained for and in compliance with the Mine Safety Act,” and therefore must produce them for warrantless inspections. 364 F. Supp. at 51 n.5.

89. 560 F.2d at 220-21.

90. *Id.*

91. *Id.*

92. 493 F.2d 682 (2d Cir. 1974), *cert. denied*, 419 U.S. 875 (1975).

93. N.Y. PUB. HEALTH LAW §§ 3350 (McKinney 1955), 3390 (McKinney 1966).

94. *Colonnade Catering Corp. v. United States*, 410 F.2d 197 (2d Cir. 1969), *rev'd*, 397 U.S. 72 (1970).

95. 493 F.2d at 684.

fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of this Court."<sup>96</sup> The succession of cases dealing with administrative searches, from *Frank* until the present day, attests to the difficulty of this task. An underlying, instrumental factor in the Court's previous considerations may have been a distinction between civil and criminal searches. This distinction, given a degree of recognition in the *Frank* majority decision,<sup>97</sup> was attacked by Justice Douglas in his dissent.<sup>98</sup> Later, in *Camara*, the Court overruled this distinction drawn by *Frank*.<sup>99</sup> Yet, in the case of *Wyman v. James*,<sup>100</sup> a decision predating *Biswell*, this distinction was once again raised. In *Wyman*, the Court upheld the constitutionality of a New York statute,<sup>101</sup> which required periodic warrantless visits by social workers to the homes of welfare recipients. Justice Blackmun, writing for the majority, distinguished *Frank*, *Camara* and *See* as arising in a criminal context, while characterizing the instant case as an inspection for an administrative purpose.<sup>102</sup> Justice Marshall's dissent in *Wyman* attacked this anomalous contention that only suspected criminals are protected by the fourth amendment: "In an era of rapidly burgeoning governmental activities and their concomitant inspectors, caseworkers, and researchers, a restriction of the Fourth Amendment to 'the traditional criminal law context' tramples the ancient concept that a man's home is his castle."<sup>103</sup> Subsequently, in *Nixon v. Administrator of General Services*,<sup>104</sup> a district court provided a detailed discussion on warrantless administrative searches, postulating such a distinction between civil and criminal searches.<sup>105</sup> While this distinction may well have been an underlying factor taken into account in earlier cases, it was not an

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96. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

97. *Frank v. Maryland*, 359 U.S. 360, 367 (1959).

98. *Id.* at 375.

99. "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." 387 U.S. at 530.

100. 400 U.S. 309 (1971).

101. *Id.* at 311-12 nn.2-4.

102. *Id.* at 325.

103. *Id.* at 339.

104. 408 F. Supp. 321, 361-63 n.56 (D.D.C. 1976), *aff'd*, 433 U.S. 425 (1977).

105. See also Note, *Administrative Searches and the Implied Consent Doctrine: Beyond the Fourth Amendment*, 43 BROOKLYN L. REV. 91, 111 (1976). It should be borne in mind that the Maryland General Assembly has made provisions for fines and incarceration as the penalty for those who seek to resist warrantless inspection laws. See, e.g., MD. ANN. CODE art. 48, § 177 (Supp. 1977), which provides that violations of the Boiler and Pressure Vessel Safety Act can result in a five thousand dollar fine and/or up to five years imprisonment for each offense. See also MD. ANN. CODE art. 89, §§ 40, 41 & 44 (Supp. 1977), which contains both civil and criminal penalties for violation of Maryland's occupational safety law.

issue directly addressed in *Colonnade* or *Biswell*, nor did it appear to be a consideration in those cases.

#### D. The Dilemma

The breadth of the application to be given to *Colonnade* and *Biswell* remained unsettled as their progeny grew in lower courts. A narrow reading of the *Colonnade-Biswell* exception to fourth amendment provisions necessitated testing for several key factors:

- (a) The industry/activity to be inspected must be pervasively regulated, perhaps even to include a long-standing history of governmental control and restriction;<sup>106</sup>
- (b) Inspection must be "a crucial part of the regulatory scheme" necessary to the accomplishment of important public interests;<sup>107</sup>
- (c) The inspection must be conducted pursuant to a valid statute which implements "a regulatory inspection system of business premises that is carefully limited in time, place and scope";<sup>108</sup> and
- (d) The inspections for compliance must pose only limited threats to the citizens' justifiable expectations of privacy.<sup>109</sup>

Proponents of a restrictive interpretation of the *Colonnade-Biswell* exception found support for their position in the Supreme Court decisions of *Almeida-Sanchez v. United States*<sup>110</sup> and *Air Pollution Variance Board v. Western Alfalfa Corp.*,<sup>111</sup> both decided

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106. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75-76 (1970); *United States v. Biswell*, 406 U.S. 311, 315-16 (1972).

107. 397 U.S. at 75; 406 U.S. at 315-16.

108. 406 U.S. at 315.

109. *Id.* at 317.

110. 413 U.S. 266 (1973). *Almeida-Sanchez* held unconstitutional warrantless roving searches of automobiles in areas within 100 air miles of United States borders by the Border Patrol in seeking to apprehend illegal aliens. In citing *Camara*, the Court stated that "the administrative inspections to enforce community health and welfare regulations could be made on less than probable cause to believe that particular dwellings were the sites of particular violations." *Id.* at 270. Yet, the Court observed:

The search in the present case was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause, or consent. The search has embodied precisely the evil the Court saw in *Camara* when it insisted that the discretion of the official in the field be circumscribed by obtaining a warrant prior to the inspection.

*Id.* Both *Colonnade* and *Biswell* were held inapplicable because the people stopped were not engaged in any regulated or licensed business. *Id.* at 271.

111. 416 U.S. 861 (1974). The Court upheld a warrantless entry by a state health inspector upon the outdoor premises of a manufacturer for the purpose of making air pollution tests. In rejecting the manufacturer's challenge based on unreasonable search grounds, the Court maintained its adherence to *Camara*

after *Colonnade-Biswell*. These cases indicated affirmation of the *Camara-See* position although neither turned on such adherence. Conversely, in *United States v. Martinez-Fuerte*,<sup>112</sup> a case involving warrantless vehicle stops at fixed checkpoints near the Mexican border, the Court explicitly found the *Camara* area warrant approach inapt because a warrant would not have provided any additional notice to the individuals who were stopped, nor was there any uncertainty as to the authority of the inspectors or the scope of their inspections. Yet, in *G.M. Leasing Corp. v. United States*,<sup>113</sup> the Court held that warrantless Internal Revenue Service intrusions into a businessman's office were unreasonable unless authorized by a valid search warrant.<sup>114</sup> The *Camara-See* rule was again applied as the *Colonnade-Biswell* exception was ruled inapplicable. Thus, the confusion continued.

Of particular note in describing the dilemma faced by lower courts were Occupational Safety and Health Act<sup>115</sup> (OSHA) cases, which became the principal battleground on the constitutionality of warrantless administrative inspections. These cases split both ways in the lower courts on the breadth of application issue.<sup>116</sup> As a result, the Supreme Court finally addressed the issue in *Marshall v. Barlow's, Inc.*<sup>117</sup>

### E. The Barlow Decision

Barlow, the president of an electrical and plumbing installation concern in Idaho, refused to allow an OSHA inspector warrantless access<sup>118</sup> to his business premises. The government obtained a court order to enter and inspect the premises, but Barlow again refused to permit any inspection. Barlow then sought an injunction against these OSHA attempts to conduct warrantless inspections. A three-

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and *See* but ruled that they were not applicable in this case. *Id.* at 864. Instead, the Court relied upon the open fields exception to the fourth amendment. *See generally* *Hester v. United States*, 265 U.S. 57 (1924).

112. 428 U.S. 543 (1976). The Court found that the government officers' authority was readily apparent as the roadblocks were permanent in nature. *Id.* at 565. The officers were in full dress uniform and official signs were posted as far as one mile ahead alerting motorists to the roadblock. *Id.* at 545-46. For a critical comment, see *Alien Checkpoints and the Troublesome Tetralogy*: *United States v. Martinez-Fuerte*, 14 SAN DIEGO L. REV. 257 (1976).

113. 97 S. Ct. 619 (1977).

114. *Id.* at 628-29.

115. 29 U.S.C. §§ 651 *et seq.* (1976). *See* Comment, *OSHA v. The Fourth Amendment: Should Search Warrants Be Required for "Spot Check" Inspections?*, 29 BAYLOR L. REV. 283 (1977).

116. Warrantless searches by OSHA inspectors were found to be unconstitutional by some courts. *E.g.*, *Dunlop v. Sandie Die and Cartridge Co.*, 4 OSHC 1569 (D.N.M. 1976); *In re Rupp Forge Company*, 4 OSHC 1487 (N.D. Ohio 1976); *Brennan v. Gibson's Products, Inc. of Plano*, 407 F. Supp. 154 (E.D. Tex. 1976). *Contra*, *Dunlop v. Able Contractors, Inc.*, 4 OSHC 1110 (D. Mont. 1975); *Brennan v. Buckeye Industries, Inc.*, 374 F. Supp. 1350 (S.D. Ga. 1974).

117. 98 S. Ct. 1816 (1978).

118. Access was sought on the basis of authorization contained at 29 U.S.C. § 657(a) (1976).



judge, federal district court<sup>119</sup> agreed with his contention that Congress did not have the authority to obviate the Constitution by empowering OSHA representatives to conduct warrantless inspections. The court held that OSHA's warrantless inspection provisions were violative of the fourth amendment. In arriving at its decision, the court faced the familiar dilemma of fitting *Colonnade-Biswell* and *Camara-See* into some orderly structure. The court resolved this problem by holding that the *Camara-See* warrant requirement for public health and safety inspections was the rule. Exceptions on the basis of the *Colonnade-Biswell* analysis were strictly confined to "the *Camara* categorization of 'certain carefully defined classes of cases.'" <sup>120</sup> From there it logically followed that OSHA's application to *all* businesses engaged in interstate commerce was far broader than any allowable exception envisioned by *Camara*, and was certainly not analogous to the *Colonnade* liquor industry's historically close supervision or with the *Biswell* gun industry's pervasively regulated business.<sup>121</sup> The government was quick to appeal this adverse ruling and cited in its brief to the Supreme Court the potential implications, at both state and federal levels, on health and safety inspections for the regulation of drugs, mining, cosmetics, food and water, pesticides, transportation media, pipelines, etc.<sup>122</sup>

In a five-to-three decision,<sup>123</sup> the Supreme Court upheld the three-judge panel by ruling that, absent consent by the owner of a business, OSHA inspectors were required to obtain a warrant before inspecting the premises. The majority opinion of Justice White traced the Court's decisions in *Camara*, *See*, *Colonnade* and *Biswell* and concluded, "[t]he clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception. The Secretary [of Labor] would make it the rule."<sup>124</sup>

In describing the flexible standard of reasonableness against which probable cause for issuance of a warrant to inspect would be measured, the Court explicitly stated that "[p]robable cause in the criminal law sense is not required."<sup>125</sup> *Camara* and *See* were specifically reaffirmed and quoted.<sup>126</sup> The Court restated its objection to statutes that placed broad inspection discretion in public officials.<sup>127</sup> In answer to the Secretary of Labor's argument

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119. *Barlow's, Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho 1977); *aff'd sub nom. Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978).

120. *Id.* at 440.

121. *Id.* at 440-41.

122. Brief for Petitioner at 49 n.25.

123. *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978). Suit was originally brought by President Ford's Secretary of Labor, W.J. Usery. With the election of President Carter, Usery was replaced by Ray Marshall, under whose name the appeal was taken to the Supreme Court.

124. *Id.* at 1821.

125. *Id.* at 1824.

126. *Id.* at 1820-21.

127. *Id.* at 1825-26.

that a warrant would merely track the statute, the Court responded that "a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed."<sup>128</sup> *Colonnade* and *Biswell* were characterized as "responses to relatively unique circumstances"<sup>129</sup> where historical governmental regulation left businessmen with little expectation of privacy when they voluntarily chose to engage in those trades.

The majority opinion also addressed the argument raised by the government that an adverse ruling on OSHA inspections would have far-reaching implications on other legislation seeking to protect the public health and welfare. OSHA was distinguished because its scope was too broad, applying to all industries engaged in interstate commerce.<sup>130</sup> Moreover, most of the other statutes cited by the Secretary<sup>131</sup> were directed "to a single industry, where regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply."<sup>132</sup> The Court did not rule on the constitutionality of any laws except OSHA itself, reserving judgment of these other statutes until they actually come into dispute. Nevertheless, the strength of the affirmation of *Camara-See* as the rule and the characterization of *Colonnade-Biswell* as the narrow exception leave little doubt as to the tests that the Court will apply in the future.

In its defense of OSHA, the government warned of the many violations that would now go undetected. This argument, reminiscent of similar warnings in *Frank*,<sup>133</sup> *Camara* and *See*,<sup>134</sup> was promptly rejected by the Court in its affirmation of the warrant requirement for an administrative inspection under a flexible probable cause standard.<sup>135</sup> The Court reiterated its belief that most businessmen would continue to comply voluntarily with the access provisions of OSHA.<sup>136</sup> For those who did not, the Court envisioned

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128. *Id.* at 1826.

129. *Id.* at 1821.

130. *Id.*

131. *Id.* at 1825 n.19.

132. *Id.* at 1825.

133. *See Frank v. Maryland*, 359 U.S. 360, 372 (1959).

134. *See v. City of Seattle*, 387 U.S. 541, 546-47 (1967) (Clark, J., dissenting).

135. 98 S. Ct. at 1822.

136. *Id.*

resort to ex parte warrants, which would place no excessive burden on government agents while preserving the element of surprise which was claimed as necessary to effective enforcement of OSHA.<sup>137</sup>

There was, however, one issue that the Court left unanswered. OSHA has no provision for seeking the issuance of a search warrant. One lower court<sup>138</sup> upheld the validity of OSHA by the judicial interpretation that it was the intent of "Congress to authorize objected-to OSHA inspections only when made by a search warrant issued by a United States Magistrate or other judicial officer of the third branch under probable cause standards appropriate to administrative searches — that is, in a constitutional manner."<sup>139</sup> The three-judge panel that heard the *Barlow* case below chose instead to "decline the invitation to judicially redraft an enactment of Congress."<sup>140</sup> The Supreme Court, however, skirted this issue in a footnote<sup>141</sup> at the close of its opinion. The Court first observed that the issue was not raised. It proceeded to note that if the compulsory process obtained by the OSHA inspector after he was first denied access satisfied fourth amendment standards, and if it was the functional equivalent of a warrant, then the inspection

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137. *Id.* Justice Stevens dissented in *Barlow*, taking the view that the fourth amendment "Warrant Clause has no application to routine, regulatory inspections of commercial premises. If such inspections are valid, it is because they comport with the ultimate reasonableness standard of the Fourth Amendment." *Id.* at 1828. See also *Lebedun v. State*, 283 Md. 257, 390 A.2d 64 (1978), which favorably cites the *Barlow* dissent while distinguishing between the warrant and the reasonableness clauses of the fourth amendment.

138. *Brennan v. Gibson's Products, Inc., of Plano*, 407 F. Supp. 154 (E.D. Tex. 1976). See Note, *Fourth Amendment Prohibits Warrantless OSHA Inspections*, 11 SUFFOLK L. REV. 156 (1976).

139. *Id.* at 162.

140. 424 F. Supp. at 441. See Comment, *OSHA v. The Fourth Amendment: Should Search Warrants Be Required For "Spot Check" Inspections?*, 29 BAYLOR L. REV. 283, 304-05 (1977), for one suggested legislative approach to remedy OSHA's defective inspection provisions.

141. 98 S. Ct. at 1827 n.23.

The District Court did not address the issue whether the order for inspection that was issued in this case was the functional equivalent of a warrant, and the Secretary has limited his submission in this case to the constitutionality of a warrantless search of the *Barlow* establishment authorized by § 8(a).

*Id.*

was constitutional.<sup>142</sup> This is an interesting point, one that may result in additional litigation of OSHA.<sup>143</sup>

### III. MARYLAND LAWS IN THE WAKE OF *BARLOW*

It is difficult to see how the virtually unrestricted authority to inspect, which various Maryland administrative inspection statutes contain, can be sustained in the light of the clear restatement of the law found in the *Barlow* decision. Consider, for example, these words of authorization appearing in some Maryland statutes:

[T]he Secretary may enter all places where bees, bee products, supplies, or appliances used in apiaries are kept.<sup>144</sup>

The Secretary shall sample, inspect, test and make analyses of commercial feed distributed in the state at any time and place and to the extent the Secretary considers necessary to ensure compliance with this subtitle.<sup>145</sup>

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142. In the eyes of the Court, the existence of a search warrant cannot be minimized. During the same Term as the *Barlow* decision, two other cases of great importance regarding search warrants were resolved. The first was *Michigan v. Tyler*, 98 S. Ct. 1942 (1978). There, a conviction on an arson conspiracy charge was overturned because the vital evidence was obtained through a warrantless search of the fire scene after the blaze was extinguished and the exigent circumstances justifying warrantless access had passed. The Court cited *Camara*, *See* and *Barlow* in holding that "[t]he showing of probable cause necessary to secure a warrant may vary with the object and intrusiveness of the search, but the necessity for the warrant persists." *Id.* at 1948. This comports with the second decision, *Zurcher v. Stanford Daily*, 98 S. Ct. 1970 (1978). In *Zurcher*, the Court upheld a search under warrant of a newspaper office. The challenge was based on the violation of the "reasonableness" required by the fourth amendment as well as on the violation of the first amendment rights of a newspaper. In answer, the Court stated that "[u]nder existing law, valid warrants may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found." *Id.* at 1975-76 (emphasis in original). And later in the same opinion, the Court noted, "*Camara* and *See* . . . held that a warrant is required where entry is sought for *civil* purposes, as well as when criminal enforcement is involved. . . . [B]oth cases held that a less stringent standard of probable cause is acceptable where the entry is not to secure evidence of crime against the possessor." *Id.* at 1976 (emphasis in original).

143. In this regard, there may be a fruitful comparison with Maryland statutes. In his brief (Brief for Appellee at 6-12), *Fitzwater* argued that the Boiler and Pressure Vessel Safety Act contained no provision for the issuance of an inspection warrant, and therefore the inspection authorization was unenforceable. Although this issue was not reached either in *Barlow* or *Fitzwater*, it must be considered a potential source of future litigation.

Several lower federal court cases involving OSHA have addressed the issue of a magistrate's authority to issue a search warrant for a contested OSHA inspection and have upheld the magistrate's authority. *See, e.g.*, *Empire Steel Mfg. Co. v. Marshall*, 437 F. Supp. 873 (D. Mont. 1977); *Matter of Northwest Airlines, Inc.*, 437 F. Supp. 533 (E.D. Wis. 1977); *Marshall v. Chromalloy American Corp.*, 433 F. Supp. 330 (E.D. Wis. 1977); *Gilbert and Bennett Mfg.*, 5 OSHC 1375 (E.D. Ill. 1977).

144. MD. AGRIC. CODE ANN. §5-504 (1974).

145. MD. AGRIC. CODE ANN. §6-106(a) (1974).

The Secretary may enter on any public or private premises, including any transportation vehicle, during regular business hours to obtain access to commercial feeds or to records relating to their distribution.<sup>146</sup>

The Secretary has full access, ingress and egress to and from any place of business, any quarry, kiln, factory, barn, building, land, or vessel used for manufacturing, storing, transporting, or selling agricultural liming materials or gypsum. The Secretary may open any container or package containing or supposed to contain agricultural liming material or gypsum and take any sample for analysis.<sup>147</sup>

In view of the limitations that the Supreme Court has placed on administrative inspections, it is unlikely that these statutes can withstand constitutional scrutiny.

#### A. *Unlimited Search Authorization*

While the congressionally empowered, gun inspection in *Biswell* was accomplished under a statute that the Court found to be constitutional, Maryland statutes fall short against a fourth amendment test and its inherent safeguards. Statutory limits regarding time, place, and scope found in *Biswell*<sup>148</sup> were especially important because they fulfilled the same purpose as the warrant itself. These limits are absent in the broad authorizations of warrantless entry made available to Maryland state officials.<sup>149</sup> In addition, the objects of the inspections in *Colonnade* and *Biswell* were articles representing some inherent threat or danger. When balancing the level of privacy invaded and the public interest at stake, the articles required governmental controls. The Court in *Barlow* commented that “[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise.”<sup>150</sup> Regarding the objects of Maryland inspection laws, however, it is difficult to conceive of a substantial, inherent threat or dangerous

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146. MD. AGRIC. CODE ANN. §6-106(e) (1974).

147. MD. AGRIC. CODE ANN. §6-304 (1974).

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

149. See text accompanying notes 144-47 *supra*. In addition, the Maryland occupational safety law, MD. ANN. CODE art. 89, §§28 *et seq.* (Supp. 1977), is modeled after the federal Occupational Safety and Health Act of 1970, which was held by the *Barlow* decision to be constitutionally deficient. The Government in the *Barlow* appeal to the Supreme Court noted Maryland's occupational safety law, and cited Maryland as one of approximately twenty-three states whose warrantless inspection provisions were also at stake in the appeal. Brief for Petitioner at 49 n.26.

150. *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1821 (1978).

instrumentality among the twenty-odd items to which warrantless inspections are addressed.<sup>151</sup>

### B. *Expectation of Privacy*

Maryland merchants, businessmen, farmers, and, indeed, the average citizen have a reasonable expectation of privacy.<sup>152</sup> The objects of Maryland's warrantless inspection laws are not so inherently dangerous or so pervasively regulated that voluntary involvement with those objects constitutes an implied waiver of privacy and its attendant fourth amendment rights. Consent by implication is not present. Liquor and guns are in a class apart from lime, swine, bees, potato seeds, broiler chickens, and pressure boilers. On balance, fourth amendment rights are more important than the threat perceived from these items by the Maryland General Assembly. In *Camara*, the Court emphasized the standard of reasonableness and cautioned that its decision did not foreclose warrantless inspections in emergency situations such as the seizure of unwholesome food, compulsory smallpox vaccinations, health quarantines, and the summary destruction of tubercular cattle.<sup>153</sup> Absent an emergency situation or some other recognized exception to fourth amendment, search warrant requirements, however, the modified probable cause standard that *Barlow* reaffirmed must be met and a suitably restricted search warrant must be sought.

The state's interest in promoting its objectives under any of its present laws authorizing warrantless inspections does not outweigh the interests of the affected citizenry to the privacy guaranteed by the fourth amendment. Although the sites at which state inspectors will intrude are mainly commercial establishments, this is of no consequence. The Supreme Court observed in *Katz v. United*

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151. See note 13 *supra*. The Maryland citizen who deals in commodities subject to warrantless inspections is not on notice of his responsibilities and the inspector's duties. Maryland law does not provide for the annual issuance of applicable rules and regulations as was found in *Biswell*. In addition, the Maryland citizen subject to these inspections has not willingly agreed to sacrifice some level of his constitutional protection in return for a government license to deal in a restricted enterprise like liquor and guns. Maryland law affects every businessman and farmer regardless of how innocent and commonplace the articles of commerce are with which they deal. The articles are not subject to widespread abuse nor are they intrinsically dangerous. The mere convenience for an inspector to be exempt from the warrant procurement process is not a sufficient justification.

152. As Justice Douglas contended in his concurring opinion in *Katz v. United States*, 389 U.S. 347 (1967), even "spies and saboteurs are as entitled to the Fourth Amendment as suspected gamblers. . . . There is, so far as I understand constitutional history, no distinction under the Fourth Amendment between types of crimes." *Id.* at 360. In Md. CTS. & JUD. PROC. CODE ANN. § 10-401 (Supp. 1977), the Maryland General Assembly, although addressing wiretapping, expressed its intent as follows: "It is further declared to be the public policy of the State that detection of the guilty does not justify investigative methods which infringe upon the liberties of the innocent."

153. *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967).

*States*<sup>154</sup> that "the Fourth Amendment protects people, not places"<sup>155</sup> and therefore required that whenever a person harbors a reasonable expectation of privacy he is entitled to be free from unreasonable government intrusion. In *Barlow*, the Court stated: "The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents."<sup>156</sup> The broad reach of the Maryland statutes and their sweeping authorization are designed in such a manner as to ensure that the maximum number of invasions of privacy will occur, thereby issuing as bold a challenge as possible to the courts to strike them down. Legislative authorizations of warrantless administrative inspections present an interesting contrast. On the one hand, alleged criminals are afforded the full range of a search warrant's fourth amendment protections. Yet, the average citizen, farmer, and businessman are shorn of proper, constitutional safeguards.

### C. *Imposition of an Impartial Magistrate*

Maryland administrative inspection laws often leave the decision of what commercial premises are to be inspected, as well as when and how the inspections are to be conducted, in the total discretion of the state official. There is no imposition of impartial judgment, control, or limitation as there is when a magistrate is approached for issuance of a warrant. There is no mechanism for deflection of abusive or harassing practices. The *Barlow* decision reiterated the importance of the magistrate's function when it observed that under OSHA procedures "[t]he authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search."<sup>157</sup>

A magistrate, not the many state functionaries that the Maryland General Assembly attempts to authorize, must determine whether probable cause for an inspection exists. If, as the legislature has directed, the subjective good faith of Maryland inspectors is the sole check on their powers, fourth amendment protections are illusory, resting on the unregulated discretion of the state's agents. If challenged, this situation cannot withstand the constitutional test to which it must be subjected by the courts. In the context of criminal searches, a magistrate must be presented with sufficient information upon which he can independently determine whether a constitu-

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154. 389 U.S. 347 (1967).

155. *Id.* at 351.

156. *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1822 (1978).

157. *Id.* at 1825-26. *See also* *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), where, although probable cause was present, the Court held a search warrant invalid because it was not issued by an impartial magistrate but by the State Attorney General who was himself involved in the case.

tional justification for entry exists.<sup>158</sup> So, too, with requested administrative inspections, the magistrate must independently conclude that the entry is part of a comprehensive, regulatory scheme, that it is not an abuse of the state's police powers, and that there is a check on the discretion of state inspectors.<sup>159</sup>

#### *D. No Provisions for Issuance of a Warrant*

Administrative inspections in the interests of public health and welfare can be pursued by first seeking the voluntary compliance of the general public — those ultimately served by any regulatory scheme of this nature. Where voluntary compliance is not forthcoming, there must exist a statutory mechanism for seeking the issuance of a warrant. *Camara*, *See* and *Barlow* specified that a flexible probable cause standard would be sufficient for a warrant authorizing inspections as part of a regulatory scheme. This presupposes, however, some existent statutory provision for obtaining a warrant. Presently, Maryland inspection laws do not address the requirement of a warrant, or provide a mechanism for seeking a warrant, as a part of the regulatory process. This could provide the basis for the next round of court challenges to administrative inspections sought by Maryland officials who request warrants issued under a flexible probable cause standard.

If the purpose of the regulatory scheme is to safeguard public health and welfare, the short delay and burden of the warrant process are a small price to pay. Maryland statutes that seek to authorize warrantless administrative inspections represent significant intrusions on fourth amendment rights, and Maryland citizens may well have the constitutional prerogative to reject access to those officials who seek entry to their domiciles or business premises without warrants. Nevertheless, even if warrantless access is upheld, the use of force to obtain that access is illegal.<sup>160</sup> For that reason

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158. *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971).

159. *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1826 (1978). As the Court said in *Beck v. Ohio*, 379 U.S. 89 (1964), when dealing with probable cause relating to warrantless arrests: "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects, only in the discretion of the police." *Id.* at 97. Harassing administrative inspections can just as easily result from overenthusiasm of state employees as from their malice. The intrusive, disruptive result would be the same to state citizens, regardless of the motivation.

In *Marshall v. Weyerhaeuser Co.*, 47 U.S.L.W. 2183 (D.N.J. Sept. 7, 1978), a federal district court refused to issue a search warrant to OSHA officials. The court found the supporting affidavit inadequate and stated: "Approval of a search warrant based on this affidavit would amount to a rubber stamp." *Id.* at 2184. Thus, resort to the independent judgment of a magistrate can provide an adequate barrier to unsubstantiated, attempted intrusions by governmental officials.

160. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970); *Camara v. Municipal Court*, 387 U.S. 523, 540 (1967); *See v. City of Seattle*, 387 U.S. 541, 545 (1967).



alone, the General Assembly must properly equip state inspectors to fulfill their tasks completely. Perhaps some offenders can escape detection because of their advance notice of inspection,<sup>161</sup> but when the purpose is truly regulatory the objective is correction or elimination of deficiencies, not penal sanctions against the offender. If this objective can be accomplished through the warrant process, either by voluntary correction during the warrant process delay or by state direction after inspection under a warrant, the public interest is served and fourth amendment rights are not violated. As long as no exigent circumstances<sup>162</sup> exist, and an "industry long subject to close supervision and inspection"<sup>163</sup> or a pervasively regulated business<sup>164</sup> are not involved, then the people's interest in the protection of their right to privacy is paramount to the state's interest in protecting health and welfare. In this regard, a footnote to the lower court *Barlow* decision contains a pointed quotation: "Expediency is the argument of tyrants, it precedes the loss of every human liberty."<sup>165</sup>

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161. *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1822 (1978).

162. See Sikma, *A Survey of Exceptions to the Warrant Requirement*, 21 S.D.L. Rev. 254 (1976) and text accompanying note 153 *supra*.

163. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970).

164. *United States v. Biswell*, 406 U.S. 311, 316 (1972).

165. *Barlow's, Inc. v. Usery*, 424 F. Supp. 437, 441 n.4 (D. Idaho 1977), *aff'd sub nom. Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978).

On September 22, 1978, the Attorney General of Maryland issued an opinion declaring that state health officials have the authority to conduct warrantless inspections of licensed nursing homes and hospitals in order to ensure compliance with MD. ANN. CODE art. 43, § 562 (1971), which deals with minimum safety and sanitation standards in nursing homes and hospitals. Md. Att'y Gen. Op., Daily Record, October 7, 1978 at 4, col. 2. The Attorney General found statutory authority to conduct these inspections in MD. ANN. CODE art. 43, § 36B (1971) (the opinion cites § 37B, presumably a typographical error since there is no § 37B and because the quoted language in the opinion conforms to § 36B); art. 43, § 561(a) (Supp. 1977). The Attorney General also declared that these particular inspections "clearly fall into the exception recognized in" *Biswell* and *Colonnade*, and distinguished these inspections from those in *Barlow*. His rationale for finding such an exception was "the longstanding and pervasive regulation" by the state in the health care facilities area, which the Attorney General argued was "sufficiently analogous to the regulation of firearms and alcohol" found in *Biswell* and *Colonnade*.

The opinion can be criticized on two specific grounds. First, the opinion missed the point of the line of Supreme Court cases from *Camara* and *See* through *Barlow*. The same analysis used in this Comment to distinguish other Maryland warrantless administrative inspections from those in *Biswell* and *Colonnade* is applicable here. Second, the two statutes relied on by the Attorney General for inspection authority to enforce § 562 do not relate to § 562. Section 36B inspections do not refer to health care facilities but apply to "any industrial plant, place of business or public premises," and the inspections are limited to certain problem areas delineated in § 36A. Section 561(a) applies to health care facilities but authorizes warrantless inspections only for the purpose of ensuring compliance with construction standards. Thus, unlike *Biswell* or *Colonnade*, there is no specific statute authorizing warrantless administrative inspections under § 562.

## IV. RECOMMENDATION FOR LEGISLATIVE CORRECTION

The newly revised Boiler and Pressure Vessel Safety Act<sup>166</sup> now provides for all-encompassing, warrantless inspections. This Act is in operation along with various other Maryland statutes, such as the Maryland equivalent of OSHA,<sup>167</sup> that also authorize warrantless inspections. As the trial court held in the *Fitzwater* boiler explosion case, the attempted authorization of health and safety inspections without search warrants is violative of the fourth amendment. This point is particularly well-taken with respect to Maryland's administrative inspection statutes where few limitations on an inspector's discretion are imposed in substitution for the protections of a warrant. In view of the decisions handed down by the Supreme Court, including its recent ruling in *Barlow*, and the warning of the circuit court in *Fitzwater*, the Maryland General Assembly should act to include provisions for the procurement of search warrants in all inspections. As an added safeguard, words of limitation regarding the time, place, and scope of an inspection should be included in each statute where inspection authorization is addressed.<sup>168</sup> It must be remembered that *Camara*, *See* and *Barlow* represent a compromise by the Court. The validity of the public interest, balanced against the intrusive inspection sought, established the level of probable cause necessary for issuance of a warrant. Despite this compromise position, which has evolved through the several Supreme Court decisions in this area, Maryland statutes on administrative inspections still permit virtually unchecked, warrantless probes, thereby violating what appears to be a clear mandate. The flexible probable cause standard evolving out of the *Camara*, *See* and *Barlow* decisions would not jeopardize the accomplishment of the objectives desired by present inspection laws. Voluntary compliance by citizens and businessmen would serve to fulfill the overwhelming majority of inspection needs, and the state would have to invoke the warrant process only on a limited basis. When surprise or previously encountered rejections or delays are involved, the area warrants<sup>169</sup> of *Camara-See* or the "ex parte warrants"<sup>170</sup> of *Barlow* can be obtained in advance. Inclusion of a warrant provision will not unduly burden regulatory officials.<sup>171</sup> As the law now stands, inspectors without a warrant cannot force entry and, therefore, the regulatory purpose may not be fulfilled, thus providing

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166. MD. ANN. CODE art. 48, §§ 167-180 (Supp. 1977).

167. MD. ANN. CODE art. 89, §§ 28 *et seq.* (Supp. 1977).

168. The Court in *Michigan v. Tyler*, 98 S. Ct. 1942 (1978), stated that a balance between the need for obtrusive inspections on the one hand and the desire for personal privacy by the individual on the other "is usually achieved by broad legislative or administrative guidelines specifying the purpose, frequency, scope and manner of conducting the inspections." *Id.* at 1949.

169. See *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967).

170. *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1822 (1978).

one more reason why the General Assembly should arm inspectors with the power to obtain a warrant.

In the absence of legislative action, the issue of the constitutionality of the Maryland inspection statutes will have to be faced by the courts. In terms of the cost to citizens and the shortcomings of a truly regulatory procedure without provision for obtaining a warrant, amendment of the various laws is the positive course. Revision of the statutes to provide for issuance of a warrant is a legislative function, not one for the courts<sup>172</sup> to judicially provide or infer.

## V. CONCLUSION

If the *Fitzwater* case were to be retried today under the revised statute, the constitutional issue would have to be squarely faced. In that event, it seems inevitable that this or any other Maryland administrative inspection statute authorizing an entry without a search warrant would be struck down as unconstitutional. This would leave Maryland without any effective health and safety controls until the General Assembly could modify current, inadequate inspection statutes for situations where voluntary compliance was withheld. The added burden that would be placed on state officials by present correction of statutes would be inconsequential, while the advantages of preserving constitutional protections against potentially abusive, discretionary inspections would be great. Considering the ease and simplicity of preemptive, corrective action that could be undertaken now, a legislative initiative is in order and should be encouraged in the current session of the General Assembly.

*Robert J. Liberatore*

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171. In *Coolidge v. New Hampshire*, 403 U.S. 443, 470-71 (1971), the Supreme Court, on the related topic of the burden on police in obtaining warrants for seizure of evidence, stated: "The requirement of a warrant to seize imposed no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of 'exigent circumstances.'"

172. As Justice Clark stated in *Clark, Some Notes on the Continuing Life of the Fourth Amendment*, 5 AM. J. CRIM. LAW 275, 282 (1977): "When you try to make up gadgets, try to invent loopholes, try to build bypasses to get by the fourth amendment, then you not only do disservice to yourself, but you will eventually destroy both the Judicial system itself and the liberties that we all enjoy."