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THE HIDDEN COST OF ROD AND RIFLE: WHY STATE FISH AND GAME LAWS MUST BE AMENDED IN ORDER TO PROTECT AGAINST UNREASONABLE SEARCH AND SEIZURE IN THE GREAT OUTDOORS

I. INTRODUCTION

Recreational anglers¹ and hunters assume many burdens before casting a line or taking aim from a tree stand.² For example, Maryland requires licenses,³ limits activity to specific seasons,⁴ and places restrictions on equipment⁵ as conditions to recreational hunting and fishing. Beyond these expected burdens, however, an unanticipated cost has emerged that threatens anglers' and hunters' Fourth Amendment privacy rights. From California's piers to the Montanan wilderness to even the calm waters of the Chesapeake Bay, hunters and anglers are subjected to warrantless searches by game wardens, often without probable cause or reasonable suspicion of any game violation.⁶

At first blush, these kinds of intrusions on an individual's privacy would appear to directly contravene well-established protections under the Fourth Amendment.⁷ State courts, however, have upheld warrantless administrative searches of anglers' and hunters' boats, vehicles, and storage containers as valid under the United States Constitution.⁸

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1. "Angling," is a method of fishing with a hook and line, and an "angler" is one who fishes by "angling." MINN. STAT. ANN. § 97A.015, subd. 2 (West 2009).
 2. Tree stands allow hunters to observe and hunt deer from a hidden vantage point up in a tree. See *Basic Treestand Hunting Techniques*, OUTDOOR ADVENTURES NETWORK, http://www.myoan.net/huntingart/deer_stand_techniques.html (last visited June 10, 2013).
 3. See MD. CODE ANN., NAT. RES. § 10-306 (LexisNexis 2007) (establishing a hunting license requirement); *id.* § 4-610 (establishing a fishing license requirement).
 4. See *id.* § 4-603 (providing for fishing seasons); *id.* § 10-415 (providing for deer hunting season).
 5. See, e.g., *id.* § 10-426 (prohibiting hunting with a gun or device via Internet connection); *id.* § 10-418 (requiring specific outerwear for hunters); *id.* § 4-617 (prohibiting angling with certain types of lines and lures).
 6. See *infra* Part II.B.
 7. See discussion *infra* Part III.A.
 8. See, e.g., *People v. Maikhio*, 253 P.3d 247, 256, 262–63 (Cal. 2011) (upholding warrantless administrative stop and search of defendant's vehicle after warden observed defendant fishing lobster); *State v. Colosimo*, 669 N.W.2d 1, 9 (Minn. 2003)

Under the administrative search exception to the Fourth Amendment warrant requirement, game wardens may perform warrantless administrative searches without probable cause or reasonable suspicion of a violation, simply because hunting and fishing are closely regulated activities.⁹ Consequently, even though anglers and hunters are private citizens engaged in seemingly innocuous recreational activities, they are subject to the same warrantless intrusions on their privacy as firearms dealers or mine operators.¹⁰

Although it is crucial for states to be able to enforce their fish and game laws and preserve wildlife populations for subsequent generations,¹¹ basic privacy protections should not have to face extinction as a result.¹² Unfortunately, the vitality of the warrantless administrative search exception for closely regulated activities has greatly diminished anglers' and hunters' privacy rights under the Fourth Amendment.¹³ Rather than rely on privacy protections under the Constitution, the best remedy for anglers and hunters to preserve their privacy rights is through legislation that would limit game wardens' search and seizure authority under state fish and game laws.¹⁴

This comment will explore how explicitly defining game wardens' search and seizure powers under state fish and game laws would be the most practical means to preserve hunters' and anglers' privacy rights, notwithstanding the warrantless administrative search exception to the Fourth Amendment.¹⁵ Specifically, this comment will propose that game wardens may stop suspected anglers and hunters to demand exhibition of licenses and any fish or game that

(holding that game warden was entitled to search defendant's boat despite no suspicion of fishing violation); *State v. Boyer*, 42 P.3d 771, 773, 779 (Mont. 2002) (upholding warrantless search of defendant's live well fish container).

9. See *infra* Part II.B.

10. Compare *Colosimo*, 669 N.W.2d at 2, 9 (upholding warrantless administrative search on recreational angler), and *Maikhio*, 253 P.3d at 256, 262–63 (upholding warrantless administrative stop and search of defendant's vehicle after warden observed defendant fishing lobster), with *Donovan v. Dewey*, 452 U.S. 594, 606 (1981) (upholding warrantless administrative searches in the mining industry), and *United States v. Biswell*, 406 U.S. 311, 317 (1972) (upholding warrantless administrative searches against an arms dealer).

11. See Scott Witty, *It's a Keeper: Preserving Minnesota's Recreational Fishing by Allowing Effective Regulatory Enforcement*, 26 *HAMLIN J. PUB. L. & POL'Y* 151, 154 (2004).

12. See *infra* Part III.C.1.

13. See *infra* Part II.B.

14. See *infra* Part III.C.1–2.

15. See *infra* Part III.C.1.

the person possesses, but a more intrusive administrative search could be performed only if the game warden develops independent suspicion of a violation.¹⁶

Part II provides background on the development of the administrative search exception to the traditional warrant requirement under the Fourth Amendment, tracing its expansion from the use of less stringent administrative warrants to the execution of warrantless administrative searches whenever an activity is closely regulated.¹⁷ Additionally, Part II addresses how the warrantless administrative search exception has been applied against anglers and hunters in states across the country to permit warrantless searches and seizures.¹⁸

Part III discusses why previous challenges to the exception's constitutionality, in the fish and game context, have failed,¹⁹ and examines why state constitutional amendments purporting to expand citizens' privacy rights would likely be insufficient to protect hunters and anglers.²⁰

Expanding upon the Supreme Court of California's interpretation of California's fish and game laws in *People v. Maikhio*,²¹ Part III argues that limiting game wardens' administrative search and seizure powers through more specific state laws would be the most reasonable method for striking a proper balance between wildlife protection and privacy rights.²² Lastly, Part III will analyze Maryland's fish and game laws and propose legislative amendments to ensure that outdoors enthusiasts' rights are preserved in proper balance with the state's interest in wildlife preservation.²³

16. See *infra* Part III.C.1–2.

17. See *infra* Part II.A.

18. See *infra* Part II.B.

19. See *infra* Part III.A.

20. See *infra* Part III.B.

21. *People v. Maikhio*, 253 P.3d 247 (Cal. 2011).

22. See *infra* Part III.C.1.

23. See *infra* Part III.C.2.

II. THE EXPANSION OF WARRANTLESS ADMINISTRATIVE SEARCHES AND THEIR APPLICATION TO RECREATIONAL FISHING AND HUNTING LAW ENFORCEMENT

A. *From Camara to Burger: Warrantless Administrative Searches under the Fourth Amendment*

Under the Fourth Amendment, individuals have the right to be free from unreasonable searches and seizures.²⁴ In order for Fourth Amendment protections to apply, the individual searched must have a reasonable expectation of privacy in the area searched.²⁵ Generally, police must obtain a warrant or have probable cause before performing a search or seizure.²⁶ However, courts recognize that when there is a reduced expectation of privacy in the area to be searched, the traditional warrant and probable cause requirements are relaxed.²⁷

Despite the Fourth Amendment's seemingly clear wording, exceptions to the warrant requirement abound.²⁸ The administrative search exception—first established by the United States Supreme Court in *Camara v. Municipal Court*—originally provided for less stringent administrative warrants to perform regulatory inspections, rather than require the traditional search warrants used by police.²⁹

Under *Camara*, the Court recognized that when state inspections are aimed at citywide compliance with a regulatory scheme, rather than a criminal investigation, an administrative warrant need not be issued by a judge and need not be supported by probable cause.³⁰

24. U.S. CONST. amend. IV. The Fourth Amendment provides that:

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.

25. See *Katz v. United States*, 389 U.S. 347, 353 (1967).

26. See U.S. CONST. amend. IV.

27. See, e.g., *New York v. Burger*, 482 U.S. 691, 707, 712 (1987) (upholding warrantless inspection because operator of vehicle dismantling business had a diminished expectation of privacy).

28. See, e.g., *Michigan v. DeFillippo*, 443 U.S. 31, 35–36 (1979) (search incident to arrest); *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976) (fixed internal border checkpoints); *United States v. Santana*, 427 U.S. 38, 42 (1976) (hot pursuit); *Terry v. Ohio*, 392 U.S. 1, 32 (1968) (stop and frisk).

29. *Camara v. Municipal Court*, 387 U.S. 523, 538–39 (1967).

30. *Id.* at 535–36.

Instead, administrative warrants could be issued by the pertinent administrative agency.³¹ Accordingly, the Court indicated that, although administrative inspections implicate Fourth Amendment privacy rights, the level of the intrusion and the lack of satisfactory alternatives to enforcement render the exception necessary.³²

After establishing administrative warrants as a means to ensure regulatory enforcement, the Supreme Court subsequently recognized an exception for warrantless administrative searches for certain types of industries.³³ Under the “closely regulated” business exception to the administrative warrant, the Court recognized that some administrative agencies need the ability to conduct surprise inspections in order to enforce regulations on businesses that have a pervasive history of regulation.³⁴

In *Donovan v. Dewey*, the Court further relaxed the warrantless administrative search standards.³⁵ There, the Court upheld warrantless administrative searches of a coal mine, despite the fact that coal mining did not have a long history of pervasive regulation.³⁶ So long as the business was subject to comprehensive regulations, administrative agencies could perform warrantless inspections without any suspicion of a violation.³⁷

Finally, in *New York v. Burger*, the Supreme Court upheld the warrantless inspection of a junkyard, and established the current framework for determining the constitutionality of warrantless administrative searches.³⁸ Under *Burger* and its progeny, the Court has determined that suspicionless inspections are proper without an administrative warrant so long as: (1) the state has a substantial interest in regulating the industry or activity; (2) the regulations could not be effectively enforced if the officials needed reasonable suspicion of a violation before inspection; and (3) the persons or businesses to be searched are engaged in an industry or activity that reduces the reasonable expectation of privacy so that those parties

31. *Id.*

32. *Id.* at 536–37.

33. *See United States v. Biswell*, 406 U.S. 311, 317 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970).

34. *See, e.g., Colonnade*, 397 U.S. at 75, 77 (permitting surprise inspections of retail alcohol businesses).

35. *Donovan v. Dewey*, 452 U.S. 594, 602 (1981).

36. *Id.* at 605–06.

37. *Id.* at 600.

38. *New York v. Burger*, 482 U.S. 691, 702–03, 707–08, 712 (1987).

have notice that they are subject to random inspection within reasonable time, place, and scope limitations.³⁹

B. An Unfair Hunt? Warrantless Administrative Searches in the Great Outdoors

Due to its vast land and abundant wildlife, Minnesota's courts have seen frequent disputes over warrantless administrative searches of hunters and anglers;⁴⁰ however, this is not solely a Minnesota controversy.⁴¹ Many states have wrestled with the parameters of game wardens' search authority, as inspections once reserved for notorious industries now are executed against private citizens merely enjoying themselves in the great outdoors.⁴²

States across the country have comprehensive regulatory schemes to preserve their wildlife populations, dictating everything from hunting and fishing seasons to proper equipment.⁴³ Consequently, under the administrative search exception, game wardens have the authority to inspect hunters' and anglers' property, without suspicion of a violation.⁴⁴

Many suspicionless inspections performed by game wardens are fairly innocuous, such as requests to produce licenses or tagged game at checkpoints.⁴⁵ Such interactions are expected and generally do not

39. *Burger*, 482 U.S. at 707–11; *see also* *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 627 (1989) (expanding warrantless searches to employees of industries that are regulated to ensure safety); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–67, 62, 679 (1989) (expanding warrantless drug testing for U.S. Customs employees who apply for certain positions).

40. *See, e.g.*, *State v. Colosimo*, 669 N.W.2d 1, 7, 9 (Minn. 2003); *State v. Larsen*, 637 N.W.2d 315, 317 (Minn. Ct. App. 2001); *State v. Krenz*, 634 N.W.2d 231, 235–36 (Minn. Ct. App. 2001).

41. *See, e.g.*, *Tarabochia v. Adkins*, No. C10-5197BHS, 2011 WL 3475492, at *4 (W.D. Wash. Aug. 9, 2011); *People v. Maikhio*, 253 P.3d 247, 251 (Cal. 2011); *State v. Boyer*, 42 P.3d 771, 776 (Mont. 2002).

42. *See, e.g.*, *Maikhio*, 253 P.3d at 256, 262–63; *State v. Tourtillott*, 618 P.2d 423, 430 (Or. 1980); *State v. Halverson*, 277 N.W.2d 723, 724–25 (S.D. 1979); *Monroe v. State*, 253 S.W.2d 734, 734–36 (Tenn. 1952).

43. *See supra* notes 3–5 and accompanying text.

44. *See, e.g.*, *Maikhio*, 253 P.3d at 258–59, 262–63 (discussing the administrative search exception's application to fish and game enforcement).

45. *See* *United States v. Fraire*, 575 F.3d 929, 930 (9th Cir. 2009) (upholding game checkpoint outside of a national park); *United States v. Buehler*, 793 F. Supp. 971, 975–76 (E.D. Wash. 1992) (upholding conviction for failure to exhibit fishing license).

spur confrontation or resistance.⁴⁶ Yet when game wardens attempt to search boats, vehicles, and other property, the reasonableness of the search comes into question.⁴⁷

For instance, in *State v. Colosimo*, a game warden and an angler argued over the warden's authority to search the anglers' boat for fish while the boat was parked on land waiting for portage.⁴⁸ The game warden cited the angler for refusing an inspection, and the angler challenged on grounds that the game warden lacked probable cause to search the boat,⁴⁹ which justified his refusal of the search.⁵⁰

Ultimately, the Minnesota Supreme Court upheld the angler's conviction.⁵¹ The Court stressed that the state's regulatory scheme provided for suspicionless fish inspections and that such measures were the only reasonable way to enforce the recreational fishing regulations.⁵² Further, the Court held that Colosimo did not have a reasonable expectation of privacy in the rear platform of his boat.⁵³ Hence, the game warden would not have exceeded his authority to search for fish in that limited area.⁵⁴

Similarly, in *State v. Boyer*, the Montana Supreme Court likewise upheld a warden's authority to search a fishing boat with only reasonable suspicion of a violation.⁵⁵ There, the Court upheld an angler's conviction for possession of unlawfully killed game fish, over the angler's contention that the game warden physically intruded onto his fishing boat without probable cause.⁵⁶ The dispute arose when the game warden stepped onto the transom⁵⁷ of Boyer's boat to

46. See Malin J. Stearns, Note, *It's Good to Be the Game Warden: State v. Boyer and the Erosion of Privacy Protection for Montana Sportsmen*, 65 MONT. L. REV. 187, 206 (2004).

47. See Witty, *supra* note 11, at 173–80.

48. *Colosimo*, 669 N.W.2d at 2–3. Portage is the process of transporting boats and gear across land between two bodies of water. Witty, *supra* note 11, at 156 n.19.

49. *Colosimo*, 669 N.W.2d at 2–3. Colosimo, an attorney, argued that under section 97A.215 of the Minnesota Statutes, the warden could not search Colosimo's boat without probable cause of a fish or game violation. *Id.*

50. *Id.*

51. *Id.* at 9.

52. *Id.* at 6.

53. *Id.*

54. *Id.* at 6–7.

55. *State v. Boyer*, 42 P.3d 771, 773, 777 (Mont. 2002).

56. *Id.* at 773–74.

57. In nautical terms, the transom is the exterior platform at the rear of the boat. *Id.* at 773.

inspect Boyer's live well⁵⁸ to determine whether the angler exceeded the daily catch limit.⁵⁹ Boyer argued that despite the extensive regulatory scheme for recreational fishing,⁶⁰ under section 87.1.506(1)(b) of the Montana Code, a warden may only perform a warrantless search of an angler's property with probable cause to believe that a game violation took place.⁶¹

The Court, however, disagreed.⁶² Rather than consider the warden's actions as a search, the Court held that the warden merely performed an administrative inspection, limited to reasonable places where the angler would store his fish.⁶³ Consequently, the warden's entry onto the boat on less than probable cause was constitutional as a warrantless administrative search.⁶⁴

Ultimately, *Boyer* and *Colosimo* demonstrate the breadth of the warrantless administrative search exception.⁶⁵ In both Minnesota and Montana, state laws purported to limit game wardens' authority to perform certain warrantless searches only upon probable cause.⁶⁶ The courts, however, stressed the need for wardens to inspect for fish and game violations.⁶⁷ Accordingly, the courts determined that the anglers lacked a reasonable expectation of privacy in their boats, and thus the administrative inspections limited to searches only for fish were proper.⁶⁸

58. A live well is a container in a boat used to hold caught fish in water in order to preserve freshness. Witty, *supra* note 11, at 159 n.47.

59. *Boyer*, 42 P.3d at 773.

60. See, e.g., MONT. CODE ANN. § 87.1.502(3) (West 2007) (authorizing game wardens to enforce fish and game licensure); *id.* § 87.1.502(6) (mandating the production of fish and game at the warden's request).

61. *Boyer*, 42 P.3d at 775.

62. *Id.* at 775–76.

63. *Id.*

64. *Id.*

65. See Witty, *supra* note 11, at 180–89.

66. See MINN. STAT. ANN. § 97A.215, subdiv. 1 (West 2009) (noting that wardens may search vehicles and containers upon probable cause of possession of unlawful fish or game); MONT. CODE ANN. § 87.1.506(1)(b)(2007) (noting that wardens may search without a warrant upon probable cause of a game violation).

67. Witty, *supra* note 11, at 180–88.

68. *Id.*; see also *People v. Maikhio*, 253 P.3d 247, 249–51 (Cal. 2011).

III. HOW TO PRESERVE PRIVACY RIGHTS FOR HUNTERS AND ANGLERS

A. *Constitutional Challenges to Warrantless Administrative Searches are Dead-Ends*

Outside of a brief mention in Justice Blackmun's concurring opinion in *Delaware v. Prouse*, the Supreme Court has yet to discuss the constitutionality of game wardens' warrantless inspections.⁶⁹ However, cases in state appellate courts and federal trial courts have wrestled with a game warden's authority to search for fish and game violations without a warrant or probable cause.⁷⁰ With a few specific exceptions,⁷¹ the majority of these cases have sided with the government, finding that the state's interest in preserving its wildlife is sufficient cause to permit the warrantless inspections.⁷²

Although commentators and dissenting judges may disagree, claiming these intrusions to be unconstitutional,⁷³ game warden inspections are almost always upheld under the warrantless administrative search exception.⁷⁴ Typically, these inspections meet the first two prongs under *Burger*—a substantial state interest and no adequate alternative for enforcement—with little controversy.⁷⁵ Fishing and game laws are nearly ubiquitous,⁷⁶ and most states consider those regulations vital in order to preserve wildlife populations for current populations and future generations.⁷⁷ Further,

69. *Delaware v. Prouse*, 440 U.S. 648, 664 (1979) (Blackmun, J., concurring) (clarifying that the holding of the case did not address the constitutionality of “the necessarily somewhat individualized and perhaps largely random examinations by game wardens in the performance of their duties”).

70. See Edwin J. Butterfoss & Joseph L. Daly, *State v. Colosimo: Minnesota Anglers' Freedom from Unreasonable Search and Seizures Becomes "The One That Got Away,"* 31 WM. MITCHELL L. REV. 527, 545 (2004).

71. Generally, courts have recognized a higher expectation of privacy in dwelling-like locations, and therefore have not permitted game wardens to perform suspicionless administrative searches of ice fishing houses. See *State v. Krenz*, 634 N.W.2d 231, 234 (Minn. Ct. App. 2001); *State v. Larsen*, 637 N.W.2d 315, 316–20 (Minn. Ct. App. 2001).

72. See discussion *supra* Part II.B.

73. See, e.g., *State v. Colosimo*, 669 N.W.2d 1, 9–13 (Minn. 2003) (Page, J., dissenting).

74. See Witty, *supra* note 11, at 175–76.

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

76. See *supra* notes 40–45 and accompanying text.

77. See Witty, *supra* note 11, at 152–54. Minnesota has even gone so far as to protect recreational hunting and fishing in its state constitution, declaring, “the taking of game and fish are a valued part of our heritage that shall be forever preserved for the people

in the fish and game context, realistic enforcement requires that game wardens have the ability to perform suspicionless—albeit limited—searches and seizures.⁷⁸

Accordingly, most disagreement over warrantless administrative searches against anglers and hunters lies in the third *Burger* prong, namely, that inspections be limited in time, place, and scope to areas where the person to be searched lacks a reasonable expectation of privacy.⁷⁹ Much of the disagreement centers on the dissenters' belief that courts have used the administrative search exception to completely erode any expectation of privacy for anglers and hunters, despite statutes to the contrary.⁸⁰

For example, in *Boyer*, the dissent argued that the majority improperly focused on Boyer's expectation of privacy in the fish he possessed.⁸¹ The dissent argued that the primary inquiry should have centered solely on Boyer's expectation of privacy in his boat and live well.⁸² Commentators note that the majority was able to justify the warrantless intrusion onto the boat because it is widely accepted that anglers must display their catch upon demand.⁸³

Another argument against the fish and game search exception is that the definition of the anglers' and hunters' reasonable expectation of privacy is disconnected with the roots of the warrantless administrative search exception.⁸⁴ Proponents of hunters' and anglers' rights note that, whereas the fishing and hunting cases involve individuals engaging in recreation, the earlier administrative search cases focused on industries and businesses.⁸⁵ Further, proponents of greater privacy protections argue that extending the administrative search exception to all closely regulated activities should be invalid, since the courts have declined to extend the

and shall be managed by law and regulation for the public good." MINN. CONST. art. 13, § 12.

78. See Witty, *supra* note 11, at 153, 162–63. Enforcing fishing and game laws is a difficult task, even with the administrative search exception. See *id.* at 153. Hunters and anglers typically operate away from prying eyes, and game wardens are expected to patrol vast expanses of outdoor terrain. See *People v. Maikhio*, 253 P.3d 247, 261–62 (Cal. 2011). Further, without close inspection, it is difficult to develop reasonable suspicion that an angler or hunter has procured unlawful game, rather than acceptable species. *Id.* Thus, a probable cause or reasonable suspicion requirement for fish and game inspections would render enforcement nearly impossible. *Id.*

79. See Butterfoss & Daly, *supra* note 70, at 545.

80. Stearns, *supra* note 46, at 207–09.

81. *State v. Boyer*, 42 P.3d 771, 781–82 (Mont. 2002) (Nelson, J., dissenting).

82. *Id.*

83. Stearns, *supra* note 46, at 210–13.

84. See, e.g., *State v. Colosimo*, 669 N.W.2d 1, 13–16 (Minn. 2003) (Page, J., dissenting).

85. *Id.*

administrative search exception to roving vehicle stops to check for licenses or drunk drivers, even though driving is just as regulated as fishing and hunting.⁸⁶

Although arguments to the contrary are compelling, it appears fruitless to contend that the wardens' suspicionless searches are unconstitutional. The Supreme Court denied certiorari for *Colosimo* and has yet to address the issue.⁸⁷ State and lower federal courts have upheld the majority of the warrantless administrative game warden searches.⁸⁸ In fact, absent specific state laws that narrowly define the game warden's search authority,⁸⁹ or a search of a structure that is akin to a home,⁹⁰ the courts have overwhelmingly sided with the game wardens.⁹¹ Therefore, advocates for anglers' and hunters' privacy should not focus on attacking the exception's vitality in court but, instead, should propose other methods with a greater chance for success.⁹²

B. *Raising the Floor: Using State Constitutions to Protect Privacy*

Not every state's constitution mirrors the protections of the United States Constitution.⁹³ Although states may not mandate a narrower scope of protection, they may "raise the floor" and offer greater protection than the baseline rights under the United States Constitution.⁹⁴ This practice is most notably used by states that

86. *Id.* Justice Page claims that under the administrative search exception's expansion, anglers and hunters have fewer privacy rights than drunk drivers, who are protected against suspicionless stops by roving patrols. *Id.* at 13.

87. *State v. Colosimo*, 669 N.W.2d 1 (Minn. 2003), *cert. denied*, 541 U.S. 988 (2004).

88. *See, e.g., Elzey v. State*, 519 S.E.2d 751, 755 (Ga. Ct. App. 1999); *People v. Maikhio*, 253 P.3d 247, 250 (Cal. 2011); *State v. Keehner*, 425 N.W.2d 41, 45 (Iowa 1988); *Drane v. State*, 493 So.2d 294, 297–98 (Miss. 1986); *State v. Tourtillott*, 618 P.2d 423, 427–30 (Or. 1980); *State v. Halverson*, 277 N.W.2d 723, 724–25 (S.D. 1979); *Monroe v. State*, 253 S.W.2d 734, 735–36 (Tenn. 1952).

89. *See Witty, supra* note 11, at 173–75.

90. *Id.* at 169.

91. *Id.* at 175–80.

92. *See infra* Part III.C.1.

93. *See Paul H. Anderson & Julie A. Oseid, A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 894–95 (2007). For a discussion of the mechanics of achieving state constitutional amendment to protect individual rights, see G. Alan Tarr & Robert F. Williams, *Foreword: Getting From Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1075–77 (2005).

94. *See Jeffrey A. Parness, American State Constitutional Equalities*, 45 GONZ. L. REV. 773, 788 (2010).

provide for broader equal protection rights and anti-discrimination measures.⁹⁵ Some commentators recognize that the practice of providing greater individual rights through state constitutional provisions could also be used to offer broader search and seizure rights than those afforded under the Fourth Amendment.⁹⁶

Notably, Montana's state constitution provides for greater privacy protection than under the Fourth Amendment.⁹⁷ Under the Montana Constitution, "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."⁹⁸ In several instances, such as thermal imaging⁹⁹ and the automobile exception,¹⁰⁰ the Montana Supreme Court has interpreted this provision to grant greater privacy protection than under the Fourth Amendment.¹⁰¹

In the warrantless administrative search context, however, Montana's expanded privacy protection has yet to gain traction.¹⁰² Because game warden administrative searches are based on the state's interest in preserving its wildlife populations, courts have consistently valued the compelling state interest in wildlife preservation over the privacy of Montanan anglers and hunters.¹⁰³ So long as courts view wildlife preservation as a compelling state interest, a more expansive state constitutional measure beyond what Montana has provided would be required to offer anglers and hunters some greater privacy protection against suspicionless searches.¹⁰⁴

95. *Id.* at 789. Scholars recognize four approaches that states take toward analyzing individual rights: (1) lockstep—where the state follows the U.S. Supreme Court's interpretation of the Constitution; (2) interstitial—where the state will look to its own state constitution only after analyzing the U.S. constitutional interpretation; (3) dual sovereignty—where the state court considers the federal and state constitution as equals; and (4) primacy—where the state constitution reigns. Anderson & Oseid, *supra* note 93, at 879–80.

96. See Anderson & Oseid, *supra* note 93, at 894–95; cf. Jack L. Landau, *Should State Courts Depart from the Fourth Amendment? Search and Seizure, State Constitutions, and the Oregon Experience*, 77 MISS. L.J. 369, 370 (2007) (arguing that states should not depart from Federal Fourth Amendment case law).

97. See Stearns, *supra* note 46, at 191.

98. MONT. CONST. art. II, § 10.

99. *State v. Siegal*, 934 P.2d 176, 191–192 (Mont. 1977).

100. *State v. Elison*, 14 P.3d 456, 468–69 (Mont. 2000).

101. See Stearns, *supra* note 46, at 191.

102. *Id.* at 213.

103. *State v. Boyer*, 42 P.3d 771, 774–75 (Mont. 2002).

104. See Stearns, *supra* note 46, at 213.

Unfortunately for those who wish to expand individual privacy rights, state constitutional reform is not an easy process.¹⁰⁵ It can be difficult to motivate state legislators to undertake an involved task like state constitutional reform, especially for such a specialized class as recreational anglers and hunters.¹⁰⁶

Further, many states simply interpret their own constitutions in lock-step fashion with the United States Constitution.¹⁰⁷ Maryland courts, for instance, interpret Article 26 of the Maryland Declaration of Rights as being *in pari materia* with the Fourth Amendment.¹⁰⁸ Thus, in states that do not stray from the United States Constitution, efforts aimed at state constitutional reform would likely fail to improve individual privacy rights for anglers and hunters.¹⁰⁹

C. A Pragmatic Balance of Privacy and Preservation

1. The Suspicion Solution

There is a “nuclear option”¹¹⁰ for hunters and anglers to achieve heightened privacy protection. Through deregulation of the regulatory schemes for recreational fishing and hunting, anglers and hunters could remove the state’s interest in their activity, hence crippling the game wardens’ administrative search authority.¹¹¹ Such drastic measures would be a gross overcorrection, undermining noble efforts to preserve vital wildlife populations.¹¹² The cost of greatly reducing fish and game regulations would be too steep a price, as

105. See Vladimir Kogan, *The Irony of Comprehensive State Constitutional Reform*, 41 RUTGERS L.J. 881, 882, (2010).

106. See *id.* at 890–91.

107. See Anderson & Oseid, *supra* note 93, at 880–81.

108. See *Jones v. State*, 407 Md. 33, 46 n.2, 962 A.2d 393, 400 n.2 (2008). The Latin phrase, “*in pari materia*,” means “[o]n the same subject” or “relating to the same matter.” BLACK’S LAW DICTIONARY 807 (8th ed. 2004).

109. Cf. Anderson & Oseid, *supra* note 93, at 881 (criticizing the limitation of the “lockstep” approach for state constitutions).

110. “Nuclear option,” often used in political discussions, refers to the most drastic solution to a problem. Cf. Stephanie Dinan, *Senate ‘Nukes’ Amendments: Reid’s ‘Nuclear Option’ vs. GOP Likely to Heighten Acrimony*, WASH. TIMES, Oct. 6, 2011, at A4, available at <http://www.washingtontimes.com/news/2011/oct/6/reid-uses-nuclear-option-block-gop-amendments/?page=all> (discussing a drastic legislative strategy to forward a particular agenda).

111. Cf. *supra* text accompanying note 39 (explaining the three requirements under *New York v. Burger* for a warrantless administrative search).

112. Witty, *supra* note 11, at 192–93.

most states would balk at subjecting fragile wildlife populations to the whims of their citizens.¹¹³

Yet privacy advocates fear a slippery slope of unchecked searches performed at the whim of a game warden, which they believe will proliferate in the wake of *Colosimo* and *Boyer*.¹¹⁴ A middle path is required in order to strike a reasonable balance between privacy and preservation.¹¹⁵

The Supreme Court of California demonstrated the possibility of such a middle path when it upheld a game warden's warrantless administrative inspection in *People v. Maikhio*.¹¹⁶ There, a game warden spotted Maikhio from a distance using a hand line to fish what appeared to be a lobster.¹¹⁷ The warden observed Maikhio put his catch into a black bag and then return to his car to leave the pier.¹¹⁸ The warden subsequently stopped Maikhio's vehicle and developed suspicion of a violation after questioning Maikhio.¹¹⁹ Then the warden executed a search of the vehicle and found a spiny lobster, which was out of season.¹²⁰

Maikhio was charged for possessing a spiny lobster during closed season and for failing to exhibit his catch when commanded by the game warden.¹²¹ Maikhio contended that the warden's search was unconstitutional, as he was in his vehicle attempting to leave the pier and the warden did not have reasonable suspicion of a fishing violation when he stopped the vehicle.¹²² The Court, however, sided with the game warden.¹²³

In holding that the game warden's actions were constitutional, the *Maikhio* Court examined the state's fish and game codes to determine the scope of the warden's authority to perform warrantless stops and searches.¹²⁴ Under section 1006 of the California Fish and Game Code, wardens may search for fish and game only in places where the fish and game may be stored or hidden.¹²⁵ Further, under section

113. *Id.*

114. *See, e.g., Stearns, supra* note 46, at 213.

115. *See Witty, supra* note 11, at 189–93.

116. *People v. Maikhio*, 253 P.3d 247, 250 (Cal. 2011).

117. *Id.* at 251–52.

118. *Id.* at 249–50.

119. *See id.* at 250.

120. *Id.*

121. *Id.* at 253.

122. *Id.*

123. *Id.* at 250.

124. *Id.* at 254–55.

125. *Id.* Section 1006 provides that wardens may inspect, “[a]ll boats, markets, stores and other buildings, except dwellings, and all receptacles, except the clothing actually

2012 of the Fish and Game Code, hunters and anglers must exhibit their game, licenses, and equipment upon demand of a game warden.¹²⁶

The Court interpreted sections 1006 and 2012 as granting statutory authority for game wardens to make brief stops of individuals as long as the wardens had reasonable suspicion that the person recently was fishing or hunting.¹²⁷ Even without suspicion of a fish or game violation, the Court held that a stop is permissible for the purpose of demanding display of proper licensure for any fish or game that the stopped person possessed.¹²⁸ Further, the Court held that such stops could be made on vehicles, so long as the warden reasonably believed that the occupants had recently been hunting or fishing.¹²⁹

Because the game warden developed probable cause before searching Maikhio's vehicle, the Court refrained from deciding whether section 1006 authorized warrantless searches without probable cause or reasonable suspicion of a violation.¹³⁰ Yet the facts behind the *Maikhio* decision¹³¹ suggest a simple procedure for future warrantless administrative searches in the fish and game context.¹³² Namely, that any additional search of a vehicle or container would only be permissible if the warden developed suspicion of a violation during the initial, lawful stop. Thus, under the "Suspicion Solution," had the game warden in *Maikhio* failed to develop probable cause or reasonable suspicion of a violation during his stop of Maikhio, the

worn by a person at the time of inspection, where birds, mammals, fish, reptiles, or amphibians may be stored, placed, or held for sale or storage." CAL. FISH & GAME CODE § 1006 (West 1998).

126. *Maikhio*, 253 P.3d at 255. Section 2012 provides that:

All licenses, tags, and the birds, mammals, fish, reptiles, or amphibians taken or otherwise dealt with under this code, and any device or apparatus designed to be, and capable of being, used to take birds, mammals, fish, reptiles, or amphibians *shall be exhibited upon demand* to any person authorized by the department to enforce this code or any law relating to the protection and conservation of birds, mammals, fish, reptiles, or amphibians.

CAL. FISH & GAME CODE § 2012 (West Supp. 2009) (emphasis added).

127. *Maikhio*, 253 P.3d at 256.

128. *Id.* at 255–56.

129. *Id.* at 256.

130. *Id.* at 266 n.18.

131. See *supra* text accompanying notes 117–20.

132. Notably, the game warden only searched Maikhio's vehicle and bag after Maikhio lied to the game warden about poaching off the pier that evening. *Maikhio*, 253 P.3d at 266.

game warden would not have been authorized to search Maikhio's vehicle or bag.

Free from the empty provisions claiming that searches may only be made upon probable cause of a violation, as in Montana and Minnesota,¹³³ the *Maikhio* Court's interpretation of California's fish and game laws struck a more sensible balance of preservation and privacy. Whereas the *Boyer* and *Colosimo* courts established seemingly discretionless authority for administrative searches of any place that fish and game may be located,¹³⁴ the *Maikhio* Court established a clear procedure for wardens to effectuate stops of suspected hunters and anglers.¹³⁵

The *Colosimo* and *Boyer* holdings were troubling for dissenters because of the courts' seemingly selective statutory enforcement¹³⁶ and willingness to embolden game wardens with discretionless search authority.¹³⁷ The *Maikhio* Court's interpretation of the state's fish and game laws suggests that statutes can be tailored to not only ensure regulatory enforcement,¹³⁸ but prevent situations such as in *Boyer* and *Colosimo* where the game warden had the authority to perform a suspicionless inspection of the angler's boat.¹³⁹

Ultimately, the *Maikhio* holding demonstrates that, with specific fishing and game codes, a state can narrow the authority of game wardens without jeopardizing the preservation of a state's wildlife population by severely limiting wardens' enforcement capabilities.¹⁴⁰ States across the country face an ongoing struggle between their preservation goals and privacy concerns.¹⁴¹ Rather than allow the courts to further expand the administrative search exception, state legislatures should expand upon the *Maikhio* holding and strive to better define a game warden's warrantless administrative search authority. The California Supreme Court's interpretation of the state's fish and game laws offers a measured and pragmatic way to appease both sides of a contentious issue.

133. MINN. STAT. ANN. § 97A.215 (West 2009); MONT. CODE ANN. § 87-1-502(6).

134. See discussion *supra* Part II.B (examining the *Boyer* and *Colosimo* holdings).

135. See *Maikhio*, 253 P.3d at 256.

136. See, e.g., Butterfoss & Daly, *supra* note 70, at 549; Stearns *supra* note 46, at 206–11 (explaining how the decision in *Boyer* is inconsistent with Montana's constitution and statutory authority).

137. See Butterfoss & Daly, *supra* note 70, at 554.

138. See *Maikhio*, 253 P.3d at 256.

139. See *supra* Part II.B (discussing the *State v. Boyer* and *State v. Colosimo* holdings).

140. See *Maikhio*, 253 P.3d at 256.

141. See *supra* text accompanying notes 40–45.

2. *Applying the Suspicion Solution to Maryland's Fish and Game Laws*

Maryland may not boast 10,000 lakes like Minnesota or cover as broad a territory as California and Montana, but the Chesapeake Bay is unique and precious to the state's history and tradition.¹⁴² In order to protect the fragile estuary and its wildlife denizens, Maryland has comprehensive statutes and regulations to oversee the abundant recreational fishing and hunting that occurs in the state.¹⁴³ In light of recent environmental pressures, Maryland has altered its enforcement of fishing laws and regulations.¹⁴⁴ State legislators have tried to address problems of poaching fish out of season and fishing without proper equipment.¹⁴⁵ Although new equipment may aid game wardens in the fight against improper fishing tactics, Department of Natural Resources officials will likely have situations in which they must directly interact with individuals enjoying the bay's waters.¹⁴⁶ Such interactions could lead to unwelcome interactions between game wardens and anglers, and disputes over privacy rights could arise.¹⁴⁷

Similar to *Boyer* and *Colosimo*, Maryland's fish and game laws seem to provide contradictory standards regarding a game warden's search authority.¹⁴⁸ Although hunters and anglers are mandated to exhibit their catches, licenses, and equipment upon demand by a

142. The Chesapeake Bay, the largest estuary in North America, is home to 3,600 different plant and animal species. *Bay Area Facts*, CHESAPEAKE BAY FOUNDATION, <http://www.cbf.org/page.aspx?pid=433> (last visited June 10, 2013).

143. See, e.g., MD. CODE ANN., NAT. RES. §§ 4-101 to -1211 (LexisNexis 2005 & Supp. 2011) (Maryland's Fish and Fisheries Codes); *id.* §§ 10-101 to -1203 (LexisNexis 2007 & Supp. 2011) (Maryland's Wildlife Codes).

144. See Candus Thomas, *War on Rockfish Poaches: Police Have new Tools, new Laws, to Avoid Repeat of Last Year*, BALT. SUN, Jan. 5, 2012, at A2.

145. *Id.*

146. See Candus Thomas, *State Proposes New Policies to Prevent Rockfish Poaching*, BALT. SUN, July 15, 2011, at A3.

147. Maryland natural resources officials face a continuing problem with unlawful conduct by recreational anglers. See Don Markus, *60 Recreational Fishermen Face Loss of License*, BALT. SUN, Sept. 13, 2011, at D1.

148. Compare MONT. CODE ANN. § 87.1.506(1)(b) (West 2007) (searches of anglers only upon probable cause), and MINN. STAT. ANN. § 97A.215, subdiv. 1 (West 2009) (searches of anglers only upon probable cause), with MD. CODE ANN., NAT. RES. §§ 4-1204 (LexisNexis 2005), 10-1104 (LexisNexis 2007) (probable cause required to search anglers and hunters respectively).

game warden,¹⁴⁹ there are also provisions that prohibit warrantless searches without probable cause.¹⁵⁰

Maryland has not had such a dispute go to an appellate court; however, Maryland could set a dangerous precedent, as occurred in *Colosimo*, based on the state's similarly contradictory fish and game laws.¹⁵¹ Thus, the Maryland General Assembly should amend its fish and game laws to reflect the procedures adopted in *Maikhio*. Rather than promise no intrusion on less than probable cause,¹⁵² the law should provide that wardens are free to stop suspected anglers or hunters to demand exhibition of licenses and any fish or game that the person possess.¹⁵³ Then, under the Suspicion Solution, game wardens could only conduct a more invasive search after developing independent suspicion of a violation.¹⁵⁴

This would permit the game wardens to carry out their authority to inspect licenses and wildlife while keeping a barrier in place before the warden could search a vehicle or container.¹⁵⁵ Without this procedure, as in *Colosimo* and *Boyer*, Maryland hunters and anglers could be subjected to suspicionless entries onto their boats or into their vehicles merely because they have been hunting or fishing.¹⁵⁶ Under the Suspicion Solution, this would add an extra procedural step to ensure that wardens' inspections are properly limited without placing undue burdens on enforcement.¹⁵⁷

Ultimately, it would be in Maryland's best interest to follow the Suspicion Solution and adopt more narrowly defined fish and game laws.¹⁵⁸ As wildlife resources in the Chesapeake Bay and in the western mountains dwindle, state officials face greater pressures to enforce fish and game laws in both the recreational and commercial arenas.¹⁵⁹ Thus, a measured approach, as utilized in *Maikhio*, would be a prudent path for Maryland to follow in order to maintain its

149. MD. CODE ANN., NAT. RES. § 10-306 (display of a hunter's license); *id.* § 4-610 (display of angler's license).

150. *Id.* §§ 4-1204, 10-1104 (probable cause required to search fishers and hunters respectively).

151. See discussion *supra* Part II.B.

152. NAT. RES. §§ 4-1204, 10-1104 (probable cause required to search anglers and hunters respectively).

153. See *People v. Maikhio*, 253 P.3d 247, 256 (Cal. 2011).

154. See discussion *supra* Part III.C.1.

155. See discussion *supra* Part III.C.1.

156. See discussion *supra* Part II.B.

157. See discussion *supra* Part III.C.1.

158. See *supra* text accompanying notes 146-52.

159. See Markus, *supra* note 147; Thomas, *supra* note 147.

anglers' and hunters' privacy while ensuring enforcement of its fish and game laws.¹⁶⁰

IV. CONCLUSION

It can be difficult to navigate the delicate balance between privacy rights and the need for law enforcement to investigate wrongdoing.¹⁶¹ As this comment demonstrates, the balancing act is especially difficult when nontraditional law enforcement, such as game wardens, attempt to execute their duties to preserve vulnerable natural resources.¹⁶²

A uniform approach to this national issue would be a futile exercise.¹⁶³ Not only do states have divergent approaches to the authority afforded to game wardens, but recreational hunting and fishing are valued differently as well.¹⁶⁴ Ultimately, however, the Suspicion Solution likely is the most practical approach to address the issue.¹⁶⁵ The emphasis on narrowly drawn statutes and regulations would enable the model to work in any state.¹⁶⁶ It could accommodate one state's preference for greater wildlife protection and another state's preference for greater privacy for anglers and hunters.¹⁶⁷

Maryland should examine its fish and game laws.¹⁶⁸ Although there have apparently been no legal disputes over the inconsistencies in the law, that does not mean that concerned citizens should refrain from being proactive.¹⁶⁹ As Maryland is home to the largest estuary in North America,¹⁷⁰ opportunities abound for interaction between game wardens and anglers.¹⁷¹

160. See discussion *supra* Part III.C.1.

161. See discussion *supra* Part II.B.

162. See discussion *supra* Part II.B.

163. See discussion *supra* Parts III.A–B.

164. For instance, not every state finds it necessary to provide for the preservation of recreational fishing and hunting in its state constitution, as does Minnesota. See MINN. CONST. art. XIII, § 12. For a detailed survey of various state constitutional provisions regarding fish and game rights, see Jeffrey Omar Ussman, *The Game is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 77–90 (2009).

165. See discussion *supra* Part III.C.

166. See discussion *supra* Part III.C.

167. See discussion *supra* Part III.C.

168. See discussion *supra* Part III.C.

169. See *CFB Action Center*, CHESAPEAKE BAY FOUNDATION, <http://capwiz.com/cbf/home/> (last visited June 10, 2013); discussion *supra* Part II.B.

170. See *Bay Area Facts*, *supra* note 142.

171. Nearly 10 million people live on, or near, the shores of the Chesapeake Bay. *Id.*

Rather than waiting to react to a future dispute, state legislators and regulators could amend the state's fish and game statutes and regulations to ensure that the game wardens can protect the state's rich wildlife without sacrificing reasonable boundaries on individual privacy rights.¹⁷² Failure to do so could result in a dangerous precedent that could be difficult to remedy in the future.¹⁷³

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172. See discussion *supra* Part III.C.1.

173. Cf. Butterfoss & Daly, *supra* note 70, at 545–46 (providing examples of how state courts have struggled with how much authority a game warden should have).

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