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SEARCHES BY ADMINISTRATIVE AGENCIES AFTER BARLOW'S AND TYLER: FOURTH AMENDMENT PITFALLS AND SHORT-CUTS

In 1967 the Supreme Court in *Camara v. Municipal Court*¹ overruled *Frank v. Maryland*² and held that searches by administrative agencies must ordinarily be conducted pursuant to a search warrant. The companion case of *See v. Seattle*³ extended this new Fourth Amendment protection to commercial as well as residential property. To reconcile this new search warrant requirement with the Fourth Amendment command that "no warrant shall issue except upon probable cause," the *Camara* Court adopted an expansive definition of probable cause in the context of administrative searches⁴ (referred to as administrative probable cause in this comment).

In 1970 and 1972 the Supreme Court created an exception by holding that two highly regulated businesses, liquor (*Colonnade Catering Corp. v. United States*⁵), and firearms (*United States v. Biswell*⁶) could be forced to submit to warrantless, nonconsensual searches by federal agents or face a penalty for refusing to allow the search. These exceptions increased interest in the question reserved in *See*⁷ of what other searches by administrative agencies could be conducted without warrants.

Recently in *Marshall v. Barlow's*⁸ the Supreme Court held that the Occupational Safety and Health Administration (OSHA) may not conduct nonconsensual searches without a warrant or the equivalent and discussed *Camara*, *See*, *Colonnade* and *Biswell*. Eight days later in *Michigan v. Tyler*⁹ the Court held inadmissible evidence of arson obtained from a gutted building without a warrant and not obtained during the initial firefighting visit. The *Tyler* Court went beyond the facts of the case to discuss under what circumstances officials investigating the cause of a fire may conduct warrantless searches or searches supported by a

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1. *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967).
2. *Frank v. Maryland*, 359 U.S. 360, *reh. den.* 360 U.S. 914 (1959).
3. *See v. Seattle*, 387 U.S. 541 (1967).
4. *Camara v. Municipal Court*, *supra* note 1, at 534-538.
5. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).
6. *United States v. Biswell*, 406 U.S. 311 (1972).
7. *See v. Seattle*, *supra* note 3, at 546.
8. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).
9. *Michigan v. Tyler*, 436 U.S. 499 (1978).

warrant issued on the basis of administrative probable cause. This comment discusses searches by administrative agencies in light of *Barlow's* and *Tyler*, their four progenitor cases and some of the lower court case law.

WHEN WILL WARRANTLESS SEARCHES BE PERMITTED?

Businesses Subject to a Colonnade-Biswell Exception

The *Barlow's Court* suggested several reasons for distinguishing OSHA inspection from those of liquor and firearms businesses. First, there is a long tradition of close government supervision of firearms and liquor. The significance of the tradition is that one enters a regulated business with a reduced expectation of privacy.¹⁰ The *Barlow's Court* also emphasized that *Colonnade* and *Biswell* "represent unique responses to relatively unique circumstances."¹¹

Secondly, the *Barlow's Court* also stated that, "the reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute."¹² This concern for enforcement needs is also evident in *Camara* where the Court said, "whether the authority to search should be evidenced by a warrant . . . depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purposes behind the search."¹³ Similarly, in dictum in his concurrence in *Almeida-Sanchez v. United States* Mr. Justice Powell indicated a willingness to stretch the definition of administrative probable cause on the basis of government need.¹⁴

In upholding the warrantless search of a pawn shop federally licensed to sell guns, the *Biswell Court* said, "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible."¹⁵ In *Barlow's*,

10. *Marshall v. Barlow's, Inc.*, *supra* note 8, at 313.

11. *Id.*

12. *Id.* at 321.

13. *Camara v. Municipal Court*, *supra* note 1, at 533.

14. *Almeida-Sanchez v. United States*, 413 U.S. 266, 281-282 (1973).

15. *United States v. Biswell*, *supra* note 6, at 316.

however, the Court made it clear that the need for surprise inspections alone will not justify a *Colonnade-Biswell* exception since *ex parte* warrants allow for such surprise inspections.¹⁶

Most administrative agency inspectors are not armed and will need to enlist the aid of a U.S. Marshall if refused entry. In those cases in which an administrative inspection is a genuine raid, the agency will have had to have done advance planning with the U.S. Marshall's Office. In such a case, it is difficult to see how the necessity to obtain a warrant would destroy the effectiveness of the raid.

The *Barlow's* Court also noted that if a statute authorizing warrantless searches applies only to a single industry, regulation might already be so pervasive that a *Colonnade-Biswell* exception could apply.¹⁷

Finally, the *Barlow's* Court distinguished the *Colonnade* and *Biswell* cases on the basis that the liquor and firearms businesses involve a grant of a federal license.¹⁸

At least one circuit and three district courts have held that businesses regulated by the Food and Drug Administration are subject to a *Biswell-Colonnade* exception even though they are not federally licensed.¹⁹ These courts rationalized that regulation of the food and drug industry is as important and pervasive as regulation of the liquor and firearms businesses. A district court²⁰ has held that warrantless, nonconsensual searches of coal mines may be conducted pursuant to the Federal Coal Mine Health and Safety Act.²¹

These lower court decisions shed light on whether an industry will be subject to a *Biswell-Colonnade* exception in

16. *Marshall v. Barlow's, Inc.*, *supra* note 8, at 319, 320.

17. *Id.* at 321.

18. *Id.* at 313.

19. *United States ex rel. Terraciano v. Montanye*, 493 F.2d 682, 685 (2nd Cir. 1974); *United States v. Litvin*, 353 F. Supp. 1333, 1336 (D.C. 1973); *United States v. Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371, 1377 (D.Del. 1972); *United States v. Business Builders, Inc.*, 354 F. Supp. 141, 143 (N.D. 1973). It should also be mentioned that in *United States v. Cardiff*, 344 U.S. 174 (1952) the Court upheld warrantless searches under the Federal Food, Drug and Cosmetic Act. Since the *Cardiff* case predates *Camara* its authority is weak. *Cardiff* was cited with neither approval nor disapproval in *See, supra* note 3, at 544 N. 4.

20. *Youghiogeny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973).

21. 30 U.S.C. § 813(a) *et seq.*

two ways. In *United States v. Business Builders, Inc.*, the district court, in upholding warrantless inspections of warehouses containing food subject to federal regulation, offers an appealing rationale: "It would be an affront to common sense to say that the public interest is not as deeply involved in the regulation of the food industry as it is in the liquor and firearms industries."²² Many agencies might offer a similar rationale. However, OSHA lost the *Barlow's* case despite the availability of such a rationale. In *Terraciano v. Montanye* the privacy guarantees of the state police inspection scheme were poor but the Second Circuit overruled and chastised the district court for "overreading" the portion of the *Biswell* opinion requiring warrantless, nonconsensual searches to be "carefully limited in time, place and scope."²³ It can be assumed that occasionally lower federal courts and state courts will uphold warrantless, nonconsensual searches which do not meet Supreme Court guidelines.

Even if a court decides that an administrative agency is entitled to conduct searches without a warrant or to seek penalties against a person who refuses to allow a warrantless search, it may deny the agency the ability to make the election. In *Colonnade* the Supreme Court held that defendants' motion to suppress evidence obtained as the result of a forcible, warrantless search should have been granted. The *Colonnade* Court indicated that Congress had the constitutional power to authorize forcible warrantless searches of liquor retailers but had instead chosen to make refusal to allow a warrantless search a crime. "Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant," the Court said.²⁴

Open Fields Exception

In at least one situation warrantless administrative searches should be permissible. In *Hester v. United States*, the Supreme Court held that, "the special protection accord-

22. *United States v. Business Builders, Inc.*, 354 F. Supp. 141, 143.

23. *Terraciano v. Montanye*, *supra* note 19, at 684, citing *United States v. Biswell*, *supra* note 6 at 315.

24. *Colonnade Catering Corp. v. United States*, *supra* note 5, at 77; *United States v. Biswell*, *supra* note 6, is less clear on this point. The *Biswell* defendant initially protested the search but "consented" when read a copy of a federal statute making his refusal to consent a criminal offense. *Id.* at 90-91. The citation of *Colonnade Catering Corp. v. United States*, *supra* note 5, by the *Biswell* Court could be interpreted as indicating that the search could not have produced admissible evidence unless

ed by the Fourth Amendment to the people in their 'persons, houses, papers and effects' is not extended to the open fields"²⁵ This exception was affirmed recently in *Air Pollution Variance Board v. Western Alfalfa Corp.*²⁶ In that case, the court refused to suppress evidence obtained by a Colorado official who observed smoke plumes after entering the open fields of Western Alfalfa Corp. without consent and without notice.

Traditionally, the courts have defined open fields as all the grounds except the curtilage.²⁷ The *Western Alfalfa Court* did not define open fields but stated that, "we are not advised that [the inspector] was on the premises from which the public was excluded."²⁸ The mere posting of "No Trespassing" signs will not vitiate "open field" status.²⁹

Emergencies

Emergency situations might also lend themselves to warrantless searches by administrative agencies. In *Camara* the Court said, "[N]othing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations."³⁰ Similarly, the *Tyler* court held that no warrant is required for entry to fight a fire "and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze."³¹ As noted above, the Court in several cases has indicated that reasonable warrantless searches by administrative agencies would be allowed when necessary.³² If an administrative agency publishes guidelines defining emergencies in which resort to a warrant will make a reasonable enforcement objective impossible, and if the search guidelines insure minimal intrusions on privacy, then it is likely that such warrantless searches will be upheld. The emergency exceptions cited in *Camara* were

the defendant gave this forced consent. *United States v. Biswell*, *supra* note 6 at 91. But other language in the *Biswell* opinion suggests that the defendant's "consent" was irrelevant in determining the admissibility of the fruits of the search. *Id.* at 91-92.

25. *Hester v. United States*, 266 U.S. 57, 59 (1924).

26. *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974).

27. *E.g.*, *McDowell v. United States*, 383 F.2d 599, 603 (8th Cir. 1967).

28. *Air Pollution Variance Board v. Western Alfalfa Corp.*, *supra* note 26, at 865.

29. *McDowell v. United States*, *supra* note 27, at 602.

30. *Camara v. Municipal Court*, *supra* note 1, at 539.

31. *Michigan v. Tyler*, *supra* note 9 at 511.

32. *See*, Notes 12, 13 and 15, *supra*.

seizure of unwholesome food,³³ compulsory smallpox vaccination,³⁴ health quarantine,³⁵ and summary destruction of tubercular cattle.³⁶

Can a Permit be Conditioned Upon Consent to Search?

Many administrative agencies issue permits. The question immediately arises: can the agency do indirectly what it cannot do directly; namely can the agency condition the continued possession of a permit upon the permittee's consent to allow the agency to search the premises?

The doctrine that a state may condition a privilege upon waiver of constitutional rights is officially dead.³⁷ However, there is one modern case which raises a suspicion that the doctrine that receipt of a benefit may be conditioned upon waiver of Fourth Amendment rights is alive but in disguise. In *Wyman v. James* the Supreme Court held that the State of New York may condition continued eligibility for Aid to Families with Dependent Children upon the recipient's consent to be interviewed in her home by a caseworker.³⁸ The *James* Court denied that the home visit was a search, but declared that the holding would be the same even if the visit were a search.³⁹

The *James* Court did not view the case as involving waiver of Fourth Amendment rights,⁴⁰ but the dissent interpreted *James* as a waiver case.⁴¹ The Court's opinion pointed out that the Fourth Amendment prohibits "unreasonable searches," and cited *Camara* for the proposition that, "except in certain carefully defined classes of cases, a [warrantless] search . . . is unreasonable."⁴² But the Court concluded that the facts presented just such a special case and that, therefore, the home visit by the caseworker was not an unreasonable search. Thus, *Wyman v. James* is nominally not a waiver case, even though the Court found that the

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

34. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

35. *Compagnie Francaise v. Board of Health*, 186 U.S. 380 (1902).

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

37. *E.g.*, *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Blount v. Rizzi*, 400 U.S. 410, 416 (1971).

38. *Wyman v. Jones*, 400 U.S. 309 (1971).

39. *Id.* at 317-318.

40. *Id.* at 324.

41. *Id.* at 328.

42. *Id.* at 316 citing *Camara v. Municipal Court*, *supra* note 1, at 528-9.

search was reasonable, in part, precisely because the welfare recipient could refuse to allow the search and stop receiving welfare.⁴³

In justifying the *Wyman v. James* decision, the Court listed eleven reasons which appear to encompass the four criteria distinguishing *Biswell* and *Colonnade* from *Camara*, *See* and *Barlow*'s.⁴⁴ First, the Court stressed that the warrantless scheme of home visits was necessary to the enforcement scheme, and that the privacy invasion was minimal because the caseworker gave advance notice of the visit by mail.⁴⁵ Second, like a licensing scheme, the welfare recipient's involvement is voluntary—one enters with knowledge of the search requirements. The Court stated that the recipient was perfectly free to refuse the search and give up the aid.⁴⁶ Third, although the Court did not speak of a long tradition of government regulation of welfare recipients, it discussed the public trust aspect of dispensing public charity and the lesser expectation of privacy of a recipient of charity.⁴⁷ Fourth, the Court did not emphasize this point, but the statutory search authority in *Wyman v. James* is confined to those seeking public assistance.⁴⁸ This authority might be considered less broad than some regulatory schemes covering a large number of industries. If *Wyman v. James* is not a waiver case, it is probably no more helpful to administrative agencies than *Biswell* or *Colonnade*.

In *California v. LaRue*⁴⁹ the Court held that California could condition a liquor license on the absence of certain sexual entertainment, First Amendment claims notwithstanding. However, that case has limited application to most administrative agencies since the majority opinion stated that the authority to impose conditions for a liquor license derives from the Twenty-First Amendment.⁵⁰ Other cases involving a challenge to a claimed conditioning of a benefit upon waiver of constitutional rights are more convincingly explained by the Court as not involving waiver.⁵¹

43. *Wyman v. Jones*, *supra* note 37, at 324.

44. *Id.* at 318-324.

45. *Id.* at 320-321.

46. *Id.* at 324.

47. *Id.* at 319.

48. *Id.* at 311 N.2.

49. *California v. LaRue*, 409 U.S. 109 (1972).

50. *Id.* at 114-115.

51. *E.g.*, *Fox River Paper Co. v. Railroad Commission*, 274 U.S. 651 (1927).

The *Colonnade* distinction between a warrantless, forceable search and a sanction for refusing to allow a warrantless search may be relevant here.⁵² The limitation to the latter in *Colonnade* was based on a statute so it was not necessary for the Court to reach the constitutional necessity of the limitation. In fact, in *Biswell* the Court indicated in dictum that the police could have used force to search the guns in the pawnshop if the owner had withheld "consent" after being advised that refusal to "consent" was a criminal violation.⁵³ It is possible, however, that a sanction for refusing to allow a search, especially one not involving criminal penalties (such as a permit revocation or welfare cut-off) will be considered "reasonable" whereas a forceable warrantless search would not. Even the *Barlow's* Court had this to say about the *Colonnade-Biswell* exception, "Businessmen . . . in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade. The businessman in a regulated industry in effect consents to the restrictions placed upon him."⁵⁴ It is thus difficult to predict whether attempts by administrative agencies to condition permits upon consent to search will survive constitutional challenge.

There is, however, one narrow situation in which a court would be more likely to find conditioning a license upon consent to search constitutional. In *See* the Court said, "Nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. A constitutional challenge to such programs can only be resolved . . . on a case by case basis."⁵⁵ The Ninth Circuit in a recent case commented that the *See* Court declined to extend Fourth Amendment requirements to such inspections.⁵⁶

ENFORCEMENT OF STATUTES BY AN ADMINISTRATIVE AGENCY IF WARRANTLESS SEARCHES ARE NOT ALLOWED

When Should an Administrative Agency Attempt to Obtain Consent to a Search Instead of a Warrant?

52. *Colonnade Catering Corp. v. United States*, *supra* note 5, at 77.

53. *United States v. Biswell*, *supra* note 6, at 315.

54. *Marshall v. Barlow's, Inc.*, *supra* note 8, at 313, citing *Almeida-Sanchez v. United States*, *supra* note 14, at 271.

55. *See v. Seattle*, *supra* note 3, at 546.

56. *Midwest Growers Cooperative Corp. v. Kirkemo*, 533 F.2d 455, 462 (9th Cir. 1976).

The Supreme Court in *Camara*, the case on which the *Barlow's* opinion is largely based, offers this guideline:

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.⁵⁷

Both *Camara* and *Barlow's* express the hope that, in most cases, consent to warrantless searches will be given.⁵⁸ *Camara* and *Barlow's* imply a doctrine that, absent special circumstances, an administrative agency should not seek a search warrant before an inspection is attempted. However, the Supreme Court has indicated a clear preference for warrants when police conduct an ordinary criminal investigation search.⁵⁹ The two doctrines are not necessarily in conflict. However, a United States district court which suppressed evidence obtained during an administrative search in which the validity of the consent to search was challenged appears to have confused the two doctrines. It said, "Given the ease of obtaining administrative search warrants, there is no excuse for not obtaining one as a matter of course or at least as a safety precaution when other validating factors such as consent are questionable."⁶⁰ *United States v. Pugh* shows that administrative agencies cannot rely with complete confidence on the *Camara* guideline on when to seek consent rather than administrative search warrant.

What is required to Obtain a Search Warrant for an Administrative Search?

The warrant clause of the Fourth Amendment states, "no warrant shall issue except on probable cause." Numerous Supreme Court criminal law cases define probable cause. In *Barlow's* the Court states that "Probable cause in the criminal law sense is not required [to obtain a warrant for an administrative search.]"⁶¹ The question then is what constitutes probable cause in the administrative law sense? As a practical matter the question will arise in two contexts. **First, does an administrative agency have sufficient "ad-**

57. *Camara v. Municipal Court*, *supra* note 1, at 539-540.

58. *Marshall v. Barlow's, Inc.*, *supra* note 8, at 316.

59. *E.g.*, *United States v. Ventresca*, 380 U.S. 102 (1965).

60. *United States v. Pugh*, 417 F.Supp. 1019, 1023 (W.D. Mich. 1976).

61. *Marshall v. Barlow's, Inc.*, *supra* note 8, at 320.

ministrative” probable cause to conduct an area-wide or industry-wide search? This question is answered rather easily by *Camara* which allows area-wide searches upon a showing of sufficient public need. *Camara* provides less help in answering the second, far more difficult question: when does an administrative agency have sufficient “administrative” probable cause to conduct a search of some particular business singled out by enforcement personnel. Because of limited enforcement resources, this second question is very important to most administrative agencies. It would be likely to arise whenever an administrative agency has a suspicion not rising to the level of criminal law probable cause, that business X is violating a law which the agency is charged with enforcing. The *Barlow’s* Court stressed that the criteria for selecting businesses to be searched must be neutral:

A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from *neutral* sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area would protect an employer’s Fourth Amendment rights. [emphasis added].⁶²

The *Barlow’s* Court repeated that an inspection must be “pursuant to an administrative plan containing specific neutral criteria,” as well as being reasonable under the Constitution and authorized by statute.⁶³ In the accompanying footnote the *Barlow’s* Court said:

The application for the inspection order filed by the secretary . . . represented that “the desired inspection and investigation are contemplated as part of an inspection program designed to assume compliance with the Act and are authorized by . . .” The program was not described, however, or any parts presented that would indicate why an inspection of *Barlow’s* establishment was within the program.⁶⁴

62. *Id.* at 321.

63. *Id.* at 323.

64. *Id.* at 323 n.20.

'The *Barlow's* Court offers a further guideline. It cites *Camara* for the proposition that probable cause for an administrative search may be based, "on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'"⁶⁵

Because of limited enforcement personnel most administrative agencies will be able to search only a small percentage of the facilities in an area or industry. A random selection of facilities to be searched would be neutral, and it would appear to be reasonable. However, from the viewpoint of an agency, it would be more reasonable to substitute for some of the randomly selected facilities, those sites under some rational suspicion. In furtherance of this argument an agency could offer a court a distinction between searches in criminal and administrative investigations. Unlike administrative investigations, area-wide or industry-wide searches for criminal investigations are forbidden by the Fourth Amendment. If an administrative agency singles out individual business for a search, it engages in fewer searches than if it searches all businesses in the area or industry. The counter argument is that the traditional definition of probable cause (the criminal law definition) must apply unless the Supreme Court has announced a particular exception; the Court's exceptions in *Camara* and *Barlow's* do not include singling out individual businesses on a suspicion which does not rise to the level of traditional probable cause.

There are few federal cases on the issue of whether a specific set of facts constitutes administrative probable cause. In *Marshall v. Shellcast* the court said that OSHA could not rely on industry-wide statistics to support its claim of administrative probable cause when detailed information regarding the particular industry is available.⁶⁶

In *Marshall v. Weyerhaeuser Co.*⁶⁷ a district court found an OSHA affidavit insufficient to show a general administrative plan derived from neutral sources. OSHA had merely shown that the plant it wished to inspect was in-

65. *Id.* at 320, citing *Camara v. Municipal Court*, *supra* note 1, at 538.

66. *Marshall v. Shellcast*, 46 U.S.L.W. 2079 (N.D. Ala. 1977).

67. *Marshall v. Weyerhaeuser Co.*, 47 U.S.L.W. 2183 (D.N.J. September 7, 1978).

volved in an industry with a high rate of accidents per establishment; OSHA had failed to show why the particular plant sought to be searched was selected instead of other plants within the same group.

As will be discussed, there have been several criminal convictions sustained on the basis of evidence obtained pursuant to an administrative search warrant, the sufficiency of which was later challenged in court. However, these cases involve businesses subject to federal liquor or food and drug regulation. As noted above, all such businesses may be subject to a *Colonnade-Biswell* exception in which case the searches could be done without any probable cause at all. Consequently, definitions of administrative probable cause in those cases are of little precedential value to an agency regulating businesses not subject to a *Colonnade-Biswell* exception. However, it is worth noting that the First Circuit recently said that the mere fact that a bar had not been inspected within the past year for compliance with liquor revenue laws constituted sufficient administrative probable cause.⁶⁸ Also a district court has upheld a section of the Federal Comprehensive Drug Abuse Prevention and Control Act⁶⁹ which defines administrative probable cause as “a valid public interest in the effective enforcement of this subchapter.”⁷⁰ The lack of an analogous statutory definition in other laws should not be very significant since Congress is without power to contravene the Fourth Amendment.

An agency's own administrative standards for conducting searches will have some influence on what a court will consider probable cause for an “administrative” search warrant. The Supreme Court is quite explicit in *Barlow's* and *Camara* in stating that the validity of a search depends not only on the reasonableness of the particular search, but also on the reasonableness and existence of an administrative standard authorizing the search.⁷¹ Some Supreme Court cases allowing police to “inventory” a vehicle lawfully in their custody imply that whether or not such an inventory search is valid turns, in part, on the presence or absence of

68. *United States v. Blanchard*, 495 F.2d 1329, 1331 (1st Cir. 1974).

69. 21 U.S.C.A. § 801 *et. seq.*

70. 21 U.S.C.A. § 880(d)(1).

71. *Marshall v. Barlow's, Inc.*, *supra* note 8 at 320; *Camara v. Municipal Court*, *supra* note 1, at 538.

police rules authorizing such a search.⁷² The rationale appears to be that a written regulation protects against arbitrary searches. In addition, in *Barlow's* the Court notes that OSHA's own regulations and inspection manual concede the lack of need to conduct a warrantless search.⁷³ This statement suggests that an agency's regulations and inspection manuals are virtually a "brief" to the Court.

Could "Administrative" Search Warrants Be Valid for Multiple Searches Over an Extended Period of Time?

Search warrants used in criminal investigations are usually good for a single search and must be executed very soon after issuance. However, since the Supreme Court has relaxed the definition of probable cause for administrative search warrants, some federal courts have issued "administrative" search warrants valid for multiple searches over a long period of time.⁷⁴

In *Barlow's* the Court offered this rationale for requiring warrants for "administrative" searches:

The 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. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, 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.⁷⁵

"Administrative" search warrants providing for multiple searches over an extended period of time could be drafted to satisfactorily answer the objections to warrantless searches quoted above. The troublesome element would be to avoid "unbridled discretion . . . as to when to search."⁷⁶ If an agency wished to conduct a series of searches, the effective-

72. *South Dakota v. Opperman* 428 U.S. 364 (1976); *Harris v. United States*, 390 U.S. 234 (1968); *Cady v. Dombrowski* 413 U.S. 433, 445 (1973).

73. *Marshall v. Barlow's, Inc.*, *supra* note 8, at 319.

74. *United States v. Martinez-Fuerte*, 428 U.S. 543, 547 N.2 (1976).

75. *Marshall v. Barlow's, Inc.*, *supra* note 8, at 323.

76. *Id.*

ness of which would not be impaired by advance notice to the person whose business is to be searched, the warrant could authorize a specific schedule of searches. If an agency wished to conduct such a series of searches without advance notice, an *ex parte* warrant might contain either a schedule or criteria for the timing of the searches. The rationale in *Camara* for requiring search warrants is very similar to the *Barlow's* rationale, but the Court in *Camara* does not mention the fear that warrantless searches "involve unbridled discretion . . . as to when to search." The emphasis in *Camara* is that absent a search warrant requirement the person whose place of business is to be searched could not challenge the search without risking sanctions.⁷⁷ Thus, the *Camara* rationale for requiring warrants for administrative searches is even more compatible with the idea of "administrative" search warrants authorizing multiple searches over an extended period of time. In at least two cases the Supreme Court suggested that a warrant authorizing random searches might be obtained.⁷⁸

The Authority for Obtaining an Administrative Warrant

No federal statute or court rule specifically authorizes the issuance of a warrant for an administrative inspection or search. However, in invalidating statutory regulatory schemes authorizing warrantless, nonconsensual searches, the Supreme Court in *Camara*, *Barlow's* and *See* strongly suggested that courts have inherent power to issue administrative warrants.⁷⁹ In *Michigan v. Tyler*, the Court cited with approval this language from the Michigan Supreme Court: "a search may be conducted pursuant to a warrant issued in accordance with reasonable legislative or administrative standards or, absent their promulgation, judicially prescribed standards."⁸⁰ The *Tyler* Court's discussion of guidelines on the issuance of administrative warrants assumes that magistrates will issue the warrants.⁸¹ Also, in

77. *Camara v. Municipal Court*, *supra* note 1, at 532.

78. *United States v. Martinez-Fuerte*, *supra* note 75, at 557 and *Almeida-Sanchez v. United States* (concurrency) 413 U.S. 266, 283 N.3 (1973).

79. *Camara v. Municipal Court*, *supra* note 1, at 538; *Marshall v. Barlow's Inc.*, *supra* note 8, at 316; *See v. Seattle*, *supra* note 3 at 545.

80. *Michigan v. Tyler*, *supra* note 9, at 508, citing *People v. Tyler*, 399 Mich. 564, 584, 250 N.W. 2d 467, 477 (1977).

81. *Michigan v. Tyler*, *supra* note 9, at 508.

United States v. New York Telephone Co.,⁸² the Supreme Court adopted an expansive interpretation of the All Writs Act.⁸³ If necessary, it might be argued that the All Writs Act is specific statutory authority for the issuance of warrants based on administrative probable cause. Most lower courts which have considered the issue have held that magistrates may issue warrants based on administrative probable cause without specific statutory authorization.⁸⁴

Precautions Against Tainting a Search

In both criminal and civil proceedings, evidence improperly obtained by the government may be suppressed.⁸⁵ A search conducted without valid consent or conducted pursuant to an improperly obtained warrant may be tainted.

In *Bumper v. North Carolina*⁸⁶ the Court held invalid the consent given by an ignorant person to a search after a policeman bluffed and threatened to get a warrant if consent was not given. The Ninth Circuit has held that the standards for judging whether consent to a search is valid are less stringent for administrative searches than for criminal searches.⁸⁷ The court held that in the context of an administrative search a "manifestation of assent, no matter how casual, can reasonably be accepted as waiver of warrant."⁸⁸ It said that citizens subject to administrative searches are not likely to be uninformed or surprised. "Also, the consent to an inspection is not only not suspect but is to be expected. The inspection itself is inevitable."⁸⁹ It should be noted that while *Thriftmart* was styled an administrative search by the court, the case involved convictions for violating the Food, Drug and Cosmetic Act,⁹⁰ and fines were imposed.

82. *United States v. New York Telephone Co.* 434 U.S. 159 (1977).

83. 28 U.S.C.A. § 1651.

84. *United States v. Blanchard*, *supra* note 69, at 1331; *Dunlop v. Hertzler Enterprises, Inc.* 418 F. Supp. 627, 630 and 634 (D.N.M. 1976); *Brennan v. Gibson's Products, Inc.*, 407 F. Supp. 154, 162 (E.D. Tex. 1976); *Marshall v. Shellcast Corp.*, *supra* note 66; *Marshall v. Chromalloy American Corp.*, 433 F. Supp. 330 (E.D. Wis. 1977); *But cf. Barlow's Inc. v. Usery*, 424 F. Supp. 437, 440-441 (D. Idaho 1976), *aff'd on other grounds*, *supra* note 8.

85. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965).

86. *Bumper v. North Carolina*, 391 U.S. 543 (1968).

87. *United States v. Thriftmart*, 429 F.2d 1006, 1009 (1970).

88. *Id.* at 1010.

89. *Id.* at 1009.

90. 21 U.S.C.A. § 331(k) and § 333(a).

However, in *United States v. Pugh* a district court granted a motion to suppress evidence obtained pursuant to an administrative warrant and used in a criminal conviction on the grounds that an informed consent to the full scope of the search was not given and commented adversely on the government agent's threats to get a warrant in response to questions about his search authority by the defendant.⁹¹ These two cases do not make for an easy rule on how the validity of consent to a search by an administrative agency is to be judged.

The Supreme Court's handling of the consent issue in *Biswell* should not be confused with the situation in which an agency lacks power to conduct a warrantless search or to punish the refusal to allow one. In *Biswell* the defendant "consented" to a warrantless search authorized by a valid statute rather than face criminal prosecution for refusing to allow the search. The Court found *Bumper v. North Carolina*, inapposite since the police demand to search in *Biswell* was based "not on consent but on the authority of a valid statute."⁹²

If a search warrant is improperly obtained, the fruits of a search conducted pursuant to it should be suppressed.⁹³ It might be argued that the government's use of an "administrative warrant" to conduct an essentially criminal investigation would be an intolerable circumvention of the Fourth Amendment guarantee that no warrant shall issue except upon probable cause that a crime has been committed. It is not at all clear that such logic prevails.

In *Michigan v. Tyler* the Supreme Court obliquely addressed this issue.⁹⁴ The *Tyler* Court upheld a Michigan Supreme Court reversal of an arson conviction based on evidence obtained by police and fire officials who visited the fire scene without a warrant. The court said that firemen and police, without a warrant, may put out a fire and conduct an initial investigation of the fire while they are still on the premises as a result of the firefighting activity.⁹⁵ Further

91. *United States v. Pugh*, *supra* note 60, at 1021-1022.

92. *United States v. Biswell*, *supra* note 6, at 315.

93. *E.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

94. *Michigan v. Tyler*, *supra* note 9.

95. *Id.* at 511.

searches to determine the cause of fire, the Court said, must be conducted pursuant to an administrative search warrant.⁹⁶ The Court continued:

Evidence of arson discovered in the course of such investigations is admissible at trial, but if the investigating officials find probable cause to believe that arson has occurred and require further access to gain evidence . . . they must obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime.⁹⁷

The important implication of the above holding is that evidence obtained during a search authorized by an administrative warrant is admissible in a criminal prosecution. The safeguard requirement that a criminal law warrant be obtained when criminal law probable cause exists is less important except as a potential procedural pitfall, since a criminal law warrant can easily be obtained whenever criminal law probable cause exists. The important question left unanswered by the *Tyler* Court in its summary statement of the holding is the extent to which an administrative search warrant can be used in cases in which criminal law probable cause does not exist but in which a criminal prosecution is suspected, or is the principal motivation for the investigation. In its discussion the *Tyler* Court quoted the opinion below with approval. It said, "But if the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of probable cause] will apply."⁹⁸ However, the *Tyler* Court applied the plain view doctrine in holding that firemen legitimately in a building without a warrant may seize evidence of arson within plain view.⁹⁹ This raises the possibility that where civil and criminal violations may both exist, a search warrant issued on the basis of administrative probable cause can be used to search for civil violations, and evidence of criminal violations found within the scope of the civil violation search will be admissible under the plain view doctrine. In virtually all cases in which an administrative agency is conducting an investigation for possible criminal violations, it will be able to claim that it is

96. *Id.*

97. *Id.* at 512.

98. *Id.* at 508, citing 399 Mich. 564, 584, 250 N.W.2d 467, 477 (1977).

99. *Michigan v. Tyler*, *supra* note 9, at 4536.

also—and perhaps, primarily—investigating the possibility of civil violations. The lower federal courts have consistently upheld criminal convictions based on evidence obtained during administrative searches conducted upon administrative probable cause and have not expressed concern that the traditional, criminal law probable cause requirement of the Fourth Amendment was circumvented. The Ninth Circuit recently sustained convictions and jail sentences based on evidence obtained on the basis of administrative probable cause.¹⁰⁰ That case involved the Controlled Substances Act, Section 880(d) of which provides for the issuance of warrants based on this permissive definition of administrative probable cause: That there be “a valid public interest in the effective enforcement of this title or regulations thereunder sufficient to justify administrative inspections . . .”¹⁰¹ Federal Drug Enforcement Officials obtained a Section 880(d) warrant to inspect the records of a pharmacy suspected of carrying on an illicit drug trade. The *Goldfine* court argued that to invalidate criminal convictions based on administrative searches would prevent the government from investigating except when it had no reason to suspect a violation.¹⁰² Several other federal courts have produced similar results and analyses.¹⁰³

All of the cases just cited involve the liquor, food or drug industries and all of these industries are arguably subject to a *Biswell-Colonnade* exception.¹⁰⁴ Possibly, this distinction is important since *Colonnade* and *Biswell* make it clear that persons who engage in pervasively regulated industries have a lesser expectation of privacy under the Fourth Amendment.¹⁰⁵ Consequently, the available case law does not definitely settle the question of whether an administrative agency may properly use an administrative search warrant to conduct an investigation designed primarily to uncover evidence of criminal violations. On the

100. *United States v. Goldfine*, 538 F.2d 815, 819 (9th Cir. 1976).

101. 21 U.S.C.A. § 801 *et. seq.*

102. *United States v. Goldfine*, *supra* note 108, at 819.

103. *United States v. Blanchard*, *supra* note 67, at 1330-31; *Colonnade Catering Corp. v. United States*, 410 F.2d 197, 205 (2nd Cir. 1969), *rev'd on other grounds*, 397 U.S. 72 (1970); *United States v. Montrom*, 345 F. Supp. 1337, 1342 (E.D. Pa. 1972), *aff'd mem.* 480 F.2d 918, 919 (3rd Cir. 1973); and *United States v. Greenberg*, 334 F. Supp. 364, 367 (W.D. Pa. 1971).

104. Note 19, *supra*.

105. *Colonnade Catering Corp. v. United States*, note 5, *supra*; *United States v. Biswell*, note 6, *supra*. See also, note 53, *supra*.

one hand, an agency runs some risk of losing a motion to suppress evidence in circumventing the traditional criminal law probable cause requirement by conducting an essentially criminal investigation on the basis of administrative probable cause. On the other hand, if an agency obtains a search warrant based on criminal law probable cause, the defendant will be able to have the evidence suppressed if he can prove that there was insufficient criminal law probable cause alleged in the agency's warrant application and that the agency needed criminal law probable cause to obtain the warrant.

In close areas in which it is uncertain whether an agency's suspicions rise to the level of criminal law probable cause, the agency may attempt to protect its position by reciting, in its application for an administrative search warrant, whatever suspicions it has in addition to what it deems to be the minimum justification for an administrative search warrant. If a court, considering a motion to suppress evidence, determines that when the agency applied for the warrant it had criminal law probable cause and that a criminal law warrant should have been sought, the agency will be able to respond that its antecedent justification for the search was preserved in its warrant application. This is important since an important policy reason for insisting on a warrant—as opposed to calling a warrantless search reasonable and permissible under the Fourth Amendment—is that without a warrant application the antecedent justification for the search cannot be evaluated first hand by a court. This action might satisfy the *Tyler* Court's objection to an administrative search warrant when criminal law probable cause exists.

CONCLUSION

There is inevitable tension between the probable cause requirement of the warrant clause of the Fourth Amendment, the rule that "except in certain carefully defined classes of cases, a [warrantless search] . . . is unreasonable,"¹⁰⁶ and the needs of various agencies to conduct inspections to protect the public health. It is possible to read into the *Camara* and *Barlow*'s decisions a conscious re-evaluation of

106. *Michigan v. Tyler*, *supra* note 9, at 506, citing *Camara v. Municipal Court*, *supra* note 1, at 528-529.

traditional criminal law probable cause requirements. Many administrative agencies uncover and prosecute criminal violations during administrative investigations. As our society becomes more complex administrative agencies can be expected to increase their share of society's police work. The new probable cause standard of *Camara* found application in *Terry v. Ohio*,¹⁰⁷ a case allowing limited warrantless searches in criminal investigations. In addition, the majority opinion in *Mississippi v. Davis*¹⁰⁸ speculated on a broader application of the new probable cause standard to strictly criminal investigations.

However, taken at face value, *Camara* and *Barlow's* are limits on police power, not attempts to lay the groundwork for an increase in police power. By simultaneously bending the warrant requirement of the Fourth Amendment and strengthening the rule that warrantless searches are *per se* unreasonable, the Supreme Court has sought to minimize the instances in which a search is initiated without prior judicial authorization. Although magistrates may freely issue warrants based on administrative probable cause the warrant does require that the antecedent justification for the search to be preserved in a perjury proof manner. Evidence obtained on the basis of a warrant issued without proper administrative probable cause should be suppressable. However, recording the antecedent justification for the search has been accomplished only at the expense of redefining probable cause.

Whether or not *Camara*, *See, Barlow's* and *Tyler* lead to an increase or weakening of society's police power will depend on future Supreme Court cases defining the extent to which search warrants issued on the basis of administrative probable cause may be used to produce admissible evidence of criminal violations. Although the *Tyler* Court announced a holding¹⁰⁹ far in excess of that needed to dispose of the case, it avoided a clear commitment on this important question.

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107. *Terry v. Ohio* 392 U.S. 1 (1968).

108. *Davis v. Mississippi* 394 U.S. 721 (1969).

109. *Michigan v. Tyler*, *supra* note 9, at 511-512.