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INSPECTIONS BY ADMINISTRATIVE AGENCIES: CLARIFICATION OF THE WARRANT REQUIREMENT

I. Introduction

Adminstrative agencies at all levels of government have important responsibilities for the protection of public health, safety, and welfare. One of the devices by which these responsibilities are carried out is the administrative inspection. Although such inspections may result in severe penalties for uncovered violations, their major function is preventative. Discovery of fire code violations and punishment of the violators achieve little if a city block has been reduced to ashes; similarly if thousands of cases of contaminated food have entered the market, the violation may be discovered too late to prevent mass food poisoning. But if large scale inspection programs to determine whether there is compliance with regulatory laws are to be possible, they cannot be subjected to the rigorous standards which searches in the area of criminal law must meet. Since they are official intrusions, however, a tension of values is created by administrative searches between the right to privacy and public need for inspections.

Prior to 1967, only one case had ever held that administrative searches without a warrant were not reasonable within the meaning of the fourth amendment.[1] In 1967, however, the Supreme Court extended the warrant requirement of the fourth amendment to area inspections of private dwellings to enforce health ordinances in *Camara v. Municipal Court,*[2] and made the same extension to inspections of business premises by fire inspectors in *See v. City of Seattle.*[3] Since then, there have been three Supreme Court decisions modifying and clarifying the 1967 cases which first imposed upon administrative searches a warrant requirement.[4]

The 1967 decisions, because they assumed most inspections would proceed on consent and because the standard of probable cause which they established seemed to offer little of the protection normally associated with warrant procedures, left considerable doubt as to what the Supreme Court had achieved. Three members of the Court itself criticized the majority's approach as amounting to no more than mere formalism, inconveniencing agencies, and offering little real security to those subject to inspection.[5] In the lower courts arguments were made for the application to administrative inspections of the stringent requirements of the criminal law in regard to warrants.[6] In response, the Court has limited its original formulation of the warrant requirement by carving out a few broad exceptions.

1 District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949); *see* Annot., 13 A.L.R.2d 969 (1950).

2 387 U.S. 523 (1967).

3 387 U.S. 541 (1967).

4 United States v. Biswell, 406 U.S. 311 (1972); Wyman v. James, 400 U.S. 309 (1971); Colonnade Catering Corp. v. United States, 397 U.S. (1970).

5 387 U.S. at 554-55 (Clark, Harlan & Stewart, JJ., dissenting).

6 *See, e.g.,* United States v. Thriftimart, Inc., 429 F.2d 1006 (9th Cir. 1970); United States v. Hammond Milling Co., 413 F.2d 608 (5th Cir. 1969); United States v. Greenberg, 334 F. Supp. 364 (W.D. Pa. 1971).

The most recent and significant exception is that created by the Court in *United States v. Biswell*,[7] holding that, in the case of regulatory inspection systems, the legality of an inspection depends upon the authority of a statute that carefully limits the time, place, and scope of the authorized search.[8] In so deciding, the Court returned almost full circle to its position prior to 1967 in the broad area of regulatory inspection under statutory authority.

Whether the later cases represent a clarification or a retreat depends upon the intention of the Court in 1967. Comments upon *Biswell* view the decision as a significant curtailment of the protections granted to administrative inspections by *Camara* and *See*.[9] However, if attention is not focused merely upon the warrant requirement by which the Court sought to introduce protection against the arbitrary power of inspectors, but rather upon the *nature* of the protection intended, then *Biswell* does not signal any significant curtailment of that protection.

A close look at the line of cases ending in *Biswell*, particularly *See*, shows an intention on the part of the Court to create protections in the area of administrative search different from those which have come to be associated with the warrant through its use in criminal proceedings. Rather, the Court has paralleled the protection already provided against arbitrary use by administrative agencies of their subpoena power.[10] If this is what was intended in 1967, then the entire line of cases is neither inconsistent nor formalistic as they would appear to be if focus were placed upon the warrant requirement alone. This note explores this hypothesis and looks beyond procedure to the substance of the protection against arbitrary administrative action which the Court has attempted to provide, thereby clarifying an otherwise confusing line of cases.

II. Historical Background

A. *The* Boyd *and* Frank *Cases*

The earliest Supreme Court case to examine the constitutionality of administrative searches was *Boyd v. United States*,[11] overturning a statute[12] granting authority to compel surrender of private papers which might constitute evidence of tax fraud. In its reasoning the Court considered the protective measures of the fourth amendment as designed to secure the freedom from self-incrimination guaranteed by the fifth amendment. Therefore, searches which gave rise to no fifth amendment problems were not to be subjected to the warrant requirement of the fourth amendment.[13]

Subsequently, in *Frank v. Maryland*[14] the Court relied upon the distinction

7 406 U.S. 311 (1972).
8 406 U.S. at 315.
9 *See, e.g.*, 22 CATH. U. L. REV. 496 (1973); 11 DUQUESNE L. REV. 253 (1972); 50 J. URB. L. 537 (1973); 43 MISS. L.J. 562 (1972).
10 *See generally*, 1 K. DAVIS, ADMINISTRATIVE LAW §§ 3.03, 3.12 (1958), §§ 3.04, 3.06, 3.11, 3.12 (Supp. 1970).
11 116 U.S. 616 (1886).
12 Act of June 22, 1874, § 5, 18 Stat. 186.
13 116 U.S. at 624, 633.
14 359 U.S. 360 (1959).

between criminal searches and administrative investigations, which had been made throughout American history, in order to uphold a fine for refusal to permit a public health inspector to enter a private dwelling. The Court specifically held that warrants were not required for such inspections.[15] But the Court was divided, and there was a vigorous dissent which relied heavily upon the one lower court decision applying the warrant requirement of the fourth amendment to administrative inspections.[16]

B. *The* Camara *and* See *Cases*

By the time *Camara v. Municipal Court*[17] and *See v. City of Seattle*[18] were decided, two members of the majority in *Frank* had been replaced. In *Camara* the Court reversed a conviction for refusing a health inspector entry into a private dwelling when he was unable to produce a warrant. In doing so the Court overruled *Frank v. Maryland,* to the extent that it had upheld warrantless administrative inspections as reasonable under the fourth amendment.[19]

The Court rejected the civil-criminal dichotomy of older cases and concluded that the applicability of the fourth amendment should not depend upon the nature of the search, but rather upon the need to "safeguard the privacy and security of individuals against arbitrary invasions by government officials."[20] The opinion set forth the rule that where there is no emergency demanding immediate access, and no warrant is obtained for an inspection, there is a constitutional right to insist that a warrant be obtained and anyone refusing entry to an inspector without a warrant constitutionally cannot be convicted for refusing to consent to the inspection.[21]

In *See* a conviction for refusing to permit a representative of the City of Seattle Fire Department to enter and inspect a locked commercial warehouse was reversed.[22] In effect the Court simply extended the *Camara* rule to business premises: "[A]dministrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure."[23]

III. The Impact of *Camara* and *See*

A. *The Limits of the Rule*

First, it was not intended that these decisions should impede administrative inspections and it was presumed that inspection programs to which the warrant requirement applied would normally continue upon consent; only rarely would a refusal make it necessary to seek a warrant.[24]

15 *Id.* at 373.
16 *Id.* at 377, citing District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949).
17 387 U.S. 521 (1967).
18 387 U.S. 541 (1967).
19 *Id.* at 528.
20 387 U.S. at 528.
21 *Id.* at 540.
22 *Id.* at 542.
23 *Id.* at 545.
24 *Id.* at 539-40.

Second, both *Camara* and *See* indicated there would be circumstances when it would not be practical to seek a warrant. *Camara* specifically excepted from the warrant requirement prompt inspections traditionally upheld in emergency situations. The examples given made it clear that "emergency" would be more liberally construed than in a criminal context.[25]

Third, there was also the suggestion that should some public need justify inspection and the goals of inspection could not be achieved within the confines of a reasonable requirement for a warrant, a warrant would not be required.[26]

In regard to business premises the Court made it clear in *See* that it was not challenging regulatory techniques such as "licensing programs which require inspections prior to operating a business or marketing a product;" these programs would need to be examined on a case-by-case basis.[27] If read literally, the quoted language applies only to a small number of licensing schemes, but neither lower courts nor later decisions of the Supreme Court have given restrictive meaning to the language "prior to."[28]

Clearly the Court did not intend the warrant requirement to override all other considerations or to value the right to privacy above the public need for inspections. Therefore, only when the two were not inconsistent was the warrant to be required.

B. *Reasonableness and Probable Cause*

1. Analogy to Administrative Subpoenas

In *Frank v. Maryland* the Court found that administrative inspections were reasonable within the meaning of the fourth amendment, and concluded from this that warrants would not be required.[29] In contrast, the Court in *Camara* said that even though administrative inspections in general were "reasonable", under normal circumstances they would not be exempted from the warrant requirement and its attendant showing of probable cause.[30] While the Court in *Frank* differentiated the requirements for administrative inspections from those for criminal searches on the basis of "reasonableness," the *Camara* Court based its distinction on the definition of probable cause.

In discussing probable cause sufficient to justify the issuance of a warrant, the Court adopted the rule: "If a valid public interest justifies the intrusion contemplated, then there is probable cause. . ."[31] In support the Court cited *Oklahoma Press Publishing Co. v. Walling*,[32] a decision concerning the power of administrative agencies to issue subpoenas. In *Oklahoma Press* the Court said

25 *Id.* at 539. The Court mentioned seizure of unwholesome food, health quarantines, and the destruction of diseased cattle.
26 *Id.* at 533.
27 *Id.* at 546.
28 *E.g., Biswell* itself involved the inspection of a business which had already begun to operate with a product already marketed.
29 See text accompanying note 15 *supra.*
30 387 U.S. at 534.
31 *Id.* at 539.
32 327 U.S. 186 (1946).

that administrative subpoenas amount to "constructive" searches.[33] From this the Court in *See* concluded that if the fourth amendment applied to administrative "constructive" searches, it certainly must apply to actual searches.[34]

The Court's earlier rulings applying the fourth amendment to administrative subpoenas were precedents which had left the agencies with wide latitude within which their actions could be construed as justifiable. The Court had begun by insisting that it was unjust to permit fishing expeditions in the hopes that something would turn up and that a subpoena should issue only when there was reason to believe the documents sought contained evidence that the law had been violated.[35] This doctrine eroded to the point that an agency did not need to prove that particular information which it sought was relevant so long as the subject matter was within the agency's jurisdiction.[36] Furthermore, as long as the agency was authorized to investigate the subject matter of the material sought by subpoena, it became possible to subpoena not only to determine if there was a violation but even to determine whether it was within the agency's power to regulate.[37] Finally, the Court made it clear that administrative subpoenas would issue more freely than those of courts and would not be limited by the technical concepts of relevance or immateriality.[38]

The mechanics of the administrative subpoena procedure permits an agency to issue its own process, but reserves to the courts the power to enforce the subpoenas if they are challenged.[39] Therefore, before refusal to comply can result in any penalty, the person subject to the subpoena may have a court determine if the agency is engaged in a lawful subject of inquiry, whether the scope is reasonably specific, and whether the subpoena is intended simply to harass.[40] Thus, the procedure gives agencies very broad substantive scope, permits the great majority of subpoenas to become operative upon consent, and provides a review which prevents arbitrary action and allows a right to challenge agency action before any penalty is imposed for failure to cooperate.

A result similar to that secured by the administrative subpoena process was obtained by the Court in *Camara*. Inspections would normally continue upon permission, without judicial review, just as most administrative subpoenas are honored without the need for judicial review. However, the decision requires a judicial review of the proposed administrative action before compliance can be demanded or refusal to cooperate can be treated as an offense, which is also true in the subpoena process.

2. Distinction Between Administrative and Criminal Searches in the Probable Cause Requirement

The procedure for securing judicial review of a search had always been the

33 *Id.* at 202.
34 387 U. S. at 545.
35 FTC v. American Tobacco Co., 264 U.S. 298 (1924).
36 Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943).
37 Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).
38 United States v. Morton Salt Co., 338 U.S. 632 (1950).
39 387 U.S. at 544-45.
40 *Id.*

warrant requirement. Since the warrant had been a creature of the criminal realm, its introduction to administrative inspections created considerable confusion about the intended standard of judicial review. The Court attempted to avoid this by creating standards different from those applicable to warrants for criminal searches, just as standards for administrative subpoenas had been distinguished from those for court subpoenas. The fourth amendment requirement of reasonableness was defined to cover both criminal and administrative investigation, but to permit different standards of review for each.[41] The question of whether a particular *type* of search is reasonable is to be answered by determining if a legitimate government interest exists to justify an intrusion upon constitutionally protected rights of the citizen.[42] This is not the kind of question which would need to be re-evaluated every time a warrant is sought. For example, there is no question that police searches for stolen goods are justified. Equally justified are inspections for unsanitary conditions in food processing and storage facilities or inspections for violations of housing and fire codes.[43] The Court found administrative searches to be reasonable upon the grounds they had long been accepted by the public and the judiciary, and were necessary to insure that conditions dangerous to the public interest were prevented or abated. Further the Court doubted that any means of enforcement except inspections would be effective, and they did not seriously invade personal privacy since such inspections are nonpersonal and not intended to discover evidence of crime.[44]

In addition to a determination that a *type* of search is reasonable, there is the question of whether a *particular* search is reasonable, and this is determined by inquiring whether there is probable cause for the search.[45] "Probable cause" in general terms, is the standard by which a decision to search is tested against the constitutional requirement of reasonableness. In criminal law establishment of probable cause requires a showing that something is connected with a crime and that it will probably be found in the place to be searched. Thus probable cause tests a particular search against the general standard of reasonableness. There can be no public interest in random or indiscriminate searches for contraband.[46]

If administrative inspections, such as the area-wide search involved in *Camara,* are to be feasible, as they should be once it is determined that they are reasonable, probable cause must not have the narrow meaning it has acquired in criminal law. It is not reasonable, nor is it in the public interest, to permit the police to search an entire city for stolen goods and therefore, in the criminal context, a narrow definition of probable cause is justified.[47] But since the primary purpose of inspection is to prevent on a city-wide basis the development of hazardous conditions, there is a strong public interest in area inspections without regard to whether there is reason to suspect violations in a particular building.[48]

41 *Id.* at 534-35.
42 *Id.* at 535.
43 *Id.*
44 *Id.* at 537.
45 *Id.* at 538.
46 *Id.* at 534.
47 *Id.*
48 *Id.* at 535.

A showing of probable cause of the kind required in the criminal area would render administrative inspections only corrective at best and largely defeat their preventive purpose.

Therefore, the Court suggested as factors which would establish probable cause for the issuance of a warrant to make an administrative inspection such things as the passage of time, nature of the building to be inspected, and condition of the area where the building is located. If a general rule is to be found, it is that "probable cause" exists "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[49] This is a standard much nearer to that for the review of administrative subpoenas than to that required to warrant criminal searches.

IV. The Interim: From *See* to *Biswell*

A. *Application of the* Camara-See *Rule*

The warrant requirements of *Camara* and *See* subsequently were found applicable to a number of federal regulatory schemes, such as the Food, Drug and Cosmetics Act,[50] the Federal Comprehensive Drug Abuse Prevention and Control Act,[51] and the Gun Control Act.[52] The agencies generally continued making inspections upon consent.[53] However, since a warrantless inspection was not valid unless consent had been given, when violations were discovered those culpable often sought to contest the validity of the consent given for the inspection. Probable cause, which is necessary for any reasonable search, was also litigated, but the theories put forth were drawn from criminal law and clearly contrary to the requirements *Camara* had established for administrative inspections.[54] When the abuses of the inspector were not great, the lower courts were not sympathetic to consent litigation.[55]

The most thoughtful opinion on the consent issue was *United States v. Thriftimart, Inc.*[56] in which the court began with the Supreme Court's recognition that the constitutionality of administrative searches and criminal searches must be tested by different standards. From this premise the court reached the conclusion that there need be no warning of a right to insist upon a warrant, that failure to give such warning did not make the consent unknowing or involuntary, and that any manifestation of consent, no matter how casual, could be accepted as a waiver of the right to insist upon a warrant.[57] An implicit presumption of consent to administrative searches was held to exist whenever there is acquiescence, based upon the inevitability of such inspections, the probable cause standard, and the nature of the searches which are less coercive than crim-

49 387 U.S. at 538.
50 United States v. Thriftimart, Inc., 429 F.2d 1006 (9th Cir. 1970).
51 United States v. Greenberg, 334 F. Supp. 364 (W.D. Pa. 1971).
52 United States v. Biswell, 442 F.2d 1189 (10th Cir. 1971).
53 *E.g.*, the procedures used by inspectors of the Food and Drug Administration. United States v. Thriftimart, Inc., 429 F.2d 1006, 1008 (9th Cir. 1970).
54 *E.g.*, United States v. Thriftimart, 429 F.2d 1006 (9th Cir. 1970).
55 *E.g.*, United States v. Hammond Milling Co., 413 F.2d 608 (5th Cir. 1969).
56 429 F.2d 1006 (9th Cir. 1970).
57 *Id.* at 1010.

inal searches by armed police, who are more likely to take a citizen by surprise and unaware of the consequences of consent.[58] If inspections were to proceed upon consent, frequent litigation of consent whenever a violation was discovered would impede the administrative process, which the Court in *Camara* made clear was not its intent.[59]

B. *The Liquor Law Exception*

In *Colonnade Catering Corp. v. United States,* the Supreme Court required the suppression of evidence obtained by federal agents who entered appellant's liquor storage area by force.[60] In doing so, however, they found an exception to the *See* rule that inspection without consent may only be compelled by force or prosecution within the context of a warrant procedure. Though the only license involved was a state liquor license, inspections under the liquor laws were found to be under one of the "licensing programs" which *See* had reserved for resolution on a case-by-case basis.[61] The Court accepted the position that inspections under the liquor laws are not unreasonable because they have never been found to be so. In the year the fourth amendment was ratified, Congress provided for warrantless inspection of the premises of liquor distillers and importers. *Boyd v. United States* had recognized this special treatment. Therefore, the Court concluded that in this area it was proper to permit Congress to establish standards for searches.[62] However, because Congress failed to make rules governing inspection procedure, the fourth amendment applied; and since the statutes did not specifically authorize force, the only recourse when entry was refused was the statutory fine.[63]

It is the *Colonnade* holding, finding an exception to *See* in which a search authorized by statute may be reasonable without a warrant, which is extended by the *Biswell* decision.[64]

V. The *Biswell* Decision

Biswell was a pawnshop owner who had a federal license to deal in sporting

58 *Id.* at 1009.
59 387 U.S. at 539.
60 397 U.S. 72 (1970).
61 *Id.* at 76-77.
62 *Id.* at 75-76.
63 *Id.* at 77.
64 Between *Colonnade* and *Biswell* the Court decided Wyman v. James, 400 U.S. 309 (1917), holding that home visits by welfare workers were not searches subject to the fourth amendment even though the information gathered from the visits might result in the reduction or termination of payments for the support of dependent children. The Court also held that even if the home visitation were a search, it would not be barred by the fourth amendment because it would not be "unreasonable." 400 U.S. at 317-18.

The Court distinguished *Camara* and *See* on the grounds that in those situations there was more than a mere interview, but rather genuine searches were involved. Also in each case criminal prosecution for refusing entry was involved, whereas in *Wyman* only loss of welfare resulted from refusal to permit official entry. 400 U.S. at 324-25.

Therefore, immediately prior to *Biswell,* the Court required of administrative actions falling short of technical search, and of searches which cannot result in criminal penalties, only that they be reasonable. If an inspection may result in criminal penalties, or if such penalties are imposed upon refusal to permit search, then there must be either consent or a warrant, unless the search falls within one of the categories excepted by *Camara* or *See.*

rifles. An investigator from the Treasury Department visited the shop, identified himself, inspected Biswell's books, and requested entry to his gun storeroom which was locked. Biswell inquired whether the investigator had a warrant, and he replied that he did not, but that the Federal Gun Control Act[65] authorized the inspection. Upon being shown a copy of the law, Biswell replied, "Well, that's what it says so I guess it's okay." The agent seized two weapons in which Biswell's license did not authorize him to deal.[66] The district court convicted Biswell of dealing in firearms without paying the required occupational tax. The court of appeals reversed on the grounds that the appellant had not validly consented, and the statute authorizing inspections with neither a warrant nor consent was unconstitutional.[67] The Supreme Court granted certiorari[68] and reversed upon the grounds that the statute was constitutional, a search authorized by such a statute was reasonable, and that where such a search proceeded upon the authorization of a statute no consent was needed.[69]

The *Biswell* decision carved out an exception to *See* for inspections of business premises pursuant to federal regulatory schemes. *Biswell* involved a licensing program under the Gun Control Act of 1968; however, the decision is not limited in its application only to licensing programs.[70]

Whereas the *Colonnade* opinion limited statutory authorization for administrative searches to liquor regulation, where they could be justified as reasonable upon the basis of a unique historical treatment, *Biswell* gave broad approval to statutory authorization, abandoning the historical test and replacing it with the broader criterion of whether the scheme is to further an "urgent federal interest."[71] However, it is apparent from the considerations upon which the reasonableness of the warrantless inspection in *Biswell* was based that no *carte blanche* to replace warrant procedures by statutory authorization was intended. Those considerations were:

> (1) The inspection was a crucial part of a regulatory scheme in which "large interests" were at stake.[72]
>
> (2) The law could not properly be enforced and the inspection made effective unless inspection without a warrant was deemed reasonable conduct.[73]

It is upon this second factor that the Court distinguished the situation in *Biswell* from that in *See*. In *See* the defects subject to inspection, those in building struc-

65 18 U.S.C. §§ 921, 923(g) (1970).
66 United States v. Biswell, 406 U.S. 311, 312 (1972).
67 442 F.2d 1189 (10th Cir. 1971).
68 404 U.S. 983 (1971).
69 406 U.S. at 312.
70 United States v. Schafer, 461 F.2d 856 (9th Cir. 1972) (Plant Quarantine Act); United States v. Business Builders, Inc., 354 F. Supp. 141 (N.D. Okla. 1973); United States v. Del Campo Baking Mfg. Co., 345 F. Supp. 1371 (D. Del. 1972) (Food, Drug, and Cosmetic Act); United States v. Montrom, 345 F. Supp. 1337 (E.D. Pa. 1972) (Comprehensive Drug Abuse Prevention and Control Act of 1970).
71 406 U.S. at 317.
72 *Id.* at 315.
73 *Id.* at 316.

ture, were relatively difficult to remedy or conceal in a short period of time. In *Biswell* the objects of inspection, guns, were easily and quickly concealed. Therefore, if the normal routine of inspection under the Federal Gun Control Act is to proceed without a warrant until one is demanded, as the *Camara* rule anticipated administrative inspections would proceed,[74] then any violator could simply refuse to consent to the inspection and conceal the evidence of his violation while the inspector sought the necessary warrant.

> (3) It would not be possible to establish a standard for obtaining a warrant which would offer any significant protection to the appellant and still provide sufficient flexibility in the search scheme to make it an effective means of enforcement.[75]

To avoid this dilemma an inspector would have to possess himself of a large number of warrants before setting out on his rounds. Issuance of warrants in such numbers and in *ex parte* proceedings would become a mere formality, diluting the standard of probable cause even further, and leaving the court with no indication of when an inspector's conduct has been challenged and thus deserves special scrutiny as is the case when warrants are sought only after consent is refused.

> (4) The search involved only limited threats to justifiable expectations of privacy.

Biswell was engaged of his own choice in a "pervasively regulated industry"[76] and had obtained a federal license to engage in the firearms trade. He did so knowing that certain records and goods would be inspected. Furthermore the administrators of the Federal Gun Control Act provided licenses with an annual compilation of ordinances so that licenses were on notice of the law governing inspection of their business.[77] Therefore, one of the concerns expressed by the Court in *Camara,*[78] the need for notice of the inspector's identity and powers, was not present when an inspection was subject to a regulatory scheme of this kind. Even without a warrant, there was notice of the inspector's authority, of the necessity of inspecting the particular premises as part of an administrative scheme, and of the scope of inspection. Any doubt of such notice was removed by the presentation to Biswell of a copy of the statute authorizing inspection.[79]

Once an inspection is determined to be pursuant to a proper regulatory scheme, there are standards which a statute must meet before its authorizations of a warrantless search may be deemed reasonable: "In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority

74 387 U.S. at 539.
75 406 U.S. at 316.
76 *Id.*
77 *Id.*
78 387 U.S. at 532.
79 406 U.S. at 312.

of a valid statute."[80] The Gun Control Act of 1968 authorizes entry "during business hours, . . . to the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector, . . . for the purpose of inspecting or examining . . . records or documents required to be kept . . . and . . . any firearms or ammunition. . . ."[81] A lower court has upheld less precise language which refers to inspection "at reasonable times," within "reasonable limits," of warehouses containing food products subject to federal regulations.[82] However, in neither of these two statutes is the language as imprecise as that in the ordinance at issue in *See v. City of Seattle*.[83]

VI. Conclusion: Consequences of *Biswell*

The first and most direct result of *Biswell* is to eliminate the necessity of consent once a regulatory scheme and a valid statute are found. In such circumstances the legality of the inspection depends upon neither a warrant nor consent.[84]

Second, within the context of such a qualifying regulatory scheme, it is permissible to establish statutory penalties for refusal to permit inspection even when no warrant was presented by the inspector as required by *Camara* and *See*:

> Respondent's submission to lawful authority and his decision to step aside and permit the inspection rather than face a criminal prosecution is analogous to a householder's acquiescence in a search pursuant to a warrant when the alternative is a possible criminal prosecution for refusing entry or a forcible entry.[85]

Third, this decision taken with *Colonnade,* opens the further possibility that a legislative scheme specifically authorizing forcible entry might be upheld. In *Colonnade,* with respect to liquor regulation, while the Court found Congress had the authority "to design such powers of inspection under the liquor laws as it deems necessary . . ."[86] the Court did not find such authority in the statute at issue.[87] However, the dissenting justices would have found that the right to use force was implied in the authority to search areas where liquor is stored.[88] The statute involved in *Biswell* also failed to give specific authority to use force,[89] however, there was nothing in the opinion that indicates a provision for the use of force would be found unconstitutional. The analogy used by the Court,[90]

80 *Id.* at 315.
81 18 U.S.C. § 923(g) (1970).
82 88 United States v. Del Campo Baking Mfg. Co., 345 F. Supp. 1371 (D. Del. 1972).
83 SEATTLE, WASH., FIRE CODE § 8.01.050:
INSPECTION OF BUILDINGS AND PREMISES. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards.
84 406 U.S. at 315.
85 *Id.*
86 397 U.S. at 76.
87 *Id.*
88 397 U.S. at 78 (Burger, C. J., Black & Stewart, JJ., dissenting).
89 406 U.S. 311.
90 See text accompanying note 85 *supra.*

and its holding that inspections such as that in *Biswell* are legal independent of consent or warrant, strongly suggests that a legislative authorization to inspect by force would be upheld. One lower court has already reached this conclusion.[91]

In regard to inspections subject to statutory schemes of regulation the Court has come to a position close to that which it held in *Frank v. Maryland*. This is true to the extent that in a large number of situations neither a warrant nor consent is required for a valid administrative search. Yet Biswell does not give blanket permission for all administrative searches to proceed without warrants; *Camara* and *See* have not been overruled. Thus the warrant can be dispensed with only if two conditions are met: first, the authorizing statute must contain standards limiting the time, place, and scope of the inspections; and second, the scheme of regulation must be so pervasive that those subject to inspection will have been put on notice by their own familiarity with the statutes and the frequent visits of inspectors.

When the inspection is of business premises under a federal regulatory scheme governed by a properly drafted statute everything is accomplished without a warrant which its presence would accomplish in inspections of the type involved in *Camara* and *See*. The purposes of a warrant as described in *Camara* (judicial review, and notice of the need, scope, and authority of the inspection) are equally satisfied under *Biswell* by a sufficiently precise statute applicable to businessmen who are aware that they are being regulated. Under both, warrant and statute limitations are placed upon the discretion of the inspector in the field, by the terms of the warrant in the first instance, and by the inspectee's knowledge of the inspector's statutory authority in the other. In either a *See* or a *Biswell* situation, the person subject to inspection has no opportunity to participate in a hearing prior to search. A two party hearing upon the propriety of the search can be obtained only after the inspection is completed. Refusal to honor inspection under either the warrant or the statute may result in penalties. Even if *Biswell* permits force, so does a warrant. Finally the review of probable cause upon which an administrative search warrant will issue under *Camara* and *See* amounts only to a determination that it is part of a reasonable legislative and administrative scheme.[92] It is precisely such schemes which *Biswell* requires and for which it establishes standards.

Because of the exceptions made for licensing schemes in *See* and for federal regulatory schemes in *Biswell*, the warrant requirement and the related issues of consent and probable cause will be inapplicable to a great number of administrative inspections. The court has followed the track back very close to where it began with its holding in *Frank v. Maryland* that administrative inspections are free from the warrant requirement. But the circle is not complete; the Court has at least provided for controls over administrative searches analogous to those already established over administrative subpoena powers.

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91 United States v. Montrom, 345 F. Supp. 1337, 1339 (E.D. Pa. 1972) (dictum).
92 387 U.S. at 538.