CAMARA AND SEE: A CONSTITUTIONAL PROBLEM WITH EFFECT ON AIR POLLUTION CONTROL

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I. INTRODUCTION

Somewhere in a quiet suburb lives a man — let's call him Mr. Householder — who lives in his own single-family home, so he doesn't have much waste. He either doesn't know or doesn't care that his incinerator doesn't comply with the specifications set by his city's air pollution control agency. He burns his waste and the soot from the incinerator goes into the air, probably unnoticed by his neighbors. The city is located in a valley where it is common to have a temperature inversion, so sometimes the soot doesn't get blown away; it just hangs around. Downtown, set among other factories, is Mr. Householder's factory. It is heated by a coal-burning furnace which has the required particulate matter trap for taking out soot, so no smoke can be seen. The factory contains a large rendering pot which produces the best grade of glue in the West. On Fridays, when a new batch of glue is begun, the neighbors begin to complain about the odor. If the wind blows, only those downwind notice. If a temperature inversion occurs, the whole city notices.

Mr. Householder is the typical polluter of the air. He is the "evil genius" behind pollution from stationary sources which the air pollution statutes attempt to control. He is in both the private and commercial sectors of the community, and he pollutes in both traceable and untraceable ways. Various combinations of these factors present the factual situations faced by any air pollution control agency, whether federal, state, or local. Somehow, ways must be found to detect his violations and stop them before the pollution process has gone too far.

Air pollution statutes deal with pollution from stationary sources by detecting violations of standards through the means of systematic area inspection programs by administrative bodies. In this respect, air pollution statutes do not vary significantly from other health and safety statutes, such as fire prevention, rat control, and building codes. Many states have adopted the method of periodic administrative inspections.[1]

[1] DEL. CODE ANN. tit. 7 § 6203 (6, 10) (Supp. 1966); FLA. STAT. ANN. § 403.10(1-4) (Supp. 1961); HAWAII REV. LAWS § 47-64 (e) (Supp. 1961); ILL. ANN. STAT. ch. 111½ § 240.5-1.6 (Smith-Hurd 1966); IND. ANN. STAT. § 35-4604B(9) (Supp. 1967); KY. REV. STAT. ANN. 224.370 (Supp. 1967); LA. REV. STAT. ANN. §

The reason for adopting inspection statutes is perhaps most eloquently and graphically stated by one of the *Amici Curiae* in the companion cases of *Camara v. Municipal Court*[2] and *See v. Seattle*:[3]

> [I]t is the responsibility of the government to use its best efforts to warn of rats and to establish procedures for finding and exterminating them before plague claims its first victim and to regulate the use of lanterns in straw-littered barns before a kick by Mrs. O'Leary's cow ignites an entire city. Obviously, to discharge that solemn responsibility the government must be able, without undue delay or hindrance, to look into the places where the rats may be nesting and into Mrs. O'Leary's barn. It is for this reason that administrative officials such as health inspectors have the right to visit and inspect even private houses.[4]

The occupant whose premises will be inspected has certain rights. The public has certain rights. How are the conflicts between them to be resolved? The Supreme Court's answer to this question in *Camara* and *See* bears directly on the enforcement of air pollution legislation.

II. CAMARA AND SEE

Camara and *See* are related cases, decided during the last term of the Court, wherein an apparently definitive rule was laid down as to the rights of householders or businessmen, and the method of inspection to be used by the inspectors. They are essentially identical cases, except that *Camara* dealt with a housing inspection of a private residence[5] and *See* with a fire inspection of a commercial warehouse.[6] Since *See* held that there was no distinction between the rights of the private and

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40:2204A(3) (West 1965); MASS. ANN. LAWS ch. 111 § 142B (1967); MICH. STAT. ANN. § 14.58(5)(i) (Supp. 1968); MO. ANN. STAT. § 203.050(8) (Supp. 1967); N.J. STAT. ANN. § 26:2C-9(d) (Supp. 1967); N.Y. PUB. HEALTH LAW § 1277(2)(a) (McKinney Supp. 1967); N.C. GEN. STAT. § 130-225(1) (1964); ORE. REV. STAT. § 449.900(7) (1963); PA. STAT. ANN. tit. 35 § 35-4004(1) (1964); R.I. GEN. LAWS ANN. § 23-25-5(9) (Supp. 1966); TENN. CODE ANN. § 53-3412(6) (Supp. 1967); TEX. REV. CIV. STAT. ANN. art. 4.477-5(3) (Supp. 1967); VA. CODE ANN. § 10-17-22 (Supp. 1966); WASH. REV. CODE ANN. § 70.94.200 (1962); W. VA. CODE ANN. § 1409(132)(9) (1961). Other states rely on local investigations or, having no control statutes, rely on general nuisance law.

[2] 387 U.S. 523 (1967) [hereinafter referred to as Camara].

[3] 387 U.S. 541 (1967) [hereinafter referred to as See].

[4] Brief for the Commonwealth of Massachusetts, the City of Malden, and the Malden Redevelopment Authority as Amicus Curiae at 11, Camara [hereinafter referred to as Massachusetts Amicus].

[5] Camara at 525-26. An inspector of the San Francisco Division of Housing Inspection, Department of Public Health, during a routine annual inspection for violations of the housing code was refused entry by appellant to the apartment where appellant was living in apparent violation of the code which prohibited residential use of the building's ground floor. Appellant refused entry twice, ignored a citation to appear at the District Attorney's office to discuss the matter, and refused entry a third time. A complaint was then filed charging him with violation of the code provision requiring him to permit entry. He was convicted and this appeal followed.

[6] See at 541-42. Appellant was convicted for refusal to allow a City of Seattle

commercial occupants,[7] usually they will not be distinguished in this Comment.

The Court in these cases agreed with the governmental parties regarding the necessity of planned periodic area inspections. The many examples and statistics advanced in the briefs of the appellees made an impressive showing, and it was clear that there was no serious dispute on this point.[8]

Though the Court agreed with the need, it emphasized that the fourth amendment's basic purpose of safeguarding privacy against arbitrary invasions by governmental officials compelled judicial control of the searches.[9] Reasoning from the premise that the safeguards of the fourth amendment applied no less to health and safety enforcement than to criminal law enforcement,[10] the Court held:

> [T]hat administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in Frank v. State of Maryland and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections.[11]

Frank v. Maryland[12] was therefore overruled.

The Court next discussed how the warrants should issue. Since the fourth amendment requires probable cause for the issuance of a warrant, the key question was the nature of probable cause in the circumstance of the *administrative* search.[13] Distinguishing the situation from a criminal investigation, and discussing the necessity for the search, the Court concluded:

> [I]t is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for an area inspection are satisfied with respect to a par-

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Fire Department inspector to enter his locked commercial warehouse. The attempted inspection was part of a routine periodic city-wide canvass to obtain compliance with Seattle's fire code. After he refused entry the first time he was arrested and charged with violation of the access provisions of the Fire Code.

[7] See at 543. It is true that government regulation of business in the public interest might give a stronger voice to the public need which is to be balanced against the private right, but this is a matter affecting the reasonableness of the search for which a warrant is sought rather than eliminating the business' right itself.

[8] The Court, in fact, stated this specifically when it said:

> The public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions — faulty wiring is an obvious example — are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself. Camara at 537.

[9] Camara at 528-29.

[10] Camara at 530.

[11] Camara at 534.

[12] 359 U.S. 360 (1959).

[13] Camara at 535.

> ticular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building, (*e.g.*, a multi-family apartment house), or the conditions of an entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.[14]

The Court then said that the traditional "emergency" exceptions from the warrant procedure still applied.[15] Moreover, since most citizens permit inspection, warrants for an administrative search normally should be sought only after entry is refused.[16] Thus, the magistrate ordinarily would need to determine the matter only where there has already been refusal to entry, although the Court obviously did not intend that a prior refusal be a prerequisite to a warrant application.[17]

Applying these doctrines to the facts at hand, the Court then held that the appellants could not be convicted for exercising their constitutional rights and refusing to admit inspectors without a warrant.[18]

III. The Residue

The *Camara* and *See* decisions did not fully settle the problems of administrative searches. Instead, it seems that the decisions, while they did settle the question that warrants were needed, did not settle three serious questions, all of which were considered in briefs to the Court. These major problem areas are: (1) Can a warrant procedure be administered practically so as to give adequate judicial consideration to each application for a warrant? This problem involves whether the magistrate can handle the work load thrust upon him. (2) What factors must the magistrate consider in determining whether there is probable cause for a warrant? What is probable cause for a warrant to inspect Mr. Householder's incinerator or his glue factory? (3) Does the warrant procedure indeed protect the individual's right to privacy? Is there a better way to control administrative inspectors? These questions are vitally interrelated; each is important to the other. Nevertheless, for the purpose of analysis, they will be considered separately.

A. *The Practicality of the Required System*

> [T]he question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the purpose behind the search. [Citations omitted.]

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[14] Camara at 538. Substantially identical language is used to describe the probable cause standard relating to inspections of commercial premises in *See* at 545.
[15] Camara at 539-40.
[16] *Id.*
[17] See at 545 n.6.
[18] Camara at 540; See at 546.

> It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive.[19]

> While there may be only "one rebel a year" where officials have a right to inspect without a warrant, it cannot be said that such would be the case when there is no right to enter without a warrant. San Francisco has for three years conducted a Home Fire Safety Program where fire safety inspections are made of dwellings on a consent basis — no right to inspect is asserted. In this period, 46,848 homes were contacted where someone was at home. In 7,244 cases the occupant refused to permit the inspection . . . . If this proportion, in excess of 15%, were applied, for instance, to the conservation program inspection enumerated above, in excess of 2,000 search warrants [annual average] would be required. Applied to the inspections made by the Department of Public Works [145,589 inspections in 1964], more than 21,000 warrants would be required. *The inspectors and the courts could not handle this volume.* (Emphasis supplied.)[20]

Without doubt, this controversy was a factor in the *Frank v. Maryland* result,[21] and provoked Mr. Justice Douglas to frame in his dissent the rallying cry of the "pro-warrant" forces: "One rebel a year . . . is not too great a price to pay for maintaining our guarantee of civil rights in full vigor."[22]

In his brief, the *Camara* appellant did not raise the possibility of needing a large number of warrants for health and safety inspection programs. The *Camara* appellee and the Amici Curiae, on the other hand, urged that the warrant requirement would be seriously harmful to inspection programs.[23]

When figures from the various briefs are combined, it appears that there may be grounds for this fear. The briefs cite, from eight cities scattered throughout the United States, partial figures which totaled al-

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[19] Camara at 533.
[20] Brief of the Appellee, Camara, at 48.
[21] 359 U.S. 360, 372-73 (1959).
[22] 359 U.S. 360, 384 (1959) (dissenting opinion).
[23] Brief of the Appellee, Camara, at 48; Brief of the Appellee, See, at 20; Brief for the Member Municipalities of the National Institute of Municipal Law Officers as Amicus Curiae at 18 [hereinafter cited as NIMLO].

most 1,500,000 inspections from these cities during 1965-66 alone.[24] It is obvious that if any substantial percentage of a number that large chooses to refuse to admit the inspector, so that he must obtain a warrant in order to inspect, then the courts will be flooded with requests for warrants.

Mr. Justice Douglas based his "one rebel a year" statement upon the experience of Baltimore, where *prosecutions* for refusal to allow entry had averaged one per year.[25] These were prosecutions under statutes which made the refusal a misdemeanor.[26] It is not known whether or not all those who refused were prosecuted for their violation. Persuasion and threats of prosecution for refusal to allow entry probably were used to overcome resistance to the entry, so that not all were prosecuted. Though such methods should be deplored, still they indicate that "one rebel a year" does not tell the whole story.[27] Under a warrant system, such methods will not be permissible, because after the first refusal the inspector must obtain a warrant to inspect.[28] A threat of immediate prosecution may not be used. The situation before the warrant is obtained perhaps approaches, in effect, a voluntary inspection program.[29]

The experience of various cities with voluntary inspection programs thus is illuminating as to what might be expected under the warrant system. The city of Portland has for some time carried on a voluntary home inspection program, with entry by consent only. In that city during the year 1966, 16,171 attempted inspections were made where the occupants were at home. Entry was refused in 2,540 cases, or about

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[24] The following is a breakdown of the figures from the briefs:

PLACE	NUMBER	YEAR	TYPES
NIMLO Brief at 7-8:			
Chicago	355,450	1966	Fire, Health
Cleveland	161,559	1965-66*	Fire, Health, Building
Boston	75,082	1965-66*	Building, Redevelopment
Baltimore	13,408	1965	Building
Los Angeles	402,992	1965-66*	Fire, Conservation
Jacksonville	156,441	1965	Fire, Health
Seattle	85,220	1965	Fire
Appellee, Camara, at 48 and appendix p. 38:			
San Francisco	178,756	1964-65-66**	Fire, Conservation

*Fiscal year

**Figures from different departments, one 1964, one fiscal 1965-66.

[25] Frank v. Maryland, 359 U.S. 360, 384 (1959) (dissenting opinion).

[26] BALTIMORE, MD., CITY CODE art. 12, § 120 (1956):

> Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or encolsure, he may demand entry therein in the daytime, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars. Cited in Frank v. Maryland, 359 U.S. 360, 361 (1959).

[27] Even the Brief of the Appellee, Camara, agrees that warrants will not *kill* inspection systems. When it speaks about the possibility of harm it says, "We make no claim that such results would necessarily follow; the figures, however, strongly indicate that Mr. Justice Douglas's prediction of 'one rebel a year' may be too optimistic." Brief of the Appellee, Camara, at 41 n.31.

[28] Camara at 539-40.

[29] Brief of the Appellee, Camara, at 48; NIMLO at 18.

fifteen per cent.[30] The city of San Francisco during the same time and under a similar program attempted 46,848 inspections and was refused entry in 7,244 cases — again about fifteen per cent.[31]

If one were to apply a similar percentage to the total figure from the briefs, he would find that in these eight cities alone, magistrates would be required to consider 225,000 applictions for warrants.[32] It is probable, however, that this percentage is as deceptive as the "one rebel a year," because the inspector will still have a power of persuasion when he points out that he will obtain a warrant and return. Yet, if only *one per cent* of the householders refuse to allow entry, courts in those eight cities will still have to find time to give competent consideration to 15,000 warrant applications, if the inspectors attempt to inspect each place where entry is refused.[33] Admittedly, these games with numbers are sheer speculation. The right answers will be proven only by the experience of time. Still, if the fourth amendment right to privacy is to be *protected in fact,* it is absolutely essential that the Court have considered how the protection can actually be accomplished. If magistrates are to be swamped with warrant applications, then the warrants might indeed have to become "rubber stamps" as is so earnestly argued by the briefs of Amici and the appellee in *Camara.*[34] Setting a theoretical standard without consideration of its practical effect is akin to Don Quixote's setting out to do chivalrous deeds — a worthy purpose, but not certain of success.

B. *The Job of the Magistrate*

How does a magistrate determine probable cause in the context of a warrant for an administrative search? Frequently in air pollution situations there will be no real problem. When, for instance, Mr. Householder burns oil-soaked rags in his incinerator, dense black smoke will be produced. It is obvious that persons seeing the smoke will be able to complain, furnishing even the traditional probable cause for a warrant.[35] The same is true when someone can smell the glue factory in operation. The probable cause problem only becomes acute when a violation occurs which is not so easily detected. For example, Mr.

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[30] NIMLO at 18.

[31] Brief of the Appellee, Camara, at 48.

[32] See figures cited note 24 *supra.*

[33] It is interesting to compare these possibilities with the number of "criminal" warrants issued annually for comparable cities. One source indicates that in Detroit during 1956-57, 29 search warrants were issued; 30 in Milwaukee; 17 in Wichita. This same source indicates that this is still the approximate annual figure for these cities, and more important, that this small number is highly indicative of the number issued in other cities today. L. TIFFANY, D. MCINTYRE, JR., D. ROTENBERG, DETECTION OF CRIME 100 (1967).

[34] Brief of the Appellee, Camara, at 48.

[35] The sight of a violation in progress which must be stopped is clearly enough to meet the standards of the probable cause requirement even for criminal searches. In addition, the Court in *Camara* at 539-40 enumerates similar situations that are permissible.

Householder's factory furnace has the required particulate matter trap so that the stack does not emit visible smoke, but it may still emit large concentrations of invisible sulfur dioxide (SO_2), a dangerous air pollutant.[36] If the factory were in an area where it could be the subject of tracing operations by modern air pollution detectors to pinpoint the violations to the factory, then the traditional probable cause would be present.[37] The only method of detecting this violation where the factory is in the middle of other industry, however, would be to conduct an area inspection including the glue factory.[38] But it is not clear just how deeply the magistrate is to go into the factors behind the legislative or administrative decision to make the search. One commentator, Professor Wayne LaFave, has effectively pointed out the problem:

> Are these decisions now to be reviewed by the magistrate? Is he to determine the wisdom of once-a-year inspections throughout the community? Is he to pass upon the soundness of a particular neighborhood inspection plan? Although it has been frequently asserted that a judicial officer is not in a position to perform such a function, the responsibilities of the magistrate in this regard are not absolutely clear in *Camara*.[39]

"Anti-warrant" forces have long charged that a warrant requirement for administrative searches would either be a rubber-stamp item of paperwork, if the judge were bound to accept the agency's decision to canvass, or a judicial usurpation of the agency's decision-making powers, if he were not so bound.[40] The first position has some support

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[36] For two exceptionally readable and informative works on the nature of air pollution and the particular problems of the sulfur oxides, see D. CARR, THE BREATH OF LIFE (1965) and H. LEWIS, WITH EVERY BREATH YOU TAKE (1965). See also U.S. PUBLIC HEALTH SERVICE, AIR QUALITY CRITERIA FOR SULFUR OXIDES xii (Pub. No. 51, 1967).

[37] If the detectors pinpoint the source of pollution, then there would be probable cause to believe that a violation of the established control standards exists, and the traditional test is fulfilled.

[38] NIMLO at 5 indicates that this is often the case. It cites particularly a study done in New York City about hidden violations in 1953, which showed the seriousness of such hidden violations: *Grand Jury Presentment*, "In the Matter of the Investigation of the Enforcement of Any and All Laws Concerning Hazardous and Unsanitary Conditions in Dwellings, etc." Kings County Court, N.Y., pt. 1 at 6-8 (January 28, 1953).

[39] LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1, 24.

[40] The following is a good example of this charge:

> If the warrant procedure is to become a mere "rubber-stamp" process, pursuant to which warrants will be issued in quantity upon a showing that there is a neighborhood inspection plan, and without any review of that plan, then the procedure, although bothersome to the administrative agency, offers no protection to the householder and is unworthy of the dignity of a court of law . . . . If the court were to entertain an attack on the plan, and to substitute its judgment as to the appropriateness of inspections for the expertise of the agency, it would thus virtually usurp the role for which the agency is uniquely suited. In neither case does the suggested procedure present a justifiable issue or an appropriate function to be performed by a court of law. Massachusetts Amicus at 26.

in the *Camara* and *See* cases.[41] Neither, probably, is actually true.

Principal support for the position that the cases create a rubber-stamp procedure is to be found in statements such as the one in *Camara* that the magistrate's review can be accomplished "without any reassessment of the basic agency decision to canvass an area,"[42] and in the heavy reliance in *See* on the "administrative subpoena" cases.[43] Those cases have held that in administrative subpoenas of books and records, the magistrate has the power to see that the subpoenas are limited in scope, but no discretion to review the agency's decision that inspection of the books and records is necessary.[44] After discussing these cases in *See*, Justice White continued, "It is these rather minimal limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments."[45] All of this seems to support a "rubber-stamp" warrant. For several reasons, however, this probably will not be the ultimate conclusion.

In *Camara* the Court based its holding on the right to privacy of the householder in his home. The language about the lack of reassessment of the agency decision is followed by an extensive discussion of the nature of probable cause — the "reasonableness" of issuing a warrant.[46] The language of the Court in that discussion can only be interpreted as requiring the magistrate to exercise some sort of discretion:

> In determining whether a particular inspection is reasonable — *and thus in determining whether there is probable cause to issue a warrant for that inspection* — the need for the inspection must be weighed in terms of these reasonable goals of code enforcement. (Emphasis supplied.)[47]

If the magistrate is not to do some "weighing," then the Court's statement is meaningless. What decision he is to make in a residential context is not clear, it is true; it is clear only that he is to exercise discretion, not merely automatically approve the agency's decision.

When commercial premises are involved, the case for "rubber-stamping" at first seems stronger, because of the great reliance on the administrative subpoena cases. Yet, immediately following the reliance upon those cases is found the following statement:

> The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against

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[41] The second position, that the judge is to be the ultimate policy-maker for searches, is consistently rejected by the cases. For example, see Camara at 532.

[42] Camara at 532.

[43] See at 544 & n.5.

[44] Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 214 (1946); United States v. Morton Salt Co., 338 U.S. 632, 652-53 (1950); Wilson v. United States, 221 U.S. 361 (1911).

[45] See at 545.

[46] Camara at 534-39.

[47] Camara at 535.

> a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved.[48]

Under the fourth amendment, the judiciary must determine probable cause. The Court's language probably should be interpreted to require magistrates to give great weight to the administrative agency's determination and to the public need, but not to remove the requirement that a judicial officer make the ultimate judgment as to the reasonableness of a particular search.

Close examination of the administrative subpoena cases indicates that this is true. Administrative subpoenas, although analagous to warrants, are not warrants; the same physical invasion of privacy is not involved.[49] They are subpoenas *duces tecum*, termed "constructive searches" in the cases.[50] In *Oklahoma Press Publishing Co. v. Walling* the Court took great pains to distinguish a "constructive search" from an actual search, saying that they intrude on different areas of privacy and that there is a "basic distinction" between the two.[51] It stated that cases deviating from the non-discretionary rule for administrative subpoenas are explicable by the fact that they involved *actual illegal searches and seizures*.[52] In this light, it seems that the purpose for the reference to the administrative subpoena cases in *See* was to show by analogy that the public interest has greater weight where business is concerned than where an individual is concerned. It is therefore not accurate to attribute to the Court's reference to these conceptually different cases a limiting effect on judicial discretion.

Having decided that there is to be discretion, but not so much as to make the magistrate the final arbiter whether to search or not, the question is, "What must he do?"

The Court recognized that hidden violations exist and must be found. Further, the Court noted that although there must be probable cause, since the objectives of health and safety inspections are different from those of criminal searches, the standard for probable cause is also different.[53] The Court said:

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[48] See at 545.
[49] Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 202 (1946).
[50] *Id.*
[51] 327 U.S. 186, 202, 204 (1946). It might be mentioned that this distinction also appears to effectively foreclose any argument that might be made that the reliance in *See* on the administrative subpoena cases indicated a willingness of the Court to approve some sort of administratively-issued "warrant." The Court in *Camara* and *See* particularly objected only to the uncontrolled discretion of officials in the field, and did not expressly rule upon the validity of an administrative "warrant" issued by an agency superior. However, the care taken in *Oklahoma Press* to emphasize that actual physical invasions of privacy are situations to which the fourth amendment is literally applicable indicates that the more traditional warrant will be required.
[52] Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 206 (1946).
[53] Camara at 535.

> [I]t is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative standards for conducting an area inspection are satisfied with respect to a particular dwelling.[54]

Apparently, under this definition, the magistrate must decide two things: First, is there a reasonable legislative standard for this search? Second, is it being reasonably applied in this particular instance?[55] These two determinations, if considered in light of the public need for the search and the particular private right involved, appear to be the middle ground approach to the amount of discretion intended by the Court to be given to the magistrate. They imply a discretion, but one limited to insuring that the action of the administrative agency and its inspectors are reasonable under the circumstances. This interpretation seems to be the most logical answer to the unsolved question of the nature of the magistrate's job under *Camara* and *See*.

C. *The Effectiveness of the Attempted Protection*

The decisions of *Camara* and *See* sprang from a feeling of the Court that the right of privacy must be protected,[56] a proposition exemplified by "countless decisions."[57] The fourth amendment, enforceable against the states through the fourteenth amendment, prohibits unreasonable searches, a prohibition which the Court in *Camara* forthrightly stated was difficult to translate into workable guidelines. First stating that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant,"[58] the Court rejected *Frank v. Maryland*[59] insofar as it allowed warrantless administrative health and safety inspections.[60] It rejected criminal penalties for refusing admittance to inspectors without warrants, saying that this placed a great risk on those who exercised their right to privacy, and in practical effect left occupants subject to the discretion of officials in the field.[61] There was great emphasis placed upon the need for unbiased review of the decision to search:

> We simply cannot say that the protections provided by the warrant procedure are not needed in this context; *broad statutory safeguards are no substitute for individualized review*, par-

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[54] Camara at 538.
[55] LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1, 24, 25.
[56] Camara at 528, 530-31.
[57] Camara at 528. *See, e.g.*, Ker v. California, 374 U.S. 23 (1963); Wolf v. Colorado, 338 U.S. 25 (1949); Gouled v. United States, 255 U.S. 298 (1921).
[58] Camara at 528-29.
[59] 359 U.S. 360 (1959).
[60] Camara at 534.
[61] Camara at 532.

> ticularly when those safeguards may only be invoked at the risk of a criminal penalty. (Emphasis supplied.)[62]

The advantages of "broad statutory safeguards" compared with those of "individualized review" present the most serious question arising from *Camara* and *See*: Is the warrant requirement the best way to obtain the goal sought, namely, the protection of the right to privacy while still meeting the public need for effective searches?

It was to answer this question that the appellees set out the various safeguards in ordinances. For example:

> [The authority to enter] is carefully circumscribed: only authorized employees of city departments or agencies may enter; they may enter only when necessary for the performance of the duties imposed upon them by the Municipal Code; they have the right to enter only at reasonable times; and, most important, they have no power to force entry.[63]

The Court itself noted another safeguard when it mentioned that other ordinances contain requirements that residents be notified in advance.[64]

The appellees and Amici also discussed the other side of the coin — the shortcomings of the warrant's "individualized review." The appellee in *Camara* argued that the householder would lose the chance he presently had to control the time of the inspection if a warrant system were instituted, and that in addition:

> Since the warrant would presumably give the right to force entry if the occupant resisted, the occupant would, in effect, lose an important protection. Thus the "sanctity of a man's home and the privacies of life" protected by *Griswold v. Connecticut* . . . would be more vulnerable to invasion. (citations omitted).[65]

These arguments were rejected by the Court because of its underlying premise that individualized review is the best way to protect the right of privacy.[66] The Court therefore felt that the traditional safeguard imposed by the fourth amendment, the warrant, was necessary. Yet the Court recognized throughout its opinion in *Camara* that this was a situation different from the "traditional" search case in that it does not in essence involve *criminality*.[67]

It is true that under some statutes violations found in a search could ultimately result in criminal prosecutions, since they would be misdemeanors. It is also true that criminal penalties for refusal to allow entry introduce the element of criminality into the situation at an earlier,

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[62] Camara at 533.
[63] Brief of the Appellee, Camara, at 43.
[64] Camara at 531-32.
[65] Brief of the Appellee, Camara, at 24.
[66] Camara at 533.
[67] *Id.*

more immediate stage. Further, it should be accepted that the right to privacy should be safeguarded as much against "administrative" enforcers as against "criminal" enforcers, since it would indeed be an anomalous result if "the individual and his private property are fully protected only when the individual is suspected of criminal behavior."[68] Even accepting each of these points, it is submitted that the Court was not bound to impose a warrant requirement, and that in doing so it made no ultimate change in the occupant's protection even under statutes which involve "criminality" by making violations crimes.

First, if violations are to be "criminal,"[69] it should be recognized that the normal operating procedure of a warrantless administrative search program is to notify the owner to comply upon a finding of a violation. After notice is given, the owner is allowed time to comply, and thereafter there is another inspection. Ordinarily the criminal complaint will follow only if the violation has not then been corrected.[70] While it is true that the first inspection "leads" to criminality, it is difficult to see how this remote "leading" can in itself incriminate the owner. Warrants will not change this reinspection procedure, as the object is to secure correction of violations, not convictions. The conviction rate will not change. The situation in that regard remains the same.

Second, although the application of criminal penalties for the refusal of entry itself does make the exercise of the right to privacy a gamble, since entry can be refused only at the risk of a criminal penalty, an ordinary warrant procedure does not change this situation. A warrant is ordinarily issued in an ex parte proceeding. If the householder then wishes to contest the right of the inspector to invade his home, he may do so only by refusing the entry and risking the penalty for disobeying a warrant. Thus a contempt penalty is substituted for a misdemeanor.

Third, the civil-criminal distinction of *Frank v. Maryland* indeed is illogical.[71] However, since the reason for the abolition of the distinction is to afford the individual protection for all his privacy interests (whether or not violations are crimes),[72] then the best approach would be to adopt a system which gives protection *in fact* to those interests. From the serious possibility of court-administration problems in obtaining large numbers of warrants, which would force the magistrate to make a hur-

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[68] *See* Camara at 530.

[69] As, for example, they are under the Los Angeles "misdemeanor" approach to air pollution control. *See* MIX, The Misdemeanor Approach to Pollution Control, *supra* p. 90.

[70] Camara at 531, n.9. *See* Gruber, *Source Inspection and Survey* in II AIR POLLUTION 509-13 (A. Stern ed. 1962).

[71] Camara at 530-31; Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 279 (1960) (separate opinion).

[72] *See* textual discussion, *supra* pp. 122 and notes thereto.

ried decision,[73] and from the doubt about how he is to determine probable cause,[74] the warrant procedure seems to have serious flaws in providing protection *in fact*, either to the occupant's interest in avoiding criminal prosecution or his right of privacy.

An alternative was available to the Court. First, the Court while rejecting the civil-criminal distinction of *Frank v. Maryland*, could have re-affirmed its holding that the administrative search is a reasonable search within the fourth amendment, even without a warrant. In effect, it would have set up an exception to the warrant requirement, as *Frank* had already been interpreted to do.[75] Next, it could have outlined certain factors, the lack of which would make a search presumptively unreasonable. This would entail a decision on the order of *Miranda v. Arizona*,[76] which outlined prerequisites for an admissible confession. Many factors *could* have been included, most of which are already present in various statutes: (1) prior notice of inspection, at least in residential searches;[77] (2) inspection at reasonable times only;[78] (3) no entry by force;[79] (4) proper credentials for the inspector;[80] (5) exhibition by the inspector of statutory or administrative limits to the inspection;[81] (6) adversary hearing on the propriety of a requested but refused entry;[82] and (7) no criminal penalty for refusal of entry prior to such hearing.[83] Such procedures should be no more burden on the administrative agency than the warrant procedure and probably less, since the householder would be forewarned of the coming of the inspector; since the occupant would be furnished, at the very first contact, with information from which to decide whether to admit the inspector or not; and since a refusal of entry would result in a requirement that the occupant take positive action to protect his right by going into court. Perhaps more important than the possible lessened burden, this procedure would actually provide the individual with protection that *Camara* and *See*

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[73] *See* textual discussion of the practical implications, *supra* pp. 123-24.

[74] *See* textual discussion of the probable cause problem, *supra* pp. 126-27.

[75] Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960); Commonwealth v. Hadley, 351 Mass. 439, 222 N.E.2d 681 (1966). The *Hadley* case was subsequently vacated by the United States Supreme Court on the authority of *Camara* and *See*, 388 U.S. 464 (1967), and returned to the Massachusetts courts for reconsideration in light of those decisions.

[76] 384 U.S. 436 (1966).

[77] *E.g.*, FLA. STAT. ANN. § 403.10 (1-4) (Supp. 1961); MICH. STAT. ANN. § 14.58(5)(i) (Supp. 1967); ORE. REV. STAT. § 449.800 (1963); ILL. ANN. STAT. ch. 111½, § 240.5-1.6 (Smith-Hurd 1966); N.D. CENT. CODE § 23-05-06 (1960). All these are air pollution statutes.

[78] *E.g.* DEL. CODE ANN. tit. 7, § 6203(6), (10) (Supp. 1966); ILL. ANN. STAT. ch. 111½ § 240.5-1.6 (Smith-Hurd 1966); N.D. CENT. CODE § 23-05-06 (1960).

[79] The San Francisco ordinance involved in *Camara* contained this requirement. Brief of the Appellee, Camara, at 43.

[80] N.D. CENT. CODE § 23-05-06 (1960).

[81] FLA. STAT. ANN. § 403-10(1-4) (Supp. 1961).

[82] *Id.*

[83] *Id.*

warrants do not. Prior notice gives the householder time to make sure his private affairs won't be open to the inspector's view. Reasonable time limits and the necessity for lack of force, only hinted at in *Camara,* would be clear.[84] The documentation shown by the inspector would contain substantially the same information available in a warrant and would be no more likely to be forged. And an adversary hearing would allow the magistrate to weigh the householder's right against the public's need, thus insuring against unreasonable searches.

A distinction could have been made to allow health and safety inspectors more flexibility when dealing with commercial property. The requirements of prior notice and adversary hearing could be dropped if the inspector could make some showing of need. Then, in the situation where surprise is needed, the inspector could obtain the warrant prior to any request for entry.

The Court did not adopt this approach, however. The decisions make unlikely any early change in the approach of the Court, making it pertinent to examine the effect of these cases on the functioning of air pollution control measures, and to make specific suggestions concerning what must be done.

IV. AIR POLLUTION INSPECTIONS

The decisions are clear that the warrant requirement does not change any of the traditionally exempted "emergency" situations.[85] The Court qualifies this, however, by pointing out, as is undoubtedly true, that such emergency situations are less frequent in administrative inspections than in criminal searches, since there is less urgency to inspect at a particular time or on a particular day.[86] Further, the Court states clearly that the warrants are required only where the occupant refuses to consent to the search.[87] Therefore the administrative officer does not need a warrant when he first attempts to inspect. After entry is refused, he does, but only then.

In order that the warrant procedure be most workable, both for public need and private rights, it is desirable that the air pollution statutes contain *specific* statutory authorization for issuing warrants. Existing *general* authorization may suffice, but a specialized warrant procedure would be superior since it would lessen uncertainty about

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[84] Added almost as an afterthought to the discussion of emergency exceptions to the warrant requirements was the following unexplained dictum:

> [T]he requirement of a warrant procedure does not suggest any changes in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not entry by force, to inspect. Camara at 540.

[85] Camara at 539.

[86] *Id.*

[87] *Id.*

exactly when the warrant may issue and what it should contain. Further, by incorporating some of the safeguards suggested earlier, it would still be possible to achieve fuller protection for privacy without any substantial additional burden on the agency. It is suggested that the warrant statute contain three different procedures.

If an inspection is to include private residences, the procedures should require that: (1) when the decision is made to inspect, a comprehensive statement of the plan, its necessity, and its proposed methods be drawn up and authenticated by the agency; (2) appropriate prior notice of the inspection be given each householder; (3) the inspections be at reasonable times and no force be used; (4) each householder at the time of refusal of entry be given notice of the time of hearing on the warrant application so that he may present evidence showing cause why the warrant should not issue; (5) at the hearing the previously-prepared plan of inspection be introduced as prima facie evidence of the reasonableness of the inspection plan; and (6) an affidavit by the inspector describing the particular circumstances be introduced as prima facie evidence of the reasonableness of the inspection.

If an inspection is to include commercial property, then the residential procedure would be followed except that prior notice need not be given of the attempt to search.

If an inspection is to include commercial property, and it is thought necessary to obtain the warrant before attempting the search, for surprise purposes, the agency may, before inspection, submit to a magistrate: (1) the prepared general plan, together with (2) an affidavit from the inspector disclosing the reasonableness of the search as applied to the property, and (3) *some showing* of need for issuance of a warrant without a warrant hearing. Since this is not an adversary hearing, the "prima facie" status of such evidence under the procedure for residences could be overcome only if the magistrate should find from his own judgment that the request was plainly unreasonable.

These requirements are designed to do two things: reduce the burden of uncertainty on the administrative agency by providing what shall be evidence of probable cause in each situation, and protect the householder's personal privacy by giving him advance notice of the inspection and of the warrant proceeding. Different procedures have been proposed for commercial property. This is based upon the fact that commercial polluters are likely to have a superior capacity for temporarily concealing violations during a previously announced inspection. For example, if a code requires the burning of certain fuels during "smog alerts," prior notice to the commercial operator would enable him to use that fuel during the time of the inspection and immediately thereafter return to using the prohibited fuel. The administrator would

learn nothing about the operating procedure which the search was designed to reveal. The owner of a residential furnace, on the other hand, would probably not possess the capacity to change fuel sources quickly. It would seem reasonable, therefore, to permit unannounced inspections of commercial premises with warrants, and since the standard to be used is one of reasonableness, the use of different procedures is consonant with the language of *See*.[88]

The warrant statute should also provide a basic form for the warrant itself, to insure that all the information needed for the occupant's protection is contained therein. Such a warrant should contain the following basic information: (1) recital that an affidavit from the named air pollution control agency shows the need for an area inspection because of (a) passage of time or lack of prior inspection in the area; or (b) scientific determination that pollution is coming from the area but the exact source is unknown; or (c) other, as detailed; (2) recital that an affidavit from the named inspector (a) shows that a proper inspection was attempted but entry was refused at the named location on the named date; or (b) shows need under the circumstances for an immediate warrant; (3) recital that insufficient evidence was introduced to overcome the affidavits (if 2(b) is used, omit this provision); (4) therefore for the purpose of enforcing the named statutes and codes authorizing the inspection, an inspection is to be carried out by the named inspector or his deputy, at a reasonable time, within a defined period, without force, of places where there may be sources of pollution (described if possible); date of issuance and signature of issuing officer.[89]

V. CONCLUSION

Camara and *See* represent progress in the protection of the rights of *individuals* to their privacy. That these cases do not go further in protecting fourth amendment rights is to be regretted but perhaps not harshly criticized. The Court recognized the overwhelming need for health and safety inspections and emphasized that there must be a balance between public and private rights. This Comment has made a number of proposals which would present the magistrate with a reasonable basis for making a judgment quickly, to protect the public and to protect the right of privacy at the same time. Prior notice of the inspection and the warrant hearing should protect the individual. Prior preparation of evidence about the area program's reasonableness, coupled

[88] See at 545-46.

[89] The department of the Attorney General of Massachusetts has prepared a suggested form of warrant that incorporates most of these suggestions, and appears to be a useful form for beginning study of a specific air pollution control warrant. Attorney General's Bulletin to All City and Town Departments or Boards of Public Health of August 10, 1967.

with an affidavit of the inspector, should allow speedy determination, thus easing the burden on the agency and the magistrate. If air pollution statutes adopt these suggestions, they can then be effectively enforced by those responsible, and at the same time the *Camara* and *See* warrant requirement will become a significant protection for the individual *and* the public.