The Fourth Power? Administrative Searches vs. The Fourth Amendment

I. INTRODUCTION

In 1967, Justice White concisely stated the Supreme Court's position regarding the validity of warrantless administrative searches as "these conclusions must be the beginning, not the end, of our inquiry." Today, twenty-five years later, the Supreme Court continues its inquiry into the validity and scope of warrantless administrative searches. Although the Fourth Amendment is conventionally thought of as a guideline for searches and seizures in the criminal context, it is intended to govern civil proceedings as well. One of the ways in which the United States Supreme Court has expanded the initial intent of the Framers of the Constitution is the creation of the "administrative search" exception to the warrant requirement of the Fourth Amendment.

"The average person is much more directly and much more frequently affected by the administrative process than by the judicial process." The effects of the administrative process on the average person can be quickly appreciated by noting a few examples of the protection afforded by the administrative process. The system protects against the following: air and water pollution; excessive prices of


2. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV (emphasis added).


5. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT § 1.02, at 3 (3d ed. 1972).
electricity, gas, telephone and other utility services; unreasonableness in rates and schedules; and a vast array of other consumer needs.\(^6\)

In addition to administrative agencies regulating and over-seeing consumer product areas, a "relatively small number of independent regulatory federal agencies are considered 'major' because of the substantial impact they have on widespread segments of the nation's economy."\(^7\) Other important business regulatory agencies, such as the Food and Drug Administration, are not included as "independent" agencies because they are within the Executive Department itself.\(^8\)

In various factual situations, the Supreme Court has faced issues of whether a warrantless administrative search violates one's Fourth Amendment rights, as well as whether the individual is a private citizen or a business owner.\(^9\) This Note will address and analyze: (1) whether the constitutional protection of the Fourth Amendment is afforded to warrantless administrative search exceptions equally in commercial and residential contexts; (2) whether administrative procedures, at both the federal and state level, require a lesser showing of probable cause to conduct an administrative inspection;\(^10\) and (3) whether administrative inspections are simply used as a pretextual search for evidence of criminality.

This Note will chronologically discuss the immense confusion and disarray of Supreme Court decisions in the administrative search area. Next, this Note will analyze distinctions and standards imple-
mented by the Court and administrative agencies in commercial searches regarding Fourth Amendment issues and the admissibility of evidence of criminal activity. After discussing the development of the rules and exceptions, this Note will apply these decisions to the inspection of pharmacies under the authority of the Controlled Substances Act,\textsuperscript{11} the Code of Federal Regulations\textsuperscript{12} and Massachusetts statutory authority.\textsuperscript{13} Finally, this Note will propose a viable alternative to the current standards employed, which satisfy both the constitutional protection of privacy while accommodating the need for effective government enforcement in the commercial setting.

Inherently, an examination of the federal government, specifically governmental agencies, must begin with the issue of separation of powers\textsuperscript{14} which is demonstrated by the organization and ranking provisions of the Constitution.\textsuperscript{15} Separation of powers translates to a distinction between executive, legislative, and judicial functions. The ranking of these powers found in the first three Articles of the Constitution indicates their importance, and functions as a basis for the dispersion of constitutional authority. There is no specific constitutional provision, however, that the three powers shall be kept separate.\textsuperscript{16} Yet, strictly viewing the types of power in an administrative agency, as it includes executive, legislative, and judicial powers, the very existence of an administrative agency is unconstitutional.\textsuperscript{17}

Justice Jackson, commenting on the realities of the law regarding the separation of powers, once said: "[Administrative bodies] have

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  \item \textsuperscript{11} 21 U.S.C. § 880 (1988).
  \item \textsuperscript{12} Administrative Functions, Practices, and Procedures, 21 C.F.R. §§ 1316.01-1316.13 (1992).
  \item \textsuperscript{13} MASS. GEN. LAWS ANN. ch. 94C, § 30 (West 1988); see infra text and accompanying note 23.
  \item \textsuperscript{14} The United States Constitution is our legal system's fundamental legal document which is supreme to any other law. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The United States Supreme Court interpreted this provision for supremacy to mean that in case of conflict between the Constitution and other sources of domestic law, the Constitution must prevail. See Peter L. Strauss, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 7 (1989).
  \item \textsuperscript{15} Strauss, supra note 14, at 12.
  \item \textsuperscript{16} Davis, supra note 5, at 24. The Federal Constitution goes no further than to provide separately for each of the three branches of government: "All legislative powers herein granted shall be vested in a Congress . . . ." U.S. CONST. art. I, § 1. "The executive power shall be vested in a President . . . ." U.S. CONST. art. II, § 1. "The judicial power of the United States shall be vested in one Supreme Court and in . . . inferior courts . . . ." U.S. CONST. art. III, § 1.
  \item \textsuperscript{17} Davis, supra note 5, § 1.08, at 24.
\end{itemize}
become a veritable fourth branch of the [g]overnment, which ha[ve] deranged our three-branch legal theories as much as the concept of a fourth dimension unsettles our three-dimensional thinking." Thus, in order to validate administrative agencies under the separation of powers scheme, the term “quasi” has been applied to illustrate the blending of power, not power which remains unchecked.

Administrative agencies and the relevant laws pertaining to each organization are an abyss-like situation. The Food and Drug Administration and, more specifically, the Drug Abuse Prevention and Control Act (Controlled Substances Act) are examples on the federal level. Similar controversies arise on the state level. This Note will use the administrative inspection statute in Massachusetts as such an example. The procedures implemented by the Food and Drug Administration are most representative of the current controversies the Supreme Court must soon face regarding administrative inspections as these procedures collide with fundamental protections of the Fourth Amendment.

II. DEFINITIONS AND BACKGROUND

In order to establish guidelines to narrow down the extensive field of law regarding administrative agencies, the following definitions will highlight the important areas and assist in the focus of this Note. "Administrative law relates to the powers, functions, and procedures of the various administrative agencies . . . ." "Administrative process" broadly refers to the functions of administrative agencies, such as the formulation of rules and investigations. In determining

19. Id. This discussion is only intended to give a brief description of the constitutional area of separation of powers and to highlight its relationship and application to an administrative agency’s powers.
22. 1 STEIN ET AL., supra note 7, § 1.01[1], at 1-3. "Administrative law” includes a large body of constitutional and statutory law, quasi-executive regulatory provisions, quasi-legislative rules, and quasi-judicial orders. 1 id. at 1-3 n.2. The same broad concepts of administrative law are applicable to all agencies. However, as this author will illustrate, the practices or procedures of a specific agency raise individual significant constitutional issues. 1 id.
23. Id. An “agency,” as defined in the Administrative Procedure Act, means “each authority of the Government of the United States, whether or not it is within or subject to review by another agency.” 5 U.S.C. § 551(1) (1988). Congress and the federal courts are excluded from this definition. 1 STEIN ET AL., supra note 7, § 1.01[1], at 1-5 n.8.
whether an agency is really 'administrative,' the most accurate standard is whether it has the power to regulate private rights and obligations . . . by means of investigation, prosecution, licensing and informal action." An "agency" is any commission or department, or subdivision of a department, which has a substantial degree of independence in the department's internal organization.

"The Administrative Procedure Act, enacted in 1946 and last amended in 1976, governs virtually every aspect of federal administrative law . . . ." In comparison to their earlier counterparts, modern agencies are much larger, have a considerably greater impact on society, are much more responsive to public needs, and have a far greater variety of administrative duties. There is considerable criticism of this modern process. These criticisms remain focused on the combination of roles administrative agencies perform. Most scrutinized is the agencies' all encompassing role of lawmaking, combined with executive and adjudicative functions. Critics argue there is a lack of effective means insuring lawful operation in the public interest.

As one author states, the units of government assume a diversity of forms. "Four are of principal importance: the cabinet department, the bureau or administration within a department, the independent agency within the executive branch; and the independent regulatory commission." The Executive Department of Health and Hu-

24. 1 STEIN ET AL., supra note 7, § 1.01[1], at 1-4.
25. A more common example would be a bureau office.
26. 1 STEIN ET AL., supra note 7, § 1.01[1], at 1-5.
27. 5 U.S.C. § 551 (1988). "The President's Committee on Administrative Management was created by President Roosevelt on March 20, 1936." See generally 1 STEIN ET AL., supra note 7, § 1.01[4], at 1-32. "It was created to study administrative management in the Federal Government, and it submitted recommendations covering a broad range of topics." 1 id. at 1-32 to 1-33. "The [r]eport found that agencies constituted 'a headless "fourth branch" of government that was "irresponsible" and possessed "uncoordinated powers.'" 1 id. at 1-33. The main criticism was that there was no separation of executive and judicial functions within an agency. Hence after much debate, the Administrative Procedure Act was enacted containing minimal procedural standards for the conduct of regulatory administration. 1 id.
28. 1 STEIN ET AL., supra note 7, § 1.01[1], at 1-6.
29. 1 id. § 1.01[2], at 1-10.
30. For a discussion of the justifications and criticisms of the current administrative process, see 1 id. at 1-12 to 1-19.
31. 1 id. at 1-11.
32. STRAUSS, supra note 14, at 86.
33. Id. Other possibilities, not possessing significant regulatory authority, include corporation-like forms responsible for providing services to the public like distribution of electric
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man Services contains the regulatory agency of the Food and Drug Administration. The common features of these agencies are:

(1) they are all creatures of statute, rather than the Constitution or presidential specification;34 (2) their political leadership, composed of persons subject to presidential appointment, is thin in relationship to the size of the agency as a whole; (3) they all fall under the same set of statutes for the internal management of government with limited exceptions; and (4) all reflect the same principles of internal organization.35

Finally, their general procedures, structures, and performance are uniformly provided for by the Administrative Procedure Act.36

The term "administrative agencies" encompasses all units of the federal government established by statute, executive order,37 presidential reorganization plan,38 or departmental order for purposes of formulating policy,39 rendering advice, or regulating specific conduct.40 If an administrative agency is not established statutorily, then an agency may be created independently without being placed in a particular branch.41 Although an agency may be termed "independent," it is still subject to control by the legislative, executive, and judicial branches.42

Congress enacts enabling legislation under which agencies are created43 and function, and it appropriates funds under which the agencies operate.44 The appointment of administrative officials is

power, postal service and railroad service. Id. at 86 n.118.

34. But see infra note 38 and accompanying text.
35. STRAUSS, supra note 14, at 86.
37. Although certain agencies are authorized by statute, they actually are created or activated by executive order. 1 STEIN ET AL., supra note 7, § 4.01, at 4-5 n.5.
38. A reorganization plan is promulgated by the President and it has the force and effect of law unless either house of Congress declines by resolution to accept it. 1 id. at 4-5 n.6.
39. The National Science Foundation, established by the National Science Foundation Act of 1950, 42 U.S.C. §§ 1861-1875 (1988), is an example of a policy-making agency. 1 STEIN ET AL., supra note 7, § 4.01, at 4-5 n.8.
40. 1 STEIN ET AL., supra note 7, § 4.01, at 4-5 n.10. There are regulatory agencies situated within the eleven Executive Departments. See 5 U.S.C. § 101 (1988) (identifying the eleven executive departments).
41. 1 STEIN ET AL., supra note 7, § 4.01, at 4-8.
42. 1 id. at 4-9.
43. One example of an enabling act is the Controlled Substances Act which authorizes the Drug Enforcement Administration to conduct administrative inspections. 21 C.F.R. § 1316.01 (1992).
44. 1 STEIN ET AL., supra note 7, § 4.01, at 4-9.
done by the President, and the courts exercise the power of judicial review over agency actions.\textsuperscript{45}

The internal organization of the Executive Department is varied and complex, and it is designed so each agency has a particular responsibility.\textsuperscript{46} For clarification of terminology, these agencies may be called administrations, offices, bureaus or services.\textsuperscript{47} Regardless of the language used, each term generally refers to the same administrative action. The actions of the department heads are binding upon the government and third parties if there is no abuse of authority.\textsuperscript{48}

III. ADMINISTRATIVE INSPECTIONS IN THE SUPREME COURT

Although the concept of administrative inspections of both commercial and residential premises is novel, the relationship between inspections and the Fourth Amendment's protection against unreasonable searches and seizures is a relatively recent development. The Supreme Court decided that residential inspections must comply with the warrant provision of the Fourth Amendment.\textsuperscript{49} Since this decision, the Court "has emphasized the exceptions to, rather than the strictures of, the warrant requirement" in the commercial inspection context.\textsuperscript{50}

A. The Development of the Camara and See Rules

In 1959, the Supreme Court issued its first decision regarding a warrantless administrative search in \textit{Frank v. Maryland}.\textsuperscript{51} In a five-to-four decision affirming the appellant's conviction and imposition of a fine\textsuperscript{52} for resisting a warrantless inspection of his house by a

\textsuperscript{45} 1 \textit{id.} The issue of independence regarding the three branches of government and administrative agencies is a matter of degree. 1 \textit{id.}

\textsuperscript{46} 1 \textit{id.} § 4.02[3], at 4-18.

\textsuperscript{47} 1 \textit{id.}

\textsuperscript{48} 1 \textit{id.} § 4.02[4], at 4-22 to 4-23.

\textsuperscript{49} Camara v. Municipal Court, 387 U.S. 523 (1967).

\textsuperscript{50} Mark A. Rothstein & Laura F. Rothstein, Administrative Searches and Seizures: What Happened to Camara and See?, 50 WASH. L. REV. 341 (1975).

\textsuperscript{51} 359 U.S. 360 (1959). A health inspector seeking the source of a rat infestation discovered evidence in the rear of appellant's home and requested appellant's permission to inspect his basement in the daytime. \textit{id}. at 361. The appellant refused to admit the inspector. \textit{id}. The inspector returned the following afternoon with two police officers, but again without a search warrant. \textit{id.}

\textsuperscript{52} The Baltimore City Code provided the following:

Whenever the Commissioner of Health shall have cause to suspect that a nui-
health inspector, the Court held there was no due process violation.\textsuperscript{53} Specifically, the Court reasoned there was no privacy intrusion, and stated:

\begin{quote}
[N]ot only does the inspection touch at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion, but it is hedged about with safeguards designed to make the least possible demand on the individual occupant, and to cause only the slightest restriction on his claim of privacy.\textsuperscript{54}
\end{quote}

The \textit{Frank} Court based its decision on three factors: (1) history; (2) necessity; and (3) the level of intrusiveness.\textsuperscript{55} Justice Holmes, after a historical analysis stemming back to the 1700s,\textsuperscript{56} stated: "[I]f a thing has been practised for two hundred years . . . it will need a strong case for the Fourteenth Amendment to affect it . . . ."\textsuperscript{57}

In 1967, however, that strong case did come before the Court. Justice White, writing for the majority, overruled the \textit{Frank} decision in \textit{Camara v. Municipal Court}.\textsuperscript{58} The composition of the Supreme Court changed, and the Court's two new members, by siding with the four \textit{Frank} dissenters, were able to overrule \textit{Frank} by a six-to-three majority.\textsuperscript{59} The \textit{Camara} Court overruled the \textit{Frank} decision to
the extent that *Frank* "sanctioned such warrantless inspections." Justice White based his opinion on two essential grounds. First, he argued that the *Frank* decision is factually distinguishable from the *Camara* case. Secondly, he reasoned that the Court viewed the *Frank* decision as "carving out an additional exception to the rule that warrantless searches are unreasonable under the Fourth Amendment."

The *Camara* Court observed that "one governing principle, justified by history and current experience, [which] has consistently been followed is: 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." The Court explained, "the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." Justice White reasoned that the bulk of Fourth Amendment cases differed from *Frank*. The Court, however, did not agree that these inspection cases are merely "peripheral" and do in fact jeopardize "self protection" interests.

The appellee maintained that a magistrate must issue a "rubber stamp" warrant if there is no review of the policy of the specific administrative inspection. Consequently, if a magistrate does not

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by becoming the majority in *Camara* and *See.*" *Id.* at 344 n.18.

60. *Camara* v. Municipal Court, 387 U.S. 523, 528 (1967). Regarding the extent of the *Camara* warrant requirement, the Court emphasized that its holding was not "intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations." 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE: INSPECTIONS AND REGULATORY SEARCHES § 3.9, at 320 (1984).

61. *Camara*, 387 U.S. at 529. In the *Frank* case, the Baltimore ordinance required that the health inspector "have cause to suspect that a nuisance exists in any house, cellar or enclosure" before demand for entry could be made without a warrant . . . ." *Camara*, 387 U.S. at 529 n.4 (citing Eaton v. Price, 364 U.S. 263, 264, 265 n.2.). This requirement was clearly met in *Frank* since the inspector observed the violation outside of the appellant's residence. *Id.* "[T]he San Francisco Housing Code has no such 'cause' requirement . . . ." *Id.*

62. *Id.* at 529.
63. *Id.* at 528-29.
65. The Court was referring to *Camara* v. Municipal Court, 387 U.S. 523 (1967), and *See* v. City of Seattle, 387 U.S. 541 (1967).
67. *Id.* at 531.
68. *Id.* at 532.
review the probability of an administrative health and safety violation, there is no protection afforded to a property owner. To support this argument, the appellee pointed out that inspections of a municipal area are based upon the legislature's assessment of factors such as the property's age and condition. The Court viewed broad statutory safeguards as no substitute for individualized review, especially when there is a risk of criminal sanctions if entry is refused.

The appellant, on the other hand, argued that individual privacy should have priority over the public interest when administrative inspections are conducted. The Court used this argument as a springboard to dive into the balancing test used to determine reasonableness in this pool of confusion. This test balances the need to search against the breadth of the search's intrusion. The factors used to support the reasonableness and permissibility of area code-enforcement inspections were: (1) whether such programs have a long history of judicial and public acceptance; (2) whether the public interest demands that all dangerous conditions be prevented or abated; and (3) since the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, whether an inspection involved a relatively limited invasion of the urban citizens' privacy.

In the Court's summation of their holding, Justice White stated that "[b]ecause of the nature of the municipal programs under consideration, however, these [rulings] must be the beginning, not the

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69. Id.
70. Id.
71. Id. at 533.
72. Id. at 536.
73. Id. at 534. The Camara balancing test was later used in Terry v. Ohio to permit brief seizures on the street, for investigative purposes, upon evidence less than that required for a full-fledged arrest. Terry v. Ohio, 392 U.S. 1 (1968).
74. The Court specifically ruled that area code-enforcement inspections are prima facie reasonable. Rothstein & Rothstein, supra note 50, at 346.
75. An area code-enforcement inspection is a routine, periodic inspection of structures of a geographic area to ensure that they meet safety, sanitation or other standards. Id. at 346 n.31.
76. Camara, 387 U.S. at 537. Two conclusions as to the meaning of this factor are: (1) probable cause may be demonstrated by a lesser quantum of evidence when the objective is not prosecution; or (2) this lesser quantum is needed when the search is less intrusive than one conducted pursuant to a criminal investigation. See Wayne R. LaFave, Administrative Searches and the Fourth Amendment: The Camara and See Cases, 1967 SUP. CT. REV. 1, 13-20.
end, of our inquiry.” The *Camara* Court clearly recognized the unique character of these inspections as well as the competing interest of adhering to the letter of the Fourth Amendment. An accommodation between public need and individual rights is essential. In an effort to achieve this accommodation, the Court ruled that reasonableness would be the controlling standard.

The *Camara* Court assumed "it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied . . . ." Legislative and administrative standards cannot determine probable cause. The Fourth Amendment has been held to require that, upon the issuance of a criminal search warrant, probable cause must be determined by a detached and neutral magistrate.

On the same day *Camara* was decided, Justice White also delivered the Supreme Court opinion in *See v. City of Seattle.* The *See* case was a commercial inspection, as distinguished from the residential inspection in *Camara.* In *See,* the appellant was convicted and given a suspended fine for refusing to allow a representative from the City of Seattle Fire Department to make a warrantless inspection of his locked commercial warehouse. The Court emphasized the need for effective investigatory techniques in relation to the growth of governmental regulation of businesses. The Court concluded, after a brief discussion of the limitations on administrative action, that the subpoena cases provide strong evidence that it is untenable for Fourth Amendment protections not to apply to an actual search of a commercial premise. Applying the principles set forth in *Camara,* Justice White, writing for the majority, reversed the appellant’s conviction.

The *See* decision, similar to the *Camara* decision, lacked preci-

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77. *Camara*, 387 U.S. at 534 (emphasis added).
78. Id.
79. Id. at 535.
80. Id. at 538.
82. 387 U.S. 541 (1967).
83. Id. at 542.
84. Id. The court imposed a $100.00 fine. Id.
85. Id.
86. Id. at 543.
87. Id. at 544-45.
88. Id. at 542.
sion. The Court concluded that "administrative 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." The Court implied that the only two exceptions to the warrant requirement were (1) consent and (2) if the premise is open to the public. In the same breath, however, Justice White stated that the Court is not implying "that business premises may not reasonably be inspected in many more situations than private homes."

The United States Supreme Court may have anticipated that the rules established in *Camara* and *See*, which covered both residential and commercial contexts, would have ended the inquiry regarding the scope of administrative inspections. Unfortunately, the Supreme Court was mistaken. In reality, the Court inadvertently created much leeway regarding which situations would constitute a reasonable warrantless inspection. As the later commercial inspection cases illustrate, the Court has been forced to create many exceptions to the *Camara* rule.

"As a rule, when an administrative agency seeks to inspect businesses or private premises for purposes of enforcing its regulatory powers (such as enforcement of health and safety codes), a search warrant . . . is required."

Warrantless inspections are permitted when:

1. An emergency condition exists.
2. The site of inspection is open to the public or the condition is apparent to public view.
3. The inspection is conducted under a licensing program pursuant to which Congress has deemed a search reasonable without a warrant.

These three exceptions have clouded the parameters of what defines a constitutional search.

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89. *Id.* at 545.
90. *Id.* at 546.
91. Since the Supreme Court's decision in *Camara* in 1967, many exceptions have been created to undercut the rule that warrantless administrative searches are unreasonable and violate the Fourth Amendment. See *supra* note 9 for the exceptions to the *Camara* rule.
92. 4 STEIN ET AL., *supra* note 7, § 29.04[2], at 29-25.
93. 4 *id.* at 29-26 to 29-27.
B. Creating the Exceptions: The Pervasively Regulated Industry

In 1970, the Supreme Court cast some doubt on the Camara and See rule, specifically that the warrant requirement of the Fourth Amendment was applicable to administrative inspections. In Colonnade Catering Corp. v. United States,94 the Court enunciated the licensing exception. The Court held that warrantless inspections, pursuant to licensing programs, were reasonable under the Fourth Amendment.95

In Colonnade Catering Corp., a retail liquor dealer resisted a warrantless search of his locked storeroom by Internal Revenue Service (IRS) agents.96 After entry was refused, IRS agents broke the lock and forcibly entered.97 Consequently, the petitioner brought suit to obtain the return of seized liquor and to suppress it as evidence.98

The Court framed the issue as: “whether the imposition of a fine for refusal to permit entry . . . is, under this statutory scheme[,] the exclusive sanction absent a warrant to break and enter.”99 Again, the Court utilized the administrative standards to determine reasonableness.100 Although the Camara Court overruled Frank v. Maryland,101 the Court left undisturbed the dictum in Frank regarding the propriety of an imposition of a fine when an inspection was refused.102 Therefore, the Court in Colonnade Catering Corp. viewed the issue in terms of whether the dictum in Frank was the controlling principle to be applied in the case.103 The Court never addressed whether the warrantless administrative inspection violated the licensee’s Fourth Amendment rights. Instead, the Court created an exception.

In Colonnade Catering Corp., the government argued “the long history of the special treatment afforded inspection laws dealing with the liquor industry provided the basis for the majority’s opinion that
See's rule was not applicable." The Court accepted the government's argument, thereby creating the licensing exception to the rule in Camara and See. Although the Court attempted to narrow this exception, it expanded the scope by noting that in See it reserved decision regarding the "licensing programs" by explaining how these problems can be dealt with "on a case-by-case basis under the general Fourth Amendment standard of reasonableness." After recognizing Congress's authority to determine inspection powers, the Court deferred to that branch's power to further select the standard which made the refusal of entry by an authorized agent an offense.

Justice Douglas, writing the majority opinion, focused on the fact that the federal agent used force to enter the petitioner's establishment, not whether the business owner's Fourth Amendment rights were solely violated by the warrantless entry. The Court reconciled the congressional authority under the Internal Revenue statute and the forced entry by holding that the congressional standard does not authorize forcible warrantless entries. Instead, it provided a "remedy" by making it an offense for the licensee under the respective statute to refuse admission of an inspector.

The next exception to the Camara and See rule was announced in United States v. Biswell. The Biswell exception provides for warrantless inspections of licensed firearms dealers. A Federal Treasury agent and a city policeman requested entry into a pawn
shop operator's locked storeroom. The investigator sought entry under section 923(g) of The Gun Control Act and claimed the Act authorized such inspections. The agent found two unregistered, sawed-off rifles under the pawn shop operator's control. The pawn shop operator was indicted and convicted for dealing in firearms while not having paid the required tax.

Justice White, writing for the Court, analogized the federal regulation of firearms to the government’s control of the liquor industry. Although firearms regulation is not as "deeply rooted" in history as the liquor industry, Justice White pointed out that "close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime . . . ."

The Court concluded that the lawfulness of such a search does not depend on the owner’s consent, but on the authority of a valid statute. Therefore, since the statute provides the safeguards for an inspection to be limited in time, place, and scope, the discretion of the inspector will be curtailed. Consequently, the owner’s privacy rights against unreasonable intrusions will be protected. This type of administrative inspection is, therefore, interpreted as being reasonable and not violative of the Fourth Amendment.

The Biswell Court, however, did imply that "unannounced, even frequent, inspections are essential" if the inspection is to be effective and serve as a credible deterrent. The Court continued to tilt the balancing test in favor of the inspection program by stating: "the

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114. Id. at 312.
117. Id.
118. Id. at 312-13.
119. Id. at 315. For a discussion of Colonnade Catering Corp. v. United States, see supra notes 95-111 and accompanying text.
120. Biswell, 406 U.S. at 315.
121. After the federal agent requested entry, the pawn shop owner asked if the agent had a search warrant. Id. at 312. The agent said he did not, but claimed that § 923(g) of the Gun Control Act authorized the inspection. Id. The agent provided the owner with a copy of the relevant section of the Act and the owner replied, "Well that's what it says so I guess it's okay." Id. at 312.
122. Id. at 315.
123. Id.
124. Id. at 316.
125. Id. at 316-17.
126. Id. at 316.
prerequisite of a warrant could easily frustrate inspection.” 127 It was at this juncture—the development of the validity and scope of administrative inspections, coupled with exceptions to the warrant requirement—that the Court began to seriously undermine the fundamental rule established in the Camara and See cases. 128

C. The OSHA Exception

A little more than a decade after Camara and See, Justice White had another opportunity to address an administrative inspection of a commercial premise in Marshall v. Barlow’s, Inc. 129 The issue in Marshall was whether a warrantless inspection, pursuant to the Occupational Safety and Health Act of 1970 130 (OSHA), was constitutional. 131

"An OSHA inspector entered the customer service area of Barlow’s, Inc., an electrical and plumbing installation business.” 132 The business owner refused to allow the OSHA inspector to enter the non-public area of the business. 133 Subsequently, a district court issued an order compelling the owner to admit the inspector; the owner again refused and sought injunctive relief against the warrantless inspection. 134 A three-judge court was convened and concluded that, under Camara and See, the Fourth Amendment required a warrant for the search. 135 Furthermore, the court held that the statutory authorization in OSHA providing for a warrantless inspection was unconstitutional. 136 The United States Supreme Court affirmed. 137

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127. Id.
130. Section 8(a) of OSHA empowers the agents of the Secretary of Labor to search the work area of any employment facility within the Act’s jurisdiction. 29 U.S.C. § 657(a) (1970).
132. Id. at 309.
133. Id. at 310.
134. Id. “A regulation of the Secretary, 29 C.F.R. § 1903.4 (1977), requires an inspector to seek compulsory process if an employer refuses a requested search.” Marshall, 436 U.S. at 310 n.3.
137. Id. at 325. "Justice Brennan took no part in the consideration or decision of the
The government argued and analogized the present OSHA inspection to the Colonnade-Biswell exceptions for “pervasively regulated” industries. The Court surprisingly distinguished Colonnade and Biswell by qualifying these cases as responses to “unique circumstances.” The Court limited Colonnade and Biswell to their facts and stated that certain industries have a history of government regulation; therefore, no reasonable expectation of privacy could exist for a proprietor. Liquor and firearms, for example, are industries of this type. Conversely, engagement in the electrical and plumbing industries are not deemed as regulated or licensed businesses.

The Court expressly based its holding on the inspection provision of OSHA. Since some statutes “apply only to a single industry, ... regulations might already be so pervasive that a Colonnade-Biswell exception to the warrant requirement could apply.” The Marshall Court continued to adhere to the Camara balancing test by further noting that the reasonableness of a warrantless search is determined by balancing the specific enforcement needs against the privacy intrusion of each statute.

By stating the existence of a statute inherently provides Fourth Amendment protection against unwarranted intrusions, the Marshall Court contradicted itself. The Court noted, according to the Colonnade-Biswell exception, “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.” With the same stroke of the pen, the Court justified the Colonnade-Biswell exception by explaining that when regulatory inspections further urgent federal interests, the war-
rantless inspection will be valid when specifically authorized by statute.\textsuperscript{147} Furthermore, Congress has broad authority to establish the standards of reasonableness for searches and seizures.\textsuperscript{148} Thus, the broad discretion given to governmental agents by the \textit{Marshall} court if a statute exists contradicts the \textit{Colonade-Biswell} assertion that the agents' discretion is limited by statute. One possible explanation would be that an administrative procedure will be reasonable so long as there has been an extensive history of government regulation in the specific industry. If an industry has not been categorized as extensively regulated, then an inspection authorized by a regulatory statute must adhere to the Warrant Clause of the Fourth Amendment.\textsuperscript{149}

D. The Mine Safety Exception

In 1981, \textit{Donovan v. Dewey}\textsuperscript{150} came before the Court and presented the issue of whether section 103(a) of the Federal Mine Safety and Health Act of 1977\textsuperscript{151} violated the Fourth Amendment by authorizing warrantless inspections of underground and surface mines.\textsuperscript{152} A federal mine inspector attempted to inspect quarries owned by the appellee.\textsuperscript{153} There were twenty-five safety and health violations previously discovered in the appellee's quarries.\textsuperscript{154} The inspector sought entry to determine whether the violations had been subsequently corrected.\textsuperscript{155} During the inspection, the appellee interrupted and requested the inspector to obtain a search warrant before completing the inspection.\textsuperscript{156} The inspector issued a citation,\textsuperscript{157} and the Secretary filed a civil action in district court seeking to enjoin the appellee from denying the warrantless inspection of the quarry facility.\textsuperscript{158}

\textsuperscript{149} \textit{Marshall}, 436 U.S. at 323-24.
\textsuperscript{150} 452 U.S. 594 (1981).
\textsuperscript{152} \textit{Donovan}, 452 U.S. at 596.
\textsuperscript{153} \textit{Id.} at 597.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} The Act provides that the Secretary shall issue citations and propose civil penalties for violations of the Act. 30 U.S.C. §§ 814(a), 820(a) (Supp. III 1976). The Secretary's regulations call for issuance of a citation and the assessment of a civil penalty for denial of entry. 30 C.F.R. § 100.4 (1980).
\textsuperscript{158} \textit{Donovan}, 452 U.S. at 597.
The district court found the respective provision of the statute violative of the Fourth Amendment’s prohibition of warrantless searches.\(^\text{159}\)

The Supreme Court reversed.\(^\text{160}\) The majority held that the statute’s inspection provision was a constitutionally adequate substitute for a traditional warrant.\(^\text{161}\) The Court once again deferred to legislative determination of a warrant requirement: “[W]hen Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive[,]” the business person is on notice that their property will be periodically inspected.\(^\text{162}\)

Justice Marshall distinguished the statute at issue from the statute in *Marshall*\(^\text{163}\) by stating that the Mine Safety and Health Act “applies to industrial activity with a notorious history of serious accidents and unhealthful working conditions.”\(^\text{164}\) Further justification of the constitutionality of the inspection was based on the fact that *all* mines would be inspected; therefore, the frequency of inspections are not left in the hands of government officers.\(^\text{165}\) Further support for the opinion was founded upon the statute’s provision, which contained a mechanism to address a business owner’s privacy concerns.\(^\text{166}\)

### E. The Vehicle Dismantling Exception

In 1992, after all of the constitutional groundwork was set, the New York Court of Appeals continued to hold that the state’s Vehicle and Traffic Law section 415-a5(a) violated the privacy right encompassed in the Fourth Amendment and the Constitution of New York. In *People v. Keta*,\(^\text{167}\) the defendant moved to suppress physical evidence which had been seized from his vehicle dismantling

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\(^{159}\) *Id.*

\(^{160}\) *Id.* at 603.

\(^{161}\) *Id.*

\(^{162}\) *Id.* at 600.

\(^{163}\) The statute at issue in *Marshall* was OSHA. See *supra* notes 129-47 and accompanying text for discussion of *Marshall*.

\(^{164}\) *Donovan*, 452 U.S. at 603.

\(^{165}\) *Id.* at 604.

\(^{166}\) *Id.* The Act prohibiting forcible entries instead requires the Secretary to file a civil action to obtain an injunction against future refusals thereby addressing a mine owner’s privacy interests. 30 U.S.C. § 818(a) (1988).

business. In *New York v. Burger*, the United States Supreme Court overruled the New York Court of Appeals on this same issue. It was the *Burger* case in which the Supreme Court finally spoke on the constitutionality of warrantless administrative inspections.

One of the issues presented in *Burger* was whether the Court of Appeals correctly held that an otherwise proper administrative inspection is unconstitutional because the ultimate purpose of the regulatory statute, the deterrence of criminal behavior, is the same as that of penal laws. In *Burger*, the Court explained that punishment by criminal sanctions under the guise of an administrative inspection was proper, and concluded "that a State can address a major social problem both by way of an administrative scheme and through penal sanctions." Although both may have the same purpose, it is of little significance. The Supreme Court held that the administrative scheme of deterring criminal behavior was an adequate substitute for a warrant since it contained the limitations of time, place, and scope, which place the appropriate restraint on the discretion of the inspecting officers.

Despite this rather explicit ruling by the Supreme Court, the New York Court of Appeals continues to hold today that Vehicle and Traffic Law section 415-a5(a) violates the Fourth Amendment’s prescription against unreasonable searches and seizures, as well as Article I, Section 12 of the New York Constitution.

In deciding *People v. Keta*, the New York Court of Appeals explained that under well-settled principles of federalism, they were "not bound by decisions of the Supreme Court construing similar provisions of the Federal Constitution." New York courts have on many occasions interpreted Article I, Section 12 of the New York Constitution independently of its federal counterpart to assure protection from unreasonable government intrusion against New York citi-

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168. Id.
170. The statute in *Burger* was also the New York Vehicle and Traffic Law § 415-a5(a) (McKinney 1986). *Burger*, 482 U.S. at 694.
171. Id. at 693.
172. Id. at 712.
173. Id. at 711.
175. Id. at 1341. The Court of Appeals viewed its holding as providing greater protection to its citizens. Id. at 1342.
The courts have agreed that state and federal uniformity is an important goal, but it does not supersede the need for "a predictable, structured analysis." The Court of Appeals construed the Vehicle and Traffic Law statute as authorizing searches to discover evidence of criminality, not as carrying out an administrative scheme. "The asserted 'administrative scheme' here [is], in reality, designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property." The Supreme Court negated this viewpoint in Burger claiming the administrative schemes and penal laws may have the same ultimate purpose of correcting a social problem, as long as they prescribe different methods of addressing the problem.

The Court of Appeals stated the statute in question failed to "define rules to guarantee the 'certainty and regularity of . . . application' necessary to provide a 'constitutionally adequate substitute for a warrant.'" There are no guidelines as to the number of times an inspection may be made and what businesses are targeted.

Finally, the New York Court of Appeals disagreed with the Supreme Court's view that the statute regarding the vehicle dismantling business is based on a substantial government interest. By pointing out that the government's interest in law enforcement is by definition "substantial," the lower court refused to depart from Article I, Section 12 of the New York Constitution which contains the general prohibition against warrantless, suspicionless searches. In fact, the court analogized the danger of automobile theft to the recent epidemic of crack cocaine use and, thus, concluded that crime reflects changes in the social landscape and the responsibility of the judiciary is not to respond to these temporary crises by changing the law.

As this chronological analysis illustrates, the issue regarding administrative inspections of residential premises is well-settled. The Camara rule has been left untouched. However, dictum within

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177. Keta, 593 N.E.2d at 1342 (quoting People v. Johnson, 488 N.E.2d 439 (N.Y. 1985)).
178. Id. at 1341.
182. Id.
183. Id. at 1344-45.
Camara and the decision in See, along with subsequent cases, have sparked litigation from 1967 to the present time. The following statutory analysis will focus solely on the current commercial inspection dilemma.

IV. COMPARISON OF FEDERAL AND STATE AUTHORITY FOR ADMINISTRATIVE INSPECTIONS

An administrative agency may be authorized to conduct an inspection pursuant to federal or state law. The following statutory analysis will focus on federal and state provisions authorizing the designated official to conduct an administrative inspection of a pharmacy.

A. Federal Authority

The Food and Drug Act\(^{184}\) contains the Comprehensive Drug Abuse Prevention and Control Act of 1970.\(^{185}\) Section 880, titled Administrative Inspections and Warrants, is commonly known as the "Controlled Substances Act." This act provides the statutorily prescribed standard of probable cause to support the issuance of an administrative warrant.\(^{186}\) The act defines probable cause as:

[A] valid public interest in the effective enforcement of this subchapter or regulations thereunder sufficient to justify administrative inspections of the area, premises, building, or conveyance, or contents thereof, in the circumstances specified in the application for the warrant.\(^{187}\)

The Camara Court held that, in order to issue a warrant to inspect, probable cause must exist to satisfy reasonable legislative or administrative standards.\(^{188}\) The less stringent requirement of proba-

\(^{185}\) Id.
\(^{187}\) Id.; see supra note 2 to compare the probable cause standard in the Fourth Amendment with the probable cause standard provided in the Controlled Substances Act.
\(^{188}\) Camara v. Municipal Court, 387 U.S. 523, 538 (1967). Proponents of the balancing test have argued to extend the test by balancing the degree of intrusion and the law enforcement need in the particular case. Barrett, Personal Rights, Property Rights and the Fourth Amendment, 1960 SUP. CT. REV. 46, 63. Others have warned that an expansion "converts the [F]ourth [A]mendment into one immense Rorschach blot." Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 393 (1974).
ble cause for an administrative warrant is supported by the notion of reasonableness.\textsuperscript{189} The warrant provisions of the Controlled Substances Act were inserted in response to \textit{Camara} and \textit{See}.
\textsuperscript{190}

The Controlled Substances Act defines a "controlled premises" as: "places, including factories, warehouses, or other establishments . . . where persons registered . . . may lawfully hold, manufacture, or distribute, dispense, administer, or otherwise dispose of controlled substances."\textsuperscript{191} A pharmacy clearly falls under this definition.\textsuperscript{192} The scope of an administrative inspection extends authority to inspectors designated by the attorney general to enter controlled premises to conduct a search.\textsuperscript{193} However, the statute also provides for exceptions to the warrant requirement.\textsuperscript{194} Some circumstances where a warrant for an inspection and seizure of property is not required are: when the person in charge of the controlled premise consents; when there is imminent danger to health or safety; when an item is mobile; when exceptional or emergency situations exist;\textsuperscript{195} and when a warrant is not constitutionally required.

Much of the case law dealing with administrative inspection warrants focuses on the less demanding probable cause test. The Warrant Clause of the Fourth Amendment\textsuperscript{196} provides that a valid search warrant may be issued only upon a showing of probable cause.\textsuperscript{197} In the instances where a search may be conducted without first obtaining a search warrant, the second provision of the Fourth Amendment governs by declaring the right of the people to be secure "against

\begin{itemize}
\item \textsuperscript{189} \textit{Camara}, 387 U.S. at 535.
\item \textsuperscript{190} Act of 1970, Pub. L. No. 91-513, 1970 U.S.C.C.A.N. (84 Stat.) 4566, 4623. The legislative history regarding 21 U.S.C. \textsection\ 880 is as follows: "In deference to [the \textit{Camara} and \textit{See}] decisions a provision for issuance of judicial warrants for administrative inspections has been inserted in the bill . . . ." \textit{Id}.
\item \textsuperscript{191} 21 U.S.C. \textsection\ 880(a)(2) (1988). For the statutory requirement for those who manufacture, distribute, or dispense any controlled substance to register with the federal government. \textit{See} 21 U.S.C. \textsection\s 822-23 (1988).
\item \textsuperscript{192} \textit{See supra} notes 185-88 and infra notes 190-202.
\item \textsuperscript{193} 21 U.S.C. \textsection\ 880(b)(2) (1988).
\item \textsuperscript{194} 21 U.S.C. \textsection\ 880(c) (1988).
\item \textsuperscript{195} \textit{See Michigan v. Tyler}, 436 U.S. 499, 509 (1978) (burning building presents emergency circumstance sufficient to render a warrantless entry reasonable, and, for a reasonable time thereafter, fire officials may seize evidence of arson in plain view).
\item \textsuperscript{196} \textit{See supra} note 2 for precise text of the Fourth Amendment.
\item \textsuperscript{197} U.S. CONST. amend. IV. The traditional standard of probable cause is "the items sought are in fact seizable by virtue of being connected with criminal activity and that the items will be found in the place to be searched." 1 \textsc{LaFave & Israel}, \textit{supra} note 60, \textsection\ 3.3, at 184-85 n.10.
\end{itemize}
unreasonable searches and seizures." The Supreme Court strongly prefers the use of search warrants. It is now clear, however, that administrative inspection procedures are governed by a lesser standard of probable cause.

Generally, it is assumed that the problems addressed by administrative inspections could not be adequately dealt with under the traditional Fourth Amendment guidelines. This assumption is based on the notion that magistrates will "rubber stamp" warrants because of the high volume of requests. Consequently, the validity of inspections must be judged by different standards. Although the recurring issue is whether the administrative search violated the Constitution, it is becoming increasingly apparent that the inquiry focuses on the achievement of governmental enforcement of administrative standards and procedures.

B. The Code of Federal Regulations

The Code of Federal Regulations (CFR) provides specific provisions for administrative functions, practices, and procedures for the administering authority of the Drug Enforcement Administration (DEA). The CFR is governed by the Controlled Substances Act. The procedures the DEA may implement to conduct an administrative inspection include: inspection, copying, verifying the correctness of records, conducting a physical inventory and collecting samples of all controlled substances. The probable cause definition refers the DEA to the identical provision of probable cause in the Controlled Substances Act. The additional guideline stating

198. U.S. CONST. amend. IV.
199. 1 LAFAVE & ISRAEL, supra note 60, § 3.3, at 185 n.14.
200. 1 id. at 186.
201. 1 id. § 3.9, at 315.
202. See supra notes 183-84 and accompanying text.
204. Id.
205. 21 C.F.R. § 1316.01 (1992).
206. 21 C.F.R. § 1316.03(a)-(d) (1992). There is a specific section regarding distribution records. See 21 C.F.R. § 1316.03(e) (1992). This provision enables the DEA to check records and information on distribution of controlled substances by the registrant as they relate to total drug distribution. Id. When examining a particular pharmacy's distribution records, the DEA agent should be concerned with whether "the distribution in controlled substances increased markedly in the past year, and if so, why." Id.
207. 21 C.F.R. § 1316.10 (1992). This section reads as follows: "If the judge or magistrate is satisfied that 'administrative probable cause,' as defined in section 510(d)(1) of the
that "[a]dministrative probable cause shall not mean criminal probable cause as defined by federal statute or case law,"\textsuperscript{208} directly responds to the \textit{Camara} holding that probable cause should be a "flexible standard of reasonableness."\textsuperscript{209} The federal counterpart of 21 U.S.C. § 880 does not mention this distinction between criminal and administrative probable cause.

The CFR sets forth the intent of the administration regarding the frequency of administrative inspections.\textsuperscript{210} This provision segregates the time frame intended for inspections according to the Schedule within which the controlled substance is listed.\textsuperscript{211} The Controlled Substances Act categorizes all controlled substances into one of five Schedules.\textsuperscript{212} Schedules I and II classify its members as a drug or other substance which has a high potential for abuse.\textsuperscript{213} A Schedule I classification also consists of the identifiers which illustrate that there is (1) "no currently accepted medical use"; and (2) "a lack of accepted safety for the use of the drug . . . ."\textsuperscript{214}

A Schedule II controlled substance has a currently accepted medical use, and the abuse of the drug may "lead to severe psychological or physical dependence."\textsuperscript{215} The controlled substances listed in Schedules III, IV, and V have a lesser potential for abuse than drugs listed in Schedules I and II. The remaining factors for categorizing controlled substances into Schedules III, IV, and V are that they all have accepted medical uses and result in moderate or limited physical and psychological dependence.\textsuperscript{216}

The DEA's intent is to inspect all manufacturers of controlled substances listed in Schedules I and II once a year,\textsuperscript{217} distributors listed in Schedule I once a year,\textsuperscript{218} and all distributors and manufacturers listed in Schedules III, IV and V once every three years.\textsuperscript{219}

\textsuperscript{208} Id.

\textsuperscript{209} Id.


\textsuperscript{211} 21 C.F.R. § 1316.13 (1992).

\textsuperscript{212} See infra notes 214-16 and accompanying text.


\textsuperscript{214} Id.

\textsuperscript{215} Id.

\textsuperscript{216} Id. For a complete listing of controlled substances in Schedules I through V, see 21 U.S.C. § 812 (1988).


\textsuperscript{218} Id.
years.\textsuperscript{219} Apparently the DEA has determined those controlled substances in Schedules I and II as the most eligible substances for abuse. The statutory scheme of the Controlled Substances Act is one of control through registration and recordkeeping by all those within the "legitimate distribution chain" and prohibition of transactions outside this chain.\textsuperscript{220} Undoubtedly, Congress's purpose is reasonable and creates a "valid public interest." The deterrence of drug trafficking and drug abuse are legitimate goals. The authority to regulate and supervise directly corresponds to the statutory limits of conducting a valid administrative inspection, thereby justifying a lesser showing of probable cause.

C. Massachusetts Authority

The authority for an administrative inspection in Massachusetts\textsuperscript{221} is an almost mirror-image statute of the Controlled Substances Act.\textsuperscript{222} The Massachusetts statute defines administrative probable cause as "a showing of a reasonable and valid public interest."\textsuperscript{223} There is, however, one grave distinction between the Massachusetts statute and the Controlled Substances Act. In Massachusetts, the statute authorizes an inspector to "use reasonable force and means to execute the warrant."\textsuperscript{224} There is no similar provision in the Controlled Substances Act.\textsuperscript{225}

A uniform provision of reasonableness located in the Controlled Substances Act,\textsuperscript{226} the Massachusetts statute,\textsuperscript{227} and the Code of Federal Regulations\textsuperscript{228} merits discussion. Each of the relative provisions pertains to the method of inspecting and the times at which the inspection may commence. A slight deviation among the statutes is

\begin{footnotes}
\footnote{219. Id.}
\footnote{221. MASS. GEN. L. ch. 94C, § 30 (1988).}
\footnote{222. 21 U.S.C. § 880 (1988).}
\footnote{223. MASS. GEN. L. ch. 94C, § 30(b) (1988).}
\footnote{224. MASS. GEN. L. ch. 94C, § 30(f) (1992).}
\footnote{225. On the other hand, the Code of Federal Regulations states that, if a registrant refuses to allow the execution of an administrative warrant or interferes with the inspection, continued interference will result in an arrest and the inspection shall continue. 21 C.F.R. § 1316.12 (1992). Under two statutory schemes, one on the state level and one on the federal level, a state agent can use force, while a federal agent is empowered to arrest a business owner. Compare MASS. GEN. L. ch. 94C, § 30(f) (1992) with 21 C.F.R. § 1316.12 (1992).
\footnote{227. MASS. GEN. L. ch. 94C, § 30(f)(3) (1992).}
\footnote{228. 21 C.F.R. §§ 1316.03(b), 1316.05, 1316.11 (1992).}
found within the Massachusetts provision. The Massachusetts statute does not lend any guidance regarding the time limitations of an administrative inspection. For example, the Controlled Substances Act and the CFR provide that a warrant shall be served, and an inspection conducted, during normal or regular business hours.\textsuperscript{229} The Massachusetts statute is more broad and only provides for an administrative inspection to be conducted in a reasonable manner and within reasonable limits.\textsuperscript{230}

The Supreme Court has held that as long as an inspection pursuant to a warrant is limited in time, place, and scope, the discretion of the agents conducting the inspection will be limited.\textsuperscript{231} Subsequently, the Court viewed a statute which provided for searches to be performed "at . . . reasonable times, within reasonable limits and in a reasonable manner"\textsuperscript{232} as allowing the inspectors "unbridled discretion."\textsuperscript{233} Comparing the three statutes in question, identical language is used to describe the limits of time, place, and scope. Although the states are free to provide greater protection to their citizens,\textsuperscript{234} Massachusetts has failed to offer protection equal to the safeguards offered by the federal statute.

V. JURISDICTIONAL INTERPRETATION AND APPLICATION

The following examination of how surrounding jurisdictions interpret the Controlled Substances Act will highlight the areas of controversy inherent within the present structure authorizing an administrative inspection of a commercial premise. The arguments stem from motions to suppress evidence obtained in violation of the Fourth Amendment. Although it appears that most jurisdictions agree on the validity of an inspection, there is a minority of jurisdictions that hold otherwise.

In \textit{United States v. Montrom},\textsuperscript{235} the allegation of suspicious activity of a doctor who practiced out of his home justified the issuance of an administrative search warrant. Through drug monitoring

\textsuperscript{229.} See 21 C.F.R. § 1316.11 (1988).
\textsuperscript{233.} Id.
\textsuperscript{234.} See \textit{supra} notes 164-80 and accompanying text.
activities, the Bureau of Narcotics and Dangerous Drugs discovered that Dr. Montrom ordered unusually high amounts of amphetamines and barbiturates, and obtained an administrative warrant. The underlying issue focused on the "controlled premises" definition in the Controlled Substances Act. The "controlled premise" issue was raised because the defendant practiced medicine out of his home. When the inspectors requested records and an inventory of drugs, the defendant replied they were "kept all over the house." As a result, the inspectors proceeded to search "all over the house." The search produced machine guns as well as the intended objects of the search.

The federal district court stated that the statutory language would be taken out of context if it was to be read broadly. The court, however, explained that if Congress was to list all of the types of locations to which the statute could be applied, "such a list would be to invite the disaster of an unforeseen omission." Therefore, the district court applied its own interpretation of the statutory language. When the controlled premise description is applied to a doctor, their principal place of practice is presumed to be the proper area for an inspection. Furthermore, a doctor is required to register, by address, their principal place of practice according to federal regulations. The district court concluded that when a warrant is issued pursuant to the registration listing, the Controlled Substances Act is being followed in letter and in spirit.

The United States Court of Appeals for the Ninth Circuit affirmed a district court decision in United States v. Goldfine, and found the defendant in violation of the Controlled Substances Act. In Goldfine, two brothers were pharmacists: one brother was registered with the Federal Drug Enforcement Administration to sell...
controlled substances, while the other brother was not registered.\textsuperscript{248} The violations of the Controlled Substances Act consisted of conspiracy to possess controlled substances with the intent to distribute, possession with the intent to distribute, and knowingly omitting information in records required to be kept.\textsuperscript{249}

The appellants contended that the administrative inspection was a search for evidence of criminality; thus, the traditional standards of probable cause were necessary to issue the warrant.\textsuperscript{250} The Ninth Circuit did not find this argument convincing. The inspection was proper because of the valid public interest in monitoring controlled substances; therefore, the lesser showing of probable cause was supported.\textsuperscript{251} The alleged facts set forth in the affidavit by the Compliance Investigator stated that the pharmacy was registered pursuant to federal requirements.\textsuperscript{252} In addition, the affidavit stated the pharmacy had not been previously inspected.\textsuperscript{253} The Ninth Circuit viewed these factors as establishing probable cause for an inspection.\textsuperscript{254}

Similarly, in \textit{United States v. Prendergast},\textsuperscript{255} the United States Court of Appeals for the Third Circuit held that because the appellant's pharmacy had never been inspected the issuance of an inspection warrant was justified\textsuperscript{256} The pharmacist contended that the administrative warrant was in aid of a criminal investigation, and "was a subterfuge in avoidance of the probable cause burden" supporting a traditional search warrant.\textsuperscript{257}

The Third Circuit was in accord with the Ninth Circuit's reasoning and conclusion that "[t]he administrative need for and the public interest in inspection continue to provide justification apart from the obtaining of evidence of crime."\textsuperscript{258} Courts have based the lesser showing of probable cause on a valid public interest, and in most cases, the defendant's motion to suppress will be denied with the affirmation of fines or criminal sanctions.

\begin{itemize}
\item \textsuperscript{248} Id. at 817.\textsuperscript{249} Id. \textsuperscript{250} Id. at 818-19.\textsuperscript{251} Id. at 819.\textsuperscript{252} Id. at 819 n.2.\textsuperscript{253} Id. \textsuperscript{254} Id. at 819.\textsuperscript{255} 585 F.2d 69 (3d Cir. 1978).\textsuperscript{256} Id. at 70.\textsuperscript{257} Id. \textsuperscript{258} Id. at 71 (quoting United States v. Goldfine, 538 F.2d. 815, 819 (1976)).
\end{itemize}
Holding in uniformity with the Third and Ninth Circuits, in *United States v. Schiffman*, the United States Court of Appeals for the Fifth Circuit affirmed a pharmacist's conviction. The defendant was convicted for conspiracy to possess and distribute controlled drugs, distribution of controlled drugs, and furnishing false information in records. The Fifth Circuit examined the facts stated in the warrant application to determine whether large purchases of controlled drugs by a registered retail pharmacy alone created a valid public interest. The *Schiffman* court did not inquire whether the information supplied by the inspecting officers supported the statutory requirement of probable cause. The facts contained in the warrant application were enough for a magistrate to issue an administrative search warrant. The court examined the warrant application and viewed the fact that the pharmacy "had not been previously inspected" as critical, thereby supporting the lesser standard of statutory probable cause.

After affirming the constitutionality of the probable cause provision, the court held the probable cause requirement was satisfied and affirmed the lower court's ruling. Justice Douglas's dissenting opinion in *Frank v. Maryland* proposed the possibility that "[t]he passage of a certain period [of time] without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant." Today, this possibility has become a reality.

The United States Court of Appeals for the Seventh Circuit ruled in a consistent fashion with its sister jurisdictions. In *In re Searches and Seizures Conducted on Oct. 2, and 3, 1980*, the Seventh Circuit held probable cause may be established if a pharmacy has never been inspected or the pharmacy has recently received an inor-

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259. 572 F.2d 1137 (5th Cir. 1978).
260. Id. at 1138.
261. Id.
262. Id. at 1140.
263. Id. at 1138.
264. Id.
265. Id. at 1140.
266. Id. at 1140-42.
267. Id. at 1142-43.
ordinately large supply of a controlled substance.\textsuperscript{270} The appellant claimed "the 'administrative' warrant . . . was merely a subterfuge and that the purpose behind . . . its execution was to gather evidence of criminality."\textsuperscript{271} The district court held there was probable cause to support the warrant and "it was irrelevant whether the DEA used the administrative search to obtain evidence for a criminal investigation."\textsuperscript{272}

The Seventh Circuit did not acknowledge the damaging statement made by the district court. Since the opinion of See,\textsuperscript{273} the Supreme Court has consistently denied any inference that an inspection conducted for regulatory purposes will be utilized in the criminal context. Some lower courts may view the potential of an inspection warrant acting as a pretext for a criminal search as irrelevant. The New York Court of Appeals,\textsuperscript{274} however, has seen through this facade and has held for the suppression of evidence if it is gathered under this pretext.\textsuperscript{275}

The United States Court of Appeals for the Sixth Circuit holds in the minority with the New York Court of Appeals. In \textit{United States v. Acklen},\textsuperscript{276} a DEA inspector obtained three inspection warrants at different intervals.\textsuperscript{277} During each one of the three searches, the inspector seized prescriptions suspecting that they were forged.\textsuperscript{278} The district court ruled that the primary purpose of the second and third inspections was to uncover criminal evidence.\textsuperscript{279} These allegations resulted in the district court granting the defendant's motion to suppress the evidence from these searches.\textsuperscript{280} Ruling in favor of the defendant, the court held that the DEA was required to obtain a criminal search warrant pursuant to Fourth Amendment requirements for the second and third inspections.\textsuperscript{281}

The Sixth Circuit analyzed this case under the "expectation of

\textsuperscript{270} Id. at 777.
\textsuperscript{271} Id. at 776 (quoting Brief of Movant at 1).
\textsuperscript{272} Id.
\textsuperscript{273} See supra notes 83-91 and accompanying text.
\textsuperscript{274} See supra notes 164-80 and accompanying text.
\textsuperscript{275} See supra notes 171-80 and accompanying text.
\textsuperscript{276} 690 F.2d 70 (6th Cir. 1982).
\textsuperscript{277} Id. at 71.
\textsuperscript{278} Id.
\textsuperscript{279} Id. at 72.
\textsuperscript{280} Id. at 70.
\textsuperscript{281} Id. at 72.
privacy" doctrine. The court analogized the pharmaceutical industry to the liquor, firearms, and mining industries. The Supreme Court ruled that each of these industries were classified as "pervasively regulated." Accordingly, since the Sixth Circuit classified the pharmaceutical industry as "pervasively regulated," registrants have a reduced expectation of privacy in the items kept in compliance with the Controlled Substances Act. Furthermore, the Sixth Circuit reasoned that, since these intrusions were regulatory in nature, "the fact that they were predicated upon overt criminal suspicion rather than on administrative necessity" did not affect the regulatory scheme.

The Supreme Judicial Court of Massachusetts confronted the administrative inspection warrant issue in a series of three decisions. Massachusetts' highest court attempted to define the proper application and scope of the Massachusetts statute authorizing inspections by designated officials. In each of the three cases, the court affirmed the defendant's motion to suppress. Although the Massachusetts statute offers less protection to the business owner when compared to the federal statute, the court apparently is not inclined to follow its legislature's relaxed threshold regarding warrant specificity.

In Commonwealth v. Accaputo, the defendant's pharmacy was inspected pursuant to an administrative warrant. The administering officials were six police officers and a special agent of the Board of Registration in Pharmacy. While conducting the inspection, a gun, a shopping bag containing drugs, drugs from the shelves in the pharmacy, and certain records were seized. Mr. Accaputo was indicted on thirty-six counts of unlawfully distributing and dispensing con-

283. Acklen, 690 F.2d at 75.
285. Acklen, 690 F.2d at 75.
286. Id. at 74. See New Jersey v. Rednor, 497 A.2d 544 (N.J. Super. 1985) (holding the Fourth Amendment did not bar inspection because pharmacist had no expectation of privacy due to the pervasive governmental control of the pharmaceutical industry).
289. Id.
290. Id. at 1206.
291. Id.
trolled substances. Judge Barton of the Superior Court denied the defendant's pretrial motion to suppress the evidence seized in the inspection. An interlocutory appeal was permitted.

Accaputo did not claim the inspection itself was unauthorized. Instead, he argued that the inspection warrant did not contain authority to seize any item and, in effect, the officials exceeded the reasonable scope of an administrative inspection. Furthermore, Accaputo alleged the warrant was invalid because neither the purpose nor the property subject to inspection were specified with particularity in the warrant. The court agreed with Accaputo and held the warrant failed to comply with statutory requirements.

Writing for a unanimous Supreme Judicial Court, Justice Liacos gave a detailed account of the existing state of Fourth Amendment law regarding administrative inspections. After establishing the current requirements, Justice Liacos applied the components of the warrant in question to the statutorily required elements. Once again, the Camara rationale surfaced. When the scope of an inspection is within statutory authority, an administrative warrant meets constitutional protections. The same rationale cannot be supported in a general exploratory search for incriminating evidence.

If an inspection exceeds the statutory scope, a constitutional violation has occurred and the evidence must be suppressed. Asserting the principles of Camara and See, the court applied these cases to the interplay of the warrant requirements of the Massachusetts statute and the constitutional protections of the Fourth Amendment. The court concluded that the lesser showing of probable cause was "inexorably linked" to the limited scope in an inspec-

292. Id.
293. Id. at 1204.
294. Id. at 1206.
295. Id.
296. Id. at 1210.
297. Id. The statutory standard with which the officials failed to comply was MASS. GEN. L. ch. 94C, § 30(c) (1984). Id.
299. Accaputo, 404 N.E.2d at 1207 (rationalizing that reasonableness will be the determining factor based on the justification that the nature of the intrusion is limited).
300. Id. at 1208-09.
301. Id. at 1209.
302. Id.
303. 38 CELLA, supra note 298, § 173, at 382-83.
The Commonwealth argued the warrant application should be incorporated by reference with the warrant. Finding this argument meritless, the court stated: "[T]he power to seize is not a detail which can be incorporated by reference into a warrant"; the warrant must contain that power itself. The person subjected to the search must be informed and advised of the inspector's reach of authority and the objects of the inspection.

The second case in the Massachusetts trilogy of inspection cases was Commonwealth v. Lipomi. In Lipomi, the Supreme Judicial Court addressed the issue it reserved in Accaputo. The court held that retail pharmacies are a "pervasively regulated industry." A pharmacy is subject to a warrantless administrative inspection pursuant to the Colonnade-Biswell exception. To avoid giving the impression that a regulated industry is at an administrative agency's mercy, Justice Liacos noted that "Biswell makes the existence of a statute carefully defining the time, place, and scope of an allowable inspection a prerequisite of a valid inspection without a warrant."

Similar to the facts in Accaputo, a state police officer while investigating Lipomi's pharmacy seized invalid prescriptions. The officer obtained an inspection warrant and arranged for an inspector from the Board of Registration in Pharmacy to assist in the inspection. The inspection uncovered inconsistencies in Lipomi's inventory and his prescription files. Lipomi was indicted for illegally distributing controlled substances.

304. Accaputo, 404 N.E.2d at 1208.
305. Id. at 1210-11.
306. Id. at 1211.
307. Id.
308. 432 N.E.2d 86 (Mass. 1982).
309. Lipomi, 432 N.E.2d at 89 (the Accaputo court reserved the question of whether the pharmaceutical industry falls under the category of "pervasively regulated" as established in Biswell).
310. Id. at 93.
311. Id.
312. Id. at 95.
313. See supra notes 288-301 and accompanying text.
314. The state police officer was the same officer who conducted an invalid search under a defective warrant in Commonwealth v. Accaputo, 404 N.E.2d 1204 (1980). 38 CELIA, supra note 298, § 173, at 386 n.40.
315. Lipomi, 432 N.E.2d at 88.
316. Id.
317. Id.
318. Id.
The Commonwealth conceded that the rule established in *Accaputo* was controlling; therefore, the seized physical evidence was suppressed. Contending the warrant was sufficient to support the inspection, the *Lipomi* court applied the principles underlying its decision in *Accaputo*. Accordingly, the Commonwealth's argument was foreclosed. One distinguishing argument by the Commonwealth was that the inspector from the Board of Registration in Pharmacy was separately authorized by a different statutory provision. In a five-to-two decision, the court held there was no inspection under Chapter 13, section 25, of the Massachusetts General Laws giving authority to the Board of Registration; rather, there was a search and seizure utilizing an invalid warrant pursuant to Chapter 94C, section 30, of the Massachusetts General Laws.

The last in the line of cases was *Commonwealth v. Frodyma*. The defendant's pharmacy was subject to a routine inspection which revealed a shortage in the defendant's inventory. The superior court granted defendant's pretrial motion to suppress evidence that was seized during the inspection. The Commonwealth applied for an interlocutory appeal which was allowed.

The Supreme Judicial Court affirmed the order granting the motion to suppress based on the lack of particularity in the warrant. The fact that administrative probable cause was not established in the warrant contributed to the warrant's deficiency. In defining the deficiency, the lower court noted that "[t]he difficulty stems... from the Board's attempt to draft a form warrant which can be used in any situation... It is undoubtedly true that such a form would be most convenient from an administrative standpoint—but administrative convenience must yield to constitutional values."

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319. See supra notes 288-301 and accompanying text.
321. *Id.*
322. *MASS. GEN. L. ch. 13, § 25* (1986) (authorizing agents of the Board of Registration in Pharmacy to inspect places of business where drugs are sold).
323. *MASS. GEN. L. ch. 94C, § 30* (1986); *CELLA*, supra note 298, § 173, at 388; see text accompanying notes 222-23 for description of the Massachusetts Warrant requirements.
324. 436 N.E.2d 925 (Mass. 1982).
325. *Id.* at 927.
326. *Id.* at 925.
327. *Id.*
328. *Id.*
329. *Id.* at 927.
330. *Id.*
Focusing on the probable cause element, the court emphasized that "the purposes for which a warrant is sought should determine the standards under which it is issued."\(^{331}\) The Supreme Judicial Court refused to follow previous authority which has upheld probable cause findings even if a warrant was issued based on a suspicion of criminal activity. Recognizing the public interest in monitoring controlled substances, the court has consistently held that if a warrant does not meet the statutory standards and procedures, evidence will be suppressed.

VI. THE BOTTOM LINE

The Supreme Court has not addressed an administrative inspection issue since 1987.\(^ {332}\) The balancing test implemented by the Court in *Camara* appeared to be the appropriate solution. Yet, hindsight shows that this test actually created injustice and unconstitutional results. Not only must the balancing test be reevaluated, so must the judicially created exception to the warrant requirement. The "pervasively regulated industry" exception effectually swallows the constitutional rule prohibiting warrantless administrative inspections.

A. The Invisible Probable Cause Requirement

Since its inception, the *Camara* balancing test has been faithfully applied in all of the inspection cases which have come before the Supreme Court.\(^ {333}\) Analysis of the case law indicates that it is time for a change. An inapplicable rule should not continue to be used for the sole reason that it has been followed for twenty-five years. Although the components of the test are adequate factors, the application of the balancing test unfairly favors one side, the administrative agency.\(^ {334}\) This test must be reformulated to balance the scales.

An unreasonable search by the government is an infringement on

\(^{331}\) Id. at 928.


\(^{333}\) See supra note 9 for a chronological list of the United States Supreme Court’s application of the *Camara* rule.

\(^{334}\) Enabling legislation authorizes an administrative agency to formulate its own interpretation of what constitutes a valid public interest when creating procedural guidelines for an inspection. See 21 C.F.R. § 1316.01 (1992) and *supra* note 43 for discussion of enabling act. An agency, therefore, has a much smaller hurdle to jump when forced to defend the need for an inspection. By comparison, the business person, who is the subject of the inspection, must prove the interest of the administrative agency is not valid.
a person's fundamental right not to be subjected to, or placed at, the unbridled discretion of the government. The Court severely errs in determining whether this fundamental right has been violated through the use of a balancing test.\textsuperscript{335} A constitutional scale which is weighted to favor the government will never balance. When the reasonableness test is applied, a constitutional right will always be out-weighed by even a minimal governmental interest. For instance, the Court defers to administrative standards and procedures to define reasonableness.\textsuperscript{336} The purpose of administrative agencies is to protect the public interest; consequently, the functions and procedures of an agency are consistently viewed as per se reasonable, never tipping the scale to afford Fourth Amendment protections.

The present balancing test uses administrative inspections as the means to achieve the end result, namely protecting the interests of the public. The gravamen of the current test today is that although the end result is legitimate, the means used to achieve this end are not rationally related.\textsuperscript{337} The Court is irrational and overinclusive when it defers to the criteria set out in a valid statute to hold that probable cause has been established.

The Court defers to the congressional determination of statutory criteria. Nonetheless, it is actually the government enforcement agent who, in the administrative search and subpoena\textsuperscript{338} areas, is the one deciding whether a violation exists according to the standards and procedures created by congressional authority. By using administrative standards and procedures as guidelines to determine reasonableness, administrative agencies are utilizing their "quasi-judicial" authority.\textsuperscript{339}

The power an administrative agency possesses completely disregards the authority established by the separation of powers.\textsuperscript{340} The responsibility of determining probable cause is placed upon a neutral

\textsuperscript{335} The balancing test weighs the need for the inspection against the extent of the intrusion. See Camara v. Municipal Court, 387 U.S. 523, 534 (1967).

\textsuperscript{336} Id. at 538.

\textsuperscript{337} The Supreme Court applies a rational relationship test in the area of administrative inspections. See New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (discussing the ends/means analysis).

\textsuperscript{338} The scope of this Note is limited to warrantless administrative searches and inspections.

\textsuperscript{339} See supra note 22 for an explanation of "quasi-judicial" authority.

\textsuperscript{340} See supra note 16 for a description of the separation between executive, legislative and judicial powers.
and detached magistrate. The responsibility of determining administrative probable cause belongs to a magistrate since both criminal and civil sanctions are imposed once a violation has been discovered.

Referring to the Supreme Court line of cases, specifically Colonnade Catering Corp. v. United States, Justice Douglas focused the federal agents using force to enter the petitioner's establishment without possession of a warrant. Although Congress intended to make it an offense to refuse an inspector's entry and did not address the issue of force, the Court concluded that the statute did not authorize forcible entries. This statutory scheme violates the business owner's rights in two possible situations. The first situation is if the owner refuses inspection, then a sanction will be imposed. Secondly, if the owner is aware of the possible sanction and chooses to allow the agent's entry, the owner's Fourth Amendment right against an unreasonable search will be sacrificed. Although the Massachusetts provision for the use of force relates to an entry by an inspector authorized through an administrative warrant, the warrant ultimately is issued on the less stringent showing of probable cause. The reasonableness prong of the Camara balancing test favors the administrative agency by giving the agency the authority to impose sanctions and the ability to use force. There must be uniformity in the allocation and effective enforcement of these powers. Avoiding this concentration of power in a single branch is the principle behind the separation of powers doctrine.

The variable on the other side of the equation is the Fourth

341. Although the requirement of a neutral and detached magistrate is not specified in the text of the Fourth Amendment, according to the Court it is critical to the validity of warrants. Connally v. Georgia, 429 U.S. 245 (1977) (individual must be "detached," in other words not affiliated with law enforcement); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (warrant issued by state attorney general in his capacity as "justice of the peace" declared as unconstitutional).


344. Id.
Amendment provision against unreasonable searches.\textsuperscript{345} Since the Fourth Amendment is at stake, a constitutional legal test must be applied. The current status of the law can be analyzed as an application of a rational relationship test. A rational relationship test determines whether the purpose is legitimate, and furthermore, if the means are rationally related to achieving that legitimate purpose.\textsuperscript{346} Even if the government's purpose is legitimate, the lesser showing of probable cause results in administrative inspections being arbitrarily implemented and a consequent overly inclusive scheme, and thereby violates a business owner's Fourth Amendment rights. A rational relationship test wholly misses the mark. A more definite and constitutionally adequate test must be considered to incorporate both interests in the equation.

Working with both interests in mind, an intermediate level of scrutiny test would satisfy both needs. An intermediate level scrutiny test is applied when there is an important governmental interest and the means are substantially related to achieving the governmental purpose.\textsuperscript{347} In the commercial context of the inspection of pharmacies, the supervision of illegal distribution and manufacturing of drugs is an important governmental interest. The means of an administrative inspection are substantially related since the most direct manner in discovering illicit drug use is through supervision and inspection.

There are other less discriminatory alternatives to an inspection. Instead of placing the power to supervise solely within the DEA, responsibility should also be placed upon the pharmacist. Some possibilities include allowing the DEA to determine the history or pattern of drug usage by a pharmacy through an examination of past records. Special concentration should be placed on the quantities of those drugs classified in either Schedules I or II.\textsuperscript{348} Subsequently, if an additional order must be placed which exceeds the routine amounts, the pharmacist should notify the DEA. Upon notification, the DEA

\textsuperscript{345} See \textit{supra} note 2 for Fourth Amendment provision.


\textsuperscript{348} The drugs in Schedules I and II have the greatest potential for abuse. 21 U.S.C. § 812(b)(1), (b)(2) (1988).
would then determine the legitimacy of the request through proof supplied by the registrant.

In the case of a newly established pharmacy, initial requirements should be more formal until the pharmacy has established a pattern of drug usage. For instance, the registrant should be required to supply an inventory every three months for the first two years to the DEA. After this initiation, the pharmacy could then continue with the procedure mentioned above while being exposed to the same conditions. If there is a need for an administrative inspection, traditional notions of probable cause should be required. There can be no question that preventing drug abuse is a valid public interest, and as such, more should be shown.

Although the Supreme Court has renounced using an administrative warrant as a pretext to search for evidence of criminality,\(^{349}\) in practice, this is precisely what is happening. The criminal standard of probable cause must be required to protect a pharmacist from unwarranted intrusions.\(^{350}\) For instance, the main purpose of the DEA is to deter illegal drug use, a purpose which easily meets the requirement of a valid public interest to be enforced by the government. If the DEA suspects foul play and conducts an administrative inspection, the discovery of violations of the regulations automatically results in criminal sanctions due to the nature of the controlled substances industry. An alternative result is the retraction of a pharmacist’s license.\(^{351}\) The possibility of either result warrants the curtailment of the agency’s authority and the application of traditional notions of probable cause. These simplistic alternatives appropriately balance the pharmacy owner’s privacy interests against the governmental needs for inspection.

**B. The Pervasively Regulated Exception Swallows the Rule**

The second area deserving special commentary is the judicial creation and application of the “pervasively regulated industry” exception to the warrant requirement of the Fourth Amendment.\(^{352}\) To

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350. See *supra* note 197 for a description of the traditional standard of probable cause.

351. For cases in Massachusetts, see *supra* notes 288-325 and accompanying text.

352. The “closely” or “pervasively regulated” industry exception was applied to the liquor and firearms industries in *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74 (1970) and *United States v. Biswell*, 406 U.S. 311, 316 (1972), respectively.
The Supreme Court has failed to offer a clear definition of this exception. Factors used to determine whether a particular industry is pervasively regulated include: (1) furthering a federal interest through the regulatory statute in question, (2) requiring possession of a license, and (3) having a long history of governmental supervision within the specific industry. Despite the lack of a clear definition from the Court, longevity of regulation and licensing seem to be the controlling factors.

The defense to this exception is grounded on the assumption that when a business person enters a regulated industry, that person knowingly forfeits their expectation of privacy. The Fourth Amendment privacy right must never be forfeited. The Court has held when the regulatory presence is sufficiently comprehensive the owner of commercial property cannot help but be aware that the business will be subject to periodic inspections. Nonetheless, due to the nature of the regulation, (i.e., requiring a pharmacist to register), one's privacy expectation may be diminished. Diminution of privacy, however, cannot be extended to one incurring criminal sanctions in the name of federal regulatory goals.

Perhaps this irreparable injury did not appear serious to the Court because, in most instances, the Court found the administrative statute in question to pass constitutional muster. Yet, the Court continues to promulgate the perspective that unannounced, even frequent, inspections are necessary if the inspection is to serve as a credible deterrent to pharmacists. Nonetheless, the Supreme Court claimed in Burger that, in order for the regulatory scheme to function, "frequent" and "unannounced" inspections are necessary in the vehicle dismantling business. The Supreme Court contradicts this purpose by claiming that the statute provides an adequate substitute for a warrant by informing an operator of a vehicle dismantling business that inspections will be made on a "regular basis." The New York Court of Appeals has correctly noted that the limitations of time,

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354. Marshall, 436 U.S. at 313. Justice White commented that the element of close government supervision distinguishes regulated industries from ordinary businesses. Id.
355. Id. at 313 (Court reasoned expectation of privacy lessened in response to regulatory enforcement); see supra note 140.
356. Biswell, 406 U.S. at 316; see supra text accompanying note 126.
place, and scope are not adequate substitutes for a warrant in this administrative scheme.

The lower probable cause requirement and the "pervasively regulated industry" exception are on two ends of the spectrum. Those who are subjected to a search and are engaged in the "pervasively regulated" industry are not afforded the prerequisite showing of full probable cause. All other business people, however, have the protection of this initial hurdle for the government, albeit a small hurdle.

This distinction effectually transforms a regulated industry into a suspect classification. By reason of an industry's classification, pervasively regulated businesses are automatically subjected to non-conforming administrative authority. The ordinary procedures required by a warrant virtually disappear when the purpose of an inspection is claiming to further a governmental interest achieved through inspecting and supervising the business activity.

The justifications for a warrantless inspection of a pervasively regulated industry are meritless. Defenses that the inspection is not aimed at the discovery of criminal activity nor is it personal in nature are nothing more than mere excuses. There are no constitutional justifications which can account for the overreaching, unchecked authority of an administrative agency. The segregation of pervasively regulated industries from all others must be dissolved. The Fourth Amendment does not provide for different levels of protection among different levels of crime; nor should the legislature. Inspection requirements should be consistent among all businesses.

VII. CONCLUSION

The Fourth Amendment protection against unreasonable searches and seizures is becoming an endangered species in commercial inspections. The Supreme Court has created many exceptions to the warrant requirement in an attempt to accommodate the objectives of federal regulations and procedures. Privacy interests are not balanced against the need for inspections since these exceptions effectually swallow the rule prohibiting warrantless searches.

The legislature has replaced the traditional probable cause requirement with its own interpretation of what constitutes a reasonable search. Additionally, administrations have been empowered to determine when an industry is pervasively regulated, thus jeopardizing the protection of a warrant.

Federal and state courts have been afforded little guidance to
interpret the scope of a valid administrative inspection. Lower courts have been relying on an unreasonable balancing test established by the Supreme Court. The validity of an inspection must be balanced against the means used to achieve the governmental need. The means must be substantially related to the object in question. Otherwise, the Fourth Amendment becomes a piece of paper which is easily manipulated through translation into terms chosen by a quasi-fourth branch of power.

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