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Search Warrants and Sanitation Inspections - The New Look in Enforcement

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SEARCH WARRANTS AND SANITATION INSPECTIONS—THE NEW LOOK IN ENFORCEMENT*

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Two 1967 Supreme Court decisions brought the protections of the fourth amendment to bear on administrative searches into both private homes and commercial premises. These cases, Mr. Edelman points out, require the federal and local governments to alter their approach to housing, sanitation and safety inspections. The author suggests that an understanding of the private rights guaranteed by the Constitution is necessary to the development of legislation and administrative procedures which will allow social programs for the public health and welfare to be carried out without invading those private rights. With this goal in mind, Mr. Edelman discusses the legal problems surrounding the exclusionary rule, consent to a warrentless search, who may consent, standing to challenge seizure, enforcement of warrants, and consent to warrantless searches as a condition of the license. Mr. Edelman suggests that statutory authorization will be necessary at any governmental level to provide a workable procedure for obtaining search warrants. The necessity of describing particularly the things to be seized is not an insurmountable problem, according to Mr. Edelman. He asserts that a court can constitutionally issue a warrant if the purpose of the search is stated. He reasons that with this information a court can determine the necessity of the search and verify its limits. To illustrate the procedure used by the Department of Health, Education and Welfare, one set of forms developed for obtaining warrants is included in an appendix to the article.

"It is not admissible to do a great right by doing a little wrong.... It is not sufficient to do justice by obtaining a proper result by irregular or improper means."

— *Miranda v. Arizona*[1]

INTRODUCTION

THE RECENT decisions of the Supreme Court of the United States in *Camara v. Municipal Court*[2] and *See v. City of Seattle*[3] call for a thorough reexamination and revision of the concepts and procedures which have previously guided the conduct of housing, sanitation, and safety inspection programs in this country.

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[1] 384 U.S. 436, 447 (1966).

[2] 387 U.S. 523 (1967).

[3] 387 U.S. 541 (1967).

The *Camara* case arose out of the refusal of Camara, the lessee of the ground floor of an apartment building, to permit a housing inspector access to a part of the leased premises used by Camara as a personal residence. This residential use was alleged to be in violation of the occupancy permit for the building. Camara was advised that section 503 of the San Francisco Housing Code authorized the entry of housing inspectors into any building, structure, or premises in the city, but he persisted in refusing the inspector access to his apartment without a search warrant. Thereafter he was arrested and charged under section 507 of the Code[4] with refusing to permit a lawful inspection. Contending that section 503 was contrary to the fourth and fourteenth amendments, Camara sought a writ of prohibition in a California superior court against his trial on the charge of violating that section.

Upholding Camara's contention and overruling *Frank v. Maryland*,[5] Mr. Justice White, writing for the Supreme Court, held that administrative searches for housing violations are significant intrusions on the privacy and security of individuals — interests which are protected by the fourth amendment[6] against arbitrary invasions by government officials and enforceable against the states under the fourteenth amendment.[7] The Court declared that "such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual . . . ."[8] This is true, Mr. Justice White noted, whether discovery of a violation on the initial inspection leads to a criminal conviction or results only in an administrative compliance order. In the latter case, he pointed out, refusal to comply is a criminal offense, with the fact of compliance verified by a second inspection, again without a warrant, and the refusal to permit the inspection is itself a crime.[9]

Having concluded that a search warrant was necessary to support the inspection at issue, Mr. Justice White turned to the fourth amendment requirement that "no warrants shall issue but upon probable

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[4] Under section 507, such refusal is a misdemeanor punishable by a fine of not more than $500 or by imprisonment for not more than 6 months or by both such fine and imprisonment.

[5] 359 U.S. 360 (1959). This case held that sanitation and housing inspections not seeking evidence for criminal prosecution were not unreasonable searches within the fourth amendment and did not require search warrants.

[6] The fourth amendment of the U.S. Constitution 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.

[7] Ker v. California, 374 U.S. 23, 30 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

[8] Camara v. Municipal Court, 387 U.S. 523, 534 (1967).

[9] *Id.* at 531.

cause." Recognizing that "the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures,"[10] he declared that the area inspection approach was a reasonable search of private property within the meaning of the fourth amendment,[11] and provided the following guidelines for the determination of "probable cause" to issue a warrant:

> [I]t 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 with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (*e.g.*, a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.[12]

The Court noted three significant reservations to its general holding:

> [1] [N]othing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations. . . . [2] [A]s a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry. [3] Similarly, the requirement of a warrant procedure does not suggest any change in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not entry by force, to inspect.[13]

In *See*,[14] the owner of a locked warehouse refused to permit a representative of the City of Seattle Fire Department to enter and inspect the warehouse without a warrant. The intended inspection was part of a routine, periodic city-wide canvass to compel compliance with Seattle's Fire Code and was authorized by section 8.01.050 of the Code. That section authorized entry into buildings and inspections without a search warrant. See, who was convicted and given a suspended fine of $100.00 for violation of the section, contended that the warrantless inspection authorized by the Code would violate his rights under the fourth and fourteenth amendments.

Mr. Justice White, speaking for the Court in this case also, declared there was no justification for distinguishing between private

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[10] *Id.* at 535-36.

[11] *Id.* at 538.

[12] *Id.*

[13] *Id.* at 539-40. The opinion cites, with regard to emergency situations, North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (seizure of unwholesome foods); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory smallpox vaccination); Compagnie Francaise v. Board of Health, 186 U.S. 380 (1902) (health quarantine); Kroplin v. Truax, 119 Ohio St. 610, 165 N.E. 498 (1929) (summary destruction of tubercular cattle).

[14] See v. City of Seattle, 387 U.S. 541 (1967).

houses and commercial premises insofar as the protection of the fourth amendment was concerned, saying:

> As we explained in *Camara,* a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.[15]

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."[16]

This holding, like that in *Camara,* was hedged about by comments and reservations:

(1) The Court, with respect to the timing of a warrant, stated:

> We do not decide whether warrants to inspect business premises may be issued only after access is refused; since surprise may often be a crucial aspect of routine inspections of business establishments, the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved and may differ from standards applicable to private homes.[17]

(2) The Court did not "imply that business premises may not reasonably be inspected in many more situations than private homes . . . ."[18]

(3) The Court did not question "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product."[19]

The teaching of these cases is that an entry upon and inspection of private property — residential property or commercial property not open to the public — by government officials without proper consent is an "unreasonable search and seizure" within the fourth amendment and may not be enforced unless authorized by a valid search warrant.[20] Accordingly, the occupant may not be punished for refusing to permit a warrantless inspection. The restriction against

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[15] *Id.* at 543.

[16] *Id.* at 545 (footnote omitted).

[17] *Id.* at 545 n.6. This language would appear to limit the issuance of warrants in advance of refusal to permit inspection of residential premises to two situations, *i.e.,* a citizen complaint or other satisfactory reason (an emergency?) for securing immediate entry. *Id.* at 539-40.

[18] 387 U.S. 541, 546 (1967).

[19] *Id.*

[20] Although not an issue in these cases, corporations are protected by the fourth amendment against warrantless entries and inspections. "[T]he Fourth Amendment has been held applicable to corporations notwithstanding their exclusion from the privilege against self-incrimination . . . ." Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 205 (1946) (footnote omitted). *See also* United States v. Morton Salt Co., 338 U.S. 632 (1950); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Hale v. Henkel, 201 U.S. 43 (1906).

entry on private commercial property would, of course, be applicable to the portions of multi-family houses reserved by the landlord, *e.g.*, boiler rooms.

CONSTITUTIONAL INSPECTIONS AND THE NEED FOR ADMINISTRATIVE INGENUITY

Putting aside the problems relating to the development of inspection criteria designed to meet the probable cause requirement of the fourth amendment, as suggested by the Court, let us examine some of the other legal problems not mentioned in the decisions which will attend the administrative implementation of the Court's holdings.

A. *Availability of Warrants*

At the very threshold of our consideration we are confronted with the question: Is there an available procedure for obtaining a search warrant to make an inspection?

In *Camara,* the brief on behalf of the government pointed out that there was no specific provision in the San Francisco Code or in the state law under which a search warrant for inspection of the premises could have been obtained.[21] This situation is a generally prevailing one, since most state laws authorizing the issuance of search warrants are patterned on the federal authority, which is limited to searches for fruits of crime, instrumentalities, and certain contraband.[22] Congress has never authorized the issuance of search warrants for the seizure of mere evidence of crime, although the Supreme Court has recently indicated that a search warrant could be authorized for such a purpose after fulfilling the probable cause and particularity requirements of the fourth amendment and after the intervention of "a neutral and detached magistrate."[23] Research has disclosed only eight states which, subject to the probable cause and specificity requirements of the fourth amendment, authorize the issuance of search warrants to search for and seize property constituting evidence of crime or tending to show that a particular person committed a crime.[24] Only one state — New Jersey — specifically author-

[21] Brief for Appellee at 4.

[22] Rule 41(b), Federal Rules of Criminal Procedure, provides:

> (b) Grounds for Issuance.
> A warrant may be issued under this rule to search for and seize any property
> (1) Stolen or embezzled in violation of the laws of the United States; or
> (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or
> (3) Possessed, controlled or designed or intended for use or which is or has been used in violation of Title 18, U.S.C. § 957.

[23] Warden v. Hayden, 387 U.S. 294, 309-10 (1967).

[24] CAL. PEN. CODE § 1524 (West 1956) (only in case felony has been committed); ILL. REV. STAT. ch. 38, § 108-3 (1964); MINN. STAT. ANN. § 626.07 (1947); MONT. REV. CODE ch. 95, § 705 (1967); N.J. STAT. ANN. § 55:11-16 (1964); N.Y. CODE CRIM. PROC. § 792 (McKinney 1958); ORE. REV. STAT. § 141.010 (1953); VT. STAT. ANN. tit. 13, § 4701 (1959).

izes the issuance of a search warrant to enter and inspect multi-family dwellings for housing code violations.[25] Clear authorization to issue inspection warrants (or equivalent court orders) under fourth amendment safeguards is thus a matter of the highest priority and need.

In the light of the rulings in these cases, the Department of Health, Education, and Welfare has taken the position that inspection warrants may be issued under specific authorities for inspection provided in the Federal Food, Drug, and Cosmetic Act and in the Federal Hazardous Substances Act. A few of these warrants have already been obtained, and one set of the forms developed for such purpose is included in the appendix. Whether a similar approach is feasible under state and local laws would, of course, depend on an evaluation of the prevailing statutory situation.

B. *The Exclusionary Rule*

Lest there be any temptation to do business as usual on initial inspections, one consequence of an illegal search which should be noted here is that any seizure made during an illegal search would itself be illegal, and if timely and appropriate objection is made, such items may not be used or remain in evidence.[26] This exclusionary rule, flowing from the command of the fourth amendment implemented by the fifth amendment, is applicable to the states under the fourteenth amendment.[27] The rule has traditionally barred from trial physical tangible materials obtained either during or as a direct result of an unlawful invasion.[28] But the policies underlying this rule do not invite any distinction between tangible and intangible evidence so that a verbal statement made during an illegal search has been suppressed and testimony concerning objects illegally observed has been excluded.[29] Nor may conditions illegally observed be the basis for subsequently swearing out a search warrant.[30] The applicability

[25] N.J. STAT. ANN. § 55:11-16 (1964).

[26] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920); Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616, 630 (1886).

[27] Mapp v. Ohio, 367 U.S. 643 (1961). As the Court declared in *Ker v. California:*

> In *Mapp v. Ohio,* at 646-647, 657, we followed *Boyd v. United States,* 116 U.S. 616, 630 (1886), which held that the Fourth Amendment, implemented by the self-incrimination clause of the Fifth, forbids the Federal Government to convict a man of crime by using testimony or papers obtained from him by unreasonable searches and seizures as defined in the Fourth Amendment. . . . This means, as we said in *Mapp,* that the Fourth Amendment "is enforceable against them [the states] by the same sanction of exclusion as is used against the Federal Government," by the application of the same constitutional standard prohibiting "unreasonable searches and seizures." 367 U.S., at 655.

374 U.S. 23, 30 (1963) (footnotes omitted).

[28] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[29] Berger v. New York, 388 U.S. 41 (1967) (involving seizure of conversation by wiretapping); Wong Sun v. United States, 371 U.S. 471 (1963); Silverman v. United States, 365 U.S. 505 (1961); McGinnis v. United States, 227 F.2d 598, 603 (1st Cir. 1955); Katz v. United States, 389 U.S. 347 (1967) (involving seizure of conversation by electronic device).

[30] McGinnis v. United States, 227 F.2d 598 (1st Cir. 1955).

of this rule emphasizes the importance of establishing clearly that consent has been obtained for a warrantless search based on consent.

C. *Consent to Warrantless Search*

With these considerations in mind, let us now examine the question of consent to a warrantless search, a consent which is needed under the fourth and fifth amendments to assure the legality of the search as well as the availability of evidence so obtained. While the Supreme Court has held that constitutional rights protected by the fourth and fifth amendments may be voluntarily waived,[31] the cases identify a gulf between acquiescence or submission and the consent necessary to constitute a voluntary waiver. Where officers demand admission to private premises in the name of the law or under color of office, their subsequent explorations have been held searches within the bar of the Constitution, even though the occupant opens the door to admit them.[32] Such entry, it has been said, is "granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right."[33]

In short, the consent must be unequivocal and specific, freely and intentionally given. When entry into a person's premises by officers of the law not having a warrant is sought to be justified by that person's consent, the applicable standard is a rigorous one, and the Government has the burden of proving by clear and positive evidence that such consent has been given.[34]

Evidence of consent may be oral or written, and experience in the inspection field will show which is preferable.[35] Where a verbal consent is relied on, some federal courts have held that nothing short of specifically advising the person of his right to refuse a warrantless

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[31] Zap v. United States, 328 U.S. 624, 628 (1946).

[32] Johnson v. United States, 333 U.S. 10, 13 (1948); Amos v. United States, 255 U.S. 313 (1921).

[33] Johnson v. United States, 333 U.S. 10, 13 (1948).

[34] Simmons v. Bomar, 349 F.2d 365, 366 (6th Cir. 1965); McDonald v. United States, 307 F.2d 272, 274 (10th Cir. 1962); Channel v. United States, 285 F.2d 217, 219 (9th Cir. 1960); Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951); Kovach v. United States, 53 F.2d 639 (6th Cir. 1931).

[35] The Department of Justice *Handbook on the Law of Search and Seizure* recommends that the consent be in writing and suggests the following form:

> I, John Doe, know of my constitutional rights to refuse to allow a police search of any part of my house at 711 Royalty Road, Alexandria, Va. However, I have decided to allow Tom Smith and Bill Jones, members of the Metropolitan Police, to search every part of my house. They have my permission to take any letters, papers, materials, or other property they want. I have decided to make this consent carefully, of my own free will, and without being subject to threats or promises. I know that anything discovered may be used against me in a criminal proceeding.
>
> Jan. 22, 1967
> Signed John Doe
>
> Witness 1. Bob Janitor.

DEPARTMENT OF JUSTICE, HANDBOOK ON THE LAW OF SEARCH AND SEIZURE 52 (1967).

search will meet the fourth amendment requirement of a knowing waiver imposed to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd.[36]

D. *Who May Consent*

The general rule is that immunity from unreasonable search and seizure can be waived only by the person whose rights are otherwise to be invaded or by someone known to have authority to make a waiver of that right for the person to be affected in his absence, and such authority cannot be implied or presumed.[37]

Thus, the occupant of residential premises can give an effective consent to a search of the apartment or room occupied by him. The landlord or other proprietor of residential premises, hotels, or boarding houses cannot, however, give an effective consent to a search of the apartment or room actually occupied by another person.[38]

A person having equal rights to the use or occupation of premises may consent to a search, and evidence thus obtained may be used against the other joint occupant even though the latter has not consented.[39]

The cases are in conflict as to whether a wife can give effective consent as against her husband for a search and seizure of property in the family living quarters. Thus it has been held that the constitutional protection against unreasonable searches is a personal one which neither the husband nor the wife can waive for the other.[40] Other cases have held that where the wife is a joint owner of the premises,[41] or is recognized as a joint occupant, her consent to a search of family quarters is valid.[42] The authority of the wife to give

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[36] United States v. Nickrasch, 367 F.2d 740, 744 (7th Cir. 1966); United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966). *Contra,* Gorman v. United States, 380 F.2d 158 (1st Cir. 1967), which held a specific fourth amendment warning unnecessary in the following factual situation:

> [W]hen the accused is directly asked whether he objects to the search, there must be at least some suggestion that his objection is significant, or that the search waits on his consent. When this is combined with a warning of his right to be silent, and his right to counsel, which would seem in the circumstances to put him on notice that he can refuse to cooperate, we think it fair to infer that his purported consent is in fact voluntary.

Id. at 163-64.

[37] Raine v. United States, 299 F. 407 (9th Cir. 1924); United States v. Ruffner, 51 F.2d 579 (D. Md. 1931); Hayes v. State, 38 Okla. Crim. 331, 261 P. 232 (1927).

[38] Stoner v. California, 376 U.S. 483 (1964); Chapman v. United States, 365 U.S. 610 (1961); Lustig v. United States, 338 U.S. 74 (1949).

[39] Drummond v. United States, 350 F.2d 983 (8th Cir. 1965); United States v. Sferas, 210 F.2d 69 (7th Cir. 1954), *cert. denied,* 347 U.S. 935 (1954); People v. Hicks, 165 Cal. App. 2d 548, 331 P.2d 1003 (1958).

[40] United States v. Rykowski, 267 F. 866 (S.D. Ohio 1920); Simmons v. State, 94 Okla. Crim. 18, 229 P.2d 615 (1951); People v. Weaver, 241 Mich. 616, 217 N.W. 797 (1928).

[41] People v. Hambley, 4 Ill. 2d 38, 122 N.E.2d 172 (1954).

[42] United States v. Best, 76 F. Supp. 857 (D. Mass. 1948); United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1937); People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957); Bellam v. State, 233 Md. 368, 196 A.2d 891 (1964); State v. Cairo, 74 R.I. 377, 60 A.2d 841 (1948).

such consent is based, not upon any principle of agency, but upon her own status, and extends only to that property or area of the premises over which the wife normally exercises as much control as the husband.[43] Under this view, which reflects the growing trend, the wife clearly may give authority for an inspection of living quarters jointly occupied by herself and her husband.

In the case of consent for a search of business or industrial premises, the cases appear to turn on the scope of the authority of the employee whose consent is relied upon. Thus, courts have upheld consent for a warrantless search given by an office manager,[44] by the corporation general manager entitled to 50 percent of the profits,[45] and by the agent placed in charge of property.[46] A clerk or similar employee cannot give an effective consent in the absence of specific authorization for the purpose.[47]

While a presumption of authority to give consent to a warrantless search does not arise from the mere fact of employment, the courts have found such authority where the search or inspection was directed to matters which would usually arise in and be part of the duties of employment. Managerial employees, whose duties include the oversight of business operations and compliance with legal requirements would, therefore, probably be found authorized to grant an effective consent to the inspection of business premises.

E. *Standing to Challenge Seizure*

Under section 41(e) of the Federal Rules of Criminal Procedure only a "person aggrieved by an unlawful search and seizure" has standing to move for the exclusion or suppression of the property seized. As illuminated by the Supreme Court, this rule reaches not just the victims of the invasion (generally described as having an interest in the premises such as ownership, a right to possession, or the interest of a lessee); as stated in *Jones v. United States,*[48] "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."[49] In *Jeffers v. United States,*[50] the rule was

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[43] People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957); State v. Evans, 45 Hawaii 622, 372 P.2d 365 (1962); Bellam v. State, 233 Md. 368, 196 A.2d 891 (1964).

[44] United States v. Antonelli Fireworks Co., 155 F.2d 631 (2d Cir. 1946), *cert. denied,* 329 U.S. 742 (1946).

[45] Application of Fried, 68 F. Supp. 961 (S.D.N.Y. 1946), *modified on other grounds,* 161 F.2d 453 (2d Cir. 1947), *cert. denied,* 331 U.S. 858 (1947).

[46] Raine v. United States, 299 F. 407 (9th Cir. 1924).

[47] Lord v. Kelly, 223 F. Supp. 684 (D. Mass. 1963); United States v. Ruffner, 51 F.2d 579 (D. Md. 1931); Hays v. State, 38 Okla. Crim. 331, 261 P. 232 (1927).

[48] 362 U.S. 257 (1960).

[49] *Id.* at 267.

[50] 187 F.2d 498, 501 (D.C. Cir. 1950), *aff'd,* 342 U.S. 48 (1951).

held to extend to the owner of property seized as the fruit of an unlawful search even though the premises searched were not his and he was not present at the time of the search.

California has adopted an even more liberal view on the exclusion of evidence and holds that evidence obtained by virtue of an unlawful search and seizure is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights.[51]

Thus, where an attempt is made to use evidence obtained in an unlawful search of a tenant's apartment against a landlord (*e.g.*, defective wiring or plumbing), the landlord may, under the federal rule, be able to suppress the evidence on the grounds that he owned the property seized or, under the California rule, simply on the grounds that the search and seizure was unlawful.

F. *"Particularly describing . . . the things to be seized"*

The fourth amendment requirement that a search warrant "particularly" describe "the things to be seized" may occasion some difficulty for general housing and sanitation inspections which extend from defective appliances, hazardous conditions, and cleanliness to window screens, ratholes, and the number of electrical outlets in a room. Such a broad-ranging inspection may require a thorough search of every room in an apartment, or of the entire commercial premises as well as closets, cupboards, storerooms, and related accounts and records. But a warrant which is so broad that the appropriate limits of the inspection depend on the discretion of the investigator and could not be verified by reference to the warrant itself would obviously fall short of the fourth amendment requirement. As the Court observed in *Camara,* in the absence of a warrant, the appellant was unable "to verify . . . the appropriate limits of the inspection."[52]

While it could be argued that the fourth amendment requires that the warrant must specify in detail every item to which the inspection will be directed, a reasonable middle ground, which will permit the court issuing the warrant to determine its necessity as well as to verify the limits of the search, would call for a statement of the purpose of the search, *e.g.*, inspection of the physical condition of the premises, plumbing, electrical wiring and fixtures, and related

[51] People v. Martin, 45 Cal. 2d 755, 290 P.2d 855, 857 (1955). *See also* State v. Schaffel, 4 Conn. Cir. 234, 229 A.2d 552 (1966), *petition for certification for appeal denied,* 228 A.2d 560 (Conn. 1967), holding that while landlord had standing to move for suppression of evidence obtained by warrantless inspection of tenant's apartment, his rights were not infringed since tenant had consented.

[52] 387 U.S. 523, 540 (1967). *See also* Berger v. New York, 388 U.S. 41 (1967).

conditions bearing on violations of sections_____of the Housing Code and of sections_____of the regulations issued thereunder. It may also be desirable to attach to the warrant copies of the cited sections of the code.

G. *Enforcement of Warrants*

If the occupant of premises to be searched refuses to comply with a warrant, how is the warrant to be enforced?

In *See,* the Court spoke of compelling entry "through prosecution or physical force within the framework of a warrant procedure,"[53] while in *Camara,* it indicated that force to compel entry into residential premises was not contemplated by the requirement of a warrant procedure.[54]

While entry by force is the traditional method of enforcing compliance with a warrant,[55] this approach appears revelant only to seizing evidence of a crime which may be disposed of or secreted if entry is delayed. In the case of housing violations, these can be hidden from the inspector only by the desired remedial action, so that delay, except in the case of emergencies, does not ordinarily frustrate the public interest.

When entry under a search warrant is refused, the court could punish such refusal. In addition, the provisions in most housing codes penalizing a refusal to comply with or resistance to the execution of the provisions of the code, would probably be adequate to support a penalty for refusal to comply with a lawful search warrant issued to implement the inspection provisions.

H. *Consent to Warrantless Search as Condition of License*

The Court's recognition of "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product"[56] raises the question of whether a license may, as a condition of its issuance, require consent to warrantless inspections after such issuance. Such a proposal raises the question of unconstitutional conditions. Unlike *Zap v. United States,*[57] where the petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records and the Court found a voluntary waiver of his claim to the privacy of such records, the licensee under this proposal would have to waive his constitutional protection under the fourth and fifth amendments

[53] See v. City of Seattle, 387 U.S. 541, 545 (1967).

[54] Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

[55] Crimes & Criminal Procedure, 18 U.S.C. § 3109 (1964).

[56] See v. City of Seattle, 387 U.S. 541, 546 (1967).

[57] 328 U.S. 624 (1945).

as a condition to engaging in business with anyone.[58] The dilemma that would confront the individual is the choice between losing the benefit or privilege which the license would confer and the hazard of waiving his constitutional rights in advance, not knowing when or how they may be violated by the law enforcement agency. It could reasonably be argued that the threat of withholding the license would constitute duress vitiating the consent.[59] Moreover, it is doubtful that a case could now be made for the proposition that the alternative means of a search warrant which is not subversive of constitutional rights is inadequate to protect the public welfare.[60]

CONCLUSION

The holdings of the Supreme Court in *Camara* and *See* are a challenge to the inventiveness of administrators and lawyers to demonstrate that social programs intended to protect the public health and welfare can be developed and operated efficiently without invading private rights guaranteed by the Constitution. The cases should not be interpreted as requiring slavish adherence to the broad guidelines indicated by the Court, but rather as giving room for a variety of approaches to the problem which can be developed to meet the constitutional requirements. It would be unrealistic to assume that these decisions have settled the problems of regulatory inspections, or that further litigation of these issues should not be anticipated. An understanding of the thrust of the constitutional guaranties involved, and of the limitations on official actions spelled out in cases implementing these guaranties, however, is an essential ingredient of the development of legislation and programs capable of withstanding these challenges.

In dealing with problems such as these, where community and individual interests seem to conflict, we must bear in mind the statement of the Supreme Court in *Mapp v. Ohio:*

> Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States,* 277 U.S. 438, 485 (1928): "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a

[58] This goes far beyond the requirement that a business maintain records which are to be made available for public inspection. Such records have been held to assume the characteristics of quasi-public documents and their disclosure may be compelled without violating the fourth amendment. United States v. Morton Salt Co., 338 U.S. 632 (1950); Shapiro v. United States, 335 U.S. 1 (1948).

[59] In People v. Younger, 327 Mich. 410, 42 N.W.2d 120 (1950), the court held that a person accepting a license to hunt could not be required as a condition of such license to waive his constitutional right against unreasonable search and seizure, even though the search would be directed only against game taken by the licensed hunter.

[60] *Cf.* Parrish v. Civil Service Comm'n, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy." [61]

APPENDIX

I. PERTINENT STATUTORY INSPECTION PROVISIONS

A. *Federal Hazardous Substances Act,* 15 U.S.C. § 1270 (1964).

§ 1270. Examinations and Investigations

(a) Authority to conduct.

The Secretary is authorized to conduct examinations, inspections, and investigations for the purposes of this chapter through officers and employees of the Department or through any health officer or employee of any State, territory, or political subdivision thereof, duly commissioned by the Secretary as an officer of the Department.

(b) Inspection; notice; samples.

For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which hazardous substances are manufactured, processed, packed, or held for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such hazardous substances in interstate commerce; (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle, and all pertinent equipment, finished and unfinished materials, and labeling therein; and (3) to obtain samples of such materials or packages thereof, or of such labeling. A separate notice shall be given for each such inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness.

B. *Federal Food, Drug, and Cosmetic Act,* 21 U.S.C. § 374 (1964).

§ 374. Inspection

(a) Right of agents to enter; scope of inspection; notice; promptness; exclusions.

For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held for introduction into interstate commerce or after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials; containers, and labeling therein. In the case of any factory, warehouse, establishment, or consulting laboratory in which prescription drugs are manufactured, processed, packed, or held, the inspection shall extend to all things therein (including records, files, papers, processes, controls, and facilities) bearing on whether prescription drugs which are adulterated or misbranded within the meaning of this chapter, or which may not be manufactured, introduced into interstate com-

[61] 367 U.S. 643, 659 (1961).

merce, or sold, or offered for sale by reason of any provision of this chapter, have been or are being manufactured, processed, packed, transported, or held in any such place, or otherwise bearing on violation of this chapter.

II. Forms Used for Inspection Warrants Under the Federal Food, Drug, and Cosmetic Act

(Prescription Drugs)

In the Matter of
Establishment Inspection
of

_____Company

_____ APPLICATION FOR INSPECTION WARRANT
_____, _____ UNDER THE FEDERAL FOOD, DRUG, AND COSMETIC ACT.

To the United States District Judge:
United States District Court

_____District of_____.

_____, duly authorized inspector of the Food and Drug Administration, Department of Health, Education, and Welfare,

_____, _____, hereby applies for an inspection warrant, pursuant to 21 U.S.C. 374, for the inspection of the establishment identified as follows:

_____

_____

_____

1. This establishment is engaged in the manufacture, processing, packing, holding of prescription drugs which are to be or have been shipped in interstate commerce.

2. It is a registered establishment under 21 U.S.C. 360, and is required to be inspected at least once every two years.

3. The establishment has not previously been inspected.

was last inspected_____.

4. This is a scheduled inspection undertaken as a part of a statutorily authorized inspection program designed to assure compliance with the Federal Food, Drug, and Cosmetic Act.

5. The inspection will be conducted within regular business hours. Written notice and the inspector's credentials will be supplied as prescribed in 21 U.S.C. 374. The inspection will begin as soon as practicable after the issuance of this warrant and will be completed with reasonable promptness.

6. The inspection will extend to the establishment and all pertinent equipment, finished and unfinished materials, containers, labeling, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether prescription drugs are being produced in compliance with the Act, whether products not in compliance have been processed, packed, transported, or held, or whether conditions exist which otherwise bear upon violation of the Act.

7. Samples will be collected when necessary to a reasonable inspection and receipt will be given therefor.

8. The inspector may be accompanied by one or more inspectors, duly authorized pursuant to 21 C.F.R. 2.121(b).

9. A return will be made to the Court at the completion of the inspection.

10. The authority for the issuance of the inspection warrant is 21 U.S.C. 374 and *Camara v. Municipal Court*, No. 92, and *See v. Seattle*, No. 180, decided June 5, 1967 by the Supreme Court of the United States.

Sworn to and subscribed by

_____

John Doe - 007
United States Food and Drug
Administration

Before me_____, Clerk of the United States District Court for the_____, District of _____, on this_____day of_____, personally appeared_____, and upon oath stated that the facts set forth in this application are true to his knowledge and belief.

_____

Clerk, U.S. District Court

WARRANT FOR INSPECTION UNDER THE
FEDERAL FOOD, DRUG, AND COSMETIC ACT

To_____and any other authorized United States Food and Drug Inspector:

Application having been made, and probable cause shown, by_____ _____, United States Food and Drug Inspector, for an inspection of the establishment described as:

_____

_____

_____

Pursuant to the Federal Food, Drug, and Cosmetic Act and the decisions of the Supreme Court in *Camara v. Municipal Court, No. 92,* and *See v. Seattle,* No. 180, decided June 5, 1967, you are authorized to enter the above described premises at reasonable times during ordinary business hours, and to inspect in a reasonable manner and to a reasonable extent, including the collection of samples if necessary, all pertinent equipment, finished and unfinished materials, containers, labeling, and all other things in the establishment (including records, files, papers, processes, controls, and facilities) bearing upon whether prescription drugs are being produced in compliance with any applicable provisions of the Federal Food, Drug, and Cosmetic Act, whether products not in compliance have been processed, packed, transported, or held, or whether conditions exist which otherwise bear upon violation of the Act.

A return shall be made to this Court showing that the inspection has been completed.

Dated:

_____

Judge

RETURN

Inspection of the establishment described in this warrant was made on _____.

_____

John Doe - 007
Inspector, U.S. Food and Drug
Administration

_____

_____