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# State v. Galio: An Administrative Search

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# *STATE v. GALIO*: AN ADMINISTRATIVE SEARCH?

Recent decisions by New Mexico and federal courts in cases involving challenges to the constitutionality of warrantless searches and inspections[1] will have a broad impact on statutorily authorized searches by state agencies. In two cases[2] the challenge stemmed from an employer's refusal to submit to a warrantless administrative inspection pursuant to the Occupational Safety and Health Act of 1970 (hereinafter OSHA).[3] In another case, *State v. Galio*,[4] the New Mexico Court of Appeals held that a warrantless police search of an automobile repair garage conducted pursuant to apparent statutory authority was unconstitutional. *Galio* was decided on the basis of the OSHA cases and on the basis of the United States Supreme Court's decision in *Marshall v. Barlow's Inc.*,[5] even though the facts differed from those present in the OSHA cases. This casenote will briefly examine the import of the *Galio* decision in light of the law which has evolved in the area of administrative searches since 1967 when the United States Supreme Court decided two important cases involving such searches.[6]

## ADMINISTRATIVE SEARCHES: SUPREME COURT DECISIONS

The constitutional challenge to a warrantless nonconsensual administrative search is grounded on the Fourth Amendment's prohibition of unreasonable searches.[7] In the typical criminal case a search

1. Dunlop v. Hertzler Enterprises, Inc., 418 F. Supp. 627 (D.N.M. 1976); State *ex rel.* Environmental Improvement Agency v. Albuquerque Publishing Co., 91 N.M. 125, 571 P.2d 117 (1977); State v. Galio, 92 N.M. ____, 587 P.2d 44 (Ct. App. 1978).

2. Dunlop v. Hertzler Enterprises, Inc., 418 F. Supp. 627 (D.N.M. 1976); State *ex rel.* Environmental Improvement Agency v. Albuquerque Publishing Co., 91 N.M. 125, 571 P.2d 117 (1977).

3. 29 U.S.C. §657(a) (1970).

4. 92 N.M. ____, 587 P.2d 44 (Ct. App. 1978).

5. 436 U.S. 307 (1978).

6. Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

7. U.S. Const. Amend. IV 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 and things to be seized.

is unreasonable if conducted without probable cause.[8] The Fourth Amendment's protection of individual privacy from arbitrary governmental intrusions is achieved by broadly prohibiting the issuance of search warrants except on a showing of probable cause. The requirement of a warrant ensures that an impartial judicial officer has determined that, based on police evidence, probable cause to believe that an offense has been or is being committed does exist.[9]

Administrative searches and inspections, on the other hand, are usually conducted pursuant to statutory and regulatory schemes which typically lack a warrant procedure ensuring an impartial screening for reasonableness. Even where a warrant might be obtained, agencies will rarely have the particularized probable cause required for a criminal search warrant. The Supreme Court has developed two lines of cases in dealing with the problems associated with administrative searches. In one line of cases, the Court balances the governmental need to make the inspection against the extent of the intrusion. In these cases the result of the balancing is a finding that a nonconsensual search is reasonable if made pursuant to an "administrative" search warrant. In the alternative line of cases, actually constituting more of an exception for unique situations, the Court finds that the government's interest in making certain warrantless inspections so outweighs the search's invasion of protected privacy interests that a carefully restricted warrantless search is reasonable.

The 1967 companion cases *Camara v. Municipal Court*[10] and *See v. City of Seattle*[11] and the recent decision in *Marshall v. Barlow's Inc.*[12] establish the first line of cases. In the *Camara* and *See* cases

8. *See* Agnello v. United States, 269 U.S. 20, 33 (1925); Chambers v. Maroney, 399 U.S. 42 (1970).

9. In United States v. United States Dist. Court, 407 U.S. 297, 316-17 (1972), the Court stated that investigation and enforcement officials should not be the sole judges in determining when governmental intrusions are required. Rather, protection of Constitutional freedoms is best served by leaving this determination to a disinterested and neutral magistrate. *See also,* Aguilar v. State of Texas, 387 U.S. 108 (1964).

10. 387 U.S. 523 (1967). In *Camara* a San Francisco housing inspector making a routine annual inspection for possible violations of the city's housing code was refused entry upon presentation of his credentials. Camara challenged the resulting imposition of penalties authorized by the city code. The Court found that the traditional safeguards of the Fourth Amendment, as applicable to the states through the Fourteenth Amendment, barred such warrantless inspections. The Court also outlined the requirements for issuance of a new type of administrative search warrant.

11. 387 U.S. 541 (1967). In *See,* a fire department inspector was refused access to a locked commercial warehouse. The applicable city ordinance provided criminal sanctions for refusing to permit such warrantless fire inspections. The Court found that the Fourth Amendment's protections extend to private commercial property and concluded that a suitable administrative warrant is required for nonconsensual administrative searches of such business premises.

12. 436 U.S. 307 (1978).

the Supreme Court held that local officials authorized under municipal codes to conduct routine health and safety inspections are required to obtain an administrative warrant to inspect both residential and commercial property when consent to a warrantless inspection is denied. The Court viewed this warrant requirement for agency inspections as consistent with the basic purpose of the Fourth Amendment to "safeguard the privacy and security of individuals against arbitrary invasions by government officials."[13] The *Camara* Court initially found that recognizable Fourth Amendment interests were implicated in health and safety inspections. The Court then engaged in a balancing of the governmental interest in preventing the development of conditions harmful to public health and safety against the extent of the intrusion of such inspections on protected privacy interests. The Court concluded that such inspections were reasonable if conducted pursuant to a search warrant issued upon different criteria than required for criminal search warrants.[14] In the Court's view, the warrant requirement addressed the problem of the occupant who has "no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization."[15]

The Court in *Camara* briefly discussed the question of appropriate standards for issuance of search warrants for such administrative searches. Whereas particularized probable cause must exist for issuance of a warrant in a criminal case, the Court in *Camara* said reasonableness should be the standard for issuance of administrative inspection warrants. The Court stated that determining reasonableness required "balancing the need to search against the invasion which the search entails."[16] Thus, where a valid governmental interest jus-

13. Camara v. Municipal Court, 387 U.S. 523, 528 (1967). The opinion clearly rejects the argument that such administrative inspections violate merely peripheral Fourth Amendment interests, overruling Frank v. Maryland, 359 U.S. 360 (1959).

14. 387 U.S. at 538. The Court found the following factors persuasive in concluding area code-enforcement inspections were reasonable:

> First, such programs have a long history of judicial and public acceptance. . . . Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results . . . . Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.

*Id.* at 537. The Court further stated 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." *Id.* at 535-36.

15. *Id.* at 532.

16. *Id.*

tifies an inspection, a properly limited area inspection warrant may issue even where probable cause in the traditional criminal sense does not exist. A limited area inspection warrant can be issued "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[17] The Court included as examples of administrative standards, "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."[18] However, in *See* the Court reserved for decision on a case-by-case basis the validity of regulatory inspections conducted as part of licensing programs.[19]

In the *Marshall v. Barlow's, Inc.* case, an agent of the Secretary of Labor sought entry to the nonpublic work area of an electrical and plumbing installation business in order to make a safety inspection pursuant to the Occupational Safety and Health Act of 1970.[20] He lacked a warrant and consent was denied. The Supreme Court held that nonconsensual warrantless OSHA inspections are in fact unreasonable. In reaching its conclusion the Court rejected the government's argument that the intrusion of an OSHA inspection was minimal and that the government's interest in conducting the inspection was of such importance that the search was reasonable without a warrant. The government's position was based on the fact that prior federal health and safety regulation of interstate businesses as well as extensive governmental involvement in labor relations operated to reduce a business' expectations of privacy. The government also argued that agency restrictions on the scope of OSHA inspections reduced its intrusiveness and permitted such inspections to meet the Fourth Amendment's requirement that the search be reasonable. In support of the government's alleged need to conduct warrantless inspections, the Secretary of Labor argued that surprise was a neces-

17. *Id.*
18. *Id.*
19. 387 U.S. at 456.
20. 29 U.S.C. §657(a) (1976) provides:

> . . . the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized–
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> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer, and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

sary element for proper enforcement of the Act. The Secretary further argued that a warrant requirement would result in an increase in denials of consent to warrantless inspections which in turn would create additional administrative burdens resulting from having to obtain warrants. The Court found, however, that the balance of the competing governmental and private interests did not weigh in favor of warrantless OSHA inspections. The Court concluded that issuance of an OSHA warrant would not require demonstrating probable cause to believe that conditions in violation of OSHA existed at the business to be inspected. Rather, the Court said that a valid warrant could issue upon a "showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area."[21] Following the decision in *Camara,* the Court thus recognized that the reduced probable cause requirements for administrative search warrants were applicable to OSHA inspections.

In *Colonnade Catering Corp. v. United States*[22] and *United States v. Biswell,*[23] the other line of administrative search cases, the Supreme Court created an exception to the *Camara-See-Biswell* rule requiring warrants for nonconsensual administrative inspections. In this second line of cases, licensing programs requiring a business to submit to warrantless inspections as a condition to operation were challenged. In both *Colonnade* and *Biswell* the Court found administrative search warrants for such nonconsensual agency searches unnecessary. In *Colonnade* federal agents suspecting liquor law violations entered a catering establishment's locked liquor storeroom without consent and without a warrant. The Court noted that federal law provided for warrantless entry and inspection of the premises of retail liquor dealers.[24] Both the majority and the dissent found such a statutorily sanctioned warrantless entry and inspection reasonable.[25] The Court based its decision on the long history of governmental regulation of the liquor industry.

In *Biswell* the Court held that a warrantless search of a locked storeroom, authorized under the Gun Control Act of 1968,[26] which

21. 436 U.S. at 321.
22. 397 U.S. 72 (1970).
23. 406 U.S. 311 (1972).
24. 26 U.S.C. §5146(b) (1976).
25. 397 U.S. at 76-77. The majority, unlike the dissent, was not willing to find that the statute authorized *forcible,* warrantless entries.
26. 18 U.S.C. §§921-28 (1976).

resulted in the seizure of unlicensed sawed-off rifles from a federally licensed gun dealer was not unreasonable. While the Court noted that federal regulation of firearms was "not as deeply rooted in history as is governmental control of the liquor industry,"[27] it did find that federal firearm regulation "is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders."[28] The Court reached its conclusion that such warrantless inspections were reasonable partly because "inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy."[29] In the *Biswell* case a finding of reduced expectations of privacy resulted from the fact that a firearms dealer was a federally licensed and "pervasively regulated business,"[30] whose "business records, firearms, and ammunition [were] subject to effective inspection."[31] The Court also specifically noted that the regulatory inspection scheme under the Gun Control Act strictly limited the time, place, and scope of inspections.[32] Although these limitations figured in the *Camara* opinion's suggested calculus for determining whether administrative search warrants should issue,[33] *Biswell* held such limitations on the scope of inspection essential to the validity of an administrative search. In fact, the Court said that the legality of regulatory inspection schemes which carefully limit in time, place, and scope authorized searches depends not on consent, "but on the authority of a valid statute."[34] By viewing the *Biswell* warrantless inspection as reasonable, the Court was not required to discuss appropriate standards for issuance of an administrative warrant.

It seems clear that the Supreme Court views the *Colonnade-Biswell* type situation as the exception and has subsequently declined opportunities to expand the doctrine.[35] The Court in *Barlow* in fact char-

27. 406 U.S. at 315.
28. *Id.*
29. *Id.* at 316.
30. *Id.*
31. *Id.*
32. *Id.* at 315.
33. *See* text accompanying note 17 *supra.*
34. 406 U.S. at 315. It has been suggested that the Court did not abandon the flexible standard of probable cause announced in *Camara;* rather it must be inferred. Weissberg, *Marshall v. Barlow's, Inc.: Are Warrantless Routine OSHA Inspections A Violation of the Fourth Amendment?,* 6 Envt'l. Aff. 423, 432 (1978). Other commentators suggest that in disclaiming the need for consent, the Court meant only that actual consent at the time of inspection was unnecessary since the licensee impliedly consented to such inspections when the license was issued. McManis and McManis, *Structuring Administrative Inspections: Is There Any Warrant For A Search Warrant?,* 26 Am. U. L. Rev. 942, 950-51 (1977).
35. *See* notes 40 and 41 and accompanying text *infra.*

acterized *Colonnade* and *Biswell* as representing "responses to relatively unique circumstances."[36]

## ADMINISTRATIVE SEARCHES: NEW MEXICO DECISIONS

The New Mexico cases involving administrative searches were decided in light of the foregoing Supreme Court decisions. The first case, *Dunlop v. Hertzler Enterprises, Inc.*,[37] involved a challenge to OSHA regulations which permitted nonconsensual administrative inspections to check for compliance with health and safety standards promulgated by the Secretary of Labor.[38] OSHA representatives seeking to conduct a routine inspection and apparently acting without reason to suspect violations were denied entry to the Hertzler premises. Application was subsequently made to a federal magistrate for an inspection warrant. In support of the Secretary of Labor's petition for an order compelling inspection, the government argued that it was not required to obtain a warrant to make an OSHA inspection since such inspections fell within the *Colonnade-Biswell* exception. Hertzler, on the other hand, asserted both the necessity of a warrant under the Fourth Amendment and the constitutional deficiency of the inspection warrant which OSHA officials actually obtained. Hertzler claimed the magistrate had issued the inspection warrant without a showing of probable cause.[39] The court construed the *Colonnade-Biswell* exception to the warrant requirement narrowly. It found recent Supreme Court pronouncements in *Almeida-Sanchez v. United States*[40] and *Air Pollution Variance Board v. Western Alfalfa Corp.*[41] reaffirmed the general vitality and applicability of *Camara* and *See.*

36. 436 U.S. at 313.

37. 418 F. Supp. 623 (D.N.M. 1976).

38. *See* note 20 *supra.*

39. 418 F. Supp. at 629. In footnote 3, at 629, the court stated:

> The warrant application included only a recitation of the OSHA inspection provisions as authority for the proposed inspection plus statements to the effect that inspection of Hertzler was necessary to determine its compliance with OSHA and that OSHA inspectors previously had been denied entry at Hertzler. The warrant itself contained a conclusory assertion that reasonable legislative standards had been proposed for the inspection pursuant to 29 U.S.C. §657(a) (1976).

40. 413 U.S. 266 (1973). A warrantless automobile stop and search conducted by roving Border Patrol officers pursuant to federal statutory authority permitting such stops and searches within 100 miles of the border to check for illegal aliens was held unconstitutional. The Court found that the warrantless searches, conducted without probable cause or consent, "embodied precisely the evil the Court saw in Camara when it insisted that the 'discretion of the official in the field' be circumscribed by obtaining a warrant prior to the inspection." 413 U.S. at 270. The exceptions of *Colonnade* and *Biswell* were not applicable since "the petitioner here was not engaged in any regulated or licensed business." *Id.* at 271.

41. 416 U.S. 861 (1974). A state health inspector entered the outdoor premises of the

The *Hertzler* opinion enumerated the factors which need to exist for a warrantless inspection to be sustained under the narrow *Colonnade-Biswell* exception.[42] Since these factors were absent in the *Hertzler* situation, the court concluded that a warrantless OSHA inspection of the Hertzler premises was outside the *Colonnade-Biswell* exception and therefore prohibited under *Camara* and *See*. The court also noted that unlike the relatively limited scope of the administrative inspections sustained in *Colonnade* and *Biswell*, OSHA inspections embrace practically every private enterprise. The court decided that Congress intended that OSHA "conduct nonconsensual inspections only pursuant to the authority of a warrant issued upon satisfaction of standards of probable cause which have been articulated in the area of administrative searches."[43] The court concluded that the federal magistrate's warrant was improperly issued because OSHA had failed to meet the reduced probable cause requirements of an administrative search.[44]

On the basis of the decision in *Hertzler* and another federal case,[45] the New Mexico Supreme Court in *State ex rel. Environmental Improvement Agency v. Albuquerque Publishing Co.*[46] held that a state agency, authorized to conduct OSHA health and safety inspections, must obtain a warrant to make a nonconsensual administrative inspection of the premises of a publishing company. The court said that,

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plant without the company's knowledge or consent to test the smoke emitted from the plant's chimneys. The Court reaffirmed the principles of *Camara* and *See* but sustained the inspection under the theory that the Fourth Amendment does not extend to sights seen in the open fields. 416 U.S. at 865.

42. The *Hertzler* court gave this summary of the relevant factors:

> First, the enterprise sought to be inspected must be engaged in a pervasively regulated business. The presence of this factor insures that warrantless inspections will pose only a minimal threat to justifiable expectations of privacy. Second, warrantless inspection must be a crucial part of a regulatory scheme designed to further an urgent federal interest. And third, the inspection must be conducted in accord with a statutorily authorized procedure, itself carefully limited as to time, place, and scope. The presence of this factor guards against the possibility that any inspection right will be abused.

418 F. Supp. at 631-632 (footnotes omitted).

43. 418 F. Supp. at 634. The court followed the decision in Brennan v. Gibson's Products, Inc., 407 F. Supp. 154 (E.D. Tex. 1976). In *Gibson's Products* the court held that 29 U.S.C. §657(a) authorizing entries without delay, "was intended by Congress to authorize objected-to OSHA inspections only when made by a search warrant issued by a United States Magistrate or other judicial officer of the third branch under probable cause standards appropriate to administrative searches—that is, in a constitutional manner." 407 F. Supp. at 162. *Contra,* Brennan v. Buckeye Industries, Inc., 374 F. Supp. 1350 (S.D. Ga. 1974) (sustaining the constitutionality of nonconsensual warrantless OSHA inspections).

44. 418 F. Supp. at 634. *See* text accompanying note 37 *supra* for the court's discussion of the warrant application.

45. Usery v. Centrif-Air Machine Co., Inc., 424 F. Supp. 959 (N.D. Ga. 1977).

46. 91 N.M. 125, 571 P.2d 117 (1977).

> a non-consensual, warrantless administrative inspection of business premises can be made only when: (1) the enterprise sought to be inspected is engaged in a business pervasively regulated by state or federal government; (2) the inspection will pose only a minimal threat to justifiable expectations of privacy; (3) the warrantless inspection is a crucial part of a regulatory scheme designed to further an urgent government interest; and (4) the inspection is carefully limited as to time, place and scope.[47]

Using the first element of the test, the court found that the state agency failed to meet its burden of showing that the publishing business qualified as an industry subject to pervasive governmental regulation.[48] Thus, the inapplicability of the *Colonnade-Biswell* exception to the warrant requirement led the court to conclude that the state agency must "obtain a search warrant based upon a preliminary finding of probable cause by a judicial officer before being allowed to inspect the premises involved."[49] The court did not discuss what type of showing of probable cause was required for issuance of the warrant. This absence of discussion may have occurred because the court viewed the question on appeal to be whether the district court properly refused to grant an order compelling a warrantless administrative inspection.[50]

## STATE v. GALIO

In *State v. Galio*[51] a warrantless police search of an automobile repair garage resulted in the seizure of evidence leading to criminal convictions for violation of motor vehicle statutes. The statutes which were violated prohibited the dismantling of motor vehicles without a license, the possession of vehicles lacking manufacturer's identification numbers, and the receiving or transferring of stolen vehicles. The inspection was made pursuant to statutory authority[52]

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47. *Id.* at 125, 571 P.2d at 117. These four criteria are nearly identically stated in Usery v. Centrif-Air Machine Co., Inc., 424 F. Supp. 959, 961 (N.D. Ga. 1977).

48. 91 N.M. at 125-26, 571 P.2d at 117-18. Failure to satisfy this first test was found determinative on the question of the reasonableness of nonconsensual, warrantless inspections in both the *Hertzler* and *Centrif-Air Machine* cases.

49. *Id.* at 126, 571 P.2d at 118.

50. In both the *Hertzler* and *Centrif-Air Machine* cases, cited and approved by the court, the standard for probable cause was deemed to be that for administrative searches, as set out in *Camera* and *See.*

51. 92 N.M. ____, 587 P.2d 44 (Ct. App. 1978).

52. N.M. Stat. Ann. §64-2-14 (Repl. 1972) provides:

> 64-2-14. Police authority of division.—The commissioner and such officers, deputies and inspectors of the division as he shall designate by the issuance of credentials shall have the powers:
>
> (a) Of peace officers for the purpose of enforcing the provisions of this act;

which granted the Commissioner of the Department of Motor Vehicles the power to inspect vehicles at public garages and repair shops "for the purpose of locating stolen vehicles and investigating the title and registration thereof."[53]

The defendant Galio operated a repair shop and was the employer of a codefendant, Cruz. The challenged inspection of the premises of the defendant's repair garage was made by members of the Albuquerque Police Department's Auto Theft Division who were deputized as inspectors of the New Mexico Department of Motor Vehicles.[54] Although not mentioned in the court's opinion, the record indicates that the police had information prior to making the search that a stolen truck was purchased from Cruz at Galio's business address.[55] As part of their search of cars belonging to both the defendant and third party customers, the police opened car doors, looked into glove boxes, raised hoods and raised cars on hoists and looked under them for numbers.[56]

The circumstances of the search prompted the court to note that it was not "concerned with a consent search or with probable cause to search."[57] The court was, however, concerned with the constitutionality of an unusual warrantless police search—one conducted pursuant to express statutory authority. The challenged *Galio* search did resemble the usual administrative search in having legislative sanction.[58]

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(b) To make arrests upon view and without warrant for any violation committed in their presence of any of the provisions of this act;

(c) When on duty, upon reasonable belief that any vehicle is being operated in violation of any provision of this act, to require the driver thereof to stop and exhibit his driver's license and the registration evidence issued for the vehicle and submit to an inspection of such vehicle, the registration plates, and registration evidence thereon or to an inspection and test of the equipment of such vehicle;

(d) Inspect any vehicle of a type required to be registered hereunder in any public garage or repair shop or in any place where such vehicles are held for sale or wrecking, for the purpose of locating stolen vehicles and investigating the title and registration thereof;

(e) To determine by inspection that all dealers and wreckers of vehicles are in compliance with the provisions of this act with particular reference to but not limited to the requirements for an established place of business and for records.

This section is now N.M. Stat. Ann. §66-2-12 (1978). There are minor changes in the new section.

53. *Id.*

54. State's Answer Brief at 1.

55. Defendant's Brief-In-Chief at 1.

56. *Id.*

57. 92 N.M. at ____, 587 P.2d at 45.

58. Generally, criminal searches by police for fruits and evidence of crime are not conducted pursuant to express statutory or regulatory authority, though administrative searches usually are. *But see,* Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (Border Patrol searches statutorily sanctioned).

The *Galio* opinion referred to the test set out in *Albuquerque Publishing* for determining whether the statute authorizing the search fulfilled the requirements of a warrantless administrative search. The court specifically discussed application of the third requirement for such a search—whether the warrantless inspection was a crucial part to a regulatory scheme designed to further an urgent governmental interest. The court applied this test by first quoting a statement of legislative purpose found elsewhere in the motor vehicle statutes[59] which the court stated was "similar"[60] to OSHA policy.[61] The court noted that in *Marshall v. Barlow's Inc.*[62] the Supreme Court held warrantless OSHA inspections to be unreasonable.[63] With this as authority, the *Galio* court concluded that no "urgent government interest would be served by a warrantless inspection."[64] The court thus held the warrantless search of Galio's garage unconstitutional since it was made without a warrant.

The New Mexico Court of Appeals in deciding *Galio* was not presented with the argument that the challenged search may actually have been a criminal search rather than an administrative inspection. However, with increasingly pervasive governmental regulation and compliance inspections, it seems likely that challenges to govern-

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59. The court quoted the following from N.M. Stat. Ann. §64-37-1 (Supp. 1975) [now N.M. Stat. Ann. §57-16-1 (1978)]:

> . . . The distribution and sale of motor vehicles in this state vitally affects the general economy of the state and the public interest and welfare of its citizens. It is the policy of this state and the purpose of this act [64-37-1 to 64-37-16] to exercise the state's police power to ensure a sound system of distributing and selling motor vehicles and regulating the manufacturers, distributors, representatives and dealers of those vehicles to provide for compliance with manufacturer's warranties, and to prevent frauds, unfair practices, discriminations, impositions and other abuses of our citizens.

92 N.M. at ____, 587 P.2d at 46.

60. 92 N.M. at ____, 587 P.2d at 46.

61. The court quoted the following from 29 U.S.C. §651 (1970):

> "(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.
>
> "(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—"

92 N.M. at ____, 587 P.2d at 46.

62. 436 U.S. 307 (1978).

63. The *Barlow* opinion reached its conclusion that nonconsensual OSHA inspections require a warrant without any reference to the OSHA policy statute from which the *Galio* opinion quoted. The Court in *Barlow* basically followed the *Camara* and *See* type approach: a balancing of the interests involved to determine whether warrantless OSHA inspections were reasonable.

64. 92 N.M. at ____, 587 P.2d at 46.

mental inspections may be decided on the distinction between criminal and administrative searches. Criminal search warrants may only be issued upon a showing of particularized probable cause; the requirements for issuance of an administrative search warrant, however, are significantly lower. Future searches conducted pursuant to an administrative warrant may be challenged on the ground that the search was criminal and conducted without the requisite probable cause.

Had the court in *Galio* squarely faced the question of whether the search was an administrative or a criminal search, it may have found helpful the balancing test suggested by the *Camara-See-Barlow* line of cases. In any weighing of the competing governmental and private interests, the fact that the search of Galio's garage was conducted by uniformed police officers acting upon a tip and looking for fruits and evidence of criminal activity would probably be significant. Inevitably, such a search is more hostile than that conducted by an agency inspector.[65] Also significant is the purpose of the statute authorizing the *Galio* search. Most administrative inspections seek to check for compliance with health and safety regulations.[66] The stated purpose

65. The *Camara* opinion, while recognizing the Fourth Amendment's applicability to both regulatory inspections and criminal searches, does seem to suggest that one method of distinguishing them might be the level of the hostility of the governmental intrusion. "We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. For this reason alone, *Frank* differed from the great bulk of Fourth Amendment cases which have been considered by this Court." 387 U.S. at 530.

In Frank v. Maryland, 359 U.S. 360 (1959), the Court sustained a challenged municipal inspection ordinance which, like the one in *Camara*, permitted warrantless inspections of private property to enforce health codes. *Frank* distinguished the challenged municipal health inspection from the normal criminal search and detailed the factors making it a less hostile intrusion. In such administrative searches "no evidence for criminal prosecution is sought to be seized . . . the inspection is conducted with due regard for every convenience of time and place . . . the inspector has no power to force entry and did not attempt it. A fine is imposed for resistance, but officials are not authorized to break past the unwilling occupant." 359 U.S. at 366-67. This key distinction made in *Frank* between normal criminal searches and administrative inspection—the basis of its holding that merely peripheral Fourth Amendment interests are involved in such administrative inspections—formed part of the legal background against which *Camara* was decided. In fact, the distinction supports *Camara's* lowering of the probable cause threshold for administrative warrants. *Camara* overruled *Frank* by finding that administrative searches do implicate protected privacy interests. Presumably the *Frank* distinction between criminal and administrative searches remains viable in post-*Camara* analysis. *See, e.g.* Wyman v. James, 400 U.S. 309 (1971) (Reduced hostility of caseworker's warrantless visit to welfare recipient's home was a factor in Court's sustaining the inspection).

66. For instance the Supreme Court said this of OSHA inspections: "The purpose of the search is to inspect for safety hazards and violations of OSHA regulations." Marshall v. Barlow's Inc., 436 U.S. 307, 309 (1978). The inspection in *Camara* was "aimed at securing city-wide compliance with minimum physical standards for private property." 387 U.S. at 535. And the *See* inspection "was conducted as part of a routine, periodic city-wide canvass to obtain compliance with Seattle's Fire Code." 387 U.S. at 541.

of the statute authorizing the *Galio* search, in contrast, is location of stolen vehicles[67]—a clear search for evidence of crime. Another significant factor in any balancing test is the fact that the level of the governmental intrusion is at least arguably greater in *Galio* than in the usual administrative search.[68] The police examination of the vehicles at Galio's repair shop was indeed extensive.[69] It represented not only a very real threat to the defendants of subsequent criminal prosecution, but also a significant invasion of the privacy of the third party vehicle owners. Another useful factor to a court's balancing might be the level of sanction involved.[70] Galio was convicted at trial of fourth degree felonies.[71] Such severe criminal penalties would seem to distinguish the *Galio* case from the more common administrative inspection cases.

The *Galio* opinion lacks express recognition that nonconsensual searches are generally unreasonable unless authorized by a valid warrant.[72] The opinion eschews balancing the challenged search's utility against the extent of its intrusion to determine its reasonableness. Such a conscious balancing might have forced the court to consider whether the challenged search was administrative or criminal. Such balancing would have required consideration of the rather extensive invasion of Galio's protected privacy interests to accomplish a governmental purpose arguably of the same dimension as the governmental purpose underlying typical criminal searches.[73]

Use of the *Albuquerque Publishing* test permitted the court to determine whether the *Galio* inspection fell within the narrow *Colonnade-Biswell* exception to the prohibition on nonconsensual warrant-

67. *See* text accompanying note 53 *supra.*

68. The extent of governmental intrusion was certainly considered by the Court in *Camara.* There the reasonableness of code enforcement area inspections was upheld. "[B]ecause the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." 387 U.S. at 537.

69. *See* text accompanying note 55 *supra.*

70. No Court seems to have expressly used this factor. However, Wyman v. James, 400 U.S. 309, 325 (1971) by analogy seems to support this proposition. The refusal in *Wyman* to permit a welfare caseworker's home visit was not a criminal act under any applicable state or federal statute. Instead, such refusal only resulted in termination of benefits. The Supreme Court's consideration of such a sanction was a factor it relied upon in finding that the caseworker's warrantless visit to the home of the recipient did not constitute an unreasonable search.

71. Fourth degree felonies carry penalties of imprisonment for not less than one nor more than five years, or the payment of a fine of not more than five thousand dollars or both such imprisonment and fine in the discretion of the judge.

72. "[E]xcept 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." Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967).

73. *See* notes 63-67 and accompanying text *supra.*

less administrative searches. But, by beginning its analysis with this test, the court made an assumption that the search was an administrative inspection. The *Albuquerque Publishing* test is relevant only after a search has been found to be an administrative search. Once the court decided the inspection of Galio's repair shop did not meet the *Albuquerque Publishing* test, it considered briefly the appropriate probable cause standard. The court found that "probable cause in the criminal law sense is not required."[74] This determination logically followed from the unquestioned assumption that the search was an administrative inspection since administrative inspections do not require the traditional particularized search warrant issued only upon a showing of probable cause. The full impact of the court's assumption that the *Galio* search was an administrative inspection is, therefore, that the probable cause threshold is relaxed for inspections that may well be statutorily sanctioned criminal searches.

## CONCLUSION

Analysis by the Supreme Court of a challenged search focuses on deciding whether the search is reasonable under the Fourth Amendment. This involves balancing the extent of the search's invasion of protected privacy interests against the governmental need to conduct the search. Thus, where the intrusion is limited and the government's need to conduct the noncriminal search to effectuate important public policies is great, the Court has held in the *Camara-See-Barlow* line of cases that searches made pursuant to a warrant issued on a showing of less than particularized probable cause are reasonable. The *Colonnade-Biswell* line illustrates the limited situation where the balance so favors the governmental interests that even warrantless inspections are deemed reasonable.

New Mexico cases involving administrative searches have not been decided by a similar process of considered weighing of the competing interests. Instead of determining the reasonableness of the challenged search, New Mexico courts have applied a four part test. This test is useful in determining whether a challenged search falls within the narrow *Colonnade-Biswell* exception, but it does not answer the essential question of whether a search is reasonable. The *Galio* case demonstrates the shortcomings of deciding challenges to searches by applying this test rather than applying the balancing test used by the Supreme Court.

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74. 92 N.M. at ____, 587 P.2d at 46. The court approvingly quotes this language from the *Barlow* case.