Warrantless Administrative Searches and Falconry

Bill Murrin, AFC Legal Liaison

AFC (American Falconry Conservancy) is opposed to the current regulatory format regarding warrantless searches of falconers' facilities and AFC believes that such an inspection format is, and always has been, in fact illegal

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. Fish & Wildlife Service (FWS) asserts it has the authority to require warrantless administrative searches – referred to as "inspections" – of curtilage (homes and their surrounding yards) of citizens who possess raptors for personal use under falconry regulations established by FWS (soon to be solely under the States' permitting scheme) in order to ensure compliance with these regulations. They assert this authority is derived from the Migratory Bird Treaty Act (MBTA). The Act provides under **USC Title 16, Chapter 7, Subchapter II, Section 706 Arrests; search warrants:**

Any employee of the Department of the Interior authorized by the Secretary of the Interior to enforce the provisions of this subchapter shall have power, **without warrant, to arrest any person committing a violation of this subchapter in his presence or view** and to take such person immediately for examination or trial before an officer or court of competent jurisdiction; shall have power to **execute any warrant** or other process issued by an officer or court of competent jurisdiction **for the enforcement of the provisions of this subchapter; and shall have authority, with a search warrant, to search any place**. The several judges of the courts established under the laws of the United States, and United States magistrate judges may, within their respective jurisdictions, upon proper oath or affirmation **showing probable cause, issue warrants in all such cases**. All birds, or parts, nests, or eggs thereof, captured, killed, taken, sold or offered for sale, bartered or offered for barter, purchased, shipped, transported, carried, imported, exported, or possessed contrary to the provisions of this subchapter or of any regulation prescribed thereunder shall, when found, be seized and, upon conviction of the offender or upon judgment of a court of the United States that the same were captured, killed, taken, sold or offered for sale, bartered or offered for barter, purchased, shipped, transported, carried, imported, exported, or possessed contrary to the provisions of this subchapter or of any regulation prescribed thereunder, shall be forfeited to the United States and disposed of by the Secretary of the Interior in such manner as he deems appropriate.

Emphasis added.

Under 18 USC Chapter 109 – Searches and Seizures (1/8/08) Section 2236 Searches without warrant, it provides:

-STATUTE-

Whoever, being an officer, agent, or employee of the United States or any department or agency thereof, engaged in the enforcement of any law of the United States, searches any private dwelling used and occupied as such dwelling without a warrant directing such search, or maliciously and without reasonable cause searches any other building or property without a search warrant, shall be fined under this title for a first offense; and, for a subsequent offense, shall be fined under this title or imprisoned not more than one year, or both.

This section shall not apply to any person -

(a) serving a warrant of arrest; or

(b) arresting or attempting to arrest a person committing or attempting to commit an offense in his presence, or who has committed or is suspected on reasonable grounds of having committed a felony; or

(c) making a search at the request or invitation or with the consent of the occupant of the premises.

Definition of Administrative Search: "an inspection or search carried out under a regulatory or statutory scheme esp. in public or commercial premises and usu. to enforce compliance with regulations or laws pertaining to health, safety, or security - one of the fundamental principles of *administrative searches* is that the government may not use an administrative inspection scheme as a pretext to search for evidence of criminal violations *People v. Madison*, 520 N.E.2d 374 (1988)" http://dictionary.getlegal.com/search-(1)

"The Supreme Court has placed fewer checks on government searches pursuant to administrative schemes (health and safety inspections, for example) than it has placed on searches aimed at gathering evidence of criminal wrong-doing. Moreover, under current doctrine, government officials are less likely to need a SEARCH WARRANT for administrative searches of businesses than for similar searches of homes." Kozinski, Alex, "Administrative Search," Macmillan Reference USA, 2000.

It is the position of the AFC that FWS's claim of authority to require warrantless inspections of falconers' curtilage, at the State or federal level, as a condition of the falconry permit is ungrounded in that there is no provision in the MBTA authorizing it; there can be no statutory justification in it; and further, it is violative of Fourth Amendment protections guaranteed by the federal Constitution. Therefore, FWS asserts their warrantless inspection requirement without sanction of law. This will be aptly demonstrated by U.S. Supreme Court decisions.

In *Weeks v. United States*, 232 U.S. 383 (1914) the Court provides an appropriate summary for the purpose of the Fourth: "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as

to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. … In *Adams v. New York,* 192 U. S. 585, this court said that the Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law, acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it. … To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."

The court added the old adage "a man's house was his castle, and not to be invaded by any general authority to search and seize his goods and papers." "General authority" is the key phrase which is in direct contrast to *specific authority* that the Fourth requires. Warrantless falconry inspections fall under a general search authority which is prohibited by the Fourth as it applies to individuals in their private endeavors.

In *Marron v. United States*, 275 U.S. 192 (1927) the Court states, "The requirement of the Fourth Amendment that warrants shall particularly describe the things to be seized makes general searches under them impossible…. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." The Court further provides "It has long been settled that the Fifth Amendment protects every person against incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment. *Agnello v. United States,* 269 U. S. 20, 269 U. S. 34…." The *Lefkowitz* Court, cited below, quoted Lord Camden in the celebrated case *Entick v. Carrington,* 19 How. St. Tr. 1029, where it provided that one's private "papers are his dearest property" and opposed the use of them in convictions of crime questioning whether "such a power would be more pernicious to the innocent than useful to the public..." which we must consider a measuring stick for Fourth Amendment considerations.

In *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931) the Court responded to prohibition agents' warrantless search, seizure and arrests with "The Fourth Amendment forbids every search that is unreasonable, and is to be liberally construed." The tone for the Fourth to be liberally construed was set by *Boyd v. United States*, 116 U.S. 616 (1886) where the Court stated "[The start of abuse] can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed." It was hoped that future Courts' would see this as the test for Fourth Amendment applicability. The need to search or inspect must have a significant public interest at stake in order to justify the temporary departure from protections the Fourth was designed to cover.

United States v. Lefkowitz, 285 U.S. 452 (1932) was a prohibition case whereby in conjunction with a legal arrest a room was searched and evidence seized without a search warrant. The lower court "held that the things seized when the office and furniture were explored did not belong to the same class, referred to 'the firmly rooted proposition that what are called general exploratory searches throughout premises and personal property are forbidden,' and said that it did not matter 'whether the articles of personal property opened and the contents examined are numerous or few, the right of personal security, liberty and private property is violated if the search is general, for nothing specific, but for whatever the containers may hide from view, and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light….'" While this position has lost some of its force since 1932, the principle that law enforcement cannot invade private property solely for discovery of violations, still has the force of law, except under compelling public issues of grave concern to society – such as health, safety and security issues..

The Lefkowitz Court quoted Lord Camden in *Entick v. Carrington*, cited above, who offered, "'It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust, and it should seem that search for evidence is disallowed upon the same principle. There too, the innocent would be confounded with the guilty.' The teachings of that great case were cherished by our statesmen when the Constitution was adopted. In *Boyd v. United States,* 116 U. S. 630, this Court said: 'The principles laid down in this opinion affect the very essence of constitutional liberty and security. . . . They apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. . . . Any forcible and compulsory extraction of a man's own testimony … to be used as evidence … or to forfeit his goods is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other.'"

McDonald v. United States, 335 U.S. 451 (1948) was a case pertaining to the operation of an illegal lottery, where the police "forced their way, without a warrant for search or arrest, into a rooming house in which [the petitioner] had rented a room." The Court held "A search without a warrant is not justified unless the exigencies of the situation make that course imperative." The Court explained "The prosecution seeks to build the lawfulness of the search on the lawfulness of the arrest, and so justify the search and seizure without a warrant." The same reasoning applies to inspections: wildlife agents, under color of law, assert they simply want to make sure permittees are in compliance with regulations, but when permittees are not, officers are rewarded with the opportunity to cite the permittee. This demonstrates that inspections are actually warrantless searches looking for evidence of some wrongdoing – major or minor wrongdoing is irrelevant. "The reasoning runs as follows: … The [citation] being valid, the search incident thereto was lawful." A citation for a falconry violation, no matter how small, can lead to the revocation of the falconry permit; and wildlife managers assert that if a falconer loses his permit, he must surrender his bird(s) – his property! This becomes an issue of self incrimination since a takings, based on an illegal search, is the end result. The Fifth Amendment is now also at issue.

The *McDonald* Court further clarifies the purpose of the Fourth: "Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional circumstances…. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime…. Power is a heady thing, and history shows that the police acting on their own cannot be trusted. And

so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." One may say that the unjustified warrantless falconry inspections are "far more serious than [any falconry infraction] they [are attempting to] suppress." The sport of falconry is "not one which endanger[s] life or limb or the peace and good order of the community" and therefore is not an activity deserving of such contempt and disregard of falconers' rights. While the management of wildlife harvest is most assuredly justified, once wildlife is legally harvested, wildlife managers' authority and interest in the use of wildlife is diminished substantially, though not completely (as it relates to commerce), and the suppression of its use for private purposes is certainly not "more important to society than the security of the people against unreasonable searches and seizures."

In *Henry v. United States*, 361 U.S. 98 (1959) the Court reiterated what the *McDonald* Court asserted: "The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses…." The *Henry* Court expanded upon this and provided "It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest."

Abel v. United States, 362 U.S. 217 (1960) is an illegal immigration case combined with espionage. INS officers were used by FBI agents to gain access to petitioner's hotel room since the acquisition of a warrant for espionage was untenable. The Immigration and Nationality Act of 1952 authorized the issuance of administrative warrants to INS officers without judicial sanction (this regulatory authority is allowed by statutory language grounded in substantial national interests), which provided the means for the FBI to search the petitioner's room for evidence of espionage, i.e. a criminal investigation. Evidence was found, the petitioner was arrested and subsequently convicted. Therefore the INS administrative arrest was used by the FBI improperly. The Court stated "it may be said that the circumstances of this case reveal an opportunity for abuse of the administrative arrest." Aliens, certainly illegal ones, do not have the same rights as citizens as evinced by the Court's statement "deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions." Therefore the conviction is not objectionable. What is objectionable is the disregard for the rule of law displayed by the FBI and INS agents when they circumvented appropriate law enforcement procedures and attempted to mask their efforts under false pretenses. This case is an example of the abuses that can occur with administrative searches; i.e. officers, under the color of law, use regulatory mechanisms to pursue criminal investigations. This does not mean administrative searches are inherently bad, but regulations can be used in bad faith to accomplish quite different ends then the intent of a statute. It demonstrates why warrantless inspections can only be allowed when justifiable social interests such as health, safety and security issues are at stake, and even here with very clearly defined and limited powers. The exposure of citizens to potential law enforcement abuses must be kept to a minimum by maintaining the understanding that administrative searches are a necessary evil under exceptional circumstances. For a deeper analysis of the dangers this case presents in regard to administrative powers, please see Justices Douglas and Black's dissent as well as Justice Brennan's dissent. They summarize their concerns with the following statement, "Some things in our protective scheme of civil rights are entrusted to the judiciary. Those controls are not always congenial to the police. Yet, if we are to preserve our system of checks and balances and keep the police from being all-powerful, these judicial controls should be meticulously respected. When we read them out of the Bill of Rights by allowing shortcuts, as we do today and as the Court

did in the *Frank* and *Carlson* cases, police and administrative officials in the Executive Branch acquire powers incompatible with the Bill of Rights."

Silverman v. United States, 365 U.S. 505 (1961) is an eavesdropping case which "was accomplished by means of an unauthorized physical penetration into the premises occupied by petitioners, which violated their rights under the Fourth Amendment" and therefore their convictions were reversed. The Court provided "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. What the Court said long ago bears repeating now: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.' *Boyd*"

In the conclusion of *Mapp v. Ohio*, 367 U.S. 643 (1961) the Court states "Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." This is a case where the object of a warrantless search produced evidence for an unrelated violation – possession of lewd and lascivious books, pictures, and photographs – which resulted in a conviction. The Court reversed the conviction based on "the right to privacy" and "the right to be secure against rude invasions of privacy."

Rogers v. Richmond, 365 U.S. 534 (1961) is a case where police extracted a confession to murder by coercion. The Court reversed the conviction and provided the following reasoning for this decision: "Our decisions under [the 14th] Amendment [Due Process Clause] have made clear that convictions following the admission into evidence of confessions which are involuntary, *i.e.,* the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true, but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial, and not an inquisitorial, system -- a system in which the State must establish guilt by evidence independently and freely secured, and may not, by coercion, prove its charge against an accused out of his own mouth" Administrative searches are coercive by their very nature, i.e. if one does not comply, there is a penalty to pay. Our society accepts this compromise when there is a substantial public interest at stake, such as health, safety and security issues; but even here, not under all conditions. However, when there is no substantial interest at stake, then our society finds coercion repulsive and utterly rejects its use; especially when society becomes aware of the abusive nature of some law enforcement personnel. Administrative searches used for benign personal activities, use coercion with no public benefit to show for it and are therefore repulsive at their core. The most objectionable aspects of it is: a falconer cited for some infraction of the falconry regulations can lose his permit and, as FWS would have us believe, lose his bird. All of this is based on the falconer providing wildlife managers the means to accomplish this through the warrantless inspection requirement. This offends: the Fourth Amendment's Search and Seizure Clause, since there is no warrant acquired through judicial oversight; the Fifth Amendment's Self-Incrimination Clause since the falconer provides incriminating evidence against his will; and the Fourteenth Amendment's Due Process Clause since there is no trial involved in this government takings. There is simply a government confiscation with

no judicial oversight. This establishes the opportunity for an abusive relationship between wildlife managers and falconers at the outset - this is un-American at its very foundation.

Griswold v. Connecticut, 381 U.S. 479 (1965) is a case where the Directors of a medical clinic were tried and "were convicted as accessories for giving married persons information and medical advice on how to prevent conception and, following examination, prescribing a contraceptive device or material for the wife's use." The Court held "The Connecticut statute forbidding use of contraceptives violates the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights." The penalty included fines and/or imprisonment. The Court's reasoning provides a deeper insight into the meaning of citizens' rights: "The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice -- whether public or private or parochial -- is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights. … Without those peripheral rights, the specific rights would be less secure. … The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. … The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment." This understanding covers all those activities that are benign or neutral in their nature. Falconry is a benign or neutral endeavor; a form of expression; a pursuit of happiness that is a right, not a privilege, covered by the Ninth Amendment (however, rights do have conditions attached, expressed through statutes and regulations, in order to maintain harmony within society). "…the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people." In his *Commentaries on the Constitution of the United States* 626-627 (5th ed. 1891), Justice Joseph Story in referring to the Ninth, stated, "This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well known maxim that an affirmation in particular cases implies a negation in all others, and, *e converso,* that a negation in particular cases implies an affirmation in all others."

The *Griswold* Court referenced another case to express what the American system of government really means: "I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.' *Id.* at 367 U. S. 521. Mr. Justice Brandeis, dissenting in *Olmstead v. United States,* 277 U. S. 438, 277 U. S. 478, comprehensively summarized the principles underlying the Constitution's guarantees of privacy: 'The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.'" This expresses perfectly the deep convictions the members of AFC believe in. "The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under the cases of this Court, require "strict scrutiny," *Skinner v. Oklahoma,* 316 U. S. 535, and "must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker,* 364 U. S. 479."

Regarding the Connecticut contraceptive prohibition, the Court stated, "… Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' *NAACP v. Alabama,* 377 U. S. 288. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy…." Yet FWS does "sweep unnecessarily broadly and thereby invade the area of protected freedoms" when falconry is at issue. The Court continued "In a long series of cases, this Court has held that, where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling,' *Bates v. Little Rock,* 361 U. S. 516. The law must be shown 'necessary, and not merely rationally related, to the accomplishment of a permissible state policy.' *McLaughlin v. Florida,* 379 U. S. 184." FWS would be hard pressed to show that their draconian falconry regulatory scheme is compelling and rationally necessary to accomplish the management of migratory bird populations as was the intent of the MBTA.

The *Griswold* case provides another lesson that Justice White provided in his concurrence in the judgment: "The traditional due process test was well articulated and applied in *Schware v. Board of Bar Examiners,* a case which placed no reliance on the specific guarantees of the Bill of Rights. 'A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. … *A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.* Obviously an applicant could not be excluded merely because he was a Republican, or a Negro, or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.'" This informs us that human endeavors that are not anti-social in nature, are a right and not a privilege. Driving, hunting, fishing, trapping, etc. are all rights, not privileges based on the reasoning presented here. A permitting scheme requiring some form of qualification does not detract from the right; it simply provides society with the assurance that he will not be a nuisance while pursuing or practicing his endeavor.

Camara v. Municipal Court, 387 U.S. 523 (1967) is a case closer in relation to the falconry regulatory scheme since it addresses a warrantless code-enforcement inspection of a personal residence. "Appellant was charged with violating the San Francisco Housing Code for refusing, after three efforts by city housing inspectors to secure his consent, to allow a warrantless inspection of the ground-floor quarters which he leased…. [Appellant claimed] the inspection ordinance unconstitutional for failure to require a warrant for inspections…." The Court stated, "With certain carefully defined exceptions, an unconsented warrantless search of private property is 'unreasonable.' … Warrantless administrative searches cannot be justified on the grounds that they make minimal demands on occupants; that warrants in such cases are unfeasible; or that area inspection programs could not function under reasonable search-warrant requirements. … In the nonemergency situation here, appellant had a right to insist that the inspectors obtain a search

warrant." Under the San Francisco Housing Code "Sec. 503 RIGHT TO ENTER BUILDING. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code. … Appellant has argued throughout this litigation that 503 is contrary to the Fourth and Fourteenth Amendments in that it authorizes municipal officials to enter a private dwelling without a search warrant and without probable cause…. the District Court of Appeal held that 503 does not violate Fourth Amendment rights because it 'is part of a regulatory scheme which is essentially civil rather than criminal in nature….' Having concluded that *Frank v. Maryland*, to the extent that it sanctioned such warrantless inspections, must be overruled, we reverse."

In distinguishing between civil and criminal searches, the Court stated "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. … But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security. And even accepting *Frank's* rather remarkable premise, inspections of the kind we are here considering do in fact jeopardize 'self-protection' interests of the property owner. Like most regulatory laws, fire, health, and housing codes [as well as MBTA regulations] are enforced by criminal processes. … Finally, as this case demonstrates, refusal to permit an inspection is itself a crime, punishable by fine or even by jail sentence." Whereas with falconry, refusal entails revocation of the permit and the threat of confiscation of property – the falconer's bird(s).

The *Camara* Court quoted *Johnson v. United States*, 333 U.S. 10: "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When 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." In addressing the warrantless inspections, the Court said, "The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review…."

The Court continues, "The final justification suggested for warrantless administrative searches is that the public interest demands such a rule: it is vigorously argued that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and that the only effective means of enforcing such codes is by routine systematized inspection of all physical structures." The Court admits this requires careful consideration and given the seriousness of the consequences urban blight has brought to communities, under these troubling circumstances the Court does not argue that inspections cannot be pursued; it believes they can only be pursued with a warrant. "It has nowhere been urged that fire, health, and housing code inspection

programs could not achieve their goals within the confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive." Fire and health issues are of a far greater concern to society than the sport of falconry; therefore how can FWS's position withstand constitutional scrutiny and justify warrantless inspections on an activity that has no negative social ramifications? "In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections."

"In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. To apply this standard, it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen. For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is 'reasonable' only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling." The MBTA is certainly in agreement with this as provided in Section 706 Arrests and Search Warrants.

The Court points to circumstances where warrantless inspections are justified: "Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations. See North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (seizure of unwholesome food); Jacobson v. Massachusetts, 197 U.S. 11 (compulsory smallpox vaccination); Compagnie Francaise v. Board of Health, 186 U.S. 380 (health quarantine); Kroplin v. Truax, 119 Ohio St. 610, 165 N. E. 498 (summary destruction of tubercular cattle)." All of these cases demonstrate a serious public issue at stake, which is obviously absent from the sport of falconry.

See v. City of Seattle, 387 U.S. 541 (1967) was decided at the same time as *Camara*. The primary difference between *See* and *Camara* was that *See* was for inspection of private commercial premises, whereas *Camara* was for a residential inspection. Appellant was convicted by the lower court, but the Supreme Court reversed the decision stating, "We find the principles enunciated in the *Camara* opinion applicable here, and therefore we reverse."

Warden v. Hayden, 387 U.S. 294 (1967) is an armed robbery case where the Court provided "'The exigencies of the situation,' in which the officers were in pursuit of a suspected armed felon in the house which he had entered only minutes before they arrived, permitted their warrantless entry and search…." The Court affirmed the conviction, but Justice Douglas' dissent provides some insight into the Fourth Amendment that further clarifies when warrants are needed in contrast to when they are not. He states, "This constitutional guarantee … has been thought … to have two faces of privacy:

(1) One creates a zone of privacy that may not be invaded by the police through raids, by the legislators through laws, or by magistrates through the issuance of warrants.

(2) A second creates a zone of privacy that may be invaded either by the police in hot pursuit or by a search incident to arrest or by a warrant issued by a magistrate on a showing of probable cause."

Justice Douglas continues, "The debates concerning the Bill of Rights did not focus on the precise point with which we here deal. There was much talk about the general warrants and the fear of them. But there was also some reference to the sanctity of one's home and his personal belongings, even including the clothes he wore. Thus, in Virginia, Patrick Henry said: 'The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes, for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights or some similar restriction, go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear. They ought to be restrained within proper bounds.'"

"… in *Watkins v. United States,* 354 U. S. 178: 'While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process." Inspections for falconry have no adjunct to the legislative process and therefore are illegal since an agency's authority must be narrowly confined within the limits of a statute if rights are to be protected.

The *Warden* Court continued, "The constitutional philosophy is, I think, clear. The personal effects and possessions of the individual (all contraband and the like excepted) are sacrosanct from prying eyes, from the long arm of the law, from any rummaging by police. Privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses. The article may be a nondescript work of art, a manuscript of a book, a personal account book, a diary, invoices, personal clothing, jewelry, or whatnot. Those who wrote the Bill of Rights believed that every individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing. This is his prerogative not the States'. The Framers, who were as knowledgeable as we, knew what police surveillance meant and how the practice of rummaging through one's personal effects could destroy freedom. I would … leave with the individual the choice of opening his private effects (apart from contraband and the like) to the police or keeping their contents a secret and their integrity inviolate. The existence of that choice is the very essence of the right of privacy. Without it, the Fourth Amendment and the Fifth are ready instruments for the police state that the Framer sought to avoid."

Bumper v. North Carolina, 391 U.S. 543 (1968) This was a rape and attempted murder case where evidence was acquired under the false pretense of a warrant. The conviction was reversed based on the stated principle, "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion -- albeit colorably lawful coercion. Where there is coercion, there cannot be consent." The Court further declared, "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and

voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." Therefore, when wildlife managers assert they have the authority to inspect falconers' premises and falconers give their consent, any violation discovered is inadmissible to any administrative or judicial proceedings since such evidence was not discovered under a valid warrant, not authorized under statutory authority, nor discovered under legitimate consent "freely and voluntarily given." Such inspections and any subsequent violations discovered must simply be understood to be instructional in nature, but not subject to punishment of any kind.

Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) is a case based on the refusal of the owner of a catering company to allow federal agents to inspect his liquor. They broke the lock to the room where the liquor was stored and suspected that the bottles had been refilled which was illegal. The Court recognized the authority of agents to inspect, but not to break into the room.

The Court describes the statutory authority to allow for warrantless inspections. "Congress, which has broad authority to fashion standards of reasonableness for searches and seizures respecting the liquor industry, has made it an offense under 26 U.S.C. § 7342 for a liquor licensee to refuse admission to federal inspector, a sanction that precludes forcible entries without a warrant." "It is provided in 26 U.S.C. § 5146(b) and in 26 U.S.C. § 7606 that the Secretary of the Treasury or his delegate has broad authority to enter and inspect the premises of retail dealers in liquors." No such provision can be found in the MBTA.

The Court agreed "that Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." Demonstrating a compelling public interest.

United States v. Biswell, 406 U.S. 311 (1972) is a case in which a warrantless search of a gun dealer produced weapons for which the dealer was not licensed to possess. In support of this warrantless search the Court references the Gun Control Act of 1968 which "authorizes official entry during business hours into 'the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises.'" Again, no inspection provision can be found in the MBTA.

"In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent, but on the authority of a valid statute." Under this scenario, consent is not required for the warrantless inspection to be legitimate. The statutory authority provides agents with the power to inspect without a warrant. The owner's consent is merely a formality in his recognition of the legitimacy of their lawful powers. No such provision, and therefore no such authority, is available to FWS. They must live within normal law enforcement boundaries to detect violations.

The justification for the statutory authority of the warrantless inspections is explained by the Court: "Federal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, but close scrutiny of this traffic 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. … Large interests are at stake, and inspection is a crucial part of

the regulatory scheme, since it assures that weapons are distributed through regular channels and in a traceable manner, and makes possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms." This expresses well, the need for a vigorous regulatory scheme. It explains what's at stake and why the American community needs this kind of inspection provision. Falconry does not fall within this scenario and therefore requires no federal regulatory scheme beyond management of wild take and commerce."

"It is also apparent that, if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment. In *See v. City of Seattle*, the mission of the inspection system was to discover and correct violations of the building code…. Periodic inspection sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system there at issue. We expressly refrained in that case from questioning a warrantless regulatory search such as that authorized by § 923 of the Gun Control Act. Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential."

"We have little difficulty in concluding that, where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute." The Court reiterates the need for statutory authority here in their conclusion.

In *Marshall v. Barlow's*, Inc., 436 U.S. 307 (1978) "Appellee brought this action to obtain injunctive relief against a warrantless inspection of its business premises pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 (OSHA), which empowers agents of the Secretary of Labor to search the work area of any employment facility within OSHA's jurisdiction for safety hazards and violations of OSHA regulations. A three-judge District Court ruled in appellee's favor, concluding, in reliance on *Camara v. Municipal Court,* and *See v. Seattle,* that the Fourth Amendment required a warrant for the type of search involved and that the statutory authorization for warrantless inspections was unconstitutional."

Unlike the MBTA, OSHA had a provision for warrantless inspections and yet the Court affirmed the District Court's ruling, which demonstrates that even Congress' authority has constitutional limits. Given this fact, how can FWS claim a power it does not possess? "OSHA inspectors had unbounded discretion in choosing which businesses to inspect and when to do so, leaving businesses at the mercy of possibly arbitrary actions and certainly with no assurances as to limitation on scope and standards of inspections. Further, warrantless inspections were not necessary to serve an important governmental interest…." http://caselaw.lp.findlaw.com/data/constitution/amendment04/01.html#7

The Court continued "Insofar as experience to date indicates, requiring warrants to make OSHA inspections will impose no serious burdens on the inspection system or the courts. The advantages of surprise through the opportunity of inspecting without prior notice will not be lost if, after entry to an inspector is refused, an *ex parte* warrant can be obtained, facilitating an inspector's reappearance at the premises without further notice…."

"Requiring a warrant for OSHA inspections does not mean that, as a practical matter, warrantless search provisions in other regulatory statutes are unconstitutional, as the reasonableness of those provisions depends upon the specific enforcement needs and privacy guarantees of each statute."

"The clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception. The Secretary [of Labor] would make it the rule." Here the Court informs us that a "closely regulated industry of the type involved [in liquor and firearms] is the exception" and therefore requires inspections due to the nature of the industry, i.e. certain industries have a substantial public interest at stake. However, where there is no substantial public interest, the government cannot apply, on the one hand, an exceptional power over "closely regulated" industries "long subject to close supervision and inspection," and then on the other hand, with a broad stroke, apply it to any other endeavor that officials would like to see regulated.

"In short, we base today's opinion on the facts and law concerned with OSHA, and do not retreat from a holding appropriate to that statute because of its real or imagined effect on other, different administrative schemes. Nor do we agree that the incremental protections afforded the employer's privacy by a warrant are so marginal that they fail to justify the administrative burdens that may be entailed. 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. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. … We conclude that the concerns expressed by the Secretary do not suffice to justify warrantless inspections under OSHA or vitiate the general constitutional requirement that for a search to be reasonable a warrant must be obtained. "

In footnote 19 the Court provides other regulatory regimes that have provisions for inspections. All of them cover a compelling interest of real substance to the nation's health, safety and security.

Michigan v. Tyler, 436 U.S. 499 (1978) is an arson case where the owner of the building was convicted for setting the fire. The investigation was undertaken at first by the fire chief and a police detective who uncovered evidence of arson and several days later the investigation was continued on the damaged property by a State police arson detective but without a warrant. "The State Supreme Court reversed respondents' convictions…" and the U.S. Supreme Court affirmed the lower Court's decision.

"There is no diminution in a person's reasonable expectation of privacy or in the protection of the Fourth Amendment simply because the official conducting the search is a firefighter, rather than a policeman, or because his purpose is to ascertain the cause of a fire, rather than to look for evidence of a crime. Searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment. The showing of probable cause necessary to secure a warrant may vary with the object and intrusiveness of the search, but the necessity for the warrant persists."

"A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry "reasonable," and, once in the building to extinguish a blaze, and for a reasonable time thereafter, firefighters may seize evidence of arson that is in plain view and investigate the causes of

the fire. Thus, no Fourth and Fourteenth Amendment violations were committed by the firemen's entry to extinguish the blaze at respondents' store, nor by the fire chief's removal of the plastic containers."

This case informs us that even under serious public circumstances, such as an arson investigation, inspections require a warrant except under clearly defined circumstances. *Camara* covers routine inspections, such as falconry inspections, but *Michigan* covers inspections and searches that encompass a serious problem that has actually manifested and that the public certainly has a stake in, which is public safety in the present case. Given this understanding, how can warrantless falconry inspections be seen as legal?

Payton v. New York, 445 U.S. 573 (1980) "These appeals challenge the constitutionality of New York statutes authorizing police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest. In each of the appeals, police officers, acting with probable cause but without warrants, had gone to the appellant's residence to arrest the appellant on a felony charge and had entered the premises without the consent of any occupant."

"The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. To be arrested in the home involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home, which is too substantial an invasion to allow without a warrant, in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is present. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. … And, unlike the situation in *Watson,* no federal statutes have been cited to indicate any congressional determination that warrantless entries into the home are 'reasonable.'" It does not get any more explicit than this. FWS must withdraw its inspection provision from the falconry regulations.

"The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home -- a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that, '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' *Silverman v. United States,* 365 U. S. 505. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house."

In Justice Blackmun's concurrence of the opinion, he provides: The suspect's interest in the sanctity of his home then outweighs the governmental interests.

See *Welsh v. Wisconsin*, 466 U.S. 740 (1984) for further clarification of the sanctity of the home.

Donovan v. Dewey, 452 U.S. 594 (1981) page 49 "Section 103(a) of the Federal Mine Safety and Health Act of 1977 requires federal mine inspectors to inspect underground mines … to ensure compliance with health and safety standards…. When a federal inspector attempted a followup

inspection of appellee company's stone quarries, appellee officer of the company refused to allow the inspection to continue." Again, there is statutory authority for warrantless inspections.

The Court held "The warrantless inspections required by § 103(a) do not violate the Fourth Amendment, but instead are reasonable within the meaning of that Amendment."

"Unlike searches of private homes, which generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment, legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate that Amendment. A warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme…."

"Here, in view of the substantial federal interest in improving the health and safety conditions in mines, and of Congress' awareness that the mining industry is among the most hazardous and that this industry's poor health and safety record has significant deleterious effects … Congress could reasonably determine that a system of warrantless inspections was necessary 'if the law is to be properly enforced and inspection made effective.' *United States v. Biswell*"

"The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections. *United States v. Biswell.* … Inspections of commercial property may be unreasonable if they are not authorized by law or are unnecessary for the furtherance of federal interests."

Due to the health and safety component, mine inspections becomes a substantial public interest, and the Court provides a straight forward explanation in order to justify the need for them. If there is an explosion or a mine collapses on workers, the whole community in that region becomes involved. Every available community resource is allocated to the rescuing of miners – both public and private. These catastrophic events have historically experienced a substantial loss of life. Therefore, one cannot claim this is simply a private activity for private purposes. The risks and inherent problems make this a very public and community oriented enterprise. Again, no such social threat comes from falconry.

To summarize the validity of our claim that FWS has no authority to require warrantless inspections, the following is offered as an outline for review.

1. Section 706 of the MBTA refers to the need of a warrant "for the enforcement of the provisions of this subchapter…" It also provides that Department of the Interior law enforcement (LE) officials "shall have power, **without warrant**, to arrest any person committing a violation of this subchapter in his presence or view…." This provision makes it clear this is the only power LE has to act on a violation, or potential violation, without a warrant. Emphasis added.
2. 18 USC Section 2236 refers to penalties federal officers can face if engaged in a search without a warrant of any private dwelling (curtilage), excluding enumerated exceptions.

3. Criminal searches and administrative inspections are not distinguishable looking through the lens of the Fourth Amendment, excluding exceptional circumstances that are carefully defined.
4. General warrants were the primary evil the Fourth Amendment was designed to prevent. The warrantless administrative falconry inspections have very similar qualities to the general warrants in that they are exploratory in nature rather than specific in purpose.
5. Evidence of regulatory violations gathered through a warrantless inspection/search cannot be used against the offending falconer since it would violate his Fifth Amendment rights regarding self-incrimination.
6. The Fourth Amendment should be liberally construed in favor of protecting individual rights.
7. For warrantless inspections to be legal in regards to falconry, they must derive their authority from explicit statutory language as evinced in all other statutes that provide for them.
8. Our legal system is based on accusations of guilt being directed at a specific source for specific reasons; whereas warrantless inspections have qualities of a blanket inquisition – the shotgun approach. This is a mechanism that requires extraordinary monitoring due to the potential harm it can do to our system of government.
9. FWS does not need warrantless inspections to achieve their enforcement responsibilities. Where there is a violation, the FWS is empowered with the authority to seek a warrant and act on it.
10. There must be a substantial public interest at stake which justifies official intrusion into the sanctity of the home. The right to privacy is one of the most cherished protections we possess. To open it to governmental intrusion is to take a large chunk out of our constitutional rights.

A closing thought:

"However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." *Mapp v. Ohio*