Competition Litigation: "Dawn Raids" and Administrative Searches and Seizures

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I. INTRODUCTION

A. Background and Significance

"Dawn raids." These are two words that sow panic among business owners.

It is eight o'clock in the morning. A business owner is the first to arrive at his office. Then, a group of agents from the National Bureau of Investigation (NBI) enters his office to search and seize documents, computers, hard drives, computer servers, phone records, and even his secretary's notes, calendar, and appointment book. An NBI agent tells the owner that a complaint has been filed against him and his company for violation of the Philippine Competition Act (Competition Act).[1]

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With the passage of the Competition Act, which took effect on 5 August 2015, and the organization of the Philippine Competition Commission (Commission),[2] the Author believes that the abovementioned scenario will become common.

B. Limitations of Discussion

This Article will focus on the Commission's power of search and seizure in non-criminal proceedings (i.e., administrative and civil proceedings),[3] being the area in Philippine law and jurisprudence that has more unsettled issues as compared to criminal proceedings. This limitation is also useful to legal practitioners, as the bulk of the Commission's case load, the Author anticipates, will involve administrative proceedings.[4]

This Article, however, will not discuss the mergers and consolidation provisions and the policy issues behind the Act.

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1. An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefor [Philippine Competition Act], Republic Act No. 10667 (2015).

2. The Philippine Competition Commission was established on 1 February 2016 pursuant to the Philippine Competition Act. Philippine Competition Commission, Memorandum Circular No. 16-001, whereas cl., para. 3 (Feb. 12, 2016).

3. For brevity, non-criminal proceedings and searches will be referred to as "administrative proceedings" or "administrative searches," although it may include civil proceedings or searches.

4. It is easier to successfully prosecute administrative cases than criminal cases given the lower quantum of evidence needed in the former (i.e., substantial evidence versus proof beyond reasonable doubt). Administrative proceedings are also speedier as affidavits are sufficient to constitute testimonial evidence, and evidentiary rules are not strictly applied. In fact, the principal sponsor of the Act, Senator Paolo Benigno "Bam" Aquino IV explained during the Senate discussions that the law was structured to encourage administrative, instead of criminal, enforcement. Senator Aquino said, "[m]ost of the cases regarding competition are really left at an [administrative] level and civil liability level, and very few do get to a criminal level ... [and] have to prove intent and people go to jail, things like that. That is a lesser occurrence than [administrative] and civil liability cases." Senator Juan Edgardo "Sonny" M. Angara then correctly observed, "I guess the bias in favor of administrative proceedings is in the interest of speed and speedy disposition of disputes." *See* S. JOURNAL No. 11, at 174-75, 16th Cong., 2d Reg. Sess. (Aug. 20, 2014).

C. Statement of Questions

This Article aims to answer the following questions:

In administrative enforcement under the Act, can the Commission conduct warrantless searches and seizures of business premises? Can Congress empower the Commission to conduct warrantless routine inspections (not targeted searches) of business establishments? And last, if administrative searches and seizures require a court warrant, what is the standard for its issuance?

II. COMPETITION LAW IN THE PHILIPPINES

A. A Brief History

Competition law rests on the belief that competition is good.[5] Competition is believed to be good because it lowers prices and increases the quality of goods, ultimately benefiting the consumers.[6] It is somewhat *laissez-faire*.[7]

In contrast to such a system is strict government regulation. This was the case during the peak of the Soviet Union, when the supply and demand of goods and its prices were government-controlled and kept immune from market forces.[8]

The irony is that "real" competition — as opposed to artificial competition, which only creates the appearance of competition — has to be maintained through government regulation.[9] Enter competition laws, which prohibit and penalize acts that distort or destroy competitive forces in the market.

Competition law in the Philippines did not start with the Competition Act. As early as 1930, under the American regime, the Philippine Insular

5. ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN), ASEAN REGIONAL GUIDELINES ON COMPETITION POLICY 3-4 (2010).

6. *Id.*

7. *See* ASEAN, *supra* note 5.

8. *See generally* THOMAS SOWELL, BASIC ECONOMICS: A COMMON SENSE GUIDE TO THE ECONOMY 17 (4th ed. 2011). In most countries, however, the economy is a mix of free trade and government regulation.

9. "The policy of complete *laissez-faire*, founded upon mythical concepts of classical economists of free and unfettered competition, has long been discarded." Milton Handler, *The Constitutionality of Investigations by the Federal Trade Commission*, 28 COLUM. L. REV. 708, 709 (1928).

Government enacted the Revised Penal Code[10] that criminally punished bid-rigging,[11] monopolies, and restraint of trade.[12]

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10. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815 (1930).

11. *Id.* art. 185. Article 185 provides —

> Any person who shall solicit any gift or a promise as a consideration for refraining from taking part in any public auction, and any person who shall attempt to cause bidders to stay away from an auction by threats, gifts, promises, or any other artifice, with intent to cause the reduction of the price of the thing auctioned, shall suffer the penalty of *prision correccional* in its minimum period and a fine ranging from 10 to 50 per centum of the value of the thing auctioned.

Id.

12. *Id.* art. 186. Article 186 provides —

> The penalty of *prision correccional* in its minimum period or a fine ranging from 200 to 6,000 pesos, or both, shall be imposed upon:
>
> (1) Any person who shall enter into any contract or agreement or shall take part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce to prevent by artificial means free competition in the market.
>
> (2) Any person who shall monopolize any merchandise or object of trade or commerce, or shall combine with any other person or persons to monopolize said merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other article to restrain free competition in the market.
>
> (3) Any person who, being a manufacturer, producer, or processor of any merchandise or object of commerce or an importer of any merchandise or object of commerce from any foreign country, either as principal or agent, wholesaler or retailer, shall combine, conspire[,] or agree in any manner with any person likewise engaged in the manufacture, production, processing, assembling[,] or importation of such merchandise or object to commerce or with any other persons not so similarly engaged for the purpose of making transactions prejudicial to lawful commerce, or of increasing the market price in any part of the Philippines, or any such merchandise or object of commerce manufactured, produced, processed, assembled in[,] or imported into the Philippines, or of any article in the manufacture of which such manufactured, produced, processed, or imported merchandise or object of commerce is used.
>
> If the offense mentioned in this [A]rticle affects any food substance, motor fuel[,] or lubricants, or other articles of prime necessity; the penalty shall be that of *prision mayor* in its maximum and medium

In 1950, the new Civil Code[13] granted a right of action for damages arising from unfair competition.[14]

Then, in 1987, the Philippine Constitution mandated the State to prohibit combinations in restraint of trade and unfair competition, and if public interest requires, to regulate or prohibit monopolies.[15]

Thereafter, piecemeal legislations were enacted to protect and enhance competition, and to punish unfair competition in certain industries.[16]

> periods, it being sufficient for the imposition thereof that the initial steps have been taken toward carrying out the purposes of the combination.
>
> Any property possessed under any contract or by any combination mentioned in the preceding paragraphs, and being the subject thereof, shall be forfeited to the Government of the Philippines.
>
> Whenever any of the offenses described above is committed by a corporation or association, the president and each one of the directors or managers of said corporation or association or its agents or representative in the Philippines in case of a foreign corporation or association, who shall have knowingly permitted or failed to prevent the commission of such offenses, shall be held liable as principals thereof. (As amended by Republic Act No. 1956, approved June 22, 1957.)

Id.

Article 186 was fashioned after Section 2 of the United States Sherman Act of 1890. *See* APEC Competition Policy & Law Database, Competition Policy in the Philippines – Existing Competition Laws, *available at* www.apeccp.org.tw/doc/Philippines/Competition/phcom1.html (last accessed Oct. 31, 2016).

13. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386 (1950).

14. *Id.* art. 28. Article 28 provides — "Unfair competition in agricultural, commercial[,] or industrial enterprises or in labor through the use of force, intimidation, deceit, machination[,] or any other unjust, oppressive or highhanded method shall give rise to a right of action by the person who thereby suffers damage." *Id.*

15. PHIL. CONST. art. XII, § 19. The provision of the Constitution states that "[t]he State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed." PHIL. CONST. art. XII, § 19.

16. Some of these laws are the Intellectual Property Code, the Electric Power Industry Reforms Act, the Price Act, the Anti-Dumping Act, the Securities Regulation Code, the Consumer Act of the Philippines, and the Downstream Oil Industry Deregulation Act. *See* An Act Prescribing the Intellectual Property

Finally, on 5 August 2015, the Competition Act — the first comprehensive competition law of the Philippines — took effect.[17] The Commission was later organized in February 2016 and, on 18 June 2016, issued the Competition Act's Implementing Rules and Regulations (IRR).[18]

B. Salient Provisions of the Philippine Competition Act

1. Objectives of the Act

The objectives of the Competition Act are to "[e]nhance economic efficiency and promote free and fair competition ... [p]revent economic concentration ... [and] [p]enalize all forms of anti-competitive agreements,

Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for Other Purposes [INTELL. PROP. CODE], Republic Act No. 8293 (1997); An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes [Electric Power Industry Reform Act of 2001], Republic Act No. 9136 (2001); An Act Providing Protection to Consumers by Stabilizing the Prices of Basic Necessities and Prime Commodities and by Prescribing Measures Against Undue Price Increases During Emergency Situations and Like Occasions [Price Act], Republic Act No. 7581 (1992); An Act Providing the Rules for the Imposition of an Anti-Dumping Duty, Amending for the Purpose Section 301, Part 2, Title II, Book I of the Tariff and Customs Code of the Philippines, as Amended by Republic Act No. 7843, and for Other Purposes [Anti-Dumping Act of 1999], Republic Act No. 8752 (1999); The Securities Regulation Code [SECURITIES REG. CODE], Republic Act No. 8799 (2000); The Consumer Act of the Philippines [Consumer Act of the Philippines], Republic Act No. 7394 (1992); & An Act Deregulating the Downstream Oil Industry, and for Other Purposes [Downstream Oil Industry Deregulation Act], Republic Act No. 8479 (1998).

17. The Competition Act repealed all laws that were inconsistent with it, including by express mention, Article 186 of the Revised Penal Code. Philippine Competition Act, § 55 (a).

18. The Implementing Rules and Regulations, however, did not contain provisions implementing the enforcement provisions of the Act, including the rules of procedure, pleading, and practice, which, according to the Commission in its Public Consultation held between 16 and 24 May 2016, will be embodied in future issuances. Hence, as of the writing of this Article, the Commission has no rules on how to handle complaints. *See* Richmond Mercurio, *PCC readies draft IRR for competition law*, PHIL. STAR, May 11, 2016, *available at* www.philstar.com/business/2016/05/11/1581884/pcc-readies-draft-irr-competition-law (last accessed Oct. 31, 2016).

abuse of dominant position[,] and anti-competitive mergers and acquisitions[.]"[19]

2. Enforcement Powers of the Commission

The Commission has original and primary jurisdiction to enforce and implement the provisions of the Competition Act and the Act's IRR.[20] To carry out its mandate, the Commission has investigatory and enforcement powers, which include the following:

(1) Investigate and decide cases involving violations of the Competition Act and other competition laws, either *motu propio* or upon complaint or referral, and institute civil or criminal proceedings.[21]

(2) Conduct administrative proceedings and impose sanctions, fines, or penalties for violation of the Competition Act and its IRR, and punish for contempt.[22]

(3) Issue subpoenas *duces tecum* and *ad testificandum*, summon witnesses, administer oaths, and issue interim orders such as show cause orders and cease and desist orders after due notice and hearing.[23]

(4) Upon order of the court, undertake inspections of business premises and other offices, land, and vehicles, as used by the entity,[24] where the Commission reasonably suspects that relevant books, tax records, or other documents which relate to any matter relevant to the investigation are kept, in order to prevent the removal, concealment, tampering with, or destruction of the books, records, or other documents.[25]

19. Philippine Competition Act, § 2.

20. *Id.* § 12.

21. *Id.* § 12 (a).

22. *Id.* § 12 (e).

23. *Id.* § 12 (f).

24. *Id.* § 4 (h). Section 4 (h) of the Act states that an "[e]ntity refers to any person, natural or juridical, sole proprietorship, partnership, combination[,] or association in any form, whether incorporated or not, domestic or foreign, including those owned or controlled by the government, engaged directly or indirectly in any economic activity[.]" Philippine Competition Act, § 4 (h).

25. *Id.* § 12 (g).

(5) Deputize enforcement agencies of the government or enlist the aid and support of any private institution in the implementation of its powers and functions.[26]

Thus, to gather evidence, the Commission can compel an entity to produce books and records, require witnesses to testify, and inspect and search business premises for relevant books, records, and documents, with the assistance of the Philippine National Police or the NBI.

3. Anti-Competitive Agreements

Prohibited agreements may be classified into *per se* prohibited and those prohibited because of their adverse effects on competition, which must pass the "rule of reason" test.[27]

i. Per Se Prohibited

Under the Competition Act, there are only two forms of *per se* prohibited agreements between competitors:[28] (a) price-fixing[29] and (b) bid-rigging.[30] These are traditionally considered "hardcore" antitrust violations.[31]

ii. Under the Rule of Reason Test

Significantly, agreements between competitors that limit production and divide the market — which were historically, and are currently, regarded *per*

26. *Id.* § 12 (i).

27. *See* Edward J. Schneidman, *The Creation of a Separate Rule of Reason: Antitrust Liability for the Exchange of Price Information Among Competitors*, 28 DUKE L.J. 1004, 1004 (1979).

28. Philippine Competition Act, § 14 (a). But "[a]n entity that controls, is controlled by, or is under common control with another entity or entities, have common economic interests, and are not otherwise able to decide or act independently of each other, shall not be considered competitors for purposes of this section." *Id.* at § 14.

29. *Id.* § 14 (a) (1). "Restricting competition as to price, or components thereof, or other terms of trade[.]" *Id.*

30. *Id.* § 14 (a) (2). "Fixing price at an auction or in any form of bidding including cover bidding, bid suppression, bid rotation and market allocation[,] and other analogous practices of bid manipulation[.]" *Id.*

31. Organisation for Economic Co-Operation and Development (OECD), Hard Core Cartels 5-6, *available at* www.oecd.org/competition/cartels/2752129.pdf (last accessed Oct. 31, 2016).

se prohibited in many countries[32] — are not *per se* prohibited by the Competition Act. They may be justified if the object or effect of such agreements does not substantially prevent, restrict, or lessen competition.[33] As to who has the burden of proving or disproving that such agreements substantially prevent, restrict, or lessen competition, the Competition Act is silent.

The prohibited agreements may further be classified into criminal or administrative offenses.[34] On one hand, price-fixing, bid-rigging, limiting production, and market division — considered "horizontal restraints" or agreements between competitors or entities on the same level of production[35] — are criminal and administrative offenses. On the other hand, "vertical restraints," such as those between the manufacturer and the distributor, or the distributor and the retailer or dealer, or entities on different levels of production, considered less harmful to competition are punished administratively only.[36]

Anti-competitiveness is, however, not limited to agreements between two entities. It can be a unilateral act committed by one entity with a dominant position,[37] when such act would substantially prevent, restrict, or lessen competition. This so-called "abuse of dominant position" can take any of the following forms:

(1) "Predatory pricing" or selling goods or services below cost with the object of driving competition out of the relevant market;[38]

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32. BRIAN L. NELSON, LAW AND ETHICS IN GLOBAL BUSINESS: HOW TO INTEGRATE LAW AND ETHICS INTO CORPORATE GOVERNANCE AROUND THE WORLD 82 (2006 ed.).

33. *See* Philippine Competition Act, § 14 (b).

34. It is submitted that both criminal and administrative offenses carry with them a corresponding civil cause of action.

35. United Nations Conference on Trade and Development (UNCTAD), Intergovernmental Group of Experts on Competition Law and Policy, *Model Law on Competition, Revised chapter III*, ¶ 8, U.N. Doc. TD/B/C.I/CLP/L.4 (July 9-11, 2012).

36. *Id.* ¶ 7-8.

37. The Philippine Competition Act explains that a "[*d*]*ominant position* refers to a position of economic strength that an entity or entities hold which makes it capable of controlling the relevant market independently from any or a combination of the following: competitors, customers, suppliers, or consumers." Philippine Competition Act, § 4 (g) (emphasis supplied).

38. *Id.* § 15 (a).

(2) Imposing market entry barriers;[39]

(3) "Tying" or making a transaction subject to acceptance by the other parties of other obligations which, by their nature or according to commercial usage, have no connection with the transaction;[40]

(4) Unreasonable price discrimination;[41]

(5) Vertical territorial and customer restrictions, such as resale price maintenance and exclusivity agreements;[42]

(6) Imposing unfairly low purchase prices for the goods or services of marginalized service providers and producers;[43]

(7) Imposing unfair purchase or selling price;[44] and

(8) Limiting production, markets, or technical development to the prejudice of consumers.[45]

Note that "abuse of dominant position," though it represents the classic "David versus Goliath" image of antitrust laws, is not a crime.

4. Administrative Penalties

The administrative fine for all the above anti-competitive agreements and conduct can reach up to ₱250,000,000.00.[46]

An entity that fails or refuses to comply with a ruling, order, or decision issued by the Commission may be penalized by a fine of up to ₱2,000,000.00 for each violation, and a similar penalty for each day thereafter until the entity complies fully.[47]

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39. *Id.* § 15 (b).

40. *Id.* §§ 15 (c) & (f).

41. *Id.* § 15 (d).

42. *Id.* § 15 (e).

43. Philippine Competition Act, § 15 (g).

44. *Id.* § 15 (h).

45. *Id.* § 15 (i).

46. *Id.* § 29 (a). A substantial sum for some, but which will perhaps not cause much financial bleeding to the local Goliaths.

47. *Id.* § 29 (b). The disobedient entity has a grace period of 45 days from receipt of the decision, order, or ruling within which to comply. *Id.*

Entities who, intentionally or negligently, supply incorrect or misleading information to the Commission shall be fined up to ₱1,000,000.00.[48] Other violations of the Competition Act are penalized by a fine of up to ₱2,000,000.00.[49]

III. "DAWN RAIDS"

A. Nature and Effectivity

"Dawn raids," or unannounced searches and seizures by government agents, are an effective tool in prosecuting competition law offenses.[50] When entities agree, whether expressly or implicitly, to fix their prices or to perform any other anti-competitive act, such agreement will not likely be reflected in a formal contract or memorandum. As entities are becoming more sophisticated in how they conduct business, so too are their efforts to hide evidence that will prove collusion or intention to prevent, restrict, or lessen competition substantially. In other words, the days of the "smoking gun" are long gone.[51]

So how can collusion and the intention to dominate be successfully prosecuted without a smoking gun? Unless there is an informant, the prosecution's success or failure rests on circumstantial evidence. These include expert witnesses, particularly macro-economists, who can analyze and explain to the tribunal or commission the anti-competitive effect of the agreement or conduct, and where the intentions of the parties lie. Circumstantial evidence may also include e-mails, internal company reports and memos, business planning documents, strategic plans, marketing plans,

48. Philippine Competition Act, § 29 (c).

49. *Id.* § 29 (d). The foregoing amounts are subject to increase every five years. *Id.* § 29.

50. *See* OECD, Competition Committee, *Latin American Competition Forum — Session III: Unannounced Inspections in Antitrust Investigations (Contribution from Chile)*, ¶ 8, OECD Doc. No. DAF/COMP/LACF(2013)7 (Sep. 3-4, 2013); Shepstone & Wylie Attorneys, Competition Commission Dawn Raids: Don't get caught short.., *available at* www.lexology.com/library/detail.aspx?g=6111ef00-fdea-4da2-972e-ac26fa55b194 (last accessed Oct. 31, 2016); & Gecić Law, A Short Guide on Dawn Raids, *available at* http://www.geciclaw.com/short-guide-on-dawn-raid (last accessed Oct. 31, 2016).

51. Charles J. Bloom & Neil C. Schur, *Trends in Anti-Trust Law*, *in* ASPATORE, ANTITRUST LITIGATION BEST PRACTICES: LEADING LAWYERS ON DEVELOPING A DEFENSE STRATEGY, EVALUATING SETTLEMENT OPPORTUNITIES AND AVOIDING COMMON CLIENT MISTAKES 10 (2008 ed.).

contracts, and even non-traditional business records such as calendars, appointment books, hotel and restaurant reservations, and telephone records.[52] This is nothing new — in fact, e-mails were used to seal the fate of the technology company Microsoft in the 2001 case of *United States v. Microsoft Corp.*[53]

The Commission, to be sure, has the power to subpoena documents and records,[54] but this power is effective only to the extent of the entity's integrity. Also, given that the entity investigated has probably committed an anti-competitive act and is aware of the penalties, one cannot expect much candor.[55]

Dawn raids fill this gap. They eliminate the entity's discretion to say what documents exist, and what should be surrendered or withheld. Dawn raids being unannounced, the entity investigated would have no time and opportunity to "sanitize" their records before the raid.

B. Embodiment in the Act

The Commission's power to search and seize is embodied in Section 12 (g) of the Competition Act —

> [The Commission,] [u]pon *order* of the court, [may] undertake *inspections* of *business* premises and other offices, land[,] and vehicles, as used by the entity, where it *reasonably suspects* that relevant books, tax records, or other documents which relate to any matter relevant to the *investigation* are kept,

52. There is an increased amount of communication conducted through e-mail and variations such as instant messaging, which leaves a lasting trail that can be retrieved in the future. The result is an "explosion in the amount of potential evidence that is memorialized and accessible to other parties during litigation." Gianluca Morello, *Observations and Tips for Antitrust Litigation, in* ASPATORE, *supra* note 51, at 23. *See also* Michael J. Gaertner, *Navigating the Antitrust Laws to Achieve Business Objectives, in* ASPATORE, *supra* note 51, at 64.

53. *See* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001). *See also* Ellen Neuborne, Microsoft's Teflon Bill, *available at* http://www.bloomberg.com/news/articles/1998-11-29/microsofts-teflon-bill (last accessed Oct. 31, 2016).

54. *See* Philippine Competition Act, § 12 (f).

55. "But control through publicity is impossible unless adequate means are available for the collection of the data to be published. Without compulsory process, investigators are at the mercy of the close-mouthed business man." Handler, *supra* note 9, at 713.

> in order *to prevent* the removal, concealment, tampering with, or destruction of the books, records, or other documents[.][56]

Some observations:

Does Section 12 (g) provide the power to inspect, or the power to search and seize, or both?

Does this provision apply to criminal, administrative, and civil searches?

What is the standard to issue a court order allowing an inspection? Is it reasonable suspicion? Is it the same as probable cause?

What are the limitations of the search?

Can the Commission search homes of the corporate directors and officers of the entity investigated?

C. Search and Seizure v. Routine Inspections

First, search and seizure should be distinguished from routine inspections. On one hand, "search and seizure," for the purpose of this Article, means a search conducted pursuant to an ongoing investigation of an entity. On the other hand, "routine inspections" are searches that are conducted regularly but randomly to check for compliance with legal requirements.[57] The entity inspected in this case is not under investigation.

The Author submits that Section 12 (g) relates to searches and seizures, in spite of the term "inspections," because the "inspection" allowed in the said provision is pursuant to an "investigation," and is not random and routinary.[58]

The Competition Act, as currently worded, does not appear to give the Commission the power to conduct routine inspections to check an entity's compliance with the Competition Act. As to whether the Commission can be given the power to inspect, the same will be discussed further in this Article.

Originally, however, Senator Paolo Benigno "Bam" Aquino IV proposed that the Commission should have inspection powers similar to the Bureau of Internal Revenue (BIR), whose power requires no warrant.[59]

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56. Philippine Competition Act, § 12 (g) (emphases supplied).

57. *See* Caballes v. Court of Appeals, 373 SCRA 221, 234 (2002).

58. *See* Philippine Competition Act, § 12 (g).

59. S. JOURNAL No. 14, at 210-11, 16th Cong., 2d Reg. Sess. (Sep. 1 2014).

D. Criminal, Administrative, and Civil Searches

The wording of Section 12 (g) does not limit the Commission's search powers to criminal proceedings. Hence, it should also apply to administrative and civil searches. When the law does not distinguish, neither should the courts distinguish.

In the Philippines, search warrants are traditionally issued in criminal proceedings only.[60] The sole exception this Author is aware of is search warrants in civil cases for the enforcement of intellectual property (IP) rights. In 2002, the Supreme Court, through A.M. No. 02-1-06-SC, promulgated the Rule on Search and Seizure in Civil Actions for Infringement of Intellectual Property Rights (IP Rules),[61] which govern the "provisional seizure and impounding of documents and articles in pending and intended civil actions for the purpose of preventing infringement and preserving relevant evidence in regard to alleged infringement."[62]

By issuing the IP Rules, the Supreme Court recognized that search warrants can be issued in non-criminal cases. But given that search warrants are traditionally associated with criminal cases, the Competition Act uses the more generic term "order of the court," perhaps to distinguish it from criminal warrants.

Despite this, what rules will govern the issuance of administrative or civil warrants in non-IP cases? This will be discussed in the succeeding parts of this Article.

E. Applicable Standard

In its general sense, "probable cause" has been defined in early Philippine jurisprudence as "such reasons, supported by facts and circumstances, as will warrant a cautious man in the belief that his action and the means taken in prosecuting it, are legally just and proper."[63] In its more limited sense, however, probable cause in criminal searches means "such facts and circumstances which would lead a reasonably discreet and prudent man to

60. *See* 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 126.

61. RULE ON SEARCH AND SEIZURE IN CIVIL ACTIONS FOR INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS, A.M. No. 02-1-06-SC (Jan. 30, 2002).

62. *Id.* § 1. Unfortunately, as far as this Author is aware, this is the only set of rules that authorizes court-issued search warrants in non-criminal cases. Moreover, it is limited to civil cases involving infringement of intellectual property rights. *Id.*

63. United States v. Addison, 28 Phil. 566, 570 (1914) (citing Burton v. St. Paul, M. & M. Ry. Co., 22 N.W. 300 (Minn. 1885) (U.S.)).

believe that an offense has been committed, and that the objects sought in connection with the offense are in the place sought to be searched."[64]

For the issuance of a search warrant, Section 12 (g) of the Competition Act sets the standard at the level of reasonable suspicion.[65] The Author submits that this is equivalent to probable cause in its general sense. In addition, the term "reasonably suspects" stresses that searches by the Commission are not limited to criminal searches. This is supported by Senator Aquino's statement that the provision on searches was originally intended to cover all kinds of searches.[66]

F. Limitations of Search

Section 12 (g) appears to have added a requirement not found in criminal warrant rules. The applicant must show that a search warrant is necessary "in order *to prevent* the removal, concealment, tampering with, or destruction of the books, records, or other documents."[67]

Section 12 (g) also limits the search to "*business* premises and other offices, land[,] and vehicles, as used by the entity" and excludes the houses of the entities' directors and officers, even if corporate documents are kept there.[68]

Note that the phrase "homes of entity directors, officers[,] and employees" was found in the draft bill by Senator Aquino.[69] It did not find its way to the final version of the bill, though, perhaps due to the objection of Senator Juan Edgardo "Sonny" M. Angara.[70] Regrettably, however, the word "homes" was still excluded in the final version, even if the reason behind Senator Angara's objection no longer existed.[71] This creates an absurd situation. The Commission, despite being armed with a court

64. Burgos, Sr. v. Chief of Staff, AFP, 133 SCRA 800, 813 (1984).

65. The Competition Act uses the phrase "reasonably suspects." Philippine Competition Act, § 12 (g).

66. S. JOURNAL No. 14, at 210-11.

67. Philippine Competition Act, § 12 (g) (emphasis supplied).

68. *Id.* (emphasis supplied).

69. S. JOURNAL No. 14, at 210-11.

70. *Id.*

71. *Id.* He objected to the search of homes without a court warrant, as the draft bill allowed. The final version of the bill however requires a court warrant, so there was no longer any reason to exclude homes. *Id.*

warrant, cannot search the homes of the entities' directors, officers, or employees, where evidence may be found.

Although the Competition Act does not expressly say that things seized may be used as evidence, the Author submits that this is implicit in Section 12 (g). The objective of the Commission's search power, as stated in the Competition Act, is "*to prevent* the removal, concealment, tampering with, or destruction of the books, records, or other documents."[72] It is nonsensical, however, if the end-goal of the seizure is merely to prevent the removal, concealment, tampering, or destruction of evidence. It makes more sense that the preservation of evidence is preliminary to their presentation.

IV. SEARCH AND SEIZURE

A. Constitutional Provision and History

The right against unreasonable searches and seizures is enshrined in Article III, Section 2 of the 1987 Philippine Constitution —

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.[73]

This provision however underwent several changes.

As early as 1900, General Order No. 58,[74] issued by the Office of the United States (U.S.) Military Governor, provided for the procedure for the

72. Philippine Competition Act, § 12 (g) (emphasis supplied).

73. PHIL. CONST. art. III, § 2.

74. 1900 RULES OF CRIMINAL PROCEDURE (superseded 1940). The pertinent provisions provide —

> Sec. 95. A search warrant is an order in writing, issued in the name of the United States, signed by a judge or a justice of the peace, and directed to a peace officer, commanding him to search for personal property and bring it before the court.
>
> Sec. 96. It may issue upon either of the following grounds:
>
> (1) When the property was stolen or embezzled.
>
> (2) When it was used or when the intent exists to use it as the means of committing a felony.

issuance of search warrants in criminal cases. At that time, only a judge or a justice of the peace could issue search warrants.[75]

In 1902, the Philippine Organic Act[76] codified the right against unreasonable searches and seizures.[77] The provision simply stated "[t]hat the right to be secure against unreasonable searches and seizures shall not be violated."[78]

In creating the fundamental law of the colony and its criminal procedure rules, the U.S. was guided by its Constitution, particularly the Fourth Amendment, which reads —

> 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.[79]

In 1916, the Philippine Autonomy Act,[80] otherwise known as the Jones Law, superseded the 1902 Act, but retained the same provision — "[t]hat the right to be secured against unreasonable searches and seizures shall not be violated."[81]

> Sec. 97. A search warrant shall not issue except for probable cause and upon application supported by oath particularly describing the place to be searched and the person or thing to be seized.
>
> Sec. 98. The judge or justice must, before issuing the warrant, examine on oath the complaint and any witnesses be may produce and take their depositions in writing.

Id. §§ 95-98.

75. *Id.*

76. An Act Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippine Islands, and for Other Purposes (1902) (also known as The Philippine Organic Act).

77. *Id.* § 5, para. 11.

78. *Id.*

79. U.S. CONST. amend. IV.

80. An Act to Declare the Purpose of the People of the United States as to the Future Political Status of the People of the Philippine Islands, and to Provide a More Autonomous Government for Those Islands, Public Act No. 240 (1916) (also known as the Jones Law).

81. *Id.* § 5 (h).

Thereafter, Article III, Section 1 (3) of the 1935 Philippine Constitution, based on the Fourth Amendment of the U.S. Constitution, but modified to limit the warrant power to judges, provided —

> 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, *to be determined by the judge* after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized.[82]

The 1973 Constitution, under the Martial Law regime, modified the search and seizure provision by adding the phrase "of whatever nature and for any purpose,"[83] to clarify that the right is not limited to criminal searches, as it was then commonly perceived.[84]

Moreover, the 1973 Constitution expanded the warrant-issuing authority to include "such other responsible officer as may be authorized by law."[85] Article IV, Section 3 provided —

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *of whatever nature and for any purpose* shall not be violated, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined by the judge, *or such other responsible officer as maybe authorized by law*, after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized.[86]

Then, in 1987, the search and seizure provision was again amended, this time removing the phrase "or such other responsible officer as maybe authorized by law" that was added by the 1973 Constitution, and imposing on the judge the obligation to "personally" determine if there is probable cause.[87]

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82. 1935 PHIL. CONST. art. III, § 1 (3) (superseded 1973) (emphasis supplied).

83. 1973 PHIL. CONST. art. IV, § 3 (superseded 1987).

84. *See* Material Distributors (Phil.) Inc., v. Natividad, 84 Phil. 127, 135-36 (1949).

85. 1973 PHIL. CONST. art. IV, § 3 (superseded 1987). Congress, however, never passed any law under the 1973 Constitution authorizing any person not a judge to issue warrants.

86. 1973 PHIL. CONST. art. IV, § 3 (superseded 1987) (emphases supplied).

87. PHIL. CONST. art. III, § 2.

Currently, only a judge may issue warrants.[88]

B. "Of whatever nature and for any purpose"

The 1987 Constitution, however, retained the clarification in the 1973 Constitution that the right against unreasonable searches and seizures applies to all searches and seizures "of whatever nature and for any purpose."[89] Hence, the search and seizure clause was extended to non-criminal actions, such as the court-ordered production of documents (e.g., subpoenas and discovery) and administrative inspections.[90]

C. Subpoenas and Discovery

Material Distributors (Phil.) Inc. v. Natividad[91] tackled the constitutionality of Rule 21 of the 1940 Rules of Court[92] on production or inspection of

88. Salazar v. Achacoso, 183 SCRA 145, 149 (1990). However, as an exception, the Commission on Immigration may order the arrest of an alien in order to carry out a deportation order that has already become final. *See* Qua Chee Gan v. Deportation Board, 9 SCRA 27 (1963) & Board of Commissioners (CID) v. Dela Rosa, 197 SCRA 853 (1991). In *Qua Chee Gan v. Deportation Board*, the Supreme Court ruled —

> Under the express terms of our [1935] Constitution, it is, therefore, even doubtful whether the arrest of an individual may be ordered by any authority other than the judge if the purpose is merely to determine the existence of a probable cause, leading to an administrative investigation. The Constitution does not distinguish between warrants in a criminal case and administrative warrants in administrative proceedings. And, if one suspected of having committed a crime is entitled to a determination of the probable cause against him, by a judge, why should one suspected of a violation of an administrative nature deserve less guarantee? Of course[,] it is different if the order of arrest is issued to carry out a final finding of a violation, either by an executive or legislative officer or agency duly authorized for the purpose, as then the warrant is not that mentioned in the Constitution which is issuable only on probable cause. Such, for example, would be a warrant of arrest to carry out a final order of deportation, or to effect compliance of an order of contempt.

Qua Chee Gan, 9 SCRA at 36.

89. PHIL. CONST. art. III, § 2.

90. *See* JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 186-91 (2009 ed.).

91. *Material Distributors (Phil.) Inc.*, 84 Phil.

92. The provision is now part of Rule 27 of the 1997 Rules on Civil Procedure. 1997 RULES OF CIVIL PROCEDURE, rule 27.

documents or things — one of the modes of discovery in civil procedure.[93] The relevant part of Rule 21 provides —

> Section 1. *Motion for production or inspection; order.* [—] Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (a) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects[,] or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody[,] or control; or (b) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place[,] and manner of making the inspection and taking copies and photographs, and may prescribe such terms and conditions as are just.[94]

In resolving whether Rule 21 violated the search and seizure clause of the 1935 Constitution, the Supreme Court in *Material Distributors (Phil.) Inc.* stated that

> [t]he orders in question, issued in virtue of the provisions of Rule 21, pertain to a civil procedure that cannot be identified or confused with the unreasonable searches prohibited by the Constitution. But in the erroneous hypothesis that the production and inspection of books and documents in question is tantamount to a search warrant, the procedure outlined by Rule 21 and followed by respondent judge place them outside the realm of the prohibited unreasonable searches. There is no question that, upon the pleadings in the case, [the respondent] has an interest in the books and documents in question, that they are material and important to the issues between him and petitioners, that justice will be better served if all the facts pertinent to the controversy are placed before the trial court.[95]

The Supreme Court, in other words, found that the search and seizure clause in the 1935 Constitution did not apply to civil actions,[96] but it did not provide what proceedings were covered by the search clause. Given, however, that the antecedent of the 1935 Constitution search clause was the General Order No. 58, which was then the rule on criminal procedure, it can be surmised that the Supreme Court in *Material Distributors (Phil.) Inc.* considered that the search clause covered criminal proceedings only.

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93. *Material Distributors (Phil.) Inc.*, 84 Phil. at 135-36.

94. 1940 RULES OF CIVIL PROCEDURE, rule 21, § 1 (superseded 1964).

95. *Material Distributors (Phil.) Inc.*, 84 Phil. at 135-36.

96. *Id.*

Material Distributors (Phil.) Inc. added that, assuming the search and seizure clause in the Constitution applied to civil cases — however erroneous this assumption may be — the search was reasonable given that the judge followed the procedure outlined in the rules, and the documents requested were material to the controversy.[97]

Fr. Joaquin G. Bernas, S.J., a Constitutional Law authority and a member of the Constitutional Commission of 1986, finds that the wider scope of the search clause in the 1987 Constitution (i.e., searches and seizures "of whatever nature and for any purpose") compels a re-examination of the *Material Distributors (Phil.) Inc.* ruling that only criminal cases are covered.[98]

D. The Essentials of Probable Cause: Materiality and Particularity

Fr. Bernas posits that Rule 21 of the 1940 Rules of Court (now Rule 27 on production of documents) is constitutionally sound, because it demands, as minimum requirements:

(1) "Probable cause," expressed in the phrase "contain evidence material to any matter involved in the action,"[99] and

(2) "Particularity," expressed in in the phrase "designated documents, papers, [and] books[.]"[100]

It therefore follows that the finding of probable cause, at least for Fr. Bernas, remains the minimum standard in non-criminal searches. Probable cause may, however, be expressed differently, provided that the essential elements of materiality and particularity are present.

Going further, it is submitted that the rule on subpoenas[101] likewise passes the requirements of materiality (i.e., probable cause) and particularity, and is therefore constitutionally sound.

Sections 3 and 4 of Rule 21 of the Rules of Court provide —

> Section 3. *Form and contents.* [—] A subpoena shall state the name of the court and the title of the action or investigation, shall be directed to the person whose attendance is required, and in the case of a subpoena *duces tecum*, it shall also *contain a reasonable description* of the books, documents[,] or things demanded which must appear to the court *prima facie relevant.*

97. *Id.*

98. BERNAS, *supra* note 90, at 188.

99. *Id.*

100. *Id.*

101. 1997 RULES ON CIVIL PROCEDURE, rule 21.

> Section 4. *Quashing a subpoena.* [—] The court may quash a subpoena *duces tecum* upon motion promptly made and, in any event, at or before the time specified therein *if it is unreasonable and oppressive*, or the *relevancy* of the books, documents[,] or things *does not appear*, or if the person in whose behalf the subpoena is issued fails to advance the reasonable cost of the production thereof.[102]

Thus, there is probable cause to issue a subpoena *duces tecum* if the documents requested are relevant (materiality) and reasonably described (particularity).[103]

However, orders for the production of documents (whether through subpoena or discovery) can be less productive than searches and seizures (i.e., raids). As Milton Handler notes, "[a] subpoena, unlike the warrant, commissions no roving expedition. Its service results in no rummaging of private papers, no invasion, actual or figurative, of the home. The witness is free to select, at his leisure, the papers sought without unwelcome supervision."[104]

The success of the subpoena and discovery process depends heavily on the integrity and willingness of the person subpoenaed to admit the existence of the requested documents and to produce the same. The process also provides such person time to sanitize his records and delay the submission of the documents by filing multiple dilatory motions. Hence, the preference for — and effectivity of — unannounced searches to secure evidence needed to prosecute an offense.

Given that evidence in the prosecution of competition law violations are now more likely contained in e-mails and other informal company records, all the more reason that "dawn raids" are important in competition law.

E. Search and Seizure in Administrative Proceedings

Before proceeding further, there is a need to first define an "administrative search." For purposes of this Article, the Author proposes this definition — "an inspection or search carried out by administrative agencies or their deputies, pursuant to a regulatory or statutory scheme, to enforce compliance

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102. *Id.* rule 21, §§ 3 & 4 (emphases supplied).

103. The court processes of subpoenas and discovery, unlike "dawn raids," involve Constitutional issues involving the right against self-incrimination. But this Article's limitation will not delve into a discussion on self-incrimination issues, which is, on its own, enough for a separate Article.

104. Handler, *supra* note 9, at 914.

with regulations or laws, or to seize evidence for the prosecution of administrative offenses."

An administrative search can be further classified into two types:

(1) Searches pursuant to an ongoing investigation (e.g., "dawn raids"); and

(2) Routine inspections (e.g., inspections pursuant to visitorial powers, without an ongoing investigation of an entity).

Fr. Bernas recognizes that administrative search and seizure is a "penumbral" area yet untouched by Philippine jurisprudence.[105] The Author submits, however, that this is true only insofar as routine inspections are concerned.

With respect to searches pursuant to an ongoing investigation, *Salazar v. Achacoso*[106] held that searches by administrative agencies without a court-issued warrant are invalid.[107] *Salazar* involves the validity of the power of the Secretary of Labor, through the Administrator of the Philippine Overseas Employment Administration (POEA) to order arrests and seizures under Article 38 of the Labor Code.[108] In this case, respondent POEA Administrator, without a court warrant, ordered the seizure of "[petitioner's] documents and paraphernalia being used or intended to be used as the means of committing illegal recruitment."[109] In striking down as unconstitutional the power of the Secretary of Labor to conduct warrantless searches, the Supreme Court ruled —

> For the guidance of the bench and the bar, we reaffirm the following principles:
>
> (1) Under Article III, Section 2, of the 1987 Constitution, it is only judges [and no other person, including the Secretaries of the different Departments], and no other, who may issue warrants of arrest and search[.]
>
> (2) The exception is in cases of deportation of illegal and undesirable aliens, whom the President or the Commissioner of Immigration may

105. BERNAS, *supra* note 90, at 189.

106. Salazar v. Achacoso, 183 SCRA 145 (1990).

107. *Id.* at 154.

108. *Id.* at 146.

109. *Id.* at 153.

> order arrested, following a final order of deportation, for the purpose of deportation.[110]

Salazar, however, was silent as to what standards the courts should follow in issuing warrants in administrative proceedings. Likewise, it did not involve and, therefore, did not shed light on routine inspections and their constitutionality in the Philippine setting. Accordingly, to further understand this issue, one may draw from U.S. case law.

In *Katz v. United States*,[111] the U.S. Supreme Court held that warrantless searches are generally unreasonable, "subject only to a few specifically established and well-delineated exceptions."[112] The same rule is followed in this jurisdiction.

In the interpellation by Commissioner Jose N. Nolledo during the 1986 Constitutional Convention, Fr. Bernas answered that the first part[113] of the search and seizure clause states what the right is, while the second part[114] states how the right is protected. He added that a search is generally unreasonable if made without a warrant, except if it is an exception found in jurisprudence.[115]

Fr. Bernas classifies[116] the recognized exceptions as follows:

(1) Search incidental to arrest;[117]

(2) Search of moving vehicles;[118]

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110. *Id.* at 155.

111. Katz v. United States, 389 U.S. 347 (1967).

112. *Id.* at 357.

113. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable[.]" PHIL. CONST. art. III, § 2.

114. PHIL. CONST. art. III, § 2. It provides that —

> [N]o search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.

PHIL. CONST. art. III, § 2.

115. 1 JOURNAL OF THE CONSTITUTIONAL COMMISSION, at 296 (1986).

116. BERNAS, *supra* note 90, at 191-92. *See also* People v. Doria, 301 SCRA 668 (1999).

117. *See, e.g.*, Moreno v. Ago Chi, 12 Phil. 439 (1909).

(3) Seizure of evidence in plain view;[119]

(4) Customs searches;[120]

(5) Waiver of right;[121]

(6) "[E]xigent circumstances;"[122] and

(7) "[S]top and frisk" rule.[123]

Notably, administrative searches, other than customs searches, are not recognized as an exception to the warrant rule. Therefore, not being an exception, warrantless administrative searches are generally unreasonable and unconstitutional.

F. Warrantless Administrative Searches: Development in U.S. Jurisprudence

In 1959, the U.S. Supreme Court, in *Frank v. Maryland*,[124] ruled that the right against unreasonable searches and seizures can be invoked only in criminal cases.[125]

The *Frank* doctrine was overturned in 1967 in the leading case of *Camara v. Municipal Court*,[126] which ruled that administrative inspections are also covered by the search and seizure clause, and that therefore a judge-issued warrant is required.[127]

In *Camara*, the appellant refused entry of city housing inspectors in his residential house, which inspection was pursuant to the city's housing code.[128] Appellant argued that the inspectors should have been armed with a

118. *See, e.g.*, Papa v. Mago, 22 SCRA 857 (1968).

119. *See, e.g.*, People v. Tabar, 222 SCRA 144 (1993).

120. *See, e.g.*, Pacis v. Pamaran, 56 SCRA 16 (1974).

121. *See, e.g.*, People v. Malasugui, 63 Phil. 221 (1936).

122. *See, e.g.*, People v. De Gracia, 233 SCRA 716 (1994).

123. *See, e.g.*, Posadas v. Court of Appeals, 188 SCRA 288 (1990).

124. Frank v. Maryland, 359 U.S. 360 (1959). A decade earlier, the Supreme Court of the Philippines in *Material Distributors (Phil.) Inc.*, had declared essentially the same principle. *See Material Distributors (Phil.) Inc.*, 84 Phil. at 135-36.

125. *Frank*, 359 U.S. at 371-73.

126. Camara v. Municipal Court, 387 U.S. 523 (1967).

127. *Id.* at 534-39.

128. *Id.* at 525.

search warrant before they could inspect his home.[129] In abandoning *Frank*, the U.S. Supreme Court in *Camara* held —

> 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*] and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections.[130]

The *Camara* court, however, rejected appellant's contention that probable cause of the same degree as that in criminal proceedings is required in administrative searches.[131] Appellant had argued that for the city to secure a warrant, it should show "probable cause to believe that a particular dwelling contains violations of the minimum standards prescribed by the code being enforced."[132] Disagreeing with this argument, the U.S. Supreme Court held that —

> [u]nlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. Because fires and epidemics may ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and enforce such minimum standards even upon existing structures. *In determining whether a particular inspection is reasonable* [—] *and thus in determining whether there is probable cause to issue a warrant for that inspection* [—] *the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.*
>
> There is unanimous agreement among those most familiar with this field 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. It is here that the probable cause debate is focused, for the agency's decision to conduct an area inspection is unavoidably *based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building.*

129. *Id.* at 526.

130. *Id.* at 534.

131. *Id.*

132. *Camara*, 387 U.S. at 534.

...

> Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails. But we think that a number of persuasive factors combine to support the reasonableness of area code enforcement inspections. 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. Many such conditions [—] faulty wiring is an obvious example [—] are not observable from outside the building, and indeed may not be apparent to the inexpert occupant himself. *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.*
>
> ...
>
> '[ ]This is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. *Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken.* Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant. The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought.'
>
> ...
>
> The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But *reasonableness is still the ultimate standard.* If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy.[133]

In other words, *Camara* recognized that probable cause in administrative inspections is different from that in criminal searches. Probable cause in

133. *Id.* at 535-38 (citing *Frank*, 359 U.S. at 383 (J. Douglas, dissenting opinion)) (emphases supplied).

administrative inspections is not individualized; there is no need to show reasonable suspicion that a particular establishment is violating an administrative standard. One need only show the reasonableness of the enforcement agency's appraisal of conditions in the area as a whole.[134]

Camara added that although a warrant is generally required for administrative searches, traditionally recognized exceptions are emergency situations, such as the seizure of unwholesome food, compulsory smallpox vaccination, health quarantine, and summary destruction of tubercular cattle,[135] all of which are health and safety issues.

Camara's companion case, *See v. City of Seattle*,[136] extended the right against unreasonable administrative searches to inspections of commercial buildings or enterprises.[137]

To summarize *Camara* and *See*, a warrant is required to conduct administrative inspections, whether of commercial or residential establishments, except for emergency situations.[138] Probable cause in administrative inspections does not require individualized suspicion of a violation, but only the reasonableness of the government interest.[139]

Another exception to the warrant requirement in administrative proceedings was crafted in the 1970s. This is the so-called "pervasively regulated industries" exception[140] as illustrated in the leading cases of *Colonnade Catering Corp. v. United States*[141] and *United States v. Biswell*.[142]

The U.S. Supreme Court, in *Colonnade*, a case involving liquor,[143] and *Biswell*, a case involving firearms,[144] held that heavily regulated and licensed

134. *Id.* at 524.

135. *Id.* at 539.

136. See v. City of Seattle, 387 U.S. 541 (1967).

137. *Id.* at 544-45.

138. *Camara*, 387 U.S. at 539.

139. *Id.* at 534 & *See*, 387 U.S. at 545.

140. WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW: EXAMPLES AND EXPLANATIONS 341 (2009 ed.). It is also sometimes referred to as the "closely" regulated business exception. *Id.*

141. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

142. United States v. Biswell, 406 U.S. 311 (1972).

143. *Colonnade*, 397 U.S. at 72.

144. *Biswell*, 406 U.S. at 311-12.

industries, if mandated by law, may be inspected without a warrant, and if the inspectors are refused entry, sanctions may be imposed.[145]

In *Colonnade*, on one hand, what justified the warrantless search was the long history of government regulation of liquor.[146] In *Biswell*, on the other hand, the search was justified because of practicality —

> [I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and, if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.[147]

The U.S. Supreme Court in *Biswell* added that entities that choose to do business in pervasively regulated industries are deemed to have consented to the warrantless search —

> It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority. The dealer is not left to wonder about the purposes of the inspector or the limits of his task.
>
> 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.[148]

After *Colonnade* and *Biswell*, the pervasively regulated industries doctrine became so rife in U.S. case law that in 1978, the U.S. Supreme Court was compelled to remind everyone that the exception was precisely that — an exception. Thus, in *Marshall v. Barlow's, Inc.*,[149] the U.S. Supreme Court said that *Camara* and *See* were the general rule, while *Colonnade* and *Biswell* were the exceptions.[150]

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145. *Id.* at 317 & *Colonnade*, 397 U.S. at 74-75.

146. *Colonnade*, 397 U.S. at 80.

147. *Biswell*, 406 U.S. at 316.

148. *Id.* at 316-17.

149. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

150. *Id.* at 312-13.

In *Marshall*, the Occupational Safety and Health Act of 1970 (OSHA)[151] empowered the U.S. Department of Labor (DOL) to search, without a warrant, the work area of any employment facility for safety hazards and violations of OSHA regulations.[152] An OSHA inspector wanted to inspect, without a warrant, the non-public areas of Barlow's, Inc., an electrical and plumbing installation business.[153] Barlow's refused entry.[154] Consequently, the DOL filed an action to compel Barlow's to admit the inspector.[155]

The U.S. Supreme Court, speaking through Justice Byron Raymond White, invalidated the DOL's power to conduct warrantless searches, because the case did not fit the pervasively regulated industries exception.[156] *Marshall* explained that doing business that affects interstate commerce is not enough to make it fall within the purview of the pervasively regulated industries exception —

> The Secretary urges that an exception from the search warrant requirement has been recognized for 'pervasively regulated business[es],' and for 'closely regulated' industries 'long subject to close supervision and inspection.' *These cases are indeed exceptions, but they represent responses to relatively unique circumstances.* Certain industries have such a history of government oversight that no reasonable expectation of privacy, could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.
>
> *Industries such as these fall within the 'certain carefully defined classes of cases,' referenced in Camara. The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware.* 'A central difference between those cases (*Colonnade* and *Biswell*) and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him.'
>
> 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 would make it the rule. Invoking the Walsh-Healey Act of 1936, ... the

151. Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1970).

152. *Marshall*, 436 U.S. at 309 (citing 29 U.S.C. § 657).

153. *Id.* at 310.

154. *Id.*

155. *Id.*

156. *Id.* at 313-14.

> Secretary attempts to support a conclusion that all businesses involved in interstate commerce have long been subjected to close supervision of employee safety and health conditions. *But the degree of federal involvement in employee working circumstances has never been of the order of specificity and pervasiveness that OSHA mandates. It is quite unconvincing to argue that the imposition of minimum wages and maximum hours on employers who contracted with the Government under the Walsh-Healey Act prepared the entirety of American interstate commerce for regulation of working conditions to the minutest detail. Nor can any but the most fictional sense of voluntary consent to later searches be found in the single fact that one conducts a business affecting interstate commerce; under current practice and law, few businesses can be conducted without having some effect on interstate commerce.*[157]

In other words, the reach of OSHA was so broad, as it affected nearly all businesses, that it could not be considered to cover pervasively regulated industry.[158]

Taking *Camara*'s lead, *Marshall* had this to say about probable cause in administrative searches —

> Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, *his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular* [*establishment*].' A warrant 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, would protect an employer's Fourth Amendment rights.[159]

Hence, in the U.S., the level or degree of probable cause required in administrative searches differs from probable cause in criminal searches. In the former, one need not, in all instances, show that an offense has been committed and that the personal property subject of the offense is probably found in the premises sought to be searched. It is enough that there are reasonable legislative or administrative standards to conduct an inspection.

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157. *Id.* at 313-14 (emphases supplied).

158. *Marshall*, 436 U.S. at 334.

159. *Id.* at 320-21 (emphasis supplied).

The pervasively regulated industries doctrine further took form in *Donovan v. Dewey*.[160] The U.S. Supreme Court, in *Donovan*, upheld the constitutionality of the Federal Mine Safety and Health Act of 1977,[161] which authorized the Secretary of Labor to conduct warrantless inspections of underground and surface mines.[162]

Donovan held that if the U.S. Congress gave an administrative agency the power to inspect but did not provide rules to regulate such power, a warrant was still required.[163] If Congress, however, "establishe[d] a predictable and guided federal regulatory presence" that does not leave the frequency and purpose of inspections to the unchecked discretion of government officers, then no warrant was needed.[164]

Particularly, following *Marshall*, for the statute authorizing an administrative search to be valid, it has to cover only pervasively regulated industries, and must contain an administrative plan containing specific neutral criteria, including the frequency of the search, and a guide in selecting the establishments to be searched, and the manner of searching.[165] It is not enough that the statute provides that the search may be conducted "at [ ] reasonable times, and within reasonable limits and in a reasonable manner."[166]

But what makes an industry or business pervasively regulated as to exempt it from the warrant rule? In support of its position, the Secretary of Labor in *Donovan* argued that the "long tradition of government regulation" — in other words, the history of regulation — should be the determining factor.[167] Since the mining industry had no "long tradition of government regulation," unlike the liquor industry in *Colonnade*, it should not be considered pervasively regulated.[168] The U.S. Supreme Court however disagreed —

> To be sure, in *Colonnade*, this Court referred to 'the long history of the regulation of the liquor industry,' and more recently, in [*Marshall*], we

160. Donovan v. Dewey, 452 U.S. 594 (1981).

161. Federal Mine and Safety Health Act, 30 U.S.C. §§ 801-964 (1977).

162. *Donovan*, 452 U.S. at 602-05 (citing 30 U.S.C. § 813 (a)).

163. *Id.* at 603-04.

164. *Id.* at 604.

165. *Donovan*, 452 U.S. at 613 (citing *Marshall*, 436 U.S. at 323).

166. *Marshall*, 436 U.S. at 333 (citing 29 U.S.C. § 657 (a) (2)).

167. *Donovan*, 452 U.S. at 605.

168. *Id.*

> noted that a 'long tradition of close government supervision' militated against imposition of a warrant requirement. However, as previously noted, it is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment. Thus, in [*Biswell*], this Court upheld the warrantless search provisions of the Gun Control Act of 1968 despite the fact that '[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry.' Of course, the duration of a particular regulatory scheme will often be an important factor in determining whether it is sufficiently pervasive to make the imposition of a warrant requirement unnecessary. But if the length of regulation were the only criterion, absurd results would occur. Under appellees' view, new or emerging industries, including ones such as the nuclear power industry, that pose enormous potential safety and health problems could never be subject to warrantless searches, even under the most carefully structured inspection program, simply because of the recent vintage of regulation.[169]

Thus, a business which has no "long tradition of government regulation" may nevertheless be considered pervasively regulated if the State's regulation of the business, even if of "recent vintage," is extensive and regularly done.[170]

New York v. Burger[171] continued the saga of the pervasively regulated industries exception.[172] In this case, the U.S. Supreme Court upheld the constitutionality of a New York statute authorizing warrantless inspections of automobile junkyards for the following reasons: first, general junkyards and secondhand shops have existed, and been closely regulated in New York for many years;[173] and second, the statute satisfied the three criteria for reasonableness of the search.[174]

The U.S. Supreme Court enumerated the three criteria as follows: *First*, the State had substantial interest in regulating the industry because of the theft problem associated with the industry;[175] *second*, the warrantless searches

169. *Donovan*, 452 U.S. at 606 (citing *Marshall*, 436 U.S. at 313 & *Biswell*, 406 U.S. at 315).

170. *Id.*

171. New York v. Burger, 482 U.S. 691 (1987).

172. *Id.* at 693.

173. *Id.* at 706.

174. *Id.* at 702.

175. *Id.* at 708.

were necessary to further the regulatory scheme;[176] and *third*, the law adequately informed a business operator that regular inspections will be made, and also set forth the scope and limitations of the inspection.[177]

New York added that evidence seized during a valid administrative search may also be used in a criminal action —

> Nor do we think that this administrative scheme is unconstitutional simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself. In [*Biswell*], the pawnshop operator was charged not only with a violation of the recordkeeping provision, pursuant to which the inspection was made, but also with other violations detected during the inspection, and convicted of a failure to pay an occupational tax for dealing in specific firearms. *The discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal, or the administrative scheme suspect.*[178]

In 2015, after *Donovan* and *New York*, and after the deluge of the pervasively regulated industries exception,[179] the U.S. Supreme Court revisited the exception in *City of Los Angeles v. Patel.*[180]

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176. *Id.* at 709.

177. *New York*, 482 U.S. at 711.

178. *Id.* at 716 (emphasis supplied).

179. "Meanwhile, state and lower federal courts have found many industries to be pervasively regulated. These decisions can be divided into a few categories." Harvard Law Review, *Rethinking Closely Regulated Industries*, 129 HARV. L. REV. 797, 805 (2016). The same Note from the Harvard Law Review expounds on this further —

> First, many cases involved industries with obvious potential risk to public health and safety: pharmaceuticals, the medical profession, food, nuclear power, storing and dispensing gasoline, construction, day cares, and nursing homes, asbestos removal, and solid waste disposal. Alcohol, firearms, and mining also fall into this category.
>
> Next, some cases dealt with commerce: credit unions, pawnshops, banking, insurance, commercial trucking, purchase of precious metals and gems, and foreign trade zone storage.
>
> Industries involving animals were also often found to be pervasively regulated: commercial fishing, dog breeding, deer breeding, horse racing, hunting, taxidermy, and the sale of rabbits for research.
>
> Finally, a few industries — casinos, adult entertainment stores, and massage parlors — seem to have been the target of morality legislation.

Id. at 805-06.

180. City of Los Angeles v. Patel, 135 S. Ct. 2443 (2015) (U.S.).

City of Los Angeles, in addition to applying the historical test (*Colonnade*) and the comprehensiveness test (*Donovan*), used the test of "riskiness" or "intrinsic danger of the business."[181] In *City of Los Angeles*, the Los Angeles Municipal Code[182] required hotels to keep certain information about their customers and to allow inspection by a police officer without need of a warrant, or face criminal penalties.[183] Respondents and other hotel operators sued the city alleging that the ordinance violated the Fourth Amendment of the U.S. Constitution.[184] The city countered that no warrant was required because the hotel industry is "closely regulated."[185] The U.S. Supreme Court declared the ordinance unconstitutional[186] and found that the hotel industry is not closely regulated.[187] In so finding, it used the historical and comprehensiveness tests, as well as the "intrinsically dangerous" test.[188] Thus, for a business to be considered pervasively regulated, its operations should also pose a clear and significant risk to public welfare or are intrinsically dangerous.[189]

These three tests, according to the late Justice Antonin Gregory Scalia, who dissented in *City of Los Angeles*, "are not talismans, but shed light on the expectation of privacy the owner of a business may reasonably have, which in turn affects the reasonableness of a warrantless search."[190] In other words, the tests measure the business owner's reasonable expectation of privacy, which is the ultimate consideration.[191]

Although the term "intrinsically dangerous" suggests that the risk must consist of bodily harm — such as what alcohol, firearms, and mining, which clearly threaten — the term may now, because of *New York*, be deemed to include economic harm; or, at least, economic harm that results from criminal activities.[192]

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181. *Id.* at 2454-55.

182. Los Angeles Municipal Code, §§ 41.49 (2), (3) (a), & (4) (2015).

183. *City of Los Angeles*, 135 S. Ct. at 2447.

184. *Id.*

185. *Id.* at 2454.

186. *Id.* at 2447.

187. *Id.* at 2459-61.

188. *Id.* at 2461.

189. *City of Los Angeles*, 135 S. Ct. at 2454-55.

190. *Id.* at 2459.

191. *Id.* at 2458-59.

192. *Id.* at 2461.

One commentator also noted that a search of "pervasively regulated business" is "not self-executing," such that a statute should first be implemented allowing it.[193] The legislature may grant inspectors less than the full authority possible under the search clause (e.g., authorizing inspections of premises and inventory, but excluding business records).[194] The State may also choose the means to compel a business owner to submit to a lawful warrantless inspection (e.g., an injunction or the imposition of a fine).[195]

V. DRAGNET AND SPECIAL SUBPOPULATION SEARCHES

U.S. case law involving administrative searches can be quite confusing. Eve Breniske Prismus[196] therefore, attempted to find some order in this confusion. She proposed that the U.S. administrative search and seizure cases can be classified into two: "dragnet" searches and "special subpopulation" searches.[197]

A dragnet search is a "search or seizure of every person, place, or thing in a specific location or involved in a specific activity."[198] It is permissible if minimally intrusive and necessary to protect important health and safety interests.[199] The government must show that there is either a warrant or a statutory regime with clear limitations on executive discretion.[200] Examples of this search are safety inspections in a neighbourhood as in *Camara*, checkpoints as in *United States v. Martinez-Fuerte*,[201] and business inspections in particular industries as in *Biswell*.[202]

Unlike the traditional individualized warrant regime, the government, in a dragnet search, need only show a generalized government interest to justify the search.[203] However, it must be shown that government interest could

193. Harvard Law Review, *supra* note 179, at 801.

194. *Id.*

195. *Id.*

196. Eve Brensike Primus is a Professor of Law at the University of Michigan Law School. Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254 (2011).

197. *Id.* at 254.

198. *Id.* at 260.

199. *Id.*

200. *Id.* at 267.

201. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

202. Primus, *supra* note 196, at 260.

203. *Id.* at 263.

not be protected by an individualized suspicion regime.[204] For instance, fire safety in a particular area or neighborhood cannot be effectively enforced by the government if it has to wait for information that a particular house may have faulty wirings before a search can be done.[205] Hence, a dragnet search can be justified by legislation that reasonably limits executive discretion.[206]

To summarize, for a dragnet search to be constitutionally sound:

(a) There should be an underlying government interest for the search;[207]

(b) The degree of intrusion is minimal;[208] and

(c) It is necessary to dispense with traditional individualized probable cause.[209]

With these circumstances present, a court may issue a "general warrant" to conduct a dragnet search, as opposed to a traditional warrant which requires that a specific entity is suspected to have violated a law or regulation.[210]

A warrantless dragnet search, on one hand, may nevertheless be conducted if there is a law that allows and regulates the search.[211]

Special subpopulation searches, on the other hand, are warrantless searches of certain persons who have a reduced expectation of privacy.[212] Examples are searches of public school students,[213] probationers,[214] and government employees.[215] These searches need not satisfy traditional warrant and probable cause requirements, as "mere reasonable suspicion of

204. *Id.* at 266.

205. *See Camara*, 387 U.S. at 537.

206. *See* Primus, *supra* note 196, at 267.

207. *Id.* at 270.

208. *Id.*

209. *Id.*

210. *Id.* at 268-70.

211. *Id.* at 270.

212. Primus, *supra* note 196, at 270-71.

213. *Id.* at 260 (citing New Jersey v. T.L.O., 469 U.S. 325, 340 (1985)).

214. Primus, *supra* note 196, at 260 (citing Griffin v. Wisconsin, 483 U.S. 868, 879 (1987)).

215. Primus, *supra* note 196, at 260 (citing O'Connor v. Ortega, 480 U.S. 709, 725 (1987)).

wrongdoing, rather than probable cause" is required.[216] "Reasonable suspicion," in turn, means that "there is a 'moderate chance' that searching a person will reveal evidence of wrongdoing."[217]

Unlike dragnet searches, special subpopulation searches are more intrusive[218] and do not require a warrant or a regulatory regime;[219] while targeting specific persons.[220]

Therefore, dragnet searches — if justified by a statute — and special subpopulation searches are considered valid warrantless administrative searches in the U.S.

Now, this begs the question: do we adopt these additional exceptions to the warrant rule in the Philippines? Given that, would these survive an attack on their constitutionality? It seems that the first question has already been answered, in one form or another.

In the following Section, "special subpopulation" searches in the Philippines are initially discussed, but only briefly, as dawn raids do not appear to fall under this search.

VI. SPECIAL SUBPOPULATION SEARCHES IN THE PHILIPPINES

A. Drug Tests in Schools and Workplaces

In *Social Justice Society (SJS) v. Dangerous Drugs Board*,[221] the Supreme Court, citing U.S. jurisprudence, upheld the constitutionality of random and suspicionless drug testing of students in secondary and tertiary schools[222] and in public and private work places.[223]

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216. Primus, *supra* note 196, at 271.

217. *Id.* at 290 (citing Safford Unified School District No. 1 v. Redding, 557 U.S. 364, 367 (2009)).

218. Primus, *supra* note 196, at 271.

219. *Id.* at 271-72. The reasonableness of the search is determined by a judge through a *post hoc* analysis. *Id.* at 272.

220. *Id.*

221. Social Justice Society (SJS) v. Dangerous Drugs Board, 570 SCRA 410 (2008).

222. *Id.* at 429-30 (citing Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) & Palmer v. Board of Education, 11 N.E.2d 887 (N.Y. 1937) (U.S.)). This ruling is in contrast to U.S. jurisprudence where the validity of drug testing in schools was limited to public schools. *See Social Justice Society (SJS)*, 570 SCRA at 429-30.

223. *Social Justice Society (SJS)*, 570 SCRA at 430.

With respect to the legality of the drug testing of students, the Supreme Court reasoned that:

> (1) [S]chools and their administrators stand *in loco parentis* with respect to their students;
>
> (2) [M]inor students have contextually fewer rights than an adult, and are subject to the custody and supervision of their parents, guardians, and schools;
>
> (3) [S]chools, acting *in loco parentis*, have a duty to safeguard the health and well-being of their students and may adopt such measures as may reasonably be necessary to discharge such duty; and
>
> (4) [S]chools have the right to impose conditions on applicants for admission that are fair, just, and non-discriminatory.[224]

In the case of employees, the Supreme Court justified their drug testing on the bases of reduced expectation of privacy and reasonableness of the testing guidelines.[225]

The Supreme Court also commented —

> In the criminal context, reasonableness requires showing of probable cause to be personally determined by a judge. Given that the drug-testing policy for employees [—] and students for that matter [—] under [Republic Act No. 9165] is *in the nature of administrative search* needing what was referred to in *Vernonia* as 'swift and informal disciplinary procedures,' *the probable* [ ] *cause standard is not required or even practicable.* Be that as it may, the review should focus on the *reasonableness* of the challenged administrative search in question.[226]

The Supreme Court's statement that the "probable[ ]cause standard is not required"[227] should not, however, be misconstrued to mean that probable cause is absolutely not required in administrative searches. It should be taken in context and interpreted to mean that the traditional notion of probable cause in criminal cases is not required in administrative searches. This is because, in certain instances, where "swift and informal disciplinary procedures" are necessary, the applicable standard can be "reasonableness" of the search, which, according to Fr. Bernas, satisfies the probable cause requirement in administrative searches.[228]

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224. *Id.* at 429.

225. *Id.* at 435.

226. *Id.* at 432 (citing *Vernonia*, 515 U.S. at 653) (emphasis supplied).

227. *Social Justice Society (SJS)*, 570 SCRA at 432.

228. *See* BERNAS, *supra* note 90, at 189-91.

B. Probationers

Probationers in the Philippines, as in the U.S., have a reduced expectation of privacy that justifies warrantless visitations to ensure their compliance with the conditions of probation. The Probation Law[229] provides that "[t]he probationer and his probation program shall be under the control of the court who placed him on probation subject to actual supervision and visitation by a probation officer."[230]

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229. Establishing a Probation System Appropriating Funds Therefor and for Other Purposes [Probation Law], Presidential Decree No. 968 (1976) (as amended).

230. *Id.* § 13. Moreover, Section 10 of the same law provides the other conditions and limitation on the probationer —

> Every probation order issued by the court shall contain conditions requiring that the probationer shall:
>
> (a) present himself to the probation officer designated to undertake his supervision at such place as may be specified in the order within [72] hours from receipt of said order; [and]
>
> (b) report to the probation officer at least once a month at such time and place as specified by said officer.
>
> The court may also require the petitioner to:
>
> (a) cooperate with a program of supervision;
>
> (b) meet his family responsibilities;
>
> (c) devote himself to a specific employment and not to change said employment without the prior written approval of the probation officer;
>
> (d) undergo medical, psychological[,] or psychiatric examination and treatment and enter and remain in a specified institution, when required for that purpose;
>
> (e) pursue a prescribed secular study or vocational training;
>
> (f) attend or reside in a facility established for instruction, recreation[,] or residence of persons on probation;
>
> (g) refrain from visiting houses of ill-repute;
>
> (h) abstain from drinking intoxicating beverages to excess;
>
> (i) permit to probation officer or an authorized social worker to visit his home and place or work;
>
> (j) reside at premises approved by it and not to change his residence without its prior written approval; or
>
> (k) satisfy any other condition related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience.

C. Government Employees

The Court in *Pollo v. Constantino-David*,[231] also citing U.S. jurisprudence, held that the government may search, without need of a warrant, the workplace of its employees, especially in respect of things or objects over which the employee had a reduced expectation of privacy, which in this case was a government-owned computer used by the employee.[232]

VII. DRAGNET SEARCHES IN THE PHILIPPINES

Likewise, the Philippines is no stranger to dragnet searches.

A. Checkpoints

The constitutionality of checkpoints has been affirmed in *Valmonte v. De Villa*,[233] and later in *People v. Usana*.[234] In *Valmonte*, the Supreme Court held —

> Not all searches and seizures are prohibited. Those which are reasonable are not forbidden. A reasonable search is not to be determined by any fixed formula but is to be resolved according to the facts of each case.
>
> Where, for example, the officer merely draws aside the curtain of a vacant vehicle which is parked on the public fair grounds, or simply looks into a vehicle, or flashes a light therein, these do not constitute unreasonable search.
>
> ...
>
> Between the inherent right of the state to protect its existence and promote public welfare and an individual's right against a warrantless search which is however *reasonably* conducted, the former should prevail.[235]

Usana added —

> This Court has ruled that not all checkpoints are illegal. Those which are warranted by the exigencies of public order and are conducted in a way least intrusive to motorists are allowed. For, admittedly, routine checkpoints do intrude, to a certain extent, on motorists' right to 'free passage without interruption,' but it cannot be denied that, as a rule, it involves only a brief detention of travelers during which the vehicle's occupants are required to

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Id. § 10.

231. Pollo v. Constantino-David, 659 SCRA 189 (2011).

232. *Id.* at 219-21.

233. Valmonte v. De Villa, 178 SCRA 211 (1989).

234. People v. Usana, 323 SCRA 754 (2000).

235. *Valmonte*, 178 SCRA at 216-17 (emphasis supplied).

> answer a brief question or two. For as long as the vehicle is neither searched nor its occupants subjected to a body search, and the inspection of the vehicle is limited to a visual search, said routine checks cannot be regarded as violative of an individual's right against unreasonable search. In fact, these routine checks, when conducted in a fixed area, are even less intrusive.[236]

B. Port Security Procedures

The Supreme Court has also upheld the validity of warrantless security inspections and searches in airports[237] and seaports.[238] In *Sales v. People*,[239] the Supreme Court ruled that

> [p]ersons may lose the protection of the search and seizure clause by exposure of their persons or property to the public in a manner reflecting a lack of subjective expectation of privacy, which expectation society is prepared to recognize as reasonable. Such recognition is implicit in airport security procedures. With increased concern over airplane hijacking and terrorism has come increased security at the nation's airports. Passengers attempting to board an aircraft routinely pass through metal detectors; their carry-on baggage as well as checked luggage are routinely subjected to x-ray scans. Should these procedures suggest the presence of suspicious objects, physical searches are conducted to determine what the objects are. There is little question that such searches are reasonable, given their minimal intrusiveness, the gravity of the safety interests involved, and the reduced privacy expectations associated with airline travel. Indeed, travelers are often notified through airport public address systems, signs, and notices in their airline tickets that they are subject to search and, if any prohibited materials or substances are found, such would be subject to seizure. These announcements place passengers on notice that ordinary constitutional protections against warrantless searches and seizures do not apply to routine airport procedures.[240]

In the recently decided case of *Dela Cruz v. People*,[241] the Supreme Court also elaborated on the reason behind the existence of a reasonably reduced expectation of privacy in airports or ports of travel —

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236. *Usana*, 323 SCRA at 767 (citing *Valmonte*, 178 SCRA at 216).

237. *See* Sales vs. People, 690 SCRA 141 (2013).

238. *See* Dela Cruz v. People, G.R. No. 209387, Jan. 11, 2016, *available at* http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/january2016/209387.pdf (last accessed Oct. 31, 2016).

239. Sales vs. People, 690 SCRA 141 (2013).

240. *Id.* at 150 (citing People v. Johnson, 348 SCRA 526, 534 (2000)).

241. *Dela Cruz*, G.R. No. 209387.

> *Persons may lose the protection of the search and seizure clause by exposure of their persons or property to the public in a manner reflecting a lack of subjective expectation of privacy, which expectation society is prepared to recognize as reasonable. Such recognition is implicit in airport security procedures.* With increased concern over airplane hijacking and terrorism has come increased security at the nation's airports. Passengers attempting to board an aircraft routinely pass through metal detectors; their carry-on baggage as well as checked luggage are routinely subjected to x-ray scans. *Should these procedures suggest the presence of suspicious objects, physical searches are conducted to determine what the objects are.* There is little question that such searches are reasonable, given their minimal intrusiveness, the gravity of the safety interests involved, and the reduced privacy expectations associated with airline travel. *Indeed, travelers are often notified through airport public address systems, signs*[,] *and notices in their airline tickets that they are subject to search and, if any prohibited materials or substances are found, such would be subject to seizure. These announcements place passengers on notice that ordinary constitutional protections against warrantless searches and seizures do not apply to routine airport procedures.*[242]

Thus, the Supreme Court has found checkpoints and port security procedures reasonable warrantless searches because:

(a) There is an underlying government interest for the search;

(b) The degree of intrusion is minimal;

(c) It is necessary to dispense with traditional individualized probable cause (i.e., the search, to be effective, had to be random and need not wait for reasonable suspicion to arise); and

(d) In the case of port security procedures, that the passenger had reduced expectation of privacy.

C. Visitorial Power of the Department of Labor and Employment

The Labor Code of the Philippines[243] grants the Secretary of Labor visitorial and enforcement powers,[244] which authorizes the Secretary to enter, without

242. *Id.* at 17 (citing People v. Suzuki, 414 SCRA 43, 53-54 (2003)).

243. A Decree Instituting a Labor Code Thereby Revising and Consolidating Labor and Social Laws to Afford Protection to Labor, Promote Employment and Human Resources Development and Insure Industrial Peace Based on Social Justice [LABOR CODE], Presidential Decree No. 442 (1974) (as amended).

244. Article 128 of the Labor Code provides:

> (a) The Secretary of Labor and Employment or his duly authorized representatives, including labor regulation officers, shall have access to employer's records and premises at any time of the day or night whenever work is being undertaken therein, and the right to

copy therefrom, to question any employee and to investigate any fact, condition[,] or matter which may be necessary to determine violations or which may aid in the enforcement of this Code and of any labor law, wage order[,] or rules and regulations issued pursuant thereto.

(b) Notwithstanding the provisions of Articles 129 and 217 of this Code to the contrary, and in cases where the relationship of employer-employee still exists, the Secretary of Labor and Employment or his duly authorized representatives shall have the power to issue compliance orders to give effect to the labor standards provisions of this Code and other labor legislation based on the findings of labor employment and enforcement officers or industrial safety engineers made in the course of inspection. The Secretary or his duly authorized representatives shall issue writs of execution to the appropriate authority for the enforcement of their orders, except in cases where the employer contests the findings of the labor employment and enforcement officer and raises issues supported by documentary proofs which were not considered in the course of inspection.

An order issued by the duly authorized representative of the Secretary of Labor and Employment under this article may be appealed to the latter. In case said order involves a monetary award, an appeal by the employer may be perfected only upon the posting of a cash or surety bond issued by a reputable bonding company duly accredited by the Secretary of Labor and Employment in the amount equivalent to the monetary award in the order appealed from.

(c) The Secretary of Labor may likewise order stoppage of work or suspension of operations of any unit or department of an establishment when non-compliance with the law or implementing rules and regulations poses grave and imminent danger to the health and safety of workers in the workplace. Within [24] hours, a hearing shall be conducted to determine whether an order for the stoppage of work or suspension of operations shall be lifted or not. In case the violation is attributable to the fault of the employer, he shall pay the employees concerned their salaries or wages during the period of such stoppage of work or suspension of operation.

(d) It shall be unlawful for any person or entity to obstruct, impede, delay[,] or otherwise render ineffective the orders of the Secretary of Labor or his duly authorized representatives issued pursuant to the authority granted under this Article, and no inferior court or entity shall issue temporary or permanent injunction or restraining order or otherwise assume jurisdiction over any case involving the enforcement orders issued in accordance with this Article.

need of a warrant, the premises of an employer, to copy records, and to question any employee.[245]

VIII. U.S. EXCEPTIONS APPLICABLE IN THE PHILIPPINES

The search clause in the 1987 Constitution, which includes the phrase "of whatever nature and for any purpose,"[246] creates the initial impression that it is wider in scope, and therefore more restrictive, than the search clause in the U.S. Constitution.[247] If, therefore, the Philippine Constitution is more restrictive, then the warrant requirement would appear absolute.

But, as discussed previously, the Supreme Court, following U.S. case law, has long recognized exceptions to the warrant requirement. Reliance on U.S. jurisprudence is justified as they are "considered doctrinal in this jurisdiction."[248]

(e) Any government employee found guilty of violation of, or abuse of authority under this Article shall, after appropriate administrative investigation, be subject to summary dismissal from the service.

(f) The Secretary of Labor may, by appropriate regulations require employers to keep and maintain such employment records as may be necessary in aid of his visitorial and enforcement powers under this Code.

Id. § 128.

245. If *Marshall* were adopted in this jurisdiction, which case involved a similar inspection authority on all workplaces, the validity of the Secretary's visitorial powers may be found questionable. *See Marshall*, 436 U.S. 307.

246. PHIL. CONST. art. III, § 2.

247. U.S. CONST. amend. IV.

248. People v. Marti, 193 SCRA 57, 63 (1991). In this regard, the discussion in *People v. Marti* is instructive —

> Our present constitutional provision on the guarantee against unreasonable search and seizure had its origin in the 1935 Charter which, worded as follows [—]
>
> '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, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized.'

In addition, the Author submits that the difference in the wording is more facial than substantial. Although the deliberation records of the 1971 Constitutional Convention are silent as to why the phrase "of whatever nature and for any purpose" was added,[249] it is submitted that the phrase was brought about — if not inspired — by *Camara*, the U.S. landmark decision on administrative searches, decided five years before the Convention.

Camara confirmed that the warrant requirement applied as well to non-criminal searches, although the "probable cause" standard would differ.[250] In other words, the phrase "*of whatever nature and for any purpose*" in the search and seizure clause of the 1973 Constitution, and carried over to the 1987 Constitution, was a result of *Camara*.

Other exceptions to the warrant requirement are: (a) emergency situations — such as, but not limited to, seizure of unwholesome food,[251] compulsory smallpox vaccinations,[252] health quarantines,[253] summary

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> was in turn derived almost verbatim from the Fourth Amendment to the [U.S.] Constitution. As such, the Court may turn to the pronouncements of the [U.S.] Federal Supreme Court and State Appellate Courts which are considered doctrinal in this jurisdiction.

Id. (citing 1935 PHIL. CONST. art. III, § 1 (3) (superseded 1973) & U.S. CONST. amend. IV.). *See also Pollo*, 659 SCRA 189.

249. Fr. Bernas has this to say regarding this point —

> When the Constitution says that it is meant to cover 'searches and seizures of whatever nature and for any purpose,' one might ask what the 1972 Convention meant to sweep into the grab-bag. The same language, not found in the 1935 Constitution[,] is now also in the 1987 Constitution. It is submitted, although the present writer has not found anything explicit in the conventions discussions in support of the position, that the new phrase has effectively extended the search and seizure clause to at least two penumbral areas.

BERNAS, *supra* note 90, at 186. The penumbral areas being referred to are constructive search, such as subpoenas and discovery, and administrative searches as in *Camara*. *See* BERNAS, *supra* note 90, at 186-91.

250. *Camara*, 387 U.S. at 534.

251. *Id.* at 539 (citing North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908)).

252. *Camara*, 387 U.S. at 539 (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905)).

253. *Camara*, 387 U.S. at 539 (citing Compagnie Francaise v. Board of Health, 186 U.S. 380 (1902)).

destruction of tubercular cattle,[254] and investigation of a fire;[255] (b) plain or open view;[256] and (c) consensual searches.[257]

What ties all these exceptions together is the element of the "reduced expectation of privacy" of the person to be searched.

A quasi-exception is dragnet searches pursuant to a "general warrant." It is "quasi" because although a warrant is the basis of such search, it is not in the nature of a traditional warrant that requires individualized probable cause. What is required only is that there are "reasonable legislative or administrative standards for conducting an area inspection."[258]

"General warrants" for dragnet searches are not in the nature of general warrants that were outlawed by the Fourth Amendment of the U.S. Constitution.[259] Unlike general warrants of the past, the general warrants allowed under the dragnet umbrella are minimally intrusive and do not always amount to a search in the constitutional sense. Further, the warrant targets not a particular entity, but an area. The choice of the entity to be searched within the area is random and without discrimination.

Yet another exception are cases when the government can search, without a warrant documents required to be kept by persons or businesses (e.g., documents required by the BIR to be kept by establishments).[260]

In 1948, the U.S. Supreme Court in *Shapiro v. United States*,[261] which involved the Emergency Price Control Act,[262] held that "the privilege which exists as to private papers, cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subject of governmental regulation

254. *Camara*, 387 U.S. at 539 (citing Kroplin v. Truax, 119 Ohio St. 610 (Ohio 1929) (U.S.)).

255. *Camara*, 387 U.S. at 528-29.

256. Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974).

257. *See* United States v. Thriftimart, Inc., 429 F.2d 1006 (9th Cir. 1970).

258. *Camara*, 387 U.S. at 538.

259. *See generally* Payton v. New York, 445 U.S. 573 (1980).

260. *See* An Act Amending the National Internal Revenue Code, as Amended, and for Other Purposes [Tax Reform Act of 1997], Republic Act No. 8424, § 171 (1997) [hereinafter NAT'L INTERNAL REVENUE CODE].

261. Shapiro v. United States, 335 U.S. 1 (1948).

262. Emergency Price Control Act, 50 U.S.C. §§ 901-946 (1942).

and the enforcement of restrictions validly established.'"[263] Even earlier, in *United States v. Sullivan*,[264] the U.S. Supreme Court held that the submission of Income Tax Returns may be required and the person cannot claim a violation of his right against self-incrimination.[265]

Notably, in the Senate discussions,[266] Senator Aquino characterized the Commission's search power, as it was then worded, as akin to the BIR's power to require the submission of documents required to be kept by the entity.[267] As presently worded, however, it finds no similarity with the BIR's

263. *Shapiro*, 335 U.S. at 33 (citing Davis v. United States, 328 U.S. 582, 589-90 (1946)).

264. United States v. Sullivan, 274 U.S. 259 (1927).

265. *Id.*

266. S. JOURNAL No. 14, at 210-11.

267. *See* NAT'L INTERNAL REVENUE CODE, tit. I, § 5. The relevant provision provides —

> In ascertaining the correctness of any return, or in making a return when none has been made, or in determining the liability of any person for any internal revenue tax, or in collecting any such liability, or in evaluating tax compliance, the Commissioner is authorized:
>
> (A) To examine any book, paper, record, or other data which may be relevant or material to such inquiry;
>
> (B) To obtain on a regular basis from any person other than the person whose internal revenue tax liability is subject to audit or investigation, or from any office or officer of the national and local governments, government agencies and instrumentalities, including the Bangko Sentral ng Pilipinas and government-owned or -controlled corporations, any information such as, but not limited to, costs and volume of production, receipts[,] or sales and gross incomes of taxpayers, and the names, addresses, and financial statements of corporations, mutual fund companies, insurance companies, regional operating headquarters of multinational companies, joint accounts, associations, joint ventures or consortia and registered partnerships, and their members;
>
> (C) To summon the person liable for tax or required to file a return, or any officer or employee of such person, or any person having possession, custody, or care of the books of accounts and other accounting records containing entries relating to the business of the person liable for tax, or any other person, to appear before the Commissioner or his duly authorized representative at a time and place specified in the summons and to produce such books, papers, records, or other data, and to give testimony;

power. Equally important, the Competition Act does not require entities to maintain and keep certain documents or records.

IX. ANSWERING THE QUESTIONS

Based on the foregoing, the questions posed in the beginning of this Article are revisited.

A. In Administrative Enforcement Under the Competition Act, Does the Commission have the Power to Conduct Warrantless Searches and Seizures of Business Premises?

The answer to the question is generally in the negative. Administrative searches, to be constitutionally sound, should be authorized by a judge-issued warrant, unless the case clearly falls under one of the exceptions.

On one hand, the applicable exceptions are: (a) when the Commission conducts a search of the public areas of the establishment (the plain view exception);[268] and (b) when the entity consents to the search. On the other

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(D) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry; and

(E) To cause revenue officers and employees to make a canvass from time to time of any revenue district or region and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care, management[,] or possession of any object with respect to which a tax is imposed.

The provisions of the foregoing paragraphs notwithstanding, nothing in this Section shall be construed as granting the Commissioner the authority to inquire into bank deposits other than as provided for in Section 6 (F) of this Code.

Id. See also NAT'L INTERNAL REVENUE CODE, tit. VI, § 171. The provision states —

Any internal revenue officer may, in the discharge of his official duties, enter any house, building[,] or place where articles subject to tax under this Title are produced or kept, or are believed by him upon reasonable grounds to be produced or kept, so far as may be necessary to examine, discover[,] or seize the same.

He may also stop and search any vehicle or other means of transportation when upon reasonable grounds he believes that the same carries any article on which the excise tax has not been paid.

Id.

268. For instance, a tying arrangement can be readily seen in the public area of an entity considered to have a dominant position. "Tying" is characterized by the

hand, the emergency and special subpopulation exceptions do not appear to be relevant in "dawn raids."

Despite this, can warrantless "dawn raids" by the Commission be justified by the pervasively regulated industries exception, which falls under the dragnet umbrella? In other words, a discussion of the second question posed at the beginning of this Article proves instructive.

B. Can Congress Empower the Commission to Conduct Warrantless Routine Inspections (not Targeted Searches) of Business Establishments?

There are contrasting views.

One view, supported by *Camara* and *Marshall*, is that the industries which the Commission regulates do not fall under the pervasively regulated industries exception because (a) the Commission's regulatory power was not meant to ensure the health, safety, and well-being of the public — at least not directly, like in *Camara*; and (b) the scope of the Commission's regulatory powers are so vast and all-inclusive[269] that it cannot pass the *Marshall* test.[270]

Competition Act as "[m]aking a transaction subject to acceptance by the other parties of other obligations which, by their nature or according to commercial usage, have no connection with the transaction[.]" Philippine Competition Act, § 15 (c).

An illustrative example is the European Union case of *Hilti v. Commission* wherein Hilti required users of its patented nail cartridges to buy nails from it as well. *See* Hilti AG v. Commission of the European Communities, Case C-53/92P, 1991 E.C.R. I-667.

In fact, this type of "search" is believed not to be a search in the constitutional sense. An inspection becomes a search when the acts of the government officers go beyond a mere visual survey or scan. It becomes a search when one conducts a discriminating scrutiny of whatever is being searched, or when it becomes an extensive search. *See Caballes*, 373 SCRA at 234-35.

269. Philippine Competition Act, § 3. The provision of law provides —

> This Act shall be enforceable against any person or entity engaged in any trade, industry[,] and commerce in the Republic of the Philippines. It shall likewise be applicable to international trade having direct, substantial, and reasonably foreseeable effects in trade, industry, or commerce in the Republic of the Philippines, including those that result from acts done outside the Republic of the Philippines.
>
> This Act shall not apply to the combinations or activities of workers or employees nor to agreements or arrangements with their employers when such combinations, activities, agreements, or arrangements are

The contrary view, however, is supported by *New York*, following the reasoning that the prevention of "economic harm," which is essentially the Commission's mandate, is sufficient to justify a warrantless search.

The Author is partial to the first view.

As held in *Marshall*, "the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception."[271] The burden therefore is on the proponent to convincingly prove that the case squarely falls under the said exception.

In this jurisdiction, granting the Commission the power to conduct warrantless searches will not satisfy the three criteria in determining if a business is pervasively regulated.[272]

First, the industries covered by the Competition Act cannot be said to have had a "long tradition of close government regulation."[273] The regulation of anti-competitive behavior is certainly unlike the regulation of the liquor industry in *Collonade*.

Second, if Congress empowers the Commission power to conduct regular inspections of all industries, such power will fail the *Donovan* test which requires that the law should be "sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he 'will be subject to effective inspection.'"[274] In other words, given that the Competition Act

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> designed solely to facilitate collective bargaining in respect of conditions of employment.

Id.

270. The Court in *Marshall* reasoned —

> It is quite unconvincing to argue that the imposition of minimum wages and maximum hours on employers who contracted with the Government under the Walsh-Healey Act prepared the entirety of American interstate commerce for regulation of working conditions to the minutest detail. Nor can any but the most fictional sense of voluntary consent to later searches be found in the single fact that one conducts a business affecting interstate commerce; under current practice and law, few businesses can be conducted without having some effect on interstate commerce.

Marshall, 436 U.S. at 314.

271. *Id.*

272. *See Marshall*, 436 U.S. at 314.

273. *Id.*

274. *Donovan*, 452 U.S. at 603 (citing *Biswell*, 406 U.S. at 316).

covers all industries, a particular business would not be sufficiently aware that it could be the subject of inspection at a certain and regular time. The Competition Act does not even say how often and in what manner the inspections will be conducted as to put the relevant industry on notice.

Third, without need to elaborate, the matters that the Commission regulates would not pass the "intrinsically dangerous test" in *City of Los Angeles*.[275]

Equally, if not more important, dragnet searches, under which the pervasively regulated industries fall, should at least seek to protect the health and safety of the public.[276] The Competition Act does not protect these interests.

It is, therefore, a strain to argue that warrantless searches by the Commission can be justified as dragnet searches. Thus, the Author submits that Congress cannot empower the Commission to conduct warrantless routine inspections or searches and seizures in the guise of a dragnet search of pervasively regulated industries.

C. What then are the Philippine Standards to Obtain a Warrant in Administrative "Dawn Raids" (i.e., Targeted Searches with Individualized Probable Cause)?

Unfortunately, there are few guiding principles or precedents in this jurisdiction.

Because the search and seizure clause in the Constitution covers even non-criminal searches, the standards therefore should at least comply with the following Constitutional requirements:

(a) There should be probable cause;[277]

(b) Which should be determined personally by a judge;[278]

(c) Who should conduct an examination of the witnesses under oath or affirmation;[279] and

(d) The warrant should particularly describe the place to be searched and things to be seized.[280]

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275. *City of Los Angeles*, 135 S. Ct. at 2454-55.

276. Primus, *supra* note 196, at 262.

277. PHIL. CONST. art. III, § 2.

278. PHIL. CONST. art. III, § 2.

279. PHIL. CONST. art. III, § 2.

280. PHIL. CONST. art. III, § 2.

1. Warrants for Civil Searches in the Philippines

Given the foregoing, how are these requirements met in non-criminal searches in the Philippines?

As far as the Author is aware, the only set of rules regulating the issuance of warrants in non-criminal cases is the IP Rules. Significantly, by issuing the IP Rules, the Supreme Court has deviated from its 1949 ruling in *Material Distributors (Phil.) Inc.*, and now recognizes that search warrants are not exclusive to criminal cases.[281] How, then, is the issuance of civil search warrants different from criminal warrants? A look at some of the pertinent provisions in the IP Rules proves useful.

Under the IP Rules, an applicant of a search warrant must show all of the following:

(1) that he is the holder of the IP right;[282]

(2) there is probable cause to believe that his right is being infringed or that such infringement is imminent and there is a *prima facie* case for final relief against the infringing defendant;[283]

(3) damage is irreparable;[284]

(4) there is demonstrable risk of evidence being destroyed, hidden, or removed;[285] and

(5) the documents and articles to be seized:

   (a) constitute evidence of the infringing activity;[286]

   (b) infringe upon the applicant's IP right;[287] or

   (c) are used or intended to be used as means of infringing the applicant's IP right.[288]

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281. The history of the warrant requirement also shows that warrants were originally not limited to criminal actions only. *See* Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't This Exactly What the Framers were Trying to Avoid?*, 5 REGENT U. L. REV. 215 (1995).

282. RULE ON SEARCH AND SEIZURE IN CIVIL ACTIONS FOR INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS, § 6.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

Like a criminal warrant, the IP civil warrant may be applied *ex parte*;[289] its application should be supported by affidavits of witnesses who personally know the facts;[290] the applicant should provide a specific description and location of the documents and articles to be searched, inspected, copied, or seized;[291] and the judge shall ask searching questions and answers, with the applicant and witnesses under oath or affirmation.[292]

Unlike a criminal warrant, however, but similar to an application for a temporary restraining order, the applicant in the IP Rules is required to post a bond to answer for any unlawful damages that the defendant may incur by reason of the issuance of the writ.[293]

Thus, the warrant under the IP Rules is *sui generis* as it appears to be a hybrid of a criminal search warrant — with the requirement of probable cause; a temporary restraining order — with the requirements of irreparable harm and risk of destruction; and a subpoena or order for production of documents[294] with the requirement that the documents or things seized constitute evidence of the infringing activity.

It may even be argued that the requirements to apply for an IP civil warrant appear more stringent than a criminal warrant, which do not require a showing of irreparable harm, risk of destruction, or that the things to be seized constitute evidence.[295]

D. The Issue of "Probable Cause" in Non-criminal Searches

The statement in *Camara* that administrative probable cause does not require individualized suspicion should, the Author submits, refer exclusively to dragnet searches and not all kinds of administrative searches. Thus, on the one hand, housing inspections, as in *Camara*, do not require the State to

288. RULE ON SEARCH AND SEIZURE IN CIVIL ACTIONS FOR INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS, § 6.

289. *Id.* § 2.

290. *Id.* § 4.

291. *Id.* §§ 2 & 4.

292. *Id.* § 5.

293. *Id.* § 9.

294. In addition, the writ may order the defendant to allow the applicant to enter his premises and to search, inspect, and copy documents and records. *See* RULE ON SEARCH AND SEIZURE IN CIVIL ACTIONS FOR INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS, § 2.

295. *See* RULE ON SEARCH AND SEIZURE IN CIVIL ACTIONS FOR INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS, § 6.

show that a house is probably in violation of a regulation, but only that the State's appraisal of the conditions in the area as a whole is reasonable.

On the other hand, for administrative searches that target a specific establishment, because it is reasonably suspected to be in violation of a regulation, individualized probable cause is required, although its degree may be lower than in criminal searches.[296]

Donna Mussio[297] notes that "[a]lthough it is unclear exactly what quantum of evidence will satisfy the specific evidence prong of administrative probable cause, courts agree that it is something less that that required to satisfy traditional criminal probable cause."[298] She adds that "if a more lenient administrative probable cause standard is sufficient for routine regulatory inspections pursuant to a neutral administrative scheme, a more lenient administrative probable cause standard should also be sufficient for administrative inspections predicated on suspicion of violations."[299]

Having established that the Commission's searches cannot be considered "dragnet," as they do not ensure the health and safety of the public, the Author submits that dawn raids should be supported by individualized probable cause, that is, there are "such facts and circumstances which would lead a reasonably discreet and prudent man to believe that an [administrative] offense has been committed and that the objects sought in connection with the offense are in the place sought to be searched."[300]

When the term "probable cause" is mentioned, people usually associate it with the criminal warrant procedure. This is not surprising, given that nearly all of Philippine jurisprudence that discusses the issue of probable cause involves a criminal case. This perception is in line with the history of search warrants, where "reasonable suspicion" was a requirement for common law warrants to search for stolen goods, but was not required for other warrants, such as executive warrants — for searches pursuant to sedition law, licensing of books, and printing restrictions — and statutory warrants — for searches to enforce revenue and customs laws.[301]

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296. Donna Mussio, *Drawing the Line Between Administrative and Criminal Searches: Defining the "Objective of the Search" in Environmental Inspections*, 18 B.C. ENVT'L AFF. L. REV. 185, 190 (1990).

297. *Id.*

298. *Id.* at 193.

299. *Id.* at 204-05.

300. *Burgos, Sr.*, 133 SCRA at 813.

301. *See* Hemphill, *supra* note 281, at 218-20.

Under common law, searches to seize evidence have been disallowed. Thus, Lord Charles Pratt, the first Earl of Camden,[302] in *Entick v. Carrington*,[303] recognized that searches can only be for stolen goods, arguing that "[i]t is very certain that the law oblige[s] no man to accuse himself; because the necessary means of compelling self-accusations, falling upon the innocent as well as the guilty, would be cruel and unjust; and it should seem that search for evidence is disallowed upon the same principle."[304]

The limited scope of common law warrants (i.e., to search for stolen goods) was carried over to, but slightly expanded in, the Philippine criminal rules of procedure. Thus, Section 3, Rule 126 of the Rules of Court provides —

> A search warrant may be issued for the search and seizure of personal property:
>
> (a) Subject of the offense;
>
> (b) Stolen or embezzled and other proceeds, or fruits of the offense; or
>
> (c) Used or intended to be used as the means of committing an offense.[305]

It follows, then, that if the purpose of the criminal search is merely to seize evidence, which is neither the subject of the offense, stolen or embezzled, nor used or intended to be used in the crime, a search warrant will not issue.

However, in the case of non-criminal searches, U.S. case law, as well as the Philippine IP Rules, indicates that what may be seized is not limited to the property subject of the offense. For instance, dragnet searches allow for the finding of possible violations of regulations, and special subpopulation searches allow the seizure of evidence. Even the IP Rules expressly allow the seizure of evidence of the infringing activity.

As discussed heretofore, U.S. jurisprudence on administrative searches recognize that for a warrant to issue, probable cause is required, although not in the same degree as probable cause in criminal warrants.

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302. Lord Camden is an 18th century English judge. *See* The Editors of Encyclopædia Britannica, Charles Pratt, 1st Earl Camden, *available at* https://www.britannica.com/biography/Charles-Pratt-1st-Earl-Camden (last accessed Oct. 31, 2016).

303. Entick v. Carrington, 19 Howell's State Trials 1029, 1073 (1765) (U.K.).

304. Justice Oliver Wendell Holmes agreed with this in *Federal Trade Commission v. American Tobacco Co. See* Federal Trade Commission v. American Tobacco Co., 264 U.S. 298, 305-06 (1924).

305. REVISED RULES OF CRIMINAL PROCEDURE, rule 126, § 3.

X. FRAMEWORK OF SEARCH AND INSPECTION POWERS OF THE COMMISSION

A. In Criminal Actions

To secure a warrant in criminal searches, the Commission has to comply with the requirements found in the Constitution[306] and the Rules of Court,[307] including the showing of probable cause as it is traditionally understood in jurisprudence.[308] In respect of what can be seized, the Commission may only seize property subject of the offense, stolen or embezzled property, fruits of the offense, or those used or intended to be used as the means to committing an offense. The Commission, however, may not seize evidence which does not constitute any of the above items. Thus, in price-fixing offenses, it is arguable that e-mails containing informal conversations about an earlier oral agreement to fix prices may not be seized as they are merely evidence — circumstantial at best — of the oral agreement to fix prices.

B. In Non-criminal Actions

Warrants for targeted administrative searches are similar to criminal warrants insofar as the following are concerned: (a) they may be applied *ex parte*; (b) the places and things sought to be searched and seized are particularly described; and (c) the judge asks the applicant and his witnesses searching questions and answers.

Considering, however, that probable cause in administrative searches may be more lenient and flexible than criminal probable cause,[309] the Author submits that the following may be relaxed.

1. Definition of administrative probable cause and the purpose of the search

The Author proposes to define "probable cause" in targeted administrative searches as follows —

> Such facts and circumstances which would lead a reasonably discreet and prudent man to believe that an administrative offense has been committed and (a) that the objects sought in connection with the offense or objects proving the commission of the offense are in the place sought to be

306. *See* PHIL. CONST. art. III, §§ 2 & 3.

307. *See* REVISED RULES OF CRIMINAL PROCEDURE, rule 126, § 4.

308. *See Burgos, Sr.*, 133 SCRA at 813.

309. Mussio, *supra* note 296, at 193.

searched, or (b) that there is a need to conduct a search to prevent further violation of an administrative regulation.

Thus, the purpose of the administrative search, unlike in criminal searches, may include the seizure of object and documentary evidence that is not necessarily the object of the offense (e.g., e-mails), provided they are *prima facie* relevant, as is the requirement in subpoenas and orders for production of documents in civil cases, which Fr. Bernas opines,[310] satisfies the requirement of probable case.

Because the purpose of administrative searches is not merely to punish administrative offenses, but also to safeguard public interest, health, and safety, such search should, the Author submits, allow the seizure of objects that may be used to continue the violation of an administrative regulation.

The current wording of Section 12 (g) of the Competition Act appears to satisfy the above standard as it requires reasonable suspicion, relevance, and particularity,[311] which, taken together, constitute probable cause. Further, the said provision allows the seizure of objects and documents that may be used as evidence of the commission of the offense.

2. Personal knowledge

Given that administrative probable cause may be more liberal than criminal probable cause, it is also submitted that the requirement of personal knowledge by the complainant and his witnesses may be relaxed,[312] especially in urgent cases involving the health and safety of the public. In such situations, an informer's tip that is found reliable and credible, as confirmed and corroborated by independent *prima facie* relevant data obtained through surveillance or other investigatory techniques,[313] may be accepted to establish probable cause for an administrative search.[314]

310. *See* BERNAS, *supra* note 90, at 188.

311. Philippine Competition Act, § 12 (g).

312. Notably, Article III, Section 2 of the 1987 Constitution does not expressly say that the complainant and his witnesses should have personal knowledge of the offense committed. PHIL. CONST. art. III, § 2.

313. Mussio, *supra* note 296, at 194.

314. *Id.* at 189-90 (citing Illinois v. Gates, 462 U.S. 213, 231 (1983)). "For example, when an affiant relies on an informant, the affiant can establish probable cause by giving reasons why the informant is a reliable source and why the information is credible." *Id.* at 189.

3. "One specific offense" rule

For a criminal warrant to issue, the rules of criminal procedure require that the probable cause be "in connection with one specific offense."[315] This requirement — not found in the Constitution — may also be relaxed in administrative searches.

4. Other requirements by the IP Rules

Further, so as not to unreasonably raise the standard of administrative searches to the level of criminal searches, or even to exceed it, the Author submits that the additional requirements[316] set in the IP Rules need not be adopted in all types of non-criminal searches. The Author however recognizes that due to the peculiarities of an industry or a business, such additional requirements may be necessary for searches in such industries, to prevent abuse in the issuance of administrative search warrants.

Note that the above proposed standards apply to targeted administrative searches (i.e., against a specific entity) and not area-wide dragnet searches, which has been found to be outside the Commission's powers.

XI. THE ISSUE OF PARALLEL PROCEEDINGS AND ADMISSIBILITY OF EVIDENCE

Before concluding, it is relevant to also discuss the admissibility of evidence in parallel proceedings. For one offense under the Competition Act, the Commission may institute against the entity administrative and civil actions, and criminal actions through the DOJ, with each proceeding running parallel to and independent of each other. This was confirmed during the Senate discussions between Senators Aquino and Angara.[317]

"Parallel proceedings" refer to at least two actions, one criminal and the other non-criminal (either civil or administrative), in which the allegations of unlawful conduct arise out of the same set of facts, and which actions may either be concurrent or successive.[318] In addition, the two actions may be

315. REVISED RULES ON CRIMINAL PROCEDURE, rule 126, § 4.

316. These are (a) to show that the objects sought to be seized are in danger of being removed or destroyed; (b) to show that the damage will be irreparable; and (c) to post a bond to secure the other party. RULE ON SEARCH AND SEIZURE IN CIVIL ACTIONS FOR INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS, §§ 2 & 9.

317. S. JOURNAL No. 11, at 174-75.

318. Walter P. Loughlin, Fighting On Two Fronts: Parallel Proceedings And Challenges At The Intersection Of Criminal And Civil Law, *available at*

initiated by either the government alone, or the government and a private person.[319]

In the Competition Act, the Commission's discretion to initiate criminal and administrative cases simultaneously[320] appears virtually unlimited, provided, of course, it is not exercised capriciously. In *United States v. Kordel*,[321] it was explained that "it would stultify enforcement of federal law to require a government agency invariably to choose either to [forego] recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial."[322]

Given that the purpose of administrative searches should be flexible, as it can include the search and seizure of evidence, another question arises: Can evidence obtained during an administrative search be used in a parallel criminal proceeding? Or should such evidence, given the difference in the standards between the two proceedings, be excluded pursuant to the exclusionary rule?

The Author submits that the practice of sharing evidence to prosecutors does not violate the exclusionary rule.[323] This is because the rule presupposes that the search was invalid. If, however, the administrative search was pursuant to a valid warrant or clearly fell under any of the exceptions to the warrant requirement, the objects seized were legally obtained and may therefore be used in both the administrative and criminal proceedings.

The Commission may share evidence obtained pursuant to a valid administrative search to the DOJ for the prosecution of the criminal action. Thus, Mussio posits that "[i]nformation may be shared with the prosecutors[,] subject only to the good faith determination that it was sought

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http://www.metrocorpcounsel.com/articles/7442/fighting-two-fronts-parallel-proceedings-and-challenges-intersection-criminal-and-civi (last accessed Oct. 31, 2016).

319. *Id.*

320. *See* Philippine Competition Act, § 12 (a). The DOJ, upon complaint by the Commission, has the authority to prosecute criminal violations of the Act. *Id.* §§ 13 & 31.

321. United States v. Kordel, 397 U.S. 1 (1970).

322. *Id.* at 11.

323. Any evidence obtained in violation of Sections 2 and 3 of Article III of the 1987 Constitution shall be inadmissible for any purpose in any proceeding. *See* PHIL. CONST. art. III, § 3, para. 2.

for legitimate civil or administrative purposes, and not solely to gather criminal evidence."[324]

Recall also that *New York* held that "[t]he discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal, or the administrative scheme suspect."[325]

Moreover, in the recent case of *Dela Cruz*, firearms which were validly discovered and seized in the course of an administrative search by the port authorities were allowed to be used by the DOJ in criminally prosecuting petitioner for illegal possession of firearms and violation of the election gun ban.[326] Such sharing of evidence was not found unconstitutional.[327]

In the IP Rules, however, the Supreme Court appears to have taken a different approach. The IP Rules require the applicant to undertake "that he will not use any of the documents, articles, or information obtained by reason of the search and seizure for any purpose other than in the action in which the writ is issued."[328] Thus, the applicant can only use the seized documents in the civil action.

It is unclear, however, if the applicant is prohibited from sharing the seized documents or objects to a government agency that can then use the evidence in administrative or criminal proceedings. Because, in this case, it is not the private person or applicant, but the government agency, that used the evidence in another proceeding. To make sense of the provision, it is submitted that only the private person (i.e., the applicant), and not the government, is restricted from using the same evidence in another proceeding. Criminal prosecution of trademark infringement should not be precluded by a prior action instituted by a private person.

At any rate, the limitation is in the form of an undertaking or a promise not to use the evidence seized in another proceeding, and is not akin to the exclusionary rule in the Constitution. Hence, if the private person violates his undertaking, he may be liable for damages under his bond, but the violation should not render the evidence inadmissible.

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324. Mussio, *supra* note 296, at 209.

325. *New York*, 482 U.S. at 716.

326. *Dela Cruz*, G.R. No. 209387, at 24.

327. *Id.* at 12.

328. RULE ON SEARCH AND SEIZURE IN CIVIL ACTIONS FOR INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS, § 4.

XII. CONCLUSION

This Author, therefore, recommends the following laws and amendments.

First, that the Supreme Court promulgate Rules of Procedure or Guidelines in the issuance of search warrants in administrative and civil cases, as outlined above, for the guidance of the courts and the public. The requirements should at least comply with the Constitutional requirements of probable cause (i.e., reasonableness), personal determination by a judge, an examination under oath or affirmation, and particularity in the place to be searched and things to be seized.[329] But it may, in all other respects, be more flexible than the criminal warrant requirements.

It is also proposed that the rules include a provision for "general warrants"[330] for dragnet searches, in the absence of a law regulating the same. For such warrants, individualized probable cause should not be required.

The Supreme Court may also include in the rules a provision that sanctions the concealment, withholding, and destruction of evidence that may be used in administrative and civil proceedings, which may be similar to the sanctions found in the rules on discovery.

Without rules to guide the courts in the issuance of non-criminal warrants, confusion will arise as to what the Commission, as well as other administrative agencies, have to establish to secure a warrant. And as administrative enforcement is becoming far-reaching and more effective, it is high time that the Supreme Court recognizes the urgent need to set the parameters for administrative searches.

Second, that a law be passed punishing the alteration, destruction, suppression, or concealment of any paper, record, document, or object, with intent to impair its veracity, authenticity, legibility availability, or admissibility as evidence in administrative or civil proceedings.[331] This is to

329. PHIL. CONST. art. III, § 2.

330. As discussed, the concept of general warrants in administrative searches is different from the general warrants that have been outlawed by the Constitution.

331. Presidential Decree No. 1829, or the law on Obstruction of Justice, applies only to criminal actions. Thus, as far as this Author is aware, there is no general law that criminally punishes the destruction of evidence in administrative and civil proceedings. *See* Penalizing the Obstruction of Apprehension and Prosecution of Criminal Offenders, Presidential Decree No. 1829 (1981).

deter entities from sanitizing their records when they receive an order for production of documents.

Third, that Section 12 (g) be amended to include the homes of directors, officers, employees, agents, and representatives of the entity. Given that a court-issued warrant is required for a search, which requirement was not found in the original text of the bill, Senator Angara's concern that a man's home is his castle should no longer be an issue. It would not make sense to allow searches of houses in criminal actions but not in non-criminal actions.

Fourth and finally, that Section 12 (g) be amended to remove the phrase "in order to prevent the removal, concealment, tampering with, or destruction of the books, records, or other documents," as it unduly burdens the Commission to prove intent to remove, conceal, tamper with, or destroy evidence, which is not always apparent, and is more importantly, irrelevant.