

# SWEEPS: AN UNWARRANTED SOLUTION TO THE SEARCH FOR SAFETY IN PUBLIC HOUSING

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## INTRODUCTION

The prevalence of violence in publicly owned housing developments is a major problem in the United States today.<sup>1</sup> This problem has triggered debates among policymakers, residents, and the general public as to how best to make these developments safe for their residents. In Chicago, violence at the publicly owned housing projects run by the Chicago Housing Authority (CHA)<sup>2</sup> has become a way of life.<sup>3</sup> Random gunfire is a common occurrence. On the last weekend in March 1994, for example, police received 300 reports of shots fired at the sixteen-story Robert Taylor Homes, the most infamous of the CHA's projects.<sup>4</sup> CHA residents, fed up with the

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1. See, e.g., Michael Abramowitz, *Daley Plans Crackdown on Violence: Boy's Killing Sparks 'Sweeps' at Projects*, WASH. POST, Oct. 20, 1992, at A3 (reporting that seven-year-old boy's shooting death sparked search policy to stop "seemingly endless spate of gang violence" in housing projects); Ruben Castaneda, *14-Year-Old Fatally Shot Near Home: Cabbie Also Among 4 Killed in the District*, WASH. POST, Sept. 12, 1994, at C1 (stating that 14-year-old boy was shot to death on steps of apartment in District of Columbia public housing development); Serge F. Kovaleski, *Drastic Measures for a Desperate Place: Fences May Mean Freedom at D.C. Housing Complex*, WASH. POST, July 11, 1994, at D1 (detailing effects of violence on public housing project, including "bullet-riddled" hallways, walls smeared with dried blood, and graffiti message "Welcome to Your Death").

2. The Chicago Housing Authority (CHA) was created under the Housing Authorities Act, ILL. ANN. STAT. ch. 310, para. 2 (Smith-Hurd 1993). The CHA is an Illinois municipal corporation created "to promote and protect the health, safety, morals and welfare of the public" through the maintenance of Chicago's low-income housing developments. *Id.*

3. See Memorandum in Support of Request for Authority to Perform Warrantless Searches at 2-3, *Summeries v. Chicago Hous. Auth.* (N.D. Ill. Dec. 16, 1988) (No. 88 C 10566); see also Robert Davis, *Judge to Rule on Chicago Gun Sweeps*, USA TODAY, Apr. 4, 1994, at 3A (describing fear felt by residents of Robert Taylor Homes and listing examples of random acts of violence); *Tenants See Pros, Cons in Clinton Anti-Crime Plan*, WASH. POST, Apr. 19, 1994, at B7 (reporting personal stories of residents who witnessed shootings); Don Terry, *A Fight for Peace on Chicago's Streets*, N.Y. TIMES, Apr. 4, 1994, at A8 (describing end of truce among Chicago gangs as reason for increased violence in Chicago public housing projects). In fact, the rate of murder, criminal sexual assault, robbery, and serious assault is twice as high in the low-income public housing developments of the CHA than in Chicago generally. Affidavit of Leroy Martin, Director of Public Safety for the Chicago Housing Authority at 3, *Summeries* (No. 88 C 10566).

4. Davis, *supra* note 3, at 3A; see, e.g., Matt O'Connor & Mitchell Locin, *Judge Upholds Search Ban; Clinton Volunteers Help*, CHI. TRIB., Apr. 8, 1994, at 1; Don Terry, *Chicago Project in Furor About Guns and the Law*, N.Y. TIMES, Apr. 8, 1994, at A12; Terry, *supra* note 3, at A8.

violence, have demanded enhanced security measures designed to make living in the projects safer.<sup>5</sup> As a response to this demand, the CHA initiated a policy of conducting "sweep" searches with the goal of eradicating the shooting and intimidation that occurs in the developments.<sup>6</sup> Pursuant to the policy, CHA officials conducted warrantless searches of entire housing developments, searching each tenant's home to locate weapons used in shootings and removing those weapons from the property, thereby protecting the people and property within the development.<sup>7</sup> During these sweeps, members of

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5. Memorandum of the Chicago Housing Authority and Vincent Lane in Support of Motion to Modify Consent Decree at 6, *Summeries* (No. 88 C 10566) (noting that tenants demanded "vigorous and effective security procedures" to deal with problem of violence in projects).

6. See *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792, 793 (N.D. Ill. 1994) (stating that CHA ordered its police department to conduct sweeps after specified violent actions took place). The issue of warrantless searches in CHA developments is not a new one. See Consent Decree at 3-5, *Summeries* (No. 88 C 10566). In December 1988, the American Civil Liberties Union filed a civil rights class action suit on behalf of tenants of the CHA against the CHA, in part, for violations of the tenants' Fourth Amendment rights. *Id.* at 4. The tenants claimed that the CHA engaged in "a policy of systematic, warrantless searches of persons, personal effects, [and] homes . . . in violation of the Fourth Amendment." *Id.* at 3-4. The CHA never admitted that its policy violated its tenants' Fourth Amendment rights but agreed to enter into a Consent Decree with the tenants to "avoid[] protracted and costly litigation." *Id.* at 5. The Consent Decree, in part, allowed the CHA to conduct "emergency housing inspection[s]" when it developed "reasonable cause to believe that there is an immediate threat to the safety and/or welfare of tenants and/or employees and/or business invitees and/or property of the CHA." *Id.* app. B at 1. The purposes of the inspections were to identify any unauthorized occupants and to "inspect the condition of the units," *id.* at 6, and *not* to "enforce, or otherwise to investigate or obtain evidence of, the violation of any federal, state or local criminal or quasi-criminal law." *Id.* The Consent Decree allowed the CHA, pursuant to these inspections, to examine the structural condition of the units, i.e., floor, wall, and electrical wiring. *Id.* app. B at 6. The Decree explicitly forbade the CHA from inspecting personal property of the tenants including bureaus, dresser drawers, closets, bed clothes, clothing, boxes, or other containers. *Id.* app. B at 7.

In October 1992, the CHA motioned the district court to modify the Consent Decree to allow searches of apartments and personal effects for drugs and weapons as a means of combatting crime. Amended Motion to Modify Consent Decree at 1, *Summeries* (No. 88 C 10566). Although the procedural history is confusing, apparently the CHA went ahead and instituted its new "sweeps" policy in the fall of 1992 without court approval. David E.B. Smith, Note, *Clean Sweep or Witch Hunt?: Constitutional Issues in Chicago's Public Housing Sweeps*, 69 CHI-KENT L. REV. 505, 507 (1993) (explaining that in response to death of seven-year-old boy in fall of 1992, "the CHA reinstituted an even more aggressive sweep program" that resulted in further litigation). The CHA later asked the court for authority to conduct the warrantless searches, arguing that the searches were outside the scope of the Consent Decree. Memorandum in Support of Request for Authority to Perform Warrantless Searches at 1-2, *Summeries* (No. 88 C 10566); see also Steven Yarosh, Comment, *Operation Clean Sweep: Is the Chicago Housing Authority 'Sweeping' Away the Fourth Amendment?*, 86 NW. U. L. REV. 1103, 1128-29 (1992) (arguing that searches authorized by Consent Decree fit into special needs exception to warrant requirement and are therefore constitutional).

7. Defendant Chicago Housing Authority's Answer to Class Action Complaint for Declaratory and Injunctive Relief at 10, *Pratt* (No. 93 C 6985) (describing purpose of CHA's search policy as stopping violence, finding and removing weapons, and protecting people and property). The searches occurred during the months of July and August 1993. *Id.* at 2.

the CHA's police force<sup>8</sup> searched entire apartment units, examining closets, drawers, refrigerators, cabinets, and personal effects, without probable cause to believe that any particular apartment contained weapons.<sup>9</sup>

This policy sparked wide criticism because it gave broad authority to CHA officials to search tenants' homes, which many argued violated the Fourth Amendment of the Constitution.<sup>10</sup> Opponents noted that the sweeps policy unacceptably put the need to make the developments safer in conflict with the tenants' right to privacy under the Fourth Amendment.<sup>11</sup> In fact, although many of the tenants actually supported the sweeps,<sup>12</sup> four CHA tenants, represented by the American Civil Liberties Union (ACLU), responded to the policy by filing a complaint in the U.S. District Court for the Northern District of Illinois, claiming that the warrantless searches, conducted pursuant to the sweeps policy, violated their Fourth Amendment rights.<sup>13</sup> The court agreed, and, on April 7, 1994, ordered a preliminary injunction to end the sweeps, holding that there was "a substantial likelihood that the . . . [sweeps] violate[d] the Fourth Amendment."<sup>14</sup> In its decision, the court acknowledged that the searches had the support of many of the CHA tenants<sup>15</sup> and that the CHA

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8. The Chicago Housing Authority Police have the "same powers as those conferred on the police of organized cities and villages." ILL. ANN. STAT. ch. 310, para. 8.1a (Smith-Hurd 1993).

9. *Pratt*, 848 F. Supp. at 793 (detailing places searched within apartments and noting disregard for normal warrant process).

10. The Fourth Amendment states:

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

U.S. CONST. amend. IV. The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

11. See *infra* note 49 and accompanying text (providing examples of criticisms of sweeps policy).

12. *Pratt*, 848 F. Supp. at 796.

13. See *id.* at 793 (explaining that plaintiffs, who were "all tenants and lawful residents" of CHA developments, complained that CHA had violated their rights under Fourth and Fourteenth Amendments of Constitution). The complaint asked for declaratory and injunctive relief pursuant to 42 U.S.C. §§ 1983, 1988 and 28 U.S.C. §§ 2201 *et seq.* *Id.* The American Civil Liberties Union (ACLU) had also represented the tenants in *Summeries*. Yarosh, *supra* note 6, at 1104.

14. *Pratt*, 848 F. Supp. at 796. Specifically, the court held that the plaintiffs had a reasonable likelihood of success on the merits, that there was no adequate remedy at law and that they would be irreparably harmed if not for the injunction, that the balance of hardships favored the plaintiffs, and that the public interest would not be harmed by granting the injunction on the sweeps. *Id.*; see also *infra* note 39 and accompanying text (delineating legal standard for injunctive relief applied by court).

15. See *Pratt*, 848 F. Supp. at 796 (acknowledging that tenants' "sad experience" of inadequate law enforcement services in housing projects has "prepared [tenants] to forgo their own constitutional rights" and rights of their neighbors in name of safety).

had a valid need to maintain safety in the developments.<sup>16</sup> The court warned, however, that although many Americans supported warrantless searches in the inner city, "all Americans are bound together in law and fact" and the erosion of rights in one part of the city "undermine[s] the rights of each of us."<sup>17</sup>

In response to the preliminary injunction, and in an effort to illustrate its concerns about the problem of crime in public low-income housing developments,<sup>18</sup> the Clinton administration devised policy guidelines (Clinton Guidelines or Guidelines)<sup>19</sup> aimed at providing public housing officials with "effective and constitutionally valid" law enforcement measures to use "in dealing with the severe problems of violent crime in urban public housing developments."<sup>20</sup> In addition to providing other recommendations, the Clinton Guidelines suggested that housing authority officials put "consent clauses" into leases, presumably avoiding the sweeps' constitutional problems by having the tenants explicitly consent to sweep-like searches.<sup>21</sup>

Although both the sweeps policy and the Clinton Guidelines are sincere attempts to fight violence in the housing projects, the methods each recommends to reduce crime and thereby make the developments safer have important constitutional implications. In particular, both beg the question of whether the government is requiring the tenants who live in low-income housing to forgo their

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16. See *id.* (noting that CHA is responsible for maintaining "safe conditions" in projects but has inadequate resources to do so properly).

17. *Id.* at 797.

18. As a reaction to the district court decision, President Clinton "instructed Secretary of Housing and Urban Development Henry Cisneros and Attorney General Janet Reno to devise a constitutional, effective way to protect the residents of America's public housing communities." The President's Radio Address, 30 WEEKLY COMP. PRES. DOC. 823 (Apr. 16, 1994) [hereinafter Radio Address]. Clinton stressed that "[e]very law-abiding American, rich or poor has the right to raise children without the fear of criminals terrorizing where they live." *Id.*; see, e.g., Mitchell Locin, *Clinton Unveils a Sweeps Plan for CHA*, CHI. TRIB., Apr. 17, 1994, at 1 (stating that President Clinton pursued aggressive use of sweeps to reduce violence in public housing projects); O'Connor & Locin, *supra* note 4, at 1 (discussing President Clinton's response to district court's injunction); Clarence Page, *For CHA Residents a Fight to Keep Their Constitutional Rights*, CHI. TRIB., Apr. 13, 1994, at 21 (mentioning that President Clinton asked for guidelines as part of his "anti-crime campaign"); Lynn Sweet, *Feds at Odds over Sweeps*, CHI. SUN-TIMES, Apr. 13, 1994, at 3 (discussing differences in approaches between Justice Department and HUD in preparing guidelines).

19. See Letter from Janet Reno and Henry Cisneros, Apr. 14, 1994 [hereinafter Reno Letter], reprinted in 140 CONG. REC. S4660 (daily ed. Apr. 21, 1994) (outlining Clinton Guidelines).

20. *Id.*

21. *Id.* (explaining that warrantless searches are constitutional as long as conducted pursuant to "uncoerced consent"); see *infra* Part I.B and accompanying notes (outlining specific recommendations set forth in Guidelines); *infra* Part II.B.1 and accompanying notes (articulating consent exception to warrant requirement of Fourth Amendment).

right to privacy, protected by the Fourth Amendment, as a means of achieving safety in the developments. This Comment focuses on the constitutional issues raised by the sweeps policy and the Guidelines, examining how the sweeps policy and the Clinton Guidelines affect the tenants' rights under the Fourth Amendment and whether the goal of safety justifies the privacy intrusion these two policies promote. Part I gives a detailed description of the sweeps policy, the searches conducted pursuant to this policy, and the reasons why the district court decided to enjoin the CHA from pursuing the policy. In addition, Part I describes the Clinton Guidelines and the questions raised by its recommendations. Part II outlines the relevant Fourth Amendment jurisprudence regarding warrantless searches conducted in homes. Part III provides an analysis of the constitutionality of the sweeps policy, concluding that the policy of warrantless sweep searches violates the Fourth Amendment rights of public housing tenants. Part III also discusses the Clinton Guidelines in terms of Fourth Amendment jurisprudence, determining that, as written, the Guidelines will lead housing authorities to institute search policies that violate their tenants' Fourth Amendment rights. Part IV provides specific recommendations as to how the Clinton administration should revise the Guidelines to avoid the constitutional problems posed by the Guidelines while still providing guidance to housing authorities as to how to make the developments safer for the tenants. This Comment concludes by pointing out the dangers of allowing the erosion of constitutional rights in the name of safety.

## I. BACKGROUND

### A. *The Sweeps Policy*

The CHA characterized the sweeps as a law enforcement effort instituted "for the common good of the tenants [of the CHA developments], [and] for the safety of the general population."<sup>22</sup>

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22. Response Memorandum of the Chicago Housing Authority at 2, *Pratt* (No. 93 C 6985). In the words of the CHA, the policy may be summarized as:

Where there is persistent and continuous gunfire or other weapons related incidents on CHA property, and given that CHA can identify a building or buildings from which such incidents take place but not specific locations within such buildings, searches involving an entire building(s) in which the weapon may be stored or from which the gunfire or incident originated are necessary. Such searches are necessary for law enforcement purposes, for the common good of the tenants, for the safety of the general population, and for the ability to effectively manage the CHA developments. These searches include searches of individual apartments and personal effects.

*Id.* at 1-2.

The policy authorized the CHA police force to conduct searches of entire buildings, including individual apartments, whenever "persistent and continuous gunfire or other weapons related incidents" occur on the premises.<sup>23</sup> Pursuant to the policy, CHA police could search all apartments in a particular building if they were unable to identify the specific location from which the gunfire originated, in an effort to locate the weapons being used.<sup>24</sup> Furthermore, the policy authorized the CHA police to look through personal effects,<sup>25</sup> which included searches of cabinets and dresser drawers, refrigerators, under mattresses, and inspections of private papers.<sup>26</sup>

In applying the policy during the summer of 1993, the CHA police conducted warrantless searches of twelve apartment developments, constituting more than 1000 total units.<sup>27</sup> Although most of the tenants who were at home at the time of the sweeps consented to the searches in writing,<sup>28</sup> the CHA also searched the homes of tenants who were not at home and who had not previously consented to the search.<sup>29</sup>

The CHA intended that the sweeps be conducted in response to the exigency of gunfire, however, none of the building-wide searches occurred sooner than forty-eight hours after a gun-related incident.<sup>30</sup>

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23. *Id.* at 2; see also *Pratt*, 848 F. Supp. at 793 (explaining that sweeps policy authorized searches when certain preconditions including "random gunfire from building to building," "intimidation at gunpoint," and shooting inside buildings occurred). For example, the most well known incident that triggered a sweep occurred at the Robert Taylor Homes after sniper fire directed at contractors employed to install protective windows (to alleviate the problem of children falling out of windows) in the development injured a CHA security guard and caused the contractor to walk off the job. Memorandum in Support of Request for Authority to Perform Warrantless Searches at 2-3, *Pratt* (No. 93 C 6985). Another incident that attracted much attention was the shooting death at Cabrini Green housing project of a seven-year-old boy. See Smith, *supra* note 6, at 507 (relating how boy's death "shocked the city").

24. See Response Memorandum of the Chicago Housing Authority at 2, *Pratt* (No. 93 C 6985).

25. *Id.*

26. *Pratt*, 848 F. Supp. at 794 (listing areas searched during sweep); see also Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 1, *Pratt* (No. 93 C 6985) (describing search of Plaintiff Redman's house as turning her "home upside down").

27. See *Pratt*, 848 F. Supp. at 793 (noting that CHA ordered searches of 12 residential buildings on four different occasions beginning in summer of 1993); Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 2, *Pratt* (No. 93 C 6985) (explaining that each development has at least 160 separate units and that in total over 1000 apartments were searched).

28. Defendant Chicago Housing Authority's Answer to Class Action Complaint for Declaratory and Injunctive Relief at 2, *Pratt* (No. 93 C 6985).

29. See *Pratt*, 848 F. Supp. at 793-94 (noting that CHA conceded failure to obtain consent from absent tenants).

30. *Id.* at 793 (observing that it took CHA several days to institute searches in response to emergency situations).

The CHA blamed its slow reaction on the "logistical difficulties of coordinating sufficient police to search properly."<sup>31</sup>

The ACLU represented the four tenants who sued the CHA. It filed suit on behalf of the tenants as a class,<sup>32</sup> asking the court to enjoin the CHA from continuing to conduct searches pursuant to the sweeps policy.<sup>33</sup> Plaintiffs alleged that the warrantless searches conducted by the CHA violated the tenants' rights under the Fourth and Fourteenth Amendments. The CHA responded to the suit by arguing that the searches were "emergency inspections for weapons" and did not violate the Fourth Amendment.<sup>34</sup> First, the CHA argued that the majority of tenants consented to the searches.<sup>35</sup> Second, the government interest in maintaining order and safety in the developments, it contended, outweighed the tenants' privacy expectations, thus justifying warrantless searches.<sup>36</sup> Finally, the CHA explained that exigent circumstances created by the gunfire required and allowed the police to conduct warrantless searches.<sup>37</sup>

The district court, however, found the CHA's arguments unpersuasive.<sup>38</sup> In its opinion, the court did not determine whether the CHA had actually violated the constitutional rights of the tenants. Instead, it held that the tenants' claims were sufficient to justify injunctive relief.<sup>39</sup> The court found that the tenants' claim had "a reasonable

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31. *Id.*

32. See *infra* text accompanying notes 46-48 (explaining that court later decertified class action at request of tenant leaders but that decertification had no effect on validity of injunction).

33. See *supra* note 13 and accompanying text (noting that Plaintiff Pratt's complaint asked for injunctive relief, arguing that CHA's warrantless searches violated Plaintiff's Fourth Amendment rights).

34. Response Memorandum of the Chicago Housing Authority at 4, *Pratt* (No. 93 C 6985) (arguing that plaintiffs cannot succeed on merits because CHA's searches meet Fourth Amendment requirements allowing searches without warrants).

35. See *id.* at 4-5 (maintaining that CHA had authority to conduct sweeps because during each of 10 searches all but one tenant "present at the time of the inspection" consented to search and clause in lease allowed CHA to enter apartments when emergencies exist).

36. See *id.* at 5-10 (outlining special needs exception to Fourth Amendment warrant requirement and arguing that because of severe problem of violence in developments, sweeps policy fits within exception).

37. See *id.* at 10-13 (defining exigency exception to warrant requirement and concluding that weapons problem in development created sufficient exigency to justify searches).

38. See *Pratt*, 848 F. Supp. at 797 (enjoining CHA from conducting further warrantless searches pursuant to sweeps policy).

39. *Id.* (explaining that harm caused by violating constitutional rights through warrantless searches outweighs safety benefits derived by conducting searches). Specifically, the court held that plaintiffs had proven their legal elements, namely that:

(1) the plaintiffs [had] at least a reasonable likelihood of success on the merits; (2) plaintiffs [had] no adequate remedy at law and [would] be irreparably injured if the defendants [were] not enjoined; (3) the balance of hardships favor[ed] granting the preliminary injunction; and (4) the public interest [would] not be disserved if the injunction [was] granted.



likelihood of success."<sup>40</sup> The court emphasized that exigent circumstances did not exist at the time the searches were conducted, citing the fact that the searches occurred several days after the gunfire.<sup>41</sup> In addition, the court found that the CHA did not have probable cause to search the apartments, noting that even if exigent circumstances had existed, the CHA still needed to show that a particular apartment contained weapons in order to conduct a legal warrantless search of that apartment.<sup>42</sup>

Moreover, the court found that the likelihood that the searches would violate the constitutional rights of CHA residents outweighed any added safety benefit that the searches might provide.<sup>43</sup> The court also stressed that the searches were an "ineffective means to secure long-term safety" and that they were "a chaotic invasion of privacy" that did not, in the long term, reduce illegal activity.<sup>44</sup> The court acknowledged that many CHA tenants supported the sweep searches, but noted that such support did not justify the erosion of the constitutional rights of the supporters' neighbors.<sup>45</sup>

Reaction to the sweeps policy and the court's decision has been mixed. Many CHA tenants were upset with the decision, and, in fact, eighteen tenant leaders filed a motion to de-certify the original class action suit<sup>46</sup> on behalf of the tenants who supported the sweeps policy.<sup>47</sup> Although the court granted this motion, noting that the "class representatives" that brought the case against CHA could not "be deemed to fairly and adequately protect the interests" of the tenants who supported the policy, this decision had no effect on the

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*Id.* at 794.

40. *Id.*

41. *Id.* at 795-96.

42. *Id.* (arguing that because CHA searched apartments even when there was no reason to believe that residents participated in crime, CHA's search policy failed Fourth Amendment requirement of probable cause). In its decision, the court did not address the CHA's arguments that the searches conducted with the consent of the tenants were constitutional. Similarly, the court did not mention the special government needs exception and why it did not apply to the CHA searches. For an analysis of the policy in terms of consent and special needs, see *infra* Part III.A.

43. *Pratt*, 848 F. Supp. at 796.

44. *Id.*

45. *Id.* at 796-97 (pointing out that eroding constitutional rights for some individuals would equally erode those rights for all individuals).

46. *Pratt v. Chicago Hous. Auth.*, 155 F.R.D. 177, 178 (N.D. Ill. 1994). Each CHA development has a Local Advisory Council (LAC) made up of residents of the developments. *Id.* The plaintiffs in this case represented 18 of the 19 LAC presidents. *Id.* These same representatives were defendant-intervenor in *Pratt*, contending that the sweeps policy did not violate their Fourth Amendment rights. *Pratt*, 848 F. Supp. at 793.

47. See *Pratt*, 155 F.R.D. at 178 (purporting that 5000 CHA residents signed petition expressing support of sweeps policy and opposing action by ACLU).

validity of the injunction.<sup>48</sup> Many scholars and journalists, however, praised the decision of the court to enjoin the sweeps, writing that the policy severely threatened the civil liberties of the tenants and that the CHA should find less intrusive and more effective means of making the developments safe.<sup>49</sup>

### B. The Clinton Guidelines

President Clinton responded to the district court's decision by asking Attorney General Janet Reno and Housing and Urban Development Secretary Henry Cisneros to develop guidelines for housing authorities throughout the country that would recommend constitutionally acceptable ways to conduct searches for guns in low-income housing developments.<sup>50</sup> On April 14, 1994, President Clinton announced the content of the Guidelines.<sup>51</sup> Among other suggestions,<sup>52</sup> the Clinton Guidelines recommended that housing

48. *Id.* at 179 (stating that although class was decertified, original injunction nevertheless prevents warrantless searches absent consent).

49. See, e.g., *Don't Trash Constitution in Zeal to Fight Crime*, USA TODAY, Apr. 13, 1994, at 8A (suggesting that instead of sweeps, CHA should provide more effective police protection); Vernon Jarret, *Ignoring 4th Amendment Is a Dangerous Precedent*, CHI. SUN-TIMES, Apr. 19, 1994, at 29 (emphasizing that need for strong Bill of Rights makes policy suspect and that crisis situation does not justify eroding civil liberties); John Leo, *Sweeping up the Projects*, U.S. NEWS & WORLD REP., May 2, 1994, at 20 (indicating that policy was "cheap and dramatic alternative" but ineffective and unconstitutional solution to safety problems); Page, *supra* note 18, at 21 (arguing that privacy rights and safety rights should not be mutually exclusive); *Projects and Police Raids*, WASH. POST, Apr. 19, 1994, at A14 (suggesting that more effective means, such as increased security within development, should be instituted rather than sweep searches); Richard Roeper, *Issue of Rights Makes Sweeps Stakes Too High*, CHI. SUN-TIMES, Apr. 12, 1994, at 11 (noting that policy set "a very dangerous precedent"); Terry, *supra* note 4, at A12 (reporting that even attorney who represented tenants who supported search believed that sweeps were ineffective "glitzy, superficial quick fixes" to housing development problems); Eric Zorn, *A Bill of Rights Worth Defending*, CHI. TRIB., Apr. 3, 1994, at 1 (discussing that sweeps policy erodes rights guaranteed by Bill of Rights). But see Gary L. Bauer, *Protect Poor From Crime*, USA TODAY, Apr. 13, 1994, at 8A (stating that sweeps decision was misguided and that "liberal federal judges are making" the Bill of Rights "a suicide pact" for Americans who are "terrorize[d in their] commun[ities]").

50. See *supra* note 18 and accompanying text (discussing President Clinton's belief that sweeps policy was needed to combat violence in low-income housing developments).

51. See Radio Address, *supra* note 18, at 822-24 (announcing new policy to "encourage more weapons frisks of suspicious person[s], and . . . [to have] tenant associations . . . put clauses in their leases allowing searches when crime conditions make it necessary").

52. The Guidelines outlined seven "options . . . which . . . are constitutionally valid, at least in the extraordinary circumstances presented by the crime problem in the Robert Taylor Homes." Reno Letter, *supra* note 19. The Guidelines provide in relevant part that:

2. *Consent Searches.* A search is lawful if it is conducted pursuant to an uncoerced consent. Leases in housing projects, as elsewhere, typically include a standard consent clause permitting . . . routine maintenance inspections and to enter . . . in case of emergency. Where crime conditions in the housing development make unit-by-unit inspections essential, similar lease consent clauses could be employed to authorize periodic administrative inspections of tenants' units for unlicensed or unauthorized firearms.

authorities place standard consent clauses into their leases that would permit housing authority officials to search each apartment for unlicensed and unauthorized guns.<sup>53</sup> The Guidelines described these searches as "periodic administrative inspections" and likened the consent clause to the standard clauses already included in leases allowing the housing authority to conduct emergency maintenance inspections.<sup>54</sup>

The Guidelines also suggested three ways of reducing "any constitutional objection to the inspection[s]."<sup>55</sup> First, they recommended that the searches occur on a regular basis, during daytime, and that they be "no more intrusive than absolutely necessary to determine whether weapons are present" in the apartment.<sup>56</sup> Second, they advised housing authorities to give the tenants advance notice of inspections and of the general time frame within which they would take place.<sup>57</sup> Finally, the Guidelines indicated that "tenant associations . . . be encouraged to endorse . . . the inclusion of consent clauses in lease agreements" by enacting resolutions to that effect.<sup>58</sup>

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As in the case of maintenance inspections, such firearms inspections should be conducted on a routine basis, during daylight hours, and should be no more intrusive than absolutely necessary to determine whether weapons are present in the tenant's unit.

If the agency gives advance notice . . . that an inspection will be conducted and the general period within which it will take place the intrusiveness of the inspection will be lessened and any constitutional objection to the inspection thereby reduced . . .

5. *Warrant Searches on Probable Cause.* Whenever law enforcement officials have probable cause to believe that a specific dwelling contains evidence of a crime, a search may be conducted with a judicial warrant . . .

6. *Searches Based on Exigent Circumstances.* Housing authority officials may conduct warrantless searches of individual units where there is justification for a search but insufficient time to obtain a judicial warrant.

*Id.*

Other provisions included placing metal detectors in entrances, erecting fences around developments, using identification cards, searching common areas and vacant apartments, and conducting weapons frisks of suspicious persons. *Id.*

53. Reno Letter, *supra* note 19 (stating that because leases usually include consent clauses allowing housing authorities to enter apartments for maintenance purposes, similar consent clause could be used to allow inspections for firearms).

54. Reno Letter, *supra* note 19; see Response Memorandum of the Chicago Housing Authority at 5, *Pratt* (No. 93 C 6985) (describing consent clause currently incorporated in CHA leases allowing apartment entry when CHA officials reasonably believe emergency exists); Consent Decree app. B at 1-9, *Summeries* (No. 88 C 10566) (spelling out guidelines for emergency inspections of development apartments pursuant to legal agreement between CHA and tenants).

55. Reno Letter, *supra* note 19.

56. Reno Letter, *supra* note 19.

57. Reno Letter, *supra* note 19.

58. Reno Letter, *supra* note 19.

The Guidelines do not clearly indicate whether housing authorities should require that a tenant sign the lease consent clause in order to obtain or remain in publicly funded housing. The Guidelines merely indicate that "[w]here crime conditions in the housing developments make unit-by-unit inspections *essential*," such clauses "*could* be employed."<sup>59</sup> The Guidelines do suggest, however, that the housing authorities have discretion to decide how to present the consent clause to their tenants.<sup>60</sup>

Another relevant provision in the Guidelines suggests that housing authorities conduct searches supported by a warrant when the police have probable cause to believe that the apartment contains evidence of a crime.<sup>61</sup> In addition, the Guidelines recommend that housing authorities may conduct warrantless searches "where there is a justification for a search, but insufficient time to obtain a judicial warrant."<sup>62</sup> In other words, the searches may take place when "exigent circumstances" are present.

Press and scholarly reaction to the Clinton Guidelines has centered on whether it is constitutional to ask tenants to consent to sweep searches in their leases. The Clinton administration argued that "[e]very law-abiding American, rich or poor, has the right to raise children without the fear of criminals terrorizing where they live," and that the Guidelines help to ensure that the tenants realize they possess a right to safety.<sup>63</sup> In essence, the Administration's argument seems to be that the Fourth Amendment protection against unreasonable searches can often be an impediment to ensuring safety in the

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59. Reno Letter, *supra* note 19 (emphasis added).

60. On April 21, 1994, Senator Dole offered an amendment to S. 540, the Bankruptcy Amendment Act, stating that the Senate had endorsed the Clinton Guidelines. 140 CONG. REC. S4657 (daily ed. Apr. 21, 1994). Senator Wellstone promptly introduced his own amendment to Senator Dole's amendment. Senator Wellstone's amendment stated that consent clauses, allowing searches for guns in housing authority leases, could not be a requirement for residency. *Id.* at S4658-59. The amendment further stated that residents and potential residents must be informed that acceptance of a consent clause in their lease is not a requirement for residency. *Id.* The Senate endorsed the Dole amendment, only after it was modified, so that access to public housing would not be conditioned on signing of the lease. *Id.* at S4663. The compromise language that the Senate agreed upon was: "include noncoercive consent clauses in lease agreements permitting routine warrantless apartment-by-apartment police searches for illegal weapons and illegal drugs, so long as residency or continued residency in public housing is not contingent upon the inclusion of such consent clause as a provision of a lease." *Id.*

61. Reno Letter, *supra* note 19.

62. Reno Letter, *supra* note 19.

63. Radio Address, *supra* note 18, at 823; see also Marsha Ginsburg, *Clinton's Tough Plan on Guns in Projects; Residents of S.F. Housing Skeptical About Searches*, SAN FRANCISCO EXAMINER, Apr. 17, 1994, at A1 (observing that although tenants want to be safe, Guidelines were received with skepticism in San Francisco because of other problems they create); Gwen Ifill, *Clinton Asks Help on Police Sweeps in Public Housing*, N.Y. TIMES, Apr. 17, 1994, at A1 (describing President Clinton's emphasis on safety in public housing).

housing projects.<sup>64</sup> The argument also stresses that the right to safety is so fundamental, and the support for the searches so strong, that these factors outweigh concerns over the constitutionality of consent searches via public housing leases.<sup>65</sup> Critics, however, point out that such clauses coerce public housing tenants into relinquishing their Fourth Amendment rights.<sup>66</sup> Occupants of the projects are often unable to afford any other type of housing. Therefore, they are not given a viable alternative if they do not support the searches. Furthermore, the critics argue that the recommendations outlined in the Guidelines, like the sweeps policy, force the tenants to forgo their right to privacy in order to receive the benefit of safety.<sup>67</sup> Critics point out that the Clinton administration should concentrate instead on recommending less intrusive ways to deal with the problem of violence endemic to the projects,<sup>68</sup> noting that safety should not

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64. See Page, *supra* note 18, at 21 (commenting that Clinton Guidelines treat constitutional protections as impediment to "effective crime-fighting"). The Guidelines, themselves, indicate that the options they present are constitutional because of the "extraordinary circumstances" of violence in the developments. Reno Letter, *supra* note 19. Such language suggests that because the circumstances in the developments are so urgent, the tenants' expectation of privacy becomes less important than their need for protection.

65. See 140 CONG. REC. S4665 (daily ed. Apr. 21, 1994) (statement by Sen. Biden) (discussing constitutional arguments in favor of Clinton policy).

66. See *id.* (statement by Sen. Biden) (explaining that opponents of consent clause argue that it unfairly asks poor people to give up fundamental rights); see also Jan Crawford, *CHA Sweeps Policy Near Passing Test*, CHI. TRIB., Apr. 19, 1994, at N1 (reporting that constitutional experts predict that Supreme Court is unlikely to find that consent clause would pass constitutional muster); Ginsburg, *supra* note 63, at A1 (reporting that San Francisco housing authority official conceded that tenants might feel pressured to sign consent clause "to gain access to public housing"); Ifill, *supra* note 63, at A1 (explaining that some public housing experts believe that tenants will feel compelled to agree to sign consent clause to ensure eligibility for public housing); Page, *supra* note 18, at 21 (arguing that poor should not be required to trade constitutional rights for safety); *Projects and Police Raids*, *supra* note 49, at A14 (arguing that public housing eligibility should not be contingent on signing consent clause, and that even if 99% of tenants support searches, housing authority cannot compel neighbors to be searched).

67. See *Guns Sweeps: No Model for Cities*, N.Y. TIMES, Apr. 20, 1994, at A18 (suggesting that Guidelines draw "a false distinction between tenants' constitutional rights" and right of safety); see also Jarret, *supra* note 49, at 29 (warning that Clinton Guidelines set dangerous precedent by which police power may be utilized whenever "crisis" evolves); Page, *supra* note 18, at 21 (condemning notion that public housing tenants must "trade-off" privacy for protection); *Safety-for-Rights a Bad Trade*, CHI. TRIB., Apr. 19, 1994, at N22 (calling "trade-off" between living in safety and waiving Fourth Amendment rights "unsavory").

68. See Harvey Grossman, *Toward Increased Security for Public Housing Residents*, CHI. DAILY L. BULL., Apr. 23, 1994, at 22 (noting that summer 1993 searches were ineffective and arguing that government should provide "professional, well-trained law enforcement officers in sufficient numbers"); Ray Hartmann, *America's Latest Crime Victim*, RIVERFRONT TIMES, Apr. 20-26, 1994, at 2 (noting that "real answer" to safety problems in public housing is to assign more police to projects and to have police constantly survey); Leo, *supra* note 49, at 20 (maintaining that housing developments need "real police [ ] not easily intimidated rent-a-cops [ ]" to ensure safety); *Safety-for-Rights A Bad Trade*, *supra* note 67, at N22 (suggesting "old fashion police patrols" rather than sweep searches).

come at the cost of the erosion of the right to privacy protected by the Fourth Amendment.

## II. AN OVERVIEW OF FOURTH AMENDMENT JURISPRUDENCE CONCERNING WARRANTLESS SEARCHES OF THE HOME

### A. *Warrantless Searches of Homes Are Presumptively Unconstitutional*

The Fourth Amendment protects individuals from warrantless and unreasonable searches of their homes.<sup>69</sup> The Supreme Court has recognized that the fundamental purpose of the Fourth Amendment is to protect the privacy and security of individuals against "arbitrary invasions by governmental officials."<sup>70</sup> Although, on its face, the Amendment protects the privacy of individuals "in their persons . . . papers, and effects,"<sup>71</sup> the Supreme Court has emphasized that the individual's privacy interest is greatest in the home.<sup>72</sup> Accordingly,

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69. U.S. CONST. amend. IV; *see, e.g., Arizona v. Hicks*, 480 U.S. 321, 327 (1987) (emphasizing that warrantless searches and seizure in home are presumptively unreasonable); *New York v. Burger*, 482 U.S. 691, 700 (1987) (noting that expectation of privacy in commercial setting is less than in home); *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (pointing out that "[i]t is axiomatic" that Fourth Amendment's main purpose is to protect against physical entry of home); *Payton v. New York*, 445 U.S. 573, 576 (1980) (explaining that Fourth Amendment "prohibits police from making a warrantless and nonconsensual entry into a suspect's home"); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (emphasizing that Fourth Amendment protects individuals from arbitrary searches by government); *Johnson v. United States*, 333 U.S. 10, 14 (1948) (declaring that without warrant requirement, Fourth Amendment would be "a nullity and leave the people's homes secure only in the discretion of police officers"); *Weeks v. United States*, 232 U.S. 383, 390 (1914) (acknowledging that framers intended Fourth Amendment to "enact[] into the fundamental law . . . that a man's house was his castle").

70. *Camara*, 387 U.S. at 528. The Framers of the Fourth Amendment wrote it as a reaction to the writs of assistance, which authorized the colonial government to issue general warrants upon which the government relied to conduct unreasonable searches of the home and to invade the privacy of the citizenry. *Weeks*, 232 U.S. at 390. Therefore, the purpose of the Amendment was to prevent the government from both conducting unreasonable searches and from issuing general warrants. *Id.* The Amendment contains two clauses. The first clause prohibits unreasonable searches. The second states that a warrant should not be issued without probable cause. U.S. CONST. amend. IV; *see also Payton*, 445 U.S. at 584-85 (explaining relevance of Fourth Amendment clauses). Unless an exception to the warrant requirement applies, courts read these clauses together, finding that reasonable searches are those conducted pursuant to a valid warrant. *See, e.g., Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 619 (1989) (explaining that in most cases reasonable search is defined by existence of warrant); *United States v. Katz*, 389 U.S. 347, 357 (1967) (noting that warrantless searches are illegal even if probable cause exists); *Johnson*, 333 U.S. at 14 ("When the right of privacy must reasonably yield to the right of search is . . . to be decided by a judicial officer . . ."). Thus, searches performed without a warrant are presumptively unconstitutional. *Id.*; *see also Payton*, 445 U.S. at 588 n.26 (arguing that if court allows government agents to conduct warrantless searches, Fourth Amendment would be meaningless). *But see infra* notes 76-143 and accompanying text (discussing exceptions to Fourth Amendment warrant requirements).

71. U.S. CONST. amend. IV.

72. *See, e.g., Payton*, 445 U.S. at 589-90 (noting that "zone of privacy [is nowhere] more clearly defined than when bounded by the unambiguous physical dimension of an individual's home"); *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972) (explaining that

one of the basic rules of Fourth Amendment law is that a warrantless search of an individual's home is presumptively unreasonable.<sup>73</sup> Under this rule, such searches are reasonable only if they are made pursuant to a valid warrant<sup>74</sup> issued upon probable cause. The Court has explained that a government official has probable cause to conduct a search when the facts and reliable information are sufficient to allow a reasonable person to believe that the item sought will be found in the place to be searched.<sup>75</sup>

### *B. Exceptions to the Fourth Amendment Warrant Requirement*

The Court has carved out "a few specifically established" exceptions to the Fourth Amendment warrant requirement.<sup>76</sup> For purposes of this Comment, four of these exceptions are particularly salient. First, the government may obtain voluntary and noncoercive consent from individuals to search their homes.<sup>77</sup> Second, in the face of exigent circumstances, such as "hot pursuit," or when delay would endanger police officers or the public, the government may search a home

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"physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); *Wyman v. James*, 400 U.S. 309, 316 (1971) (calling privacy interest protected by Fourth Amendment "most precious aspect[] of personal security in the home"); *see also supra* note 69 (discussing application of Fourth Amendment to searches of homes).

73. *Payton*, 445 U.S. at 586; *see also Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (holding that warrantless searches or seizures of home are "per se unreasonable").

74. According to the Supreme Court, the purpose of a warrant is to advise the individual that "the search is authorized by law," that its scope has been limited, and that a neutral magistrate, and not the police, has authorized the search. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667 (1989).

75. *See New Jersey v. T.L.O.*, 469 U.S. 325, 363-64 (1985) (Brennan, J., dissenting in part) (defining probable cause as when "the facts and circumstances within [the magistrate's] knowledge and of which he had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that a criminal offense had occurred" (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925))); *see also Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (advancing definition of probable cause as "more than bare suspicion" and declaring that it exists only where officers have knowledge and "reasonably trustworthy information" that would lead reasonable person to believe "an offense has been or is being committed"); WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 138 (2d ed. 1992) (describing probable cause for searches as requiring two conclusions: (1) that items are seizable because they were used in context of criminal activity; and (2) that police will find items in place to be searched); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* 146-47 (2d ed. 1990) (explaining that literal meaning of probable cause requires showing that evidence sought more likely than not will be found in place to be searched but that Supreme Court has indicated that it is a flexible standard). The definition of probable cause to arrest a suspect differs from the definition of probable cause for search and seizures. *Id.* at 147. A showing of probable cause for arrest may not be sufficient to justify a search because a magistrate takes different factors into consideration when issuing a search warrant, e.g., the scope of the search, than when issuing an arrest warrant. *Id.*

76. *Katz v. United States*, 389 U.S. 347, 357 (1967).

77. *See infra* notes 81-95 and accompanying text (discussing voluntary consent exception to Fourth Amendment warrant requirement).

without a warrant.<sup>78</sup> Third, government officials may perform "administrative" inspections of homes with only a general warrant based on a less stringent probable cause standard and may conduct warrantless inspections of "pervasively regulated industries."<sup>79</sup> Fourth, where special government interests are so greatly threatened that they outweigh the individual's privacy expectation, government officials may reasonably conduct warrantless searches.<sup>80</sup>

### 1. Consent

A government official may perform a warrantless search of a dwelling if that official receives valid consent from the occupant.<sup>81</sup> To decide whether the individual has consented in the context of the Fourth Amendment, courts will look to whether the "totality of the circumstances" indicates that consent was voluntary.<sup>82</sup> The Supreme Court has held that coercion, "no matter how subtly" applied, will invalidate consent.<sup>83</sup> In determining whether consent to a search is the product of coercion, courts ask whether the police obtained consent by using threats or force,<sup>84</sup> or whether they used more "subtle forms of coercion that might flaw . . . [the defendant's] judgment."<sup>85</sup> Courts base the ultimate determination on various factors such as how the police asked for consent,<sup>86</sup> the characteristics of the

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78. See *infra* notes 96-111 and accompanying text (outlining exigent circumstances exception to Fourth Amendment warrant requirement).

79. See *infra* notes 112-28 and accompanying text (explaining how less stringent probable cause requirement is required for some administrative searches while no warrant requirement exists for other administrative searches).

80. See *infra* notes 129-43 and accompanying text (delineating special needs exception to Fourth Amendment warrant requirement).

81. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (holding that where there is valid consent, no search warrant is required); *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968) (explaining that consent is invalid when individual allows search after police falsely claim to possess search warrant); *Davis v. United States*, 328 U.S. 582, 593-94 (1946) (finding that search and seizure of gasoline ration coupons was reasonable because search was pursuant to valid consent); *WHITEBREAD & SLOBOGIN*, *supra* note 75, at 231 (explaining that consent constitutes waiver of expectation of privacy as to place to be searched).

82. *Bustamonte*, 412 U.S. at 227. In *Bustamonte*, the Supreme Court held that the standard of examining the "totality of all the circumstances," which California courts used to determine the validity of confessions under the due process clause, applied to the Fourth Amendment as a means of determining "whether a consent to search was in fact 'voluntary' or was the product of duress or coercion." *Id.*

83. *Id.* at 228.

84. See *United States v. Mendenhall*, 446 U.S. 544, 557-58 (1980) (finding that in determining whether police coerced defendant, it was relevant that when police asked defendant to accompany them to questioning room, no threats or force were used to persuade her to go); *United States v. Watson*, 423 U.S. 411, 424 (1976) (noting that absence of threats or physical force was significant in determining whether defendant voluntarily consented).

85. *Watson*, 423 U.S. at 424.

86. See, e.g., *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (holding that officers could not break down door without warrant); *Bumper v. North Carolina*, 391 U.S.



person consenting,<sup>87</sup> whether the consenter had knowledge of the constitutionally protected right not to be searched,<sup>88</sup> and where the request for consent occurred.<sup>89</sup>

In light of the emphasis on the requirement that consent searches must be voluntary, it logically follows that when an individual withdraws consent to a search, any subsequent search is not voluntary. To hold otherwise would make the requirement that consent be voluntary meaningless. The Supreme Court, however, has only considered this issue indirectly.<sup>90</sup>

In *Florida v. Jimeno*,<sup>91</sup> considering the constitutionality of a warrantless search of an automobile, the Court indicated that a suspect has the power to "delimit" the scope of a consent search.<sup>92</sup> Accordingly, if a suspect withdraws consent completely, the officer no longer has the authority to conduct a consent search of any scope. This logic has been accepted by many lower courts, which have held that individuals "may limit or withdraw . . . consent to search" and that in such cases the government actor must abide by the individual's decision.<sup>93</sup> Moreover, scholars have also endorsed the idea that

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543, 549 (1968) (finding that when police asserted existence of search warrant, "acquiescence to [such] a claim of lawful authority" was not valid consent); *Amos v. United States*, 255 U.S. 313, 315-17 (1921) (holding that where government officers demand admission without warrant, situation implied presence of coercion).

87. See *Mendenhall*, 446 U.S. at 558 (noting that relevant, but not dispositive, factors in determining whether consent was given include sex, race, and education of defendant); *Bustamonte*, 412 U.S. at 248 (noting that "minimal schooling, [and] low intelligence are factors to consider" in determining whether consent was coerced).

88. See *Bustamonte*, 412 U.S. at 227 (indicating that "[k]nowledge of the right to refuse consent is one factor to be taken into account" in determining whether consent was voluntary); see also *Mendenhall*, 446 U.S. at 559 (explaining fact that police told defendant that she had right to refuse search "substantially lessened the probability that . . . [the police's] conduct could reasonably have appeared . . . to be coercive"). In *Bustamonte*, the Court distinguished "'knowing' and 'intelligent' waiver of trial rights" as required under the Fifth Amendment from Fourth Amendment consent searches. *Bustamonte*, 412 U.S. at 241. The Court held that, although knowledge of the right not to be searched may be considered as a factor in determining whether consent was voluntarily given, "the government need not establish such knowledge as the sine quo non of an effective consent." *Id.* at 227.

89. See *Mendenhall*, 446 U.S. at 555 (noting significance of fact that initial request to see identification occurred "in the public concourse" of airport); *United States v. Watson*, 423 U.S. 411, 424 (1976) (emphasizing that police requested consent to search defendant's car while on public street, not in police station).

90. Cf. *WHITEBREAD & SLOBOGIN*, *supra* note 75, at 241 (discussing limitations on consent not directly discussed by Supreme Court).

91. 500 U.S. 248 (1991).

92. *Florida v. Jimeno*, 500 U.S. 248, 252 (1991).

93. *United States v. Dyer*, 784 F.2d 812, 816 (7th Cir. 1986); see also *United States v. Cannon*, 29 F.3d 472, 477 (9th Cir. 1994) (indicating that court should consider whether individual failed "to object to the continuation of a vehicle search after giving general consent" to determine scope of consent); *United States v. Dorsey*, 27 F.3d 285, 290 (7th Cir. 1994) (emphasizing importance of fact that defendant did not revoke consent to determine validity of warrantless search of business destroyed by fire); *United States v. Gleason*, 25 F.3d 605, 608 (8th Cir.) (finding warrantless search of car constitutional because defendant did not withdraw

consent to searches may be withdrawn or limited "at any time prior to the completion of the search."<sup>94</sup> Scholars base this theory on Supreme Court decisions in the context of the Fifth Amendment, which have held that voluntary consent may be withdrawn at any time during a police interrogation.<sup>95</sup>

## 2. *Exigent circumstances*

The Supreme Court has held that under certain circumstances when police have an immediate need to act, the exigency of the situation may justify a warrantless search.<sup>96</sup> For example, the Court has indicated that police do not need to obtain a warrant when they are in "hot pursuit" of a fleeing criminal,<sup>97</sup> when they need to prevent a suspect's escape,<sup>98</sup> and when waiting to search would create danger to police officers or others inside or outside a dwell-

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previously given consent), *cert. denied*, 115 S. Ct. 283 (1994); *United States v. Jachimko*, 19 F.3d 296, 299 (7th Cir. 1994) (noting that "'traditional' consent doctrine" holds that in analyzing validity of search, court may determine whether individual withdrew consent); *United States v. McFarley*, 991 F.2d 1188, 1191 (4th Cir.) (explaining that once individual withdraws consent, search "must be measured against [other] Fourth Amendment principles"), *cert. denied*, 114 S. Ct. 393 (1993). The court in *Dyer* noted, however, that if the consentor withdraws consent after discovery of evidence, "consent remains valid" and therefore the search is constitutional. *Dyer*, 784 F.2d at 816; *see also Jachimko*, 19 F.3d at 299 (finding that if discovery of illegal substances occurred prior to withdrawal of consent, search would be valid).

94. *See WHITEBREAD & SLOBOGIN, supra* note 75, at 241-42 (explaining that Reporters of American Law Institute's MODEL CODE OF PRE-ARREST PROCEDURE § 240.3(3) (1975) were convinced by argument that "reasoning of those decisions which permit a withdrawal of a waiver to police questioning" should be extended to allow withdrawal of consent in consent searches).

95. *WHITEBREAD & SLOBOGIN, supra* note 75, at 241-42; *see Michigan v. Mosley*, 423 U.S. 96, 100 (1975) (explaining that during police questioning, if individual indicates his desire not to answer questions, interrogation must cease); *Miranda v. Arizona*, 384 U.S. 436, 445-46 (1966) ("If the individual indicates in any manner, at any time prior or during questioning, that he wishes to remain silent, the interrogation must cease."). In addition, in *Bustamonte*, the Supreme Court borrowed the standard for voluntary confessions and applied this standard to the Fourth Amendment. *Bustamonte*, 412 U.S. at 229. The Court reasoned that the prohibition against coercion being used to obtain a confession also applies to officials seeking consent to search. *Id.*

96. *See, e.g., Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (declining to find exigent circumstances where "there was no immediate or continuous pursuit" of suspect); *Payton v. New York*, 445 U.S. 573, 583 (1980) (noting that exigency exists where there is emergency or dangerous situation); *Warden v. Hayden*, 387 U.S. 294, 299 (1967) (emphasizing that "[s]peed . . . was essential" in determining whether search of home was constitutional under exigent circumstances exception to warrant). The dictionary definition of exigent circumstances is "[s]ituations that demand unusual or immediate action." *BLACK'S LAW DICTIONARY* 574 (6th ed. 1990).

97. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990); *see Hayden*, 387 U.S. at 298 (finding warrantless search proper where police were told that suspected armed robber entered home five minutes earlier); *see also Welsh*, 466 U.S. at 753 (acknowledging that hot pursuit allows valid warrantless searches).

98. *Olson*, 495 U.S. at 100; *see also Hayden*, 387 U.S. at 299 (finding that need of police to find armed suspect created exigent circumstances).

ing.<sup>99</sup> In these situations, speed is an essential component of the police action and obtaining a warrant may unreasonably impede that action.<sup>100</sup> This exception to the warrant requirement, however, is said to be very "strictly circumscribed" by the facts of the particular case.<sup>101</sup>

Even when such an exigency is found to exist, it is not necessarily enough to justify a warrantless search of a home. Courts have indicated that even when exigent circumstances exist, police must also have probable cause to conduct the search in a home.<sup>102</sup> That is, police must still have reason to believe that the item they are looking for will be found in the place they plan to search.<sup>103</sup> Although the Supreme Court has not directly considered this issue, it held in *Arizona v. Hicks* that probable cause is required for warrantless "dwelling-place search[es]" regardless of whether the item was in "plain view."<sup>104</sup> The Court emphasized that finding warrantless searches of homes reasonable under the Fourth Amendment is not the same as dispensing with the probable cause requirement.<sup>105</sup>

99. *Olson*, 495 U.S. at 100; *see also* *Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978) (recognizing that where emergency situations create need to protect lives, warrantless exigency searches may be acceptable); *Hayden*, 387 U.S. at 298-99 (noting that Fourth Amendment does not require police to delay searching home if delay "would gravely endanger their lives or the lives of others").

100. *See Welsh*, 466 U.S. at 753 (declining to apply exigency exception where suspected drunk driver was arrested in privacy of his own bedroom because "there was no immediate . . . pursuit from the scene of a crime" and no threat to public safety); *Payton*, 445 U.S. at 593 (explaining that in cases where there is "ample time to obtain a warrant," exigent circumstances are not present); *Mincey*, 437 U.S. at 393 (finding that four-day search could not be justified as exigency search); *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792, 794 (N.D. Ill. 1994) (defining "exigent circumstances" as those involving "extreme immediate urgency").

101. *Mincey*, 437 U.S. at 393 (quoting *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968)); *see also Olson*, 495 U.S. at 100 (finding no exigent circumstances despite fact that police identified house in which suspected robber was hiding, had information that he was present in house, and had been warned that robber planned to leave town); *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987) (finding that although exigent circumstances existed to search apartment for weapons, circumstances did not justify search of serial numbers on stereo).

102. *See Chimel v. California*, 395 U.S. 752, 773 (1969) (White, J., dissenting) (explaining that warrantless search of home may be reasonable if "there are exigent circumstances, and probable cause"); *United States v. Winsor*, 846 F.2d 1569, 1574 (9th Cir. 1988) (noting "bright-line rule" that probable cause is necessary for searches of homes); *United States v. Scout*, 520 F.2d 697, 700 (9th Cir. 1975) (stating that "exigencies . . . cannot . . . excuse lack of probable cause" in performing searches of apartment), *cert. denied*, 423 U.S. 1056 (1976); *WHITEBREAD & SLOBOGIN*, *supra* note 75, at 190 ("[A] warrantless entry is *never* permitted on less than probable cause to believe a crime has been committed . . . . This is a fundamental Fourth Amendment tenet.").

103. *See supra* note 75 and accompanying text (defining probable cause).

104. *Hicks*, 480 U.S. at 328 (holding that "there is no reason in theory or practicality why application of the 'plain view' doctrine would supplant" probable cause requirement for searches of homes).

105. *Id.* at 327. In *Hicks*, the Supreme Court held that "[d]ispensing with the need for a warrant is worlds apart from permitting a lesser standard of cause for seizure [in a home] than a warrant would require, i.e., the standard of probable cause." *Id.*

Although the Court in *Hicks* discussed another exception to the warrantless search rule—plain view searches—the statement seems equally applicable to exigent circumstances. Both exigency and plain view are exceptions to the warrant requirement brought about by circumstances that make a warrant impractical under the specific circumstances.<sup>106</sup> Thus, *Hicks* may be read as creating a “bright-line” rule that probable cause must support warrantless searches of homes justified by exigent circumstances.<sup>107</sup>

Moreover, to have probable cause to search, the police must reasonably believe that they will find the item in the place to be searched.<sup>108</sup> This requirement carries with it an element of particularity.<sup>109</sup> Police may not, for example, search every apartment in a building because they have a reasonable belief that someone in the building has a gun. Instead, police will have probable cause to search only if they reasonably believe that the gun is in a particular apartment.<sup>110</sup> In other words, courts have held that unit-by-unit searches of buildings without probable cause as to each individual apartment violate the Fourth Amendment.<sup>111</sup>

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106. See *supra* note 100 and accompanying text (explaining that when speed is of essence and thus obtaining warrant would be impractical, exigency may exist).

107. See *Winsor*, 846 F.2d at 1574 (interpreting *Hicks* as “adopt[ing] a bright-line rule requiring probable cause to support a search of a dwelling” and therefore finding that search of room was unconstitutional because, although exigent circumstances existed, there was not requisite probable cause).

108. See *supra* note 75 and accompanying text (delineating probable cause standard).

109. See *United States v. Voteller*, 544 F.2d 1355, 1363 (6th Cir. 1976) (holding search warrant that allowed police to search entire three-story residence when police had probable cause to search only first floor invalid); cf. *United States v. Olt*, 492 F.2d 910, 912 (6th Cir. 1974) (finding sufficient probable cause to search two apartments where affidavit linked seller of controlled substances to both apartments). In *United States v. Hinton*, the United States Court of Appeals for the Tenth Circuit explained this particularity requirement in detail:

For purposes of satisfying the Fourth Amendment, searching two or more apartments in the same building is no different than searching two or more completely separate houses. Probable cause must be shown for searching each house or . . . each apartment. . . . [P]robable cause must be shown for searching each residence unless it be shown that, although appearing to be a building of several apartments, the entire building is actually being used as a single unit.

*United States v. Hinton*, 219 F.2d 324, 325-26 (7th Cir. 1955).

110. See, e.g., *United States v. Scott*, 520 F.2d 697, 700 (9th Cir. 1975) (holding that “occupants of each apartment . . . [have an] independent right to be free from unreasonable search[es]” and that searches are improper “in the absence of probable cause to believe that the robbers were present in that particular apartment”), *cert. denied*, 423 U.S. 1056 (1976); *Winsor*, 846 F.2d at 1572 (finding that each room in low-rent residential hotel “enjoyed its own zone of Fourth Amendment protection” and that probable cause was necessary to search regardless of whether exigent circumstances existed); *Hinton*, 219 F.2d at 326-27 (invalidating warrant to search entire building when police did not have probable cause to search each particular apartment for alleged drug sellers).

111. See *supra* note 110 (noting cases in which Court has held that unit-by-unit searches without probable cause for each unit violate Fourth Amendment).

### 3. Administrative searches

The Fourth Amendment applies to searches of homes and businesses conducted for administrative purposes.<sup>112</sup> The Supreme Court has defined administrative inspections as "routine inspection[s] of the physical condition of private property."<sup>113</sup> Typical administrative searches include building inspections for housing<sup>114</sup> and fire code violations,<sup>115</sup> and inspections of fire-devastated property to determine the cause of the fire.<sup>116</sup> For example, following *Camara v. Municipal Court*,<sup>117</sup> authorities must acquire a warrant in order to conduct area-wide housing code inspections of private residences<sup>118</sup> because the Court considers such inspections "significant intrusions upon the interests protected by the Fourth Amendment."<sup>119</sup> The Court, however, has replaced the traditional probable cause test for warrants to conduct such administrative inspections with a less demanding probable cause test,<sup>120</sup> indicating that the public interest justifies the intrusion sought if "reasonable legislative or administrative standards for conducting an area inspection" apply to the particular dwelling.<sup>121</sup> Thus, in recognizing the public interest in administra-

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112. See *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967) (holding that administrative searches of home are protected by Fourth Amendment); See *v. Seattle*, 387 U.S. 541, 543 (1967) (deciding that business-like residences are protected by Fourth Amendment); see also *Michigan v. Clifford*, 464 U.S. 287, 295 (1984) (finding warrant necessary to conduct administrative search of fire damaged homes).

113. *Camara*, 387 U.S. at 530.

114. See *id.* at 526-27 (analyzing constitutionality of warrantless inspections of home designed to discover violations of city housing code).

115. See *id.* at 541 (considering constitutionality of warrantless search of business for fire code violations).

116. See *Clifford*, 464 U.S. at 290-91 (determining validity of warrantless search conducted after house fire).

117. 387 U.S. 523 (1967).

118. *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967).

119. *Id.* at 534.

120. *Id.* at 535. The Court held that the probable cause standard for administrative searches should be "weighed in terms of the[] reasonable goals of code enforcement." *Id.* The Court clarified that the "unique character" of the inspection programs allowed for this relaxed standard for judging the reasonableness of a warrantless search. *Id.* at 534. The Court distinguished administrative inspections from criminal searches indicating that the former served an important public interest, "city-wide compliance with minimum physical standards for private property." *Id.* at 535. The goal of the inspections "is to prevent even the unintentional development of conditions which are hazardous to public health and safety" and not to prevent crime. *Id.*; see also *LAFAYETTE & ISRAEL*, *supra* note 75, at 217-19 (contrasting police searches for evidence with housing inspections authorized in *Camara* and concluding that criminal searches are more intrusive because they take more time, involve "rummaging through private papers and effects," may affect reputation of person being searched, may be conducted at any time, are often conducted by surprise, and are done by armed officers).

121. *Camara*, 387 U.S. at 538. The Court further stated that even though the warrant requirement applies to administrative inspections, "in the case of most routine area inspections" a warrant should be secured only after a resident has refused to allow entry. *Id.*

tive searches, the Court made it easier to obtain a warrant to perform an administrative inspection than to conduct a criminal search.

In addition, warrantless administrative inspections of businesses do not violate the Fourth Amendment if performed on a "pervasively regulated business" pursuant to a well-delineated statute.<sup>122</sup> The Supreme Court held that inspections of pervasively regulated industries may be constitutional even if a collateral goal of the administrative inspection was the discovery of evidence of criminal acts.<sup>123</sup> In allowing warrantless inspections, however, the Court has clearly emphasized that such searches are reasonable, in part, because the privacy interests enjoyed by owners of pervasively regulated commercial businesses "differ[] significantly from the sanctity accorded an individual's home."<sup>124</sup>

The Supreme Court has also found that warrantless home visitations by government agents, pursuant to a valid statute, were not barred by the Fourth Amendment. In *Wyman v. James*,<sup>125</sup> the Supreme Court held that "home visitation[s]" by social workers, employed by the government to ensure compliance with Aid to Families with Depen-

122. *New York v. Burger*, 482 U.S. 691, 702 (1987); see also *id.* at 711 (finding warrantless administrative searches of junkyards constitutional because searches fell "within the well-established exception to the warrant requirement for administrative inspections of 'closely regulated' businesses"); *Donovan v. Dewey*, 452 U.S. 594, 606 (1981) (determining that warrantless searches of underground mine pursuant to valid regulatory scheme do not violate Fourth Amendment); *United States v. Biswell*, 406 U.S. 311, 317 (1972) (holding warrantless search of pawn shop for unregistered guns valid); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (explaining that Congress may delineate "standards of reasonableness for searches and seizure" in pervasively regulated liquor business). In *Burger*, the Court laid out a three-part test to determine whether a statute permitting warrantless searches of a particular industry fit within constitutional boundaries: (1) the government must have a substantial interest in regulating the industry; (2) the searches must be necessary to further this interest; and (3) the statute must provide some of the basic functions of a warrant, such as giving notice to the subjects of the search, limiting the discretion of the inspectors, as well as limiting the time, place, and manner of the search. *Burger*, 482 U.S. at 702-03.

123. *Burger*, 482 U.S. at 716. In *Burger*, the Supreme Court found 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." *Id.* In that case, police officers inspected an automobile junkyard pursuant to a state statute authorizing such inspections. *Id.* at 693-95. After establishing that the proprietor of the junkyard did not have a license or a record of the cars in the junkyard, the police inspected the vehicles and found that some were stolen. *Id.* at 695-96. The proprietor was arrested and charged with possessing stolen property. *Id.* at 695. The Court found that the police's warrantless search which turned up the evidence of stolen vehicles was proper because it occurred during a valid administrative inspection of the junkyard pursuant to a proper regulatory scheme. *Id.* at 716.

124. *Dewey*, 452 U.S. at 598-99; see also *Burger*, 482 U.S. at 702 (explaining that although junkyard owner has legitimate expectation of privacy on commercial premises, expectation is less than that in individual's home); *Biswell*, 406 U.S. at 317 (noting that privacy interest of firearms dealers was limited because of urgent regulatory interests of government). But cf. *California v. Carney*, 471 U.S. 386, 395 (1985) (finding warrantless search of "fully mobile 'motor home' located in a public place" reasonable).

125. 400 U.S. 309 (1971).

dent Children (AFDC) regulations, were "reasonable administrative tool[s]."<sup>126</sup> In so doing, however, the Court emphasized that it did not consider these "interviews" as true Fourth Amendment searches.<sup>127</sup> In addition, the Court indicated that the privacy interest affected was minimal and that the visits were reasonable, in part, because "snooping in the home during the visitations was forbidden."<sup>128</sup>

#### 4. *Special needs exception*

The Supreme Court has held that when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable," officials may conduct warrantless searches that are not based on probable cause.<sup>129</sup> In such circumstances, the court balances the government's interest in maintaining order with the individuals' privacy and security interests.<sup>130</sup> When the government's interest outweighs the individuals' privacy interest, searches conducted without a warrant or probable cause satisfy the Fourth Amendment as long as they are reasonable.<sup>131</sup>

The Court has applied the special needs exception when facts of the case have met certain criteria. First, the warrant/probable cause

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126. *Wyman v. James*, 400 U.S. 309, 326 (1971).

127. *Id.* at 317-18.

128. *Id.* at 321. The Court also emphasized that the visits were not part of any criminal investigation, no "actual or suspected perpetrators of crime" were involved, and that caseworkers, not "uniformed authorit[ies]," visited the AFDC recipients. *Id.* at 322-23.

129. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); *see also* *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (determining that warrantless urine tests of government employees applying for jobs that involve drug interdiction or carrying firearms are reasonable because of special government interest in ensuring that drug users are not promoted to such positions); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 622 (1989) (finding safety needs justified warrantless drug-testing of railroad workers); *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987) (explaining that special law enforcement needs justified warrantless search of probationer's home); *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987) (holding that special needs justified searches of employees' desks and offices).

130. *See, e.g., Skinner*, 489 U.S. at 633 (noting that government's "compelling" interest in safety of railroads must be balanced with employees' privacy interest); *Griffin*, 483 U.S. at 875 (balancing probationer's privacy interest with government need to ensure compliance with probation); *T.L.O.*, 469 U.S. at 341 (stating that child's privacy right must be weighed against "substantial [interest] of teachers and administrators"); *Romo v. Champion*, 46 F.3d 1013, 1015-16 (10th Cir. 1995) (weighing need to intercept drugs before visitors enter prison with visitors' expectation of privacy in car).

131. *See T.L.O.*, 469 U.S. at 340-41 (stating that "'probable cause' is not an irreducible requirement of a valid search" and that in context of school, "reasonableness" standard was appropriate). In fact, the Court in *Von Raab* made clear that when special governmental needs exist, "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Von Raab*, 489 U.S. at 665; *see also* *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (holding that state's use of highway sobriety checkpoints to stop cars passing through designated checkpoints did not violate Fourth Amendment).

requirement must frustrate the government's aim or reduce the deterrent effect of a search.<sup>132</sup> For example, the Supreme Court has held that the warrant requirement "is unsuited to the school environment," emphasizing that the requirement "unduly interfere[s]" with the necessary disciplinary actions of the school.<sup>133</sup>

Second, a distinctive relationship must exist between the government actor and the individual searched.<sup>134</sup> For example, in *Griffin v. Wisconsin*,<sup>135</sup> the Court applied the special needs exception to a warrantless search of a probationer's home.<sup>136</sup> The Court emphasized that the search of a probationer's home fits under the special needs exception because of the supervisory relationship between the probation officer and the probationer.<sup>137</sup> The Court compared the probation official-probationer relationship with the parent-child relationship, and analogized that requiring a warrant for a search of a probationer's home would be like requiring a parent to obtain a warrant to search a child's room.<sup>138</sup> The Court stressed that the officer searches the probationer's home with "the welfare of the probationer" in mind.<sup>139</sup> The Court made clear, however, that this type of supervision permits "a degree of impingement upon privacy that would not be constitutional if applied to the public at large."<sup>140</sup>

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132. See *Skinner*, 489 U.S. at 623-24 (noting that warrant process would frustrate "the objectives of the Government's [drug] testing program"); *Von Raab*, 489 U.S. at 667 (explaining that Customs Service does not make discretionary determination to search based on judgment that certain conditions exist and therefore cannot provide facts necessary to obtain warrant from magistrate); *Griffin*, 483 U.S. at 879 (emphasizing that requiring probable cause would be "unrealistic and destructive" to probation system); *O'Connor*, 480 U.S. at 721 (suggesting that warrant requirement to enter offices and search desks of public employees would be unworkable when one takes into consideration "the realities of the workplace"); *T.L.O.*, 469 U.S. at 340 (noting that warrant requirement would "unduly interfere" with need for discipline in school).

133. *T.L.O.*, 469 U.S. at 340.

134. See, e.g., *Skinner*, 489 U.S. at 621 (explaining that government must monitor railroad employees to ensure travel safety); *Griffin*, 483 U.S. at 875 (discussing supervisory relationship between probationer and probation officer); *O'Connor*, 480 U.S. at 724 (noting that government employers must ensure that employees conduct their work efficiently and properly and must watch for employee misconduct); *T.L.O.*, 469 U.S. at 349-50 (emphasizing uniqueness of teacher/student relationship).

135. 483 U.S. 868 (1987).

136. *Griffin v. Wisconsin*, 483 U.S. 868, 870 (1987).

137. *Id.* at 875.

138. *Id.* at 876.

139. *Id.*; see *Franz v. Lytle*, 997 F.2d 784, 791 (10th Cir. 1993) (declining to apply special needs exception to warrantless search by police of child's vaginal area to determine whether child was victim of abuse because police focus was not so much on welfare of child but on criminal culpability of parents).

140. *Griffin*, 483 U.S. at 875. The Court also noted that although the privacy expectation is lesser, the "permissible degree" of privacy impingement is not unlimited. *Id.*



Third, in special needs cases the individual searched typically has a reduced expectation of privacy under the circumstances.<sup>141</sup> In *Griffin*, the Court stressed that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled.'"<sup>142</sup> Thus, the probationers have a lesser constitutional expectation of privacy that is conditioned on certain special restrictions.<sup>143</sup>

### III. ANALYSIS

#### A. *The CHA's Sweeps Policy Is Unconstitutional*

Because the CHA sweeps policy authorizes warrantless searches of the homes of tenants living in CHA housing,<sup>144</sup> the policy must be analyzed with a presumption of unconstitutionality.<sup>145</sup> Furthermore, as the analysis below demonstrates, the policy does not pass constitutional muster under the exceptions to the Fourth Amendment warrant requirement.

The CHA has argued that because officials requested the consent of the tenants of the developments before searching and because most of these tenants signed consent forms, the searches were constitutional.<sup>146</sup> The CHA's sweeps policy, however, clearly does not fit within the consent exception to the Fourth Amendment. Although some of the searches the CHA police performed were

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141. See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (assuming that because sobriety stop is brief, degree of intrusion on motorists is reduced); *Stinner*, 489 U.S. at 627 (holding that expectation of reduced rights comes with employment in highly regulated industry); *Von Raab*, 489 U.S. at 672 (determining that Customs Service employees who are directly involved in drug interdiction or who are required to carry guns have diminished expectations of privacy with respect to being subject to urinalysis); *Griffin*, 483 U.S. at 873-74 (stating that probationers have reduced constitutional rights); *O'Connor*, 480 U.S. at 717 (indicating that public employee's expectation of privacy may be reduced depending on practices, procedures, and regulations of office); *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring) (noting that "students within the school environment have a lesser expectation of privacy than members of the population generally").

142. *Griffin*, 483 U.S. at 874 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

143. *Id.* at 874-75; see also *Romo v. Champion*, 46 F.3d 1013, 1015-16 (10th Cir. 1995) (finding that expectation of privacy of persons visiting prisons is diminished due to need for prison security).

144. See *supra* Part I.A (describing CHA policy).

145. See *Payton v. New York*, 445 U.S. 573, 586-90 (1980) (distinguishing warrantless searches in home from other types of searches and finding that "Fourth Amendment has drawn a firm line at the entrance to the house [and] . . . [t]hat threshold may not reasonably be crossed without a warrant"); see also *supra* Part I.A (discussing presumption of unconstitutionality for warrantless searches of homes).

146. See Response Memorandum of the Chicago Housing Authority at 4-5, *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792 (N.D. Ill. 1994) (No. 93 C 6985); see also *supra* Part I.A (describing CHA's emphasis on fact that many residents supported and consented to searches).

conducted pursuant to the valid consent of individual tenants,<sup>147</sup> the policy authorized officials to search *all* units, regardless of whether the police obtained consent from the particular tenant of the unit to be searched.<sup>148</sup> The CHA officials, in fact, searched the home of at least one individual who did not sign the consent form,<sup>149</sup> and, additionally, the homes of individuals who could not consent because they were not at home at the time of the searches.<sup>150</sup>

The searches conducted pursuant to the sweeps policy also did not fit within the narrow requirements of the exigency exception to the Fourth Amendment warrant requirement. First, although the specific incidents of gunfire<sup>151</sup> may arguably have created exigent circumstances, the failure of the CHA to respond immediately to the situation negated such a claim.<sup>152</sup> Of the searches that occurred in July and August 1993, none occurred within forty-eight hours of a shooting.<sup>153</sup> This time lapse demonstrates that the CHA police did not conduct the searches in order to immediately apprehend a criminal, or to protect its officers or the public from a potential threat. If the CHA truly was responding to the exigency of the

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147. See *supra* Part II.B.1 (explaining that warrantless searches are constitutional if pursuant to voluntary consent). Other factors such as how the police represented themselves to the tenants when asking to conduct the searches and whether the tenants had actual knowledge of their Fourth Amendment right to be free of warrantless searches were not brought up by plaintiffs in the *Pratt* complaint and will not be discussed here because there are no facts to indicate coercive tactics on the part of CHA. The argument that the sweeps policy does not fit within the consent exception to warrantless searches relies on the fact that both in theory and in practice the policy authorized searches regardless of consent. See *supra* Part II.B.1 (explaining requirements for voluntary consent).

148. See Memorandum in Support of Request for Authority to Perform Warrantless Searches at 3-4, *Summeries v. Chicago Hous. Auth.* (N.D. Ill. Dec. 16, 1988) (No. 88 C 10566) ("All apartments in the building or buildings involved will be searched.").

149. See Response Memorandum of the Chicago Housing Authority at 2, *Pratt* (No. 93 C 6985). CHA contends that oral consent was given by this individual. *Id.* at 2-3. The opposing party contends that she told the CHA officers that "she did not want them to search her apartment." Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 1, *Pratt* (No. 93 C 6985).

150. *Pratt*, 848 F. Supp. at 793-94.

151. The CHA indicated that its policy authorized the sweeps when continuous gunfire or other weapons related incidents have occurred in a development under CHA's authority. Response Memorandum of the Chicago Housing Authority at 2, *Pratt* (No. 93 C 6985).

152. See *Pratt*, 848 F. Supp. at 794-95 (noting that exigent circumstances exception necessitates "extreme immediate urgency" and finding that, because sweeps occurred several days after incident of gunfire, exigent circumstances did not exist); Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 6, *Pratt* (No. 93 C 6985) (arguing that CHA had ample time to obtain warrants but instead substituted Chairman of CHA for neutral magistrate). In its Response Memorandum, the CHA does not address the issue of speed as an element of exigency but states only that this exception should apply because "[a] weapon in a CHA highrise is a deadly, menacing situation." Response Memorandum of the Chicago Housing Authority at 13, *Pratt* (No. 93 C 6985); see also *supra* notes 96, 100 and accompanying text (explaining that speed is essential element of exigency).

153. *Pratt*, 848 F. Supp. at 793.

circumstances created by sniper fire, then speed would have been an essential component of the searches.<sup>154</sup>

Second, pursuant to the policy, the officials searched "entire building(s),"<sup>155</sup> apartment-by-apartment, with no reason to believe that the gunfire had originated from any particular dwelling. In fact, the CHA believed that the sweep searches were necessary precisely because the CHA police could not pinpoint where the gunfire originated.<sup>156</sup> The CHA's policy, therefore, disregards the probable cause requirement of the exigency exception by allowing searches of every apartment rather than targeting only the homes where officials have probable cause to believe that individuals present were involved in the illegal activity.<sup>157</sup> Without probable cause as to each particular apartment, even if the CHA police had responded immediately to the gunfire, the exigency exception to the warrant requirement would not justify the sweep searches.

The CHA did have the authority to conduct emergency administrative inspections of apartment units to check their condition pursuant to a prior agreement made between the CHA and the tenants.<sup>158</sup> The searches that the CHA conducted during the summer of 1993, however, were not administrative in nature and thus did not fall within the terms of the agreement. In instituting the sweeps policy, the CHA intended to broaden its power, authorizing its officials to

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154. *Payton v. New York*, 445 U.S. 573, 583 (1980) (stressing that exigency exception only applies if police do not have time to obtain warrant).

155. Response Memorandum of the Chicago Housing Authority at 2, *Pratt* (No. 93 C 6985).

156. *See id.* (outlining procedure for searches sparked by gunfire in projects when CHA is unable to identify specific location from which it originated).

157. *See Pratt*, 848 F. Supp. at 795-96 ("Without any probable cause for searching particular apartments, the searches under the [sweeps] are unconstitutional, no matter how exigent the circumstances."); *see also* *United States v. Scott*, 520 F.2d 697, 700 (9th Cir. 1975) (finding that police had probable cause to search apartment where they had reason to believe that fugitives had entered building and had knowledge that fugitives were not in other six apartments), *cert. denied*, 423 U.S. 1056 (1976); *see also supra* note 75 (defining probable cause); *supra* note 102 (indicating that probable cause is requirement of exigency search).

158. *See* Consent Decree app. B at 1-2, 6-7, *Summeries v. Chicago Hous. Auth.* (N.D. Ill. Dec. 16, 1988) (No. 88 C 10566) (authorizing "emergency" inspections "to identify and remove unauthorized occupants" and "to examine the condition of floors, ceilings, walls, electrical wiring, heating sources, windows, window frames, doors, locks . . . and other structural elements"). These inspections closely resemble the type of administrative inspection examined in *Camara v. Municipal Court*, 387 U.S. 523 (1967). *See supra* Part II.B.3 and accompanying notes (describing administrative inspections).

The CHA did, however, attempt to argue that tenants in the development consented to the sweeps searches when they signed a consent clause in their leases, authorizing inspections at all times without prior notice. Response Memorandum of the Chicago Housing Authority at 5-6, *Pratt* (No. 93 C 6985). The plaintiffs, however, convincingly pointed out that this argument was a "red herring" because the consent clause in the lease only applied to the type of emergency administrative inspections agreed upon in *Summeries*. Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction at 6-7, *Pratt* (No. 93 C 6985).

conduct law enforcement searches aimed at finding illegal weapons and arresting individuals involved in criminal activity. In fact, the intrusive nature of the sweep searches far exceeds the types of administrative searches envisioned by the Supreme Court.<sup>159</sup> Pursuant to the policy, the CHA police have conducted invasive examinations of personal effects, drawers, closets, and cabinets in the home of CHA tenants.<sup>160</sup> Even if one of the purposes of the sweeps is safety, the scope of such searches goes far beyond that of ordinary administrative searches, such as inspections for "faulty wiring"<sup>161</sup> or "unsafe, hazardous or unsanitary conditions"<sup>162</sup> in which officials look for visible violations of housing codes.

The weapons searches also cannot be equated with the warrantless searches allowed in pervasively regulated industries.<sup>163</sup> The sweeps

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159. See *New York v. Burger*, 482 U.S. 691, 700 (1987) (explaining that expectation of privacy exists with respect to police searches and administrative searches of highly regulated business); *Donovan v. Dewey*, 452 U.S. 594, 598-600 (1981) (allowing administrative searches of commercial property, but distinguishing privacy interests of home and work); see also *California v. Carney*, 471 U.S. 386, 393 (1985) (allowing warrantless search of mobile home because vehicle is readily mobile and expectation of privacy is diminished because licensed vehicle is subject to regulations that do not apply to homes); See *v. Seattle*, 387 U.S. 541, 543-44 (1967) (concluding that decreased expectation of privacy at place of business does not eliminate need for warrants).

160. Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 1, *Pratt* (No. 93 C 6985).

161. *Camara*, 387 U.S. at 537. In fact, the Consent Decree specifically prohibits searches of personal effects, and only allows for searches for deterioration, etc. of the units. See Consent Decree app. B at 6-7, *Summeries* (No. 88 C 10566) (describing inspections allowed under Consent Decree).

162. Consent Decree app. B at 6-7, *Summeries* (No. 88 C 10566). The Consent Decree explicitly stated that "CHA staff may not examine the personal property of CHA tenants or their guests, or the contents of such property, including: bureau or dresser drawers; closets; bed clothes; clothing; boxes; or other containers." *Id.* app. B at 7. Instead it allowed officials to inspect the "condition" of the apartment, for example the ceiling, floors, heating sources, etc. *Id.* app. B at 6-7. These are the type of inspections envisioned by the Court in *Camara*. In *Camara*, the Court considered inspections aimed at "securing city-wide compliance with minimum physical standards for private property." *Camara*, 387 U.S. at 535. It distinguished such inspections from searches made pursuant to a criminal investigation. *Id.* The Court pointed out that the inspections were meant to stop conditions that might become hazardous to public health and safety, not to prevent criminal activity. *Id.*

163. See *Burger*, 482 U.S. at 702-03 (laying out three-part test for analyzing issue of whether searches allowed by particular regulatory scheme meet requirements of Fourth Amendment). First, the government must have a substantial interest in regulating the industry. *Id.* at 702. Second, the regulation authorizing the search must "reasonably serve the [government's] substantial interest" in the regulatory scheme. *Id.* at 702, 709. Third, the regulation must provide a constitutionally acceptable substitute for a warrant. *Id.* at 703. One could argue that the standard delineated in *Burger* should be applied in this case. The facts, however, are distinguishable. *Burger* applied to "closely regulated" businesses with a "tradition of close government supervision." *Id.* at 700 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978)). Criminally relevant evidence was discovered, but was a collateral result of the inspection. *Id.* at 712-13. In this case, the sweeps policy applies not to a traditional business, but to a publicly owned dwelling rented for private use. Moreover, the explicit purpose of the searches—to uncover guns used in shooting in the housing developments—was for law enforcement, not to further a regulatory scheme as in *Burger*. Response Memorandum of the Chicago Housing Authority at 9, *Pratt* (No. 93 C 6985).

policy authorized searches of residential apartments. The Supreme Court has emphasized that the expectation of privacy is greatest in the home and far exceeds any privacy expectation an individual has at a place of business.<sup>164</sup> The Court distinguished warrantless searches of pervasively regulated industries from dwelling searches, indicating that the administrative inspections are acceptable, in part, because they are far less intrusive than a full-scale dwelling search.<sup>165</sup>

The Court's decision in *Wyman v. James* does not change the conclusion that the sweeps were not administrative searches.<sup>166</sup> In *Wyman*, the Court emphasized that visits by caseworkers to the homes of AFDC recipients were more like interviews than searches and that they were non-invasive.<sup>167</sup> The CHA sweeps, however, are intrusive law enforcement searches that directly impinge on the tenants' privacy interests. The CHA, therefore, cannot justify its warrantless searches of apartments by claiming that the searches were administrative inspections.

The strongest argument in favor of the sweeps policy is that the government has a special need for instituting this policy, namely safety in the housing developments, that outweighs the tenants' privacy concerns.<sup>168</sup> Clearly, the government has a substantial interest in ensuring the safety of the residents of the developments, whose lives are threatened by the occurrence of random gunfire. The argument in favor of the constitutionality of the sweeps, thus, is that, like the government's interest in maintaining order in public schools,<sup>169</sup> ensuring that railroad workers are drug free,<sup>170</sup> and supervising probationers,<sup>171</sup> the CHA's interest in safety justifies the privacy intrusion created by the sweeps. This argument is unconvincing, however. The sweeps are easily distinguishable from the cases in

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164. See *supra* note 124 and accompanying text (discussing diminished privacy interest in "closely regulated" businesses).

165. See *Burger*, 482 U.S. at 700 (stressing that expectation of privacy in home far exceeds expectation at business).

166. See *supra* text accompanying notes 125-28.

167. *Wyman v. James*, 400 U.S. 309, 317-18 (1971). The Court held that "[t]he caseworker is not a sleuth but rather, we trust, is a friend to one in need." *Id.* at 323; see also *Franz v. Lytle*, 997 F.2d 784, 791 (10th Cir. 1993) (distinguishing police officer's search of child's body for signs of abuse from social worker's concern for child's welfare).

168. See *supra* Part II.B.4 and accompanying text (discussing balancing test pursuant to special needs exception to warrant requirement).

169. See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (explaining that government interests in keeping order justified searching student's purse).

170. See *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 620 (1989) (highlighting similarity between government need to monitor railroad employee to ensure safety and government need to supervise probationer or regulate schools).

171. See *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987) (finding that government has special need to supervise probationers).

which the Supreme Court has held that special government needs exist.

First, the evidence does not show that obtaining a warrant will unduly frustrate the aim of making the housing developments safer. The CHA instituted its sweeps policy as a means of responding immediately to dangerous situations in the developments.<sup>172</sup> Theoretically, the threat of immediate full-scale searches of the development may deter some criminals, and the searches themselves may lead to some arrests, thereby making the areas safer. In practice, however, the CHA conducted all of the searches more than forty-eight hours after reported gunfire because of the logistical difficulties associated with assembling enough police officers to search all of the units.<sup>173</sup> Thus, the argument that the warrant requirement frustrated the goals of the policy is unconvincing. Instead it seems the CHA's goals were unrealistic given the CHA's resources.

Second, the relationship between the CHA officials and the tenants is not the type of relationship that justifies the special needs exception. In cases in which the Supreme Court has held that the special government interest in the search outweighs the privacy interest of the person to be searched, the Court has emphasized the existence of a supervisory relationship between the government actor and the searchee.<sup>174</sup> In such cases, the government actor has the power to ensure that the person searched is complying with certain rules or procedures.<sup>175</sup> No such relationship exists, or ought to exist, between the CHA and its tenants. The CHA does have the authority to maintain a safe living environment in the projects,<sup>176</sup> but it does not have specific supervisory authority over its individual tenants. The tenants who live in public-assisted housing are no different than the tenants who live in middle- or high-income neighborhoods—all are “the public at large,”<sup>177</sup> free to live their lives as they choose within

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172. See *supra* Part I.A (describing CHA's claim that sweeps would be conducted in response to gunfire to protect residents).

173. *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792, 793 (N.D. Ill. 1994).

174. See *supra* note 134 and accompanying text (discussing special relationship Court looks for in applying special needs exception to warrant requirement).

175. See *Skinner*, 489 U.S. at 621 (justifying drug testing for railroad employees because of need to ensure safety); *Griffin*, 483 U.S. at 875 (explaining that goals of probation “justify the exercise of supervision to assure that the restrictions [of the probation] are . . . observed”); *T.L.O.*, 469 U.S. at 350 (explaining that school authorities' responsibilities toward students “is one of personal responsibility for the student's welfare as well as for his education”).

176. See Housing Authorities Act, ILL. ANN. STAT. ch. 310, para. 10/2 (Smith-Hurd 1993) (creating housing authority “to promote and protect the health, safety, morals and welfare of the public”).

177. *Griffin*, 483 U.S. at 875 (distinguishing public-at-large from probationer and explaining that supervisory relationship allows greater impingement on constitutional rights).

the bounds of the law. Thus, the special supervisory relationship required to trigger the special needs exception should not be applicable in the landlord-tenant context.

Third, the tenants of low-income housing developments do not have a reduced expectation of privacy.<sup>178</sup> Unlike a probationer or a student, tenants living in low-income housing enjoy "the absolute liberty to which every citizen is entitled."<sup>179</sup> The fact that some individuals within the developments engage in illegal activity should have no bearing on a tenant's right to privacy.<sup>180</sup> A tenant, regardless of where he lives, has the "right . . . to retreat into his own home and there be free from unreasonable government intrusion."<sup>181</sup> To argue the contrary would be to set up different constitutional standards for privacy, dependent on the type of housing an individual can afford and the crime rate of the neighborhood.

Because the sweeps policy does not meet the criteria set out by the Supreme Court in its special needs cases, the special needs exception to the Fourth Amendment requirement of a warrant and probable cause is not applicable in determining the constitutional status of the sweeps policy. Therefore, even though the government has a substantial interest in protecting the public from the violence in the housing developments, this interest does not justify the intrusive nature of the sweeps no matter how popular the sweeps may be. As the court pointed out in *Pratt*, the tenants who are willing to trade their constitutional rights to be free from warrantless searches for

178. See Smith, *supra* note 6, at 531-32 (stating that from property law viewpoint, expectation of privacy is same in public housing as in private home).

179. *Griffin*, 483 U.S. at 874 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

180. See *United States v. Burnett*, 890 F.2d 1233, 1237 (D.C. Cir. 1989) (outlining standard to determine whether person has legitimate expectation of privacy). The test is whether the person: (1) has a possessory interest in the place searched; (2) can exclude others from the place; (3) has a subjective expectation of privacy; (4) attempts to maintain privacy; and (5) was legitimately on premises. *Id.* (citing *United States v. Robinson*, 698 F.2d 448, 454 (D.C. Cir. 1983)). Clearly, CHA tenants who pay rent have a possessory interest in their apartments. Like all other tenants, they can exclude others from entering their apartments and expect privacy in their homes.

181. *Payton v. New York*, 445 U.S. 573, 590 (1980) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). A historical footnote in *Payton* is especially relevant to the argument that low-income tenants should not have a reduced expectation of privacy:

"The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dare not cross the threshold of the ruined tenement!"

*Id.* at 601 n.54 (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)); see also *Brand v. Chicago Hous. Auth.*, 120 F.2d 786, 788 (7th Cir. 1941) (explaining that tenancy agreement between public housing authority and low-income person is same as between two private actors). See generally Robin Morris Collin & Robert William Collin, *Are the Poor Entitled to Privacy?*, 8 HARV. BLACKLETTER J. 181 (1991) (examining how Supreme Court has treated privacy rights of poor people).

safety cannot impose this trade-off on their neighbors.<sup>182</sup> Instead, "government officials charged with providing safe housing" must find solutions that do not erode constitutional rights.<sup>183</sup>

*B. The Clinton Guidelines Create Several Constitutional Problems*

The goal of the Clinton Guidelines is to present "options available to a public housing agency such as CHA in conducting searches on the premises of public housing projects" that do not violate the constitutional rights of the tenants of the projects.<sup>184</sup> The wording of the Guidelines suggests that the Clinton administration had the special needs doctrine in mind when drafting the recommendations. The preamble of the Guidelines, for example, states that the policy options presented are "constitutionally valid, *at least in the extraordinary circumstances* presented by the crime problem in the . . . developments."<sup>185</sup> This statement implies that because of the level of the violence in the projects, the government has a significant interest in securing the buildings. This interest, then, justifies the searches' infringement on the tenants' right to privacy. Furthermore, the Guidelines recommend that providing advanced notice of when the housing authorities will search and performing the searches during "daylight hours" will reduce "any constitutional objection to the inspection."<sup>186</sup> The argument here is that if the tenants know about the warrantless searches in advance and if the searches only occur in the daytime, the searches somehow will be less intrusive than the searches conducted pursuant to the sweeps policy.

In addition, the Guidelines note that housing authorities should seek the tenant association's endorsement of the searches, reasoning that "widespread tenant support would be helpful in responding to challenges by particular tenants to the constitutionality of . . . consent clauses in leases."<sup>187</sup> Thus, the Clinton administration contends that if most of the tenants support the searches, this support makes the searches of units belonging to tenants who did not lend support somehow more constitutionally justifiable.

The warrantless searches suggested by the Clinton Guidelines, however, are not significantly different from those authorized under the CHA sweeps policy; the Guidelines recommend conducting

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182. Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 796 (N.D. Ill. 1994).

183. *Id.* at 797.

184. Reno Letter, *supra* note 19.

185. Reno Letter, *supra* note 19 (emphasis added).

186. Reno Letter, *supra* note 19.

187. Reno Letter, *supra* note 19.



warrantless unit-by-unit searches for guns. The special needs exception to the warrant requirement, therefore, cannot excuse the threat to the tenants' right to privacy that the searches pose.<sup>188</sup> First, if advance notice is given and the searches are conducted during the day, then the warrant requirement does not frustrate the aim of the searches.<sup>189</sup> If housing authority officials have time to give advance notice to their tenants as to when searches will occur and can orchestrate the searches to occur only during the day, the officials should also be able to secure warrants to conduct the searches. Second, the Guidelines do not change the fact that no supervisory relationship exists between the tenants and the housing authority.<sup>190</sup> As argued above, the relationship between the tenants and the housing authority is not similar, for example, to the relationship of a probation officer to a probationer or a school official to a student.

Finally, the Guidelines' suggestion that the "extraordinary circumstances" created by the violence in the developments diminishes the tenant's privacy right is a dangerous one. The analysis here is the same as when considering the sweeps policy in the context of the special needs exception. The argument that public housing tenants have a reduced privacy expectation is dangerous because it allows the erosion of the right to privacy by making this Fourth Amendment right contingent on the neighborhood in which a person lives and the crime rate in that neighborhood.<sup>191</sup>

The Clinton Guidelines do not rely solely on the special needs exception to justify the warrantless searches outlined in the Guidelines. The Clinton administration also attempts to fit the searches within other exceptions to the warrant requirement. In fact, the most troubling aspect of the Clinton Guidelines is the provision that recommends that housing authorities place a consent clause in public housing leases.<sup>192</sup> One problem with this provision is that it is an

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188. See *supra* notes 168-83 and accompanying text (discussing special needs exception to warrant requirement).

189. See *supra* notes 172-73 and accompanying text (arguing that under special needs exception, warrant requirement must frustrate government interest and does not do so under sweeps).

190. See *supra* text accompanying notes 174-77 (stating that no special relationship exists between CHA and tenants for purposes of special needs exception).

191. See *supra* notes 178-81 and accompanying text (stressing that special needs exception requires diminished expectation of privacy, which does not exist in context of low-income tenants).

192. Reno Letter, *supra* note 19 (suggesting that consent searches are essential in high-crime areas).

attempt to characterize the sweep searches as minimally intrusive administrative inspections.<sup>193</sup>

The Guidelines state that when criminal incidents make searches of the developments necessary, "lease consent clauses could be employed to authorize periodic *administrative inspections* of tenants' units for unlicensed or unauthorized firearms."<sup>194</sup> The Clinton Guidelines compare these "inspections" to maintenance inspections, and suggest that "inspections" be conducted on a "routine basis, during the daylight hours," and that they be "no more intrusive than absolutely necessary to determine" the existence of weapons in the unit.<sup>195</sup>

This wording is a clear attempt to de-emphasize the law enforcement purpose behind the searches and to recast the searches in administrative inspections terms. This attempt, however, is misguided. Although criminal charges may be made incident to administrative inspections,<sup>196</sup> the Supreme Court has made clear that such warrantless inspections are only valid when conducted in accordance with a statute designed to regulate commercial property and that the primary purpose of the inspection must be to find regulatory infractions and not criminal wrongdoing.<sup>197</sup> The searches suggested by the Guidelines, however, are searches of homes triggered by criminal incidents in the housing developments.<sup>198</sup> Thus, the primary purpose of the so-called gun inspections is to stop *crime*, not to look for regulatory infractions.

The Guidelines also suggest that the inspections be only as intrusive as necessary.<sup>199</sup> This standard is vague and gives no assurances that the searches will be "a less hostile intrusion" than a normal criminal search.<sup>200</sup> In fact, as evidenced by the searches conducted by the CHA during the summer of 1993, a search for a gun is intrusive.<sup>201</sup>

193. See *supra* Part I.B (outlining provisions of Clinton Guidelines).

194. Reno Letter, *supra* note 19 (emphasis added).

195. Reno Letter, *supra* note 19.

196. See *New York v. Burger*, 482 U.S. 691, 716 (1987) (holding that discovery of evidence of crimes incident to proper administrative search does not make search unconstitutional); see also *supra* notes 122-23 and accompanying text (discussing *Burger* decision).

197. See *supra* Part II.B.3 (discussing administrative searches).

198. See Reno Letter, *supra* note 19 (stating that crime conditions may make inspections "essential").

199. Reno Letter, *supra* note 19 (limiting searches to extent necessary to determine presence of weapons).

200. See *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967) (distinguishing administrative searches as "less hostile intrusion[s] than the typical policeman's search for the fruits and instrumentalities of crime").

201. See Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 1, *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792 (N.D. Ill. 1994) (No. 93 C 6985) (characterizing search of one tenant's home as turning her "home upside down" and maintaining that CHA police "combed the unit" searching cabinets, dresser drawers, private

Such searches involved looking through drawers, cabinets, personal effects, in refrigerators, and under mattresses.<sup>202</sup> They are far more intrusive than the administrative searches currently allowed, such as inspections of the walls and ceilings for signs of maintenance problems.<sup>203</sup> Moreover, the "administrative inspections" suggested by the Guidelines are more invasive than the home visits allowed in *Wyman v. James*.<sup>204</sup> The Guidelines suggest ways to conduct police searches of homes, not visits by housing officials or social workers.<sup>205</sup> In addition, the Guidelines recommend exactly the type of "snooping" search that the AFDC statute in *Wyman* explicitly forbade.<sup>206</sup> The searches described in the Guidelines, therefore, are not true administrative searches under Fourth Amendment jurisprudence and should not be characterized as such.

The issue of whether the searches are administrative or criminal in nature is irrelevant, however, if the searches are conducted pursuant to valid consent.<sup>207</sup> Thus, another issue created by the Guidelines is whether a signed lease containing a consent clause provides a valid waiver to future searches for guns.<sup>208</sup> If such consent is valid, then all searches conducted pursuant to this consent are constitutional.<sup>209</sup>

The first question that arises in the context of whether a signed consent clause constitutes a valid waiver of one's Fourth Amendment rights is whether the consent is voluntary.<sup>210</sup> In answering this question, courts look to the totality of the circumstances.<sup>211</sup> In this case, a number of factors lead to the conclusion that consent is not voluntary.

papers, personal effects, closed boxes and containers, refrigerator, and under mattresses and sofa pillows).

202. *Id.*

203. See *supra* note 162 (noting scope of search under Consent Decree).

204. See *Wyman v. James*, 400 U.S. 309, 318 (1971) (explaining that home visits by caseworkers were more similar to interviews than searches).

205. See *Franz v. Lytle*, 997 F.2d 784, 791 (10th Cir. 1993) (differentiating search by police from visit by social worker to home).

206. *Wyman*, 400 U.S. at 321.

207. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (noting that neither warrant nor probable cause are required when consent to search is given).

208. There is an argument that the current administrative inspection consent clause in the leases, the constitutional validity of which is not challenged, illustrates that consent to search given in the leases may be valid. This argument fails to consider, however, the difference between administrative inspections authorized under the Consent Decree and the gun-related inspections recommended in the Clinton Guidelines. The gun-related searches are far more intrusive than the administrative inspections. These gun-related searches spark a heightened level of scrutiny because of the privacy interest at stake. See *supra* Part IIA (stating that warrantless searches of homes are presumptively unconstitutional).

209. See *supra* Part II.B.1 (explaining that warrantless searches conducted pursuant to valid consent are not unconstitutional).

210. See *supra* Part II.B.1 (explaining that consent is only valid if voluntary).

211. *Bustamonte*, 412 U.S. at 226.

If signing the consent form is indeed a requirement of living in the development,<sup>212</sup> a subtle form of coercion is at play. Requiring a tenant to sign this consent form does not constitute the use of physical force or the threat to use physical force, two factors the Supreme Court considered in determining whether consent was the product of coercion.<sup>213</sup> Nevertheless, the Court noted that subtle forms of coercion may prove that consent was not voluntarily given.<sup>214</sup> In looking for "subtle coercion," it is important to consider the relevance of certain personal characteristics of the consentor, such as the individual's financial status.<sup>215</sup> The tenants who live in and seek housing in low-income developments are poor, and often have no choice but to live in publicly subsidized housing because they are unable to afford any other housing.<sup>216</sup> Conditioning their eligibility to live in the developments on waiving their Fourth Amendment rights leaves the tenants in an untenable position. The tenants are likely to feel coerced into foregoing their rights to be free of warrantless searches in their homes because this may be the only way to ensure that they have a place to live.<sup>217</sup>

The inclusion of a consent clause also raises the question of whether conditioning the benefit of public housing on consenting to warrantless searches is unconstitutional. The rule of "unconstitutional

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212. The Guidelines say only that if violence in housing projects makes sweep searches necessary, lease consent clauses "could be employed" to allow such searches. Reno Letter, *supra* note 19. In his speech announcing the Guidelines, President Clinton stated that the decision whether to put the clauses in the leases would be up to the tenant association. Radio Address, *supra* note 18, at 823. The Senate endorsed a version of the Guidelines that explicitly indicated that tenants would not be forced to sign consent clauses as a prerequisite for living in public housing. *Id.* Housing Secretary Henry Cisneros has indicated that making signing the consent clauses a condition of obtaining public housing is "constitutionally complicated and probably impossible." Michael Briggs, *CHA, Cisneros Relent on Search Consent*, CHI. SUN-TIMES, May 5, 1994, at 56. The Attorney General's office as well has indicated that making public housing conditional on consent is problematic. *Id.* At least one commentator believes that access to public housing should be conditional on consent to the searches. See Rob Teir, *Residents Want Chicago Sweeps*, PLAIN DEALER, May 7, 1994, at 7B (arguing that CHA policy is reasonable response to increasing gang violence).

213. See *supra* note 84 and accompanying text (discussing police coercion through force or threats of force).

214. *Bustamonte*, 412 U.S. at 228.

215. See *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (explaining that Court can take into consideration sex, race, age, and education of consentor to determine whether consent was voluntary); *Bustamonte*, 412 U.S. at 248 (stating that schooling and intelligence are factors to consider in determining if consent was voluntary).

216. See Housing Authorities Act, ILL. ANN. STAT. ch. 310, para. 10/2 (Smith-Hurd 1993) (describing need for public housing).

217. See Nat Hentoff, *Top-Level Trio Overlook the Law in Seeking Security*, ROCKY MOUNTAIN NEWS, May 9, 1994, at 37A (calling lease consent provision "yellow dog contract"); Ifill, *supra* note 63, at A1 (reporting that Housing Authority figure believes tenants would feel pressure to sign clause to gain access to housing); *Projects and Police Raids*, *supra* note 49, at A14 (likening asking tenants to waive rights to being compelled to abstain from going to church or voting).

conditions" states that the "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."<sup>218</sup> Although the Court has been inconsistent in its application of this rule, the "unconstitutional conditions" doctrine should be applied in this case.<sup>219</sup>

In *Garrity v. New Jersey*,<sup>220</sup> the Court considered a New Jersey statute that required police officers to choose between testifying in criminal proceedings, regardless of whether the testimony would be self-incriminating, or losing their jobs.<sup>221</sup> The Court held that this choice between the Fifth Amendment right not to incriminate

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218. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989); see also *Wyman v. James*, 400 U.S. 309, 329 (1971) (Douglas, J., dissenting) ("[T]he rule is that the right to continue the exercise of privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." (quoting *United States v. Chicago, Mil. St. P. & Pac. R.R.*, 282 U.S. 311, 328-29 (1931))); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (explaining that state may not condition constitutional rights "by the exaction of a price"); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 7 (1988) (defining unconstitutional conditions doctrine as rule that state cannot grant benefit "subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights"); Kenneth J. Levit, *Campaign Finance Reform and the Return of Buckley v. Valeo*, 103 YALE L.J. 469, 479 (1993) (defining unconstitutional conditions as doctrine that "prevents those who control the public fisc from using that power to extract objectionable waivers of constitutional rights").

219. See Epstein, *supra* note 218, at 10-11 (noting that unconstitutional conditions doctrine "tenaciously endures" despite fact that Supreme Court selectively invokes it); Levit, *supra* note 218, at 482-83 (indicating that Court has seemed to retreat from doctrine in some contexts but that it still may be applied in cases where "threats to coerce waiver" are present); Sullivan, *supra* note 218, at 1415-17 (explaining that Court is inconsistent in its application of rule of unconstitutional conditions).

The Supreme Court has considered one case in which a state conditioned a public benefit on a home visit by a state agency. In *Wyman v. James*, the Court considered the constitutionality of a New York regulation that made visits to the homes of recipients of Aid to Families with Dependent Children (AFDC) a condition of receiving AFDC benefits. *Wyman v. James*, 400 U.S. 309, 310-13 (1971). The Court, however, found that home visits did not fit within the definition of search under the Fourth Amendment and thus were not proscribed under the Fourth Amendment. *Id.* at 318. The Court recognized, however, that the visits possessed "some of the characteristic of a search in the traditional sense," *id.*, but reasoned that the home visits were merely "a reasonable administrative tool" and were not "an unwarranted invasion of privacy" and thus did not violate Fourth Amendment requirements. *Id.* at 326. Therefore, the Court avoided altogether the "unconstitutional conditions" rule, holding instead that the home visits could be justified under the administrative inspection exception to the Fourth Amendment. *Id.*

The factual scenario in *Wyman* is very different than the one under consideration in this Comment. Under the Clinton Guidelines the benefit of public housing may be conditioned, not on a non-intrusive visit by a government worker, but on a full-scale criminal-type search for guns. The Fourth Amendment protections are greatest when the search in question is a full-scale search in the home. See *supra* Part II.A (explaining that warrantless searches of home are presumptively unconstitutional). Thus, the unconstitutional conditions doctrine is more applicable in the context of the searches in question.

220. 385 U.S. 493 (1967).

221. *Garrity v. New Jersey*, 385 U.S. 493, 494 (1967).

oneself<sup>222</sup> and relinquishing one's job was coercive and would "water[]-down" the police officer's constitutional rights.<sup>223</sup> The Court emphasized that "[t]here are rights of constitutional stature whose exercise a State may not condition by exaction of a price."<sup>224</sup>

The suggestion is similar in this case in that housing authority officials could read the Guidelines as suggesting that they require tenants to forego their Fourth Amendment rights in order to receive the benefits of public housing. Such a condition puts a person seeking a low-income apartment in a similar, and perhaps more unacceptable, position as the police officers in *Garrity*. The condition forces the tenant to choose between giving up Fourth Amendment rights or foregoing an opportunity to have an affordable place to live. As previously mentioned, this type of condition is coercive because living in public housing is a necessity. Thus, the condition leaves the tenant with no real option but to sign the clause.<sup>225</sup>

Furthermore, to condition consent to search on receiving public housing creates a "constitutional caste" in which individuals who do not have to live in public housing have more rights than those who do.<sup>226</sup> Tenants who cannot afford private housing will have "wa-

222. U.S. CONST. amend. V (stating that no person "shall be compelled in any criminal case to be a witness against himself").

223. *Garrity*, 385 U.S. at 497, 500.

224. *Id.* at 500.

225. *See, e.g.,* *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding that conditioning unemployment benefits on working on Saturday was unconstitutional because it compelled waiving of religious freedom); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (holding that California law conditioning property-tax exemption to veterans on signing oath of allegiance to U.S. Government was unconstitutional encumbrance of "the constitutional right to speak"); *Levit, supra* note 218, at 483-84 (explaining that Court uses strict scrutiny to determine whether unconstitutional conditions exist when programs employ "threats to coerce waiver" of constitutional rights). *But see* *Rust v. Sullivan*, 500 U.S. 173, 196, 201 (1991) (holding both that regulation prohibiting Title X project from engaging in abortion counselling as method of family planning is not unconstitutional condition because grantee is not being denied benefit but merely is required to use funds for purpose authorized, and that regulations do not "impermissibly burden" women's right to abortion); *Harris v. McRae*, 448 U.S. 297, 326 (1980) (finding that government can decline to subsidize abortions through Medicaid program); *Snepp v. United States*, 444 U.S. 507, 507-08 (1980) (finding CIA employment contract that conditioned employment on agreement not to publish or disclose classified or other information without prior approval valid).

226. *Sullivan, supra* note 218, at 1421, 1490. Sullivan explains that the unconstitutional conditions doctrine should prevent "discrimination among right-holders who would otherwise make the same constitutional choice, on the basis of their relative dependency on a government benefit." *Id.* at 1421. Professor Sullivan discusses three distributive concerns raised by conditioning a government benefit on giving up a constitutional right: (1) such conditions "alter the balance of power between government and rightsholders" allowing government to encroach on "[p]referred constitutional liberties"; (2) they "skew the distribution of constitutional rights" depending on who does or does not comply with the condition; and (3) they create a "caste hierarchy in the enjoyment of constitutional rights." *Id.* at 1490; *see also* Smith, *supra* note 6, at 544 (charging that sweep searches tell society at large that tenants of low-income developments are "somehow lesser citizens than the rest of us"); Michael Briggs, *Housing*

tered-down" rights under the Constitution because they will be forced to forego their Fourth Amendment rights.<sup>227</sup> Meanwhile, wealthier citizens who can afford private housing will enjoy full Fourth Amendment protections. The rule against unconstitutional conditions should bar such a redistribution of constitutional rights.<sup>228</sup>

Finally, assuming that a tenant voluntarily signs a lease with such a clause, what happens if at the time of the search the tenant objects to the search? How long is consent valid? Fourth Amendment jurisprudence dictates that consent to searches must be voluntarily given.<sup>229</sup> If an individual who has voluntarily consented to a search later explicitly withdraws that consent, any search conducted thereafter would no longer be pursuant to *voluntary* consent.<sup>230</sup> For example, if, at the time of a search, a CHA tenant refuses to consent to a search of his home, any search conducted subsequently is not carried out pursuant to voluntary consent, regardless of whether the tenant previously signed the lease consent clause. In this context, a signed consent clause would allow authorities to conduct consent searches as long as the tenant does not explicitly object to the search at a later time. But if the tenant does object, the authorities would no longer have the authority to search without first obtaining a warrant or unless another exception to the warrant requirement applies.

The Clinton Guidelines also address the issue of exigency searches. The Guidelines define searches made under the exigency exception as "searches of individual units where there is justification for a search but insufficient time to obtain a judicial warrant."<sup>231</sup> Three points are important to consider in the context of the Guidelines' exigency exception discussion. First, this provision makes clear that when conducting warrantless exigency searches, the housing authority must conduct these searches at the time the emergency situation occurs, or shortly thereafter.<sup>232</sup> Such provisions are based on the principle

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*Plan Shifts Emphasis Off High-Rises*, CHI. SUN-TIMES, Apr. 17, 1994, at 3 (reporting that ACLU representative feared that conditioning public housing benefits on signing consent clause would make tenants "second-class citizen[s]"); DeNeen L. Brown, *Tenants See Pros, Cons in Clinton Anti-Crime Plan*, WASH. POST, Apr. 19, 1994, at B7 (reporting tenants' doubts about effectiveness of searches and anger at being treated differently because they live in low-income housing).

227. *Garrity*, 385 U.S. at 500.

228. See Sullivan, *supra* note 218, at 1506 (stressing that without unconstitutional conditions doctrine, there will be unacceptable hierarchy of right-holders).

229. See *supra* note 82 and accompanying text (stating that courts look to "totality of circumstances" to determine voluntariness).

230. See *supra* notes 90-95 and accompanying text (discussing withdrawal of consent).

231. Reno Letter, *supra* note 19.

232. See *Payton v. New York*, 445 U.S. 573, 583 (1980) (noting that exigency exception does not apply to cases "in which there was ample time to obtain a warrant").

that speed is an essential consideration when considering warrantless searches under the exigency exception.<sup>233</sup> Second, by emphasizing that housing authority officials may conduct warrantless searches of *individual* units rather than the CHA's reference to *all* units, the Guidelines narrow the type of search permissible.

Third, the Guidelines never directly state that officials must have probable cause to conduct a warrantless search based on exigent circumstances. Rather, the Guidelines note that exigent searches may only be made where there is "justification for a search."<sup>234</sup> This provision suggests that officials must have specific reasons for conducting warrantless searches under the exigency exception. Nevertheless, the Guidelines fall short of creating a constitutionally valid option upon which housing authority officials may rely. By indicating that the authorities must have a "justification" rather than using the precise standard—probable cause—the Guidelines remain unclear. Because the Guidelines do not explicitly require probable cause for a warrantless search under the exigency exception, the Clinton Guidelines may lead officials to believe that they may perform warrantless searches whenever they deem that a valid justification exists.<sup>235</sup> This ambiguous statement of Fourth Amendment principles could result in housing authorities violating the tenants' constitutionally protected right to privacy.

#### IV. RECOMMENDATIONS

The failure of the CHA's sweeps policy to meet Fourth Amendment standards indicates that housing authorities in general may benefit from the Clinton administration's advice as to how to develop policies directed at dealing with the problem of violence in housing developments without intruding on the constitutionally protected privacy rights of tenants. In the context of searches, however, such guidance will only be effective and workable if it explicitly delineates the Fourth Amendment principles relating to searches of a home. In its current form, the Clinton Guidelines do not provide such guidance. Instead, other housing authorities following the Guidelines may find themselves in a predicament similar to the CHA, with policies that do not pass constitutional muster because they violate the privacy rights of their tenants. Therefore, this section suggests ways in which the

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233. See *supra* Part II.B.2 (outlining exigency exception).

234. Reno Letter, *supra* note 19.

235. See *supra* note 102 and accompanying text (explaining that when exigent circumstances exist, police may conduct warrantless search only if they have probable cause).



Clinton administration should revise its Guidelines to explicitly deal with identified constitutional problems.

Moreover, the Clinton administration should reevaluate its emphasis on warrantless searches as a solution to the gun problem and violence in the housing developments. Emphasis on sweep searches seems misplaced for two reasons. First, the Guidelines compel an opprobrious trade-off between the tenants' Fourth Amendment privacy rights and their interest in living in a safe environment. Tenants should not be forced to choose between being safe in their homes and their right to privacy in their homes. Second, the searches are not truly effective or practical as a long-term solution to the safety problems in the developments; rather they are mere "glitzy, superficial quick fixes" to the problem.<sup>236</sup> This section recommends that the Administration concentrate on other less intrusive measures, designed to make the developments more secure on a daily basis, that do not impinge on the tenants' constitutional rights. In addition, this section suggests that the Administration, as a means of developing long-term solutions to the problem of violence in the developments, should encourage tenants and community leaders to get involved in creating programs aimed at making the projects safer.

#### A. *Revise the Guidelines*

##### 1. *Delete language implying special needs exception*

The Clinton administration should rewrite the Guidelines, taking out the emphasis on the special needs exception to the warrant requirement. Language indicating that the options provided in the Guidelines are constitutionally acceptable because of the "extraordinary circumstances" or because a majority of tenants support them should be deleted.<sup>237</sup> As discussed above, the special needs exception to the warrant requirement is not applicable to the full-scale searches of homes that the Guidelines recommend.<sup>238</sup> Thus, the Administration should not lead housing authority officials to believe erroneously that their authority to search the homes of the tenants is

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236. Terry, *supra* note 4, at A12 (quoting Thomas P. Sullivan, attorney for tenants group supporting sweeps); *see also* Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 796 (N.D. Ill. 1994) (denouncing sweep searches as ineffective and not long-term solution to safety problem); Smith, *supra* note 6, at 540 (arguing that searches redistribute rather than eliminate crime and are actually harmful to government interest in safety); *Don't Trash Constitution in Zeal to Fight Crime*, USA TODAY, Apr. 13, 1994, at 8A (noting that sweep searches conducted during summer of 1993 produced only 24 guns and that searches had little effect on reducing violence).

237. *See* Reno letter, *supra* note 19.

238. *See supra* notes 185-91 and accompanying text.

somehow enhanced because of the problem of guns and violence in public housing, or because of the fact that many tenants support the searches.<sup>239</sup> Instead the Administration should provide housing authority officials with realistic and truly constitutionally valid options for conducting searches for guns in the projects.

2. *Clarify that signing consent clause is not a condition of receiving public housing*

The Administration should clarify its recommendation concerning the placing of consent clauses in leases. Specifically, the Administration should include explicit language in the Guidelines advising housing authorities that signing such clauses should not be a condition of receiving public housing.

Moreover, to ensure that consent is voluntary, the Guidelines should encourage housing authorities to inform tenants of their Fourth Amendment right to be free of unreasonable searches.<sup>240</sup> Although such information is not an essential element in determining whether consent is voluntary, it is relevant to this determination, and is especially appropriate where citizens are being asked to surrender their constitutional rights in advance of the actual search.<sup>241</sup> In addition, the Guidelines should recommend that housing authorities explicitly inform tenants that they do not have to sign the consent clause. Finally, the Guidelines should clearly explain to the housing authorities that a signed consent form, in the face of an explicit withdrawal of consent at the time of the search, does not authorize a warrantless search.<sup>242</sup>

3. *Recognize that searches are not administrative*

The Administration should replace the language in the Guidelines that characterizes the searches for illegal guns as administrative inspections and the language that suggests that such searches can be minimally intrusive.<sup>243</sup> Instead, the Guidelines should include a specific description of the scope of the searches and clearly indicate

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239. See *supra* text accompanying notes 188-91 (explaining why argument that making developments safe justifies warrantless searches is dangerous).

240. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (acknowledging that knowledge of right to refuse consent may be factor in determining voluntariness).

241. See *supra* Part II.B.1 (noting factor considered in "totality of circumstances" is whether consenters had knowledge of right not to be searched).

242. See *United States v. McFarley*, 991 F.2d 1188, 1191 (4th Cir. 1993) (stating that consent may be withdrawn).

243. See *supra* notes 158-67, 194-206 and accompanying text (discussing problems with characterizing sweep searches as administrative searches).

that these searches will be conducted for law enforcement purposes. For example, the Guidelines should explain that searches for guns inevitably include inspecting drawers, cabinets, refrigerators, etc., and that the weapons seized may be used as evidence in a criminal conviction.<sup>244</sup> Furthermore, the Guidelines should explain that the Fourth Amendment requires the housing authority to obtain warrants to conduct invasive law enforcement searches of homes, unless they have the consent of the individual tenants or exigent circumstances exist.

#### 4. *Clarify exigent searches section*

The Clinton administration should revise the section concerning exigency searches to include a definition of probable cause and an explanation of exigent circumstances.<sup>245</sup> For example, the Guidelines should explain that probable cause to search exists when the facts and reliable information would convince a reasonable person that the apartment in question contains the item sought, e.g., an illegal weapon. The Guidelines should also make clear that the housing authority's police must have probable cause to suspect the presence of illegal weapons for *each* apartment in which they conduct an exigency search and that exigent circumstances do not justify apartment-by-apartment sweep searches.<sup>246</sup> Furthermore, the Guidelines should spell out when exigent circumstances exist. They should explain that the housing authority's police may perform exigency searches only when time makes obtaining a warrant unworkable or impractical, i.e., when the police are in hot pursuit of a suspected criminal, when an immediate search would prevent the escape of a suspect, or when waiting would create a dangerous situation for the police, the tenants, and/or the public at large.<sup>247</sup>

#### B. *Reevaluate and Change Emphasis of Guidelines*

In attempting to find constitutionally acceptable means of "maintain[ing] order and combat[ting] gang violence in . . . housing projects,"<sup>248</sup> the Clinton administration tried to fit warrantless sweep

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244. The language that the Senate endorsed goes a long way in solving this problem. The Senate called the searches "apartment-by-apartment police searches for illegal weapons and illegal drugs." 140 CONG. REC. 4663 (daily ed. Apr. 21, 1994).

245. See *supra* note 75 and accompanying text (describing how courts define probable cause).

246. See *supra* notes 109-10 and accompanying text (noting that police may not conduct apartment-by-apartment searches without probable cause as to each individual apartment).

247. See *supra* Part II.B.2 (discussing immediate need to act as justification for warrantless search).

248. Reno Letter, *supra* note 19.

searches within the exceptions to the warrant requirement of the Fourth Amendment. In effect, the Administration implies that warrantless searches are the best way to make the housing projects safer.<sup>249</sup> The premise underlying this approach is that the searches are such an effective means of eradicating violence that the government's interest in these searches is stronger, and indeed outweighs, the tenants' constitutionally protected right to privacy. As the analysis above indicates, the constitutional barriers to warrantless sweep searches of low-income housing projects are numerous.<sup>250</sup> Furthermore, such searches are not particularly effective in eradicating or even lessening the violence in the projects.<sup>251</sup> Thus, the Administration should reevaluate its emphasis on the warrantless searches and begin concentrating on finding more effective and less intrusive means of dealing with the problem.

### 1. *Provide more effective security in developments*

The Administration should focus on how to provide better security in the housing developments to prevent guns and violence from infiltrating the housing projects in the first place. The Guidelines acknowledge this problem by noting that the "housing authority [must] gain control of building lobbies and common areas."<sup>252</sup> The Guidelines recommend that housing authorities achieve this goal by erecting fences around the buildings, conducting searches of packages and clothing, and installing metal detectors at the entrances.<sup>253</sup> Currently, however, the developments do not even have adequate security in the buildings.<sup>254</sup> The security guards watching the entrances are often underpaid and unprofessional, and are easily susceptible to intimidation by gun-carrying tenants and intruders.<sup>255</sup>

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249. See Reno Letter, *supra* note 19 (asserting that crime conditions may make unit inspections essential).

250. See *supra* Part III.B (identifying constitutional concerns created by Clinton Guidelines).

251. See *supra* note 236 and accompanying text (explaining that sweeps are not effective at solving crime problem).

252. Reno Letter, *supra* note 19.

253. Reno Letter, *supra* note 19.

254. See *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792, 796 (N.D. Ill. 1994) (explaining that lack of resources prevents CHA from providing adequate security to guard entrances and "patrol common areas in and around buildings"); *Less 'Sweep,' More Protection for CHA*, CHI. TRIB., Apr. 11, 1994, at 16 (noting that residents of CHA projects need "ongoing police protection" not sweep searches); Terry, *supra* note 4, at A12 (explaining that ACLU and attorney for tenants who support sweeps agree that providing adequate security force in developments would be more effective than sweeps).

255. See Grossman, *supra* note 68, at 22 (insinuating that CHA's housing developments lack "professional, well-trained law enforcement officers in sufficient numbers" to keep projects safe); Mark Pratt, *Instead of Sweeps, CHA Should Clean Up Its Act*, CHI. SUN-TIMES, Mar. 31, 1994, at 32 (commenting that security guards are paid little and therefore will not risk their lives attempting

The Administration, therefore, should first concentrate on getting more resources allocated to housing authorities so that the authorities can hire professional, twenty-four-hour security for the developments.<sup>256</sup>

## 2. *Encourage creative alternatives to searches*

Instead of encouraging housing authorities to persuade tenants to endorse warrantless searches, the Guidelines should invite housing authorities and tenant associations to explore other less intrusive means of dealing with the problem of guns in the projects. For example, President Clinton has recently promised that the Administration will fund programs in the developments, such as midnight basketball leagues, as a way to keep kids off the street and away from gang activity.<sup>257</sup> The Administration should follow through on this promise. In addition, the Administration should invite tenant associations and community and business leaders to work together to find ways to eradicate crime and to revitalize the developments.<sup>258</sup> President Clinton has stated that the Administration would help tenants form patrols to survey public areas and elevators.<sup>259</sup> The President should also actively encourage programs that provide incentives to gun owners to turn in their guns. Several communities

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to stop individuals from taking weapons into building).

256. Apparently HUD and the Justice Department gave \$30 million to 67 public housing developments for the purpose of "beef[ing] up security and facilities." Ana Puga, *Clinton's Visit Housing Complex; In Chicago, President Delivers Pitch for Anticrime Bill*, BOSTON GLOBE, June 18, 1994, at 53.

257. Radio Address, *supra* note 18, at 823.

258. One interesting idea for revitalizing the projects is being pursued by the Chairman of the CHA. He has been working on a plan to transform the developments by "income mixing," which is "the experimental replacing of many low-income project residents with working- and middle-class families." Stephen Braun, *New Life for Notorious High-Rises?; Forceful Housing Chief Says He Can Resurrect Chicago's Cabrini-Green Project. Vincent Lane Must Win Over Many Doubters, Including Wary Tenants*, L.A. TIMES, June 2, 1994, at A1. The idea behind this plan is that, if the developments are redeveloped or torn down and rebuilt, they will become attractive to middle-income families who are looking for low rents and high safety and maintenance standards. *Id.* These new higher-income tenants then will "provide a human safety net for their poor neighbors," becoming role models and helping lower income tenants find jobs. *Id.*; see also Jeffrey McCracken, *Trying to Build a Brighter Vision for Public Housing*, CRAIN'S SMALL BUS. DET., Jan. 2, 1995, at 21 (describing proposed plan by community activist and architecture firm to revitalize 500 unit public housing project in Detroit and to add day care services and better security).

259. Radio Address, *supra* note 18, at 823; see Calvin Baker, *A Different Beat; New Patrol Introduced in Complexes*, TIMES-PICAYUNE (New Orleans), Feb. 6, 1995, at A1 (describing New Orleans' new "Community-Oriented-Policing-Squad" as community police force focused on preventing crime in public housing developments); Darryl Fears, *Urban Spotlight*, ATLANTA J. & CONST., Nov. 26, 1994, at 6 (characterizing resident patrols of public housing developments as "godsend[s] for public officials" and explaining that although they have had some success in scaring drug dealers away, they face serious obstacles, such as being treated with suspicion by fellow tenants).

around the country have developed exchange programs in which citizens are invited to exchange guns for such items as toys, groceries, or sports or concert tickets.<sup>260</sup> Such programs have the potential to help make the developments safer by encouraging individuals to turn in guns while at the same time providing an avenue by which the local community can become actively involved in solving the safety problem.

### CONCLUSION

The tenants of the CHA projects deserve to live in a safe environment, but achieving the goal of safety should not come at the cost of eroding constitutional rights. Indeed, safety from violence and liberty from official invasions of privacy should be linked goals rather than opposing ones. Yet, the CHA and the Clinton administration have characterized the privacy interest protected by the Fourth Amendment as an impediment to obtaining safety in the developments. In doing so, they have sent a dangerous message. As Justice Marshall wrote: "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."<sup>261</sup> In an attempt to provide a quick and relatively cheap solution to the enormous and immediate safety problems faced by residents of low-income housing developments, the CHA and the Clinton administration seem willing to tell low-income tenants that, under certain circumstances, their constitutional rights are too extravagant to protect.

The Clinton administration should revise its Guidelines to articulate and meet constitutional standards. More importantly, however, the Administration must recognize that safety in the housing projects and protection of civil liberties are not mutually exclusive. In so doing, the Administration must reevaluate the wisdom of emphasizing invasive searches as a means of eradicating violence in the developments. The Administration should instead explore and adopt other, less intrusive and more effective means of making public housing safe.

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260. See Emily Adams & John Pope, *City's Offer May Smoke Out Firearms*, L.A. TIMES (Home Ed.), Apr. 7, 1994, at J3 (describing Long Beach program where citizens could exchange firearms for \$100 grocery certificates at local markets and pointing to similar programs throughout the country in which guns were exchanged for concert tickets in Los Angeles, toys in New York, and hockey tickets in Orange County); Rebecca Trounson, *Police Net 104 Guns in Ducks Ticket Swap*, L.A. TIMES (Orange County Ed.), Feb. 20, 1994, at A1 (describing success of program to exchange guns for hockey tickets).

261. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).