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NOTES

Administrative Law—Natural Gas Regulation: FERC Must Consider Actual Impact of Curtailment Plans

Since the beginning of the current shortage of natural gas,¹ the Federal Power Commission (FPC and now the Federal Energy Regulatory Commission (FERC))² has regulated not only the price of natural gas sold in interstate commerce, but also the allocation of scarce supplies of interstate gas.³ The Commission has not allocated interstate

1. See M. WILLRICH, ADMINISTRATION OF ENERGY SHORTAGES 11-14 (1976) for a statistical description of the shortage. For a discussion of the causes of the shortage, see Harrison & Formby, *Regional Distortions in Natural Gas Allocations: A Legal and Economic Analysis*, 57 N.C.L. REV. 57 (1978). In the last year or so, however, the shortage has abated somewhat, as industrial users have switched to other fuels, and as additions to reserves, prompted by higher prices for new discoveries, have increased. Berry, *Whatever Happened to that Shortage of Natural Gas?*, FORBES, Sept. 4, 1978, at 32. Gas is still less plentiful on the interstate market than on the intrastate market though, since most of the new gas was intended for the intrastate markets in which prices are not controlled. *Id.* at 33.

2. The Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (1977), transferred most of the Federal Power Commission's duties in administering the Natural Gas Act to the Federal Energy Regulatory Commission.

3. A brief description of the structure and operation of the natural gas industry is helpful. The process by which natural gas comes from the ground to the consumer's burner tip is divided into three stages: production, transmission, and local distribution. Producers in the fields sell gas to pipelines according to long-term contracts. Interstate pipelines then transmit the gas to various parts of the country and sell most of it to local distributors, who, in turn, deliver and sell the gas to ultimate consumers. See Harrison & Formby, *supra* note 1, at 59-62. About 10% of interstate pipeline sales, however, are made directly from pipelines to ultimate industrial consumers. M. WILLRICH, *supra* note 1, at 19. Depending on "the density of population and the industrial structure of regional economies," some areas are served by two or more pipelines, while others are entirely dependent on a single pipeline. Harrison & Formby, *supra*, at 60.

The scope of the Commission's jurisdiction over the natural gas industry is defined by § 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) (1976):

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Id. § 1(c), 15 U.S.C. § 717(c), expressly limiting the Commission's jurisdiction, provides in part:

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States.

gas on a nationwide basis, but has chosen instead to treat each interstate pipeline as a separate unit,⁴ and to regulate the distribution of each pipeline's supplies through the use of "curtailment plans"⁵ filed by the pipeline and approved by the FPC. Since 1973, the Commission has followed a policy of favoring "end-use" curtailment plans, which allocate each pipeline's supplies according to priorities based on the ultimate or end use to which the gas is put.⁶ The implementation of

The FPC's regulation of natural gas allocation was begun by Order No. 431, 45 F.P.C. 570 (1971), entitled "Policy with Respect to Establishment of Measures to Be Taken for the Protection of as Reliable and Adequate Service as Present Natural Gas Supplies and Capacities Will Permit."

4. Harrison & Formby, *supra* note 1, at 82.

5. A "curtailment plan" is a scheme for allocating a pipeline's supply of natural gas during times of shortage. Despite the prospect of increased supplies presented by recently enacted legislation that "deregulates" prices of newly discovered natural gas, shortages, and the accompanying need for curtailment plans, are not likely to disappear altogether.

The Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, *printed in* [1978] U.S. CODE CONG. & AD. NEWS No. 12, passed by the Senate on September 27, 1978, 124 CONG. REC. S16,265 (daily ed. Sept. 27, 1978), and by the House on October 14, 1978, 124 CONG. REC. H13,427 (daily ed. Oct. 14, 1978), will no doubt increase the supply of natural gas available to the interstate market. Prior to the 1978 Act the price of gas sold for ultimate use in the same state where it was produced (intrastate gas) was not subject to federal regulation, as is the price of gas produced for use in other states (interstate gas). *See* Natural Gas Act, § 1(b), (c), 15 U.S.C. § 717(b), (c) (1976); Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) (upholding Commission's authority to regulate wellhead prices of gas intended for sale in interstate commerce). Accordingly, producers were reluctant to invest the large sums of money necessary to develop new, more expensive, sources of gas, and the new gas that was produced was sold in the intrastate market. Moring & Wilderotter, *Natural Gas: The Policy-Pricing Matrix*, 23 ROCKY MTN. MIN. L. INSTR. 737, 748 (1977). The Natural Gas Policy Act of 1978, however, extends federal price regulation to intrastate gas, and then gradually eliminates price controls on newly discovered gas, both intrastate and interstate, allowing full price deregulation in 1985. 36 CONG. Q. WEEKLY REP. 2615-16 (1978). The prospect of higher prices for producers should encourage exploitation of new, less easily tapped sources of gas.

Just how much additional gas production the new legislation will induce remains to be seen. Estimates by the administration and independent analysts vary widely. Hunt, *Senate Approves Natural Gas Bill, 57-42, to Rescind New-Find Controls by '85, Regulate Intrastate Prices*, Wall St. J., Sept. 28, 1978, at 2, col. 2. The burdensome complexity of the new bill's regulatory scheme may discourage some producers from attempting to find new gas. Sheils, *Will the Gas Bill Help?*, NEWSWEEK, Oct. 2, 1978, at 103. In any event, full deregulation of the prices of most newly discovered gas will not come until 1985. In the interim, supplies may remain sufficiently low to require curtailment. That the bill's authors foresaw the possibility of continued shortages is indicated by the Act's provision in title III for special presidential authority during natural gas emergencies, and in title IV for the establishment of certain curtailment priorities. *See* note 92 *infra*.

6. *See* North Carolina v. FERC, 584 F.2d 1003, 1007 (D.C. Cir. 1978). Theoretically, as the pipeline's supply decreases, service to successively higher-priority uses is curtailed. *Id.* Curtailment into a given priority category does not begin until service to all lower categories has been completely curtailed. *Id.* at 1008.

The Commission's ability to ensure that curtailment of service to ultimate users actually proceeds in conformity with the priorities set forth in an end-use plan, however, is significantly circumscribed by the limitations on the Commission's jurisdiction. Since its jurisdiction extends only to the sale and transportation of natural gas in interstate commerce, *see* 15 U.S.C. § 717(b) (1976), *quoted in* note 3 *supra*, the Commission has no authority to regulate the allocation of gas by local distributors to ultimate or end users. M. WILLRICH, *supra* note 1, at 46-47. Instead, the Commis-

end-use curtailment plans on a strictly pipeline-by-pipeline basis has caused much more severe curtailment in some regions (most notably the Southeast, and North Carolina and South Carolina in particular) than in others.⁷ In *North Carolina v. FERC*,⁸ however, the United States Court of Appeals for the District of Columbia Circuit determined that two major features of an end-use curtailment plan were defective because they tended to result in regionally discriminatory allocation and because they rendered an accurate assessment of the plan's actual impact impossible.⁹ The court held that in drawing the curtailment plans the Commission must determine and consider the actual impact of the plans on ultimate consumers.¹⁰ To assess a plan's actual impact, the Commission must collect and consider information about recent changes in the end uses to which gas supplied to the pipeline's customers¹¹ is put by ultimate consumers¹² and in the relative supplies available to each customer from other pipelines.¹³ This decision may mean that in the future, supplies of natural gas will be more

sion's curtailment plans control only the allocation of gas from interstate pipelines to their immediate customers—either local distributors or industrial users who purchase directly from the pipeline. *Id.* Except in the case of directly purchasing end users, then, the "end-use" character of an end-use curtailment plan lies not in the actual control of the use of gas at the burner tip, but in the allocation of the pipeline's supply to local distributors according to each distributor's "end-use profile" or "mix" of end uses to which gas purchased by the distributor's customers was put during some base period. *See* 584 F.2d at 1007. There is no guarantee, however, that the state agencies that regulate local distribution will follow the priorities set forth in a curtailment plan ordered into effect by the Commission. M. WILLRICH, *supra*, at 46-47.

A "pro rata," in contrast to end-use, curtailment plan, allocates the pipeline's supply according to the contractual entitlements of each of the pipeline's customers. 584 F.2d at 1007. The amount of gas for which each customer has contracted is reduced by the same percentage as that by which the supplies of the entire pipeline system have been reduced.

The Commission announced its preference for end-use curtailment plans in Order No. 467, 38 Fed. Reg. 1503 (1973) (partially codified as amended at 18 C.F.R. § 2.78 (1977)). For a discussion of the order, see notes 34-36 and accompanying text *infra*.

7. Harrison & Formby, *supra* note 1, at 85-86.

8. 584 F.2d 1003 (D.C. Cir. 1978).

9. *Id.* at 1012-14, 1014 n.22; *North Carolina v. FERC*, No. 76-2102 (D.C. Cir. Aug. 29, 1978) (order amending opinion of July 13, 1978, by adding footnote 20). The court's order of Aug. 29, 1978, amended *North Carolina v. FERC*, No. 76-2102 (D.C. Cir. July 13, 1978) by ordering the addition of new footnote 20 on page 21 of the slip opinion and renumbering old footnotes 20-34 as 21-35. The slip opinion was reprinted in 584 F.2d at 1003 prior to this renumbering. In this Note citations to *North Carolina v. FERC* notes 20-34 reprinted in 584 F.2d are to the notes as designated before renumbering. New note 20 is hereinafter cited as Slip op. at 21 n.20 (as amended Aug. 29, 1978).

10. 584 F.2d at 1015.

11. Throughout this Note, the term "customer," unless otherwise indicated, is intended to refer either to local distributors or to industrial end-users who purchase their gas directly from an interstate pipeline.

12. Slip op. at 21 n.20 (as amended Aug. 29, 1978).

13. 584 F.2d at 1013-15.

evenly allocated among the various regions of the country than at present. Nevertheless, regional distortions are likely to remain.

North Carolina v. FERC arose when certain customers of Transcontinental Pipe Line Corporation (Transco)¹⁴ sought judicial review of a permanent curtailment plan for the Transco system ordered into effect by FPC Opinion No. 778.¹⁵ Opinion 778 established nine priority categories of end use, ranging from residential and small commercial use (first in priority and last to be curtailed) to use of large amounts of gas as boiler fuel (last in priority and first to be curtailed).¹⁶ The

14. Transco buys natural gas from producers in the Gulf states and transmits it by pipeline to customers in Alabama, Georgia, South Carolina, North Carolina, Virginia, Maryland, Pennsylvania, New Jersey, and New York. All but one of Transco's customers "are wholesale customers—public utilities and municipalities which purchase the gas for resale to ultimate customers." *Id.* at 1008. As a company engaged in the transportation and sale for resale of gas in interstate commerce, Transco is subject to the jurisdiction of the Commission under § 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) (1976), *quoted in note 3 supra*.

15. Transcontinental Gas Pipe Line Corp., Opinion No. 778, 10 FED. POWER SERV. (M-B) 5-1045 (1976). Transcontinental Gas Pipe Line Corp., Opinion No. 778-A, 11 FED. POWER SERV. (M-B) 5-177 (1976), made only slight modifications to Opinion No. 778.

The proceedings leading to Opinion 778 began in 1971 when, in response to growing shortages and to FPC Order No. 431, 45 F.P.C. 570 (1971), Transco filed a permanent curtailment plan with the FPC. 584 F.2d at 1009. Following the Commission's direction, Transco filed another permanent plan in 1973 that was consistent with the end-use guideline set forth in FPC Order No. 467, 49 F.P.C. 85 (1973). 584 F.2d at 1009. Final decision on a permanent plan was delayed for several years, however. During the intervening period the short supplies of Transco's system were distributed according to a series of interim settlement agreements arrived at by negotiation among Transco and its customers, and either approved by the FPC or ordered into effect by the Court of Appeals for the District of Columbia Circuit. *Id.* at 1008. The first two interim settlement agreements were based on pro rata curtailment, the third on 50% pro rata and 50% end-use curtailment, and the fourth and final on an end-use plan with two priority categories. *Id.* at 1008-09.

16. The priority categories set forth in Opinion 778 are:

- (1) Residential and small commercial requirements less than 50 Mcf on a peak day.
- (2) Large commercial requirements of 50 Mcf or more on a peak day, except for commercial boiler fuel requirements above 300 Mcf/d; industrial requirement for plant protection, feedstock and process needs; and storage injection requirements.
- (3) All other industrial requirements below 300 Mcf/d.
- (4) Industrial requirements not specified in (2) (6) (7) (8) and (9) of more than 300 Mcf/d but less than 3000 Mcf/d.
- (5) Industrial requirements not specified in (2) (6) (7) (8) and (9) of more than 3000 Mcf/d.
- (6) Boiler fuel requirements of more than 300 Mcf/d but less than 1500 Mcf/d.
- (7) Boiler fuel requirements of 1500 Mcf/d or more but less than 3000 Mcf/d.
- (8) Boiler fuel requirements of 3000 Mcf/d or more but less than 10,000 Mcf/d.
- (9) Boiler fuel requirements of 10,000 Mcf/d or more.

10 FED. POWER SERV. (M-B) at 5-1091 n.63. "Mcf/d" means one thousand cubic feet per day. Opinion 778 defined "process," "feedstock," and "plant protection" as follows:

Process refers to those industrial uses for which alternate fuels are not technically feasible. In general, this means those uses requiring the precise temperature controls and flame characteristics of gas (including propane and other gaseous fuels). Feedstock refers to the industrial use of gas as a raw material, that is, for its chemical not thermal, properties. Plant protection refers to the industrial use of gas needed to prevent physical

amount of gas available to each resale distributor is determined by the "end-use profile" or "mix" of end uses to which gas purchased by the distributor's customers is put.¹⁷ This profile is, however, not derived from current uses, but rather from customer uses during the "base period," May 1, 1972, through April 30, 1973.¹⁸ According to the plan, Transco customers who are served by one or more other pipelines are allocated an amount of gas for each of their priority uses that is proportionately equal to the amount of gas supplied to them by Transco out of their total supply during the base period.¹⁹ In other words, if local distributor Company A received 40% of its total supply from Transco and 60% from another pipeline during 1972-1973, 40% of each of Company A's priorities would be assigned to Transco.²⁰ Thus, if at some point in the future the available supply on the Transco system were sufficient to allow service to only the first three priorities, Company A would be entitled to receive from Transco 40% of its requirements for those three priorities.²¹

The primary issue before the court of appeals in *North Carolina v. FERC* was whether the plan ordered into effect by Opinion 778 resulted in undue or unreasonable discrimination against certain localities or classes of service, thereby violating section 4(b) of the Natural

harm to plant facilities and/or danger to plant personnel, but it is limited to protection which cannot be attained through the use of alternate fuels (again propane and other gaseous fuels are not considered alternate fuels).

Id. at 5-1084. Use of gas for "boiler fuel" "[is] considered to be natural gas used as a fuel for the generation of steam or electricity, including utilization of gas turbines for the generation of electricity." 18 C.F.R. § 2.78 (1977).

17. 10 FED. POWER SERV. (M-B) at 5-1067. The court in *North Carolina v. FERC* explained this feature of an end-use plan as follows:

[T]he extent to which a pipeline's distributor customers are curtailed depends on the "mix" of each distributor's own customers. Distributors who have a large percentage of high priority customers theoretically will not be curtailed as deeply as those who have a small percentage of such customers, and distributors who have a large percentage of low priority customers will be curtailed more sharply than those who have a small percentage of such customers.

584 F.2d at 1007.

18. 10 FED. POWER SERV. (M-B) at 5-1067.

19. See 584 F.2d at 1010, 1013-14.

20. See *id.*

21. Two additional elements of Opinion 778 should be noted. First, the Commission refused to consider the merits of a provision by which those customers curtailed less than the average level of curtailment for the Transco system would pay monetary compensation to those customers curtailed more than the average level. 10 FED. POWER SERV. (M-B) at 5-1073, 5-1103. The Commission maintained that it had no authority to enforce such a provision. *Id.* at 5-1103; see 584 F.2d at 1015-16. Second, Opinion 778 included an "emergency high priority exemption from curtailment," available to distributors under certain conditions. 10 FED. POWER SERV. (M-B) at 5-1093 to 94.

Gas Act.²² Since the record demonstrated that the plan wrought regionally discriminatory results,²³ the legality of Opinion 778 depended on whether there was sufficient justification for those results.²⁴ Declaring that the "discrimination resulting from an end-use plan can be justified only to the extent that the plan *actually does protect high-priority uses from curtailment ahead of low-priority uses*," the court held that the plan adopted in Opinion 778 could not be said to be just and reasonable, "*in light of the Commission's failure to make findings as to the impact the plan would actually have on ultimate consumers.*"²⁵ According to the court, two features of the plan precluded an accurate assessment of the plan's impact: first, the end-use data on which the plan was based was approximately six years old,²⁶ and second, the plan failed to take into account the "partial/full requirements phenomenon"²⁷—a situation resulting from the fact that some of Transco's customers ("partial-requirements customers") are served by one or more additional pipelines that have experienced considerably less severe shortages than Transco in the years since the 1972-1973 base period, while those customers ("full-requirements customers") supplied exclusively by Transco have borne the full weight of the Transco system's deep curtailment.²⁸

22. 584 F.2d at 1010-12. Section 4(b) of the Natural Gas Act, 15 U.S.C. § 717c(b)(1976) provides:

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

23. The court stated:

A study showed that if an Opinion 778-type plan had been implemented in 1974-1975 it would have resulted in levels of curtailment among Transco's distributors ranging from 9.6% to 39.5% on a state-by-state basis On a regional basis, curtailment levels would have ranged from 20.3% in the Northeast [District of Columbia, Maryland, Delaware, Pennsylvania, New Jersey, New York] to 38.4% in the Southeast [South Carolina, North Carolina, Virginia]. . . .

584 F.2d at 1011 (footnote omitted).

In the 1976-1977 heating season, during which the Opinion 778 plan was in effect on the Transco system, regional distortions were pronounced. Curtailment of total natural gas requirements was at the level of 66.9% in South Carolina and 52.9% in North Carolina, while the corresponding figures for New York and Pennsylvania were 9.5% and 11.9%. Harrison & Formby, *supra* note 1, at 84.

24. 584 F.2d at 1012.

25. *Id.* (emphasis in original).

26. *Id.* at 1012-13.

27. *Id.* at 1013-14, 1014 n.22.

28. The court did not vacate Opinion 778. Instead, it allowed the Opinion 778 plan to remain in effect on a temporary basis until the Commission has had a reasonable time to consider the issues remanded to it by the court of appeals. *Id.* at 1017.

Development of the FPC's policies of curtailment began in 1971 with the promulgation of Order No. 431,²⁹ directing pipelines expecting shortages during the upcoming winter to submit curtailment plans to the Commission. Judicial approval of the FPC's authority to regulate curtailment by interstate pipelines came soon thereafter in *FPC v. Louisiana Power & Light Co.*,³⁰ in which the Supreme Court held that the Commission's power over curtailment derives from its jurisdiction over the transportation of natural gas in interstate commerce.³¹ The Court went on to say that the Commission must have broad powers over curtailment programs in order to carry out the duties associated with its jurisdiction over transportation of interstate gas.³² The standard by which curtailment plans are to be evaluated, the Court said, is section 4(b) of the Natural Gas Act.³³

Its power to regulate curtailment thus established, the Commission proceeded to formulate a policy, announced in Order No. 467, of favoring curtailment plans based on end use rather than on contractual entitlements.³⁴ The major premise behind Order No. 467 (and behind all

Additionally, the court ordered the Commission to consider the inclusion of a compensation feature in the permanent plan. *Id.* Despite the Commission's contention to the contrary, the court expressly held that the Commission does have the power to order, as part of a curtailment plan, that those customers whose services are curtailed less than the system-wide average compensate those whose services are curtailed more than the system-wide average. *Id.* at 1015-17.

29. 45 F.P.C. 570 (1971).

30. 406 U.S. 621 (1972).

31. *Id.* at 636-41.

32. *Id.* at 642.

33. *Id.* at 642-43. *FPC v. Louisiana Power & Light Co.* also included a discussion of the procedures available to the Commission for implementing curtailment plans. *Id.* at 643-45. As the Court pointed out, the Commission could have chosen to proceed in accordance with § 5(a) of the Natural Gas Act, 15 U.S.C. § 717d(a) (1976), which authorizes the Commission to establish on its own initiative "the just and reasonable rate, charge, classification, rule, regulation, practice or contract to be thereafter observed and in force," after the Commission has held a hearing and has determined that the existing rate, charge, classification, etc. is "unjust, unreasonable, unduly discriminatory, or preferential." Since hearings can be lengthy, the use of § 5(a) for curtailment proceedings can be cumbersome. Consequently, the Court approved the FPC's decision to proceed under § 4(c)-(e) of the Act, 15 U.S.C. § 717c(c)-(e) (1976). Under § 4, a pipeline submits its own curtailment plan which can be accepted immediately or suspended for as long as five months pending hearings. The burden of proving the reasonableness and fairness of the plan is on the pipeline. See M. WILLRICH, *supra* note 1, at 49-54.

34. 38 Fed. Reg. 1503 (1973) (partially codified as amended at 18 C.F.R. § 2.78 (1977)). Order No. 467-A, 38 Fed. Reg. 2170 (1973) (partially codified as amended at 18 C.F.R. § 2.78 (1977)), added to Order No. 467 a paragraph directing pipelines to include in their curtailment plans provisions under which pipelines could "respond to emergency situations (including environmental emergencies) during periods of curtailment where supplemental deliveries are required to forestall irreparable injury to life or property." *Id.* Order No. 467-B, 38 Fed. Reg. 6384 (1973) (partially codified as amended at 18 C.F.R. § 2.78 (1977)), amended the list of priority classifications set forth in Order 467. Order No. 467-C, 39 Fed. Reg. 12984 (1974) (partially codified at 18 C.F.R. § 2.78 (1977)), added a section setting forth the minimal information required in a petition

end-use curtailment plans) is that in times of shortage the supply of gas should be allocated according to a hierarchy of priorities.³⁵ The priorities set forth in Order 467 represent the Commission's attempt to ensure the safety of residential and small commercial customers and to prevent gas from being put to inefficient uses or to uses for which alternate fuels could be substituted relatively easily.³⁶

Not long after the promulgation of Order No. 467 the FPC indicated a further preference for "fixed-base periods" over "rolling-base

for relief from curtailment. Unless otherwise indicated, all of the above orders will hereinafter be referred to collectively as Order No. 467.

The priority categories set forth in Order No. 467-B were:

- (1) Residential, small commercial (less than 50 Mcf on a peak day).
- (2) Large commercial requirements (50 Mcf or more on a peak day), firm industrial requirements for plant protection, feedstock and process needs, and pipeline customer storage injection requirements.
- (3) All industrial requirements not specified in paragraph (a) (2), (4), (5), (6), (7), (8), or (9) of this section.
- (4) Firm industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.
- (5) Firm industrial requirements for large volume (3,000 Mcf or more per day) boiler fuel use where alternate fuel capabilities can meet such requirements.
- (6) Interruptible requirements of more than 300 Mcf per day, but less than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.
- (7) Interruptible requirements of intermediate volumes (from 1,500 Mcf per day through 3,000 Mcf per day), where alternate fuel capabilities can meet such requirements.
- (8) Interruptible requirements of more than 3,000 Mcf per day, but less than 10,000 Mcf per day, where alternate fuel capabilities can meet such requirements.
- (9) Interruptible requirements of more than 10,000 Mcf per day, where alternate fuel capabilities can meet such requirements.

Order No. 467-B, 38 Fed. Reg. 6384, 6386 (1973).

"Firm" service is "[s]ervice from schedules or contracts under which seller is expressly obligated to deliver specific volumes within a given time period and which anticipates no interruptions, but which may permit unexpected interruption in case the supply to higher priority customers is threatened." 18 C.F.R. § 2.78 (1977). "Interruptible" service is "[s]ervice from schedules or contracts under which seller is not expressly obligated to deliver specific volumes within a given time period, and which anticipates and permits interruption on short notice, or service under schedules or contracts which expressly or impliedly require installation of alternate fuel capability." *Id.*

The curtailment plan prescribed by Opinion 778 did not distinguish between firm and interruptible service. 10 FED. POWER SERV. (M-B) at 5-1189, 5-1091.

35. "We are impelled to direct curtailment on the basis of end use rather than on the basis of contract simply because contracts do not necessarily serve the public interest requirement of efficient allocation of this wasting resource. In time of shortage, performance of a firm contract to deliver gas for an inferior use, at the expense of reduced deliveries for priority uses, is not compatible with consumer protection."

Order No. 467, 38 Fed. Reg. 1503 (1973) (quoting Arkansas La. Gas. Co. 49 F.P.C. 53 (1973), *remanded for further consideration sub. nom.* Arkansas Power & Light Co. v. FPC, 517 F.2d 1223 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976)).

36. For list of priorities, see note 34 *supra*.

periods.”³⁷ A plan that uses a fixed-base period allocates gas according to each distributor’s end-use profile during a fixed historical period, whereas a plan using a rolling-base period allocates gas according to data that is periodically updated to reflect changes in the distributor’s end-use profile.

Although the employment of end-use principles in curtailment plans has received favorable judicial response,³⁸ courts have refused to allow the Commission automatically to apply the priorities set forth in Order No. 467 to individual pipelines. Instead, courts have required the Commission to demonstrate in each curtailment proceeding the reasons why the priorities set forth in Order No. 467 should be applied to the particular pipeline under consideration. In *Arkansas Power & Light Co. v. FPC*,³⁹ for example, the court rejected the Commission’s decision to place firm service in a higher priority category than interruptible service.⁴⁰ Although Order No. 467 embodied the distinction between firm and interruptible service,⁴¹ the court disapproved the employment of the distinction where the validity of its application to the curtailment plan under consideration was not supported by substantial evidence in the record.⁴²

In *Consolidated Edison Co. v. FPC (Con Ed I)*,⁴³ a case which foreshadowed the decision in *North Carolina v. FERC*, the same court of

37. El Paso Natural Gas Co., Opinion No. 697, 1 FED. POWER SERV. (M-B) 5-164 (1974); see Muys, *Federal Power Commission Allocation of Natural Gas Supply Shortages: Prorating, Priorities and Perplexity*, 20 ROCKY MTN. MIN. L. INST. 301, 333 (1975).

38. See *American Smelting & Ref. Co. v. FPC*, 494 F.2d 925 (D.C. Cir.), cert. denied, 419 U.S. 882 (1974).

39. 517 F.2d 1223 (D.C. Cir. 1975), cert. denied, 424 U.S. 933 (1976).

40. *Id.* at 1233.

41. See note 34 *supra*.

42. 517 F.2d at 1233. Similarly, in *American Smelting & Ref. Co. v. FPC*, 494 F.2d 925, 945-46 (D.C. Cir.), cert. denied, 419 U.S. 882 (1974), the court refused to accept the unsupported proposition that “boiler fuel uses of natural gas are per se inferior to all other uses, for purposes of curtailment, regardless of the particular circumstances.” Accordingly, the court remanded the case so that the Commission could state its reasons for assigning boiler fuel use on this particular pipeline to the lowest priority categories. *Id.* *American Smelting* and *Arkansas Power* are consistent with the holding in *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33 (D.C. Cir. 1974), that Order No. 467 is a general statement of policy—not a binding rule—and that it is not a replacement for the process of pipeline-by-pipeline adjudication of curtailment plans. See M. WILLRICH, *supra* note 1, at 88-92, 105 n.51.

Order No. 467 has strongly influenced curtailment plans, however. Technically, pipelines are free to file curtailment plans that do not conform to Order No. 467. *Id.* at 90. By expressing a strong preference for plans modeled after Order No. 467, though, the Commission has exerted considerable pressure on the pipelines to file conforming plans. *Id.* Furthermore, the threat of liability for breach of contract with their customers may be an incentive for pipelines to file plans consistent with Order No. 467, since “Commission approval of necessary curtailments is an effective barrier to liability where the pipeline was not in some way responsible for the shortage.” *Id.*

43. 511 F.2d 372 (D.C. Cir. 1974) (per curiam).

appeals imposed on the Transco system a temporary negotiated settlement agreement instead of a plan modeled on Order 467.⁴⁴ The court gave as one of its reasons: "the 467 plan does not take into account the fact that some customers are totally dependent on Transco while others purchase substantial quantities from pipelines supplying a much higher percentage of contract demand."⁴⁵ The opinion in *Con Ed I* thus cursorily raised the partial/full requirements issue central to *North Carolina v. FERC*.⁴⁶

Except for *Con Ed I*, most of the cases⁴⁷ criticizing the Commission's curtailment policy directed their criticism primarily at the FPC's choice of certain end-use priorities for the particular pipeline under consideration. *North Carolina v. FERC*, however, cast doubt on the whole of the Commission's curtailment policy by demonstrating that the end-use plans approved by the Commission are likely to fail to accomplish their purpose: the protection of high-priority users ahead of low-priority users.⁴⁸ Since the opinion questions the legality of any end-use plan that does not achieve results consistent with end-use theory,⁴⁹ *North Carolina v. FERC* will no doubt require the Commission to engage in a thorough reevaluation of its curtailment policy. Two well-established features of that policy—the use of fixed-base periods and the disregard of the partial/full requirements phenomenon—are now particularly suspect, since the court determined that these features, when incorporated into an end-use plan, are very likely to produce results inconsistent with end-use theory.⁵⁰

As the court observed in *North Carolina v. FERC*, the vice inherent in a plan that employs a fixed-base period is easily perceived.⁵¹ The achievement of true end-use allocation in 1978 is highly unlikely if gas is allocated, as required by Opinion 778, according to data from 1972-

44. *Id.* at 381.

45. *Id.* at 380.

46. In *Consolidated Edison Co. v. FPC*, 512 F.2d 1332 (D.C. Cir. 1975) (*Con Ed II*), the court reinforced, indirectly, its earlier criticism of the Commission's failure to take into account the partial/full requirements phenomenon. Citing that portion of *Con Ed I* in which it had raised the partial/full requirements issue, the court stated that before a 467-type plan went into effect on the Transco system, the Commission should consider the problems raised in recent judicial evaluation of the application of 467 priorities to individual problems. *Id.* at 1347 & n.90.

47. *E.g.*, *Arkansas Power & Light Co. v. FPC*, 517 F.2d 1223 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976); *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33 (D.C. Cir. 1974); *American Smelting & Ref. Co. v. FPC*, 494 F.2d 925 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974); see notes 38-42 and accompanying text *supra*.

48. 584 F.2d at 1012-14.

49. *Id.*

50. *Id.* at 1012.

51. *Id.*

1973.⁵² Since each distributor's mix of end uses has probably changed in the past six years, the use of such a distant fixed-base period would constitute a serious impediment to an accurate assessment of the curtailment plan's actual impact at adoption.⁵³

The significance of *North Carolina v. FERC's* criticism of fixed-base periods lies not in the court's express statements on the subject, but in the implications of its reasoning. The court expressly stated that plans using fixed-base periods are not illegal per se.⁵⁴ Furthermore, the court did not order the Commission to employ rolling-base periods in its end-use plans. Instead, the court required the Commission simply to collect and examine relatively current end-use data.⁵⁵ In explaining the reason why this current data must be made available, though, the court implied that, while plans using fixed-base periods were not illegal per se, most such curtailment plans would indeed be found illegal. The Commission must have relatively current end-use data available, said the court, so that the Commission can determine whether an end-use plan, regardless of the type of base period it employs, would actually produce true end-use results at the time of its adoption.⁵⁶ This determination of the plan's actual impact is necessary, in turn, for the final determination of the plan's legality, because, the court declared, the discrimination resulting from an end-use plan is justified only insofar as the plan produces true end-use results.⁵⁷ The implication of the court's reasoning is that if current end-use data shows that the use of a fixed-base period would create anti-end-use discrimination (that is, a situation in which, contrary to the principles of end use, some of the pipeline's customers were forced to curtail higher priority uses while other customers of the same pipeline were still serving lower priority uses), then the plan must be rejected, and a plan based on current end-use data, or a plan not based on end-use at all, adopted instead. Since the use of fixed-base periods is likely to produce results contrary to end-use principles,⁵⁸ end-use plans employing fixed-base periods are likely to be illegal.

One loophole through which such plans might nevertheless escape invalidation is found in the court's intimation that if other policies

52. *Id.* at 1012-13.

53. *Id.* at 1012-13 & slip op. at 21 n.20 (as amended Aug. 29, 1978).

54. Slip op. at 21 n.20 (as amended Aug. 29, 1978).

55. *Id.*

56. *Id.*

57. 584 F.2d at 1012 & slip op. at 21 n.20 (as amended Aug. 29, 1978).

58. See 584 F.2d at 1012 & slip op. at 21 n.20.

which the Commission seeks to further by way of a curtailment plan outweigh the need to eliminate the discriminatory anti-end-use impact of a plan that employs a fixed-base period, the fixed-base period may be retained as part of the plan.⁵⁹ The other or "collateral" policies to which the Commission wishes to accommodate its end-use plans, include "(1) encouraging conservation, (2) discouraging load growth, and (3) stimulating supplemental supplies."⁶⁰ The court offered no guidance, however, about the weight to be accorded each of these policies. Furthermore, the court left some question about the manner in which the "accommodation" or "balancing" process is to be carried out. Presumably, the degree of anti-end-use discrimination (determined from

59. 584 F.2d at 1014 n.27. These other policies, though, are to be considered only *after* the actual impact of the plan, has been assessed. *Id.*

60. *Id.* The term "supplemental supplies" as used in Opinions 778 and 778-A refers not to supplies of natural gas from other interstate pipelines, but to substitute supplies—liquefied natural gas (LNG), synthetic natural gas (SNG) storage, or propane-air injection—procured by local distributors through their own efforts. Transcontinental Pipe Line Corp., Opinion No. 778-A, 11 FED. POWER SERV. (M-B) 5-177, 5-190 (1976).

The idea that a fixed-base period might further the Commission's policy of "stimulating supplemental supplies" rests on the Commission's concern that a rolling-base period "would act as a disincentive to Transco's resale customers [distributors] attaching new supplemental supplies and as a penalty to those resale customers which have already attached supplemental supplies." 10 FED. POWER SERV. (M-B) at 5-1097. This argument is based on the assumption that, if a rolling-base period were used, some distributors would "upgrade their requirements," *id.*, presumably by extending service to more ultimate consumers in higher priority categories. These distributors would then be entitled to a proportionately greater share of the pipeline's supply, even though they had not made any efforts on their own to obtain supplemental supplies. *Id.* Since a proportionately smaller amount of gas would then be available to the rest of the pipeline system, those distributors who had obtained supplemental supplies would then be forced to use those supplies to make up the shortfall. The result, the Commission contends, would be to shift supplemental supplies from the more industrious and innovative distributors to those distributors who had made no efforts to obtain such supplies on their own. *Id.*

The Commission also believes that the use of a rolling-base period, by allowing distributors to take on more high priority consumers (thereby upgrading the distributors' requirements) without securing additional supplies from sources other than Transco, would cause the limited supply on the Transco system to be spread over a growing number of high priority consumers. *Id.* The result, the Commission fears, would be increased curtailment into high priorities and perhaps into priority one. *Id.* Although persuasive when considered alone, this argument is fundamentally inconsistent with end-use theory.

For example, the Commission has made it clear that the objective of its end-use policy is to drive low priority industrial uses to alternative fuels. It would seem to follow that a distribution customer ought to be able to reallocate the gas used by the low priority industrial customers to the preferred higher priority uses. This cannot happen, however, if future deliveries are forever locked in to the historic end-use pattern of the base period existing before the effect of curtailment was felt.

Muys, *supra* note 37, at 333-34. In view of the FPC's opposition to the use of rolling-base periods, it appears that the objective of the Commission's end-use policy is to drive lower priority industrial users to alternate fuels *and* to discourage distributors from reallocating the gas saved thereby. By seeking to accomplish such multiple objectives, the Commission, as the court of appeals explained, attempts to accommodate its end-use curtailment plans to the collateral policies of encouraging conservation and discouraging load growth. 584 F.2d at 1014 n.27.

an assessment of actual impact on ultimate consumers) resulting from a plan with a fixed-base period is to be weighed, in each case, against the potential benefit to collateral policies from the use of the same plan. Language in the opinion,⁶¹ however, suggests that rather than permitting a plan's anti-end-use discrimination to be justified in some instances by collateral policies, the court would not allow such discrimination to be so justified if the collateral policies sought to be effectuated by the plan could be carried out by a nondiscriminatory plan. If this language is controlling, then the balancing of collateral policies against anti-end-use discrimination never comes into play.⁶² This closes the loophole of collateral policies and makes it all the more unlikely that end-use plans incorporating discriminatory features (such as fixed-base periods) would survive judicial scrutiny.

Prior to *North Carolina v. FERC*, and except for brief mention in *Con Ed I*,⁶³ the issue whether the Commission should take into account post-base period changes in the relative levels of curtailment on other pipelines in order to avoid the partial/full requirements phenomenon had been given little judicial consideration. The issue arose in *North Carolina v. FERC* because North Carolina customers (full-requirements customers) are served only by Transco, a pipeline that has encountered very severe shortages since the 1972-1973 base period. Most of Transco's other customers (partial-requirements customers), in contrast, are served by one or more other pipelines that have experienced shortages of far less severity in the last several years than has Transco.⁶⁴ As the court found, a plan for one pipeline that does not take into account post-base period changes⁶⁵ in the relative levels of

61. "The practical effect of the Commission's actions is to convert what it has labeled an 'end-use' plan into a conservation, supply-incentive plan; hence, the discriminatory end-use features of the plan become arbitrary because the conservation, supply-incentive policies can be achieved through a non-discriminatory plan." 584 F.2d at 1014 n.27.

62. This analysis was suggested in Letter from Jeffrey L. Harrison, Associate Professor, Bates College of Law, The University of Houston, to Christopher Moore (Sept. 19, 1978) (copy on file in office of *North Carolina Law Review*).

63. See text accompanying notes 43-50 *supra*.

64. 584 F.2d at 1013-14.

There are a number of reasons for the wide disparity in curtailments between pipelines. The primary source of supply of interstate gas is the long-term contracts between pipeline companies and natural gas producers for gas in a particular field The pipeline companies with serious curtailments today did not sign contracts for extra reserves in the 1960's, did not vertically integrate into offshore production, and were unlucky enough to have substantial contracts with producers in fields that were exhausted at an unexpectedly early date.

Harrison & Formby, *supra* note 1, at 82-83 (footnotes omitted).

65. Only the relative levels of curtailment on different pipelines *in the years since the 1972-1973 base period* are in issue. The amounts of gas supplied to each partial-requirements customer

curtailment on other pipelines serving the pipeline's partial-requirements customers can have the result of forcing its full-requirements customers to curtail into high priorities, while partial-requirements customers are still serving lower priorities.⁶⁶ Such a result is obviously contrary to the principles of end-use curtailment.⁶⁷

The impact the court's decision will have on the partial/full requirements issue is only implicit in the court's reasoning. The court claimed that it was not requiring that the Commission "*actually allocate* supplies to partial-requirements customers in relation to the levels of curtailment on alternative pipelines," but was merely directing the Commission to consider the partial/full requirements phenomenon in order to assess the actual impact of the plan.⁶⁸ The implication of the court's reasoning, however, is that if an allocation plan that does not account for curtailment on other pipelines causes discrimination among members of the same class of end-users, then the plan will be declared invalid. Nevertheless, the court suggested that the discrimination resulting from disregard of the partial/full requirements phenomenon might be justified in some cases by the same collateral policies that might also justify the use of fixed-base periods.⁶⁹ As with the base pe-

by each of its supplier-pipelines *during the base period* were taken into account in the Opinion 778 plan. See 584 F.2d at 1010.

66. *Id.* at 1013-14.

67. The anti-end-use vice inherent in the Commission's failure to take account of the fact that some of Transco's customers are served by more than one pipeline can be illustrated by the following hypothetical. Company A and Company B have identical requirements by priority. If Company A obtained half of its gas from Transco during the 1972-1973 base period and half from Pipeline X, Transco would be assigned half of each of Company A's priorities. If Transco curtailed at 40% and Pipeline X at 20%, Company A's curtailment would be 30% of its total supply. If Company B were supplied entirely by Transco, it would be curtailed 40%. If the priority 1 and 2 requirements to each were 65% of its total requirements, Company A would be able to supply all of its priority 1 and 2 needs and have 5% of its total supply available for lower priorities. Company B, on the other hand, would have to curtail its priority 2 market by 5% of its total supply (which may be substantially more than 5% of just its priority 2 market). The effect then is that Company B must curtail a portion of its priority 2 market in order that Company A can sell inexpensive pipeline gas to its priority 3 market. Clearly in such a situation the whole concept of protecting high priority end users is violated.

Id.

68. *Id.* at 1014 n.22.

69. *Id.* at 1014 n.27. For a list of collateral policies, see text accompanying note 60 *supra*. Thus, although a plan might create discrimination because it does not allocate gas to a pipeline's partial-requirements customers in accordance with the relative levels of curtailment on alternate pipelines, such a plan might still be valid, if the resulting discrimination were outweighed by collateral policies (encouraging conservation, attachment of supplemental supplies, and discouraging load growth).

The court's suggestion that the Commission sought to justify its failure to take into account supplies from other pipelines by invoking collateral policies, 584 F.2d at 1014 n.27, is somewhat misleading. The Commission had these policies in mind when it decided not to use a rolling-base period, Transcontinental Gas Pipe Line Corp., Opinion No. 778, 10 FED. POWER SERV. (M-B) at

riod issue, however, there remains some uncertainty about the weight that these collateral policies are to be accorded when balanced against the discrimination resulting from a plan that fails to consider levels of curtailment on other pipelines.⁷⁰

Conspicuously absent from the opinion is any discussion of the "inter-pipeline supply allocation" that may result from a curtailment plan that allocates a particular pipeline's gas to its partial-requirements customers in relation to the levels of curtailment on other pipelines serving those customers.⁷¹ There is a question whether the Commission has the authority, in the context of a single adjudicatory proceeding directly involving only one pipeline, to order into effect a curtailment plan when inter-pipeline supply allocation results.⁷² The Commission contends that a partial/full requirements adjustment on the Transco system would have a highly complex impact on the allocation of the supplies of other pipelines that serve Transco's partial-requirements customers.⁷³ Furthermore, the Commission maintains, such an adjustment would effectively shift gas from those other pipeline systems to the Transco system,⁷⁴ and since those pipelines are not parties to the Transco proceeding, would deprive them of their due process rights.⁷⁵ Accordingly, the Commission decided that the proper vehicle for consideration of the partial/full requirements phenomenon is not a proceeding for curtailment on a single pipeline, but rather a general rulemaking proceeding.

A proceeding directly involving only one pipeline is an appropri-

5-1097, and when it decided not to take into account supplemental supplies attached since the base period. *Id.* at 5-1093. Furthermore, the Commission did discuss both the supplemental supplies issue and the partial/full requirements issue in Opinion 778. *Id.* Careful analysis of the opinion at *id.*, however, demonstrates that the Commission's primary reason for its decision on the partial/full requirements issue was not its desire to promote the collateral policies noted above. Opinion 778-A, 11 FED. POWER SERV. (M-B) 5-177 (1976), and the Commission's brief in *North Carolina v. FERC* support the same conclusion. Instead, the Commission argued that to allocate gas to Transco's partial-requirements customers according to post-base period changes in the relative supplies of other pipelines would constitute illegal inter-pipeline supply allocation. 10 FED. POWER SERV. (M-B) at 5-1093; *see* text accompanying notes 71-81 *infra*.

70. For base period issue, *see* text accompanying notes 60-62 *supra*.

71. This lacuna in the decision is puzzling in light of the considerable attention given the issue in Opinion 778, *see* 10 FED. POWER SERV. (M-B) at 5-1093, and Opinion 778-A, *see* 11 FED. POWER SERV. (M-B) at 5-190, and in the briefs of several of the parties, *see, e.g.*, Brief for Respondent Federal Power Commission at 25-29; Initial Brief for Petitioner Piedmont Natural Gas Co. at 34-37; Joint Brief for Intervenors Brooklyn Union Gas Co., North Penn Gas Co., Pennsylvania Gas and Water Co., Public Service Electric and Gas Co., Washington Gas Light Co. at 24-28.

72. *See* 10 FED. POWER SERV. (M-B) at 5-1093.

73. 11 FED. POWER SERV. (M-B) at 5-190.

74. *Id.*

75. *See* 10 FED. POWER SERV. (M-B) at 5-1093.

ate forum for the consideration of the partial/full requirements phenomenon if one accepts the view that a partial/full requirements adjustment does not constitute inter-pipeline supply allocation, but affects only the allocation of that single pipeline's gas among its customers.⁷⁶ This view is easily supportable on the basis that a partial/full requirements adjustment does not involve any physical interconnection between pipelines.⁷⁷ The Commission claims, however, that other pipelines are affected by such plans through the process of "displacement."⁷⁸ According to the Commission's argument, taking into account the partial/full requirements phenomenon in formulating Transco's curtailment plan would have negative effects on other pipeline systems through a two-stage process. First, although discrimination against the full-requirements customers on the Transco system would be eliminated, discrimination against Transco's partial-requirements customers, "*vis-a-vis* their fellow customers of the other pipeline supplier," would result.⁷⁹ A partial/full requirements adjustment would cause the proportionate supply of Transco's gas available to Transco's partial-requirements customers to decrease as the supplies to full-requirements customers were increased. Given a constant level of supply from their other pipeline sources, Transco's partial-requirements customers would then have a total supply of gas lower than the total available before the adjustment of the Transco system, causing them to curtail into higher priorities than before the adjustment. Since other multi-pipeline customers who are not served by Transco would be receiving an amount of gas unaffected by the adjustment on the Transco system, the result would be discrimination against Transco's partial-requirements customers in comparison to their fellow customers on non-Transco systems.

The second effect of a partial/full requirements adjustment which the Commission contends involves inter-pipeline supply allocation, occurs as follows. If other pipelines attempted to eliminate the discrimination against Transco's partial-requirements customers by "reducing their deliveries systemwide so as to increase deliveries to the partial requirements customers affected by Transco's full/partial requirements adjustment," the result would be inter-pipeline supply allocation by displacement.⁸⁰ The effect, according to the Commission, is to shift gas

76. See Initial Brief for Petitioner Piedmont Natural Gas Co. at 35.

77. *Id.*

78. 11 FED. POWER SERV. (M-B) at 5-190.

79. Brief for Respondent Federal Power Commission at 27.

80. *Id.*

from other pipelines to the Transco system without according the other pipelines their due process rights.⁸¹

Even if the due process problem can be solved by a general rulemaking procedure in which all affected parties are represented, there remains the question whether the Natural Gas Act⁸² grants the Commission the requisite authority to order into effect curtailment plans that result in indirect inter-pipeline supply allocation.⁸³ Such plans might violate section 7(a) of the Natural Gas Act,⁸⁴ which provides that "the Commission shall have no authority . . . to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers." Whether the indirect inter-pipeline supply allocation anticipated by the Commission would violate section 7(a) would depend on whether such allocation were deemed to constitute "physical connection," and on the reviewing court's definition of "adequate service."⁸⁵

Implicit in the court of appeals' failure to discuss the issue of inter-pipeline supply allocation could be a conclusion that allocation to partial-requirements customers according to the levels of curtailment on alternate pipelines simply does not constitute inter-pipeline supply allocation.⁸⁶ Or, the absence of discussion of the issue might be read to imply that the due process problems anticipated by the Commission are nonexistent, and that the Commission does in fact have the authority to order indirect inter-pipeline supply allocation. It is more likely, though, that the court's reticence on the issue of inter-pipeline supply allocation is a product of the court's decision to restrict the scope of its opinion. The express holding in *North Carolina v. FERC* is limited to a requirement that the Commission "first, *determine*, and, second,

81. See 10 FED. POWER SERV. (M-B) at 5-1093. Contrary to the Commission's argument, the real effect of a partial/full requirements adjustment does not appear to be a shift of gas to Transco from other pipelines. The other pipelines continue to transport and sell the same amount of gas as before the adjustment. The real shift seems to be from the *customers* of the other pipelines that serve Transco's partial-requirements customers to Transco's full-requirements *customers*. The parties whose due process rights are denied, then, are those *customers* who are not served by Transco, but who are served by other pipelines that serve Transco's partial-requirements customers.

82. 15 U.S.C. §§ 717-717w (1976).

83. See Joint Brief for Intervenors Brooklyn Union Gas Co., North Penn Gas Co., Pennsylvania Gas and Water Co., Public Service Electric and Gas Co., Washington Gas Light Co. at 25-26 & 26 n.14.

84. 15 U.S.C. § 717f(a) (1976); see M. WILLRICH, *supra* note 1, at 48.

85. See M. WILLRICH, *supra* note 1, at 48.

86. The court could have followed the reasoning in text accompanying notes 76 & 77 *supra*.

consider the impact of its opinion on ultimate users in the implementation of a curtailment plan for the Transco system."⁸⁷ The court did not actually order the Commission to allocate gas to partial-requirements customers in relation to the levels of curtailment on alternate pipelines; it was therefore technically unnecessary to consider the issue of inter-pipeline supply allocation and the potential problems associated therewith. Nevertheless, the court should have considered the issue since the natural implication of the court's reasoning is indeed that (absent the influence of a sufficiently strong collateral policy) the Commission should in fact allocate gas according to the relative levels of curtailment on other pipelines.

North Carolina v. FERC constitutes long-awaited recognition that the Commission's application of end-use theory does not always produce results consistent with end-use principles. In requiring the Commission to consider the actual impact of end-use plans at the time of their adoption,⁸⁸ and in declaring that the discrimination resulting from end-use plans is justified only to the extent that such plans actually protect high priority users from curtailment ahead of lower priority users,⁸⁹ the court made significant progress toward reducing existing regional distortions in the allocation of natural gas supplies. The court's opinion suffers, however, from a lack of clarity in its discussion of the possibility that certain collateral policies might justify the discrimination resulting from end-use plans.⁹⁰ Furthermore, the court ignored the potential legal infirmities of a plan that allocates gas to partial-requirements customers according to the relative levels of curtailment on other pipelines. The questions whether such a plan would violate the due process rights of indirectly affected pipelines and whether the Commission would have the authority under the Natural Gas Act to adopt such a plan will no doubt arise in the process of interpreting and applying the opinion. By failing to discuss these issues, the court contributed uncertainty to future curtailment proceedings.

Although it leaves a number of issues unresolved, *North Carolina v. FERC* serves the useful function of illustrating the problems that inevitably result from the allocation of natural gas on a pipeline-by-pipeline basis. Even if each pipeline's gas were allocated in such a way as to eliminate the discrimination resulting from the partial/full re-

87. 584 F.2d at 1015 (emphasis in original).

88. Slip op. at 21 n.20 (as amended Aug. 29, 1978).

89. 584 F.2d at 1012.

90. See text accompanying notes 59-62 *supra*.

quirements phenomenon, the vastly different levels of supply on different pipelines would preclude the achievement of true end-use results.⁹¹ Only if the Commission can allocate gas on a nationwide inter-pipeline basis can it prevent lower priority users from being served in some areas while higher priority users are being curtailed elsewhere. Allocation on a nationwide basis would, of course, require physical interconnection between pipelines, which would in turn require reform of the Natural Gas Act.⁹² Achievement of true end-use results would also require federal regulation of local distributors, since under present law the states are free to ignore end-use policy in regulating the allocation of gas from local distributors to ultimate consumers.⁹³ Finally, Congress could choose to deregulate the field price of all natural gas in

91. See Harrison & Formby, *supra* note 1, at 79-86.

92. M. WILLRICH, *supra* note 1, at 233-34.

The Emergency Natural Gas Act of 1977, Pub. L. No. 95-2, §§ 3-4, 91 Stat. 4, authorized the President to order transfers of gas between interstate pipelines when necessary to protect the supplies of high-priority uses of natural gas. Section 2 of the Act defined "high-priority use" as:

- (A) use of natural gas in a residence;
- (B) use of natural gas in a commercial establishment in amounts of less than 50 Mcf on a peak day; or
- (C) any other use of natural gas the termination of which the President determines would endanger life, health, or maintenance of physical property.

Section 4(a)(1)(C), however, provided that the President's power to order inter-pipeline deliveries expired on April 30, 1977.

The Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, *printed in* [1978] U.S. CODE CONG. & AD. NEWS No. 12, was passed by the Senate on September 27, 1978, 124 CONG. REC. S16,265 (daily ed. Sept. 27, 1978) and by the House on October 14, 1978, 124 CONG. REC. H13,427 (daily ed. Oct. 14, 1978). The Act confers on the President emergency powers essentially like those granted by the Emergency Natural Gas Act of 1977. Title III of the Natural Gas Policy Act of 1978 authorizes the President to declare a natural gas emergency when service to high priority uses is threatened, and, subject to certain conditions, to allocate gas on a nationwide basis during such an emergency. Unlike the 1977 Act, the 1978 Act does not set a particular date beyond which the President would no longer have power to declare a natural gas emergency.

The Natural Gas Policy Act of 1978 also provides for certain new priorities to be followed in curtailment proceedings. Title IV of the Act ranks "essential industrial process and feedstock uses" ahead of all other uses except "essential agricultural uses" and "high-priority uses." Essential agricultural uses are to be protected ahead of all other uses except high-priority uses. Essential agricultural use is defined in § 401(f)(1) as

any use of natural gas—(A) for agricultural production, natural fiber production, natural fiber processing, food processing, food quality maintenance, irrigation pumping, crop drying, or (B) as a process fuel or feedstock in the production of fertilizer, agricultural chemicals, animal feed, or food, which the Secretary of Agriculture determines is necessary for full food and fiber production.

High-priority user is defined by § 401(f)(2) as "any person who—(A) uses natural gas in a residence; (B) uses natural gas in a commercial establishment in amounts of less than 50 Mcf on a peak day; (C) uses natural gas in any school, hospital, or similar institution; or (D) uses natural gas in any other use the curtailment of which the Secretary of Energy determines would endanger life, health, or maintenance of physical property." Finally, § 402(d)(1) defines essential industrial process or feedstock use as "any use of natural gas in an industrial process or as a feedstock which the Secretary [of Energy] determines is essential."

93. See M. WILLRICH, *supra* note 1, at 233-34, 275-76.

hopes of increasing supplies and thereby reducing the need for regulation of curtailment.⁹⁴ Even if deregulation of prices were to increase supplies dramatically, however, shortages would most likely remain sufficiently serious to require some form of regulation over curtailment.⁹⁵ While it is difficult to predict with any accuracy the future form that natural gas allocation will take, *North Carolina v. FERC* demonstrates that future end-use curtailment plans will be subjected to close judicial scrutiny designed to ensure that such plans produce true end-use results.

CHRISTOPHER WHITMAN MOORE

Attorney-Client Privilege—*Diversified Industries, Inc. v. Meredith*: New Rules for Applying the Privilege When the Client Is a Corporation

The attorney-client privilege protects from disclosure confidential communications between an attorney and his client.¹ The privilege applies in both individual and corporate client contexts; when the client is a corporation, however, application of the privilege may prove more complex than when the client is an individual. Two questions must be answered in determining the applicability of the privilege in the corporate client context: first, what types of activity constitute legal services by the attorney and, second, which employees of a corporation may be deemed to so represent the corporation as to *be* the corporate client.² In *Diversified Industries, Inc. v. Meredith*,³ the United States Court of

94. The Natural Gas Policy Act of 1978, does not deregulate prices on all natural gas, but "gradually ends controls on the price of newly discovered gas until the price ceiling is lifted in 1985." 36 CONG. Q. WEEKLY REP. 2615-16 (1978); see note 5 *supra*.

95. See M. WILLRICH, *supra* note 1, at 13-14.

1. A number of criteria must be satisfied in order for the attorney-client privilege to apply. "(1) *Where legal advice of any kind is sought* (2) *from a professional legal advisor in his capacity as such*, (3) *the communications relating to that purpose*, (4) *made in confidence* (5) *by the client*, (6) *are at his instance permanently protected* (7) *from disclosure . . .*, (8) *except the protection be waived.*" 8 J. WIGMORE, EVIDENCE § 2291 (J. McNaughton rev. 1961).

2. See, e.g., *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546 (D.D.C. 1970); *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792 (D. Del. 1954); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950).

3. 572 F.2d 596 (8th Cir. 1978).

Appeals for the Eighth Circuit addressed both these issues⁴ and adopted new tests for determining when an attorney is acting in his professional capacity⁵ and for deciding which employees represent the corporation.⁶

In 1975, the Weatherhead Company, a customer of Diversified Industries, Incorporated, brought suit in the United States District Court for the Eastern District of Missouri against Diversified, alleging conspiracy to bribe Weatherhead employees.⁷ During the course of this litigation Weatherhead sought to discover a memorandum and report that had been prepared earlier for Diversified by the law firm of Wilmer, Cutler & Pickering (the Law Firm) and the corporate minutes that referred to those writings. The memorandum and report were the result of an intracorporate investigation that the Law Firm had conducted for Diversified.⁸ Endeavoring to protect the writings from dis-

4. A third issue of less importance arose in *Diversified Industries* that concerned the possible waiver of the attorney-client privilege. Diversified had revealed documents to the SEC (pursuant to subpoena during an official investigation); later it sought to protect the documents against discovery by plaintiff in a private lawsuit. The question was raised whether Diversified had thereby waived its attorney-client privilege with respect to those documents. The court concluded that it had not: "As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred." 572 F.2d at 611 (citations omitted). Although the *Diversified Industries* court devoted only three sentences to this issue, there is considerable disagreement among jurisdictions concerning whether such disclosure constitutes a waiver. Compare *In re Penn Cent. Commercial Paper Litigation*, 61 F.R.D. 453 (S.D.N.Y. 1973) (voluntary production of documents for the SEC constitutes waiver), with *United States v. Goodman*, 289 F.2d 256, 259 (4th Cir.), *vacated on other grounds*, 368 U.S. 14 (1961) ("It has been uniformly held that a prior disclosure to investigating officials cannot constitute a waiver of the privilege with respect to the same matter in a subsequent legal proceeding. A waiver of the privilege must occur in the same proceeding . . . in which it is sought to be invoked."), and *Bucks County Bank & Trust Co. v. Storck*, 297 F. Supp. 1122 (D. Haw. 1969) (testimony given to support motion to have seized property returned does not constitute general waiver), and *IBM Corp. v. Sperry Rand Corp.*, 44 F.R.D. 10, 13 (D. Del. 1968) (partial disclosure of privileged material to third party during business negotiations not waiver of privilege in subsequent patent infringement action).

5. See 572 F.2d at 610.

6. See *id.* at 609.

7. The conspiracy allegation charged Diversified employees with bribing Weatherhead employees to make purchases of inferior copper. *Id.* at 600.

8. In 1974 and 1975 Diversified became involved in litigation relating to a proxy fight. During the course of this litigation evidence revealed that Diversified might have maintained a fund with which to bribe purchasing agents of other companies, including Weatherhead. Following this litigation, Diversified's Board of Directors felt that an investigation should be made of the corporation's practices. The Law Firm was then hired to make an investigation, interview employees, draw conclusions about the propriety of employee conduct, and make recommendations to the Board concerning a future course of action. The Board of Directors instructed all employees to cooperate fully with this investigation. The memorandum outlined the manner in which the Law Firm planned to conduct the investigation. *Id.* The report detailed the actual investigation, made findings with respect to the question whether a slush fund had been used in violation of Diversified's standard business practices and internal controls, and made recommendations. *Id.* at 601. Certain corporate minutes restated parts of the report.

covery, Diversified asserted that the documents were not subject to discovery because they were protected by the attorney-client privilege.⁹ The district court refused to deny discovery and Diversified petitioned the Court of Appeals for the Eighth Circuit for a writ of mandamus.¹⁰

The petition was first considered by a three-judge panel. Judge Henley, speaking for the majority, concluded that because the Law Firm had merely acted as an investigator and had not provided Diversified with legal services or advice when it prepared the memorandum or the report, the attorney-client privilege did not apply to the documents.¹¹ He therefore found it unnecessary to decide if the employees interviewed by the Law Firm represented the corporate client. Judge Heaney dissented, finding that the Law Firm *had* provided legal services and that the employees interviewed by the Law Firm sufficiently represented the corporation to be deemed the corporate client for purposes of application of the privilege.¹² The case was then reheard en banc. After the hearing, Judge Heaney, this time for the majority, wrote an opinion similar to his prior dissent. The court adopted the position that a corporation's commitment of a matter to an attorney raises a presumption of legal services in favor of the corporation. The court thus found that while performing the investigation and preparing the report the Law Firm was acting in its professional capacity as a provider of legal services.¹³

The court then turned to the question whether the corporate client's communication was privileged, and in particular, to the question of when an employee communication can be classified as a corporate client's communication. Traditionally this has been decided using either the control group test or the subject matter test.¹⁴ Under the control group test only a corporate employee who can act on the attorney's

9. Diversified also claimed that the documents were protected under the "work product" privilege of rule 26(b)(3) of the Federal Rules of Civil Procedure. Under the rule, however, an attorney's work product must be "prepared in anticipation of litigation or for trial." The Court of Appeals for the Eighth Circuit found that the documents sought by Weatherhead had not been so prepared. *Id.* at 604.

10. Diversified had asked the district court to certify the question of privilege as appropriate for interlocutory appeal under 28 U.S.C. § 1292(b) (1970). The district court refused, ordered disclosure of the documents, and Diversified petitioned the court of appeals for relief. 572 F.2d at 598-99.

11. 572 F.2d at 603.

12. *Id.* at 605-06 (Heaney, J., dissenting).

13. *Id.* at 610. While this served to protect the Law Firm's report, it did not protect the memorandum, which was merely a preliminary document. In this respect, the en banc opinion affirmed the earlier opinion.

14. *Id.* at 608.

advice may be deemed to represent the corporation.¹⁵ Under the subject matter test only a corporate employee who communicates to the attorney at the direction of his superior concerning the subject matter of his employment may be identified as the corporate client.¹⁶ The court of appeals concluded that the control group test "is inadequate for determining the extent of a corporation's attorney-client privilege"¹⁷ and proposed instead a modified subject matter test.¹⁸

The attorney-client privilege protects the confidentiality of communications between attorney and client made for the purpose of securing legal advice. The history of the privilege extends back to the reign of Elizabeth I.¹⁹ The privilege as originally conceived belonged to the attorney—it was a point of honor for the attorney to protect a client's secrets.²⁰ By the late 1700's, however, this theory had been repudiated and replaced by the contemporary view that the privilege belongs to the client.²¹ As presently understood, the purpose of the rule is to encourage clients to seek legal advice freely and to speak openly with their attorneys by removing clients' apprehension that their communications will be divulged.²²

The attorney-client privilege may be invoked to protect communication between an attorney performing legal services and his client, when the communication is intended to be confidential.²³ A communication by an attorney to a client is protected to the same extent as a communication by a client to an attorney, since the former may reveal

15. *Id.* at 602 (citing *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963)). See also note 42 and accompanying text *infra*.

16. See 572 F.2d at 602 (citing *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971)). See also notes 43 & 44 *infra*. The original subject matter test made its appearance in *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971). See notes 43 & 44 and accompanying text *infra*.

17. 572 F.2d at 609.

18. Three judges dissented from the opinion. Judge Henley, dissenting, reasserted his conclusion that the Law Firm acted merely as an investigator, not as legal counsel. *Id.* at 614 (dissenting opinion). Judge Gibson, also dissenting, concluded that the corporate minutes were not protected from disclosure because they were open to the shareholders and thus their confidentiality had been waived. *Id.* at 616 (dissenting opinion). Judge Bright, in a third dissenting opinion, argued that the entire controversy was moot because Weatherhead had already uncovered the information it sought from SEC files. *Id.* at 617 (dissenting opinion).

19. J. WIGMORE, *supra* note 1, § 2290, at 542.

20. *Id.* at 543.

21. *Id.*

22. *Id.* § 2291. See also *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 322-23 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963).

23. J. WIGMORE, *supra* note 1, § 2292.

the substance of the latter.²⁴ The attorney-client privilege is a personal privilege and as such, might be thought of as being available only to individuals, but it has been held applicable to communications to or from a *corporate* client.²⁵ Corporations, like individuals, must be free to communicate openly with their attorneys in order to procure needed legal advice without fearing the repercussions of disclosure. Deciding when the privilege may properly be invoked is, however, more difficult in the corporate context because of the greater difficulty of determining whether the attorney's services are actually legal services and identifying who constitutes the client.²⁶ Moreover, proper resolution of these issues in the corporate context requires accommodating conflicting interests—the need of the corporation for confidentiality on the one hand, and on the other, the desire for disclosure on the part of the public and of those businesses dealing with the corporation—while not extending the benefits of the attorney-client privilege beyond the interests the privilege was designed to protect.

Because the privilege exists only when the attorney is acting in his professional capacity as a lawyer, the first question that must be addressed in determining the scope of the privilege in an attorney-corporate client situation is what constitutes performance of legal services.²⁷ The lawyer must be engaged in legal activities such as offering legal advice, applying law to fact, and preparing for and carrying on litigation.²⁸ When an attorney is performing tasks that could as easily have been accomplished by laymen, the privilege does not apply.²⁹ Nor does the privilege apply when the attorney is acting, for instance, as a busi-

24. *See Georgia-Pacific Plywood Co. v. United States Plywood Corp.*, 18 F.R.D. 463, 464 (S.D.N.Y. 1956).

25. *See, e.g., Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 323 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963).

26. *See* text accompanying notes 36 & 37 *infra*.

27. *See Georgia-Pacific Plywood v. United States Plywood Corp.*, 18 F.R.D. 463, 464 (S.D.N.Y. 1956).

28. There is a privilege only if . . . the person to whom the communication was made is acting as a lawyer in connection with this communication "Acting as a lawyer" encompasses the whole orbit of legal functions. When he acts as an adviser, the attorney must give predominantly legal advice to retain his client's privilege of non-disclosure, not solely, or even largely, business advice [Attorneys act as lawyers] when in specific matters they are engaged in applying rules of law to facts known only to themselves and other employees of their client-companies, and in preparing cases . . . and prosecuting appeals They do not "act as lawyers" when not primarily engaged in legal activities.

Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792, 794 (D. Del. 1954).

29. *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 548 (D.D.C. 1970); *Georgia-Pacific Plywood Co. v. United States Plywood*, 18 F.R.D. 463, 464 (S.D.N.Y. 1956).

ness adviser.³⁰ Since a corporate attorney often acts as both legal and business adviser, the two functions must in some way be distinguished.³¹ Most courts have employed a case-by-case factual analysis when addressing the issue of legal services. *Diversified Industries* departs from this practice in adopting a rule that the existence of legal services is prima facie established by commitment of a matter to a legal adviser. Moreover, these prior cases concerned house counsel or counsel in the corporation's patent department,³² while *Diversified Industries* involved outside counsel. Therefore, *Diversified Industries* also constitutes recognition that there is potential for intermingling of legal and business advice even when outside counsel is involved.³³

A second and separate issue in applying the privilege is the determination of when a corporate employee communication can be classified as the corporate client's communication. Corporations function differently from individuals in several important respects.³⁴ While an individual client is usually the only source of disclosure to an attorney, the corporate client potentially has numerous spokesmen.³⁵ An individual client both gives information and makes decisions based on the attorney's advice, while in a corporation these functions may be split in such a way that some employees are information-givers and others are decisionmakers.³⁶ While it is easy to determine whether a communication by an individual client is intended to be confidential, this is not the case for the corporate client. Communications divulged to numerous

30. *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 324 (7th Cir.), cert. denied, 375 U.S. 929 (1963); *United States v. Vehicular Parking, Ltd.*, 52 F. Supp. 751, 753 (D. Del. 1943); see *Pye*, *Fundamentals of the Attorney-Client Privilege*, PRAC. LAW., Nov. 1969, at 17-22.

31. "[T]he corporate lawyer is . . . often a business as well as legal advisor However, privileged protection does not extend beyond communications necessary for legal advice and therefore a job of line-drawing is inevitable." Burnham, *Confidentiality and the Corporate Lawyer*, 56 ILL. B.J. 542, 543 (1968).

32. See, e.g., *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546 (D.D.C. 1970) (when communications by corporation's patent attorney concern tasks which could have been performed by nonlawyers privilege does not apply); *United States v. Aluminum Co. of America*, 193 F. Supp. 251 (N.D.N.Y. 1960) (house counsel's requests to corporate executive for factual information on which to base legal opinion and executive's reply held privileged); *Georgia-Pacific Plywood Co. v. United States Plywood Co.*, 18 F.R.D. 463 (S.D.N.Y. 1956) (when in-house counsel doing mostly patent work primarily communicated business advice, communications not privileged).

33. The court never stresses that it is dealing with outside rather than house counsel, and thus the court in all likelihood intended the presumption of legal services to apply to both. However, it is possible to argue that the presumption only applies to outside counsel since the court only addressed that factual setting.

34. See 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)[04] (1977).

35. *Id.*

36. *Id.*

corporate employees may still be intended to be confidential.³⁷ Because of these distinct characteristics of the corporate client, the courts have been called upon to create devices for determining when an employee speaks for the corporation and may thus be deemed to be the corporate client. Several different approaches to this problem have been employed.

*United States v. United Shoe Machinery Corp.*³⁸ suggested that a communication by *any* officer or employee of a corporation is privileged.³⁹ This blanket approach has not generally been accepted.⁴⁰ Most courts use either the control group test or the subject matter test to identify the corporate client. The control group test, introduced in *City of Philadelphia v. Westinghouse Electric Corp.*,⁴¹ attempts to equate the corporate client with the individual client by holding that only those employees who help control the corporation by giving information and participating in decisions about future action on the basis of the attorney's advice represent the corporation.⁴² In *Harper & Row Publishers, Inc. v. Decker*,⁴³ the Court of Appeals for the Seventh Circuit found the control group test inadequate and expanded the attorney-client privilege to protect some communications by corporate employees not within the control group. The court created the subject

37. The issue of personification of the corporate client does not frequently appear in the cases prior to 1963, the year that *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub nom.* General Elec. Corp. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963), introduced the control group test. Apparently, until 1963 it was simply assumed that the attorney-client privilege applied to corporate clients. The privilege was not explicitly held to apply to a corporation until *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963).

38. 89 F. Supp. 357 (D. Mass. 1950), *aff'd per curiam*, 347 U.S. 521 (1954).

39. *Id.* at 359; see 2 J. WEINSTEIN & M. BERGER, *supra* note 34.

40. This broad approach to the problem could conceivably conflict with the United States Supreme Court's statement in *Hickman v. Taylor*, 329 U.S. 495, 508 (1947), that the statements of employees who are merely witnesses to an incident are not privileged. See 2 J. WEINSTEIN & M. BERGER, *supra* note 34.

41. 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub nom.* General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

42. [I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.

Id. at 485.

43. 423 F.2d 487 (7th Cir. 1970), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971). In *Harper & Row*, plaintiffs filed an antitrust suit against defendants and sought to inspect memoranda prepared by the defense attorneys after debriefing employees of defendant who had testified before a federal grand jury investigating the publishing industry. *Id.* at 489-90.

matter test, which accords protection to a communication if it was made by an employee at the direction of a superior and if its subject matter was within the scope of the informant's employment.⁴⁴ Although both these tests have been criticized,⁴⁵ they are still in use. The control group test appears to be more widely used, perhaps because it is more easily applied and more clearly understood than the subject matter test.⁴⁶

The court in *Diversified Industries*, in addressing the two issues of legal services and identity of the corporate client, acknowledged the importance of determining whether the Law Firm was giving legal or lay advice,⁴⁷ and also recognized⁴⁸ and attempted to deal with the criticisms of the control group and subject matter tests.⁴⁹ These considerations led to two new rules. The first new rule arose from an issue about which there was much conflict within the court: whether the Law Firm had performed legal services for Diversified. The en banc majority announced that when a person seeks an attorney it is *prima facie* established that legal advice and services are being requested and given.⁵⁰ When no evidence is presented to defeat this *prima facie* case, it will be found that the attorney was acting in his professional capacity.⁵¹ The Court of Appeals for the Eighth Circuit appears to be the first court to subscribe to this rule, first proposed by Dean Wigmore,⁵² although a number of commentators had previously supported it.⁵³

44. [A]n employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.

Id. at 491-92.

45. See note 69 *infra*.

46. Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975).

47. 572 F.2d at 610.

48. *Id.* at 608-09.

49. For a description of the criticisms, see note 69 *infra*.

50. 572 F.2d at 608-09.

51. *Id.*

52. It is not easy to frame a definite test for distinguishing *legal from non-legal advice*. Where the general purpose concerns legal rights and obligations, a particular incidental transaction would receive protection, though in itself it were merely commercial in nature. . . . [T]he most that can be said by way of generalization is that a matter committed to a professional legal adviser is *prima facie so committed for the sake of the legal advice* which may be more or less desirable for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice.

Id. at 610 (quoting J. WIGMORE, *supra* note 1, § 2296, at 566-67).

53. One commentator suggested that the corporation should have the benefit of the inference

This prima facie approach imposes limitations on discovery by making it more difficult for the party seeking discovery to show that the sought-after documents are not privileged. Judge Henley, objecting to the rule in his dissenting opinion, pointed out that the party seeking disclosure, who must rebut the presumption, often does not *know* why a particular matter was entrusted to an attorney. He further added that often there is no way to find out.⁵⁴ The majority nonetheless did imply that the party seeking discovery is required to produce specific evidence that the attorney was acting in a business rather than a legal capacity when the particular communication in question was made. The better rule, it would seem, would be to permit the party challenging the privilege to make a general showing that the attorney has regularly acted as a business adviser and not just as a legal adviser to the corporation in a subject area that includes the communication in issue. If this showing were made, then the burden would remain on the corporation to show that the particular communication involved a legal matter.⁵⁵ Under the qualified rule, it would still be relatively easy for the corporation to make an initial showing on the matter of legal services, but the corporation would bear a much heavier burden of persuasion when the party seeking discovery points to regular activity by the attorney in a business capacity. This qualification would retain the benefits of the *Diversified Industries* prima facie rule while preventing some of its potential inequities.

In *Diversified Industries*, the Law Firm was engaged by the corporation to provide information about the activity of the corporation's employees, the legal implications of that activity, and the wisest course to take while remaining within the bounds of the law.⁵⁶ Thus, even if the party seeking discovery alleged that the Law Firm acted regularly in a business capacity, the corporation could carry its burden of persuasion by showing that the Law Firm's work pertinent to this case was essentially legal in character and, under the foregoing analysis, protected by the attorney-client privilege.

that an attorney is rendering legal advice when consulted by the corporation and that the party seeking disclosure would have the burden of indicating otherwise. Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 977-78 (1956). A student Note also supported this approach: "Since the prevailing motive of clients in consulting attorneys is the need for legal advice, the mere fact of legal consultation is prima facie the establishment of a professional relationship." Note, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics and Its Possible Curtailment*, 56 NW. U.L. REV. 235, 236 (1961).

54. 572 F.2d at 613-14 (Henley, J., dissenting).

55. See Simon, *supra* note 53, at 977-78.

56. 572 F.2d at 610.

The business adviser role was not presented in the facts of *Diversified Industries*; rather, the court was faced with the question whether an attorney offers legal services when he acts, at least in part, as an investigator.⁵⁷ The court's holding that the Law Firm in its investigatory role did offer legal services is supported by the reasoning that before an attorney can provide legal advice he must first discover and assess the facts surrounding a matter.⁵⁸ Generally, a lawyer seeks factual information in order to evaluate it and render legal advice. If courts refused to accept this position, an attorney could only retain the privilege for his client by explaining the legal purpose behind every step of the investigation.⁵⁹ Since it is often impossible for an attorney to know where a factual inquiry will lead until he has the facts, it is impossible for him to indicate for what legal purpose he is seeking each piece of information. Moreover, only the attorney has the training and skills necessary to evaluate the information he obtains by investigation.⁶⁰ Thus it is essential for the attorney to conduct at least parts of the investigation himself, since only he knows what each new piece of information may portend and what pattern the investigation should follow.

The court also examined the type of advice given during the investigation to determine whether the Law Firm as investigator was providing legal services. Judge Henley, dissenting, contended that the recommendations of the Law Firm "could have been made by any firm of private investigators, or by accountants, or by bankers, or, for that matter, by any person possessing ordinary common sense and business prudence."⁶¹ The majority, however, found that neither accountants nor lay investigators "would have had the training, skills and background necessary to make the independent analysis and recommendations which the Board felt essential to the future welfare of the corporation."⁶² The majority approach apparently recognizes that, in

57. *Id.* at 610. The court found the Law Firm to be providing legal services notwithstanding that the president of *Diversified* testified that he believed the Law Firm acted merely in an investigative capacity. The court gave several reasons for this result: (1) the president, Woodlief, was not employed until some two months after the Law Firm was retained; (2) it was impossible to determine if the president thought of attorney-client advice only in a litigation context; and (3) the president's belief was only one factor in the court's decision, and the totality of circumstances indicated the privilege was applicable. *Id.* at 610 n.3.

Judge Henley argued that an attorney acting as an investigator is not offering legal services. *Id.* at 614 (dissenting opinion).

58. "[F]actfinding is usually the first task of the lawyer." Simon, *supra* note 53, at 974 n.66.

59. See *United States v. Aluminum Co. of America*, 193 F. Supp. 251, 253 (N.D.N.Y. 1960).

60. 572 F.2d at 610.

61. *Id.* at 615 (Henley, J., dissenting).

62. *Id.* at 610.

situations involving a corporate client,⁶³ there is rarely a clear-cut distinction between legal and other services, and that the determination rests on whether the attorney relied primarily on legal skills and gave advice that was predominantly legal. While the attorney-client privilege must be construed so that it does not interfere unduly with the scope of discovery,⁶⁴ the privilege must still be broad enough to accord with the realities of corporate structure and operation. If the privilege were to be lost because some business considerations and advice were intermingled with primarily legal advice, the privilege would be of no value to the corporate client.⁶⁵ Moreover, a broad definition of legal advice does not necessarily extend the privilege, because the other requirements of the privilege⁶⁶ still may act to restrict its scope.

Having determined that the corporation was receiving legal services, the court had then to decide if the communications involved were made by persons who could properly be considered the corporate client so that the attorney-client privilege could be applied. To aid its decisionmaking, the court announced its second new rule—a new test for determining who may personify the corporate client:

[T]he attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the

63. The considerations discussed here may apply to individual clients as well. Often an individual receives advice from his lawyer that is not purely legal, but rather contains such an intermingling of legal and nonlegal matters that it is impossible to separate the two for purposes of applying the privilege.

64. Under federal rules, *any* matter that is relevant to the case is subject to discovery, unless privileged or a part of the attorney's work product under the *Hickman v. Taylor*, 329 U.S. 495, 508 (1947), exception, *discussed in note 40 supra*. FED. R. CIV. P. 26. The modern trend has been toward broader discovery because of the desirability of obtaining all the relevant facts. 2 J. WEINSTEIN & M. BERGER, *supra* note 34.

65. The privilege may, under these circumstances, lack viability for the individual client as well. See discussion in note 63 *supra*. The court recognized that such a narrow view might have severe repercussions for the existence of the privilege, as did Judge Wyzanski in *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950), when he addressed the problem of outside counsel and stated:

They were not acting as business advisors or officers . . . even though *occasionally* their recommendations had in addition to legal points *some* economic or policy or public relations aspect and hence were not unmixed opinions of law. The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in the public interest that the lawyer should regard himself as more than a predictor of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.

Id. at 359 (emphasis added).

66. Note 1 *supra*.

request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. We note . . . that the corporation has the burden of showing that the communication in issue meets all of the above requirements.⁶⁷

The Court of Appeals for the Eighth Circuit is apparently the first court to employ this test,⁶⁸ which is a modified subject matter test that strikes a balance between the much-criticized control group and subject matter tests.⁶⁹ This new test expands the amount of information that a corporation can communicate to its attorney with the assurance that it will be protected, while it avoids the potential abuse of protecting *all* corporate employee communications from discovery.⁷⁰

Under the court's analysis, following the preliminary determination that the attorney functions as provider of legal services, the focus shifts to the reason for which the client seeks the attorney's assistance. The requirements that the communication be made for the purpose of securing legal advice, and that a superior request an employee to communicate so that the corporation can secure legal advice, assure that the corporation is barred from claiming a privilege it did not intend to create at the outset. These requirements also prevent the corporation from sending routine reports and memoranda to its attorney and then claiming they are privileged.⁷¹ With these requirements the test focuses not

67. 572 F.2d at 609.

68. The test announced by the court was borrowed from Judge Weinstein. 2 J. WEINSTEIN & M. BERGER, *supra* note 34.

69. The control group test has been criticized as defeating the purpose of the attorney-client privilege because it would deny the privilege to the communications of most corporate employees, and thereby inhibit disclosure to the attorney. See Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759, 767 (1971). The control group test may thus unreasonably narrow the corporate client's ability to communicate fully with the attorney. Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. INDUS. & COM. L. REV. 873, 875 (1971). On the other hand, the subject matter test has been criticized because it could protect every employee's communication and thus make discovery impossible. Note, *supra*; Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 432 (1970). Originally, the Supreme Court's proposed rule of evidence 503 on the attorney-client privilege defined a representative of the client in terms of the control group test. However, because no agreement could be reached on the matter of which test to use, the definition was simply left out of the final draft of proposed rule 503. 2 J. WEINSTEIN & M. BERGER, *supra* note 34, ¶ 503 [01]. In the end, Congress substituted a single rule on privilege for the 13 separate rules drafted by the Supreme Court. This single rule is FED. R. EVID. 501.

70. Thus it remains compatible with the Supreme Court's statement in *Hickman v. Taylor*, 329 U.S. 495, 508 (1947), discussed in note 40 *supra*.

71. 572 F.2d at 609.

on who is communicating with an attorney but why.⁷²

The requirement that the employee make the communication at the direction of his superior is taken directly from the subject matter test⁷³ and focuses on who is communicating with the attorney. This requirement is another means for ensuring that the establishment of an attorney-client relationship was intended at the outset. The underlying consideration of this particular aspect of the subject matter and modified subject matter tests seems to be that the employee must somehow represent the corporation, a consideration that was the *main* focus of the control group test. The requirement as it is presented here, however, is freed from the overly restrictive approach of that test. Under this requirement, the employees may become an extension of the control group when they are directed to communicate by their superiors. When there is such control of the employees' communications by superiors who are involved with the attorney, the employees may be deemed to personify the corporation in making these communications. The goal is to assure that the communications for which protection is sought were intended to be made by the *corporation* in the context of an attorney-client relationship and were *not* the unauthorized comments of an employee who casually gave the attorney information.

The requirement that the subject matter of the communication be within the scope of the employee's duties is the other element of the original subject matter test that is carried over into the new test. This requirement denies the privilege to the communications of an employee who was merely a witness to an event.⁷⁴ In situations in which the employee is performing his corporate duties, he can be deemed to act for or personify the corporation. When he is merely a witness, this is not a valid assumption. Moreover, this requirement ensures that only work expressly done on behalf of the corporation and which is thus entitled to be kept a corporate confidence will be privileged.

The last requirement demands that a communication not be disseminated beyond those with a need to know its contents. This requirement aims at protecting only those communications intended to be confidential, a traditional prerequisite for the assertion of the privilege.⁷⁵ This test recognizes that, because of the structure of a corpora-

72. See Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 341, 371 (1972).

73. See note 44 *supra*.

74. See note 40 *supra*.

75. In order for a communication to be protected it must be a confidential communication. "The requirement that the communication be made 'without the presence of strangers' means that

tion, and in order for the corporation to function, there must be some dissemination of information beyond the employee who makes the communication and the attorney who receives it.⁷⁶ On the other hand, indiscriminate dissemination of information within the corporation tends to indicate that such information was not intended to be confidential, and the corporation cannot assert confidentiality at a later date simply because changed circumstances make it desirable to claim the privilege. This requirement strives to achieve an appropriate balance and permits communications to be disseminated within the corporation to a limited extent and still be deemed confidential.⁷⁷

When applying the attorney-client privilege to corporations, the ultimate goal is to achieve a balance that fosters the purposes of the privilege while protecting the scope of discovery. The court must deal with the complexities of the corporate structure and be aware of the characteristics that distinguish a corporate from an individual client. The Court of Appeals for the Eighth Circuit, in its examination of the questions of performance of legal services and of personification of the corporation, has adopted rules that advance the pursuit of the goal. The rule that matters committed to a lawyer are prima facie so committed in order to obtain legal services brings some order into a confusing area. By using this approach, courts need no longer depend on an entirely case-by-case approach. The prima facie rule will make decisions in this area more uniform, and will alleviate some of the enormous confusion that results from attempts to distinguish between legal and nonlegal advice. This rule would, however, be improved if qualified to permit the party seeking discovery to defeat the prima facie case by

the communication must have been intended as confidential, i.e., not intended to be related to others." *IBM Corp. v. Sperry Rand Corp.*, 44 F.R.D. 10, 12 (D. Del. 1968).

76. See generally Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360, 377-78 (1970).

[I]n order to foster the policy of encouraging full and accurate disclosure by clients . . . communications within the corporation that are necessary for completeness and accuracy of information given the attorney should be considered confidential even though they have been communicated to third persons . . . Thus, in order properly to perform his function, the attorney must be able to reveal fully to decision makers the substance of what he has learned from corporate employees and the ramifications thereof without fearing that he would thereby remove the privilege from information that would otherwise be protected.

Id. at 378.

77. The court in *Diversified Industries* found that Weinstein's requirements had been satisfied in the case of the report prepared by the Law Firm. The communications were made and directed by the Board of Directors to be made for the purpose of securing legal advice, the interviews only covered matters within the employees' corporate duties, and the corporation avoided disseminating the information to anyone other than those directly concerned with the investigation.

showing that an attorney has regularly acted in another capacity for a corporation. Finally, even though the modified subject matter test will probably have its critics, this new test appears to effect a balance between the narrowness of the control group test and the expansiveness of the traditional subject matter test on the issue of personification of the corporation. In a confused field the Court of Appeals for the Eighth Circuit has provided much needed clarity.

SHERI A. VAN GREENBY

Constitutional Law—Administrative Searches—*Marshall v. Barlow's, Inc.*: OSHA Needs a Warrant

Occupational Safety and Health Act (OSHA) inspectors have since OSHA's passage seven years ago¹ entered and inspected the business premises of thousands of employers to ascertain compliance with the myriad of job safety standards promulgated by the Secretary of Labor.² A great number of these inspections have been made pursuant to section 8(a)³ of OSHA, which apparently authorized warrantless inspec-

1. The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970), was signed into law on December 29, 1970, and became effective April 28, 1971. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 34, 84 Stat. 1590.

2. The stated congressional purpose behind OSHA was

[T]o assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

. . . .

3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to business affecting interstate commerce.

29 U.S.C. § 651 (1970). The Secretary has used this authority to promulgate over 4,400 safety standards. Brief for Appellee at 39, *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978) (citing R. SMITH, THE OCCUPATIONAL SAFETY AND HEALTH ACT: ITS GOALS AND ACHIEVEMENTS 11 (1976)). Because the Act makes these standards applicable to business affecting interstate commerce, over four million business establishments are covered. Comment, *OSHA: Employer Beware*, 10 HOUS. L. REV. 426, 429 (1973).

3. Section 8(a) of OSHA provides:

In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized

1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equip-

tions.⁴ Before the enactment of OSHA the Supreme Court had held that "except in certain carefully defined classes of cases, a[n administrative inspection] . . . of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."⁵ The Court later held that the exceptional cases in which warrants are not needed include administrative inspections of certain heavily regulated businesses.⁶ In *Marshall v. Barlow's, Inc.*,⁷ the Court refused to extend this narrow exception to the warrant requirement, and held that search warrants are required for OSHA inspections.⁸

OSHA authorities chose Barlow's, Incorporated for inspection based on OSHA's standard selection process.⁹ When the inspector appeared the president of Barlow's refused to permit an inspection of the employee area of the business because the inspector did not have a warrant.¹⁰ The inspector returned three months later armed with a court order compelling the president to submit to an inspection.¹¹ Con-

ment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

29 U.S.C. § 657(a) (1970).

4. In some instances OSHA inspectors, rather than relying on their authority under § 8(a) to make warrantless inspections, have nonetheless obtained a warrant before inspecting the particular premises. *See, e.g., Reynolds Metals Co. v. Secretary of Labor*, 442 F. Supp. 195 (W.D. Va. 1977); *Lockport Non-Ferrous Casting, Inc. v. Marshall*, 441 F. Supp. 333 (W.D.N.Y. 1977); *Marshall v. Reinhold Constr., Inc.*, 441 F. Supp. 685 (M.D. Fla. 1977); *Morris v. United States Dep't of Labor*, 439 F. Supp. 1014 (S.D. Ill. 1977) (mem.); *In re Northwest Airlines, Inc.*, 437 F. Supp. 533 (E.D. Wis. 1977) (mem.); *Empire Steel Mfg. Co. v. Marshall*, 437 F. Supp. 873 (D. Mont. 1977); *Marshall v. Chromalloy Am. Corp., Fed. Malleable Div.*, 433 F. Supp. 330 (E.D. Wis. 1977).

5. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967). *See also* *See v. City of Seattle*, 387 U.S. 541 (1967).

6. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *accord, United States v. Biswell*, 406 U.S. 311 (1972).

7. 98 S. Ct. 1816 (1978).

8. *Id.* at 1820.

9. *Id.* at 1819. OSHA determines which businesses to inspect based on a priority system. First priority is given to businesses that have experienced a catastrophic accident. Next priority is given to instances in which there have been employee complaints. Then come the "target industries" chosen because of a characteristically high incidence of injury in the industry. The lowest priority is given to random inspections as in *Barlow's*. *See* D. PETERSON, THE OSHA COMPLIANCE MANUAL 13 (1975); Brief for National Federation of Independent Business as Amicus Curiae at 14 n.2, *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978).

10. 98 S. Ct. at 1819.

11. After the inspector was denied permission to inspect, OSHA regulations required him to report this to his area director who was to "take appropriate action, including compulsory process, if necessary." 29 C.F.R. § 1903.4 (1977). Compulsory process has in the past taken one of two forms: (1) a search warrant granted by a federal magistrate or judge, *see, e.g.,* cases cited note 4 *supra*; or (2) an order compelling the businessman to submit to the inspection, *see* *Usery v. Centrif-Air Mach. Co.*, 424 F. Supp. 959 (N.D. Ga. 1977); *Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp. 627 (D.N.M. 1976) (three-judge panel) (mem.); *Brennan v. Gibson Prods., Inc.*, 407 F. Supp. 154 (E.D. Tex. 1976) (three-judge panel); *Brennan v. Buckeye Indus., Inc.*, 374 F. Supp.

sent was again refused and Barlow's brought an action to enjoin OSHA from conducting warrantless inspections.¹² A three-judge court ruled in Barlow's favor,¹³ holding that if consent to inspect is denied, the fourth amendment requires OSHA inspectors to obtain a warrant and that section 8(a) authorizing warrantless inspections is unconstitutional.¹⁴

Affirming the lower court's holding that warrantless OSHA inspections are unconstitutional, the Supreme Court reinforced its prior holdings "that the Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations"¹⁵ and "that this rule applies to commercial premises as well as homes."¹⁶ Because "warrantless searches are generally unreasonable" a warrantless search would have to fit under a recognized exception.¹⁷ The Secretary argued that despite this rule the warrantless OSHA inspection is reasonable and therefore an exception to the warrant requirement rule. Specifically, the Secretary urged that OSHA inspections are covered by the warrant requirement exception applicable to pervasively regulated businesses.¹⁸ The Court, however, reasoned that this exception for inspections of certain heavily regulated businesses is inapplicable because the degree of federal involvement in OSHA-affected businesses does not rise to the level necessary to activate that exception.¹⁹ According to the Court, federal imposition of

1350 (S.D. Ga. 1974). It is the latter type of compulsory process that the OSHA inspectors presented on their second visit.

In prior cases in which OSHA had sought orders to compel, OSHA had made no effort to establish administrative probable cause, (for discussion of administrative probable cause, see notes 24 & 25 and accompanying text *infra*), but had merely cited the provisions of § 8(a) as evidencing their authority to inspect. *See, e.g.*, 418 F. Supp. at 629 n.3. The Court in *Barlow's* indicated that the order to compel an inspection may be the "functional equivalent of a warrant" if the fourth amendment is satisfied by a showing of administrative probable cause. 98 S. Ct. at 1827 n.23.

12. 98 S. Ct. at 1819.

13. *Barlow's, Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho 1976) (three-judge panel), *aff'd sub nom. Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978).

14. The lower court entered an injunction prohibiting any OSHA searches under § 8(a). Justice Rehnquist stayed that order pending appeal except as it applied to Barlow's. Jurisdictional Statement at 37.

15. 98 S. Ct. at 1820. The Secretary had argued that *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), were distinguishable from *Barlow's* because the municipal housing codes involved in *Camara* and *See*, unlike OSHA, provided for fines for refusal to consent to an inspection. Brief for Appellant at 14. The holding in *Barlow's* would seem to indicate that it is not the punitive nature of a fine or sanction but the invasion of privacy interests occasioned by the inspection that is determinative.

16. 98 S. Ct. at 1820.

17. *Id.*

18. *Id.*

19. OSHA covers all businesses affecting interstate commerce. 29 U.S.C. § 652(5) (1970).

minimum wages and maximum hours does not constitute sufficient regulation to find implied consent to detailed OSHA inspections.²⁰

The Secretary also contended that the warrantless inspection was reasonable, and therefore in compliance with the fourth amendment,²¹ because OSHA enforcement depends upon warrantless inspections and because the restrictions on agency discretion in the Act protected privacy as much as a warrant would. The Court found, however, that contrary to the Secretary's assertions, warrantless inspections are not essential to the proper enforcement of OSHA,²² and the incremental protections of the employer's privacy afforded by a warrant are not "so marginal that [the protections] fail to justify the administrative burden that may be entailed."²³

The cases in which the Court had previously found exceptions to the warrant requirement rule for administrative inspections involved a federally licensed retail liquor dealer, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and a federally licensed firearms dealer, *United States v. Biswell*, 406 U.S. 311 (1972). *Barlow's* held that whereas a liquor or firearms dealer, by engaging in a regulated business, "has voluntarily chosen to subject himself to a full arsenal of governmental regulation," 98 S. Ct. at 1821, all businesses involved in interstate commerce are not regulated so heavily that engaging in them would constitute implied consent to later searches.

20. 98 S. Ct. at 1821. The Court's discussion of the point indicates that the level of government intrusion impliedly consented to by a certain business corresponds to that level of federal regulation covering the business. Conceivably, the Court could find that the relatively minor minimum wage regulations would support implied consent to some lesser intrusions. *See* note 86 *infra*.

The Court also rejected the argument that because work areas are open to employees these areas should be open to inspectors. 98 S. Ct. at 1821-22. If, on the other hand, the area to be inspected is open, not only to employees, but to the general public as well, then the inspector does not need a warrant. *See, e.g., Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974).

21. 98 S. Ct. at 1822. Although the Court discussed the Secretary's two contentions in different parts of the opinion, both contentions are basically that the warrantless OSHA inspection is reasonable. The first contention, that OSHA inspections come within those cases allowing warrantless inspections of heavily regulated businesses, is termed by the Court "an exception from the search warrant requirement." *Id.* at 1820. The finding, however, of such an exception to the rule that warrantless searches are generally unreasonable is tantamount to finding a reasonable search. Indeed, the cases recognizing this exception speak in terms of the reasonableness of the search. *See, e.g., Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75 (1970).

22. 98 S. Ct. at 1822. The Court based this determination on its belief that "the great majority of businessmen can be expected in normal course to consent to inspection without warrant," *id.*; its inference that because OSHA regulations provide for obtaining compulsory process if consent is initially refused, the Secretary must have determined that such a procedure would not cripple the Act's effectiveness, *id.* at 1823-24; and its observation that if surprise is actually imperative, then the desired result may be achieved by obtaining an *ex parte* warrant before seeking to inspect, *id.* at 1824. Justice Stevens, in dissent, joined by Justices Blackmun and Rehnquist, stated that he "would defer to Congress' judgment regarding the importance of a warrantless search power to the OSHA enforcement scheme." *Id.* at 1829 (dissenting opinion).

23. *Id.* at 1825. The Court concluded that a warrant would "provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria," *id.* at 1826, and "advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed," *id.* Stevens' dissent urged that the first function would be served by the statute itself

Although the Court found that OSHA inspections are not reasonable absent a warrant, it also held that the showing necessary for the issuance of an administrative warrant is not the same as "probable cause in the criminal law sense."²⁴ The standard of "administrative probable cause" may be met by

showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources, such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area.²⁵

Thus, the Court continued a middle of the road posture with respect to administrative inspections by requiring a warrant, but one that could be issued on a showing of administrative probable cause rather than the more rigid standard of particularized probable cause.²⁶

and pertinent regulations. *Id.* at 1830 (dissenting opinion). It is inconsistent with traditional fourth amendment analysis, however, to allow the searcher's own set of rules to substitute for the determination of a neutral and detached magistrate. *Cf.* *Johnson v. United States*, 333 U.S. 10, 14 (1948) (a warrant's "protection consists in requiring . . . a neutral and detached magistrate instead of . . . the officer engaged in the often competitive enterprise of ferreting out crime"); Brief for Appellee at 43. The Secretary urged, however, that, unlike police officers in the field, OSHA field inspectors do not exercise discretion in determining which businesses to inspect; that decision belongs to the area director. Therefore, a magistrate's warrant is not needed because the area director serves as the neutral and detached decisionmaker. Brief for Appellant at 35, 44-45; *cf.* 37 *CIN. L. REV.* 243, 246-47 (1968) (distinguishing police searches from health inspections with similar discretion argument).

24. 98 S. Ct. at 1824. If criminal probable cause were required it would be necessary for OSHA agents to demonstrate to a magistrate that they had probable cause to believe conditions on the particular business premises to be searched were in violation of OSHA standards. This standard can be termed *particularized* probable cause because it requires an assessment of a particular situation. It is this feature that distinguishes probable cause in the criminal law sense from administrative probable cause.

25. *Id.* at 1825. The fourth amendment comprises two different clauses: (1) the reasonableness clause—"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 (2) the warrant clause—"no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." U.S. CONST. amend. IV. The clauses are interrelated by virtue of the general rule that searches made pursuant to a valid warrant under the warrant clause are reasonable and thus not prohibited by the reasonableness clause; searches made without a warrant are prohibited unless they fall within an exceptional class of searches that are considered reasonable apart from any requirement of a warrant. The *Barlow's* majority found the OSHA inspection to be unreasonable and therefore under the warrant requirement. The warrant they require, however, does not meet the probable cause standard of the warrant clause. The dissenters correctly assert that the administrative standard of probable cause, based not on a particularized belief that there are violations on the premises, but on compliance with administrative selection procedures, is inconsistent with the warrant clause. 98 S. Ct. at 1828 (Stevens, J., dissenting). The dissenting opinion accuses the majority of acting inconsistently in using the lack of a warrant to find the search unreasonable but then only requiring an administrative warrant based on less than particularized probable cause.

26. For definition of particularized probable cause, see note 24 *supra*.

Prior to the birth of administrative probable cause in *Camara v. Municipal Court*²⁷ and *See v. City of Seattle*,²⁸ the Supreme Court had consistently held that the protections of the fourth amendment had no application outside the criminal area.²⁹ The reversal of this position began in *Camara* in which the appellant was arrested and convicted under a city ordinance for refusing to allow city housing inspectors to inspect the portion of his leased premises that he used as a residence.³⁰ The Court held the fourth amendment warrant requirement applicable to the administrative search contemplated by the municipal housing code.³¹ Yet, the Court realized that the criminal standard of particularized probable cause was inappropriate for such compliance inspections.³² Instead, a new standard applicable to administrative inspections was enunciated: “[P]robable cause’ to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.”³³

In *See v. City of Seattle*, the appellant was arrested and convicted for refusing to allow city housing inspectors to inspect his commercial warehouse. The Court held that “*Camara* applies to similar inspections of commercial structures which are not used as private residences.”³⁴ The opinion, however, contained some dicta that was to become the basis for later exceptions to the rule:

We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or

27. 387 U.S. 523 (1967).

28. 387 U.S. 541 (1967).

29. See *Eaton v. Price*, 364 U.S. 263 (1960) (per curiam) (equally divided Court let stand decision by Ohio Supreme Court upholding conviction of defendant who refused to submit to warrantless housing inspection); *Frank v. Maryland*, 359 U.S. 360 (1959) (upholding defendant's conviction on similar facts as *Eaton* but inspection was prompted by neighbor's complaint); cf. *Boyd v. United States*, 116 U.S. 616 (1886) (fourth amendment protected defendant from seizure of business invoices that could be used to establish violations of revenue laws because sanctions involved were in substance criminal). For further background on application of the fourth amendment in civil in contrast to criminal contexts, see generally Sonnenreich & Pinco, *The Inspector Knocks: Administrative Inspection Warrants Under an Expanded Fourth Amendment*, 24 Sw. L.J. 418 (1970).

30. *Id.* at 525-27.

31. *Id.* at 534.

32. *Id.* at 536. This is true because “the agency’s decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building.” *Id.*

33. *Id.* at 538.

34. *Id.* at 542.

marketing a product. Any constitutional challenge to such programs can only be resolved, as many have in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness.³⁵

Thus, the *See* holding was carefully limited to local housing code inspections and did not "consider the reach of the Fourth Amendment with respect to various federal regulatory statutes."³⁶

The Court had its first opportunity to resolve a conflict between the fourth amendment and a federal regulatory scheme in *Colonnade Catering Corp. v. United States*.³⁷ Colonnade had been licensed by the State of New York to serve liquor and was subject to the federal retail liquor dealer's tax.³⁸ In the course of enforcing the latter regulation, agents of the Internal Revenue Service³⁹ requested permission to inspect a locked warehouse on Colonnade's premises. Permission was refused by Colonnade's president on the ground that the agents did not have a search warrant. Thereupon, the agents broke the lock and confiscated a quantity of liquor.⁴⁰ The Court held that the warrant requirement of *Camara* and *See* was not applicable in this case,⁴¹ basing its holding on the long history of "close supervision and inspection" of the liquor industry.⁴² The Court noted that warrantless liquor inspections date from pre-fourth amendment legislation.⁴³ Moreover, this special treatment of liquor inspections was predicated on a governmental property interest in untaxed liquor.⁴⁴ The idea that an owner engaging in a highly regulated business in effect consents to warrantless inspections did not begin to appear until later cases.

This exception to *Camara* and *See* was broadened two years later by *United States v. Biswell*.⁴⁵ Biswell was a pawn shop operator feder-

35. *Id.* at 545-46.

36. *United States v. Biswell*, 406 U.S. 311, 313 (1972).

37. 397 U.S. 72 (1970).

38. *Id.* at 72.

39. Agents of the Alcohol and Tobacco Division of the IRS have broad statutory authority to enter and inspect the premises of retail liquor dealers; dealers who refuse such inspections can be fined \$500. *Id.* at 73-74; see I.R.C. §§ 5146(b), 7342, 7606.

40. 397 U.S. at 73.

41. *Id.* at 76. The precise holding in *Colonnade* was that Congress, although constitutionally able, did not provide for warrantless inspections of liquor dealers but instead imposed a fine of \$500 on those who refused to submit to a warrantless inspection. The agents were required to return the liquor, which was also barred from use as evidence.

42. *Id.* at 77.

43. *Id.* at 75.

44. *Id.* at 76 (citing *Boyd v. United States*, 116 U.S. 616, 623-24 (1886)).

45. 406 U.S. 311 (1972).

ally licensed to deal in sporting weapons.⁴⁶ A city policeman and a federal Treasury agent seeking to ascertain compliance with federal law asked to enter a locked storeroom on Biswell's premises. Biswell unlocked the storeroom and allowed the inspectors to enter without a warrant but only after being referred to the warrantless inspection provision in the Gun Control Act.⁴⁷ The Court ultimately held that this warrantless search provision fell within the *Colonnade* exception to *Camara* and *See*.⁴⁸ Because, however, "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry,"⁴⁹ the Court found it necessary to augment its *Colonnade* reasoning with four inferred factors in order to uphold the *Biswell* search: (1) Gun control is an important federal interest and inspection is a crucial part of the regulatory scheme.⁵⁰ (2) The requirement of a warrant easily could frustrate this crucial inspection.⁵¹ (3) Protections afforded by a warrant would be negligible.⁵² (4) The threat to privacy is limited since the dealer is already engaging in a

46. *Id.* at 312.

47. *Id.* The Gun Control Act of 1968, 18 U.S.C. §§ 921-928 (1976), authorizes federal agents to enter the premises of any firearms or ammunition dealer to examine documents, firearms, or ammunition. *Id.* § 923(g).

48. 406 U.S. at 317. Whether the search was lawful depended on whether the warrantless search provision of the Gun Control Act was constitutional and not on whether Biswell's consent to the search was valid. If the warrantless search provision was unconstitutional, Biswell's consent, given only after reading the provision, could not support the search. *Cf. Bumper v. North Carolina*, 391 U.S. 543 (1968) (consent to search obtained after presentation of invalid warrant is insufficient). And, if the warrantless search was constitutional, the lawfulness of the search did not depend on consent. 406 U.S. at 315.

49. 406 U.S. at 315. It is also clear that the government had no property interest in weapons as it did in untaxed liquor.

50. *Id.* This factor is arguably present in the housing code situations of *Camara* and *See*.

51. *Id.* at 316. The Court in *Camara* failed to discuss the possibility that a warrant requirement would frustrate housing code inspection programs except to say "[i]t has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement." 387 U.S. at 533. The *Biswell* Court, however, found that gun control would be frustrated by a warrant requirement and distinguished the housing code situation by observing that building code violations were "conditions that were relatively difficult to conceal or to correct in a short time;" warrants could, therefore, be required "with little if any threat to the effectiveness of the inspection system there at issue." 406 U.S. at 316. The Court was undoubtedly referring to its recommended procedure of first seeking consent and then reappearing with a warrant after having alerted the building owner of an impending inspection. *See* 387 U.S. at 539-40. The Court was concerned that the unannounced aspect of gun control inspections, which they considered crucial, would be jeopardized by a warrant requirement. The opinion never addressed the possibility of obtaining an *ex parte* warrant before the search.

52. 406 U.S. at 316. The Court did not elaborate on this factor except to indicate that if an inspection under the Gun Control Act is to be effective it must be flexible with regard to time, scope and frequency, and that any warrant that allowed this flexibility would not provide much protection. *Id.*

pervasively regulated business.⁵³

Because *Biswell* represented an expansion of the *Colonnade* exception, the question arose whether the exception had replaced the *Camara-See* warrant requirement.⁵⁴ This uncertainty was resolved in *Almeida-Sanchez v. United States*⁵⁵ in which the Court reaffirmed the *Camara-See* rule. In *Almeida-Sanchez*, petitioner's automobile had been stopped and searched twenty-five miles from the Mexican border by roving border patrol agents who had neither a warrant nor probable cause for the search.⁵⁶ The search uncovered marijuana and led to petitioner's conviction for illegal importation.⁵⁷ The search was conducted pursuant to the Immigration and Nationality Act, which provided for warrantless searches of automobiles within a reasonable distance from the border.⁵⁸ *Almeida-Sanchez* challenged this provision as a violation of the fourth amendment. The Government argued that the warrantless search provision came within the *Colonnade-Biswell* exception to the warrant requirement rule.⁵⁹ In holding the search unconstitutional, the Court rejected the applicability of the *Colonnade-Biswell* exception.⁶⁰ Although there was a history of federal regulation in the case,⁶¹ as there was in *Colonnade* and to a lesser extent in

53. *Id.* This factor is the only one listed by the *Biswell* Court that was based on the *Colonnade* rationale of a highly regulated business. The *Biswell* opinion, unlike *Colonnade*, hints of an implied consent rationale. "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *Id.*

54. *Cf.* 98 S. Ct. at 1821 ("The clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception. The Secretary would make it the rule.")

55. 413 U.S. 266 (1973).

56. *Id.* at 267-68.

57. *Id.* at 267.

58. 8 U.S.C. § 1357(a)(3) (1976). The related regulation provides that a reasonable distance is "within 100 air miles from any external boundary of the United States." 8 C.F.R. § 287.1(a)(2) (1978).

Although the statute allows warrantless searches for illegal aliens, marijuana discovered would be admissible if it was "in plain view" during a search for illegal aliens and provided that such a search for aliens was constitutional. *Cf. Harris v. United States*, 390 U.S. 234, 236 (1968) ("objects falling in plain view of an officer who has a right to be in a position to have that view are subject to seizure and may be introduced into evidence").

59. 413 U.S. at 270-71. The government did not attempt to justify the search as within the automobile exception to the warrant requirement that allows warrantless searches of automobiles if there is probable cause. *Id.* at 269-70; see *Carroll v. United States*, 267 U.S. 132 (1925). Since there was no probable cause in *Almeida-Sanchez*, 413 U.S. at 268, the automobile exception would have been of no avail.

60. 413 U.S. at 271.

61. "Since 1875, Congress has given 'almost continuous attention . . . to the problems of immigration and of excludability of certain defined classes of aliens.'" *Id.* at 292 (White, J., dissenting) (quoting *Kleindienst v. Maudel*, 408 U.S. 753, 761-62 (1972)).

Biswell, the Court distinguished those cases as involving implied consent to search:

A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises as [alcohol and firearms] accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him.⁶²

Unlike Almeida-Sanchez, the petitioner in *Barlow's* was engaged in a regulated business. But the Court distinguished *Barlow's* from *Colonnade* and *Biswell* on the grounds that the degree of business regulation in *Barlow's* did not support implied consent to search as it did in *Colonnade* and *Biswell*. Such an implied consent rationale, however, is obviously a fiction and alone is an insufficient basis for applying the *Colonnade-Biswell* exception.⁶³ Indeed, the Court recognized a second ground on which to distinguish *Colonnade-Biswell*—whereas liquor and firearms regulatory programs would be frustrated by a warrant re-

62. 413 U.S. at 271. The *Almeida-Sanchez* dissent considered the *Colonnade-Biswell* exception broad enough to cover that case. The dissent argued that two of *Biswell's* four factors, see text accompanying notes 50-53 *supra*, would support a warrantless search. Specifically, the dissent noted the important federal interest in immigration control, and the belief that roving patrol searches were essential to the regulatory scheme, to support the warrantless search. 413 U.S. at 292-93 (White, J., dissenting). The dissent discussed the history of immigration regulation, not to support an implied consent argument, but to bolster the finding that immigration control is an important federal interest.

The position of Chief Justice Burger and Justice White in *Barlow's*, voting to require OSHA to get a warrant, is clearly inconsistent with their dissenting posture in *Almeida-Sanchez* in which Justice White argued that the roving border patrol warrantless search was sanctioned by *Colonnade-Biswell*. *Id.* at 294. Moreover, Justice White, writing for the *Barlow's* majority, cited the majority language in *Almeida-Sanchez* in order to distinguish *Colonnade* and *Biswell*. 98 S. Ct. at 1821. In the past both Justice White and Chief Justice Burger have been receptive to reasonableness arguments as justifications for not requiring law enforcement officers to get warrants. It was, however, their unwillingness to accept the reasonableness analysis of Justice Stevens that was crucial to the outcome of *Barlow's*. The inconsistency is perhaps explained by the different probable cause showing required for criminal as opposed to administrative searches. In the criminal area, in which there is a rigid requirement of particularized probable cause, Chief Justice Burger and Justice White may be more disposed to permit warrantless searches based upon a reasonableness analysis than in the administrative area in which the probable cause requirement is less stringent. This argument, however, does not adequately explain why Chief Justice Burger and Justice White voted to allow warrantless roving border patrol searches in *Almeida-Sanchez* rather than supporting Justice Powell's position requiring an administrative warrant. See 413 U.S. at 275 (Powell, J., concurring).

63. As Justice Stevens pointed out in his dissent, implied consent, taken to its logical extreme, can be reduced to absurdity. Stevens observed that under an implied consent analysis it is only those regulatory programs started long ago that will come under the *Colonnade-Biswell* exception. 98 S. Ct. at 1832-33 (dissenting opinion). A logical extension of the implied consent doctrine would demand that if businessman *A* started his business before the regulations began he would be protected from warrantless searches, while businessman *B* who began business after it was subject to regulation could be said to have impliedly consented to a warrantless inspection provision.

quirement,⁶⁴ the success of OSHA is not so dependent on a warrantless inspection. In support of this conclusion, the Court reasoned that OSHA would not be affected adversely by a warrant requirement because most businessmen would consent to warrantless OSHA inspections.⁶⁵

This reliance on the probability that businessmen will consent to government intrusions is perhaps unsound in view of the inevitable awareness that consent is not required. An additional distinction, not emphasized by the Court, suggests more strongly that the success of OSHA is not dependent on warrantless inspections: whereas no one directly involved with an illegal liquor or firearms operation has any interest in informing the government of the illegality, employees do have significant interest in informing OSHA of safety violations. Moreover, information concerning violations can be relayed anonymously.⁶⁶ Employee complaints, therefore, provide an alternative enforcement opportunity available to OSHA regulators that was not available in the liquor and firearms cases.

Thus, although the *Barlow's* opinion stressed the implied consent rationale, the Court implies that the availability of alternative enforcement opportunities is also a factor distinguishing the *Barlow's* warrantless inspection from those upheld under the *Colonnade-Biswell* exception to the warrant requirement. Combining these two factors, application of the *Colonnade-Biswell* exception appears subject to a two-pronged requirement that there be (1) regulation of a business enterprise sufficient to support an implied consent to search theory⁶⁷ and (2) no alternative enforcement opportunity to a warrantless inspection.⁶⁸ Since these requirements for the *Colonnade-Biswell* exception

64. *Cf. Biswell v. United States*, 406 U.S. at 316 (in context of gun control in which violations are easily concealed, a warrant could frustrate deterrent effect of inspections).

65. *See* note 22 and accompanying text *supra*. The Court also noted that OSHA regulations require agents to seek compulsory process if entry to inspect is denied rather than forcibly entering the premises. This regulation, not required by the Act, is viewed by the Court as evidence that the Secretary himself does not believe that warrantless, surprise inspections are necessary for OSHA's effectiveness. 98 S. Ct. at 1823-24.

66. Furthermore, "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint . . . under or related to [OSHA]." 29 U.S.C. § 660(c)(1) (1970).

67. *See, Biswell*, and *Almeida-Sanchez* all mention federally licensed and regulated enterprises. It is likely, however, that a license requirement in a regulatory scheme will not alone activate the *Colonnade-Biswell* exception. *See, e.g., Camara v. Municipal Court*, 387 U.S. at 526 n.1 (housing ordinance required each owner to obtain license renewable every year upon inspection). Thus, the amount of regulation and not the license requirement is determinative.

68. The unavailability of enforcement opportunities other than warrantless inspections is not sufficient without the implied consent requirement to activate the *Colonnade-Biswell* exception. In

were not satisfied, the *Barlow's* Court found that warrantless OSHA inspections were unreasonable and therefore unconstitutional.⁶⁹

While *Barlow's* did find that warrantless OSHA inspections were unconstitutional, the Court held that a warrant need not be supported by a showing of particularized probable cause but only by a showing of administrative probable cause.⁷⁰ The dissenters in *Camara* and *See*, as well as Justice Stevens in *Barlow's*, were correct in arguing that administrative probable cause is inconsistent with the literal language of the fourth amendment warrant clause.⁷¹ Particularized probable cause, however, is inappropriate in an OSHA context just as it was in the housing code cases. Because the purpose of OSHA inspections is more to encourage compliance with the safety regulations than to catch violations that are thought to exist,⁷² a decision to inspect is necessarily based on criteria such as the safety record of an entire industry rather than on knowledge of violations within particular business premises. Thus, requiring a particularized probable cause standard would limit OSHA inspections to those conducted pursuant to employee complaints or after catastrophic accidents and thereby curtail OSHA's ability to encourage pre-accident compliance with safety regulations. If compelled to require particularized probable cause and thus emasculate

Almeida-Sanchez, Justice White argued quite convincingly that warrantless roving border patrol searches were essential to stop the flow of illegal immigrants, 413 U.S. at 293 (White, J., dissenting), however, the *Colonnade-Biswell* exception was not applied because there was no business regulation to support implied consent. See *id.* at 271, quoted in text accompanying note 62 *supra*. In some instances in which the implied consent argument is especially strong, due to specific regulation in an unusually dangerous enterprise, implied consent alone may support the *Colonnade-Biswell* exception, even though there are other enforcement opportunities available. See text accompanying notes 79-83 *infra*.

69. Part I of the majority opinion in *Barlow's* deals with the applicability of the *Colonnade-Biswell* exception to the warrant requirement rule, while part II deals with the determination of the reasonableness of the warrantless inspection by balancing administrative necessities against the incremental protection a warrant would provide. As noted above, note 21 *supra*, finding the *Colonnade-Biswell* exception applicable constitutes a finding that the search is reasonable.

In the context of a full scale intrusion into privacy such as an OSHA inspection, it is unlikely that the balancing test discussed in part II would ever render a warrantless search reasonable. This test does not consider the privacy expectations of the inspectee as does the *Colonnade-Biswell* test, which contains the implied consent element. A balancing test is only appropriate in a situation in which there is a limited intrusion. Cf. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (routine warrantless stops for questioning at permanent border check points are constitutional based on balancing of governmental interests and personal privacy interests, but intrusion was "quite minimal"). Therefore, due to the inapplicability of a balancing test in a full scale intrusion context, the entire reasonableness inquiry should be whether the *Colonnade-Biswell* exception is applicable. It is necessary, however, to borrow the "no other enforcement opportunities" factor from the balancing analysis in order to adequately distinguish *Colonnade-Biswell* from *Barlow's*.

70. 98 S. Ct. at 1824.

71. See note 25 *supra*.

72. See generally 29 U.S.C. § 651 (1970), quoted in note 2 *supra*.

late OSHA, the Court would likely have found the inspections to be reasonable and therefore not subject to any warrant requirement. Requiring the administrative warrant instead is preferable because it does provide the businessman protection from a vengeful regulator by requiring that the decision to inspect be based on a rational administrative selection process.⁷³ Such protection, while not as great as that afforded by particularized probable cause, is better than no independent review of the inspection decision.

The ultimate impact of *Barlow's* on OSHA enforcement might depend in part on the level of *actual* consent required to justify a consensual administrative inspection.⁷⁴ As noted earlier, the *Barlow's* decision was based in part on the Court's belief that most employers probably would consent to a warrantless inspection. How valid the Court's guess is will depend to a significant extent on what level of consent will be required. If a voluntariness test as found in the criminal context⁷⁵ is required for consent to an administrative inspection, arguably fewer businessmen will be held to have given their consent. In the criminal context, knowledge of the right to withhold consent to search, while not necessary, is a factor in determining the voluntariness of the consent.⁷⁶ For example, submitting to a search by a government agent who announces "I am here to search your premises" has been held not to constitute valid consent in a criminal case.⁷⁷ Some lower courts may be willing to apply a less rigid standard for administrative inspections, just as the *Camara* Court lessened the probable cause standard.⁷⁸

73. For a detailed discussion by lower courts on the showing that would support an OSHA warrant, see *Reynolds Metals Co. v. Secretary of Labor*, 442 F. Supp. 195 (W.D. Va. 1977), and *Morris v. United States Dep't of Labor*, 439 F. Supp. 1014 (S.D. Ill. 1977).

74. Despite the vigorous arguments by the Secretary of Labor that a warrant requirement would severely hamper OSHA enforcement, see Brief for Appellant at 44-45, George H. R. Taylor, Director of the AFL-CIO's new Occupational Safety and Health Department (whose organization filed an amicus brief on behalf of appellant), stated that an amendment to a Small Business Administration bill passed by the Senate "is a far worse threat than the *Barlow's* decision." *BUS. WEEK*, Sept. 11, 1978, at 53. That amendment would exempt from OSHA regulations businesses in low injury rate industries with 10 or fewer employees. *Id.*

75. See *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (consent to criminal search requires voluntariness based on consideration of totality of circumstances).

76. *Id.* at 232-34.

77. *Amos v. United States*, 255 U.S. 313 (1921) (no valid consent when defendant acquiesced in search by revenue officers who said they had come to search premises for violations of revenue law).

78. In two OSHA cases, *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F.2d 84 (5th Cir. 1975), and *Stockwell Mfg. Co. v. Usery*, 536 F.2d 1306 (10th Cir. 1976), lower courts found adequate actual consent to inspection when inspectors merely showed their credentials and were then allowed to search. The courts in these cases did not consider that the actual consent standard they

Barlow's will also affect other federal regulatory statutes that provide for warrantless inspections but, unlike OSHA, are aimed at specific industries rather than all businesses affecting interstate commerce. Soon after the *Barlow's* decision the Supreme Court vacated and remanded for reconsideration in light of the *Barlow's* decision a Sixth Circuit case⁷⁹ involving warrantless safety inspections under the Coal Mine Safety and Health Act⁸⁰. Justice White suggested that these single industry warrantless inspections might be constitutional "where regulations [are] so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply."⁸¹ Even if a single industry inspection does not come under that exception, many of the statutes provide for resort to federal court for an order to compel inspection rather than allowing a forcible inspection.⁸² Once in court the agency could make a showing of administrative probable cause and then be allowed to search.⁸³

Moreover, *Barlow's* will affect other federal regulatory inspections that, like OSHA, are aimed at thousands of businesses in many unrelated industries. For example, the Supreme Court recently vacated and remanded for reconsideration in light of *Barlow's* two Fifth Circuit cases challenging the government's right to make warrantless inspections to check compliance with employment discrimination rules that affect all businesses that contract with the federal government.⁸⁴ Re-

applied was any different from that applied in criminal cases. An argument can be made, however, that the consent involved in these cases did not rise to the *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), voluntariness requirements. Thus these holdings indicate a willingness to relax actual consent standards in administrative searches.

79. *Consolidation Coal Co. v. United States*, 560 F.2d 214 (6th Cir. 1977), *vacated and remanded*, 98 S. Ct. 2841 (1978) (mem.).

80. Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (codified as amended at 30 U.S.C. §§ 801-960 (1970 & Supp. V 1975)).

81. 98 S. Ct. at 1825. Despite this dicta Justice Stevens believed that the *Barlow's* decision rendered inspection provisions in legislation directed at single industries presumptively invalid. *Id.* at 1834 n.11 (Stevens, J., dissenting).

82. *Id.* at 1825 nn.18 & 19.

83. OSHA regulations, but not the Act itself, required that inspectors seek compulsory process if entry was refused. The issue in *Barlow's* was not whether an adequate showing had been made in court to support the order compelling inspection, but whether any resort to judicial process was needed given the Act's provision for warrantless inspections.

84. In *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459 (5th Cir. 1977), *vacated and remanded mem.*, 98 S. Ct. 2841 (1978), and *United States v. Mississippi Power & Light Co.*, 553 F.2d 480 (5th Cir. 1977), *vacated and remanded mem.*, 98 S. Ct. 2841 (1978), two utilities questioned the constitutionality of Executive Order No. 11246, 3 C.F.R. § 339 (1964-1965 Compilation), as amended by Exec. Order No. 11375, 3 C.F.R. § 406 (1969), which prohibits employment discrimination by government contractors. The constitutional challenge is based in part on a fourth amendment violation in that the Order requires government contractors to permit access to their books and records by government officials to determine compliance with the Order. The Court of Appeals for the Fifth Circuit held that public utilities come within the *Colonnade-Biswell*

consideration of these cases will inevitably focus on two aspects of the implied consent rationale not fully clarified in *Barlow's*.

First, because the defendants in these employment discrimination cases are electric utility companies and therefore heavily regulated in the rate-setting function of their business, the question arises whether regulation of rates will support implied consent to inspections concerning employment practices. *Barlow's* did not answer this question because no aspect of the business involved in that case was appreciably regulated. In both *Colonnade* and *Biswell* the warrantless inspections were directly related to the purposes behind the federal regulation considered crucial in upholding the inspections. Moreover, it would strain the existing fiction of implied consent if regulation in one aspect of a business could lead to implied consent to a search relating to another aspect. It would seem, therefore, that regulation in one aspect of a business cannot support consent to a search related to another aspect.⁸⁵

A second aspect of the *Barlow's* implied consent rationale that must be explored in the reconsideration of these employment discrimination cases is whether the electric utilities by contracting with the federal government to supply electricity have impliedly consented to warrantless inspections in the same way that businessmen engaging in certain federally regulated businesses have. If the warrantless inspection is related to the contract provisions, the business, by accepting the benefits of the contract, might be said to accept the burden of warrantless inspection. In the electric utility cases, however, selling electricity to the government has nothing to do with hiring practices. Therefore, requiring these utilities, because they contract with the government, to be subject to *unrelated* warrantless inspections of employment records is inconsistent with the implied consent requirement behind the *Colonnade-Biswell* exception.

Even if the government is able to succeed on the implied consent arguments,⁸⁶ the second requirement of the *Colonnade-Biswell* test, that

exception, and therefore the warrantless search of employee records is not a fourth amendment violation. 553 F.2d at 471.

85. In a lower court OSHA decision, a three-judge court refused to apply the *Colonnade-Biswell* exception to allow a warrantless OSHA inspection of an employer who manufactured ammunition, a business presumably regulated by the Gun Control Act. *Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp. 627 (D.N.M. 1976) (three-judge panel). The court did not discuss whether this particular manufacturer came under the provisions of the Gun Control Act, but a manufacturer of ammunition is covered by the Act. 18 U.S.C. § 922(a)(1) (1976).

86. Some language in the *Barlow's* opinion arguably could support a finding of implied consent in the employment discrimination cases. See 98 S. Ct. at 1821. A lesser intrusion of looking through employment records (as opposed to detailed and minute OSHA inspections) might be supported by a lesser amount of regulation or, conceivably, by pervasive regulation in other as-

there be no alternative enforcement opportunities, should preclude the application of the warrant requirement exception in the employment discrimination context. The regulatory enforcement of employment discrimination rules will not suffer appreciably due to a warrant requirement because employees, just as they have an interest in reporting safety hazards, have an interest in reporting employment discrimination. Because there are effective alternative enforcement opportunities, fourth amendment rights need not bow to the urgent federal interest in the employment discrimination area.

The result of *Barlow's* is laudable in that it halts, temporarily at least, the Burger Court's erosion of fourth amendment rights.⁸⁷ The Court recognized that protection of privacy provided by administrative probable cause is not counter-balanced by mere administrative convenience or congressionally perceived urgency. In finding the *Colonnade-Biswell* exception to the warrant requirement inapplicable, the Court emphasized that consent to inspect, implied from a businessman's awareness of significant government regulation of his business, is necessary to support a warrantless inspection. In addition, although implied consent is the primary factor in a *Colonnade-Biswell* analysis, there should also be an inquiry into whether there are alternative enforcement opportunities available to government regulators. These two factors provide a test to determine whether the *Colonnade-Biswell* exception is applicable to allow a warrantless regulatory inspection. Thus, by examining both the level of implied consent and the availability of alternative enforcement opportunities, a proper balance can be

pects of the business, such as rate-setting in the case of utilities. The *Barlow's* Court, however, indicated that an industry-by-industry regulatory scheme is the type of regulation that would support implied consent, not a broadly sweeping regulatory scheme that includes all business contracting with the government.

87. See, e.g., *United States v. Janis*, 428 U.S. 433 (1976) (holding that evidence seized unconstitutionally, but in good faith, is admissible in federal civil tax proceeding); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (upholding warrantless search of automobile towed to police garage for parking violations); *United States v. Santana*, 427 U.S. 38 (1976) (upholding warrantless arrest of defendant seen on her front porch and arrested after having fled inside); *United States v. Watson*, 423 U.S. 411 (1976) (upholding warrantless arrest in public place despite sufficient time to obtain warrant and finding defendant's consent to search automobile valid although made while in custody); *Cardwell v. Lewis*, 417 U.S. 583 (1974) (upholding warrantless search of exterior of automobile seized from private lot after defendant's arrest); *Gustafson v. Florida*, 414 U.S. 260 (1973) (upholding warrantless search incident to arrest in which officer had sole discretion whether arrest would be full custody); *United States v. Robinson*, 414 U.S. 218 (1973) (upholding warrantless search of contents of cigarette pack as incident to full custody arrest); *Adams v. Williams*, 407 U.S. 143 (1972) (upholding warrantless seizure based on uncorroborated information from informant). But see *Zurcher v. Stanford Daily*, 98 S. Ct. 1970 (1978) (decision, announced week after *Barlow's*, holding newspaper's files subject to search pursuant to valid warrant although paper in no way suspected of any illegality).

struck between the individual's right to privacy and the public's interest in regulation. By not opening the gates of all businesses engaged in interstate commerce to government inspectors, but yet applying the more lenient administrative probable cause standard, *Barlow's* will allow the Court to seek that proper balance.

H. BRYAN IVES, III

Constitutional Law—Rights of the Mentally Retarded: *Halderman v. Pennhurst* Closes State Institution and Mandates Community Care

Until the middle of this century the mentally retarded, neglected by the medical profession, were routinely consigned for life to isolated institutions.¹ During the last two decades, however, medical advances regarding the capabilities and treatment of the retarded² have spurred judicial recognition of the rights of that institutionalized population. Recent cases have held, principally on the basis of the eighth and fourteenth amendments, that institutionalized retardates possess a right to habilitation—the education, training, and care required by mentally retarded individuals to reach their maximum development.³

This right to habilitation was first recognized and applied in *Wyatt v. Stickney*⁴ to mandate minimum standards of care and supervision

1. An excellent discussion of the historical treatment of the mentally retarded appears in Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124 (1976).

2. *Id.* at 136-43. A recent paper credits "mid-twentieth century discoveries (or rediscoveries) of the capacities of disabled people, of teaching and learning techniques to evoke those capacities and the more or less wide distribution of knowledge of those techniques among school people and other service agents in our society." T. Gilhool & E. Sturtman, *Integration of Severely Handicapped Students: Toward Criteria for Implementing and Enforcing the Integration Imperative of P.L. 94-142 and Section 504*, at 7 (1978) (unpublished paper for Public Interest Law Center of Philadelphia).

3. Habilitation is defined in *Wyatt v. Stickney*, 344 F. Supp. 387, 395 app. (M.D. Ala. 1972), as

the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, and social efficiency. Habilitation includes but is not limited to programs of formal, structured education and treatment.

4. 325 F. Supp. 781 (M.D. Ala. 1971); 334 F. Supp. 1341 (M.D. Ala. 1971); 344 F. Supp. 373 (M.D. Ala. 1972) (right to treatment for mentally ill); 344 F. Supp. 387 (M.D. Ala. 1972) (right to

within the institution.⁵ Recently, in *Halderman v. Pennhurst State School & Hospital*,⁶ the United States District Court for the Eastern District of Pennsylvania went one significant step further and found Pennhurst State School and Hospital, a large, isolated state institution for the mentally retarded,⁷ inherently incapable of providing its residents the minimally adequate habilitation that courts in previous cases⁸ had ordered the institutions to provide. Instead of requiring improvements in the institution's staffing, programming, and funding, the court directed that Pennhurst be closed and that suitable facilities in the community⁹ be provided for all its residents.¹⁰

The *Pennhurst* plaintiffs, originally all retarded residents of the institution, brought a class action¹¹ seeking declaratory and injunctive relief, including the closing of Pennhurst, and damages¹² on the ground that they were being denied their right to habilitation. They claimed

habilitation for mentally retarded), *aff'd in part, rev'd in part sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (*Wyatt* is a series of decisions with the same style).

5. 344 F. Supp. 387, 395-407 app. (M.D. Ala. 1972). For a discussion of the minimum standards in *Wyatt*, see note 53 *infra*.

6. 446 F. Supp. 1295 (E.D. Pa. 1977), *stay denied*, 451 F. Supp. 233 (E.D. Pa. 1978), *appeal docketed*, No. 78-148 (2d Cir. Apr. 25, 1978).

7. Pennhurst, located 30 miles from Philadelphia, was built in 1908, 446 F. Supp. at 1302, at the height of the out-of-sight, out-of-mind philosophy of treatment for the retarded. *Id.* at 1299-300.

8. See, e.g., *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated in part*, 550 F.2d 1122 (8th Cir. 1977); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972).

9. Alternative community facilities can take many forms, supplying a great variety of residential options and support services that represent a continuum of models from the least restrictive to the highly structured. Among the possible residential options are developmental homes; intensive training residences for children, for adolescents, and for adults; family living residences; adult minimum supervision residences; room and board homes; adult boarding; cluster apartments; independent living with available counseling; five-day residences; behavior-shaping residences; developmental maximization units; crisis assistance units; crisis homes; structured correctional residences; and structured rehabilitation residences. See Glenn, *The Least Restrictive Alternative in Residential Care and the Principle of Normalization*, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *THE MENTALLY RETARDED CITIZEN AND THE LAW* 499, 507-12 (1976). All of these facilities afford the mentally retarded some degree of contact with normal community living patterns, primarily because of their location within the community but also because of their smaller size and less rigid structure.

Expert testimony showed that all the retarded at Pennhurst, even the most severely handicapped, were capable of benefiting from community-centered facilities. 446 F. Supp. at 1312.

10. 446 F. Supp. at 1320, 1326.

11. The plaintiff class of retarded persons was defined as "[a]ll persons who as of May 30, 1974, and at any time subsequent, have been or may become residents of Pennhurst State School and Hospital." This included residents, those who were on a waiting list for placement at Pennhurst, and those who, "because of the unavailability of alternate services in the community," might have been placed at Pennhurst. *Id.* at 1300.

12. *Id.* at 1298, 1324.

violations of both state¹³ and federal¹⁴ statutes and the first, eighth, ninth, and fourteenth amendments to the United States Constitution.¹⁵ Defendants—Pennhurst, its supervisor and employees, the Pennsylvania Department of Public Welfare, and various state and county officials¹⁶—denied that conditions at Pennhurst violated its residents' constitutional or statutory rights.¹⁷ They agreed, however, that Pennhurst's staff of 1,500 was extremely inadequate for its patient population of 1,230, seventy-four percent of whom were profoundly retarded,¹⁸ and admitted that they already had plans for a drastic reduction of the population,¹⁹ although their timetable for the eventual closing of the institution was "vague and indefinite."²⁰

Finding that minimally adequate habilitation is properly provided only by living arrangements as much like a normal family living situation as possible,²¹ the court concluded that because of institutional conditions antithetical to this "normalization" principle,²² "minimally adequate habilitation cannot be provided in an institution such as Pennhurst."²³ The court entered judgment for plaintiffs; defendants

13. Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1967) (repealed in part in 1976; application to mentally retarded unaffected).

14. 29 U.S.C. § 794 (1970); 42 U.S.C. §§ 1983, 1986, 6010 (1970).

15. 446 F. Supp. at 1298 nn. 2 & 3.

16. *Id.* at 1301-02 & 1301 n.13.

17. *Id.* at 1313.

18. *Id.* at 1302-03. The institutional population was very similar to that in other institutions for the retarded. Ferleger, *The Future of Institutions for Retarded Citizens: The Promise of the Pennhurst Case*, in MENTAL RETARDATION AND THE LAW: A REPORT ON STATUS OF CURRENT COURT CASES 28, 32 (1978) (compilation prepared for President's Committee on Mental Retardation).

19. 446 F. Supp. at 1306.

20. *Id.* at 1325.

21. See also note 41 and accompanying text *infra*.

22. 446 F. Supp. at 1318. Much of the court's opinion is a catalog of institutional horrors. In 32 days of testimony, *id.* at 1300, and eight pages of the opinion, *id.* at 1303-11, the problems at Pennhurst were set forth. Implicitly measuring Pennhurst against the detailed minimum institutional standards developed by the federal district court in *Wyatt v. Stickney* for Partlow Hospital for the mentally retarded, see note 53 *infra*, Judge Broderick found that "[m]any of the problems at Pennhurst result from overcrowding and understaffing." 446 F. Supp. at 1303. The problems included: lack of privacy and forced conformity to an inflexible institutional schedule; inadequacies in the supervised, directed activities that are termed programming (the average amount of beneficial programming was 15 minutes per day); severe lack of physical therapy and equipment such as wheelchairs and hearing aids; inadequate "exit" and "program" plans (individual reports, regularly updated and central to the habilitative effort, that evaluate the residents' needs and goals, ways to achieve the goals, the residents' progress, and prospects for return to the community); overuse of physical restraints, seclusion, and tranquilizing psychotropic medication; lack of sanitation; deterioration of residents' earlier-acquired skills; and frequent injury to residents through self-abuse, attacks by other inmates, and occasional mistreatment by staff members. *Id.* at 1303-10.

23. *Id.* at 1318; see text accompanying notes 61-68 *infra*.

were permanently enjoined to provide suitable community living arrangements for all members of the plaintiff class, to monitor that provision, and to develop and periodically review individualized program plans for each class member.²⁴ A special master was appointed to develop for submission to the court detailed plans for necessary community facilities, including various types of small-scale, in-community residences and support services, as well as plans for the interim operation of Pennhurst.²⁵ Pennhurst was to be closed as soon as alternative community facilities could be provided for all its residents.

The *Pennhurst* court found the right to habilitation²⁶ to be based on various independent constitutional and statutory grounds. First, the right is grounded in due process. The only permissible justification for institutionalizing retardates is the state's *parens patriae* interest in providing them with care and treatment. If habilitation is not provided, then the nature and duration of the commitment bears no reasonable relation to its purpose and the due process clause is violated.²⁷ Furthermore, because fundamental individual liberties (for example, travel, association, privacy, marriage, and procreation) are compromised by commitment and institutionalization, the institutionalized retarded have a right to enjoy habilitation under the least restrictive

24. 446 F. Supp. at 1326. Defendants were also enjoined from admitting anyone else to Pennhurst and from counseling admission. *Id.* at 1327-28.

25. Pursuant to the interim operation plan, the court enjoined defendants to exert maximum effort in following Department of Public Welfare regulations concerning use of physical and chemical restraints and seclusion. *Id.* at 1328. Defendants were ordered to provide medical services, wheelchairs, and adequate sanitation; they were also prohibited from administering drugs as punishment or for convenience, among other things. *Id.* at 1329.

Defendants have appealed. No. 78-148 (2d Cir. docketed Apr. 25, 1978). The state moved for a stay of judgment pending appeal, 451 F. Supp. 233, 235 (E.D. Pa. 1978); Judge Broderick denied the motion because movant failed to make the four-part showing necessary for success. Judge Broderick's comments in examining the first two parts of the necessary showing are important in assessing the future of the *Pennhurst* decision: (1) Likelihood of success on appeal. Movant characterized the court's decision as "novel and precedent setting, both in the rights enunciated and the scope of relief granted." *Id.* at 235-36. The court disagreed, pointing out that its judgment was based on several legal theories, any one of which was sufficient to sustain it, and most of which have been previously accepted. (2) Irreparable injury to movant. The state claimed that the expenditure required by the order would be enormous. The court, however, pointed out that the state had intended to close Pennhurst before litigation and, in addition, had the benefit of Law of Nov. 27, 1970, no. 256, § 2AX(21), 1970 Pa. Laws 773, which appropriated 21 million dollars for moving Pennhurst residents into new community facilities. Eighteen million dollars of this appropriation was still untouched at the time of suit. Finally, testimony at trial had shown that community facilities are about one-third as costly as institutions and that many retardates in the community could earn substantial incomes, further reducing the cost to the state. 451 F. Supp. 233, 236-37 (E.D. Pa. 1978).

26. See text accompanying notes 70 & 75 *infra*.

27. 446 F. Supp. at 1315-16.

conditions consistent with the purposes of commitment.²⁸ This principle of the "least restrictive alternative" operates to tailor all infringements of personal liberties to conform closely to a legitimate governmental purpose.²⁹

Second, the court found a basis for the right to habilitation in the eighth and fourteenth amendments' implied guarantees of freedom from harm.³⁰ And finally the decision identified an equal protection right to nondiscriminatory habilitation.³¹ The court analogized from the decision in *Pennsylvania Association for Retarded Children v. Pennsylvania*,³² which established the right of retarded children to equal educational opportunity in the public school system in accordance with the mainstreaming (normalization) principle.³³ The court concluded that the segregation of the mentally retarded in isolated institutions produces habilitative facilities that are separate and not equal.³⁴

In addition, the *Pennhurst* court found violations of title 50, section 4201 of the Pennsylvania Statutes³⁵ which provides that the Pennsylvania Department of Public Welfare is empowered "to assure within the State the availability and equitable provision of adequate . . .

28. *Id.* at 1319.

29. In *Shelton v. Tucker*, 364 U.S. 479, 488 (1960), the Court stated:

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

30. 446 F. Supp. at 1320. Previous courts have employed the guarantee of due process and the prohibition against cruel and unusual punishment to mandate improvements in harmful institutional conditions. *See id.* at 1316; note 56 *infra*.

31. 446 F. Supp. at 1321-22.

32. 343 F. Supp. 279 (E.D. Pa. 1972).

33. In *Pennsylvania Association for Retarded Children*, a three-judge panel that included Judge Broderick determined that retarded children between the ages of four and twenty-one were entitled under the equal protection clause of the fourteenth amendment to receive at least as much education and training "appropriate to [their] learning capacities" as the state was giving to others. *Id.* at 313. *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), which was not cited by the *Pennhurst* court, established the right to an equal education for children with all types of handicaps. Both cases cite *Brown v. Board of Educ.*, 347 U.S. 483 (1954), for the proposition that education, once the state undertakes "to provide it, is a right which must be made available to all on equal terms." *Id.* at 493; *see* 348 F. Supp. at 875, 343 F. Supp. at 297.

34. 446 F. Supp. at 1322. Judge Broderick's analogy between the *Philadelphia Association for Retarded Children* and *Pennhurst* situations appears to be based on the great similarity between "education and training" and "habilitation." Because it is unable to provide minimally adequate habilitation, *Pennhurst* is unequal to state public school facilities. It is unable to provide minimally adequate habilitation precisely because it is a separate facility. *Id.* at 1321.

35. PA. STAT. ANN. tit. 50, § 4201 (Purdon 1967).

mental retardation services for all who need them . . .³⁶ and of section 504 of the federal Rehabilitation Act of 1973,³⁷ which provides in pertinent part: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance."³⁸

Because the reasoning of the *Pennhurst* court is occasionally imprecise and conclusory, examination of the earlier principal cases is necessary to an understanding of the significance of the *Pennhurst* decision in the development of the law regarding the rights of the mentally retarded. The movement to advance the rights of the mentally retarded began in the early 1960's³⁹ with the rediscovery, after almost a century,⁴⁰ of the theory of normalization and the developmental model⁴¹—practical expressions of the medical community's realization that normal living patterns are, for the mentally retarded, both an achievable goal and the means to that goal. With the determination that the retarded can function in normal society came legal recognition of their right to be afforded the training and opportunity to do so. Although medical experts generally endorse the right to habilitation,⁴² case law is not yet unanimous.⁴³

36. *Id.*; see 446 F. Supp. at 1322 (citing *In re Joyce Z.*, No. 2035-69 (C.P. Allegheny County, Pa., filed March 31, 1975)).

37. 29 U.S.C. § 794 (1970).

38. *Id.*; see 446 F. Supp. at 1323. The court found that § 504 codified the constitutional right to equal protection and conferred a private right of action. *Id.*

39. Mason & Menolascino, *supra* note 1, at 136.

40. *Id.* at 130-34. Early successful treatment techniques were forgotten when psychiatrists turned their attention to psychotherapy for the mentally ill. *Id.*

41. Normalization, or mainstreaming, places the retarded individual in an environment that resembles as much as possible an ordinary family situation, maximizing his ability to live in society. See *id.* at 136 n.31. The developmental model is simply an outline of stages in human development, reflecting the realization that mental retardates are capable of growth and change. *Id.* at 137 n.32. Essentially, the mentally retarded are considered developmentally delayed but far from unable to function in society.

42. See, e.g., PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *supra* note 9.

43. See 446 F. Supp. at 1316-17 & 1316 n.52. The United States Supreme Court has not yet recognized a right to habilitation for either the mentally retarded or the mentally ill. See *Donaldson v. O'Connor*, 422 U.S. 563 (1975) (vacating opinion by Court of Appeals for the Fifth Circuit establishing mental patient's due process right "to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition." 493 F.2d 507, 520 (5th Cir. 1974)). The Court awarded *Donaldson* his freedom on much narrower grounds, holding that "a State cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." 422 U.S. at 576. Cases decided in the Fifth Circuit on the basis of its *Donaldson* opinion and before the Supreme Court decision, in particular *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), are still authoritative, however. See 446 F. Supp. at 1316 n.52.

There are two federal district court decisions that denied the existence of a right to habilita-

Medical theory is important in cases in this area⁴⁴ for two reasons: first, the proposition that the retarded are able to benefit from habilitation is the medical foundation for the existence of the right to habilitation; and second, the evolving medical theories about the capacities of the retarded and what is best for them affect the scope and content of the legal right. *Pennhurst* breaks new ground only on the second point.⁴⁵

Legal recognition of the right of the involuntarily committed mentally ill to treatment long preceded any attention to the plight of the similarly situated mentally retarded.⁴⁶ The first case to deal with the rights of the institutionalized mentally ill, *Rouse v. Cameron*,⁴⁷ was decided on statutory grounds, but the court stated in dictum that involuntary commitment of the mentally ill without treatment might well violate the constitutional provisions against cruel and unusual punishment and deprivation of due process and equal protection of the laws.⁴⁸

tion; *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974) (companion case to *Wyatt v. Aderholt*), *cert. denied*, 422 U.S. 1057 (1975); and *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973). In *New York State Association for Retarded Children*, the court found a constitutional right to freedom from harm that did not rise to the level of a right to treatment. *Id.* at 758, 762. Later, however, in approving a consent decree, the court appeared willing to modify that holding if necessary. *New York State Ass'n. for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715, 719 (E.D.N.Y. 1975).

The trend in the lower federal courts, however, clearly is toward recognition of the right to habilitation. This is a rapidly growing area of the law, characterized by test case litigation. See generally MENTAL RETARDATION AND THE LAW: A REPORT ON STATUS OF CURRENT COURT CASES, *supra* note 18.

44. The *Wyatt* court explicitly recognized the importance of expert medical testimony about "new concepts in the field of mental retardation." 344 F. Supp. 387, 391 n.7 (quoting testimony of Dr. Phillip Roos, Executive Director for the National Association for Retarded Children). In *Pennhurst* Judge Broderick relied heavily on statistics and studies concerning, *inter alia*, the deleterious effect of institutionalization on the retarded, 446 F. Supp. at 1311, and the employability of retardates in the community, *id.* at 1312. Many of the most important cases in this area have been characterized by substantial agreement between plaintiffs and defendants and their respective experts. See, e.g., *Wyatt v. Aderholt*, 503 F.2d 1305, 1314 (5th Cir. 1974); 446 F. Supp. at 1313, 1325. The *Wyatt* litigation was apparently conceived by plaintiffs and defendants together as a way to extract more money from the Alabama legislature for what both sides considered to be essentials of care and treatment. Right-to-habilitation cases often culminate in consent agreements, and the same expert witnesses appear in almost every case.

45. See text accompanying notes 67 & 77 *infra*. Habilitation is commonly defined in the institutional context, see note 3 *supra*, reflecting medical theory upon which the decision in *Wyatt* was based.

46. Legal recognition began with an article asserting a due process right to treatment on behalf of the civilly committed mentally ill. Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 449 (1960). The author is a prominent New York City attorney and physician; his work produced an enormous response in the literature.

47. 373 F.2d 451 (D.C. Cir. 1966).

48. *Id.* at 453. This statement contains the basic components of most constitutional arguments for the right to treatment. The court also intimated that the right to treatment might be violated not only by the giving of no treatment but also by the giving of treatment inadequate in

Wyatt v. Stickney, several decisions with the same style concerning three institutions for the mentally ill and mentally retarded in Alabama, applied the due process right-to-treatment principle to the mentally retarded simply by substituting "habilitation" for "treatment." The *Wyatt* cases based the rights to treatment and habilitation on the due process clause, reasoning that civil commitment entails a massive curtailment of liberty⁴⁹ that is prohibited by due process unless justified by a permissible purpose.⁵⁰ For the mentally retarded that purpose is habilitation.⁵¹ The *Wyatt* decisions were directed at improving execrable conditions within Alabama institutions.⁵² To that end, the *Wyatt* court developed specific constitutional minima for both the institutions for the mentally ill and the institutions for the mentally retarded.⁵³ *Wyatt* also emphasized the importance of the normalization principle for the retarded:

Residents shall have a right to the least restrictive conditions necessary to achieve the purposes of habilitation. To this end, the institution shall make every attempt to move residents from (1) more to less structured living; (2) larger to smaller facilities; (3) larger to smaller living units; (4) group to individual residence; (5) segregated from the community to integrated into the community living; (6) dependent to independent living.⁵⁴

In addition to echoing *Wyatt's* due process right to habilitation under the least restrictive alternative, the later case of *Welsch v.*

light of present knowledge. See *id.* at 456-57. This inquiry necessitates the introduction of voluminous expert testimony which accordingly is extremely important in these cases.

49. 325 F. Supp. 781, 785 (M.D. Ala. 1972); *accord*, *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).

50. 344 F. Supp. 387, 390 (M.D. Ala. 1972); *accord*, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

51. "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process." 325 F. Supp. 781, 785 (M.D. Ala. 1972).

52. See note 44 *supra*.

53. 344 F. Supp. 373, 379-86 (M.D. Ala. 1972) (Bryce and Searcy Hospitals for the mentally ill); 344 F. Supp. 387, 395-407 (M.D. Ala. 1972) (Partlow Hospital for the mentally retarded). The guidelines generally included, among many other things, minimum staff size, minimum necessary equipment, and limitations on use of restraints and drugs. They were intended by Judge Johnson to effectuate his three fundamental conditions for adequate and effective treatment at public institutions: (1) a humane psychological and physical environment, (2) qualified staff in sufficient number, and (3) individualized treatment plans. 334 F. Supp. 1341, 1343 (M.D. Ala. 1971). The Partlow guidelines were used by Judge Broderick in his evaluation of *Pennhurst*. 446 F. Supp. at 1303.

54. 344 F. Supp. 387, 396 app. (M.D. Ala. 1972). This invocation of the principle of the least restrictive alternative, *discussed in* note 29 and accompanying text *supra*, represents judicial acceptance of the developmental model for the mentally retarded, by recognizing a potential in the retardate for growth and improvement. *Mason & Menolascino, supra* note 1, at 149. It foreshadows to a large extent the decision in *Pennhurst*.

*Likins*⁵⁵ recognized that the institutionalized mentally retarded have broad eighth amendment rights: the right to be free from cruel and unusual punishment in the form of conditions and practices that shock the conscience,⁵⁶ and the right to "humane and safe living while confined under State authority."⁵⁷

Although these cases were great advances for the interests of the mentally retarded, they rested on the assumption that adequate habilitation could always be achieved within the institutional context.⁵⁸ Some recent cases recognize that for certain individuals, institutions can never provide adequate habilitation. These cases have held that some institutionalized retardates, depending on their individually determined needs, have the right to receive care in settings less restrictive than those offered by large institutions.⁵⁹ But *Pennhurst* is the first decision to find that a particular institution could not adequately serve the

55. 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated in part*, 550 F.2d 1122 (8th Cir. 1977).

56. *Id.* at 496. Detention for mere status (here, mental retardation), without treatment, is cruel and unusual punishment. This argument derives from *Robinson v. California*, 370 U.S. 660 (1962) (California law making it a crime to be narcotics addict violates eighth amendment).

57. This includes the freedom from harm, *see* *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); note 43 *supra*, and the right to exercise, outdoor activity, and basic hygiene, 373 F. Supp. at 502-03. The decree in *Welsch* was directed solely toward improvement of institutional facilities.

58. Although *Wyatt* and *Welsch* are significant in their recognition of the principles of normalization and the developmental model for the factual foundation of their formulation of the constitutional right to habilitation, their approach can be considered only the rudimentary beginning. The logic of normalization and the developmental model which *Wyatt* and *Welsch* recognize suggests full implementation of habilitation can only be achieved in a noninstitutional setting. Institutions, by their very structure—a closed and segregated society founded on obsolete custodial models—can rarely normalize and habilitate the mentally retarded citizen to the extent of community programs created and modeled upon the normalization and developmental approach components of habilitation. Neither *Wyatt* nor *Welsch* fully implemented the right to habilitation in that they failed to challenge the very existence of the institution. Consequently, the two institutional characteristics most antithetical to the application of the normalization principle remain intact: segregation from the community and the total sheltering of retarded citizens in all spheres of their lives.

Mason & Menolascino, *supra* note 1, at 156.

59. Plaintiff in *Horacek v. Exon*, 357 F. Supp. 71 (D. Neb. 1973), challenged, on equal protection grounds, the placement of some involuntarily committed mental retardates in institutions while others were placed in community-based facilities. *Mason and Menolascino*, *supra* note 1, at 164, contend that "the thrust of the *Horacek* complaint was the continued legitimacy of the institution" and that it was "aimed at dismantling the institution." The suit did not succeed in this aim.

Dixon v. Weinberger, 405 F. Supp. 974 (D.D.C. 1975), was a class action brought by inmates of a mental hospital; the case was decided on statutory grounds, although plaintiffs also raised constitutional issues. The court held that the hospital had the duty to provide the least restrictive habilitative settings for its inmates, including noninstitutional community-based facilities. Although this decision was intended to entail a drastic reduction in the institutional population, the hospital itself was not placed in jeopardy. The court held: "[T]hese plaintiffs have a right to the treatment sought in this action where the Hospital has determined that such treatment is appropri-

needs of any of its residents, without regard to the severity of their handicaps. It has succeeded in shifting the focus of the habilitative effort from the institution to the community by declaring "institutions such as Pennhurst" incapable of providing minimally adequate habilitation for any mentally retarded persons.⁶⁰ Although essentially a straightforward endorsement of the principles of the previous cases, *Pennhurst*, by requiring closure of the institution, has, nevertheless, gone far beyond those cases. The opinion will undoubtedly have great impact, precipitating efforts to close other institutions and making possible right-to-habilitation litigation in noninstitutional contexts.

In the effort to close other institutions, future litigants will need to know why Pennhurst was closed and the extent to which the court's reasons are applicable to those other institutions. Judge Broderick simply held: "[O]n the basis of this record we find that minimally adequate habilitation cannot be provided in an institution such as Pennhurst."⁶¹ The reach of the holding, therefore depends upon what "an institution such as Pennhurst" is, an inquiry to which the opinion gives no clear answer.⁶²

It is arguable that the opinion should be read to condemn all public institutions. Certain of the characteristics that induced Judge Broderick to label Pennhurst constitutionally inadequate presumably are typical of most institutions. Indeed, commentators cited in the court's opinion identify certain common institutional characteristics that they believe should be fatal for any institution that possesses them. One article stresses the "segregation from the community and the total sheltering of retarded citizens in all spheres of their lives."⁶³ Another refers to "existing large-scale geographically remote institutions"⁶⁴ as the ones that must close. The *Pennhurst* opinion focuses on similar attributes that are inherent in the institutional setting and antithetical to ha-

ate." *Id.* at 978. The hospital had determined, however, that only 43% of the plaintiff class currently required care and treatment in alternate facilities.

60. 446 F. Supp. at 1318.

61. *Id.*

62. Interview with H. Rutherford Turnbull, Associate Professor, Institute of Government, University of North Carolina at Chapel Hill (September 8, 1978).

63. Mason & Menolascino, *supra* note 1, at 156-57, *quoted in* 446 F. Supp. at 1318.

64. Burt, *Beyond the Right to Habilitation*, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *supra* note 9, at 418, 427, 432 (1976) (footnote omitted), *quoted in* 446 F. Supp. at 1321:

[E]xisting large-scale geographically remote institutions cannot by their nature provide adequate programs to remedy the intellectual and emotional shortcomings and the galling social stigma that led the retarded residents to these institutions. . . . A powerful case can thus be mounted that courts should command states to use extraordinary effort to avoid institutionalizing retarded citizens.

bilitation: lack of privacy, enforced conformity to a rigid schedule, isolation from normal society, confinement, and group living.⁶⁵ None of these, however, is specifically identified as a decisive factor.

The court also devotes much of the opinion to the gross deficiencies in staffing, equipment, and funding at Pennhurst. Although courts in earlier cases, like *Wyatt* and *Welsch*, chose to cure, not close, institutions with similar problems, the presence or absence of such defects should not bear on the closure question.⁶⁶ Clearly these particular defects could have been remedied less drastically than by institutional closure.

Because it appears, therefore, that closure was mandated by characteristics inherent in the institution, *Pennhurst* plainly represents initial judicial recognition of the medical community's realization that application of the normalization principle demands less restrictive settings than can be achieved within the confines of traditional residential institutions.⁶⁷ *Pennhurst* has not, however, made plain what combination of inherent characteristics add up to a defective institution. Therefore, case-by-case adjudication must in the future determine whether a given institution is enough like Pennhurst to invite the Pennhurst remedy. Because of the wide range of institutional and community care models that exists, there is enormous potential for such future litigation; *Pennhurst* may therefore be a long way from "sound[ing] the death knell for institutions for the retarded."⁶⁸

65. See, e.g., 446 F. Supp. at 1303, 1319.

66. There was some testimony at trial that it would be cheaper to close Pennhurst than to cure it, see 446 F. Supp. at 1312, but this is certainly not the rationale for the court's decision. Nor is the argument that plaintiffs would accept nothing less than the closing of the institution, see Ferleger, *supra* note 18, at 29, sufficient, since Judge Broderick was not bound by their demands.

67. Mason & Menolascino, *supra* note 1, at 146.

68. Ferleger, *supra* note 18, at 28 (quoting statement of Judge Broderick made at trial). Frank Laski, an attorney for Pennsylvania Association for Retarded Citizens in the *Pennhurst* litigation, disagrees. Pointing out that a study for the President's Committee on Mental Retardation ranked Pennsylvania one of the top states in efforts to provide better institutional care, he reasons, "While there certainly are some mental retardation facilities that could claim some improvement over Pennhurst, they are not improvements that make a difference, and none can avoid the equal protection implications of the *Pennhurst* decision and order." He names some characteristics, essentially those named by Judge Broderick, that are significantly more prevalent in institutions than in group homes, and concludes:

While there are important implications in the *Pennhurst* opinion and order for all large-scale, segregated institutions housing disabled persons, it is necessary to keep in mind that the decision and order are based on a factual record about a *single mental retardation* institution, and the application of the law of the case depends entirely on the similarity of the institution in question to Pennhurst and the ability to establish the central factual foundation that was established in the *Pennhurst* case, i.e., that no one need be kept there, and that given less restrictive arrangements (community facilities), all could live in the community. On this analysis the direct implication of *Pennhurst* is

As the first decision to close an institution and mandate the creation of community care facilities for all its residents, *Pennhurst* will invariably produce future litigation seeking to secure the right to minimally adequate habilitation for residents, not of institutions, but of community care facilities.⁶⁹ *Pennhurst* does not reach this issue, because it, like all previous cases, is concerned only with an already institutionalized population. Moreover, the court's narrow holding implies limitations on the right to habilitation that, although not inappropriate in the past, could make the right difficult to apply in noninstitutional settings.

The court states its holding as follows: "[W]hen a state involuntarily commits retarded persons it must provide them with such habilitation as will afford them a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as their capacities permit."⁷⁰ The first problem with applying this holding to the noninstitutional setting is that it is stated in terms of commitment. Since commitment in the earlier cases was always to a *Pennhurst*-like institution, commitment became equated with institutionalization.⁷¹ And because all the institutionalized plaintiffs had been deprived of many fundamental rights by civil commitment, the right to habilitation was always characterized as contingent upon the threat of severe deprivation of liberty.⁷² Thus, placement in a community facility might be construed as not involving commitment with consequent loss of liberty sufficient to give rise to a right to habilitation.⁷³ Realistically, of course, the requirement that the right to habilitation be implemented in community care facilities assumes the existence of the right for persons

clear: it sounds the death knell for *all public mental retardation* institutions in the country.

Laski, *Right to Services in the Community: Implications of the Pennhurst Case*, HEALTH L. PROJECT LIB. BULL., May 1978, at 1, 5-7.

69. "It would be naive to think that community programs will escape the problems that plagued [institutions]." Halpern, *The Right to Habilitation*, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *supra* note 9, at 401 (1976).

70. 446 F. Supp. at 1317-18.

71. Retardates can of course be committed to foster homes and other community care facilities, in addition to the more common institutional commitment. P. FRIEDMAN, *THE RIGHTS OF MENTALLY RETARDED PERSONS: AN AMERICAN CIVIL LIBERTIES UNION HANDBOOK* 31 (1976).

72. See notes 49 & 50 and accompanying text *supra*; 446 F. Supp. at 1315.

73. The danger might become particularly acute when no institutions exist as alternatives to community care. Before *Pennhurst* an individual committed to a community facility had the right to habilitation because the mere existence of the institution, to which he could be committed at any time, represented a significant threat to his liberty. After this decision, however, a committed person potentially no longer faces even the threat of institutionalization, since the institution may no longer exist.

in those facilities. Nevertheless, the traditional narrow formulation of the right upon which *Pennhurst* relies is not without potential for "unrealistic" challenges based upon the application of its language to new settings.

The court's holding also refers only to involuntary, as opposed to voluntary, commitment, thereby placing another potential limitation on the applicability of *Pennhurst*. Some courts have held that the freedom to leave an institution at any time (an attribute of voluntary commitment at least in theory) eliminates the need for a right to habilitation by giving the retardate power to restore at will his lost liberty. Ways were therefore devised to equate the voluntarily with the involuntarily committed, in order to secure for the voluntarily committed protection of the right.⁷⁴ These devices have been so consistently used in the past that any distinction between voluntary and involuntary commitment ought for these purposes simply to be eliminated.

In dictum, the *Pennhurst* opinion refers to the right to habilitation in broader terms than used in its holding. This broader statement of the right avoids the potential problem areas in the court's specific formulation of its holding. The court stated, "[W]henever a state accepts retarded individuals into its facilities it cannot create or maintain those facilities in a manner which deprives those individuals of the basic necessities of life."⁷⁵ This formulation, by avoiding the involuntary commitment language, requires that mere acceptance of the retardate into the state's hands triggers the right to habilitation, regardless of the amount of deprivation afforded by different kinds of care and regardless of the involuntary or voluntary cooperation of the retardate. In addition, the right as so stated is applicable to all state facilities, thus making plain that the right to habilitation exists for those in community care even after the closing of the institution has eliminated the

74. One device, used by the court in *Wyatt*, is to assume that all residents are in the institution involuntarily, leaving the burden on defendants to show that some are there voluntarily. 344 F. Supp. 387, 390 n.5 (M.D. Ala. 1972). Another is to establish the right to habilitation for involuntarily committed retardates and then extend the right to voluntarily committed inmates of the same institution on an equal protection basis. Halpern, *supra* note 69, at 396; Mason & Menolascino, *supra* note 1, at 158; Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 153-61 (1972). *Pennhurst* employed two strategies. One was to argue that, practically speaking, there is no such thing as voluntary commitment, because (1) few retardates make the choice themselves—rather, their parents make the choice for them, and (2) even could they themselves choose institutionalization, the absence of alternative placements or community facilities seriously compromises the true voluntariness of such commitments. 446 F. Supp. at 1310-11, 1318. The other strategy was the broad statement of the habilitation right, avoiding the use of the involuntary-voluntary distinction. *Id.* at 1318.

75. 446 F. Supp. at 1318. Judge Broderick emphasized that for the retarded the necessities include minimally adequate habilitation.

threat of institutionalization. And because it does not mention commitment at all, but rather makes the right to habilitation contingent only upon acceptance, the broader formulation provides that the existence of the right is not affected by the exercise of the state's commitment function.⁷⁶ The *Pennhurst* holding was designed for a system of treatment through involuntary commitment, because no more was required under the facts of the case; the broader statement, however, may protect all those in the care of the state, even after future changes in treatment theories, facilities, and practices.⁷⁷

Even if *Pennhurst's* broad statement in dictum of the right to habilitation were taken as authoritative, the decision would not establish the right as constitutionally fundamental. The court states firmly, "No constitutional mandate has been called to our attention which would require a state to provide habilitation for its retarded citizens."⁷⁸ Just as education is not a fundamental right,⁷⁹ and its provision is a duty voluntarily undertaken by the state, so is the provision of facilities for the retarded. Yet the right to habilitation seems no less secure than the right to public education—and as states are not likely to close their schools, neither are they likely to close their community facilities.⁸⁰

The *Pennhurst* decision is likely to be upheld on appeal.⁸¹ The

76. Judge Broderick is opposed to commitment: "[T]his Court entertains serious doubts as to whether retarded individuals should ever be subjected to 'commitment' . . ." *Id.* at 1315.

According to the court's narrow holding, if a state were to discontinue this commitment function, the right of habilitation would no longer exist. This is consistent with the notion that commitment, even to a noninstitutional setting, entails some degree of pervasive and continuing state control over the individual, including power over choice of facility and restriction of the freedom to leave. Acceptance, on the other hand, seems to be offered as a more neutral term, perhaps meaning merely the state's assumption of care.

77. The difficulty of separating medical from legal issues arises because it is the emerging task of science to define the limits of the retardate's humanity for constitutional purposes; people of ordinary intelligence had that done for them long ago, before anyone was worried about scientific implementation of the guarantees of a free society.

78. 446 F. Supp. at 1318. The court relied on *Welsch*, which asserted: "The State is not constitutionally obligated to provide services to its citizens," 373 F. Supp. at 498, and added: "It is not disputed that the State could close its institutions for the mentally retarded without offending the Constitution." *Id.* at 499.

79. "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

80. Murdock, *supra* note 74, at 161, points out that often the state has undertaken to provide for the mentally retarded under its *parens patriae* power because of the recognized inability of the private sector to do so. This is especially true since decisions like *Pennsylvania Association for Retarded Children* and *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), see note 33 *supra*, have highlighted the importance of educational and other opportunities for the retarded.

81. See generally note 25 *supra*. It is not unlikely, however, that its most interesting argument, the equal protection basis for the right to habilitation, will not survive. Essentially, the equal protection argument depends on recognition of mental retardation as at least a semisuspect

practical results of the decision will not, of course, be apparent for some time, given the enormous problems in implementing the complicated orders issued in right-to-habilitation decisions.⁸² *Pennhurst's* importance, however, lies in its potentially broad application in future litigation more than in its results for the particular institution. First, and least controversially, *Pennhurst* is another in a growing number of cases recognizing the institutionalized retardates' right to habilitation. Second, it provides authority for a new means of achieving habilitation—complete closure of the institution and substitution of community care facilities—based upon judicial recognition of changes in medical theory about what constitutes minimally adequate habilitation for the retarded. *Pennhurst* will undoubtedly be a potent and often-used weapon for the institutionalized retarded; however, because it is not a precisely formulated decision, it may not be a weapon easy to wield. And finally, *Pennhurst* at least begins a redefinition of the circumstances giving rise to the right to habilitation. Such a redefinition is necessary to establish the applicability and scope of the right to habilitation in the noninstitutional contexts that will be created by the condemnation of institutions and the consequent widespread establishment of community facilities. Because *Pennhurst* serves not only as a blueprint for future litigation but as a warning about the constitutionality of future provision of facilities for the mentally retarded, its influence ought to be far-reaching.

NANCY M. P. KING

Tort Law—*Norton v. United States*: Federal Government's Liability Coterminous with That of Its Agents Under Federal Tort Claims Act Amendment

Prior to the 1970's a United States citizen had no remedy against the United States Government or individual federal law enforcement

classification requiring heightened judicial scrutiny, *see, e.g.*, Mason & Menolascino, *supra* note 1, at 160-64; this intermediate scrutiny in equal protection cases is not yet an established test.

82. *See, e.g.*, Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975). Most of the important cases are all still struggling with implementation and challenge of their courts' orders. *See generally* MENTAL RETARDATION AND THE LAW: A REPORT ON STATUS OF CURRENT COURT CASES, *supra* note 18; cases cited note 59 *supra*.

agents for the "constitutional torts"¹ of these agents. In 1971, however, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,² the United States Supreme Court held that a cause of action existed against individual federal officers for fourth amendment violations;³ on remand the United States Court of Appeals for the Second Circuit determined that the agent would be liable when he had not acted in good faith and with a reasonable belief that his actions were lawful.⁴ Moreover, in 1974 Congress amended the Federal Tort Claims Act (FTCA),⁵ which had limited the United States' waiver of sovereign immunity to the negligent torts of federal employees,⁶ to make the federal government independently liable for many intentional torts committed by its law enforcement agents.⁷ In *Norton v. United States*⁸ the United States Court of Appeals for the Fourth Circuit was faced with the question whether the United States was able to assert the good faith and reasonable belief of its agents, a defense that the agents could individually claim, as a defense in a lawsuit against the Government for a fourth amendment violation committed by federal agents. Reversing the trial court, the court held that the Government could use as a defense to the action the good faith and reasonable belief of its agents.⁹

On March 15, 1975, the Alexandria, Virginia police received an anonymous tip that Patricia Hearst, a nationally-sought fugitive, was

1. "Constitutional torts" are tortious acts that violate an individual's constitutional rights. The most typical infringements by government agents involve fourth or fifth amendment rights.

2. 403 U.S. 388 (1971).

3. *Id.* at 397.

4. 456 F.2d 1339, 1341 (2d Cir. 1972). Recently, in *Butz v. Economou*, 98 S. Ct. 2894 (1978), the Supreme Court acknowledged that under *Bivens* federal officers were not entitled to an absolute or unqualified immunity for their actions.

5. Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h) (Supp. V 1975)). Through this Act the United States became liable only for the negligent acts or omissions of federal employees; the Act did not make the government liable for any intentional torts committed by its agents.

6. Federal Tort Claims Act, ch. 753, § 421, 60 Stat. 812 (1946).

7. The amendment explicitly makes the federal government liable for some types of offenses that were exempt under the original Act. The language of the amendment reads as follows:

Provided That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. § 2680(h) (Supp. V 1975).

8. 581 F.2d 390 (4th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3383 (U.S. Dec. 5, 1978) (No. 78-461).

9. *Id.* at 397.

hiding in an Alexandria apartment. Acting on this tip, several FBI agents, in conjunction with local officers, went to plaintiff's apartment without seeking or obtaining a search warrant.¹⁰ Plaintiff Norton was residing alone in the apartment at that time.¹¹ The agents knocked on the door and orally identified themselves, whereupon plaintiff informed them that she would call their office to verify their identities.¹² As she attempted to call for verification, the officers began to strike the door in an attempt to open it forcibly. Fearing her door would be destroyed, Norton removed the catch and the agents entered with weapons drawn.¹³ After an exhaustive search of plaintiff's apartment uncovered no evidence of Hearst, the agents realized their tip had been inaccurate.¹⁴

Plaintiff instituted an action against the local agents based on 42 U.S.C. § 1983¹⁵ and against the federal officers directly under the fourth amendment to the Constitution of the United States.¹⁶ In addition, she filed suit against the United States under the FTCA, as amended.¹⁷ Both the local and federal officers defended their actions on the ground that they acted in good faith and with reasonable belief that their actions were lawful.¹⁸ The United States also defended on the ground that its agents had acted in good faith and with a reasonable belief in the lawfulness of their actions.¹⁹ On cross-motions for sum-

10. *Norton v. Turner*, 427 F. Supp. 138, 142 (E.D. Va. 1977), *rev'd*, 581 F.2d 390 (4th Cir. 1978).

11. Local police, using telephone locator crisscrosses, thought the apartment was occupied by a man whom they had investigated for carrying a concealed weapon. That person, however, had vacated the apartment over five months earlier, at which time plaintiff had moved in. *Id.* at 141-42.

12. The details of this interchange were disputed, but both parties agreed that at no time did Norton view the credentials of the officers. *Id.* at 142.

13. *Id.*

14. *Id.*

15. 42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

16. 581 F.2d at 392.

17. The specific provisions on which she based her suit were 28 U.S.C. §§ 1346(b), 2674, 2680(h) (1970 & Supp. V 1975). 427 F. Supp. 138, 140 (E.D. Va. 1977), *rev'd*, 581 F.2d 390 (4th Cir. 1978). Section 1346(b) is the basic jurisdictional statute for federal tort claims, § 2674 sets forth the scope of federal liability under the FTCA, and § 2680(h) eliminated the exclusion of Government liability for the intentional torts of its employees. The text of § 2680(h) appears in note 7 *supra*.

18. 581 F.2d at 392.

19. *Id.*

mary judgment the district court determined that the actions of the law enforcement officers violated plaintiff's fourth amendment rights because the officers had no probable cause to believe that Hearst was present.²⁰ The court concluded, however, that because further fact-finding was necessary with regard to the good faith and reasonable belief defense of the agents, summary judgment against the individual agents was inappropriate.²¹ The court entered summary judgment against the United States, however, on the ground that the United States could not, as a matter of law, assert the good faith defense of its agents in an action brought under the FTCA.²² Subsequently, the suit against the individual local and federal officers was dismissed and judgment was entered against the United States.²³

On appeal the Government did not contest the district court's finding that a fourth amendment violation had occurred,²⁴ nor did it dispute the application of the FTCA and 28 U.S.C. § 2680(h)²⁵ to the action.²⁶ The sole issue on appeal was whether the Government could raise in defense the good faith and reasonable belief of its agents.²⁷ Relying exclusively on the legislative history of the amendment to section 2680(h),²⁸ the United States Court of Appeals for the Fourth Circuit reversed the trial court and held that because there was no clear statement of a legislative policy to expand the Government's vicarious liability beyond the scope of the agent's direct liability, the court should not impose liability on the federal government when its agents have acted in good faith with a reasonable belief in the legality of their actions.²⁹

Tort actions have been available against state officials who violate the constitutional rights of citizens since Congress passed section 1983.³⁰ Recently this liability has been extended to suits against municipalities.³¹ The liability of the United States and its individual agents

20. 427 F. Supp. 138, 144 (E.D. Va. 1977), *rev'd*, 581 F.2d 390 (4th Cir. 1978).

21. *Id.* at 146.

22. *Id.* at 152.

23. *See* 581 F.2d at 392.

24. *Id.*

25. 28 U.S.C. § 2680(h) (Supp. V 1975).

26. 581 F.2d at 392.

27. *Id.* at 393.

28. *Id.* at 395 n.7.

29. *Id.* at 397.

30. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1970), *quoted in note 15 supra*). For examples of actions brought under this statute, see Sorenson, *Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions*, 1976 DUKE L.J. 95.

31. *Monell v. Department of Social Servs.*, 98 S. Ct. 2018 (1978).

for violation of constitutional rights has also been a recent development. The liability of individual federal agents arose out of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, in which the Supreme Court held a cause of action to exist against federal law enforcement officers who violate citizens' fourth amendment rights.³² Under *Bivens* victims of this constitutional tort are entitled to recover money damages against individual federal agents for injuries suffered as a result of the agent's violation of the amendment.³³ On remand the United States Court of Appeals for the Second Circuit held that the individual officer could escape liability by showing that he had a good faith and reasonable belief that his actions were legal under the circumstances.³⁴ Without this defense law enforcement agents would be inhibited in performing their discretionary duties by the possibility of civil lawsuits.³⁵

Originally the FTCA waived sovereign immunity³⁶ only for the negligent torts of federal employees; the Government retained its immunity for intentional torts committed by its law enforcement agents. Realizing that judgments against individual officers would often produce no recovery, Congress amended the FTCA in 1974, making the United States liable for the intentional torts of its agents. The language of the amendment does not specifically delineate the scope of the Government's liability, however. The court in *Norton*, interpreting the statute, held that "the liability of the United States under section 2680(h) is coterminous with the liability of its agents under *Bivens*,"³⁷ and there-

32. 403 U.S. at 389.

33. *Id.* at 397.

34. 456 F.2d 1339, 1341 (2d Cir. 1972). The court explained that this defense consisted of two distinct parts: first, a subjective good faith belief in the legality of the officer's actions; and second, an objective standard of the reasonableness of that belief under all of the circumstances. *Id.* at 1348.

35. Many cases and commentators have pointed out the necessity of freeing law enforcement officers from pressures of civil lawsuits.

We are called upon in this case to weigh in a particular context two considerations of high importance which now and again come into sharp conflict—on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities.

Barr v. Matteo, 360 U.S. 564, 564-65 (1959). See also *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Pierson v. Ray*, 386 U.S. 547 (1967); 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 29.14 (1956).

36. For a general treatment of the development of the doctrine of sovereign immunity, see Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

37. 581 F.2d at 393.

fore permitted the Government to retain immunity when its agents acted in good faith and with a reasonable belief.

The court rejected the arguments presented by both plaintiff and defendant at the trial court level.³⁸ Two other approaches were available to the court, however. Because the original FTCA made the Government liable for negligence "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred,"³⁹ the courts have traditionally looked to a particular state's doctrine of *respondeat superior* in determining the liability of the United States in FTCA cases.⁴⁰ In *Norton*, however, the court rejected this traditional state law negligence approach to FTCA cases because constitutional torts based on the fourth amendment were essentially questions of federal law.⁴¹ Finding the issue of federal liability under the amendment *sui generis*,⁴² the court resolved to rely upon the intent of Congress in enacting the amendment to ascertain the extent of the waiver of sovereign immunity.⁴³

The specific language considered by the court to be controlling appears in a Senate Report that accompanied the amendment to section

38. The court explicitly rejected the policy arguments relied upon by the lower court to hold the good faith and reasonable belief defense unavailable. The district court distinguished the justification for qualified individual immunity from that of sovereign immunity. The former is based on protecting a public servant from fear of civil lawsuit while performing his official duties, while the latter was transplanted from a feudalistic system based on the divine right of kings, suggesting that the rationale for sovereign immunity may no longer be applicable to tortious acts by federal agents. 427 F. Supp. 138, 150-52 (E.D. Va. 1977), *rev'd*, 581 F.2d 390 (4th Cir. 1978). The appellate court also refused to accept the arguments presented by the Government. 581 F.2d at 395 n.8. The Government argued three alternative defenses. First, they argued that no tort was committed at all because the agents did not act in bad faith or with an unreasonable belief. Second, they suggested that imposing liability without regard to the motives of the individual agents was tantamount to imposing absolute liability on the Government, which contravened two decisions of the Supreme Court. *See Laird v. Nelms*, 406 U.S. 797 (1972); *Dalehite v. United States*, 346 U.S. 15 (1953). Finally, the Government argued that the good faith and reasonable belief defense constituted a privilege rather than an immunity, thereby making the defense available to the principal under the *respondeat superior* doctrine. For a discussion of the *respondeat superior* doctrine see note 40 and text accompanying notes 39-41 *infra*.

39. 28 U.S.C. § 1346(b) (1970).

40. Under a *respondeat superior* theory "both the precipitating tort and the scope of the government's vicarious liability were to be governed by 'the law of the [state] where the act or omission occurred.'" 581 F.2d at 394 (citing *Laird v. Nelms*, 406 U.S. 797, 801 (1972)). *See, e.g.*, *James v. United States*, 467 F.2d 832, 833 (4th Cir. 1972); *Yates v. United States*, 365 F.2d 663, 667 (4th Cir. 1966); *Jennings v. United States*, 291 F.2d 880 (4th Cir. 1961).

41. 581 F.2d at 394-95.

42. *Id.* at 395 n.8.

43. *Id.* at 394-95.

2680(h).⁴⁴ The passage stated:

[T]his provision should be viewed as a counterpart to the *Bivens* case and its progeny [*sic*], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).⁴⁵

The court emphasized the parenthetical phrase and interpreted this passage to be evidence of congressional intent to impose liability on the Government only when liability is imposed on the individual defendants in constitutional tort cases like *Bivens*.⁴⁶

It seems, however, that the court did not give adequate weight to the evidence from the legislative history that the intent of Congress in submitting the legislation was indeed to expand the liability of the United States in the *Bivens*-type case beyond the liability of the individual defendant. First, the language of the amendment itself suggested no limitation based on the individual liability of the agent.⁴⁷ Taken literally, therefore, this waiver of immunity is intended to cover all of the specified intentional torts of federal law enforcement officers irrespective of their defenses.⁴⁸

Moreover, there is ample evidence in the legislative record to support an argument that the liability of the United States should be broader than the liability of the individual officer under *Bivens*. Senate Report Number 93-588,⁴⁹ on which the majority in *Norton* relied, stated that "the Committee amendment would submit the Government to liability whenever its agents act under color of law so as to injure the public through search and seizures that are conducted without warrants or with warrants issued without probable cause."⁵⁰ This passage makes no reference to a defense of good faith and reasonable belief, and clearly applies to the fact situation in *Norton*. Yet the court in *Norton* attributed this language to "imprecise draftsmanship"⁵¹ and disregarded it.

There is other evidence in the legislative record that supports the

44. S. REP. NO. 93-588, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 2789.

45. *Id.* at 3, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 2789, 2791.

46. 581 F.2d at 395.

47. See note 7 *supra*.

48. 581 F.2d at 398 (Butzner, J., dissenting).

49. S. REP. NO. 93-588, *supra* note 44.

50. *Id.* at 4, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 2789, 2791.

51. 581 F.2d at 396 n.12.

conclusion that Congress intended to expand the liability of the United States beyond the liability of the individual officers under *Bivens*. Senator Percy, in his remarks to the committee as sponsor of the amendment, recognized that the *Bivens* remedy alone was inadequate because it "is severely limited by the ease with which agents can usually establish the defense of having acted in good faith and with probable cause."⁵² Clearly implied in his statement was his intent to impose liability on the Government, even when the individual agent can successfully raise the defense of good faith and reasonable belief.⁵³ Although the majority in *Norton* recognized that this evidence was contrary to their holding, they regarded it as insignificant.⁵⁴ The court also overlooked evidence in the record that states explicitly that it was not the intent of the Senate committee that sponsored the legislation to allow the United States to assert the good faith and reasonable belief defense available to the individual defendants under *Bivens*. In a memorandum written by the Senate Committee on Government Operations,⁵⁵ in which the amendment originated, the committee observed:

It is not the intention of this amendment to allow any other defenses that may be available to individual defendants by state or federal law, custom or practice to be asserted against the government. Congress does not oppose, however, the assertion of defenses of good faith and reasonable belief in the validity of the search and arrest on behalf of individual government defendants, so long as it is understood that the government's liability is not co-terminous with that of the individual defendants.⁵⁶

52. S. REP. NO. 93-469, 93d Cong., 1st Sess. 36 (1973).

53. *Id.* at 37.

54. 581 F.2d at 396.

55. Senate Comm. on Government Operations, Memorandum on "No-Knock" Legislation (Aug. 28, 1973) (copy on file in office of *North Carolina Law Review*). This memorandum is discussed in Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C.L. Rev. 497, 514-15 (1976).

56. Senate Comm. on Government Operations, *supra* note 55, at 5. Based on this memorandum Boger, Gitenstein & Verkuil, *supra* note 55, concluded:

On one point, however, the Senate committees were clearly insistent on distinguishing their recommendation from prior law. The federal government was not to be allowed to escape liability under the new statute by retreating behind various "defenses" that had been created under *Bivens* or section 1983 Thus, despite the constant reference in legislative documents to *Bivens* and section 1983, the proposed federal liability was meant to differ in this very crucial aspect from its historical analogues.

Id. at 515. The court of appeals in *Norton* was not persuaded by this evidence, however. The court pointed out that the district court was unable to secure a copy of this memorandum, and further found it inexplicable that the Senate Committee in its report made no mention of this memorandum. 581 F.2d at 396 n.11. On the contrary, the record indicates a strong reliance on the memorandum on the part of the Senate Committee on Government Operations. The memorandum preceded, by three months, the publication of Senate Report 93-588 and most of the language appearing in the report is taken verbatim from the memorandum. Most important, the

Moreover, the policy behind allowing the individual employee to assert the good faith and reasonable belief defense is to protect him from lawsuits for money damages arising out of the performance of discretionary duties.⁵⁷ Therefore, the good faith and reasonable belief defense is available to the individual agent only in suits for money damages.⁵⁸ The "good faith defense in a suit for damages brought against any federal official . . . is not assertable in the face of a request limited to injunctive, declaratory, or mandamus relief,"⁵⁹ reflecting that the belief of the agent regarding the legality of the act does not mitigate its tortious character. Thus, the policy underlying the availability of the defense is inapplicable to the Government.

Norton is not the only case that has faced the issue whether the Government can assert the good faith and reasonable belief of its agents. *Downs v. United States*,⁶⁰ a federal district court case, noted the distinction in the underlying policies in declaring that the Government is not entitled to assert the individual defenses of its agents in FTCA actions.⁶¹ In recognizing that the origins of qualified individual and sovereign immunity are distinct, the court concluded that

the application of immunity sought by the Government would largely emasculate the purposes of the Tort Claims Act; it would be inconsistent with the Act's waiver of immunity for the Government to reclaim immunity merely because no action could be brought against the employee whose act of omission gave rise to a damage claim.⁶²

As pointed out by a number of cases and commentators, it is indeed logical that because the rationales for qualified individual immunity and sovereign immunity are discrete, the two immunities need not ac-

language, set forth in text accompanying note 45 *supra*, that the court interpreted as evidence of an intent to limit the liability of the United States under the amendment, originally appeared in the memorandum. The Senate committee, then, placed great weight on the language in the memorandum, contrary to the conclusion of the appellate court in *Norton*. Although the specific language that referred to Congress' explicit intention to disallow the *Bivens* defense by the Government is omitted from Senate Report 93-588, it should not be concluded that it was purposefully omitted. There is certainly sufficient evidence in the report to suggest that the Committee intended to provide a remedy for citizens who were victims of law enforcement abuses, regardless of the defense of the individual agent.

57. *Norton v. Turner*, 427 F. Supp. 138, 146 (E.D. Va. 1977), *rev'd*, 581 F.2d 390 (4th Cir. 1978).

58. *Id.*

59. *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 609 (D.C. Cir. 1974); *accord*, *Timmerman v. Brown*, 528 F.2d 811, 814 (4th Cir. 1975).

60. 382 F. Supp. 713 (M.D. Tenn. 1974), *rev'd on other grounds*, 522 F.2d 990 (6th Cir. 1975).

61. *Id.* at 750.

62. *Id.*

company one another.⁶³ On the one hand law enforcement officers should not have to perform their duties with a perpetual fear of civil lawsuit; on the other, the victims of fourth amendment violations should not be totally denied compensation when the Government explicitly admits the constitutional violation. Making the Government liable even when the agent has a successful defense guarantees compensation for the victim while allowing law enforcement officers to perform free of the pressure of civil suit.

The clear intent of Congress in passing the FTCA amendment was to provide compensation to the innocent victims of unconstitutional law enforcement activities regardless of the defense of the original agent.⁶⁴ Contrary to this intent, the *Norton* decision, by allowing the Government to assert the good faith and reasonable belief defense of its agents, will permit victims of constitutional torts to go without a remedy when the agent has a successful good faith and reasonable belief defense. *Norton* has thus preserved the immunity of the United States for many of the intentional torts committed by its agents, thereby circumventing the effectiveness of the FTCA amendment. Furthermore, this decision unfortunately departed from the trend to expand governmental liability in constitutional tort cases and elevates the immunity of the United States above the policy of providing compensation to injured individuals.

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63. See note 35 *supra*.

64. See generally Boger, Gitenstein & Verkuil, *supra* note 55, at 532. This compensatory interest is represented in S. REP. NO. 93-588, *supra* note 44, at 2-3, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 2789, 2790 (referring to Collinsville, Illinois raids), as well as in S. REP. NO. 93-469, *supra* note 52, at 36.

