



1986

## Administrative Search and Seizure Whither the Warrant

Jack M. Kress

Carole D. Iannelli

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Constitutional Law Commons](#), [Criminal Procedure Commons](#), and the [Fourth Amendment Commons](#)

---

### Recommended Citation

Jack M. Kress & Carole D. Iannelli, *Administrative Search and Seizure Whither the Warrant*, 31 Vill. L. Rev. 705 (1986).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol31/iss3/2>

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

# VILLANOVA LAW REVIEW

VOLUME 31

JUNE 1986

NUMBERS 3-4

## ADMINISTRATIVE SEARCH AND SEIZURE WHITHER THE WARRANT?

JACK M. KRESS†  
CAROLE D. IANNELLI‡

### TABLE OF CONTENTS

|                                                                                   |     |
|-----------------------------------------------------------------------------------|-----|
| INTRODUCTION .....                                                                | 706 |
| I. THE CONSTITUTIONAL FRAMEWORK .....                                             | 708 |
| A. <i>The Fourth Amendment</i> .....                                              | 708 |
| 1. <i>Criminal Interpretations</i> .....                                          | 709 |
| 2. <i>Non-Criminal Interpretations</i> .....                                      | 713 |
| II. <i>CAMARA AND SEE</i> .....                                                   | 714 |
| III. <i>COLONNADE AND BISWELL</i> .....                                           | 717 |
| A. <i>Introduction</i> .....                                                      | 717 |
| B. <i>Colonnade</i> .....                                                         | 720 |
| C. <i>Biswell</i> .....                                                           | 721 |
| IV. <i>FROM COLONNADE AND BISWELL TO BARLOW'S</i> .....                           | 724 |
| A. <i>Analysis of Colonnade/Biswell Exceptions</i> .....                          | 724 |
| B. <i>Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.</i> ..... | 729 |
| C. <i>Civil Aeronautics Board v. United Airlines, Inc.</i> .....                  | 731 |
| V. <i>MARSHALL V. BARLOW'S, INC.</i> .....                                        | 735 |

† Deputy General Counsel, United States Department of Energy; A.B., J.D., Columbia University; Dep't Crim., Cambridge University.

‡ Chief of Staff/Attorney-Auditor U.S. Claims Court; B.A., West Chester University; J.D., Delaware Law School.

The authors wish to express their gratitude for the research assistance provided by Julie Vaccher, Fred Weinstein and Rick Focht; and for the helpful comments by Walter Gellhorn and Loren A. Smith regarding earlier drafts. The authors are deeply appreciative of the support given to them by the Administrative Conference of the United States and wish to thank the numerous individuals who responded to our questionnaire and who consented to be interviewed in connection with this study. Nevertheless, it is incumbent upon us to state that the analysis, comments, and views expressed in this study are those of the authors, and do not necessarily represent the policies, positions or recommendations of the Administrative Conference of the United States.

|       |                                                                                                          |     |
|-------|----------------------------------------------------------------------------------------------------------|-----|
| A.    | <i>Summary of the Major Pre-Barlow's Case Law</i> . . . . .                                              | 735 |
| B.    | <i>The OSHA Setting: Lower Court Case</i> . . . . .                                                      | 737 |
| C.    | <i>Marshall v. Barlow's, Inc.: Summary of the Case</i> ..                                                | 740 |
| D.    | <i>Analysis of the Decision</i> . . . . .                                                                | 742 |
| E.    | <i>The Dissent</i> . . . . .                                                                             | 747 |
| F.    | <i>Criteria for Determination of Probable Cause</i> . . . . .                                            | 750 |
| G.    | <i>Agency Reaction to Barlow's</i> . . . . .                                                             | 754 |
|       | 1. <i>Occupational Safety and Health Administration</i> . . .                                            | 754 |
|       | 2. <i>Environmental Protection Agency</i> . . . . .                                                      | 754 |
|       | 3. <i>Consumer Product Safety Commission</i> . . . . .                                                   | 758 |
| VI.   | <i>FROM BARLOW'S TO DEWEY</i> . . . . .                                                                  | 761 |
| A.    | <i>Michigan v. Tyler</i> . . . . .                                                                       | 762 |
| B.    | <i>Authority for the Issuance of Warrants</i> . . . . .                                                  | 764 |
| C.    | <i>Breadth of Inspection</i> . . . . .                                                                   | 772 |
| VII.  | <i>DONOVAN V. DEWEY</i> . . . . .                                                                        | 777 |
| VIII. | <i>DEWEY'S PROGENY</i> . . . . .                                                                         | 783 |
| A.    | <i>The Fishery Conservation and Management Act</i> . . . . .                                             | 784 |
| B.    | <i>The Atomic Energy Act of 1954</i> . . . . .                                                           | 789 |
| C.    | <i>State Laws</i> . . . . .                                                                              | 791 |
| D.    | <i>The Clean Air Act</i> . . . . .                                                                       | 793 |
| E.    | <i>Post-Dewey Analysis</i> . . . . .                                                                     | 795 |
| IX.   | <i>QUESTIONS RAISED</i> . . . . .                                                                        | 796 |
| A.    | <i>A Survey of Agency Practice</i> . . . . .                                                             | 796 |
| B.    | <i>Survey Results</i> . . . . .                                                                          | 798 |
| C.    | <i>Searches and Subpoenas</i> . . . . .                                                                  | 800 |
|       | 1. <i>Terms for "Search"</i> . . . . .                                                                   | 802 |
|       | 2. <i>Administrative Subpoenas</i> . . . . .                                                             | 803 |
|       | 3. <i>Lone Steer</i> . . . . .                                                                           | 809 |
|       | 4. <i>Whither the Warrant?</i> . . . . .                                                                 | 813 |
| D.    | <i>Conclusion</i> . . . . .                                                                              | 816 |
| X.    | <i>APPENDICES</i> . . . . .                                                                              | 821 |
| A.    | <i>Occupational Safety and Health Administration: Field Operations Manual (selected pages)</i> . . . . . | 821 |
| B.    | <i>Terms for "Search" and "Search Warrant"</i> . . . . .                                                 | 828 |

## INTRODUCTION

SEARCH and seizure issues have long bedeviled constitutional analysts; the Supreme Court docket is often filled with cases exploring the nuances of the fourth amendment. Governmental authorities are forced to interpret close judicial decisions for guidance over a broad range of factually complex investigative activi-

ties. Although most judicial and academic attention has focused upon the protection afforded suspects subject to police searches for criminal violations, the Supreme Court has made clear that “*similar*” constitutional protections are enjoyed by citizens and businesses faced with administrative inspections/searches for regulatory violations—“*similar*”—but not the same. Given a number of recent cases with uncertain effects—and commentaries occasionally predicting drastic consequences resulting from them—it is timely to assess the present status of administrative search law, and further, to explore some of the actual results flowing from those decisions.

What was thought to have been the “latest” seminal case in the area of administrative searches—*Marshall v. Barlow’s, Inc.*<sup>1</sup>—is explored here in great depth. Rather than being of major precedential or ground breaking value, however, *Barlow’s* unfolds as one of a series of cases clarifying and fine-tuning the fourth amendment guarantees in administrative law. It has not had, moreover, any of the drastic or extreme effects upon governmental procedure that many predicted it would. The conclusions reached in this article result not only from an exhaustive study of the case law but also from an analytical survey of the investigatory search and seizure system at work in the federal government.

It is important for us first to establish the necessary constitutional framework for analysis, and then thoroughly to review and update the case law dealing with administrative searches and inspections. Only with that properly accomplished can we see where we stand today and understand the questions that others have suggested require specific exploration. With that conceptual foundation established, the results of an empirical investigation of those questions, conducted by the authors at the behest of the Administrative Conference of the United States, are set forth. Finally, some conclusions are drawn as to the present status of regulatory inspections, a summary is offered of the balancing test that appears to have been pragmatically adopted by the courts, a rationale is proposed to explain why the issues remain vital for only a very few governmental agencies, and some suggestions are offered to future researchers.

---

1. 436 U.S. 307 (1978).

## I. THE CONSTITUTIONAL FRAMEWORK

### A. *The Fourth Amendment*

All governmental actions must conform to the mandates of the Constitution; in particular, governmental agencies may not exceed their authorized powers. The most relevantly significant limitations on agency actions are those in the search and seizure area, as expressed in the fourth amendment to the Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>2</sup>

The fourth amendment applies to the search and the seizure of property, as well as to the seizure (usually arrest) of persons. The key flexibility of the fourth amendment lies in the fact that it does not prohibit all searches and seizures, but only those which are deemed to be unreasonable in light of the totality of all the circumstances surrounding the event.

According to most interpretations of the Constitution, warrants are supposed to be the norm. The basic standard for determining whether governmental agents acted reasonably in a given situation is a judicial finding that they did or did not have probable cause either to search or to seize. "Probable cause" is itself, however, a flexible term, having a significantly different meaning for different government agents, particularly for those engaged in searches for criminal activity as opposed to those conducting administrative inspections. As the Supreme Court reiterated in *Marshall v. Barlow's*: "[T]he Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations."<sup>3</sup> Citing its landmark decisions in *Camara v. Municipal Court*,<sup>4</sup> and *See v. City of Seattle*,<sup>5</sup> the *Barlow's* Court stated that the basic purpose of the fourth amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental offi-

---

2. U.S. CONST. amend. IV.

3. *Barlow's*, 436 U.S. at 312.

4. 387 U.S. 523 (1967).

5. 387 U.S. 541 (1967).

cial.”<sup>6</sup> The Court went on to state: “If the government intrudes on a person’s property, the privacy interest suffers whether the government’s motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards.”<sup>7</sup>

Moreover, given our present concerns, we should note that the fourth amendment protection discussed here applies to individuals and to businesses alike. In the criminal area, the Supreme Court has repeatedly overturned unreasonable and warrantless investigatory searches despite government protests that they were only directed at commercial rather than residential premises.<sup>8</sup> In *See v. City of Seattle*, the Supreme Court declared that so far as administrative searches are concerned, the “businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.”<sup>9</sup>

### 1. *Criminal Interpretations*

The fourth amendment is most commonly thought of as applying restrictions upon the police in their role of looking for individual violations of the criminal code. We cannot, however, fully appreciate either the similarities or the differences between the criminal and civil applications of the warrant clause without understanding each separately. We should, therefore, at least briefly summarize here the present situation respecting criminal searches.

For the police to have probable cause to arrest a person, they must have reasonable grounds, or sufficient evidence, which would warrant that a person of reasonable caution believe that a violation of the law had been committed and that the suspect committed the violation.<sup>10</sup> For the police to have probable cause

---

6. *Barlow's*, 436 U.S. at 312 (quoting *Camara*, 387 U.S. at 528).

7. *Id.* at 312-13.

8. *See Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) (fourth amendment forbids every search that is unreasonable); *Silverthorn Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (rights of corporation are to be protected against unlawful search and seizure even if not protected by the fifth amendment from compulsory production of incriminating documents).

9. *See*, 387 U.S. at 543. It is worth noting, however, that later in the *See* opinion, the Court declared: “We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes. . . .” *Id.* at 545-46. Rather, the Court limited its holding to requiring that the basic component of a reasonable search under the fourth amendment is applicable to business as well as to residential premises. *Id.* at 546.

10. *See, e.g., Carroll v. United States*, 267 U.S. 132 (1925). The *Carroll* Court stated that arrest without a warrant for a misdemeanor is allowed only

to search particular premises, they must be able to conclude that the specific items to be searched for are connected with criminal activity and that these items are to be found in the place to be searched. Particularity is a hallmark of the probable cause standard and must be demonstrated in a police application for a search warrant.<sup>11</sup>

The criminal search warrant is a document authorizing a law enforcement official to conduct a search. It is issued by a neutral and detached magistrate upon the submission of a signed police request in the form of an affidavit.<sup>12</sup> The affidavit must set forth the facts that establish probable cause, including a specific description of the persons to be searched and the things to be seized. The execution of the warrant must be made in accordance with certain generally accepted principles, including an an-

---

when the offense is committed in the presence of the officer or there are reasonable grounds to believe that the misdemeanor is about to be committed or reviewed in his presence. *Id.* at 156. The Court noted, however, that for a felony the officer need only to have a reasonable cause to believe that the person arrested committed the felony. *Id.* at 156-57.

11. *See, e.g.,* *Draper v. United States*, 358 U.S. 307 (1959). In *Draper*, an experienced federal narcotics agent was told by an informer, whose information the agent had always found reliable, that Draper was peddling narcotics, had gone to Chicago to obtain a supply, and would return on a certain day. *Id.* at 309. The agent did not know Draper, and his description was given to the agent by the informer. *Id.* The agent later recognized Draper from the informer's description, and without a warrant, arrested him, searched him, and seized narcotics found in his possession. *Id.* at 309-10. The arrest, search, and seizure and the narcotics seized were admitted into evidence at Draper's trial. *Id.* at 314. Draper was convicted for violating narcotics law. *Id.* at 308. The Supreme Court in upholding the conviction stated that an arrest without a warrant is justified where the officer had reason to believe that the law had been violated. *Id.* at 312-13. In this instance, the Court found that the information in the possession of the narcotics agent was sufficient to show probable cause and reasonable grounds to believe that Draper had violated or was violating the narcotics laws to justify his arrest without a warrant. *Id.* at 312-13.

12. *See, e.g.,* *Connally v. Georgia*, 429 U.S. 245 (1977). In *Connally*, the appellant John Connally was indicted, tried, and convicted in the Superior Court of Walker County, Georgia for possession of marijuana. *Id.* at 245. Pursuant to a search warrant issued by a justice of the peace, Connally's house was raided and marijuana was found there and seized. *Id.* At his trial, Connally moved to suppress the evidence of the seized marijuana on the ground that the justice who issued the warrant had a pecuniary interest in issuing the warrant. *Id.* at 246; *see, e.g.,* W.E. RINGEL, *SEARCH & SEIZURES, ARRESTS AND CONFESSIONS* § 5.1 (2d ed. 1986).

In order for a warrant to be valid, it must meet the requirements specified in the Fourth Amendment. . . . These minimum constitutional requirements are: (1) a pre-issuance determination of probable cause; (2) issuance only upon oath or affirmation in support of the probable cause showing; and (3) particularity of description in the warrant of the place to be searched and the persons or things to be seized.

*Id.*

nouncement by the police of their purpose and authority, except in cases where there may be danger to the officer or where evidence may be destroyed.<sup>13</sup>

In *Illinois v. Gates*,<sup>14</sup> the Supreme Court established the test by which magistrates are to gauge police requests for search warrants: "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."<sup>15</sup>

Although the Supreme Court has expressed a preference for

13. *See, e.g.*, *Ker v. California*, 374 U.S. 23, 27 (1963) (officers did not have to demand admittance and explain their purpose in order to prevent destruction of contraband).

14. 462 U.S. 213 (1983).

15. *Id.* at 238. In *Gates*, the Police Department of Bloomingdale, Ill., received an anonymous letter which included statements that respondents, husband and wife, were engaged in selling drugs; that the wife would drive a car to Florida on May 3, 1978 to be loaded with drugs, and the husband would fly down in a few days to drive the car back; that the car's trunk would be loaded with drugs; and that the respondents presently had over \$100,000 worth of drugs in their basement. *Id.* at 225. Acting on the tip, a police officer determined respondents' address and learned that the husband made a reservation on a May 5 flight to Florida. *Id.* at 226. Arrangements for surveillance of the flight were made with an agent of the Drug Enforcement Administration (DEA) and surveillance disclosed that the husband took the flight, stayed overnight in a motel room registered in the wife's name, and left the following morning with a woman in a car bearing an Illinois license plate issued to the husband heading back to Illinois. *Id.* at 226-27. A search warrant for respondents' residence and automobile was obtained from an Illinois state court judge, based on the Bloomingdale police officer's affidavit setting forth the foregoing facts and a copy of the anonymous letter. *Id.* When the respondents arrived at their home, the police were waiting and discovered marijuana and other contraband in respondents' car trunk and home. *Id.* at 227. Prior to respondents' trial on charges of violating state drug laws, the trial ordered suppression of all the items seized, and the Illinois Appellate Court affirmed. *Id.* The Illinois Supreme Court also affirmed, holding that the letter and affidavit were inadequate cause for issuance of the search warrant under *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) since they failed to satisfy the two prong test articulated in those cases which required (1) revealing the informant's "basis of knowledge," and (2) providing sufficient facts to establish either the informant's veracity or the reliability of the informant's report. *Id.* at 228-29. The United States Supreme Court reversed the judgment and rejected the two prong test, replacing it with the totality of the circumstances test. *Id.* at 231. The Court in adopting this new test noted that:

[T]he duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. . . . We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*.

*Id.* at 238-39 (citation omitted).



searches and arrests conducted pursuant to a warrant, warrants are not always necessary in practice. The great majority of criminal arrests, for example, are made without them. Indeed, the most common form of search of the person is that conducted incident to a lawful and warrantless arrest.<sup>16</sup>

Warrantless searches of automobiles are also allowed under specific circumstances.<sup>17</sup> Even where an arrest is not involved, the police may physically seize the suspect and conduct a protective frisk for weapons when the police have a reasonable belief that the suspect is armed and dangerous.<sup>18</sup>

Warrants are also not required where "exigent circumstances" exist, such as preventing the imminent destruction of evidence, preventing harm to persons, or searching following the "hot pursuit" of a fleeing suspect.<sup>19</sup> If a suspect consents to the search, or abandons the property in question, then there is also no need for police to obtain a warrant.<sup>20</sup>

Certain agencies, given their jurisdiction, are virtually exempt from the warrant requirement, even in criminal matters. This is true for a number of national security agencies,<sup>21</sup> and also for the United States Customs Service when performing inspec-

16. *See, e.g.*, *Rawling v. Kentucky*, 448 U.S. 98, 110-11 (1980) (search of person incident to formal arrest is not illegal); *Chimel v. California*, 395 U.S. 752, 763 (1969) (arresting officer may search person arrested in order to remove any weapons and to seize evidence on arrestee's person, and area into which arrestee might reach in order to grab weapon or evidentiary items).

17. *See, e.g.*, *United States v. Ross*, 456 U.S. 798 (1982) (warrantless searches of vehicles including all containers and compartments therein is constitutional if police have probable cause to believe that contraband is located in vehicle); *New York v. Belton*, 453 U.S. 454 (1981) (warrantless search of entire passenger compartment of vehicle including all containers in compartment as search incident to arrest is constitutional).

18. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968) (Court approved police seizures and frisks without search warrant of suspects on street when police have specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant suspicion of criminal conduct on part of suspect).

19. *See, e.g.*, *Cupp v. Murphy*, 412 U.S. 291, 296 (1973) (in view of stationhouse detention of suspect upon probable cause, very limited intrusion undertaken to preserve highly evanescent evidence is not violative of fourth amendment); *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967) (exigencies of situation in which officers were in pursuit of suspected armed felon in house which he had entered only minutes before they arrived permitted warrantless entry and search).

20. *See, e.g.*, *Schneekloth v. Bustamonte*, 412 U.S. 218, 227-29 (1973) (when subject of search is not in custody and state would justify a search based on consent, fourth amendment requires that state demonstrate that consent was voluntarily given; voluntariness is to be determined by totality of circumstances).

21. *See United States v. Byrd*, 483 F.2d 1196, 1199-1200 (5th Cir. 1973), *aff'd on rehearing*, 494 F.2d 1284 (5th Cir. 1974) (search at border of country is

tions at the border.<sup>22</sup>

## 2. *Non-Criminal Interpretations*

As we have seen, even in such an area of close judicial scrutiny as that of police searching for evidence of crimes, a warrant is not always a necessity. When it *is* necessary, however, the relatively strict standard of probable cause applies.

In considering fourth amendment issues, we tend first to consider police investigations for evidence of crime, but there is also no doubt that the protections of the fourth amendment are afforded non-criminal suspects as well.

The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime. As this Court stated in *Camara v. Municipal Court*, 387 U.S. 523, 528, the "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public. See *v. Seattle*, 387 U.S. 541; *Marshall v. Barlow's, Inc.*, *ante*, at 311-313. These deviations from the typical police search are thus clearly within the protection of the Fourth Amendment.<sup>23</sup>

In the non-criminal (primarily administrative) area, however, it is also true that warrants are not always required when an

---

not governed by normal fourth amendment principles; rather, neither warrant nor probable cause is necessary for search).

22. See, e.g., *United States v. Villamonte-Marquez*, 462 U.S. 579, 588-90 (1983) (fourth amendment is not violated when customs officials, acting pursuant to statute which authorizes customs officials to go on board at any place in the United States and examine documents, and without any suspicion of wrongdoing, board for inspection of documents vessel that is located in waters providing ready access to open sea); *Boyd v. United States*, 116 U.S. 616, 635-37 (1886) (search and seizure of man's private papers to be used in evidence for the purpose of convicting him of a crime is totally different from search and seizure of dutiable articles on which duties have not been paid and rightfully belong to custody of law).

23. *Michigan v. Tyler*, 436 U.S. 499, 504-05 (1978). For a discussion of *Michigan*, see *infra* notes 202-12 and accompanying text.

agency inspector wishes to conduct a search. Indeed, there are several clear analogs to the criminal exceptions. The vast majority of administrative searches, for example, are simply consented to by the subjects of the search. "Exigent circumstances" will also make seeking an administrative search warrant unnecessary.<sup>24</sup>

Further, there are a number of agencies which, given their jurisdiction over "heavily regulated" industries, are completely exempt even from the administrative warrant requirement.<sup>25</sup>

When an administrative search warrant is required, however, the standard to be applied by a magistrate in assessing the supporting affidavit request by the agency is a much lower one than that applied in criminal cases. This was made extremely clear in the seminal *Camara* and *See* decisions of the United States Supreme Court.

## II. *CAMARA* AND *SEE*

Perhaps surprisingly, it was not until 1959 that the Supreme Court even discussed the constitutionality of searches by administrative agencies. That year, in *Frank v. Maryland*,<sup>26</sup> the Court upheld a fine imposed on Aaron Frank who had refused to let a city health inspector search for infestation of rodents in his residence without a warrant. In so holding, the Court declared that city health inspectors, in furtherance of the goal of enforcing local health and safety codes, needed neither consent nor a search warrant to search a person's home, since in such cases, the person had no interest protected by the fourth amendment. The interests at stake were interests merely on the "periphery" of those

---

24. Among the exceptions recognized in *Camara* were cases necessitating "prompt inspections, even without a warrant . . . in emergency situations." *Camara*, 387 U.S. at 539 (citing *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908)) (seizure of unwholesome food); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory smallpox vaccination); *Compagnie Française v. Board of Health*, 186 U.S. 380 (1902) (health quarantine).

25. For further discussion of this exemption, see *infra* notes 45-72 and accompanying text.

26. 359 U.S. 360 (1959).

protected by the Constitution.<sup>27</sup>

Eight years later, the Supreme Court reversed itself, deciding the companion cases of *Camara v. Municipal Court*,<sup>28</sup> and *See v. City of Seattle*,<sup>29</sup> declaring that the fourth amendment interests of the citizen *were* implicated in such a situation and were not merely peripheral. *Camara* involved an attempt by an inspector from the San Francisco Department of Public Health to conduct a routine annual housing code inspection of a private apartment.<sup>30</sup> *See* involved an effort by a Seattle Fire Department inspector to examine a commercial warehouse for fire code violations.<sup>31</sup> In *Camara*, the Court stated: “[W]e hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the fourth amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguard which the fourth amendment guarantees to the individual. . . .”<sup>32</sup> In these words, the *Camara* Court asserted the relevance of fourth amendment standards to government searches involving purposes other than criminal investigation.

Nevertheless, the *Camara* Court went on to declare that, although a warrant *was* required for such inspections, in deciding whether or not to grant such warrants, magistrates were to apply a different standard than the one they typically applied in criminal cases. Although the *Camara* Court still spoke in terms of “probable cause,” the particularity requirement of the fourth amendment was implicitly deemed of little relevance in the administrative search area.<sup>33</sup> The appellant in *Camara* had argued that administrative warrants would issue only when the inspector

---

27. *Id.* at 367. The Court stated that:

Inspection without a warrant, as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, has antecedents deep in our history. For more than 200 years Maryland has empowered its officers to enter upon ships, carriages, shops, and homes in the service of the common welfare.

*Id.*

28. 387 U.S. at 523.

29. *Id.* at 541.

30. *Id.* at 526.

31. *Id.* at 541.

32. *Id.* at 534.

33. *Id.* at 535. The Court stated that in a criminal investigation where the police may undertake to recover specific stolen goods, it would not be reasonable to issue a warrant to conduct a sweeping search for these goods. *Id.* But unlike search pursuant to a criminal investigation, inspection programs are aimed at compliance with minimum physical standards for private property. *Id.*

possessed probable cause to believe that a *particular* dwelling contained code violations.<sup>34</sup> The Court specifically disagreed with this contention and approved of non-particular, routine, periodic health and safety inspections of all structures in a given area. The Court noted “It is here that the probable cause debate is focused, for the agency’s decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building.”<sup>35</sup> The Court went on to declare:

[R]easonable legislative or administrative standards for conducting an area inspection . . . may be based upon the passage of time, the nature of the building (*e.g.*, a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.<sup>36</sup>

Viewed in evidentiary terms, the amount of proof, or quantum of probable cause, required by the *Camara* Court to be found by a magistrate appeared marginal indeed: “If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.”<sup>37</sup>

Both probable cause and the reasonableness of searches in such cases were to be analyzed by applying a balancing test. The Court stated: “[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.”<sup>38</sup> In other words, before issuing an administrative search warrant, a magistrate is to weigh the public interest in effective municipal health, housing, sanitation, fire, or safety code enforcement against the fourth amendment right to be free from unreasonable searches.

Justice Clark strongly dissented from what the *Camara* and *See* majorities conceded was a sharp variance from the probable cause standard applied in criminal cases:

34. *Id.* at 534.

35. *Id.* at 536.

36. *Id.* at 538.

37. *Id.* at 539. As an illustration of the “watered-down” nature of the probable cause standard, one might look at the United States District Court conclusion that the state need not show “full-scale probable cause to search the specific boat in question, but only that the presence on the lake of boats like plaintiff’s boat or the size and nature of the lake, raise problems which justify the inspection searches.” *Klutz v. Beam*, 374 F. Supp. 1129, 1133 (W.D.N.C. 1973).

38. *Camara*, 387 U.S. at 536-37.

Today the Court . . . prostitutes the command of the Fourth Amendment that "no Warrants shall issue, but upon probable cause" and sets up in the health and safety codes area inspection a newfangled "warrant" system that is entirely foreign to Fourth Amendment standards . . . The majority . . . would permit the issuance of paper warrants, in area inspection programs, with probable cause based on area inspection standards as set out in municipal codes, and with warrants issued by the rubber stamp of a willing magistrate.<sup>39</sup>

Justice Clark argued that the procedure called for by the majority degraded the fourth amendment and added an unnecessary, time-consuming, and costly burden to legitimate inspection procedures. He predicted that:

[t]hese boxcar warrants will be identical as to every dwelling in the area, save the street number itself. I daresay they will be printed up in pads of a thousand or more—with space for the street number to be inserted—and issued by magistrates in broadcast fashion as a matter of course.<sup>40</sup>

### III. COLONNADE AND BISWELL

#### A. Introduction

The dissenters in *Camara* and *See* envisioned dire consequences resulting from the majorities' decisions.<sup>41</sup> Most commentators have viewed the cases as being landmark decisions establishing the baseline of further analysis in this area.<sup>42</sup> Others

---

39. *See*, 387 U.S. at 547-48 (Clark, J., dissenting).

40. *Id.* at 554 (Clark, J., dissenting).

41. In *See*, Justice Clark argued that, effectively, the Court's decision was: striking down hundreds of city ordinances throughout the country and jeopardizing thereby the health, welfare, and safety of literally millions of people.

But this is not all. It prostitutes the command of the Fourth Amendment that "no Warrants shall issue, but upon probable cause" and sets up in the health and safety codes area inspection of a newfangled "warrant" system that is entirely foreign to Fourth Amendment standards. It is regrettable that the Court wipes out such a long and widely accepted practice and creates in its place such enormous confusion in all of our towns and metropolitan cities in one fell swoop.

*Id.* at 547 (Clark, J., dissenting).

42. *See* W. GELLHORN, C. BYŠE & P.L. STRAUSS, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 540-41 (7th ed. 1979) [hereinafter cited as Gellhorn, Bysé & Strauss].

have suggested that, as a matter of practical effect, *Camara* and *See* represented only a slight shift for the Court from its earlier position expressed in *Frank v. Maryland*.<sup>43</sup> Still others have suggested that the exceptions to the warrant requirement, announced since the decisions in *Camara* and *See*, have effectively swallowed up the rule announced in those cases.<sup>44</sup>

---

[*Camara* and *See*] were the principal cases relied on in Barlow's. These decisions, also written by Mr. Justice White, have been treated by the Court since their decision as the point of departure for Fourth Amendment analysis, especially in cases not involving a search in aid of imminent criminal prosecution.

*Id.* See also Bartelstone, *Administrative Searches and Implied Consent Doctrine: Beyond the Fourth Amendment*, 43 BROOKLYN L. REV. 91 (1976). Bartelstone points out that the *Camara* and *See* cases shaped the law of administrative searches. *Id.* at 93. The *Camara* decision required a balancing test in weighing the public interest in effective health code enforcement against the fourth amendment right to be free from unreasonable search and seizures to determine whether a search warrant was required. *Id.* The warrant test established in *Camara* was extended beyond administrative searches of private residences in *See v. Seattle*, in which the Court included administrative searches of commercial premises. *Id.* Bartelstone noted that the *Camara* and *See* warrant requirement left open the question of the "licensing requirement." *Id.* at 96. In *See*, the Court did not question accepted regulatory techniques as licensing programs which would require inspections prior to operating business. *Id.* A few courts have used this exception to sanction warrantless inspections of ongoing businesses merely because the subject of the search was a licensee. See, e.g., *United States v. Sessions*, 283 F. Supp. 746 (N.D. Ga. 1968) (search of premises without warrant pursuant to statutory authority of liquor dealer who had not paid special tax violated no constitutional right); see also Kent, *OSHA v. The Fourth Amendment: Should Search Warrants Be Required for "Spot Checks" Inspections?*, 29 BAYLOR L. REV. 283 (1977). Kent pointed out that *Camara* and *See* introduced the "persuasive regulation test," which involves an industry regulated pervasively or one that has a long history of government control. *Id.* Warrantless searches are permissible in these situations because they are minimal intrusions into privacy when compared to other regulations already imposed on the industry. *Id.* Also, the business owner has implicitly consented to such searches by knowingly engaging in such a regulated business. *Id.* The second exception is the "statutory restraints" tests. This is met when the warrantless search is statutorily limited to being reasonable as to the time, place, and manner in which it is conducted. *Id.* The third exception is the "effective enforcement" test which arises when the element of surprise afforded by warrantless searches is crucial to the effective enforcement of the law. *Id.*

43. K.C. DAVIS, *ADMINISTRATIVE LAW TEXT* § 3.06 (3d ed. 1972):

The shift in the Court's doctrine from *Frank* to *Camara* and *See* is probably only a slight one, both with respect to the increased burden on the officers and the increased protection to the private party. The burden on the officers may be no greater, because getting a search warrant is as easy as any other method of compelling compliance and may even be easier. The protection to the private party is not significantly enhanced, because warrants are likely to be issued on a wholesale basis, since the Court specifically approves area inspection.

*Id.*

44. See Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CALIF. L. REV. 1011 (1973). Greenberg analyzed decisions applying the *Camara-See* balancing

Foremost among these latter exceptions has been a line of cases relating to what have been deemed "closely regulated" businesses or industries. The Court explicitly carved out this exception in its 1970 decision, *Colonnade Catering Corp. v. United States*,<sup>45</sup> and its subsequent 1972 decision, *United States v. Biswell*.<sup>46</sup> In these cases, the Supreme court held that those engaged in either of two highly regulated businesses, liquor or firearms, could be forced to submit to warrantless, nonconsensual searches by federal agents.

---

test and noted that the Supreme Court's use of the balancing test has not been encouraging. *Id.* at 1046.

The Court's rationale in one case raised some question as to whether the theory is still viable. In *Wyman v. James*, 400 U.S. 309 (1971), the plaintiff, a recipient of aid to families with dependent children, was notified that her home would be visited by a caseworker. *Id.* at 313. The plaintiff offered to supply information relevant to her for public assistance, but she refused to permit the caseworker to visit her home. *Id.* at 314. Pursuant to New York statutory and administrative provisions, her AFDC benefits were terminated because of such refusal. *Id.* Granting the plaintiff's request for injunctive relief, a three-judge United States District Court for the Southern District of New York held that since the visit to the plaintiff's home would, in the absence of a warrant, have been an unconstitutional search, the plaintiff's refusal to permit the visit did not justify terminating her AFDC benefits. *Id.* at 315.

On appeal, the United States Supreme Court reversed and directed a dismissal to be entered. *Id.* at 326. The Court held the caseworker's home visit was not a "search" within the meaning of the fourth amendment. *Id.* Further, the Court reasoned that even if the visit was a search, it was not unreasonable because it served a valid and proper administrative purpose of the AFDC program, it was not an unwarranted invasion of personal privacy, and it violated no right guaranteed by the fourth amendment. *Id.* Greenberg pointed out that the Court in reaching its conclusions failed to weigh the individual's interest in privacy against the government's interest. Greenberg, *supra*, at 1030-31. Rather, Greenberg noted that the Court merely implied that the probable cause and warrant requirements could be modified under regulatory search cases. *Id.* at 1035; see also Rothstein and Rothstein, *Administrative Searches and Seizures: What Happened to Camara and See?*, 50 WASH. L. REV. 341 (1975). Rothstein and Rothstein stated that

[t]he courts have enlarged upon the exceptions to *Camara* and *See* so tremendously that the very essence of those decisions—that nonconsensual administrative inspections of commercial and noncommercial premises require a warrant—is seriously threatened.

*Id.* at 382; see, e.g., *United States ex rel. Terraciano v. Montanye*, 493 F.2d 682 (2d Cir.) (New York statutes authorizing nonforcible searches limited to orders, prescriptions, or records which related to narcotic, depressant and stimulant drugs and which were statutorily required to be kept on premises were sufficiently limited to justify failure to obtain search warrant with regard to narcotics agent's nonforcible inspection and seizure during business hours of licensed pharmacist's records which were maintained on premises and which related to narcotics and stimulant or depressant drugs), *cert. denied*, 419 U.S. 875 (1974). For a discussion of the exceptions to *Camara* and *See*, see *supra* note 42 and accompanying text.

45. 397 U.S. 72 (1970).

46. 406 U.S. 311 (1972).



## B. Colonnade

In *Colonnade*, federal agents from the Alcohol and Tobacco Tax Division of the Internal Revenue Service had reason to suspect Colonnade of committing violations of the federal excise tax law.<sup>47</sup> The agents inspected the cellar of the establishment, without the manager's consent, and then requested entry to a locked storeroom.<sup>48</sup> Rozzo, Colonnade's president, arrived and requested to see a search warrant, but he was told by the agents that a warrant was unnecessary.<sup>49</sup> Rozzo refused to unlock the storeroom and the agents broke the lock, entered the liquor storeroom, and removed the bottles in question.<sup>50</sup>

The agents in *Colonnade* acted pursuant to 26 U.S.C. § 5146(b) which provides that an agent may enter, during business hours, to inspect or examine any records or distilled spirits stored on the premises;<sup>51</sup> or, as provided for in 26 U.S.C. § 7606, may enter any building or place where any articles or objects subject to tax are made, produced, or kept, so far as may be necessary for the purpose of examining said articles.<sup>52</sup> The penalty for refusal to permit such inspections is a \$500 fine.<sup>53</sup>

The Court's primary inquiry was whether the imposition of the fine for refusal to submit to entry was the exclusive sanction for violation.<sup>54</sup> The Court concluded that it was, thus precluding

47. 397 U.S. at 73.

48. *Id.*

49. *Id.*

50. *Id.*

51. Section 5146(b) provides:

The Secretary may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

26 U.S.C. § 5146(b) (1982).

52. Section 7606 provides:

(a) Entry during day.

The Secretary may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.

(b) Entry at night.

When such premises are open at night, the Secretary may enter them while so open, in the performance of his official duties.

26 U.S.C. § 7606 (1982).

53. *See* 26 U.S.C. § 7342 (1982).

54. 397 U.S. at 74.

agents from breaking and entering without a warrant.<sup>55</sup> In the course of its discussion, however, the Court emphasized the highly regulated nature of the liquor industry and the lengthy history of Congressional interest in protecting the revenue involved against various types of fraud.<sup>56</sup>

In recognition of the closely regulated and supervised industry involved, the Court stated:

We agree that Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand. The general rule laid down in *See v. City of Seattle* [at 545]—“that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure”—is therefore not applicable here.<sup>57</sup>

*Colonnade* thus upholds a broad Congressional authority “to fashion standards of reasonableness for searches and seizures” in industries long subject to close supervision and inspection.<sup>58</sup>

The Congressional scheme, in the statute scrutinized in *Colonnade*, did not include forcible entries without a warrant; instead it merely made it an offense, subject to fine, for a licensee to refuse admission to an inspector. The Court was therefore bound to uphold that standard and find for the petitioner. By rejecting the *See* test in this situation and recognizing the broad authority of Congress in a regulated area, the Court implicitly suggested that had Congress selected a standard of forcible entry, the Court would have upheld the government’s position.

### C. Biswell

Two years after *Colonnade*, the Supreme Court addressed the

55. *Id.*

56. *Id.* at 75. The Court noted the long history of the regulation of the liquor industry during pre-fourth amendment days. *Id.* During colonial days, “the precursor of modern day liquor legislation was enacted in England which allowed commissioners to enter, on demand, brewing houses at all times for inspection.” *Id.* (footnote omitted). The Court noted that after the fourth amendment was ratified, Congress passed laws which gave federal officers broad powers to inspect distilling premises and the premises of the importer without a warrant. *Id.* These laws and regulations of the liquor industry reflect Congress’s interest in protecting revenue from fraud. *Id.*

57. *Id.* at 76.

58. *Id.* at 77.

constitutionality of a warrantless search pursuant to section 923(g) of the Gun Control Act of 1968.<sup>59</sup> In *United States v. Biswell*, a pawn shop operator, who was federally licensed to deal in sporting weapons, initially denied entry to a Federal Treasury agent who requested access to a locked storeroom.<sup>60</sup> Although the owner asked about a warrant, his inquiry was apparently satisfied by a reading, provided by the agent, of the statute authorizing such a warrantless inspection.<sup>61</sup>

Having received the owner's reluctant approval, the agent entered the storeroom, found and then seized two sawed-off rifles which the owner was not licensed to possess.<sup>62</sup> The owner was subsequently indicted and convicted for dealing in firearms without having paid the required tax.<sup>63</sup> The court of appeals reversed the conviction finding "that section 923(g) was unconstitutional under the fourth amendment because it authorized warrantless searches of business premises and that respondent's ostensible consent to the search was invalid."<sup>64</sup>

59. 18 U.S.C. § 923(g) (1982).

60. 406 U.S. at 312.

61. The statute provides:

Each licensed importer, licensed manufacturer, licensed dealer, and licensed collector shall maintain such records of importation, production, shipment, receipt, sale, or other disposition, of firearms and ammunition . . . at any place, for such period, and in such form as the Secretary [of the Treasury] may by regulations prescribe. Such importers, manufacturers, dealers, and collectors shall make such records available for inspection at all reasonable times, and shall submit to the Secretary such reports and information with respect to such records and the contents thereof as he shall by regulations prescribe. *The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector for the purpose of inspecting or examining (1) any records or documents required to be kept by such importer, manufacturer, dealer, or collector under the provisions of this chapter, or regulations issued under this chapter, and (2) any firearms or ammunition kept or stored by such importer, manufacturer, dealer, or collector at such premises.* Upon the request of any State or any political subdivision thereof, the Secretary may make available to such State or any political subdivision thereof, any information which he may obtain by reason of the provisions of this chapter with respect to the identification of persons within such State or political subdivision thereof, who have purchased or received firearms or ammunition, together with a description of such firearms or ammunition.

18 U.S.C. § 923(g) (1982) (emphasis added). Congress has provided that a violation of this or any other provision of the Gun Control Act is a crime. *Id.*

62. *Biswell*, 406 U.S. at 312-13.

63. *Id.* at 313. The Court stated that although the pawn shop operator was licensed to sell certain sporting goods, the sawed-off rifles were firearms, and as such every dealer in firearms was required by statute to pay a special optional tax of \$200 a year. *Id.* at 313 n.2.

64. *Id.* at 313.

The Supreme Court reversed the court of appeals' decision.<sup>65</sup> In analogizing this case to that in *Colonnade*, the Court found that, had the target been a federally licensed liquor dealer, the fourth amendment would not have barred a seizure of illicit liquor.<sup>66</sup> The Court stated that in "the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute."<sup>67</sup>

The Court, admittedly recognizing the lack of a deeply rooted history of federal regulation, held, nonetheless, that federal regulation of interstate traffic in firearms "is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders."<sup>68</sup> Moreover, the Court went on to declare: "Large interests are at stake, and inspection is a crucial part of the regulatory scheme . . . . It is also apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment."<sup>69</sup> Finding that this area of regulation required more than merely periodic inspections—in which case warrants would not be a threat to the inspection system, as in *See v. City of Seattle*—the Court upheld the necessity for effective inspection by "unannounced, even frequent, inspections . . . . [T]he prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible."<sup>70</sup>

---

65. *Id.*

66. *Id.* at 314.

67. *Id.* at 315. On the question of the "consent" to the search given by the pawn shop operator in *Biswell*, see Gellhorn, Bysé & Strauss, *supra* note 42, at 549.

A search which might otherwise be improper becomes legitimate if it has been made with consent. Consent must, however, be genuine, not coerced or obtained by deception or based on acceptance of an invalid warrant or an invalid statutory command.

. . . But consent to routinized administrative inspection of business premises is much more readily assumed than is a search for evidence of crime.

*Id.*; see also *United States v. Thriftmart, Inc.*, 429 F.2d 1006 (9th Cir.), *cert. denied*, 440 U.S. 926 (1970); Congressional Findings and Declaration, Note preceding 18 U.S.C. § 922 (1982).

68. 406 U.S. at 315.

69. *Id.* at 315-16.

70. *Id.* at 316. Although this case is usually discussed as providing an exception to the *Camara* doctrine, the Court did, in one sense, analyze it in terms of

Finally, in one brief paragraph, the Court addressed what *Biswell* has come to represent. Holding that inspections for compliance with the Gun Control Act pose only limited threats to justifiable expectations of privacy, the Court introduced the “pervasively regulated business” or “enterprise” standard: “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.”<sup>71</sup>

The Supreme Court defined this pervasively regulated enterprise standard further by concluding that federal regulatory inspections may proceed without a warrant if the following elements are found to exist:

- 1) such inspections further an urgent federal interest;
- 2) the possibilities of abuse and the threat to privacy are not great; and
- 3) the statute specifically authorizes them.<sup>72</sup>

#### IV. FROM *COLLONNADE* AND *BISWELL* TO *BARLOW'S*

##### A. *Analysis of the Colonnade/Biswell Exceptions*

As related in the discussion of *Camara* and *See*, the administrative warrant requirement established in those cases was subject to a limited probable cause requirement—one which would not properly support the issuance of a criminal search warrant.<sup>73</sup> Administrative search warrants are enforceable if issued pursuant to “reasonable legislative or administrative standards for conducting an area inspection.”<sup>74</sup> From this duality—applying fourth amend-

---

the balancing test it had set out in *Camara*. The Court declared that, in *See*, the mission of the inspection system was “to discover and correct . . . conditions that were relatively difficult to conceal or to correct in a short time.” *Id.*

71. *Id.* (emphasis added). Thus, in *See*, in terms of the societal need end of the balance, periodic inspections sufficed and the need for inspectors to obtain warrants did not threaten the effectiveness of the inspection system. Here, however, the Court stressed that frequent and warrantless inspections were needed “if inspection is to be effective and serve as a credible deterrent.” *Id.* Thus, in terms of the balancing test, the Court effectively declared the interests of society to outweigh that of the individual where firearms control was involved. *Id.*

72. *Id.* at 317. “We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute.” *Id.*

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

74. *Id.* The Court stated that “[w]here considerations of health and safety are involved, the facts that would justify an inference of ‘probable cause’ to make

ment warrant requirements to administrative searches (and commercial property), yet reducing the probable cause standard for such warrants—a groundwork was laid for further modifications of, or, as some have labeled them,<sup>75</sup> incursions into, the protections afforded by the warrant clause of the fourth amendment.

The *Colonnade/Biswell* decisions resulted in three grounds to validate particular warrantless administrative searches:

- 1) The “pervasive regulation” test—the extensively close supervision or certain businesses (whether through a long history or present central importance to federal efforts);
- 2) the “essential to effective enforcement of the law” test—the warrantless inspection has to be reasonable in time, manner and scope, and clearly related to the goals of purposes or the underlying program;
- 3) the “implied consent” test—the view that when a person chooses voluntarily to engage in a business pervasively regulated by federal and state laws, that person

---

an inspection are *clearly different* from those that would justify such an inference where a criminal investigation has been undertaken.” *Id.* (emphasis added) (citing *Frank v. Maryland*, 359 U.S. 360, 383 (1958) (Douglas, J., dissenting)).

75. See Rothstein & Rothstein, *supra* note 44, at 382-84. Rothstein and Rothstein summarized the modifications to the warrant requirements to administrative searches. *Id.* at 382. Regarding commercial premises, outdoor administrative inspection will be upheld under the open fields doctrine. *Id.* “As to all administrative inspections, a standard less stringent than in criminal cases is used to determine if there is express consent to a search.” *Id.* at 382-83.

Consent is implied where there is an inspection of a regulated or licensed industry pursuant to statutory provisions. *Id.* at 383. “Finally, anything observed in plain view in a public area or a search for emergency life-saving purposes will be held valid.” *Id.*

Rothstein and Rothstein noted that the recent trend in the law of administrative search and seizures is toward a “benefit conferred” justification for warrantless inspections. *Id.* An individual who receives a benefit from the government whether it is the right to cross a broder, board a plane, or receive a welfare payment—is expected to relinquish certain rights in return. *Id.* at 383-84.

An administrative search involves a routine inspection of a class of persons in order to secure compliance with various regulations or statutes. *Id.* at 384. A criminal search focuses on a single or a few individuals suspected of being involved in criminal activity. *Id.* Rothstein and Rothstein noted, however, when “an administrative search becomes focused on an individual suspected of failing to comply with some statutory or regulatory provision for which criminal sanctions are provided, the search is no longer purely administrative and should comply with the more stringent criminal law standards.” *Id.* But such compliance is lacking in airport and border searches, as well as in nonroutine regulatory inspections. *Id.* These exceptions have undercut the fourth amendment requirements mandated by *Camara* and *See* in administrative searches and seizures. *Id.*

is deemed to have impliedly consented to a warrantless inspection as part of that regulation. (Some have termed this a licensing approach.)<sup>76</sup>

The fear that *Biswell's* progeny would thoroughly dilute the warrant requirements pronounced in *Camara* and *See* has not, however, been realized.<sup>77</sup> The Court reaffirmed its *Camara* requirements when a highly regulated business was not at issue in *Almeida-Sanchez v. United States*.<sup>78</sup> In that case, the United States Supreme Court invalidated a warrantless search conducted by the United States Border Patrol of the Immigration and Naturalization Service. The agents had apparent statutory authority to con-

---

76. The view is that by accepting a license to engage in a state regulated business, the entrepreneur concomitantly accepts all attendant statutory conditions and impliedly waives any constitutional immunities that would otherwise attach. The principle has been applied to liquor store operators, *see, e.g.*, *Clark v. State*, 445 S.W.2d 516 (Tex. Crim. App. 1969) (right to prevent search and seizure by person licensed to engage in business of operating liquor store regulated by law can be waived by statute); horse trainers, *see, e.g.*, *Lanchester v. Pennsylvania State Horse Racing Comm'n*, 16 Pa. Cmwlth. 85, 325 A.2d 648 (1974) (warrantless search, which was made of licensed horse trainer's vehicle by officials of state Horse Racing Commission and which revealed various drugs and devices which could have been applied to racehorse for nefarious purposes, did not violate fourth amendment rights of trainers who had executed consent to search when they applied for trainer's license); licensed real estate brokers, *see, e.g.*, *State Real Estate Comm'n v. Roberts*, 441 Pa. 159, 271 A.2d 246 (1970) (under required records doctrine, statute permitting state Real Estate Commission to conduct warrantless inspection of real estate broker's escrow account was *not* unconstitutional on theory that Commission's blanket request to see escrow account was unreasonable search and seizure in absence of opportunity to have prior judicial determination of reasonableness of demands of inspector), *cert. denied*, 402 U.S. 905 (1971); garbage collectors, *see, e.g.*, *State v. Wybierola*, 305 Minn. 455, 235 N.W.2d 197 (1975) (search during regular business hours of premises maintained and operated by defendant under ordinance requiring junk and secondhand businesses to submit to search of business premises during business hours was reasonable even assuming that defendant did not unqualifiedly give consent to search); funeral home operators, *Cooley v. State Board of Funeral Directors & Embalmers*, 141 Cal. App. 2d 293, 296 P.2d 588 (1956) (state and federal governments have right of reasonable inspection of premises operated under license from state or local government).

For a list of other cases finding implied consent to a search and seizure under a regulatory statute, *see Bartelstone, supra* note 42; *see also Rothstein & Rothstein, supra* note 44, at 358-66 (Supreme Court and lower court decisions have expanded licensing exception in manner which seriously threatens to nullify basic holding in *See* that administrative inspections of business premises must generally comply with warrant requirement of fourth amendment).

77. "The exception appeared poised to swallow the rule. *Barlow's* decided that it would not." *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 213 (1978). For a discussion of *Barlow's*, *see infra* notes 137-86 and accompanying text.

78. 413 U.S. 266 (1973). A further strong reaffirmation came in *Air Pollution Variance Board of Colo. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974). For a discussion of *Air Pollution*, *see infra* notes 90-102 and accompanying text.

duct warrantless searches without probable cause within a hundred mile zone along international borders.<sup>79</sup> This “unfettered discretion” of the Border Patrol—which had neither warrant, probable cause nor consent—was the same evil the Court perceived in *Camara*.<sup>80</sup> The *Almeida* Court distinguished *Colonnade* and *Biswell* as being based upon implied consent by one engaged in a pervasively regulated business.<sup>81</sup> Relying on *Camara*, the Court then suggested that an area search warrant might be advisable in conducting roving patrol searches along the border.<sup>82</sup> The majority’s implied position was spelled out more fully in the concurrence of Justice Powell.<sup>83</sup> Mr. Justice Powell preliminarily discussed the probable cause requirement of the fourth amendment:

Before deciding whether a warrant is required, I will first address the threshold question of whether some

---

79. The Immigration and Nationality Act provided for warrantless searches of automobiles and other conveyances “within a reasonable distance from any external boundary of the United States,” as authorized by regulations that were to be promulgated by the Attorney General of the United States. 8 U.S.C. § 1357(a)(3) (1982). The Attorney General defined “reasonable distance” as “within 100 air miles from any external boundary of the United States.” 8 C.F.R. § 287.1 (1983).

80. The Court stated “ ‘This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.’ ” 413 U.S. at 284 (quoting *Camara*, 387 U.S. at 532-33).

81. *Id.* at 271.

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

*Id.*

82. *Id.* at 273. It is also worth noting that *Almeida-Sanchez* was a 5-4 decision, with four members of the Court feeling no warrant at all was required for the Border Patrol searches there in issue. Justice White’s dissent in that case concluded:

Guided by the principles of *Camara*, *Colonnade*, and *Biswell*, I cannot but uphold the judgment of Congress that for purposes of enforcing the immigration laws it is reasonable to treat the exterior boundaries of the country as a zone, not a line, and that there are recurring circumstances in which the search of vehicular traffic without warrant and without probable cause may be reasonable under the Fourth Amendment although not carried out at the border itself.

*Id.* at 294 (White, J., dissenting).

83. *Id.* at 275-85 (Powell, J., concurring). Justice Powell’s views in this respect have generally received enhanced importance given his authorship of the majority opinion in the next major border search case decided by the Court. *See* *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).



functional equivalent of probable-cause may exist for the type of search conducted in this case. The problem of ascertaining the meaning of the probable-cause requirement in the context of roving searches of the sort conducted here is measurably assisted by the Court's opinion in *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727, 18 L.Ed.2d 930 (1967), on which the government relies heavily.<sup>84</sup>

Justice Powell reviewed *Camara* and its principles, concluding that the administrative probable cause standard enunciated there had been met by the government in *Almeida-Sanchez*:

The conjunction of these factors—consistent judicial approval, absence of a reasonable alternative for the solution of a serious problem, and only a modest intrusion on those whose automobiles are searched—persuades me that under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas.<sup>85</sup>

Having reached this conclusion, Justice Powell was next compelled to decide whether the search supported by probable cause required antecedent judicial justification in the form of a warrant as well. For, as *Camara* had made clear, “except in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.”<sup>86</sup> The government relied on the implied consent doctrine, but Justice Powell found that line of reasoning specious, stating that: “*Colonnade* and *Biswell* cannot fairly be read to cover cases of the present type. One who merely travels in regions near the borders of the country can hardly be thought to have submitted to inspections in exchange for a special perquisite.”<sup>87</sup>

Justice Powell reviewed the balancing test formulated in *Camara* and found it applicable here. In weighing the legitimate interests and needs of law enforcement against the protected fourth amendment rights of individuals, Justice Powell concluded

---

84. 413 U.S. at 277 (Powell, J., concurring).

85. *Id.* at 279 (Powell, J., concurring).

86. 413 U.S. at 279-80 (Powell, J., concurring) (quoting *Camara*, 387 U.S. at 528-29).

87. *Id.* at 281 (Powell, J., concurring).

that an area search warrant founded on administrative probable cause was both desirable and practicable in the circumstances:

Nothing in the papers before us demonstrates that it would not be feasible for the Border Patrol to obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time.<sup>88</sup> According to the Government, the incidence of illegal transportation of aliens on certain roads is predictable, and the roving searches are apparently planned in advance or carried out according to a predetermined schedule. The use of an area warrant procedure would surely not "frustrate the governmental purpose behind the search." *Camara v. Municipal Court*, *supra*, 387 U.S., at 533, 87 S. Ct., at 1733. It would of course entail some inconvenience, but inconvenience alone has never been thought to be an adequate reason for abrogating the warrant requirement.<sup>89</sup>

#### B. Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.

In 1974, with respect to a substantively different matter, in the case of *Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.*,<sup>90</sup> the Court once again restated the general rule requiring search warrants for administrative inspections, implying that *Colonnade* and *Biswell* were limited exceptions to that rule.<sup>91</sup> In *Western*

---

88. In a footnote, Justice Powell argued against the government position that a warrant system would be unfeasible and meaningless: "There is no reason why a judicial officer could not approve where appropriate a series of roving searches over the course of several days or weeks. Experience with an initial search or series of searches would be highly relevant in considering applications for renewal of a warrant." *Id.* at 283, n.3 (Powell, J., concurring).

89. *Id.* at 283 (Powell, J., concurring). In applying the balancing test of the legitimate interests of law enforcement with fourth amendment protections the Court outlined the relevant factors to be considered:

[T]hey include (i) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use, and (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road.

*Id.* at 283-84 (Powell, J., concurring) (footnote omitted).

90. 416 U.S. 861 (1974).

91. *Id.* at 864. The Court stated: "We adhere to *Camara* and *See* but we

*Alfalfa*, the Court upheld the warrantless search because the inspection of the air was accomplished without entering the private premises and a *Camara* invasion of privacy did not therefore exist. Because *Western Alfalfa* has been perceived as having great importance with regard to this subject,<sup>92</sup> it is worth looking at closely.

In an attempt to make a Ringelmann test<sup>93</sup> of plumes of smoke being emitted from Western Alfalfa's chimneys, a state health inspector entered the yard of the owner without his knowledge or consent. At the time of the inspection, the applicable state law required no warrant,<sup>94</sup> nor was any sought. The inspector remained only on the outside premises of the corporation and was acting pursuant to a federal mandate that the states have primary responsibility to assure the maintenance of air quality standards promulgated by the Environmental Protection Agency.<sup>95</sup>

Fourth amendment questions were raised in a petition for *certiorari*.<sup>96</sup> Western Alfalfa Corp. first contended that the holdings of *Camara* and *See* were applicable, and second, that since the corporation was not made aware of the inspection until it received notice of a violation hearing, it had been denied fundamental due process.<sup>97</sup>

The Supreme Court reaffirmed its decisions in *Camara* and *See*, but found that they were not applicable to the inspection of Western Alfalfa.<sup>98</sup> Rather, the Court concluded that, since the inspector had never sought entry and had never in fact entered the plant or offices or attempted to inspect books or records, the in-

---

think they are not applicable here" because of the "open fields exception." *Id.* at 864-65.

92. See, e.g., Note, *Marshall v. Barlow's Inc.: Are Employers' Fourth Amendment Rights Protected?*, 16 CAL. W.L. REV. 161, 168 (1980) ("*Western Alfalfa* illustrated that the publications afforded to individuals and businesses were not to be diminished and that the *Colonnade-Biswell* reasoning was essentially restricted to 'pervasively regulated' industries").

93. This test, prescribed by COLO. REV. STAT. ANN. § 66-29-5 (Supp. 1967), requires a trained inspector to stand in a position where the inspector has an unobstructed view of the smoke plume, observe the smoke, and rate it according to the opacity scale of the Ringelmann chart. The person using the chart matches the color and density of the smoke plume with the numbered example on the chart. The Ringelmann test is generally sanctioned for use in measuring air pollution.

94. Since the date of the test, Colorado has adopted a statute requiring a search warrant to ascertain violations of air quality standards. COLO. REV. STAT. ANN. § 66-29-8(2)(d) (Supp. 1969).

95. 42 U.S.C. § 1857c-2(a) (1970) (current version at 42 U.S.C. § 7407 (1982)).

96. 416 U.S. at 864.

97. *Id.* at 865.

98. *Id.* at 864.

spector was therefore in no better position than any member of the general public to see the sky and the apparent plumes of smoke.<sup>99</sup> Relying on Justice Holmes' opinion in *Hester v. United States*,<sup>100</sup> the unanimous *Western Alfalfa* Court held that the "open fields" doctrine was applicable and that the invasion of privacy was at best theoretical, if it existed at all.<sup>101</sup> The Court did not rule on the due process issue since it was unsure of the grounds upon which the court of appeals relied and left that issue open on remand.<sup>102</sup>

### C. Civil Aeronautics Board v. United Airlines<sup>103</sup>

In 1975, the Civil Aeronautics Board requested plenary access to the files of United Airlines.<sup>104</sup> Under the Federal Aviation Act of 1958,<sup>105</sup> the Board was entrusted with the economic regulation of air carriers and, in reliance upon section 407(e)<sup>106</sup> authorized its agents to present themselves at United Airlines, Inc.'s executive offices and seek immediate access to all records and documents located therein.<sup>107</sup> This initial request was subsequently limited to the following: 1) reading files, which contain copies of all correspondence arranged in chronological order; 2) subject matter files, which contain correspondence, memo-

---

99. *Id.* at 864-65.

100. 265 U.S. 57 (1924). In *Hester*, police officers who concealed themselves near defendant's house saw the defendant taking a jug out of a car. *Id.* at 58. When the officers were discovered, the defendant ran and dropped the jug. *Id.* Upon examining the jug, the officers found it to contain moonshine whiskey, i.e., whiskey illicitly distilled. *Id.* Based on the evidence of the seized whiskey, the defendant was convicted of concealing distilled spirits. *Id.* The defendant appealed his conviction. There was an illegal search and seizure. *Id.* The Supreme Court rejected the defendant's argument and upheld the conviction. *Id.* The Court stated "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. This distinction between the latter and the house is as old as the common law." *Id.* at 59.

101. 416 U.S. at 865.

102. *Id.* at 866. The Court stated:

Whether the Court [of Appeals] referred to Colorado "due process" or Fourteenth Amendment "due process" is not clear. If it is the former, the question is a matter of state law beyond our purview. Since we are unsure of the grounds of that ruling we intimate no opinion on that issue. But on our remand we leave open that and any other questions that may be lurking in the case.

*Id.* (footnotes omitted).

103. 542 F.2d 394 (7th Cir. 1976).

104. *Id.*

105. 49 U.S.C. §§ 1301-1552 (1982).

106. Section 407(e) was amended by 49 U.S.C. § 1377(c) (1976).

107. 542 F.2d at 395.

randa, studies, reports, etc. dealing with specific matters; 3) expense reports; and 4) memoranda. Nevertheless, agents refused to disclose the subject of the investigation.<sup>108</sup>

United offered to make specific disclosures but refused the plenary access sought by the Board.<sup>109</sup> The Board's claim to the right to search broad categories of carriers' records without stating or even having a purpose arose from the following section of the Federal Aviation Act:

The Board shall at all times have access to all lands, buildings, and equipment of any air carrier or foreign air carrier and to all accounts, records, and memorandums, including all documents, papers, and correspondence, now or hereafter existing, and kept or required to be kept by air carriers, foreign air carriers, or ticket agents and it may employ special agents or auditors, who shall have authority under the orders of the Board to inspect and examine any and all such lands, buildings, equipment, accounts, records, and memorandums. The provisions of this section shall apply, to the extent found by the Board to be reasonably necessary for the administration of this Chapter, to persons having control over any air carrier, or affiliated with any air carrier within the meaning of section 5(8) of this title.<sup>110</sup>

In 1976, two years prior to the Supreme Court decision in *Barlow's*, the Seventh Circuit summarized existing case law and unequivocally required that "an investigative demand be reasonably definite and reasonably relevant to some proper investigative purpose."<sup>111</sup> The court rejected the Board's contention that the regulated carrier was analogous to the regulated liquor dealer of *Colonnade Catering Corp.*<sup>112</sup> Conceding that the expectation of pri-

108. *Id.*

109. *Id.* United offered to make available its records pertaining to political contributions and any other records specifically identified and pertinent to the Board's investigation, but it refused to give the Board plenary access to its files. *Id.*

110. 49 U.S.C. § 1377(e) (1976).

111. 542 F.2d at 399.

112. *Id.* The Court stated:

We think that "the evils at hand", *Colonnade Catering Corp. v. United States* (citation omitted), in the liquor and gun trades are not sufficiently analogous to the problems which are likely to arise in a public transportation industry to justify reliance here on cases dealing with those trades. And, while the expectation of privacy of a regulated carrier is limited . . . there are internal corporate papers 'that stand at the heart

vacy of the regulated carrier is limited, the court asserted that it nevertheless existed and that no case exists which holds that any statute has conferred a general warrant power on any agency—a power the Board pragmatically claims when it seeks plenary access without purpose.<sup>113</sup>

As is appropriate when a court interprets a statute, the court must not view it in a vacuum: “[T]he court will not look merely to a particular clause . . . but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.”<sup>114</sup> In applying this construction, the Seventh Circuit noted that section 407(e) appears to allow the Board to obtain information on which to base its broad, though not plenary, economic regulatory powers.<sup>115</sup> The court declared that the purpose of the amendments to section 407(e) was to provide the Board with a means to detect illegal rebates and charges by ticket agents at other than the posted tariff rate.<sup>116</sup> Corresponding changes in other sections of the Act were seen as consistent with the “view that the purpose of

---

of management effort, and so long as our carrier operations are rooted in private enterprise there is a strong element of privacy in such items [which is] a reason for limiting the occasion of [their] production . . . .  
*Id.* (quoting *Burlington Northern, Inc. v. Interstate Commerce Comm’n*, 462 F.2d 280, 288 (1972)).

113. 542 F.2d at 399.

114. *Id.* (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)).

115. *Id.*

116. *Id.* at 401. See H.R. REP. NO. 93-1475, 93d Cong., 2d Sess. 4, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7461, 7466-67. The House report states:

Subsection (a) of section 7 prohibits ticket agents from charging or receiving compensation for air transportation (or related services) other than the amounts specified under current effective tariffs. In addition, ticket agents are prohibited from giving rebates, refunds, etc., except as provided in the tariffs.

Subsection (b) of this section provides the CAB with access to the records, accounts and papers of travel agents.

Presently under section 403(b) of the Federal Aviation Act, the prohibition on such actions lies only against air carriers or foreign carriers, and in the case of rebates and refunds, also against agents and brokers of such carriers.

Additionally, unders [sic] section 407(e), the CAB has authority to enter and to inspect both the facilities and the records of air carriers. The Committee amendment extends to ticket agents the prohibition on charging other than tariff rates and refunding or rebating. Ticket agents are defined in existing law (Sec. 101(35) of the Federal Aviation Act, 49 U.S.C. 1301(35)) as persons other than air carriers who sell or arrange air transportation. The Committee amendment makes such agents subject to CAB authority to have access to and inspect records.

*Id.*

§ 407(e) was to give the agency access to all documents and materials which further a valid regulatory function. They do not suggest that a general-warrant power was intended."<sup>117</sup>

The Seventh Circuit found that Congress intended the Board to have investigatory power over any subject properly within its jurisdiction and to inspect any records "reasonably relevant" to an investigation.<sup>118</sup> The court determined that a twofold obligation flows from the inspection power:

- (1) Determination of relevancy: The Board must have the requisite investigative purpose to make the necessary determination of relevancy; and
- (2) The purpose must be disclosed: More than a mere assertion that the purpose is to determine compliance with the law is required—the purpose must be specific and reasonably definite.<sup>119</sup>

Having found that the Board did not meet the above obligation, the court refused relief, which it declared would have amounted to a general warrant, had it been granted.<sup>120</sup>

Although the warrantless inspection issue present in *Barlow's* was not the focus in *Civil Aeronautics Board v. United Airlines*, the common thread between these cases is clearly the elimination of

117. 542 F.2d at 401. See, e.g., *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216-17 (1946). The *Oklahoma Press* Court held that the constitutional requirement of probable cause for issuance of a subpoena *duces tecum* in an investigation by the Wage-Hour Administrator under the Fair Labor Standards Act is satisfied by the Administrator's allegations that the Act covers the investigation, that he is proceeding with the investigation in accordance with the mandate of Congress, and that the records sought are relevant to that purpose. *Id.* at 216-17; see also *Equal Employment Opportunity Comm'n v. University of New Mexico, Albuquerque, New Mexico*, 504 F.2d 1296 (10th Cir. 1974). In *EEOC*, the court held that the fourth amendment prohibition against unreasonable searches and seizures did not preclude enforcement of an EEOC subpoena directing the university to produce confidential records in an investigation of a charge of discrimination against an associate professor. *Id.* at 1299-1300. The investigation in *EEOC* was authorized pursuant to a statute proscribing any officer or employee of the Commission from making public any information obtained. *Id.* The court noted that administrative purposes may be enforced unless they are plainly incompetent or irrelevant to any purpose. *Id.*

118. 542 F.2d at 401-02.

119. *Id.*

120. *Id.* at 402. The court stated: "This obligation is, of course not satisfied by the recital that the purpose of the investigation is to determine the compliance with the law." *Id.*; see, e.g., *Federal Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298, 306 (1924) ("It is contrary to the first principles of justice to allow a search through all the [records of a private corporation,] relevant or irrelevant, in the hope that something [tending to incriminate the corporation] will turn up").

unbridled discretion in administrative searches. The *United Airlines* court refused to enjoin United's refusal to allow the Board's agents immediate and unconditional access to the airline's land, buildings, accounts, and records in light of the Board's failure to specify its investigative purpose or to make its demand reasonably definite. The privacy expectation of the regulated carrier may be limited, but it does still exist and, absent legislative history, or a showing that general warrant authority is essential to the exercise of some regulatory function, the courts will not allow agencies to exercise such unfettered authority. The *United Airlines* court required a valid investigative purpose and an inspection that was reasonably relevant to such an investigation—not unlike the Court's landmark decision in *Barlow's* three years later that an inspection must be pursuant to an administrative standard for conducting an inspection and must be demonstrated to a magistrate prior to the issuance of a warrant.<sup>121</sup>

#### V. *MARSHALL V. BARLOW'S, INC.*

##### A. *Summary of the Major Pre-Barlow's Case Law*

The exceptions to *Camara's* general rule, as derived from the *Colonnade* and *Biswell* line of cases, had been modified as follows and could be viewed as refined versions of the balancing test factors used to determine reasonableness in *Camara*:

1. The enterprise sought to be inspected must be involved in a "pervasively regulated" business or industry.
2. The warrantless inspection must be a *crucial part* of a regulatory scheme in furtherance of an "urgent federal interest"; *i.e.*, the element of surprise must be necessary to achieving the governmental purpose.
3. The inspection must come within restrictive "statutory restraints," limiting the time, place, and scope of the search.

As these reasonableness standards were applicable and had been restated and employed by the courts prior to *Barlow's*, the result in that case should perhaps have come as no surprise. Even a cursory examination of the Occupational Safety and Health Act of 1970<sup>122</sup> would dictate a finding that it in no way met the estab-

121. See *Barlow's*, 436 U.S. at 320.

122. 84 Stat. 1590-1620 (codified at 29 U.S.C. §§ 651-678 (1982)). The Occupational Safety and Health Act was approved on December 29, 1970 and



lished criteria. The only pervasiveness in the Act was the fact that the reach of the Act extended to virtually every business in America, not that every business had previously been pervasively regulated. In *Barlow's*, the required "crucial" need for the warrantless inspection was unsupported in fact or theory—the inspection of that particular plumbing supplier was the result of a random selection procedure only; no "urgent federal interest" was demonstrated and, therefore, the element of surprise was completely unnecessary. Finally, in order to encompass the spectrum it sought to regulate, the Act's language was so broad that the Act was not narrowly tailored to allow inspections within restrictive "statutory restraints" as to time, place and scope of any one particular industry. It is not, as the government had contended, that the relationship between the statute and the procedural reasons for implementing the statute is important; rather, it is the relationship between the industry being regulated and the procedure in issue which must provide the justification for dis-

---

became effective on April 28, 1971. Its purpose was "to assure as far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources . . ." 29 U.S.C. § 651 (1982).

The Act was an attempt to prevent occupational injuries from occurring rather than merely provide compensation to victims of occupational accidents. The Occupational Safety and Health Administration was established in the Department of Labor and given the responsibility to divulge and enforce safety and health standards which were consistent with substantive criteria which existed in the Act itself. Congress made no attempt to establish standards in the Act, thus permitting OSHA a flexible reign in creating and subsequently modifying standards for the industry.

In general, OSHA's standards can be classified as either safety standards or health standards. Though this distinction or characterization is not uniformly accepted it is integrated into virtually all the OSHA guides and, therefore, must be reckoned with. *See, e.g.*, OSHA Instruction CPL 2.45 A ch. 7. Further, OSHA standards are categorized as wither (1) start-up standards, (2) standards issued after rulemaking by OSHA, or (3) emergency temporary standards. *See* 29 U.S.C. § 655 (1982). Start-up standards were the standards issued during the first two years of the Act which were previously considered nationally recognized standards and further satisfied section 3 of the Act. Standards issued or modified outside of the start-up period, required public review and other rulemaking proceedings. This second type of OSHA standard is governed by section 6 of the Act. Emergency temporary standards are standards issued without fulfilling the section 6 rulemaking requirements but which are necessary to prevent an extremely harmful working condition from continuing. These emergency standards are only in effect for six months and become void unless a permanent standard is issued.

In general, OSHA conducts surprise inspections of workplaces and checks for violations of OSHA standards. *See id.* §§ 657, 666(f). If violations are found, both citations and monetary penalties may be assessed. *Id.* § 658. These citations and penalties may be contested to OSHA and subsequently to circuit courts of appeals. *Id.* §§ 659-660. The goal of this inspection and penalty process is to provide incentive to all employers to keep their workplace conditions safe, without OSHA having to inspect every business premise.

pending with traditional constitutional safeguards. The Occupational Safety and Health Act and any similar legislation would have failed under these reasonableness standards. Nonetheless, this is stated only with the sharp clarity of hindsight; the proper scope of administrative probable cause determinations still required appellate guidance.

B. *The OSHA Setting: Lower Court Cases*

The provision of the Act establishing the Occupational Safety and Health Administration (OSHA) which the Supreme Court found unconstitutional in *Marshall v. Barlow's*<sup>123</sup> stated in relevant part:

In order to carry out the purpose 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 workplace or environment where work is performed by an employee of an employer; and
- (2) to inspect and investigate during regular working hours and in other reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.<sup>124</sup>

The OSHA compliance officer would thus approach the business to be inspected, state that he or she wished to inspect the premises, and then conduct the inspection. In the event that the compliance officer was denied permission to inspect, regulations provided that the officer was to leave immediately and report to the local OSHA office, which might then seek a court order compelling the business to allow the inspection.<sup>125</sup>

---

123. 436 U.S. at 307.

124. 29 U.S.C. § 6557(a) (1982).

125. 29 C.F.R. § 1903.4 (1985). The regulations provide:

Upon a refusal to permit the Compliance Safety and Health Officer, in exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employer, owner, operator, agent, or employee, in accordance with § 1903.3 or to permit a representative of employees to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace in accordance with § 1903.8 the Safety and Health Officer shall terminate the inspection or

Ferrol G. Barlow was not the first person to question these warrantless procedures. A significant number of cases concerning warrantless inspections under the OSH Act had been decided by lower courts between the time of the Act's passage and the Supreme Court's *Barlow's* decision.<sup>126</sup> Of these, only three upheld warrantless searches under section 8(a) of the Act.<sup>127</sup> In *Brennan v. Buckeye Indus.*,<sup>128</sup> the district court, on facts not dissimi-

---

confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The Compliance Safety and Health Officer shall endeavor to ascertain the reason for such refusal, and shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall consult with the Regional Solicitor, who shall take appropriate action, including compulsory process, if necessary.

*Id.*

The regulations further provide that such compulsory process shall be sought in advance of an inspection if certain criteria are met. *Id.* § 1903.4(b).

126. Most of these were, however, decided in the year just preceding *Barlow's*, and as there was some conflict of authority, this issue was ripe for Supreme Court resolution. Among the decisions finding warrantless inspections purportedly conducted under section 8(a) of the Act to be unconstitutional were: *Morris v. United States Dept. of Labor*, 439 F. Supp. 1014 (S.D. Ill. 1977); *Empire Steel Mfg. Co. v. Marshall*, 437 F. Supp. 873 (D. Mont. 1977); *Marshall v. Shellcast Corp.*, 5 O.S.H. Cas. (BNA) 1689 (N.D. Ala. July 26, 1977); *Marshall v. Great Lakes-Dredge & Dock Co.*, No. Misc. (S.D. Cal., July 20, 1977) (order compelling warrantless inspection denied; motion to dismiss granted); *Marshall v. Chromalloy American Corp.*, Federal Malleable Div., 433 F. Supp. 330 (E.D. Wis. 1977), *aff'd sub nom. In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335 (7th Cir.), *cert. denied sub nom. Chromalloy American Corp. v. Marshall*, 444 U.S. 884 (1979); *In re Worksite Inspection of Alfred Calcagni & Sons*, No. 77-0046M (D.R.I. June 28, 1977); *Weyerhaeuser Co. v. Reigen*, filed, No. 77 1652 (E.D. Mich., May 2, 1977) (dictum: Michigan state statute might constitutionally provide for issuance of search warrant upon showing of probable cause; but federal statute, unconstitutionally, did not); *Usery v. Centrif-Air Mach. Co.*, 424 F. Supp. 959 (N.D. Ga. 1977); *Epstein v. Fitzwater*, 6 O.S.H. REP. 94 (Cir. Ct. Garrett Cnty., Md. September 2, 1976); *Dunlop v. Hertzler Enter.*, 418 F. Supp. 627 (D.N.M. 1976) (three-judge court); *Usery v. Rupp-Forge Co.*, O.S.H. Dec. (CCH) ¶ 21,797 (N.D. Ohio April 22, 1976); *Brennan v. Gibson's Prod. of Plano*, 407 F. Supp. 154 (E.D. Tex. 1976) (three-judge court), *vacated*, 584 F.2d 668 (5th Cir. 1978); *Yocum v. Burnette Trester Co.*, O.S.H. Dec. (CCH) ¶ 21,851 (Ct. App. Ky. May 27, 1977); *Calif. v. Melvin Salwasser*, O.S.H. Dec. (CCH) ¶ 21,797 (Fresno Mun. Ct. March 24, 1977); *Alaska v. General Home Repair & Roofing*, 6 O.S.H. Rep. 943 (3d Dist. Ct. Alaska February, 1977).

127. *Brennan v. Buckeye Indus.*, 374 F. Supp. 1350 (S.D. Ga. 1974) [decided one month before *Camara* was reaffirmed by the Supreme Court in *Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.*, 416 U.S. 861 (1974)]; *Dunlop v. Able Contractors*, 4 O.S.H. Cas. (BNA) 110 (D. Mont. 1975); *Usery v. Northwest Orient Airlines*, 5 O.S.H. Cas. (BNA) 1617 (E.D.N.Y. 1977) (dictum).

128. 374 F. Supp. 1350 (S.D. Ga. 1974). In *Buckeye*, an OSHA inspector arrived at Buckeye Industries, which manufactured men's clothes, to conduct an OSHA inspection. *Id.* at 1351. The OSHA inspector identified herself to the

lar to those in *Barlow's*, supported the government's position that a warrantless search was permissible, primarily on a "pervasively regulated industries" rationale, and found that the warrantless inspection was reasonable in light of a compelling government need for unannounced "surprise" investigations.<sup>129</sup> *Buckeye* was a 1974 decision, and it has been suggested that had *Buckeye* been decided after the Supreme Court's *Western Alfalfa* decision, the district court would probably have found the search to have been unconstitutional.<sup>130</sup>

In 1976, the District Court for the Eastern District of Texas rendered a sharply different decision in *Brennan v. Gibson's Products*.<sup>131</sup> In what would prove to be the first of the many cases invalidating OSHA warrantless searches, the district court deduced that broad and indiscriminate inroads on fourth amendment safeguards, wrought in the name of administrative expedience and weighty governmental interest, were to be viewed with no greater favor than at the time of *See* and *Camara*. However, where the inroad is narrow, supported by specific and clear congressional findings, and the object or practice to be regulated is inherently dangerous and (perhaps or) traditionally regulated as in *Colonnade* and *Biswell*, it is more likely to be tolerated. And, since *Western Alfalfa*, it seems plain that the fourth amendment is not to be viewed as in a condition of general retreat before an administra-

---

plant manager, but had no search warrant. *Id.* The inspector was told that she must wait for the company's attorney to arrive before she could inspect. *Id.* Finding that the attorney was located two hundred miles from the plant, the inspector notified the plant manager that she could not wait, and was thereby refused entry. *Id.* No citations for alleged OSHA violations nor any employee complaints of unsafe conditions at Buckeye had been made. *Id.* The Secretary of Labor filed an application under the Act to compel Buckeye to submit to an inspection. *Id.* Buckeye contested any such search in a Show Cause Order hearing. *Id.*

129. *Id.* at 1354. The *Buckeye* court seemed to rely principally on the rationale of *Camara*, *See*, and *Biswell* in reaching its conclusion. *Id.* at 1354-56.

130. *See, e.g.,* Note, *supra* note 92, at 170 n.70 (indicating large number of cases finding such searches unconstitutional when compared to only these cases finding warrantless searches pursuant to section 8(a) of the Act constitutional). It is suggested that this is because *Western Alfalfa* reaffirmed *Camara* and *See* in what was viewed then as a particularly strong fashion, declaring that there were sharp limits to the exercise of administrative agency authority.

131. 407 F. Supp. 154 (E.D. Tex. 1976). In *Gibson's*, OSHA compliance officers attempted to inspect the nonpublic portion of Gibson's Products, Inc. of Plano, a business engaged in interstate commerce. *Id.* at 155. The OSHA officers presented identification to Gibson's officials who refused to allow the search. *Id.* The inspection was a generally scheduled one, neither prompted by emergency, complaint, nor prior OSHA violation. *Id.* at 155-56. The government, instead of seeking a search warrant, sought a court order to compel Gibson's to permit the inspection. *Id.* at 156.

tive advance.<sup>132</sup> The *Gibson's* court found the sweep of the Act too broad and the Congressional findings supporting a relaxed investigative standard too marginal.<sup>133</sup> The district court held that section 8(a) of the OSH Act required a warrant, but the court did not declare the Act itself unconstitutional.<sup>134</sup>

By the time of *Barlow's*, the lower courts were overwhelmingly committed to the warrant requirement, but they could not reach the same consensus on the meaning of probable cause in the administrative context. Except where a specific violation existed, there was no case law determination as to what did in fact constitute probable cause.<sup>135</sup> Materials submitted to the courts in support of a warrant were varied and extreme and the numerous court responses offered no clear or consistent guidelines.<sup>136</sup> In each case, *Camara's* delineation of a magistrate's proper functions were ignored. The Supreme Court decided *Barlow's* at a time in which the lower courts were groping for guidance. It addressed the warrant clause in general, section 8(a) in particular, and finally redeclared and redefined the standards for determining administrative probable cause.

### C. Marshall v. Barlow's, Inc.: Summary of the Case

On September 11, 1975, an OSHA compliance officer attempted to conduct an unannounced routine inspection of Barlow's, Inc., an electrical and plumbing installation business located in Pocatello, Idaho.<sup>137</sup> The inspector presented his credentials, complying with the statutory requirements,<sup>138</sup> and in-

132. *Id.* at 161. The *Gibson's* court reached this conclusion after analyzing the history of OSHA warrantless search decisions. *Id.* at 157-61. The court tracked the decisions from *Camara* and *See*, through to *Buckeye* and *Western Alfalfa*. *Id.*

133. *Id.* at 161. The district court ruled that based on *Camara* and *See*, there being no emergency or probable cause for a search, the OSHA warrantless search requested did not comply with the fourth amendment and, therefore, denied the search. *Id.* at 162.

134. *Id.* at 162-63. The district court construed the statute "to authorize objected to OSHA inspections only when made by a search warrant" properly issued. *Id.* at 162. By construing the statute as such, the court was free to rule it constitutional.

135. *See, e.g.,* Marshall v. Reinhold Constr., 441 F. Supp. 685, 695 (M.D. Fla. 1977).

136. For examples of these difficulties, compare Marshall v. Shellcast Corp., 5 O.S.H. Cas. (BNA) (N.D. Ala. 1977), with Reynolds Metals Co. v. Secretary of Labor, 442 F. Supp. 195 (W.D. Va. 1977).

137. 436 U.S. at 309. Advance notice of OSHA inspections is not permitted except in certain circumstances. 29 C.F.R. § 1903.6(a) (1985).

138. 436 U.S. at 309-10. The Act requires that inspectors present "appro-

formed the president and general manager of Barlow's, Inc., Ferrol G. "Bill" Barlow, that he wished to conduct a search of the working areas of the business. Mr. Barlow ascertained from the inspector that no complaints had been received about the company, but rather that Barlow's, Inc. had simply turned up in the agency's selection process.<sup>139</sup> Once again the inspector asked to enter the nonpublic area of the business premises.<sup>140</sup> Barlow asked if the inspector had a search warrant.<sup>141</sup> Receiving a negative reply, Barlow refused the inspector entry, relying on the guarantees of the fourth amendment.<sup>142</sup>

As a result of Barlow's refusal to allow entry, the Secretary of Labor, on December 13, 1975, petitioned the United States District Court for the District of Idaho to issue an order compelling entry, inspection and investigation of Barlow's, Inc.<sup>143</sup> The district court issued the order in December of 1975.<sup>144</sup> When Mr. Barlow was presented with the order on January 5, 1976, he again declined to permit the inspection.<sup>145</sup> Instead, he sought his own injunctive relief against the warrantless searches assertedly permitted by OSHA.<sup>146</sup> On December 30, 1976, a three judge panel ruled in Barlow's favor and held that the fourth amendment required a warrant for searches and inspections authorized under section 8(a) of OSHA and that the statutory authorization for warrantless inspection was unconstitutional.<sup>147</sup>

---

appropriate credentials to the owner, operator, or agent in charge" before he is authorized to enter the workplace. 29 U.S.C. § 657(a) (1982).

139. 436 U.S. at 310. The Court in *Barlow's* did not address the "process" by which Barlow's, Inc. had been selected by OSHA; however, in its analysis the Court indicated that the process may have allowed "unbridled discretion" on the part of inspectors as to whom to search. *Id.* at 323.

140. *Id.* at 310.

141. *Id.*

142. *Id.*

143. *Id.* An inspector is required to seek compulsory process to gain admission to search after having been refused entry. 29 C.F.R. § 1903.4(a) (1985). However, the inspector is to attempt to ascertain a reason for the refusal and is to report the refusal to the Area Director. *Id.*

144. 436 U.S. at 319.

145. *Id.*

146. *Id.*

147. *Barlow's, Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho 1976), *aff'd sub nom. Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). The district court ruled that the fourth amendment applied to OSHA inspections, that section 8(a) of the Act was unconstitutional, enjoined OSHA from conducting future searches under authority of section 8(a) of the Act and noted that their analysis was consistent with another three-judge . . . panel in *Brennan v. Gibson's Products, Inc. of Plano*. While we adopt, in general, the similar reason employed there, we decline the invitation to judicially redraft an enact-

The United States Solicitor General, acting on behalf of the Secretary of Labor, sought a United States Supreme Court order limiting the effect of this decision to Barlow's premises.<sup>148</sup> Justice Rehnquist stayed the district court order except as it applied to Barlow's on February 3, 1977. Since the district court decision had invalidated part of an Act of Congress, Justice Rehnquist declared that the stay and the Act should remain in effect pending a timely appeal and final decision on the merits of the case by the full Supreme Court.<sup>149</sup> The Secretary appealed and the Supreme Court noted probable jurisdiction.<sup>150</sup> The Supreme Court affirmed the district court ruling on May 23, 1978, holding the Act to be unconstitutional insofar as it purported to authorize inspections without a warrant or its equivalent.<sup>151</sup>

#### D. *Analysis of the Decision*

The *Barlow's* Court reviewed both the historical background leading to the adoption of the fourth amendment and the private property interests which had been subject to governmental intrusion as a result of broad grants of power to English officials and found that "[T]he Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance . . . [that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods."<sup>152</sup> The Court noted that the intrusiveness of the general warrant was most offensive to "the merchants and businessmen

---

ment of Congress. . . . Certainly, Congress was able, had it wished to do so, to employ language declaring that a warrant must first be obtained, the procedures under which it is to be obtained, and other necessary regulations. Congress did not do so and we refuse to accept that duty.

*Id.* at 441.

148. *Marshall v. Barlow's, Inc.*, 429 U.S. 1347 (1977).

149. *Id.* at 1348. Justice Rehnquist noted:

The proposed stay will not affect the respondent in any way, and there are no equities weighing against it which may be asserted by persons actually before the Court. In such a situation, where the decision of the District Court has invalidated a part of an Act of Congress, I think that the Act of Congress, presumptively constitutional as are all such Acts, should remain in effect pending a final decision on the merits by this Court.

*Id.*

150. *Marshall v. Barlow's, Inc.*, 430 U.S. 964 (1977).

151. *Marshall v. Barlow's, Inc.*, 436 U.S. at 307. The decision, authored by Justice White, was by a bare majority. Justice Brennan took no part in the consideration on the decision of the case. Justice Stevens, joined by Justices Blackman and Rehnquist, dissented.

152. *Id.* at 311 (quoting *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977)).

whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists."<sup>153</sup> Thus, the Court concluded that there can be no doubt that the ban on warrantless searches in general, and the fourth amendment in particular, was intended to shield businesses as well as residences.<sup>154</sup>

In its review of its own prior decisions in *Camara* and *See*, the Court in *Barlow's* reiterated that warrantless searches of commercial premises are as generally unreasonable as those of homes and that the fourth amendment's prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations.<sup>155</sup>

Against this background, the Court asserted that, when the government intrudes on a person's property

the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards. It therefore appears that unless some recognized exception to the warrant requirement applies, *See v. Seattle* would require a warrant to conduct the inspection sought in this case.<sup>156</sup>

Justice White, writing for the majority in *Barlow's*, as he did in both the *Camara* and *See* decisions, next addressed the major contentions raised by the Secretary of Labor, which can be summarized as follows:

- 1) OSHA searches qualify as an exception to the *Camara* rule under the *Colonnade* and *Biswell* heavily regulated business rationale;
- 2) Warrant requirements would make routine periodic

---

153. *Id.* (footnote omitted). The Court indicated that the Stamp Act of 1765, the Townshend Revenue Act of 1767, and the tea tax of 1773 were examples of these irritating parliamentary revenue measures. *Id.* at 311 n.7 (citing H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 104 (8th ed. 1968); I S. MORISON, H. COMMAGER, & W. LEUCHTENBURG, THE GROWTH OF THE AMERICAN REPUBLIC 143, 144, 159 (1969)).

154. 436 U.S. at 312. The Court stated that it would be "untenable" that places of business were not intended to be shielded by the ban on warrantless searches. *Id.*

155. *Id.* The Court indicated that the reason for this is "found in the 'basic purpose of this Amendment . . . [which] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" *Id.* (quoting *Camara*, 387 U.S. at 528).

156. *Id.* at 312-13.



searches virtually impossible and the incremental protections afforded the employer by a warrant would fail to justify the administrative burdens of obtaining that warrant; and

- 3) Requiring a warrant for OSHA inspections would render other similar regulatory statutes constitutionally infirm.<sup>157</sup>

The Secretary's first contention, that an exception to the warrant requirement exists based on the "pervasively regulated business" standard, was rejected.<sup>158</sup> OSHA's elevated purpose of assuring safe and healthful working conditions to virtually every working man and woman in America resulted in mandatory occupational safety and health standards for all businesses which affect interstate commerce. This broad purpose is not, the Court asserted, analogous to the situation with regard to those closely supervised industries in which the narrowly based, "pervasive regulation" exception to the warrant requirement arose. The Court found no heavily regulated business in *Barlow's*. Instead, it distinguished the *Colonnade/Biswell* types of enterprises as follows:

Industries such as these fall within the "certain carefully defined classes of cases," . . . *Camara*, 387 U.S. at 528. The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. "A central difference between those cases [*Colonnade* and *Biswell*] and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon

---

157. *Id.* at 313-14.

158. *Id.* The Government insisted that the Walsh-Healy Act of 1936, which governed minimum wages and maximum work hours as to certain specified employers, supported a conclusion that all businesses engaged in interstate commerce have been subject to close supervision of employee safety and health conditions. *Id.* The Court summarily rejected this argument and stated: "Nor can any but the most fictional sense of voluntary consent to later searches be found in the single fact that one conducts a business affecting interstate commerce. . . ." *Id.* at 314.

The Court also rejected the Government's argument for a *Colonnade/Biswell* exception supported by labor law analogies. *Id.* at 314-15.

him.”<sup>159</sup>

OSHA's reach pervades virtually every business, but it does not heavily regulate or closely supervise each business, as do other federal laws which regulate businesses subject to federal licensing.<sup>160</sup> Holding otherwise, the Court declared, would allow the closely regulated industry concept to become the rule rather than the exception.<sup>161</sup>

The Secretary next argued that warrantless inspections were essential to the proper enforcement of OSHA.<sup>162</sup> Claiming that inspection without prior notice was imperative to preserve the advantages of surprise, the Secretary argued, that the alternative of obtaining *ex parte* warrants—which would concededly maintain the surprise element—would create an “administrative strain that would be experienced by the inspection system, and by the courts, should *ex parte* warrants issued in advance become standard practice.”<sup>163</sup> The Court rejected these contentions, taking notice that the vast majority of business owners presently consent to inspection without warrant and thus the requirement of a warrant would not be as burdensome as was argued.<sup>164</sup> Moreover, the Court noted that where there is a denial of entry, the regulations, contemplating the possibility of such refusal, already provide for such responses as compulsory process.<sup>165</sup> With relevance to the need for surprise, therefore, the Court noted that this built-in delay and “notice” provision had not proven to have impeded the effectiveness of the Act. All that it has meant is that the provisions provide a delay for those owners who wish to deny an initial request while the inspector seeks appropriate process.<sup>166</sup> The

---

159. *Id.* at 313 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973)).

160. Both *Colonnade* and *Biswell* involved industries which were heavily regulated by federal law. *Colonnade* involved a liquor dealer and *Biswell* involved a firearms dealer.

161. 436 U.S. at 313.

162. *Id.* at 315. In addition, the Government argued that the Act and its regulations protected the owner's privacy as much as a warrant. *Id.* However, the Court made no further mention of the argued protections.

163. *Id.* at 316.

164. *Id.* The Government had not submitted any evidence of widespread refusal to OSHA searches. *Id.* However, the Court did indicate that its decision might possibly have an adverse impact on consent searches. *Id.* at 316 n.11.

165. *Id.* at 317 (citing 29 C.F.R. § 1903.4 (1977)). For the complete text of 29 C.F.R. § 1903.4(a), see *supra* note 125.

166. 436 U.S. at 318. The Court noted, however, that the “Act's effectiveness has not been crippled by providing those owners who wish to refuse an initial requested entry with a time lapse while an inspector obtains the necessary process.” *Id.* (footnote omitted). The Court further found that changes in

“essential to the Act” argument was thus rejected. However, before dismissing that subject entirely, the Court discussed the issue of probable cause. Relying on its decision in *Camara*, the *Barlow*’s Court reiterated that, for administrative searches, probable cause in the criminal sense is not required; rather, the issuance of a warrant may be based not only on specific allegations of violations, but also on a showing that “reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].”<sup>167</sup> The Court declared that a demonstration that a specific business was selected for an OSHA search based upon an administrative plan for enforcement purposes, derived from neutral sources, would sufficiently protect an employer’s fourth amendment rights.<sup>168</sup>

The Secretary’s final contention suggested that requiring a warrant for OSHA inspections would also render the warrantless search provisions of other regulatory statutes constitutionally infirm.<sup>169</sup> The Court rejected this contention, asserting that the reasonableness of any warrantless search will be individually assessed by evaluating the enforcement needs met by the particular regulation involved and the privacy guarantees of the relevant statute. In this way, the true “pervasively regulated” industry will be identified and a warrant exception may be found to be applicable. Indeed, some statutes, including OSHA’s, did envision resort to federal court enforcement, prior to the *Barlow*’s decision.<sup>170</sup> Being concerned with OSHA in this instance, and not with other potential agencies or hypothetical fact situations, the Court stated that it would not retreat from a holding appropriate to that statute because of a real or imagined effect on other, different administrative schemes.<sup>171</sup> In the penultimate portion of its opinion, the Court stated three major positions: (1) the protections afforded an employer’s fourth amendment interests by a

---

OSHA’s own operating manuals widened lenience towards those who refused entry. *Id.* at 318 n.13.

167. *Id.* at 320 (quoting *Camara*, 387 U.S. at 538).

168. *Id.* at 321. The Court indicated that a general administrative plan for the enforcement of the Act based on “dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area” would be valid under the fourth amendment. *Id.*

169. *Id.* at 322.

170. *Id.* The Court noted that statutes such as the Federal Metal and Non-metallic Mine Safety Act contained specific language indicating a resort to federal court enforcement when entry is refused. *Id.* at 322 n.18. In addition, the Court indicated that statutes such as the Animal Welfare Act of 1970 contained general language providing for such federal court enforcement. *Id.* at 332 n.19.

171. *Id.* at 322.

warrant are more than marginal and do justify the resultant administrative burden; (2) statutorily, OSHA's authorized warrantless search procedure grants "unbridled discretion" to field inspectors, as well as their superiors, as to when and whom to search and is therefore invalid; and (3) the issuance of a warrant would guarantee the reasonableness of the search by providing "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."<sup>172</sup>

Applying these standards to the facts of the case, it is clear that the application for the inspection order in *Barlow's* simply did not meet these standards. No program was described nor were any facts given that would indicate why the Barlow's establishment fell within the program. The order merely represented that "the desired inspection and investigation are contemplated as part of an inspection program designed to assure compliance with the Act as authorized by Section 8(a) of the Act."<sup>173</sup>

The United States Supreme Court thus held the Occupational Safety and Health Act of 1970 to be unconstitutional insofar as it authorized inspections without a warrant or its equivalent and affirmed the district court's judgment granting declaratory judgment and injunctive relief to Barlow's.<sup>174</sup>

#### E. *The Dissent*

The dissenting opinion, authored by Justice Stevens, and joined by Justices Blackmun and Rehnquist, disagreed with the majority on two major issues: (1) that the fourth amendment pro-

172. *Id.* at 322-23 (footnote omitted).

173. *Id.* at 323 n.20 (quoting the application for the inspection order filed by the government in this case).

174. *Id.* at 325. The Supreme Court did indicate, however, that:

The injunction entered by the District Court, however, should not be understood to forbid the Secretary from exercising the inspection authority conferred by § 8 pursuant to regulations and judicial process that satisfy the Fourth Amendment. The District Court did not address the issue whether the order for inspection that was issued in this case was the functional equivalent of a warrant, and the Secretary has limited his submission in this case to the constitutionality of a warrantless search of the Barlow establishment authorized by § 8(a). He has expressly declined to rely on 29 C.F.R. § 1903.4 (1977) and upon the order obtained in this case. Tr. of Oral Arg. 19. Of course, if the process obtained here, or obtained in other cases under revised regulations, would satisfy the Fourth Amendment, there would be no occasion for enjoining the inspections authorized by § 8(a).

*Id.* at 325 n.23.

hibited routine nonconsensual inspections without a warrant; and (2) that a constitutionally required warrant could be issued without any showing of probable cause.<sup>175</sup>

Justice Stevens analyzed the two separate clauses contained within the fourth amendment.<sup>176</sup> Each clause prohibits a category of governmental conduct; the first prohibits unreasonable searches, and the second, the issuance of warrants without probable cause. The issue in *Barlow's*, according to Justice Stevens, fell within the former category—whether the statutorily authorized warrantless search was unreasonable within the meaning of the first clause.<sup>177</sup> Distinguishing the investigation of criminal activity from regulatory inspections, the dissent asserted that, in the former, the reasonableness of a search largely depends upon its being conducted pursuant to a valid warrant;<sup>178</sup> whereas in the latter, the search may still be reasonable without satisfying the probable cause requirement of the warrant clause.<sup>179</sup>

According to Justice Stevens, the majority ruled on the warrant clause alone to invalidate the OSHA investigative program and

then avoid[ed] a blanket prohibition on all routine, regulatory inspections by relying on the notion that the “probable cause” requirement in the Warrant Clause may be relaxed whenever the Court believes that the governmental need to conduct a category of “searches” outweighs the intrusion on interests protected by the fourth amendment.<sup>180</sup>

Justice Stevens recounted the historical milieu which gave

175. *Id.* at 325 (Stevens, J., dissenting).

176. The fourth amendment to the United States Constitution stipulates that:

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

U.S. CONST. amend. IV.

177. 436 U.S. at 326 (Stevens, J., dissenting).

178. *Id.* (citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)).

179. *Id.* (citing *United States v. Martinez-Fuerte*, 428 U.S. at 543; *South Dakota v. Opperman*, 428 U.S. at 369; *United States v. Biswell*, 406 U.S. at 311).

180. *Id.* at 327 (Stevens, J., dissenting). Justice Stevens concluded that the majority's reasoning “disregards the plain language of the Warrant Clause and is unfaithful to the balance struck by the Framers of the Fourth Amendment. . . .” *Id.*

birth to the fourth amendment<sup>181</sup> and concluded that, since the immediate evil the framers intended to combat with this amendment was the abusively employed general warrant, not the warrantless search, the limits placed upon its issuance should not be diluted.<sup>182</sup> The showing of particularized probable cause is the quiddity of the warrant clause and the primary check on the warrant power of the state. The evolution of the Court's emphasis on the dangers of the warrantless search conducted without probable cause should, according to Justice Stevens, be governed by the reasonableness standard in the first clause, which the framers adopted specifically to limit this category of searches.<sup>183</sup> Acknowledging that the existence of a valid warrant generally satisfies the reasonableness requirement, Justice Stevens cautioned: "[W]e should not dilute the requirements of the Warrant Clause in an effort to force every kind of governmental intrusion which satisfies the Fourth Amendment definition of a 'search' into a judicially developed, warrant-preference scheme."<sup>184</sup>

In the alternative, Justice Stevens contended that even if a warrant issued without a showing of probable cause satisfied the warrant clause, he could not find that an inspection program was unreasonable because it failed to require such a warrant procedure. Justice Stevens gave great weight to the determination by Congress that regulation and supervision of safety in the workplace furthered an important state interest, and, that the power to conduct warrantless searches was a reasonable and necessary means to effectuate the purposes of this health and safety legislation.<sup>185</sup> The majority's conclusion that the warrantless inspection

---

181. *Id.* The dissent noted that it was the issuance of general warrants in England and writs of assistance used to collect import duties in the colonies which provided the primary target at which the fourth amendment was aimed. *Id.*

182. *Id.* at 328 (Stevens, J., dissenting).

183. *Id.*

184. *Id.* In addition, Justice Stevens continued his commitment to the framer's intention, stating that:

Fidelity to the original understanding of the Fourth Amendment, therefore, leads to the conclusion that the Warrant Clause has no application to routine, regulatory inspection of commercial premises. If such inspections are valid, it is because they comport with the ultimate reasonableness standard of the Fourth Amendment. If the Court were correct in its view that such inspections, if undertaken without a warrant, are unreasonable in the constitutional sense, the issuance of a "new-fangled warrant"—to use Mr. Justice Clark's characteristically expressive term—without any true showing of particularized probable cause would not be sufficient to validate them.

*Id.* (footnote omitted).

185. *Id.* at 329 (Stevens, J., dissenting).

power was unreasonable had not satisfied Justice Stevens and he therefore deferred to Congressional judgment as to the importance of the warrantless search power as it related to the enforcement scheme of the Act. Finally, the dissent argued that the requirement of a warrant for this category of inspections served as a mere formality, and, of greater importance, a formality which imposed great strain on an already overburdened administrative structure.<sup>186</sup>

#### F. *Criteria for Determination of Probable Cause*

In *Barlow's*, the majority stipulated that probable cause in the criminal law sense is not required to obtain a warrant for an administrative search.<sup>187</sup> The first declaration by the Supreme Court of a flexible probable cause standard was enunciated in *Camara* in which the Court held that probable cause was to be assessed by "balancing the need to search against the invasion which the search entails,"<sup>188</sup> as distinguished from the criminal standard where there must be probable cause to believe that evidence of a violation will be found in the specific place to be searched.

The *Camara* Court premised this reduction of the probable cause standard on its view of the lesser degree of governmental power that inheres in civil administrative searches compared with criminal searches and the concomitantly diminished danger of abuse of that power.<sup>189</sup> The Supreme Court in both *Camara* and

186. *Id.* at 339 (Stevens, J., dissenting). The dissent expressed what was ostensibly of great concern to the Secretary of Labor, other administrative agencies and commentators—the effect of the decision upon other regulatory statutes. Justice Stevens' concerns were even more broad, predicting an effect on heavily regulated industry as well:

The decision today renders presumptively invalid numerous inspection provisions in federal regulatory statutes. *E.g.*, 30 U.S.C. § 813 (Federal Coal Mine Health and Safety Act of 1969); 30 U.S.C. §§ 723, 724 (Federal Metal and Nonmetallic Mine Safety Act), 21 U.S.C. § 603 (inspection of meat and food products). That some of these provisions apply only to a single industry, as noted above, does not alter this fact. And the fact that some "envision resort to federal-court enforcement when entry is refused" is also irrelevant since the OSHA inspection program invalidated here requires compulsory process when a compliance inspector has been denied entry. *Ante*, at 321.

*Id.* at 339 n.11 (Stevens, J., dissenting).

187. 436 U.S. at 320-21 (citing *Camara*, 387 U.S. at 538). The *Barlow's* Court found that a warrant is to be issued if the premises to be searched was chosen through a mutual selection process. *Id.* at 321.

188. 387 U.S. at 537. For a discussion of the *Camara* Court's analysis of probable cause, see *supra* notes 33-38 and accompanying text.

189. 387 U.S. at 537-38.

*Barlow's* found that this distinction justified a lesser probable cause standard for administrative warrants. The *Barlow's* Court held that:

For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." <sup>190</sup>

The appropriate level of probable cause will differ from one program to another. Where an agency has extensive information showing a history of violations, a completely random inspection program may not be desirable, proper or appropriate. Industry-wide statistics, for example, will not support a probable cause finding when detailed information regarding a particular company is available.<sup>191</sup> For each plant and industry, with regard to OSHA, accident rate statistics will reflect the relative strength of the government interest in detecting safety hazards, which must be weighed against the invasion of the privacy interest of the occupants.<sup>192</sup> It is in this light that magistrates must determine whether administrative standards for OSHA inspections meet the reasonableness standards established by *Camara* and restated in *Barlow's*.<sup>193</sup>

Some acceptable bases from which a magistrate can determine whether a reasonable standard for conducting an inspection is satisfied are:

- 1) the targeted company is engaged in a relatively hazardous industry;<sup>194</sup>
- 2) specific employee complaints;
- 3) a systematic plan of inspection—for example, most hazardous to least hazardous (the so-called "Worst First" List);<sup>195</sup>

---

190. *Barlow's*, 436 U.S. at 320 (quoting *Camara*, 387 U.S. at 538) (footnote omitted).

191. *Marshall v. Shellcast Corp.*, 5 O.S.H. Cas. (BNA) 1689 (N.D. Ala. 1977).

192. *Id.*; *Camara*, 387 U.S. at 436-37.

193. 387 U.S. at 536-39.

194. *Marshall v. Multi-Cast Corp.*, 6 O.S.H. Cas. (BNA) 1486, 1492 (N.D. Ohio 1978).

195. *See Marshall v. Weyerhaeuser Co.*, 456 F. Supp. 474 (D.N.J. 1978)



- 4) an administrative plan based on neutral sources—statistics on accident rates, injury records, number of employees and size of business, length of time since last inspection, employer's history of violations, etc.<sup>196</sup>

The *Barlow's* Court stressed repeatedly that the criteria for selecting businesses to be searched must be neutral.<sup>197</sup>

This requirement of a reasonable and *a priori* inspection plan justifies the *Barlow's* reduced probable cause standard, as distinguished from an ad hoc inspection program where reasonableness has not been predetermined and a traditional probable cause standard would therefore still be necessary.

To rise to the required standard of reasonableness, a program must be promulgated according to the standards set forth by the Administrative Procedure Act which stipulates: "Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency. . . ." <sup>198</sup>

---

("Worst-First" schemes are valid source for isolating target industries and effecting OSHA's purposes but further information is required to assure that procedures, as applied to particular establishment, are non-arbitrary).

196. See *Barlow's*, 436 U.S. at 321 (plan of inspection based on disposition of employees in various types of industries across given area, and desired frequency of searches in any of lesser divisions of area is example of plan derived from mutual sources).

197. *Id.* at 321, 323. The Court stated that a "warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from *neutral* sources . . . would protect an employer's Fourth Amendment rights." *Id.* at 321 (emphasis added).

198. 5 U.S.C. § 552(a)(1)(D) (1982). Section 552(a)(1) provides that (a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as author-

Once a regulation is published in the Federal Register, a public hearing follows, during which suggestions for improvements from affected and interested parties are received prior to enactment of the regulation.<sup>199</sup>

---

ized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

*Id.*

199. *Id.* at § 553(b). Section 553(b) provides in pertinent part:

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

*Id.*

### G. Agency Reaction to Barlow's

#### 1. Occupational Safety and Health Administration

According to the dissent, and to numerous law review commentators, the impact of the *Barlow's* decision upon day-to-day agency operation was expected to be enormous. As very interested parties, the counsel for various agencies immediately had to consider the decision's probable and potential impact upon their individual agency's operations. One of the surprising findings of an extensive telephone survey undertaken by the authors indicates, however, that most agency counsels did not perceive that *Barlow's* posed any major ramifications for them. Moreover, according to the statistics gathered for this article, these counsel were *right* and the *Barlow's* decision did indeed have only a minimal impact upon most federal agencies. Given this finding, it is not too surprising that there was little concrete agency action in response to *Barlow's*.

There were two agencies, however, on which the *Barlow's* decision had direct impact. The first, obviously, was OSHA itself, which had the statutory authority for its warrantless inspection procedure declared unconstitutional by the United States Supreme Court. OSHA had to respond, and did, through the issuance of detailed revised procedures in its Field Operations Manual, which is issued to, and serves as a guide for, all of OSHA's inspectors. Rather than summarize this guide here, the most significant revisions are collected and incorporated as Appendix A to this survey.

The second agency to be directly affected was the Environmental Protection Agency (EPA). OSHA and EPA each regulate a wide variety of businesses with regard to a broad array of concerns, each employing health and safety justifications for their regulatory powers, and each without any long history of close or pervasive supervision over any of their "supervisees." EPA officials quickly realized the nexus between their concerns and those of OSHA, and drafted an extensive explanation of *Barlow's* for EPA staff. That response will be summarized here.

#### 2. Environmental Protection Agency

Within six months of the *Barlow's* decision, the Environmental Protection Agency circulated a memorandum to Regional Administrators, Surveillance and Analysis Division Directors and

Enforcement Division Directors, which was intended to provide guidance in the conduct of investigations following that decision.

The memorandum recognized a dual aspect of the *Barlow's* decision: (1) that the decision would, pragmatically speaking, have only a limited effect on EPA enforcement inspections; but (2) the scope of the decision was broad—potentially affecting all current inspection programs. The limited effect prediction was based on EPA's past experience that virtually all of the inspections it conducted were consented to; the breadth of the decision analysis was predicated upon the fact that all EPA inspections, by their very nature, were subject to the same limitations placed upon OSHA in *Barlow's*.

The guidelines outlined in the memorandum were designed to carry the inspector through three stages:

- 1) Preparation for inspection of premises:
  - A) An *ex parte* warrant is necessary even before entry is attempted,
    - i) For surprise purposes—based upon prior bad conduct or prior refusals; and/or
    - ii) When the magistrate is so distant from the place of entry that excessive travel time would be wasted if entry were denied.
  - B) A warrant (criminal or civil) is required,
    - i) If the inspection is for detecting and correcting non-compliance with regulatory requirements (use administrative warrant); or
    - ii) If the inspection is intended in whole or in part to gather evidence for criminal prosecution (use a criminal warrant); or
    - iii) If a combined investigation for civil and criminal violations is to occur, barring any clear intent to conduct a criminal investigation (memorandum suggests an administrative warrant should be sufficient).
  - C) Programs utilizing private contractors:
    - i) Contractors are agents of the federal government for purposes of investigations and the *Barlow's* restrictions apply to them; and
    - ii) They should be trained for the likelihood of refusal of entry; and
    - iii) An EPA inspector should be involved in the

process of obtaining and executing a required warrant.

- D) State-conducted inspections, when EPA programs are implemented through the states,
  - i) Must be in compliance with *Barlow's*; and
  - ii) State inspectors should consult their state legal advisors when refused entry; and
  - iii) EPA's Regional Enforcement Office should be contacted when *Barlow's* questions arise; and
  - iv) The state should,
    - (a) not seek forcible entry not penalize an owner for insisting upon a warrant; and
    - (b) should provide a mechanism for issuance of civil inspection warrants; and
    - (c) should report any denials of entry to the appropriate EPA Headquarters Enforcement Attorney.
- 2) Entry onto premises:
  - A) Consensual entry (warrant not normally required to secure entry):
    - i) Entry is voluntary if owner allows the inspector to enter even if owner complains while doing so;
    - ii) Any coercion by the inspector—verbal or physical—renders the entry non-consensual;
    - iii) Who may consent: the owner or the person in charge; and
    - iv) Consent is generally required only for the non-public portion of the premises—evidence obtained while in a public area is admissible.
  - B) Withdrawal of Consent:
    - i) Consent may be withdrawn at any time;
    - ii) Inspection is valid up to the time consent was withdrawn—any observations made until then are admissible; and
    - iii) Withdrawal of consent is to be treated as a denial of entry.
  - C) Entry Refusal (Denial of Entry):
    - i) Inspector should leave premises immediately and phone EPA Regional Enforcement Attorney for further instructions;
    - ii) EPA Regional Enforcement Attorney shall contact

the U.S. Attorney in the appropriate district to explain the need for a warrant; and

- iii) EPA Regional Enforcement Attorney shall arrange meeting between U.S. Attorney and inspector at which inspector should bring proper draft of warrant and affidavits.

D) Notify headquarters. EPA Regional Enforcement Attorney should inform EPA Headquarters Enforcement Attorney of all refusals of entry. This procedure satisfies several needs:

- i) Headquarters can monitor refusals and Regional successes in obtaining warrants to
  - a) evaluate the need for new procedures; and
  - b) to assess the impact of *Barlow's*.

### 3. Exceptions to Warrant Requirement:

- i) Emergency situations;
- ii) Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) inspections (possibly a pervasive government regulation exemption); and
- iii) Public area observation.

The memorandum then details the securing of a warrant, the standards of probable cause to be utilized, and the procedure for inspection with a warrant. The first and second areas are of major importance under *Barlow's* and will be summarized here.

The application should:

1. identify the statutes and regulations under which the Agency is conducting the inspection;
2. describe the probable cause or, in the absence of such, describe the administrative scheme which is the basis for the inspection;
3. be signed by one personally knowledgeable of the facts; and
4. be sworn to before a magistrate, or notarized.

The warrant (draft prepared by inspector) should:

1. specify the areas intended to be inspected, records to be inspected, samples to be taken, etc. (this should not be vague and overdrawn);
2. be ready for the magistrate's signature; and
3. should contain a "return of service"—indicating

upon whom it was served and should be signed and dated by the inspector.

Absent a showing of criminal probable cause, an administrative warrant may be obtained upon two alternative grounds. Relying on the language of *Barlow's*, the EPA memorandum summarizes those bases as follows:

1. Specific probable cause exists when an employee has registered a complaint or the agency has received a tip from a competitor. A detailed description of this basis is required in the affidavit in support of a warrant.
2. Probable cause may also be based on a neutral administrative inspection scheme. The memorandum quotes verbatim from the *Barlow's* decision and concludes that every EPA enforced program has such a scheme and that the Regions will be sent the particular neutral administrative scheme under which each program's inspections are to be conducted.

It is evident from the detail of the memorandum that the EPA foresaw *Barlow's* as having sufficient potential to substantially affect its inspection procedures. EPA saw an immediate necessity (1) to formalize its neutral inspection schemes; and (2) to terminate the agency's stated authority for initiating civil and/or criminal actions for refusal to allow warrantless inspections.

### 3. *Consumer Product Safety Commission*

According to the statistical findings of the authors, the Consumer Product Safety Commission (CPSC) should not have been terribly concerned about the impact of *Barlow's* upon its operations. Nevertheless, like EPA, the CPSC too shared characteristics with OSHA as a regulatory agency, and it too, therefore, prepared a policy memorandum detailing changes in operational procedures for CPSC staff. The salient points of CPSC Enforcement Policy and Procedural Guides, Guide 3.01, will be summarized here; the subject of the guide was "Inspection Warrants."

#### 1. *Purpose:*

To advise CPSC inspection staff that the threat of criminal prosecution or other inducement to allow an inspection should no longer be used. Rather than point out criminal penalties when denied entry, the inspector may inform the party that it will be necessary to obtain a warrant or court order.

2. *When to Inspect:*

The CPSC relies primarily on complaints or injuries in determining when and whom to inspect.

3. *Bases for an Inspection with a Warrant:*

- a. The inspector is refused complete access to premises.
- b. The company refuses to provide information which the inspector is authorized by statute to obtain through inspection; e.g., refusal to provide records necessary and relevant to a determination of compliance with the law.

4. *What Next:*

When staff has determined that the circumstances necessitate a warrant,

- a. They are to discuss the matter with the Compliance & Enforcement Regional Attorney.
  - i) Area Office, Compliance Office, Investigator and Regional Attorney will then prepare a draft of the necessary documents;
  - ii) Regional Attorney or Area Office Compliance Officer will contact the local U.S. Attorney's Office for assistance in proceeding for the inspection warrant.
- b. The application for the inspection warrant should be prepared by the Inspector making the inspection, although it may be prepared by someone familiar with the circumstances surrounding the inspection. The application generally should be left unsigned until sworn to in the presence of the U.S. Magistrate. Verification would be unnecessary in this situation.
- c. Partial refusal cases: The application should include details of the circumstances leading to the partial refusal of access.
- d. Complete refusal cases: Reference to specific field program or other inspection program may be substituted for circumstantial particulars.
- e. A warrant will be issued to the inspector conducting the inspection.
- f. *Inspection Procedures:*  
The Inspector should return to the company as soon as possible and:
  - i) Present appropriate credentials;



- ii) Show the owner, operator, or agent in charge the original signed inspection warrant; and
- iii) Give the owner, operator, or agent in charge a copy (not the original) of the inspection warrant.

The copy given the owner, operator, or agent in charge need not be signed by the issuing Magistrate (judge), but the issuing Magistrate's (Judge's) name should, if possible, be typed on the copy given to him. When the inspection warrant is obtained, attempt to have the clerk provide one or two certified copies which can be given to the firm.

g. Return:

A return, showing that the inspection has been completed, should be made out for the U.S. Magistrate (a U.S. Judge) who issued the warrant. It should be executed on the original warrant no later than 10 days following inspection. The U.S. Magistrate may request a copy of the inspection report to accompany the return.

5. *Continued Refusal:*

If access is denied after a warrant has been obtained, the matter should be discussed with the Regional Attorney and the local U.S. Attorney's Office. Such situations will be dealt with on a case by case basis.

Some alternatives include:

- a. Having the warrant reissued and served by a U.S. Marshal;
- b. Seeking a contempt of court citation for refusal to comply with the warrant; or
- c. Seeking civil or criminal sanctions for failure to comply with the statutory inspection authority.

According to the Compliance Office:

- a) In practice, the CPSC relies mainly on complaints or reported injuries which indicate non-compliance with regulations.
- b) If non-compliance exists, the employer is informed of product violation and is given the opportunity to correct the violation.
- c) Subsequent inspections are conducted by surprise.

The firm is visited, credentials and notice of violation are presented.

d) If the violations are not corrected, the Compliance Officer may resort to the following remedies:

- i) seizure of goods;
- ii) criminal and civil penalties;
- iii) injunction; or
- iv) mandatory recall.

In response to the authors' survey pertaining to inspections by federal administrative agencies, the CPSC supplied the following data:

In 1977, of 4700 inspections conducted, only one was conducted with a warrant.

In 1980, of 4573 inspections conducted, only one was conducted with a warrant.

In 1982, of 3200 inspections conducted, only one was conducted with a warrant.

These data, and the telephone interviews held with a representative of the CPSC Compliance Office, strongly support the view that there was no practical effect upon the CPSC's inspection procedures caused by the *Barlow's* decision.

## VI. FROM *BARLOW'S* TO *DEWEY*

Although both *Marshall v. Barlow's* and *Donovan v. Dewey*<sup>200</sup> are seen as landmark, standard-setting Supreme Court cases, a number of other cases decided between these two established several principles relating to magisterial authority in issuing a warrant and the proper scope of an inspection conducted pursuant to an administrative search warrant.<sup>201</sup>

---

200. 452 U.S. 594 (1981).

201. See *Michigan v. Tyler*, 436 U.S. 499 (1978) (fire inspectors' entry into burned building to determine cause of fire must be accompanied by warrant if convicted after exigency of fire is past); *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir. 1980) (OSHA warrant may be issued on the basis of informal employee complaint); *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335 (7th Cir.) (warrant application incorporating affidavit of OSHA compliance officer presumed true and correct), cert. denied, 444 U.S. 884 (1979); *Marshall v. North American Car Co.*, 476 F. Supp. 698 (M.D. Pa. 1979) (in determining reasonableness of warrant, court must compare scope of warrant to number and gravity of employee complaints), aff'd, 626 F.2d 320 (3d Cir. 1980); *Marshall v. Trinity Indus.*, 7 O.S.H. Cas. (BNA) 1851 (W.D. Okla. 1979) (warrant must be limited to areas about which employee com-

## A. Michigan v. Tyler

Eight days after the *Barlow's* decision, the Supreme Court held a warrantless search of a fire-damaged building invalid. The Court concluded in *Michigan v. Tyler*<sup>202</sup> that the initial entries into the building to extinguish the blaze allowed fire inspectors to investigate the causes of the fire and to seize evidence of arson which was then in plain view—but such investigations could only be made within a reasonable time of the fire, absent consent or warrant.<sup>203</sup>

The main thrust of the Court's analysis was that the exigency of a burning building is sufficient to render a warrantless entry reasonable, but that exigency is extinguished within a reasonable time and the protections of the fourth amendment are then rekin-

---

plained). For an extensive discussion of these cases, see *infra* notes 202-79 and accompanying text.

202. 436 U.S. 499 (1978). In *Tyler*, a fire engulfed respondents' furniture store on January 21, 1970. *Id.* at 501. Shortly after the fire was extinguished, the fire chief and another fireman entered the smoldering building to examine and remove two plastic containers of flammable liquid that had been discovered while the fire was being fought. *Id.* at 501-02. Soon thereafter, a police detective came to the scene to take photographs. *Id.* at 502. The validity of these searches was not challenged beyond the trial court level. *Id.*

On two separate occasions later in the day of the fire, police and fire officials returned to the building and removed pieces of carpet and sections of stairs. *Id.* at 502. A police sergeant visited the scene one month later to take photographs, conduct inspections and obtain tangible evidence tending to suggest that arson was the cause of the fire. *Id.* at 503. All of these entries and seizures were conducted without a warrant or consent. *Id.* at 501-03.

Respondents were convicted of conspiracy to burn real property in a Michigan trial court. *Id.* at 501. The Michigan Supreme Court reversed the convictions and ordered a new trial, holding that the evidence obtained during the warrantless searches was inadmissible. *Id.* at 501-04. The United States Supreme Court granted certiorari. *Id.* at 501.

Despite the criminal arson charges, the Court treated the searches as administrative. *Id.* at 506. For a discussion of the merits of this characterization, see Comment, *Searches by Administrative Agencies after Barlow's and Tyler's Fourth Amendment Pitfalls and Short Cuts*, 14 LAND & WATER L. REV. 207 (1979) (*Michigan v. Tyler* suggests that evidence obtained during search for civil violations authorized by administrative warrant is admissible in criminal prosecution).

203. 436 U.S. at 509-10. The Court reasoned that a burning building is an exigency justifying a warrantless entry. *Id.* at 509. Differing with the opinion of the Michigan Supreme Court, the *Tyler* Court further asserted that the exigency does not end "with the dousing of the last flame." *Id.* at 510. Rather, the Court stated that "officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished." *Id.* (emphasis added).

For a discussion contrasting the *Tyler* "reasonable time to investigate" standard with the more restrictive emergency in fact standard governing warrantless murder scene searches under *Mincey v. Arizona*, see Note, *Warrantless Murder Scene Searches in the Aftermath of Mincey v. Arizona*, 58 WASH. U.L. Q. 367 (1980).

dled.<sup>204</sup> Relying on *Camara*, the Court in *Tyler* restated the purpose of those protections as the safeguarding of the individual from arbitrary invasions by government officials.<sup>205</sup> Those officials

may be health, fire or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public . . . These deviations from the typical police search are thus clearly within the protection of the fourth amendment.<sup>206</sup>

Holding that the entries to the building occurring after the day of the fire were detached from the initial exigency and warrantless entry<sup>207</sup> and, furthermore, that privacy expectations do exist, regardless of any possible use of the burned out building,<sup>208</sup> the Court declared:

Thus, there is no diminution in a person's reasonable expectation of privacy nor in the protection of the fourth amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately. Searches for administrative purposes, like searches for evidence of crime, are encom-

---

204. 436 U.S. at 509.

205. *Id.*

206. *Id.* at 504-05.

207. *Id.* at 511.

208. *Id.* at 505. The state argued that entries to investigate the cause of a recent fire do not implicate privacy interests. *Id.* This argument rested on the alternative propositions that arson establishes abandonment, and that innocent fire victims have negligible expectations of privacy in what remains of their property. *Id.*

The Court expressly rejected the second proposition as "contrary to common experience" in that fire victims often continue to use their premises after the fire and leave some of their personal effects on the scene. *Id.* Thus the Court concluded that innocent fire victims do retain fourth amendment protections. *Id.* Addressing the state's first proposition, the Court stated: "[I]t is, of course, impossible to justify a warrantless search on the ground of abandonment by arson when that arson has not yet been proved, and a conviction cannot be used *ex post facto* to validate the introduction of evidence used to secure that same conviction." *Id.* at 505-06.

passed by the fourth amendment. And under that amendment, "one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara, supra*, at 528-529. The showing of probable cause necessary to secure a warrant may vary with the object and intrusiveness of the search, but the necessity for the warrant persists.<sup>209</sup>

The Court reasoned that the warrant in fire investigation provides the same protection as it does in routine building inspections.<sup>210</sup> The legality of the entry, in accordance with reasonable legislative or administrative standards, is assured when an independent, neutral and detached magistrate considers and issues a warrant.<sup>211</sup> The issuing magistrate's prime functions are to assure the person subject to the search that the inspector is operating under proper authority, and to prevent the harassment of that person; victims of fires are entitled to such assurances and protections as are the subjects of other searches.<sup>212</sup>

#### B. *Authority for the Issuance of Warrants*

In *Tyler*, the United States Supreme Court quoted with approval the language of the Michigan Supreme Court: "a . . . search may be conducted pursuant to a warrant issued in accordance with reasonable legislative or administrative standards or, absent their promulgation, judicially prescribed standards."<sup>213</sup>

209. *Id.* at 506 (footnote omitted).

210. *Id.* at 508. The state argued that requiring warrants in such cases would serve no purpose. *Id.* at 506. Underlying this argument was the proposition that, in order to obtain a warrant to investigate the cause of a fire, an official need only show that "a fire of undetermined origin has occurred on those premises." *Id.* Thus, the state argued, the magistrate's role would merely be that of a rubber stamp. *Id.* at 507.

The Court rejected the state's argument, expressly discounting the proposition on which it was grounded. *Id.* The Court declared that an official seeking a warrant to investigate a fire must show more than the mere occurrence of the fire. *Id.* Factors such as "[t]he number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building and the owner's efforts to secure it against intruders" might have to be weighed by a magistrate. *Id.*

211. *See id.* at 507-08. A warrant gives the property owner information that assures him of the entry's legality. *Id.* at 508.

212. *See id.*

213. *Id.*

The Court implicitly recognized that, generally speaking, there is no federal statute or court rule which specifically authorizes the issuance of a warrant for an administrative inspection or search. Despite this absence of express authorization, the United States Supreme Court in *Camara*, *See* and *Barlow's* strongly suggested that Courts have an inherent power to issue administrative warrants; this power may be inferred from the Court's invalidation of regulatory schemes authorizing warrantless, nonconsensual searches.<sup>214</sup> The *Tyler* Court discussed guidelines for the issuance of administrative search warrants and, furthermore, implicitly assumed their issuance by magistrates: "[T]he magistrate can perform the important function of preventing harrassment by keeping that invasion to a minimum."<sup>215</sup> Lower courts addressing the issue of authority have held that magistrates may issue warrants based on administrative probable cause without any specific statutory authorization.<sup>216</sup>

---

214. *Barlow's*, 436 U.S. at 316 (declaring § 8(a) of Occupational Safety and Health Act of 1970 unconstitutional insofar as it authorized warrantless inspections); *Camara*, 387 U.S. at 538 (provision of San Francisco Housing Code authorizing warrantless entries into premises within city by city employees declared unconstitutional); *See*, 387 U.S. at 545 (provision of Seattle Fire Code authorizing warrantless entry and inspection of buildings by Fire Chief to discover and correct violations declared unconstitutional).

215. 436 U.S. at 508. *See also* All Writs Act, 28 U.S.C. § 1651 (1982), which provides as follows:

Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

The All Writs Act may be viewed as specific statutory authority for the issuance of warrants based on administrative probable cause.

216. *See, e.g., In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335 (7th Cir.) *cert. denied*, 444 U.S. 884 (1979), which dealt with a contention that United States Magistrates lacked authority to issue post-*Barlow's* OSHA search warrants. Refuting a contention that United States Magistrates lacked authority to issue post-*Barlow's* OSHA search warrants, the Seventh Circuit asserted:

Under the Magistrates Act of 1976, magistrates are empowered not only to exercise "all powers and duties conferred or imposed upon United States commissioners by law," 28 U.S.C. § 636(a)(1), but to perform "such additional duties as are not inconsistent with the Constitution and laws of the United States," 28 U.S.C. § 636(b)(3). The legislative history of this latter provision indicates that Congress intended district courts to be free to experiment in the assignment of duties to magistrates: "If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudi-

The role of the magistrate in issuing an administrative warrant was delineated by the United States Supreme Court in *Barlow's*.<sup>217</sup> Of major concern to the *Barlow's* Court was the elimination of warrantless searches: "A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution. . . ." <sup>218</sup> According to the *Barlow's* Court, it is this neutral officer, i.e., the magistrate, who, in most cases, will determine:

1. the statutory authority for the inspection;
2. the existence of an administrative plan;
3. the neutral criteria within the plan;
4. the scope and timing of the search; and
5. the proper objects of the search.<sup>219</sup>

These functions are, according to the *Barlow's* opinion, the underpinnings of the *Camara* and *See* decisions, and explain how the warrant clause applies to regulatory inspections.<sup>220</sup>

How magistrates perform their functions is the cynosure of the efficacy of the warrant clause. The question then becomes: Upon what does the magistrate rely in determining that probable cause for an administrative search exists?

In the case of employee complaints of possible violations, the

catory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal Courts."

*Id.* at 1340 (citations and footnotes omitted).

217. *Barlow's*, 436 U.S. at 323.

218. *Id.*

219. *See id.*

220. *See id.* at 323-24; *see also* Burkart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313, 1319 (7th Cir. 1980) (magistrate determines reasonableness of inspection); Weyerhaeuser Co. v. Marshall, 592 F.2d 373, 378 (7th Cir. 1979) (upholding importance of magistrate's probable cause function); Marshall v. W & W Steel Co., 604 F.2d 1322, 1326 (10th Cir. 1979) (upholding magistrate's findings of probable cause); Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283, 1287 (9th Cir. 1979) (magistrate issued warrant pursuant to statutory standards); Marshall v. North American Car Co., 476 F. Supp. 698, 703 (M.D. Pa. 1979) (scope of search, as determined by magistrate, was overly broad); Marshall v. Horn Seed Co., 7 O.S.H. Cas. (BNA) 1182, 1184 (W.D. Okla. 1979) (warrant not supported by probable cause); *In re* Establishment Inspection of Chicago Magnet Wire Corp., 5 O.S.H. Cas. (BNA) 2024, 2025 (N.D. Ill. 1977) (scope of warrant, as determined by magistrate, was proper); *cf. In re* Carlson, 580 F.2d 1365, 1382 (10th Cir. 1978) (U.S. district court had jurisdiction to entertain IRS application for administrative search warrants); United States v. Consolidation Coal Co., 560 F.2d 214, 218 (6th Cir. 1977) (warrants for inspection as part of compliance inquiry to be judged by administrative standards despite criminal suspicion underlying them), *vacated*, Consolidation Coal Co. v. United States, 436 U.S. 942 (1978), *reinstated after remand*, 579 F.2d 1011, (6th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979).

application for the warrant will be insufficient to establish probable cause if it relies solely on conclusory statements that such complaints have been received.<sup>221</sup> One function of the application is to inform the magistrate of the substance of the employee complaint in order that the magistrate may exercise independent judgment as to the justification for the inspection, thus eliminating the mere rubber stamping of an administrative decision.<sup>222</sup> This requirement, however, does not impose undue burdens on the compliance officer since an exacting standard of specificity and clarity has not been promulgated by the courts. In *Burkart Randall Division of Textron, Inc. v. Marshall*,<sup>223</sup> for example, the application for the inspection warrants submitted to the magistrate described the employee complaints as follows:

The complaints alleged, in pertinent part, that certain unsafe and unhealthful work conditions exist at the described workplace to which employees are exposed, to wit: That various hygiene hazards existed in the press department; that the rest rooms had sewer gases leaking from broken plumbing and this compounded by very poor ventilation; that the eating areas were unsanitary; that there were inadequate fire escapes near the production line.

The complaints alleged that these conditions threatened serious physical harm to employee, and an inspection by OSHA was requested. The complaints indicated that the existence of these dangerous conditions may be in violation of the Act and/or the regulations issued pursuant thereto.<sup>224</sup>

The Seventh Circuit found that, although the application was "far from a model of specificity and clarity," it contained sufficient in-

---

221. *Burkart Randall Div. of Textron v. Marshall*, 625 F.2d 1313, 1319 (7th Cir. 1980). In *Burkart*, the Seventh Circuit upheld the validity of an OSHA inspection warrant based on informal employee complaints. *See id.* at 1322. The application for the warrant contained more than a conclusory statement of the complaints' receipt, however. *See id.* at 1319. It described the specific unhealthful conditions complained of. *Id.* Further, the application stated that, from this information, OSHA had determined that "reasonable grounds existed to believe that violations of [OSHA] would be found" on the premises to be inspected. *Id.*

222. *Id.* at 1319; *see also* *Weyerhaeuser Co. v. Marshall*, 592 F.2d 373, 378 (7th Cir. 1979) (purpose of warrant is to have probable cause determination made by detached judicial officer).

223. 625 F.2d 1313 (7th Cir. 1980).

224. *Id.* at 1315.



formation to establish the requisite degree of probable cause.<sup>225</sup>

The courts have also maintained that the allegations contained in the employee complaints need not be supported in the application.<sup>226</sup> The significance attached to the compliance officer's oath is of far greater import.<sup>227</sup> In *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*,<sup>228</sup> for example, the court rejected an employer's attempt to challenge a warrant application by obtaining discovery information regarding the employee complaint:

[T]he warrant application, which referred to an "employee complaint," incorporated the sworn affidavit of the OSHA compliance officer. The district judge could correctly assume, therefore, that the information contained therein was true and correct. Because this information was adequate on its face to establish probable cause there was no need to pursue further discovery. . . .<sup>229</sup>

Sustaining the significance to be attributed to the oath of the compliance officer, the Seventh Circuit in *Gilbert & Bennett* held that the warrant application need not demonstrate the reliability of the informant. Although this would be an appropriate standard in the context of criminal probable cause, it is not necessary under *administrative* probable cause: "*Camara and Barlow's* do not require that the warrant application set forth the underlying circumstances demonstrating the basis for the conclusion reached

---

225. *Id.* at 1319. The applicable standard was the administrative probable cause standard which requires that the inspection be reasonable. *Id.* "[T]he public interest in the inspection must outweigh the invasion of privacy which the inspection entails." *Id.*

For a discussion of *Burkart's* expansion of the authority of administrative searches and consequent sacrifice of fourth amendment interests, see Comment, *Administrative Inspections and OSHA: Abridging Fourth Amendment Safeguards?*; *Burkart Randall Division of Textron, Inc. v. Marshall*, 15 GA. L. REV. 233 (1980).

226. See *Burkart*, 625 F.2d at 1319.

227. See *id.* The court stated that, in making an administrative probable cause determination, "the oath of the compliance officer is entitled to greater weight than plaintiff seems willing to accord it." *Id.* Because a compliance officer submitted a sworn warrant application in *Burkart*, it was unnecessary for the complaining employees to swear to the truth of their statements as well. *Id.* at 1320.

228. 589 F.2d 1335 (7th Cir. 1979).

229. *Id.* at 1340. In appealing an order denying its motion to quash an OSHA inspection warrant, *Gilbert & Bennett* argued that it should have had an opportunity to conduct discovery regarding the employee complaint on which the warrant was based. *Id.* *Gilbert & Bennett* further argued that, had it obtained discovery regarding the complaint, "it would have been able to establish grounds for challenging the application." *Id.*

by the complainant, or that the underlying circumstances demonstrate a reason to believe that the complainant is a credible person."<sup>230</sup>

In the case of an inspection which stems from an administrative or regulatory scheme, the information supplied to the magistrate must be sufficient to assure that the *Camara* and *Barlow's* "reasonable legislative or administrative standard for conducting an . . . inspection are satisfied with respect to a particular [establishment]."<sup>231</sup>

A mere assertion that a given inspection is part of a plan or scheme is not sufficient to satisfy the *Barlow's* criteria.<sup>232</sup> For example, in *Gilbert & Bennett*, affidavits seeking the warrant stated in part: "The desired inspection is part of an inspection and investigation program designed to assure compliance with the Act in the foundry industry, and is authorized by section 8(a) of the Act."<sup>233</sup> The Seventh Circuit found that the above paragraph's assertion did not indicate that the program was based on neutral criteria.<sup>234</sup> The court held: "Without a more definite statement of the neutral criteria being utilized by the Secretary in selecting Chromalloy for inspection, it was impossible for the magistrate to form a conclusion of reasonableness."<sup>235</sup>

---

230. *Id.* at 1339. The court stated that: "[T]he criminal law standard of probable cause is not required." *Id.* The Seventh Circuit thus ensured that the reliability of informant-supplied information under administrative probable cause would not be judged by the same standards as those existing in the bedeviling and analogous area of criminal probable cause. See *Illinois v. Gates*, 462 U.S. at 213 (totality of the circumstances standard), *Spinelli v. United States*, 393 U.S. 410 (1964) (informant's tip must be sufficiently detailed); *Aguilar v. Texas*, 378 U.S. 108 (1964) (warrant application must reveal underlying circumstances showing informant's credibility and basis of informant's conclusions); *Draper v. United States*, 358 U.S. 307 (1959) (information from reliable informant, some of which is verified, can establish probable cause).

231. *Gilbert & Bennett*, 589 F.2d at 1341 (citing *Barlow's*, 436 U.S. at 320). This issue arose in the second section of the *Gilbert & Bennett* opinion, which addressed Chromalloy American Corporation's appeal of an order holding it in contempt for refusing to comply with an OSHA inspection warrant. *Id.* For a discussion of the court's probable cause findings, see *infra* notes 233-43 and accompanying text.

232. 589 F.2d at 1341. For a discussion of the relevant assertion in *Gilbert & Bennett*, see *infra* notes 233-35 and accompanying text.

233. 589 F.2d at 1341. The warrant was issued after a finding of probable cause based on the purpose of the Act that is to afford safe and healthful conditions in the workplace, and on the inherently dangerous nature of Chromalloy's foundry business. *Id.* at 337.

234. *Id.* at 1341.

235. *Id.* The court compared paragraph 2 of the warrant application in *Gilbert & Bennett* to the application criticized by the Supreme Court in *Barlow's*. *Id.* In *Barlow's*, the Court noted several deficiencies in the warrant application such as 1) failure to describe the inspection program under which the desired inspec-

However, this insufficiency was eliminated by paragraph 9 of the affidavits:

Proper entry pursuant to section 8(a)(1) of the Act for the aforesaid purposes was attempted by duly authorized compliance officers of the Occupational Safety and Health Administration, United States Department of Labor, on the 19th day of April, 1977, in the course of a National-Local plan designed to achieve significant reduction in the high incidence of occupational injuries and illnesses found in the metal-working and foundry industry, but the right of entry was denied by the employer, or an agent of the employer.<sup>236</sup>

Rejecting the foundry's contentions that the paragraph was vague, conclusory surplusage, the court held that a "massive evidentiary showing" of particularized cause by complete sets of updated industry statistics supported by validation and rationale was not required in order for the magistrate properly to issue the warrant.<sup>237</sup> Such evidence is required by 29 U.S.C. § 655 when OSHA standards are being established or judicially reviewed.<sup>238</sup>

---

tion fell and 2) facts showing why the desired inspection was within the program. *Id.* (quoting *Barlow's*, 436 U.S. at 323, n.20).

236. *Id.* at 1341 (emphasis in original).

237. *Id.* at 1342. Chromalloy's contention was granted on the premise that paragraph 9 did not prove the hazardous nature of its foundry or the foundry industry generally. *Id.* Chromalloy also asserted that paragraph 9 failed to allege a causal connection between the incidence of injuries and OSHA violations. *Id.* Finally, it argued that the court would create a *per se* exception to the fourth amendment by finding probable cause based on the subject affidavit, in effect, the court would be exposing all foundries to comprehensive OSHA inspections. *Id.*

238. *Id.* at 1342. The initial procedure to be followed when the Secretary determines a need for an occupational safety or health standard is set forth in 29 U.S.C. § 655(b)(1) (1982):

(b) Procedure for promulgation, modification, or revocation of standards

The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own

But, the magistrate issuing inspection warrants is entitled to assume—as was Congress in passing the Act based on such evidence—a direct connection between injuries and violative hazards.<sup>239</sup>

Upholding the validity of the warrant, the Court stressed the significance of the fact that the warrant was issued pursuant to an administrative plan.<sup>240</sup>

The plant in question was selected for inspection not as the result of the “unbridled discretion” of a field officer, but rather pursuant to a “National-Local plan” designed by agency officials for the purpose of reducing injuries and illness found in a specific industry—the metal-working and foundry industry.<sup>241</sup> Second, the magistrate may rely upon the recognized expertise of the Secretary in both gathering statistics and in forming educated opinions as to the incidence of injuries in a particular industry.<sup>242</sup> In light of this background, a denial of administrative inspections “would eviscerate the Act and its purposes.”<sup>243</sup>

In summary, what needs to be demonstrated to the magistrate when an agency inspection request based upon a regulatory scheme is denied by an employer is:

1. that the inspection was requested pursuant to an administrative or regulatory scheme;<sup>244</sup>

---

or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments.

*Id.*

In addition to the initial factual showing required under section 655(b)(1), the Secretary must publish the reasons for any action he takes:

(e) Statement of reasons for Secretary's determinations, publication in Federal Register

Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this chapter, he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

29 U.S.C. § 655(e) (1982).

When a standard promulgated by the Secretary is challenged in the courts, the Secretary must prove that the standard was based on specific factual findings rather than bare assumptions. *See Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980).

239. 589 F.2d at 1343.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *See id.* at 1341.

2. that it is reasonable for the magistrate to assume neutral criteria in the formulation of such a plan;<sup>245</sup>
3. that the denial of inspections would frustrate the purpose of the Act;<sup>246</sup> and
4. that the inspection scheme was reasonable with respect to the particular business establishment in question.<sup>247</sup>

### C. Breadth of Inspection

The requirement of a warrant in order to conduct a nonconsensual search in and of itself provided little guidance in determining the scope of such inspections. Absent judicial criteria for defining the scope, only the Constitution's own limitation serves as a standard: the search must be reasonable.<sup>248</sup> In making the determination that an OSHA inspection is reasonable, the courts must balance the employer's privacy interests against the statutory interest of providing employees with safe workplaces.<sup>249</sup> Some courts have permitted general "wall-to-wall" inspections while others have limited the inspection to areas specified in the complaint.<sup>250</sup>

An example of the limited approach appears in *Marshall v. Trinity Industries*.<sup>251</sup> Acting on complaints from two employees who alleged violations of safety and health standards in several working areas, OSHA obtained a wall-to-wall inspection warrant.<sup>252</sup> The employer challenged the validity of such a broad in-

245. *See id.*

246. *See id.* at 1343.

247. *See id.* at 1341.

248. The fourth amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV (emphasis added).

249. *See Note, Permissible Scope of OSHA Inspection Warrants*, 66 CORNELL L. REV. 1254, 1265 (1981). This note suggests that courts require a reasonable relationship between the scope of the warrant and the violations for which probable cause is shown. *Id.* at 1265-66. Further, it asserts that by adopting this approach, courts would "reconcile" the interest in enforcing the Act with the commands of the Constitution. *Id.* at 1269.

250. *See, e.g., Burkart*, 625 F.2d at 1313 (wall-to-wall warrant based on two employee complaints alleging isolated violations upheld); *Marshall v. North American Car Co.*, 476 F. Supp. 698 (M.D. Pa. 1979) (wall-to-wall warrant based on employee complaint alleging several violations in three areas of large plant quashed); *Marshall v. Trinity*, 7 O.S.H. Cas. (BNA) 1851 (W.D. Okla. 1979) (inspections limited to specific area cited in complaint). For a discussion of these cases, see *infra* notes 251-80 and accompanying text.

251. 7 O.S.H. Cas. (BNA) 1851 (W.D. Okla. 1979).

252. *See id.* at 1852-53. The employee complaints alleged insufficient heat, lack of running water when temperatures fall below 32 degrees F, lack of safety

spection.<sup>253</sup> In his brief, the Secretary argued that it was reasonable to believe that violations existed in addition to those complained of, and therefore, “the warrant must be broad enough to encompass all possible areas of violations.”<sup>254</sup>

The court noted that the following provision of the Act itself limits the breadth of the warrant based upon employee complaints:

[I]f upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a *special* inspection in accordance with the provisions of this section as soon as practicable, *to determine if such violation or danger exists.*<sup>255</sup>

The court construed this section narrowly and distinguished it from section 657(a) which permits a “general” inspection pursuant to an administrative plan containing specific neutral criteria:

The warrant must, therefore, be properly limited to an inspection of those specific areas of which the employee complained. This is all that is necessary “to determine if such violation or danger exists.” By its words, the Act denominates this as a “special” inspection and it

---

aids or ladders to make the repair of frozen and ruptured pipes less hazardous, unsafe practices involving overhead cranes and tripping hazards. *Id.*

The warrant issued pursuant to these complaints provided in pertinent part:

YOU ARE HEREBY COMMANDED to enter the following described premises within a period of ten (10) days and during regular working hours and at other reasonable times, for the purpose of inspecting and investigating, within reasonable limits and in a reasonable manner, all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, to question privately any employer, owner, operator, agent, or employee, to review records required by Title 29, United States Code, Section 657(c) and regulations promulgated pursuant thereto, and to review other records which are directly related to the purpose of the inspection, all as authorized by the provisions of 29 U.S.C. Section 657 and regulations promulgated by the Secretary of Labor under authority granted in 29 U.S.C. Section 651, *et. seq.*

*Id.* at 1853.

253. *Id.* The compliance officers who attempted to execute the warrant were denied admission to Trinity Industries’ plant. *Id.*

254. *Id.* at 1854. The Secretary based this belief in the existence of additional violations on his reasonable belief that certain health and safety violations were occurring. *Id.*

255. *Id.* (quoting 29 U.S.C. § 657(f)(1) (1982)) (emphasis added by court).

should be so limited.<sup>256</sup>

In direct conflict with *Trinity* is *Burkart Randall Division of Textron, Inc. v. Marshall*.<sup>257</sup> The Seventh Circuit's interpretation of the permissible scope of an inspection pursuant to a warrant revolved around complaints from two employees which alleged unsafe and unhealthful conditions in several isolated areas of Burkart's facility.<sup>258</sup> The warrant extended the inspection to the entire Burkart facility—not just to the areas identified in the complaints.<sup>259</sup> Although the court found "substantial judicial support" for Burkart's fourth amendment argument,<sup>260</sup> it evaluated the scope of the warrant by focusing on: 1) the policies supporting inspection of

256. *Id.* The *Trinity* warrant essentially tracked the language of § 657(a), which provides as follows:

(a) Authority of Secretary to enter, inspect, and investigate places of employment; time and manner

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

29 U.S.C. § 657(a) (1982). For a direct quotation of the relevant portion of the *Trinity* warrant, see *supra* note 252.

257. 625 F.2d at 1313. For a discussion of *Burkart's* treatment of the administrative probable cause issue, see *supra* notes 221-25 and accompanying text.

258. 625 F.2d at 1315. The conditions complained of included hygiene hazards in the press department, leaking restroom sewer gases, poor ventilation, unsanitary eating areas, and inadequate fire escapes. *Id.* at 1315 n.1.

259. *Id.* at 1322.

260. *Id.* at 1323. Burkart argued that the wall-to-wall warrant allows OSHA to search areas of the plant "for which no probable cause has been shown," thus violating fourth amendment principles. *Id.* at 1322-23. The fourth amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

Other cases have advanced the theory that "the scope of an inspection must not exceed the scope of the evidence used to establish probable cause to conduct the inspection." 625 F.2d at 1323. See, e.g., *Marshall v. North American Car Co.*, 476 F. Supp. 698, 706-07 (M.D. Pa. 1979) (court must compare scope of warrant to number and gravity of employee complaints), *Trinity*, 7 O.S.H. Cas. (BNA) at 1954 (scope of warrant must be limited to areas about which employee complained); *In re Inspection of Central Mine Equip. Co.*, 7 O.S.H. Cas. (BNA) 1185, 1189-90 (E.D. Mo.) (scope of warrant must be reasonably related to sub-

worksites;<sup>261</sup> 2) the remedial purposes of the Act;<sup>262</sup> 3) the comparative efficacy of “special” versus “general” inspections;<sup>263</sup> 4) Burkart’s privacy interests;<sup>264</sup> and 5) statutory construction.<sup>265</sup>

The court concluded, as have a number of district courts, that “once probable cause is established on the basis of an employee complaint, OSHA may inspect the entire premises of the subject employer.”<sup>266</sup> Adopting the reasoning of the lower courts, the Seventh Circuit asserted that an inspection limited to the “substance of an employee complaint” will not further the remedial purposes of the Act since “sanitized” areas can be presented to inspectors while violations elsewhere may be concealed.<sup>267</sup> The *Burkart* court went on to state that “fishing expeditions” are already safeguarded against by requiring a warrant for nonconsensual searches, and moreover, one general inspection would be less disruptive of an employer’s operation than a series of limited inspections.<sup>268</sup>

The court acknowledged that, since inspections based on an administrative plan are not susceptible to scope limitations, a

---

ject matter of facts on which government interest in search is based), *vacated on other grounds*, 7 O.S.H. Cas. (BNA) 1907 (8th Cir. 1979).

261. See 625 F.2d at 1324.

262. *Id.* at 1325. The court asserted that inspections are designed to implement OSHA’s broad remedial purpose ensuring employee safety. *Id.*

263. *Id.* at 1324. The court stated that general inspections might be preferable to several limited inspections in two respects. *Id.* First, general inspections are more administratively efficient. *Id.* Second, they minimize the disruptions of employers’ operations. *Id.*

264. *Id.* at 1325. According to the court, employers’ privacy interests are adequately protected by the requirement that warrants be secured prior to non-consensual inspections. *Id.*

265. *Id.* at 1326. Burkart argued that 29 U.S.C. § 657(f)(1) allows any “special” inspections in response to employee complaints. *Id.* This argument was substantially the same as that used by the court in *Trinity*. See 7 O.S.H. Cas. (BNA) at 1854. For a discussion of the statutory authority for special versus general inspections, see *supra* notes 256-57 and accompanying text.

266. 625 F.2d at 1323; see, e.g., *In re Establishment Inspection of Marsan Co.*, 7 O.S.H. Cas. (BNA) 1557, 1559 (N.D. Ind. 1979) (scope of warrant must be as broad as subject matter regulated by OSHA statute); *Drave Corp. v. Marshall*, 5 O.S.H. Cas. (BNA) 2057, 2060 (W.D. Pa. 1977) (general inspections permitted by Act), *aff’d mem.*, 578 F.2d 1373 (3d Cir. 1978); *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 5 O.S.H. Cas. (BNA) 1375, 1375-76 (N.D. Ill. 1977) (confining inspection to substance of employee complaint would unreasonably restrict Act’s goals), *aff’d*, 589 F.2d 1335 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979).

267. 625 F.2d at 1324, 1325.

268. *Id.* at 1324. The court reasoned that the warrant requirement guards against “fishing expeditions” by mandating both the intervention of a neutral magistrate and the showing of probable cause. *Id.* at 1325.



general inspection is permissible in that context.<sup>269</sup> It would be anomalous to allow a general inspection in a situation where no specific reason exists to suspect violations of the Act, "yet hold that only a limited inspection may be conducted where there is particularized probable cause to believe that violations will be found in the specific facility to be inspected."<sup>270</sup>

The court concluded that where probable cause to conduct an OSHA inspection is established on the basis of employee complaints, the strong federal interest in safety and health will be served best by an inspection of the entire workplace.<sup>271</sup>

Is there a middle ground between *Burkart* and *Trinity*? At least one commentator has suggested that a better approach would be to have the courts require that "the scope of the warrant be reasonably related to the violations for which probable cause has been shown."<sup>272</sup> Such an approach would allow the magistrate to define the scope of the warrant pursuant to a holistic review of the circumstances surrounding the perceived violations.<sup>273</sup>

Factors considered by the magistrate would include: 1) existence of other violations, 2) possibility that a violation in one area might lead to a violation in another, 3) date of last inspection, and 4) nature of the industry and hazards that it poses.<sup>274</sup> This approach would be consistent with the reasonableness requirement of the fourth amendment and would also allow the magistrate a needed degree of flexibility.<sup>275</sup>

The Court in *Marshall v. North American Car Co.*,<sup>276</sup> not only

269. *Id.* at 1324. In *Gilbert & Bennett*, the Seventh Circuit held that where an inspection is based on an administrative plan, "the scope of an OSHA inspection warrant must be as broad as the subject matter regulated by the statute and restricted only by the limitations imposed by Congress and the reasonableness requirement of the Fourth Amendment." 589 F.2d at 1343 (citations omitted).

270. 625 F.2d at 1324. The court implied that "probable cause" exists where warrants are issued based on employee complaints. *See id.*

271. *Id.* at 1335-36. The court acknowledged the possibility, however, that extraordinary circumstances may render such an inspection unreasonably broad. *Id.* at 1326.

272. *See Note, supra* note 249, at 1265-66. It is suggested that this approach would both prevent OSHA from conducting general fishing expeditions and would "deny employees the chance to harass employers by triggering a plant-wide search for an isolated complaint." *Id.*

273. *See id.* at 1266-67.

274. *Id.* at 1267-68.

275. *Id.* at 1268.

276. 476 F. Supp. 698 (M.D. Pa. 1979), *aff'd*, 626 F.2d 320 (3d Cir. 1980).

acknowledged the possibility of using a “circumstances” test—it explicitly embraced such a balanced approach:

[T]he Court must consider the scope of the warrant as compared to the number and gravity of employee complaints and whether or not it would be possible to limit the warrant so as to be no more intrusive than necessary upon the employer’s privacy while accomplishing the remedial purpose of the . . . Act.<sup>277</sup>

Applying this test to the facts of the case, the district court quashed a wall-to-wall warrant based on one employee complaint alleging nine possible violations.<sup>278</sup>

The Third Circuit, in affirming *North American*, adopted a “circumstances” test: “[T]he scope of the inspection must bear an appropriate relationship to the violations alleged in the complaint.”<sup>279</sup> The Third Circuit indicated, however, that a warrant need not be limited to those areas specifically complained of.<sup>280</sup>

#### VII. *DONOVAN V. DEWEY*

Following *Camara* and *See*, we may analyze fourth amendment searches as being either criminal or administrative.<sup>281</sup> Within the administrative search concept, we may further subdivide such searches into those which require administrative search warrants and those which do not.<sup>282</sup> One significant aspect of the *Barlow*’s decision was that it helped to clarify this latter distinction while

---

277. *Id.* at 706.

278. *Id.* at 707. The complaint specifically identified those areas of the plant in which violations allegedly occurred. *Id.* The warrant application, however, referred neither to the size of the plant nor to the size of the areas in which violations were occurring. *Id.* Without these facts, the magistrate was unable to compare the extent of the intrusion under a general warrant with the intrusion that would have occurred under a warrant limited to the areas complained of. *Id.* Further, there was no indication in the application that the particular violations alleged were likely to imply the existence of other violations elsewhere in the plant. *Id.*

279. 626 F.2d at 324. The court reasoned that since the Secretary failed to allege any relation between the scope of the warrant and the alleged violations, the exact relationship that must exist between these factors did not have to be determined. *Id.* The Third Circuit intimated, however, that the relationship need not be strict; the court stated that some employee complaints may justify a wall-to-wall inspection. *Id.*

280. *Id.*

281. For a discussion of *Camara* and *See* and the differences between the criminal and administrative probable cause standards, see *supra* notes 28-40 and accompanying text.

282. For a discussion of the various “exceptions” to the administrative warrant requirement, see *supra* notes 44-121 and accompanying text.

bringing into the administrative warrant requirement "set" the large body of OSHA inspections.<sup>283</sup>

The major line of cases delineating the non-warrant requirement "set" was established by *Colonnade* and *Biswell*.<sup>284</sup> In a 1981 case as significant as *Barlow's*, the United States Supreme Court further clarified this administrative search warrant duality in *Donovan v. Dewey*,<sup>285</sup> which allowed warrantless searches pursuant to the enforcement of the Federal Mine Safety and Health Act of 1977 ("the Act").<sup>286</sup> *Donovan v. Dewey* arose from the refusal of a quarry president to submit to a search absent a warrant.<sup>287</sup>

The Act, which authorizes warrantless inspections in certain situations, provides in pertinent part:

Authorized representatives of the Secretary or the Secretary of Health and Human Services shall make *frequent inspections and investigations* in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or deci-

283. For a discussion of *Barlow's*, see *supra* notes 137-86 and accompanying text.

284. For a discussion of *Colonnade*, see *supra* notes 47-58 and accompanying text. For a discussion of *Biswell*, see *supra* notes 59-72 and accompanying text.

285. 452 U.S. at 606. In *Dewey*, a federal mine inspector attempted to inspect the quarries owned by Waukesha Lime and Stone Co. but was prevented from completing the inspection by Waukesha's president, Douglas Dewey. *Id.* at 597. The purpose of the inspection was to discover whether prior violations at the quarry had been corrected. *Id.* Dewey terminated the inspection because it was being conducted without a warrant. *Id.* The inspector issued a citation, and the Secretary of Labor brought an action in a Wisconsin District Court seeking to enjoin Dewey and his company from refusing to permit warrantless searches of their quarry. *Id.*

The district court granted summary judgment in favor of the company. *Id.* It based its decision on the grant that the warrantless searches of stone quarries authorized by § 103(a) of the Federal Mine Safety and Health Act of 1977 violated the fourth amendment. *Id.* The Secretary appealed directly to the Supreme Court.

286. For the text of section 103(a) of the Federal Mine Safety and Health Act of 1977, see *infra* text accompanying note 288.

287. 452 U.S. at 597. For a discussion of the facts of *Dewey*, see *supra* note 285.

sion issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, *no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health and Human Services may give advance notice of inspections.* In carrying out the requirements of clauses (3) and (4) of this subsection, *the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For the purpose of making any inspection or investigation under this chapter, the Secretary, or the Secretary of Health and Human Services, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary or the Secretary of Health and Human Services, shall have a right to entry to, upon, or through any coal or other mine.*<sup>288</sup>

If a mine operator refuses to allow a warrantless inspection, the Secretary of Labor is authorized to institute a civil action to obtain injunctive or other appropriate relief.<sup>289</sup>

Initially, the Supreme Court in *Dewey* noted that the fourth amendment protects commercial property owners from unreasonable searches.<sup>290</sup> The Court asserted that inspections not au-

288. 30 U.S.C. § 813(a) (1982) (emphasis added).

289. Section 818(a)(1)(c) provides:  
§ 818 Injunctions

(a) Civil action by Secretary

(1) The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent—

....

(C) refused to admit [authorized representatives of the Secretary of Labor or the Secretary of Health and Human Services] to the coal or other mine.

30 U.S.C. § 818(a)(1)(C) (1982).

290. 452 U.S. at 599. The Court noted that commercial property owners are not free from all inspections. *Id.* Rather, an inspection program may be a necessary aspect of federal regulation of industry under the commerce power.

thorized by law or "unnecessary for the furtherance of federal interests" may be unreasonable.<sup>291</sup> Further, the Court suggested that warrantless inspections of commercial property may be prohibited under the fourth amendment if they occur so occasionally or unpredictably that the owner has no real expectation that the property will be inspected.<sup>292</sup>

By contrast, the Court acknowledged that warrantless inspections may be permissible in certain situations.<sup>293</sup> The Court advanced a two-prong test for identifying those situations.<sup>294</sup> Warrantless inspections may be constitutional where: 1) Congress determines that such searches are necessary to further a regulatory scheme; and 2) The regulatory presence is sufficiently comprehensive so that owners are aware that their property will truly be subject to inspections.<sup>295</sup> The *Dewey* Court, relying on

---

*Id.* Thus, the privacy interest a commercial property owner enjoys differs significantly from an individual's interest in the privacy of his home. *Id.* at 598-99.

291. *Id.* at 599, (citing *Colonnade*, 397 U.S. at 77). For a discussion of *Colonnade*, see *supra* notes 47-58 and accompanying text.

292. 452 U.S. at 599. The Court declared: "[W]arrantless inspections of commercial property may be constitutionally objectionable if their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." *Id.* (citing *Barlow's*, 436 U.S. at 323).

293. *Id.* at 599-600. The Court cited *Colonnade* and *Biswell* for the proposition that warrantless inspections may not violate the fourth amendment in pervasively regulated industries. *Id.* In explaining the reasoning behind this proposition, the court quoted its opinion in *Biswell*: "'[W]hen a dealer chooses to engage in this pervasively regulated business . . . [the sale of guns] he does so with the knowledge that his records, firearms, and ammunition will be subject to effective inspection. . . .'" *Id.* at 600 (quoting *Biswell*, 406 U.S. at 316).

294. *Id.* The Court asserted:

[A] warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.

*Id.*

295. *Id.* The *Dewey* two-prong test has been both applauded and criticized by the commentators. It has been praised as a workable synthesis of prior case law regarding the constitutionality of warrantless administrative inspection schemes. See Note, *Constitutional Law—Warrantless Administrative Searches and the Two-Step Test of Donovan v. Dewey*, 56 TUL. L. REV. 1467 (1982). It has also been criticized as failing to clarify those characteristics that a statute authorizing administrative inspections must have in order to be constitutional. See *Supreme Court Review, Fourth Amendment—Warrantless Administrative Inspections of Commercial Property*, 72 J. CRIM. L. & CRIMINOLOGY 1222 (1982). This criticism rested on two basic propositions. *Id.* at 1244-45. First, the commentator asserted that the *Dewey* Court reaffirmed prior decisions upholding warrantless inspection statutes that failed to satisfy the two-prong test (i.e., *Colonnade* and *Biswell*). *Id.* Second, the commentator argued that, although OSHA (the statute at issue in *Barlow's*)

*Barlow's*, reiterated that the scope and frequency of the inspections are to be tailored to meet the particular concerns posed by the businesses falling under the regulation.<sup>296</sup>

The Court concluded in *Dewey* that the Mine Act's inspection program "provides a constitutionally adequate substitute for a warrant."<sup>297</sup> It establishes a predictable regulatory presence since 1) *all* mines are required to be inspected; 2) the frequency of the inspections is clearly defined; and 3) the standards for compliance are set forth in the Act.<sup>298</sup> Further, the Court found that the Act provides a mechanism to accommodate special privacy concerns by prohibiting forcible entries and requiring the Secretary to file a civil suit when consent is refused.<sup>299</sup>

Finally, the *Dewey* Court addressed the *Colonnade/Biswell* exception standard.<sup>300</sup> In answering the argument that there was

---

was very similar to FMSHA (the statute at issue in *Dewey*), the *Barlow's* Court invalidated the OSHA provisions, while the *Dewey* Court upheld the FMSHA provision. *Id.* at 1244. The *Dewey* Court failed to adequately explain this inconsistency. *Id.*

296. See 452 U.S. at 600-01. The Court distinguished the OSHA provisions at issue in *Barlow's* from the FMSHA provisions at issue in *Dewey*. *Id.* at 601. The OSHA provisions authorized blanket inspections without considering the particular health and safety concerns of the various regulated businesses. *Id.* Further, the OSHA provisions gave inspectors no guidance as to when their authority to search could be exercised or how establishments were to be selected for inspection. *Id.* The *Dewey* Court noted that the *Barlow's* decision was expressly limited to the OSHA provisions. *Id.* It also noted the *Barlow's* Court's assertion that "some statutes 'apply only to a single industry, where regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply.'" *Id.* at 601-02 (quoting *Barlow's* 436, U.S. at 321). For a discussion of *Barlow's*, see *supra* notes 137-86 and accompanying text. For a discussion of the court's arguments for distinguishing the *Dewey* provision, see *infra* notes 297-99 and accompanying text.

297. 452 U.S. at 603. The Court asserted that the Act applies to a notoriously hazardous industrial activity and is specifically tailored to deal with the concerns inherent to that activity. *Id.*

298. *Id.* at 604. For the text of 30 U.S.C. § 813(a), wherein these elements of a predictable regulatory presence appear, see *supra* text accompanying note 288.

299. 452 U.S. at 604. For the relevant portion of the Act, see *supra* note 289 and accompanying text. The Fourth Circuit interpreted 30 U.S.C. § 818(a) as prohibiting forcible entry into mines by requiring the Secretary to seek an injunction when entry is refused. *Marshall v. Sink*, 614 F.2d 37, 39 (4th Cir. 1980).

The *Dewey* Court asserted that the injunction procedure "provides an adequate form for the mine owner to show that a specific search is outside the federal regulatory authority or to seek from the district court an order accommodating any unusual privacy interests that the mine owner might have." 452 U.S. at 604-05 (citations omitted).

300. 452 U.S. at 605-06. For a discussion of *Colonnade*, see *supra* notes 47-58 and accompanying text. For a discussion of *Biswell*, see *supra* notes 59-72 and accompanying text.

no long regulatory history involved in the mining industry, the Court restated the *Colonnade/Biswell* test, declaring that "it is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment."<sup>301</sup> The duration of a regulatory scheme is but one important factor—it is not conclusive.<sup>302</sup>

The *Dewey* Court noted that in upholding a set of warrantless inspection provisions in *Colonnade*, the Supreme Court referred to the long history of federal regulation of the liquor industry.<sup>303</sup> The Court in *Biswell*, on the other hand, concluded that warrantless inspection provisions of the Gun Control Act were constitutional despite the fact that "federal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry."<sup>304</sup> The *Dewey* court cited *Biswell* as precedent, implicitly comparing the history of federal firearms traffic regulation to the history of surface quarries regulation.<sup>305</sup> Both were vital and pervasive, although not lengthy.<sup>306</sup>

*Dewey* reaffirmed *Colonnade* and *Biswell*, cases that upheld statutes authorizing warrantless inspections but lacking the characteristics of the Mine Act.<sup>307</sup> *Dewey*, therefore, left the following questions open: 1) Would future cases require that statutes authorizing warrantless inspections possess FMSHA characteristics in order to be constitutional?; and 2) Would Justice Stewart's fear that, after *Dewey*, Congress "can define any industry as dangerous, regulate it substantially, and provide for warrantless inspections of its members" becomes a reality?<sup>308</sup>

301. 452 U.S. at 606. The *Dewey* Court indeed cited *Biswell* to illustrate this premise. *Id.* In *Biswell*, the history of firearms traffic regulation was not lengthy but was vital and pervasive. *Id.*

302. *Id.* The Court reasoned that "absurd results" would occur if the duration of a regulatory scheme were conclusive. *Id.* For example, fledgling industries such as the nuclear power industry could never be subject to warrantless searches "simply because of the recent vintage of regulation." *Id.*

303. *Id.* at 605-06.

304. *Id.* at 606 (quoting *Biswell*, 406 U.S. at 315).

305. *See* 452 U.S. at 606.

306. *See id.* Stressing the importance of regulation of interstate firearms traffic, the *Biswell* Court declared that "close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders." 406 U.S. at 315.

307. *See* 452 U.S. at 605-06. For a discussion of this apparent inconsistency, see *Supreme Court Review*, *supra* note 295.

308. 452 U.S. at 613-14 (Stewart, J., dissenting). Justice Stewart asserted that the *Colonnade-Biswell* exception to the warrant requirement applies only to "businesses that are both pervasively regulated and have a long history of regu-

As to the first question, the cases which have followed *Dewey* have, up to now, indeed required the requisite characteristics of the Mine Act, as evidenced by those statutes struck down for not meeting the standards of *Dewey*.<sup>309</sup>

As to the second question, two responses seem in order. First, it appears that Congress, according to the *Biswell* Court majority—in which Mr. Justice Stewart joined—has already been able to circumvent the warrant requirements of the fourth amendment.<sup>310</sup> Second a Congressional determination that an activity is dangerous or crucial is perhaps deserving of deference by the co-equal branches of the government just as its determinations questioning infringements of other constitutional guarantees have been so treated.

### VIII. DEWEY'S PROGENY

The *Dewey* decision has not only influenced recent district and circuit court decisions; it has, in fact, been the basis for courts determining whether the benefits of a warrant requirement for administrative inspections are outweighed by the costs of such in-

---

lation." *Id.* at 611 (Stewart, J., dissenting) (emphasis in original). he argued that the *Dewey* court ignored the second part of the exception. *Id.* In Justice Stewart's view, the length of regulation is an important factor; if a businessman enters an industry with a long history of regulation, he implicitly consents to the restrictions such regulations will place upon him. *Id.* at 610-11 (Stewart, J., dissenting). The operation of stone quarries was not pervasively regulated until 1966, and, according to Justice Stewart, should not be subject to the *Colonade/Biswell* exception. *See id.* at 612-14 (Stewart, J., dissenting).

309. *See, e.g.,* *Dow Chemical Co. v. United States*, 536 F. Supp. 1355 (E.D. Mich. 1982), *rev'd*, 749 F.2d 307 (6th Cir. 1984) (warrantless search provision of Clean Air Act declared unconstitutional), *aff'd*, 106 S. Ct. 1819 (1986). *Compare* *United States v. Kaiyo Marv* No. 53, 699 F.2d 989 (9th Cir. 1983) (warrantless search provision of Fishery Conservation and Management Act declared constitutional) with *United States Nuclear Regulatory Comm'n v. Radiation Technology, Inc.*, 519 F. Supp. 1266 (D.N.J. 1981) (warrantless searches conducted pursuant to Atomic Energy Act of 1954 and regulations promulgated thereunder declared constitutional).

For an argument echoing Justice Stewart's concern that *Donovan v. Dewey* would weaken fourth amendment protections, see Note, *Donovan v. Dewey*, 10 *ECOLOGY L.Q.* 139 (1982) (*Dewey* "Must be treated as an extreme outpost, only tolerable because of its peculiar justifications and limitations, and not as a stepping stone to a more flexible and expansive definition of the reasonable warrantless search").

For a discussion of *Dow Chemical*, see *infra* notes 368-75 and accompanying text. For a discussion of *Bionic Auto Parts*, see *infra* notes 360-67 and accompanying text. For a discussion of *Kaiyo Marv*, see *infra* notes 311-41 and accompanying text. For a discussion of *Radiation Technology*, see *infra* notes 342-59 and accompanying text.

310. For a discussion of *Biswell*, see *supra* notes 59-72 and accompanying text.



spections. It will be useful to review a few representative post-*Dewey* cases.

#### A. *The Fishery Conservation and Management Act*

In February of 1983, the Ninth Circuit decided in *United States v. Kaiyo Maru No. 53*, that a warrantless search pursuant to the Fishery Conservation and Management Act (hereinafter "FCMA"), was valid and not violative of the fourth amendment.<sup>311</sup> In *Kaiyo*, the Coast Guard boarded a Japanese trawler, discovering that the amount of fish caught had been underreported and that large quantities of a prohibited species were on board.<sup>312</sup> The Coast Guard then proceeded with a systematic search of the vessel which resulted in the uncovering of serious violations of the FCMA—and ultimately in the seizure of the vessel.<sup>313</sup> The issues specifically addressed by the *Kaiyo* court included 1) whether the FCMA authorizes warrantless searches and seizures, and 2) whether such searches and seizures violate the

311. 699 F.2d 989, 1000 (9th Cir. 1983). The relevant provision of the FCMA is 16 U.S.C. § 1861(b) (1982). For the text of a portion of that provision, see *infra* text accompanying note 315.

312. 699 F.2d at 991-92. The Coast Guard's initial boarding of the *Kaiyo* was prompted by the receipt of erroneous information. *See id.* The *Kaiyo* had been fishing by permit in the fishery conservation zone ("FCZ"), an area in which federal fisheries management jurisdiction prevails. *Id.* After giving the required notice to the Coast Guard, the *Kaiyo* moved to a different fishing area on the day of the search. *Id.* Noticing this change of position, a Coast Guard cutter requested information regarding the *Kaiyo* from its Juneau, Alaska office. *Id.* The office erroneously informed the cutter that the *Kaiyo* had not given the required notice ("shift message") before shifting position. *Id.* The cutter's commanding officer decided to board the *Kaiyo* to "inspect her documents and catch, and determine if she was fishing in the proper areas." *Id.*

313. *Id.* Since the *Kaiyo* was fishing in the FCZ, federal fisheries management jurisdiction prevailed. *Id.* 16 U.S.C. § 1812 (1982) provides:

§ 1812. Exclusive fishery management authority

The United States shall exercise exclusive fishery management authority, in the manner provided for in this chapter, over the following:

- (1) All fish within the fishery conservation zone
- (2) All anadromous species throughout the migratory range of each such species beyond the fishery conservation zone; except that such management authority shall not extend to such species during the time they are found within any foreign nation's territorial sea or fishery conservation zone (or the equivalent), to the extent that such sea or zone is recognized by the United States.
- (3) All Continental Shelf fishery resources beyond the fishery conservation zone.

*Id.* The fishery conservation zone is defined as a "197 mile-wide band of ocean beyond the territorial waters of the states." 699 F.2d at 992; *see* 16 U.S.C. § 1811 (1982).

fourth amendment.<sup>314</sup>

The provision of the FCMA addressing searches and seizures which was effective at the time *Kaiyo* was decided stated in pertinent part:

- (1) Any officer who is authorized (by the Secretary [of Commerce], the Secretary [of Transportation], or the head of any Federal or State agency which has entered into an agreement. . . ) to enforce the provisions of this chapter may—
- (A) *with or without a warrant* or other process—
- . . . .
- (ii) board, and search or inspect, any fishing vessel which is subject to the provisions of this chapter;
- (iii) seize any fishing vessel . . . used or employed in, or with respect to which it reasonably appears that such vessel was used or employed in, the violation of any provision of this chapter;
- (iv) seize any fish . . . taken or retained in violation of any provision of this chapter; and
- (v) seize any other evidence related to any violation of any provision of this chapter;
- (B) execute any warrant or other process issued by any court . . . .<sup>315</sup>

The Ninth Circuit rejected the argument that the above provision contemplated that warrantless searches were appropriate in exigent circumstances only.<sup>316</sup> Lacking legislative history upon which to rely, the Ninth Circuit analyzed the “with or without” language in light of the entire Act and the circumstances of its enactment, recognizing Congressional concern with ocean resources, the apparent failure of previous federal attempts to manage ocean fisheries, and the resultant resources crisis.<sup>317</sup> The

314. 699 F.2d at 993. The court also addressed due process and forfeiture issues not relevant to the present discussion.

315. 16 U.S.C. § 1861(b) (1976) (emphasis added).

316. 699 F.2d at 993. The vessel owners argued that the “with or without” language appearing in 16 U.S.C. § 1681(b) implied that warrants should be used when possible, but can be dispensed with if “exigent or other appropriate circumstances exist.” *Id.*

317. *Id.* The court noted that overfishing was widespread at the time the FCMA was enacted. *Id.* Because it was impossible to effectively regulate the fish

court found that because of the crisis atmosphere in which the FCMA was enacted, Congress intended to authorize the most potent possible enforcement procedures.<sup>318</sup> The court also noted that the thrust of the Act as a whole comported with this interpretation, citing examples of the Act's "stringent requirements":

- (1) Foreign nations and the owner or operator of a vessel in the Fishery Conservation Zone are to allow officials of the United States to board the vessel;<sup>319</sup>
- (2) Such owner or operator is to agree to allow an authorized officer to board and search or inspect the vessel;<sup>320</sup>
- (3) Issued permits must be prominently displayed;<sup>321</sup>
- (4) It is a criminal violation to refuse to allow any authorized officer to board the vessel for purposes of conducting a search or inspection;<sup>322</sup>
- (5) Extensive records and log-books must be kept;<sup>323</sup>
- (6) The inspection of these logs and records may be made at any time;<sup>324</sup> and
- (7) Vessels must keep the Coast Guard apprised of their location and activities at all times.<sup>325</sup>

---

harvest beyond the three mile jurisdictional limits, fisheries for several species were threatened. *Id.* Foreign fishermen in particular escaped regulation. *Id.*

318. *Id.* at 994. For a discussion of these "stringent requirements," see *infra* notes 319-25 and accompanying text.

319. 699 F.2d at 994. 16 U.S.C. § 1821(c)(2)(D) provides: "(2) The foreign nation, and the owner or operator of any fishing vessel fishing pursuant to [an international fishery agreement] will abide by the requirement that—

. . . .  
(D) duly authorized United States observers be permitted on board any such vessel. . . ." *Id.* § 1821(c)(2)(D) (1982).

320. 699 F.2d at 994. 16 U.S.C. § 1821(c)(2)(A)(1) provides: "(c)(2) The foreign nation, and the owner or operator of any fishing vessel fishing pursuant to [an international fishery agreement] will abide by the requirement that—  
(A) any officer authorized to enforce the provision of this chapter . . . be permitted—(i) to board, and search or inspect any such vessel at any time. . . ." *Id.* § 1821(c)(2)(A)(i) (1982).

321. 699 F.2d at 994. 16 U.S.C. § 1821(c)(2)(B) requires that permits for such vessels be "prominently displayed in the wheelhouse of such vessel." *Id.* § 1821(c)(2)(B) (1976).

322. 699 F.2d at 994. 16 U.S.C. § 1857(1)(D) provides: "It is unlawful—  
(1) for any person. . . .(D) to refuse to permit any officer authorized to enforce the provisions of this chapter . . . to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of this chapter. . . ." *Id.* § 1857(1)(D) (1976).

323. 699 F.2d at 994. The detailed reporting and recordkeeping requirements appear at 50 C.F.R. § 611.9 (1984).

324. 699 F.2d at 994. See *supra* note 323.

325. 699 F.2d at 994. 50 C.F.R. § 611.9(a)(1) Provides:

After reviewing these provisions, the court declared that they “support an interpretation of the Act that authorizes warrantless searches and seizures.”<sup>326</sup>

The court noted that, “had Congress intended warrantless searches to proceed only in ‘exigent’ or ‘other appropriate’ circumstances, it would have said so.”<sup>327</sup> In support of this proposition, the court cited 16 U.S.C. § 1861(b)(1)(A), which allows warrantless *arrests* only in these situations where there is “reasonable cause to believe [the arrested person] has committed an act” which the FCMA prohibits.<sup>328</sup> Moreover, the court reasoned that the physical difficulties of obtaining a warrant at sea lead to the logical conclusion “that the FCMA contemplates routine warrantless inspections or searches and seizures as part of the enforcement scheme of the Act.”<sup>329</sup>

Having evaluated the statutory scheme, the court went on to analyze the fourth amendment protections.<sup>330</sup> Although recognizing the application of the fourth amendment to administrative inspections of private commercial property,<sup>331</sup> the court noted the greater tolerance for warrantless inspections of commercial property, citing *Dewey*: “[U]nlike searches of private homes, which generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment, legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment.”<sup>332</sup>

Relying on *Barlow's*, the Ninth Circuit explicitly acknowledged the need to determine the reasonableness of regulatory schemes that allow warrantless inspections on a case-by-case basis.<sup>333</sup> Again citing *Barlow's*, the Ninth Circuit asserted that

---

(a) *General.* the . . . records required [to be kept] by this section . . . [shall be made] immediately available for inspection upon the request of an authorized officer or observer.

*Id.* § 611.9(a)(1) (1985).

326. 699 F.2d at 994.

327. *Id.*

328. *Id.* 16 U.S.C. § 1861(b)(1)(A) provides in pertinent part that “any officer who is authorized . . . to enforce the provisions of this chapter may—(A) with or without a warrant or other process—(i) arrest any person, if he has reasonable cause to believe that such person has committed an act prohibited by section 1857 of this title.” *Id.* § 1861(b)(1)(A) (1976).

329. 699 F.2d at 994.

330. *See id.* at 994-98.

331. *Id.* at 994 (citing *Barlow's*, 436 U.S. at 307; *See* 387 U.S. at 541).

332. 699 F.2d at 995 (quoting *Dewey*, 452 U.S. at 598). The Ninth Circuit noted that an individual’s privacy interests in his home and his commercial property are accorded “different sanctity.” *Id.*

333. *Id.* (citing *Barlow's*, 436 U.S. at 321).

“[r]easonableness depends on the specific enforcement needs and privacy guarantees of each statute.”<sup>334</sup> The court’s evaluation of the FCMA, however, followed precisely the more detailed guidelines set forth in *Dewey*. That is, in order for warrantless inspections to be reasonable, there must be an important federal interest to be furthered by the warrantless inspection and the owner must have an expectation that the property will be inspected by government officials from time to time on more than a random, unpredictable basis.<sup>335</sup>

In applying the *Dewey* analysis to the *Kaiyo* case, the court found that the warrantless inspections authorized by FCMA do not offend the fourth amendment for the following reasons:<sup>336</sup> First, the dangerously depleted supply of foodfish created a *strong federal interest* in protecting natural resources within the Fishery Conservation Zone.<sup>337</sup> Second, the physical difficulty of obtaining and presenting a warrant in such circumstances, as well as procuring one in advance for a specific vessel, led to a reasonable congressional conclusion that warrantless inspections are *necessary* to further the *regulatory scheme* presented under FCMA.<sup>338</sup> Finally, and most importantly, “‘the statute’s inspection program, in terms of the *certainty* and *regularity* of its application, provides a constitutionally adequate substitute for a warrant.’”<sup>339</sup> FCMA, its implementing regulations and Coast Guard enforcement policies documented in operations orders provide for the regular boarding of a limited type of vessel by a limited category of inspection officers in a united fishing zone.<sup>340</sup>

---

334. *Id.*

335. *Id.* (citing *Dewey*, 452 U.S. at 599).

336. 699 F.2d at 995-96.

337. *Id.* at 995. The court asserted that, at the time it enacted the FCMA, “Congress was aware that an important national asset was at stake and that strong measures were necessary.” *Id.* For a discussion of the prevailing conditions at the time FCMA was enacted, see *supra* note 317 and accompanying text.

338. 699 F.2d at 995-96. In support of its statement that advance procurement of a warrant for a specific vessel is impossible, the court cited several practices peculiar to the fishing industry. *Id.* Since fishing vessels are assigned to large areas, and are mobile, it is often impossible to predict the location of a vessel on a specific date. *Id.* Also, enforcement vessels are often at sea for long periods of time, thus, complicating the warrant procedure. *Id.* at 996. The *Kaiyo* court asserted that the logistical problems involved in an inspection program requiring warrants would be “insurmountable.” *Id.*

339. *See id.* (quoting *Dewey*, 452 U.S. at 603) (emphasis added).

340. *Id.* First, only officers authorized by the Secretaries of Commerce and Transportation are capable of enforcement. *Id.* Second, the Coast Guard will board only those foreign fishing vessels “actually engaged in fishing activities or otherwise within the FCZ after notifying the Coast Guard of intent to commerce fishing activities and before having ‘checked out.’” *Id.* Third, all fishing or fish

The highly regulated enterprise of foreign fishing which is subject to the FCMA, meets the *Dewey* standards for warrantless inspections—"it is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the fourth amendment."<sup>341</sup>

### B. *The Atomic Energy Act of 1954*

In *United States Nuclear Regulatory Commission v. Radiation Technology, Inc.*, RTI was charged with alleged violations of Nuclear Regulatory Commission ("NRC") regulations and license conditions.<sup>342</sup> Among the issues addressed in the court's opinion was the validity of warrantless searches and seizures executed on RTI's premises.<sup>343</sup>

RTI contended that the warrantless searches were infringements upon the company's reasonable expectation of privacy under the fourth amendment.<sup>344</sup> The resultant controversy of whether consent to the inspections had actually been given by the plant manager was not resolved by the district court since that was a factual dispute not capable of resolution on summary judgment.<sup>345</sup> The court could and did, however, decide that the warrantless administrative investigation of RTI's premises did not

---

processing vessels requiring an FCMA permit must be boarded once every three months. *Id.*

341. *Id.* at 997 (quoting *Dewey*, 452 U.S. at 606.)

342. 519 F. Supp. 1266 (D.N.J. 1981). RTI was a commercial irradiator operating under a federal license. *Id.* at 1269. As such, it was subject to inspection of licensed material, premises and facilities at all reasonable times, and to inspection of records upon reasonable notice. *Id.* at 1290 (citing 10 C.F.R. § 30.52 (1985)).

During five warrantless inspections of RTI's facility, NRC personnel discovered several actual and apparent violations, including 1) permitting byproduct material to be used by unauthorized persons, and 2) failure to maintain constant surveillance and control of licensed material stored in unrestricted areas. *Id.* at 1270. In subsequent administrative proceedings, civil penalties for these and other violations in the amount of \$4,050 were assessed against RTI. *Id.* The instant suit was instituted when RTI failed to pay the penalty assessed. *Id.* Both parties moved for summary judgment. *Id.* at 1268.

343. *See id.* at 1288-91. Other issues addressed included questions of jurisdiction, federal civil procedure, and administrative law and procedure. *See id.* at 1271-86.

344. *Id.* at 1288.

345. *Id.* NRC argued that since the inspections were conducted with the actual consent of RTI's plant manager, they were proper under the fourth amendment. *Id.* RTI centered this argument with the contentions that the individual who allegedly gave consent was not part of the company's management and that any consent given was illusory because of the threatening manner in which the entries were executed. *Id.*

constitute unreasonable searches and seizures within the meaning of the fourth amendment.<sup>346</sup>

The District Court of New Jersey began and concluded this section of its opinion with a heavy reliance on *Dewey*, stating that “[t]he most recent and instructive case on this issue is *Donavan v. Dewey*.”<sup>347</sup>

The court focused its analysis on two issues raised in *Dewey*.<sup>348</sup> In order to determine the constitutionality of warrantless administrative inspections, the court would decide:

- (1) whether a warrant requirement could “significantly frustrate effective enforcement of the Act;”<sup>349</sup> and
- (2) “whether the statute’s inspection program in terms of certainty and regularly [sic] of its application, provides a constitutionally adequate substitute for a warrant.”<sup>350</sup>

Applying the facts of the case to the *Dewey* inquiries, the *Radiation Technology* court first found that the violations under consideration were “so easily concealable and transitory in nature that any prior notice or delay inherent in obtaining a warrant could very possibly frustrate the success of the inspection itself” and therefore could significantly frustrate effective enforcement of the Act.<sup>351</sup>

As to the second issue, the court found that the inspection scheme easily provided a constitutionally adequate substitute for a warrant,<sup>352</sup> citing the following factors:

- 1) The Atomic Energy Act is specifically tailored to address the particular concerns unique to the utilization of nuclear material;<sup>353</sup>

346. *Id.*

347. *Id.* at 1289. The court first discussed the earlier authorities in the area of administrative inspections of commercial premises, including *Barlow’s*, *Biswell*, and *Colonnade*. *Id.* at 1288-89.

348. *Id.* at 1289. Those inquiries are set forth *infra* at notes 349-50 and accompanying text. For a discussion of *Dewey*, see *supra* notes 281-309 and accompanying text.

349. 519 F. Supp. at 1289 (citing *Dewey*, 452 U.S. at 603).

350. *Id.* (citing *Dewey*, 452 U.S. at 603).

351. 519 F. Supp. at 1290. For a discussion of the violations of which RTI was accused, see *supra* note 342 and accompanying text.

352. 519 F. Supp. at 1290.

353. *Id.* (citing 42 U.S.C. §§ 2012, 2013 (1982)). The Congressional findings of fact regarding atomic energy recognize the effects of the nuclear industry on interstate commerce, public defense, and public health and safety. 42 U.S.C. § 2012 (1982). The articulated purposes of the Atomic Energy Act include fostering research and development, disseminating information, providing for gov-

- 2) The Act authorizes of the licensee's activities;<sup>354</sup>
- 3) The Commission is responsible for ensuring that safety standards are being observed;<sup>355</sup>
- 4) A detailed set of regulations dictate the manner in which nuclear material may be utilized;<sup>356</sup> and
- 5) The course of conduct of licensees is, similarly, regulated in detail.<sup>357</sup>

Quoting *Dewey*, the district court found these regulations "sufficiently pervasive and defined that the owner of [a nuclear] facility cannot help but be aware that he 'will be subject to effective inspection.'" <sup>358</sup> The district court recognized that, "although the Commission's inspectors may exercise somewhat more discretion than the federal mine inspectors in *Donovan v. Dewey* . . . the Act establishes 'predictable and guided federal regulatory presence.'" <sup>359</sup>

### C. State Laws

In *Bionic Auto Parts and Sales, Inc. v. Fahner*,<sup>360</sup> the District Court for the Northern District of Illinois held invalid an Illinois statute authorizing warrantless searches of used automobile parts businesses. The provisions of the Illinois Code in question provided in part:

Every record required to be maintained under this Section shall be opened to inspection by the Secretary of

---

ernment control, encouraging participation in the industry, and promoting common international defense. *Id.*

354. 519 F. Supp. at 1290. The Act authorizes the Atomic Energy Commission to require such inspections of licensees' activities and studies as may be necessary to effectuate the purpose of this chapter. 42 U.S.C. § 2201(a) (1982).

355. 519 F. Supp. at 1290. The Commission must recall "any distributed [by-product] material from any licensee, who is not equipped to observe or who fails to observe such safety standards to protect health as may be established by the Commission." 42 U.S.C. § 2111 (1982).

356. 519 F. Supp. at 1290. The extensive set of regulations governing the nuclear industry may be found at 10 C.F.R. §§ 0.735-1-170.51 (1985).

357. 519 F. Supp. at 1290.

358. *Id.* (quoting *Dewey*, 452 U.S. at 603) (citations omitted).

359. *Id.* at 1291 (citing *Dewey*, 452 U.S. at 604). The court noted that the inspection of licensed material, premises and facilities may be conducted at all reasonable times. *Id.* This broad grant of authority to inspect is qualified, however. *See id.* Regulations exist addressing 1) procedures to be followed when employer complaints are received, 2) the ability of a licensee's representative to be present at inspections, and 3) standards with which licensees are required to comply. *Id.* Thus, the inspectors' discretion is not as unbridled as it appears at first blush. *See id.* at 1290-91.

360. 518 F. Supp. 582 (N.D. Ill. 1981), *aff'd*, 721 F.2d 1072 (7th Cir. 1983).



State or his authorized representative or any peace officer for inspection at any reasonable time during the night and day.<sup>361</sup>

Such inspection may include examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records.<sup>362</sup>

Both provisions permit warrantless inspections: the former for licensee's records and the latter for licensee's premises.

In its findings of fact, the court stated that "plaintiffs have been subjected to administrative inspections and searches of their premises without notice, without consent and without the prior obtaining of warrants for such searches."<sup>363</sup>

After a cursory acknowledgment of the general law as related to warrantless searches and the exceptions thereto, the court concluded that a *Donavan v. Dewey* analysis was appropriate.

[*Dewey's*] language would plainly apply to the used auto parts business, where the legislative consciousness of (1) the large "industry" in stolen motor vehicles (especially facilitated by the mobility of the vehicles themselves) and (2) the major problem of the so-called "chop shops," with their ability to strip and disassemble vehicles with great speed, justifies specific enforcement needs tailored to the entirely legal business in used auto parts.<sup>364</sup>

However, the court found that only the first requirement ar-

361. ILL. ANN. STAT. ch. 95 1/2 § 5-401(c) (Smith-Hurd 1971) (repealed 1985).

362. ILL. ANN. STAT. ch. 95 1/2 § 5-401(e) (Smith-Hurd Supp. 1984) (repealed 1985).

363. *Bonic*, 518 F. Supp. at 583. The court noted other abuses as well: Evidence during the preliminary injunction hearing showed that searches of premises were often made by the enforcement officers *without* the predicate or even pretense that they were simply corroborative of the record-keeping requirements. Totally without warrant (both literally and figuratively), the officers conducted inventory searches extending over many hours and placed indelible markings on various of plaintiffs' auto parts. On another occasion they entered a licensee's premises in a claimed search for a law violator without a warrant and without any semblance of a showing of probable cause. It is clear that they viewed licensees as fair game, engaged in an activity that in their view was almost *malum in se* (Tr. 29: "I licensed you. I can go anywhere I want.").

*Id.* at 585-86 (emphasis in original).

364. *Id.* at 585.

tulated in *Dewey* was satisfied, that of defining the regulated industry where “‘a warrant requirement clearly might impede the “specific enforcement needs” of the Act.’”<sup>365</sup>

As to the inspection provision supplying the requisite certainty and regularity in order to substitute for a warrant requirement, the Illinois Code was found to fail:

Measured against that standard Code § 5-401(e) is invalid. *Dewey* emphasized (*id.* — U.S. at —, 101 S. Ct. at 2539-2540) that the OSHA statute held unconstitutional in *Marshall v. Barlow's* “‘simply provides that such searches must be performed ‘at . . . reasonable times, and within reasonable limits and in a reasonable manner.’” That flawed language is echoed in Code § 5-401(e): “. . . opened . . . for inspections at any reasonable time during the night or day.” Thus the Code shares the vice found fatal in *Marshall v. Barlow's*, 436 U.S. at 328, 98 S. Ct. at 1825-26 (and reaffirmed in [*Dewey*], — U.S. at —, 101 S. Ct. at 2540):

“The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search.”<sup>366</sup>

The district court recognized the dual set of guidelines emanating from *Dewey* when it concluded: “Accordingly the Court concludes that the provisions of Code § 5-401(e), because they authorize administrative inspections without the need to obtain a valid search warrant, are unconstitutional despite—or perhaps because of—the Supreme Court decision in *Donovan*.”<sup>367</sup>

#### D. *The Clean Air Act*

In *Dow Chemical Co. v. United States*, Dow challenged the Environmental Protection Agency's warrantless aerial photography of its chemical manufacturing plant.<sup>368</sup> The Michigan District Court

365. *Id.*

366. *Id.*

367. *Id.* at 586. This decision may well represent a very limited victory for plaintiffs. Justice Stewart was plainly right in his *Dewey* dissent in concluding that it charts the route by which a legislature may supersede the fourth amendment on an industry-by-industry basis. See 452 U.S. at 613-14 (Stewart, J., dissenting). Thus, the Illinois General Assembly can overcome any constitutional infirmity if it simply amends the Act by following the *Dewey* road map (as amplified in this decision).

368. 536 F. Supp. 1355, 1356 (E.D. Mich. 1982), *rev'd*, 749 F.2d 307 (6th

framed the question presented around the *Dewey* holding: "The question must turn on whether EPA's authority under the Clean Air Act meets the 'sufficiently comprehensive and defined' criteria of *Donovan v. Dewey* . . . or whether the search violated a reasonable expectation of privacy."<sup>369</sup>

Finding that EPA's authority to regulate the chemical industry under the Clean Air Act does not constitute a sufficiently "predictable and guided federal regulatory presence," the Court held it was not an exception to the general rule prohibiting warrantless inspections.<sup>370</sup>

The Court likened EPA's authority to that of the Department of Labor under OSHA.<sup>371</sup> The chemical industry is but one of the myriad businesses regulated by EPA, but it is not a "pervasively regulated" industry and "the Act fails to tailor the scope and frequency of such administrative inspections to the particular health and safety concerns posed by the numerous and varied businesses regulated by the statute."<sup>372</sup>

Cir. 1984), *aff'd*, 106 S. Ct. 1819 (1986). The EPA had been investigating Dow's Midland, Michigan facility for possible violations of federal air quality standards. *Id.* at 1357. After beginning preparations for an enforcement action against Dow, EPA requested entry of the Dow facility. *Id.* It informed Dow of its intent to take photographs during the requested inspection. *Id.* Dow objected to the taking of photographs and denied entry. *Id.*

Instead of seeking a warrant to enter the plant, EPA obtained aerial photographs of the facility. *Id.* Dow was unaware of the flyover. *Id.*

Dow brought an action seeking declaratory judgment and injunctive relief. *Id.* It made three major allegations: 1) EPA's activity was an unreasonable search in violation of the fourth amendment, 2) EPA's activity was a taking of trade secrets in violation of the fifth amendment and 3) EPA used an inspection tool outside its authority pursuant to the Clean Air Act. *Id.* at 1356. Dow moved for partial summary judgment on the fourth amendment and statutory issues, while EPA moved for summary judgment on all issues. *Id.* at 1358.

369. *Id.* at 1360.

370. *Id.* at 1361. The court asserted that the chemical industry is not pervasively regulated by EPA under the Clean Air Act. *Id.*

371. *Id.* The court contrasted EPA's authority over the chemical industry with the pervasive government control over the alcohol, firearms, and mining industries. *Id.* By comparing EPA's authority under the Clean Air Act to that of the Department of Labor under OSHA, the court brought *Dow* under the rubric of *Marshall v. Barlow's*. See *id.* Like OSHA, the EPA regulates "a broad spectrum of different industries pursuant to legislative mandates. However, these myriad businesses are not necessarily highly regulated industries which may be said by implication to consent to warrantless inspections." *Id.* (quoting Martin, *EPA and Administrative Inspections*, 7 FLA. ST. U.L. REV. 123, 131-32 (1979)) (EPA must obtain search warrant before conducting administrative inspections). The *Dow* court reached the same conclusion as did the *Barlow's* Court, that is, that the warrantless administrative search at issue violated the fourth amendment. 536 F. Supp. at 1360.

372. *Id.* at 1361 (quoting *Dewey*, 452 U.S. at 601).

The Clean Air Act provisions authorizing administrative inspections read, in pertinent part:

(a) For the purpose . . . (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out any provision of this chapter . . . .

(2) the Administrator or his authorized representative, upon presentation of his credentials—

(A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).<sup>373</sup>

This provision, which potentially applies to numerous industries, is silent as to requirements or definitions of types of inspections, and standards of conduct.<sup>374</sup>

Because it failed to establish a predictable regulatory presence as required by *Dewey*, the Act was found by the court to succumb to the *Barlow's* rationale and, therefore, the EPA's warrantless aerial search of Dow's facility violated the fourth amendment.<sup>375</sup>

#### E. *Post-Dewey Analysis*

The influence of *Donovan v. Dewey* has been evident in post-*Dewey* decisions, whether or not the courts eventually sustained or overturned warrantless search authority in a given case under a given statute; lower courts have followed *Dewey's* analytical ap-

---

373. 42 U.S.C. § 7414 (1982).

374. 536 F. Supp. at 1362. The court further noted that "the provision does not appear to allow forced entry without some form of prior judicial oversight." *Id.* In support of this proposition, the court cited relevant language in *Barlow's* and the legislative history of the Clean Air Act. *Id.*

375. *Id.* at 1361. On appeal, the Sixth Circuit found that EPA's surveillance and photography did not constitute a search under the fourth amendment. 749 F.2d 307, 309 (6th Cir. 1984). Thus, the court of appeals did not reach the issue of the validity of warrantless administrative inspections under the Clean Air Act. *See id.* The Supreme Court affirmed the Sixth Circuit's decision. 106 S. Ct. 1819 (1986).

proach.<sup>376</sup> The cases reviewed in this section are not exhaustive, but they are fairly representative. In each case, the courts considered the following standards first enunciated in *Dewey*, determining “(1) whether there was a strong federal interest involved; (2) whether a warrantless inspection was necessary to further the regulatory scheme; and (3) whether the certainty and regularity of the statutory scheme provided a constitutionally adequate substitute for a warrant.”<sup>377</sup>

The reliance on *Donovan v. Dewey* is incontrovertible. Moreover, *Radiation Technology's* extension of the *Colonnade* and *Biswell* rationale to specifically tailored regulations may augur even more warrantless searches in the future. However, if the *Dewey* standard is not diluted in practice, then the protections afforded by it will still be present although the form will have been modified.

## IX. QUESTIONS RAISED

### A. *A Survey of Agency Practice*

The foregoing review of the case law documents that the guarantees of the fourth amendment remain substantially applicable to administrative searches. Our inquiry did not stop, however, at that reaffirmation of constitutional protection. Rather, we found that many practical and challenging questions still flowed from the case law analyses:

Have denials to searches increased since *Barlow's*? Have such denials decreased since *Dewey*?

Have agencies been required to procure warrants in considerably more cases?

Have agencies been overburdened?

Have warrants been issued indiscriminately? Has the fear of the “boxcar warrant” been realized?

Has Congress circumvented constitutional protection by creating additional *Dewey*-like legislation?

Is the broad grant of subpoena power misapplied?

Has the use of vague or unclear terminology undercut the warrant requirement?

What is a search anyway? Is it different from a field investigation or an entry or an inspection?

---

376. For a discussion of representative post-*Dewey* decisions, see *supra* notes 311-75 and accompanying text.

377. For a discussion of the *Dewey* standards, see *supra* notes 285-302 and accompanying text.

In the authors' view, these inquiries, and others, cannot be answered by further case law analysis. These are questions which relate to the application of theory to practice. Viewed in a vacuum, the constitutional analysis is at least interesting and generally reassuring as well. It seemed to us, however, that without seeking out its relevance any such constitutional analysis remains an intellectual exercise potentially void of practical application. A strict case law approach, moreover, has severe limitations; one focuses on the abnormal—the exceptional practices that undergo appellate judicial scrutiny, generally paying scant attention to the myriad situations where inspector and inspected may have no difficulty. While one must avoid Pollyannish assumptions about “freely-given consent” in an atmosphere of authority, one must also not extrapolate too broadly from the rare event of an appellate court opinion.

With that in mind, and since the questions raised relate primarily to agency inspection procedures, the authors elected to survey agencies for data that would be indicators of what impact the more recent case law has actually had on administrative searches. Given some of the responses we received, we also conducted a limited statute and regulation review with respect to the terminology of administrative searches.<sup>378</sup>

In the fall of 1983, survey forms were posted to dozens of agencies and follow-up telephone calls were later made to ensure understanding of the form.

Data was collected asking for inspection and warrant information for three time periods—1977, 1980, and 1982. The first was chosen to allow a pre-*Barlow's* comparison to be made, 1980 was immediately post-*Barlow's*, and 1982 figures were not only generally the most recent available, but were also immediately post-*Dewey*.<sup>379</sup>

The information sought asked for:

- (1) the number of regulatory inspections conducted by the given agency, broken down by (a) those conducted with a warrant, and (b) those without;
- (2) the total number of inspection requests made by the agency, broken down by those (a) consented to by

---

378. For a discussion of the weights accorded these factors by the lower courts applying *Dewey*, see *supra* notes 311-75 and accompanying text.

379. Only the year was mentioned on the survey form. To our knowledge, all respondents treated this as a request for federal fiscal year data and the data should be so viewed.

the subject of the inspection, and (b) those where the subject of the inspection refused the inspector entry;

(3) the total number of warrant requests made to the courts, broken down into (a) those approved, and (b) those denied, and

(4) the timing of those warrant requests, as divided into (a) those obtained prior to inspection (*ex parte* and aimed at “surprising” the subject), and (b) those obtained only after the inspector had first been refused entry.

Forty-seven out of approximately sixty agencies responded to the survey.<sup>380</sup>

### B. *Survey Results*

The answers to our inquiries began to take shape as soon as the first survey responses were received and that shape remained significantly consistent throughout the analysis of the data.

First and foremost, it is patently clear that consensual inspections remain the norm. With the exception of four agencies—and OSHA and EPA<sup>381</sup>—those responding with available data re-

---

380. Virtually every agency contacted was as cooperative as could possibly be expected. It was instructive to learn how few thought the court decisions under study had any relevance to their respective missions. The following agencies responded: Bureau of Alcohol, Tobacco and Firearms; Bureau of Indian Affairs; Child Support Enforcement Administration; Civil Aeronautics Board; Commodity Futures Trading Commission; Comptroller of the Currency; Consumer Product Safety Commission; Drug Enforcement Administration; Employment Standards Administration; Environmental Protection Agency; Equal Employment Opportunity Commission; Federal Aviation Administration; Federal Communications Commission; Federal Deposit Insurance Corporation; Federal Election Commission; Federal Emergency Management Agency; Federal Energy Regulatory Commission; Federal Grain Inspection Service; Federal Highway Administration; Federal Maritime Commission; Federal Mediation and Conciliation Service; Federal Mine Safety and Health Review Commission; Federal Railroad Administration; Federal Trade Commission; Food and Drug Administration; Food and Nutrition Service; Food Safety and Quality Service; Immigration and Naturalization Service; Internal Revenue Service; Interstate Commerce Commission; Mine Safety and Health Administration; National Aeronautics and Space Administration; National Highway Traffic Safety Administration; National Marine Fisheries Service; National Transportation Safety Board; Nuclear Regulatory Commission; Occupational Safety and Health Administration; Office for Civil Rights; Office of Federal Contract Compliance; Office of Surface Mining Reclamation and Enforcement; Securities and Exchange Commission.

381. The Consumer Product Safety Commission reported one warrant inspection for each of the three years surveyed; the Federal Communications Commission estimated between 20 and 25 warrant inspections for each surveyed year; the Department of Transportation's National Highway Traffic Administra-

ported *no* denial of entry in 1977, 1980 or 1982. In light of this response, it is not surprising that a *de minimis* number of warrant requests were made; with the exception of OSHA and EPA, a total of twenty-seven warrant requests were reported by those agencies having available data for the three years surveyed. The overall number of inspections conducted by those agencies in those years totals approximately 7,000,000; thus, the percentage of warrant requests, in relation to inspections conducted, is the astonishingly low figure of 0.00038%—hardly a realization of the “boxcar warrant” type of fear expressed by Justice Clark, dissenting in *Camara* and *See*,<sup>382</sup> or the burden envisioned by Justice Stevens, dissenting in *Barlow*’s: “In view of the obviously enormous cost of enforcing a health and safety scheme of the dimensions of OSHA, this Court should not, in the guise of construing the fourth amendment, require formalities which merely place an additional strain on already overtaxed federal resources.”<sup>383</sup>

When available OSHA data are added to the survey statistics, the practical result is barely altered. Available OSHA data from October 1979-September 1980 (fiscal year 1) and from October 1982-September 1983 (fiscal year 2) reveal the following:

1. Of 63,394 inspections in year 1, there were 1843 initial denials of entry, 1843 warrant requests, 665 warrant

---

tion reported one warrant inspection in 1980; and the Department of Treasury, United States Customs Service, reported obtaining *ex parte* warrants prior to every surprise inspection—but also reported that each inspection was consented to. We should point out that OSHA was not a part of this survey; its results were reported and analyzed separately and there were indeed many denials of entry, as reported in the body of this article. Moreover, and most unfortunately, EPA does not maintain centralized data; from non-survey sources, we know EPA faced denials of entry, but this cannot be statistically verified from the data we received.

382. *See*, 387 U.S. at 554 (Clark, J., dissenting). Justice Clark’s dissent, applicable in both *See* and *Camara*, reasoned that if probable cause can be established based on the inspection standards within the applicable statute, then the issuance of a “paper warrant” would come as a matter of course. *Id.* at 553, n.4.

383. *Barlow*’s, 436 U.S. at 334 (Stevens, J., dissenting). The dissenting Justices identified three purposes asserted by the majority in justifying a warrant requirement—and found each of them satisfied under the statutory scheme. *Id.* at 332 (Stevens, J., dissenting). The fact that an inspector was required by the statute to contact his superiors (and ultimately the courts) if he was refused entry to search was seen by the dissenters as a deterrent to an inspector attempting to conduct a non-routine search. *Id.* at 333. (Stevens, J., dissenting). The statute also required the inspector to show his credentials prior to a search—thus assuring the employer that the inspector’s entry was authorized. *Id.* Finally, the warrant procedure does not limit the scope of the search any more than does the statute. *Id.* at 333-34 (Stevens, J., dissenting). Thus, the dissent concluded that a warrant requirement, obviously a burden, was “superfluous” to the protections in the statute. *Id.* at 334 (Stevens, J., dissenting).



requests withdrawn by the agency after internal review, and, finally, out of 1178 situations which therefore would have required warrants, 739 were granted by magistrates. Therefore, out of all OSHA inspections conducted, only 2.9% were met with a denial of entry, and only 1.85% of the total OSHA inspections attempted required the actual use of a warrant.

2. Of the 68,840 inspections conducted in year 2, there were 1786 denials of entry, 1786 initial warrant requests, 363 withdrawn requests, and, finally, out of 1423 situations which would have required warrants, there were 992 cases where the warrant applications were granted. Therefore, in the most recent fiscal year, out of all OSHA inspections conducted, only 2.6% were met with a denial of entry and only 2.06% of the total inspections attempted required the presentation of a warrant.

Unfortunately, OSHA was unable to supply data for any time prior to the *Barlow's* decision. However, detailed personal interviews with various agency personnel indicate that, in the year prior to that decision, an even lower, approximately 0.5% refusal of entry rate existed, and in the year immediately following the decision, the refusal of entry rate rose to an estimated 4.0%. The long range impact, however, could be seen as an absolute increase to approximately 2.1% as of September 1983. This figure both belies the initial concern expressed by Secretary Marshall that the burden upon the agency would be significant and should allay the respective fears expressed by Justices Clark and Stevens.

When the OSHA figures are added to the previous statistics, the results are:

1. Total number of agency inspections . . . . . 7,132,234
2. Total number of warrants required . . . . . 1,758
3. Percentage of warrants required as related to  
total inspections . . . . . 0.0246%

All of the data collected in response to the four survey questions points to a resounding "no" as the answer to the question of whether any major changes in federal administrative agency procedures for investigatory searches have occurred due to *Barlow's*.

### C. *Searches and Subpoenas*

The second set of questions, those relating to legislation and

statutory language, could only be addressed by a close examination of enabling statutes, regulatory codes and investigatory schemes. The first question raised by the case law in this area is whether Justice Stewart's concern in the *Dewey* dissent has materialized in the way of new and repressive legislation. As a reminder, his warning was that, after *Dewey*, Congress could indiscriminately avoid the fourth amendment by defining an industry as dangerous, regulating it heavily, and making provisions for necessary warrantless inspections.<sup>384</sup> After extensive statutory readings, as well as interviews with numerous federal agency personnel, the authors conclude that there has been no demonstrable evidence that Congress had so acted since *Dewey*, nor have the lower courts been so inclined in their interpretations. *Dewey's* progeny gave strict adherence to the model laid out in *Dewey* and the courts have been reluctant to expand that model.<sup>385</sup> However, these decisions do not directly address just how Congress may circumvent the fourth amendment in drafting legislation. It is the authors' belief that the language of *Dewey* will place restrictions upon legislation, albeit indirectly. According to *Dewey*: "[I]t is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary."<sup>386</sup> If, in fact, Congress enacts a statute that adheres to the *Dewey* mandate, it will have provided a "constitutionally adequate substitute for a warrant."<sup>387</sup> However, Congress has not reframed the legislation of existing agencies, nor has it created new agencies with such broad investigatory power—Justice Stewart's concern has not yet been validated.

Nonetheless, it has not been long since *Dewey*, and the Reagan Administration's apparent deregulatory emphasis may be the greatest reason Congress has not yet created any new agencies nor broadened the investigatory powers of any existing agency. All we can say for certain is that the fear is, so far, more theoretical than actual.

---

384. *Dewey*, 452 U.S. at 613-14 (Stewart, J., dissenting). Specifically, Stewart interpreted the majority's decision as leaving Congress free "to avoid." *Id.*

385. For a discussion of the decisions following the rule laid down in *Dewey*, see *supra* text accompanying notes 311-75.

386. 452 U.S. at 606.

387. *Id.* at 603. The Court reasoned that since the mining industry required such extensive regulation, the mine owners must have expected that the inspections would occur. *Id.*

### 1. *Terms for "Search"*

Our review of the relevant statutes and regulations has, however, led the authors to be concerned about a more subtle issue—the unclear and ambiguous use of synonyms for the term “search” that make much of the investigatory activity of federal agencies appear to resemble other forms of process, in particular the subpoena. Our inquiries relating to ambiguous language and the possible use and abuse of certain terms and procedures required examining statutory and regulatory language as well as case law. In the case of statutory and regulatory terms for “search” and “search warrant” our review of the pertinent statutes and regulations revealed that in excess of a dozen terms are found alternately throughout the sections dealing with the particular acts in question. For example,

thorough examination;  
to enter . . . to inspect;  
investigate;  
access to records;  
conduct administrative inspections;  
investigate and gather data;  
right of entry;  
access to copy and inspect;  
field investigations . . . inquiries;  
inspections and investigations;  
access to inspect and sample;  
inspect and examine;  
gather and compile information to  
investigate;  
have access to . . . for examination; and  
board and search,

are all found in the cited statutes. Often, more than one phrase appears in the same provision and the reader is left to question whether “access to records” is any different from “gathering and compiling information.”<sup>388</sup> Not only are such variances on their face indiscriminate, but, in the context of ascertaining whether a particular agency has the authority to search a particular establishment, the distinctions do not appear to be well articulated. This becomes especially problematical when an agency’s actions are being scrutinized as possibly being violative of fourth amend-

---

388. Compare 15 U.S.C. § 49 (1982) with 15 U.S.C. § 46(a) (1982).

ment guarantees. In the early sections of this article, discussing the case law regarding administrative searches, it became apparent that the interpretation of agency code sections was of paramount importance. The first step in the interpretation of any statute or regulation is the reading of its "plain meaning" followed by an analysis of the legislative history (or congressional findings which clarify or establish legislative intent).<sup>389</sup> The cases discussed earlier establish the language of administrative search law with relative clarity. The ambiguity attendant to the phrases here described may not cause the statutes to be declared "void for vagueness," but they do unnecessarily raise questions as to the adequacy and legitimacy of an individual agency's inspection authority. What is the difference between an "inspection," a "search," or an "access request"? Does an "examination" afford an inspector more leeway than an "investigation"?

In general, highly regulatory, single industry agencies have more detailed and specific statutory authority, whereas those agencies dealing with a broader range of businesses have language that is less precise. The question of what is a search becomes increasingly more difficult to answer as one peruses the statutes, especially when one considers the administrative subpoena.

## 2. *Administrative Subpoenas*

The final area of concern which developed for us was an outgrowth of our analysis of the statutory language problems discussed above. In exploring agency use of compulsory process, the authors became aware that the term "administrative subpoena" is used in practice to mean something far broader than that for which it was originally intended.<sup>390</sup>

---

389. *See, e.g.*, *Blum v. Stenson*, 465 U.S. 886, 896 (1984) (where interpretation of statute is involved court turns first to statutory language, then to legislative history); *Aaron v. SEC*, 446 U.S. 680, 695 (1986) (where there is no conflict between two, court need only examine clear wording of statute and legislative history in interpreting statute); *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157 (1972) (clear meaning of statutory language not to be ignored but it is essential that court resort to legislative history); *Allen v. State Board of Elections*, 393 U.S. 544, 570 (1969) (where language of statute is not crystal clear court must resort to legislative history).

390. An analysis of the development of the administrative subpoena power should start with a look at the subpoena power of Congress. The Supreme Court was very protective of the power to compel the production of evidence and testimony, holding in 1881 that neither House of Congress had the power to compel a witness to testify in a quasi-judicial proceeding regarding his personal affairs. *Kilbourn v. Thompson*, 103 U.S. 168, 196 (1881). *Kilbourn* was called before a committee of the House of Representatives to testify about his

Neither the language of the fourth amendment nor its legislative history literally limits the use of judicially enforceable subpoenas which require testimony or the production of documents.<sup>391</sup> However, a century ago, the Supreme Court, in *Boyd v. United States*, extended fourth amendment protections to “any forcible and compulsory extortion of a man’s own testimony or of *his private papers* to be used as evidence to convict him of crime or to forfeit his goods.”<sup>392</sup> The *Boyd* ruling, however, only protects an individual where a personal privilege is asserted: “[T]here is no unreasonable search and seizure, when a writ, suitably specific and properly limited in its scope, calls for the pro-

---

real estate partnership as well as to produce various records of the partnership. *Id.* at 172. In reversing a contempt order, the Court distinguished the power to compel testimony at a judicial proceeding with the power of Congress to conduct a legislative investigation and found this investigation was judicial in nature. *Id.* at 190-96.

This view of the judicial “nature” of investigation was limited in the case of *McGrain v. Dougherty*, 273 U.S. 135 (1927). In *Dougherty*, a Senate Committee issued a subpoena to the appellee in an investigation of his brother, who had been the Attorney General. *Id.* at 151-52. The Court upheld the use of the subpoena holding that the power to investigate is implied in the grant of legislative powers. *Id.* at 160-62, 174.

Prior to 1927, several cases arose in which administrative agencies attempted to exercise subpoena power and the *Kilbourn* rule held strong. See K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 4:1, at 225-26 (1978).

Arguably the Supreme Court took its strongest stance against agency use of subpoenas in *Federal Trade Comm’n v. American Tobacco Co.*, 264 U.S. 298 (1924). There the F.T.C. wanted to compel the production of records, not to substantiate specific allegations, but to investigate the possible existence of violations of the F.T.C. Act. *Id.* at 305 (1924).

The Court unanimously held that Congress could not have intended “to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.” *Id.* at 306. However, while the Court found such power to involve a substantial conflict with the protections of the fourth amendment, the Court implied that if Congress *explicitly* showed its intent to grant such pure investigatory power to the agency, it might be constitutional. See *id.* at 306.

The Supreme Court’s view of administrative investigations slowly shifted, however, in the 1940’s. See K. DAVIS, *supra* at 228. For a discussion of the evolution of the courts’ acceptance of the investigatory rule of agencies, see *infra* notes 392-437 and accompanying text.

391. See K. DAVIS, *supra* note 390, at 227. For a discussion of the background and the history of the fourth amendment, see *supra* notes 2-9.

392. 116 U.S. 616, 630 (1886) (emphasis added). In *Boyd*, the defendant was charged with defrauding the federal government out of the duties owed for importing thirty-five cases of glass plates. *Id.* at 617-18. During trial, the district court, pursuant to federal law, directed the defendants to turn over various invoices of previous shipments. *Id.* at 618. The defendants complied, but objected to the introduction of this evidence at trial on the grounds that the fourth and fifth amendments barred compelling the defendants to turn over evidence against themselves. *Id.* The Supreme Court held the statute unconstitutional on both fourth and fifth amendment grounds, saying, in effect, that compelling a person to turn over evidence against himself is an “unreasonable search and seizure.” *Id.* at 633-35.

duction of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced."<sup>393</sup>

Nevertheless, despite critics' charges of "fishing expeditions," and except for limits concerning breadth and relevancy, the fourth amendment does not today restrict the scope of an administrative subpoena for records.<sup>394</sup> The broad standard of the requirement of particularity was declared in the Supreme Court's landmark 1950 decision, *Oklahoma Press Publishing Co. v. Walling*.<sup>395</sup>

---

393. *Wilson v. United States*, 221 U.S. 361, 376 (1911). In *Wilson*, a subpoena was served upon Wilson for the production of corporate documents. *Id.* at 368. Wilson, however, refused to make the records available claiming they would tend to incriminate him. *Id.* at 369. The Court held that the *Boyd* doctrine did not apply here because the books belonged to the corporation, not Wilson; however, certain incriminating letters written by Wilson could be properly removed. *Id.* at 377-78.

394. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1950). For a discussion of the use of administrative subpoenas, see *infra* notes 395-414 and accompanying text.

395. 327 U.S. 186 (1946). In *Oklahoma Press*, the U.S. Department of Labor issued a subpoena duces tecum to two printing companies in order to compel the production of the press companies' records so that the agency could determine whether the companies were in violation of the Fair Labor Standards Act. *Id.* at 189. The Act gave the agency power to "investigate data" in order to determine whether the various wage and working condition requirements were being met by the employer. *Id.* at 199 n.23. The Act also incorporated the subpoena provisions of the Federal Trade Commission Act. *Id.* at 189. Section 209 of the Fair Labor Standards Act had incorporated section 9 of the Federal Trade Commission Act:

For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U.S.C. 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau and the industry committees.

Fair Labor Standards Act, ch. 676, 52 Stat. 1065 (1938) (current version at 29 U.S.C. § 209 (1982)). Section 9 of the Federal Trade Commission Act further provided that, for the purposes of the authorized investigations, the Commission or its agents "shall have access to and the right to copy" any documentary evidence of any corporation being investigated or proceeded against, with the power to require by subpoena "the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." Federal Trade Commission Act, ch. 311, 38 Stat. 722 (1914) (current version at 15 U.S.C. § 49 (1982)). The section then proceeds:

[I]n case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so or-

Under the *Oklahoma Press* decision, there is no requirement that there be any violation of law alleged in order to issue a subpoena.<sup>396</sup> All that is required is that the investigation be for a lawful purpose, i.e. within the power of Congress to authorize, and that the documents to be produced are “adequate for the purpose of relevant inquiry.”<sup>397</sup> Further apparent judicial retreat from fears of governmental “fishing expeditions” was illustrated in *United States v. Morton Salt Co.*,<sup>398</sup> in which the Supreme Court approved of FTC requests for highly particularized reports showing compliance with a cease and desist order.<sup>399</sup> In that case, the Supreme Court rejected fourth and fifth amendment challenges and said that “law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with law

---

dered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

*Id.*

The appellants claimed that enforcement of the subpoenas would violate their fourth amendment rights—they argued akin to the Supreme Court’s holding in *American Tobacco* that allowing the agency to investigate company records in search of evidence that there has been a violation of the Fair Labor Standards Act but before being charged with a violation amounts to an unconstitutional search and seizure. *Oklahoma Press*, 327 U.S. at 194-95. However, the Supreme Court no longer saw any fourth amendment implications involving an administrative subpoena for company records: “The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure . . . .” *Id.* at 195. More to the point of the appellants’ objections, the majority opinion stated that the very purpose of a subpoena is to procure evidence, *not* to prove an allegation. *Id.* at 201.

396. *Id.* at 209.

397. *Id.* at 209-10.

398. 338 U.S. 632, 651-54 (1950).

399. The *Morton* case arose after the F.T.C. had issued a cease and desist order against Morton and various other salt producers ordering them to halt certain pricing practices. *Id.* at 635-36. The Seventh Circuit affirmed this order and directed that the respondents submit reports to the Commission to prove their compliance with the order, which Morton Salt Co. did. *Id.* at 636. Approximately four years later, the F.T.C. on its own violation ordered the Morton Salt Company to turn over “highly particularized reports” to prove their continuing compliance with the prior cease and desist order. *Id.*

The Court first had to address the issue of the Commission’s authority to order such information to be revealed—the Commission relief on the purported authority of one of its own rules of practice. *Id.* at 636. In finding that the Commission was authorized to request such records, the Court relied on section 6 of the Federal Trade Commission Act which states in part that the Commission has the power to investigate businesses engaged in commerce and to *require* those businesses to file annual and/or special reports upon the Commission’s request. *Id.* at 648-51. Once the Court found valid authorization, the Court cited *Oklahoma Press* in stating it was not even necessary to ask whether the corporation had any fourth amendment rights. *Id.* at 651.

and the public interest.”<sup>400</sup> A subpoena duces tecum or other production of documents order may be invalid for undue breadth or irrelevancy if it is so “sweeping” in nature that it exceeds the investigative power.<sup>401</sup> However, “if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant,” the subpoena will be upheld.<sup>402</sup>

The breadth of an investigation is, however, generally left for the investigators to determine, subject only to the limitation that the records sought are reasonably relevant to the matter at issue.<sup>403</sup> If federal administrative subpoenas are not complied with, the usual sanction sought for refusal is application to a district court for an order which, if violated, is punishable as contempt of court.<sup>404</sup> The scope of judicial inquiry in a proceeding to enforce subpoenas was determined by the Supreme Court in *Endicott Johnson Corporation v. Perkins*, where it was held that the district court need not hear evidence on the issue of whether the information sought is within the coverage of the applicable statute governing the administrator’s procedures.<sup>405</sup> Instead, a pleading by the administrator—alleging he has “reason to believe” that the defendant and the desired subject matter are covered by the statute—is sufficient.<sup>406</sup> Thus, the district court need

---

400. *Id.* at 652. The Court further stated that this right is legitimate even if the request for information was caused by nothing more than official curiosity.” *Id.*

401. *Id.* (citing *F.T.C. v. American Tobacco Co.*, 264 U.S. 298 (1924)).

402. *Id.*

403. *Id.* at 652-53.

404. *Interstate Commerce Comm’n v. Brimson*, 154 U.S. 447, 485 (1894) (administrative agency cannot compel obedience to its own orders), *see also* *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 510 n.1 (1943) (Murphy, J., dissenting) (stating that disregard of agency subpoena is punishable through criminal proceedings in that no federal agency has been granted power to punish disobedience of its order by contempt authorization); K. DAVIS, *supra* note 390, at 240-41.

405. 317 U.S. 501, 508-09 (1943). The district court had refused to enforce a Labor Department subpoena because the Secretary of Labor sought information before alleging that the employee contracts which were under investigation were actually covered under the department authorizing statute—the Walsh-Healy Act. *Id.* at 508. In order for the Labor Department to have the authority to enforce minimum wage requirements under the Act, the government must have a contract with the employer for more than \$10,000.

The Supreme Court pointed out that it is for the Secretary of Labor to decide whether an employer is held to the requirements of the Act. *Id.* at 507 (citing *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940)). For the Secretary of Labor to make this judgment as to coverage, she should have been allowed to investigate the facts necessary to so determine. *Id.* at 508.

406. *Id.* The Court stated that allowing the district court to decide the issue



inquire no further than is necessary to ascertain whether the information sought is relevant to any lawful purpose of the administrative authority.<sup>407</sup>

It appears that the effect of *Endicott Johnson* was to afford administrative officers great latitude in compelling disclosure of information even to the extent that their investigation may reveal the information to be beyond agency jurisdiction. (The reviewing court may make the same finding.) The burden that the private party bears in order to successfully resist disclosure is significant. The private party must show that the evidence sought is "plainly incompetent or irrelevant to any lawful purpose" of the administrative body.<sup>408</sup> Thus, a key difference between a subpoena to produce documents and an administrative search is that, in the latter, a warrant based upon some showing of probable cause is required;<sup>409</sup> in the former, however, it appears a showing to meet even the lower administrative probable cause standard, as a preliminary requirement, is unnecessary.<sup>410</sup>

The *Oklahoma Press* case made the decision in *Endicott Johnson* applicable to many statutes;<sup>411</sup> a district court has an obligation to enforce a subpoena where it is relevant to the administrator's lawful purpose.<sup>412</sup> The contrary view, that subpoenas should only be issued by the judiciary as a means of ensuring or safeguarding fundamental rights seems weakened by the fact that Federal Rule of Civil Procedure 45(a) specifically provides that clerks "shall" issue subpoenas upon a party's request.<sup>413</sup>

of an employer's coverage under the Act would be allowing the court to usurp the duty which Congress had left to the discretion of the agency. *Id.* at 509.

407. See *Morton Salt*, 338 U.S. at 651-54; *Oklahoma Press*, 327 U.S. at 209-10. For a discussion of these cases, see *supra* notes 395-402 and accompanying text.

408. *Endicott Johnson*, 317 U.S. at 509; see also *Oklahoma Press*, 327 U.S. at 211 (question of validity of subpoena involves determining whether evidence relevant to possible violations is sought).

409. For a discussion of the probable cause requirement in the administrative search context, see *supra* notes 326-72 & 167-74 and accompanying text. For a discussion of the distinction between a search and a subpoena for information, see *infra* text accompanying notes 415-37.

410. See *United States v. Powell*, 379 U.S. 48, 57 (1964) (holding based on *Oklahoma Press* and *Morton Salt* that under the Internal Revenue Code, no standard of probable cause is necessary for issuance of process); see also K. DAVIS, *supra* note 390, at 239.

411. K. DAVIS, *supra* note 390, at 230; *Oklahoma Press*, 327 U.S. at 211 (stating it would be anomalous to not apply the *Endicott Johnson* holding to one agency enabling act but to another when in both Congress has granted investigatory power to agency).

412. 327 U.S. at 209.

413. FED. R. CIV. P. 45(a).

Another result of the *Oklahoma Press* case is that subpoenas may still be issued even though specific charges are not pending.<sup>414</sup> It is sufficient that the investigation is for a lawfully authorized purpose within the power of Congress to command. Thus the power to investigate extends to authorized investigations for a valid purpose where the documents sought are relevant to the inquiry.

Having discussed the breadth of the administrative subpoena, it becomes germane to address, at least preliminarily, the presently blurred distinction between the need for a search warrant as opposed to that for a subpoena ducus tecum.

### 3. Lone Steer

On January 17, 1984 the Supreme Court rendered its unanimous decision in *Donovan v. Lone Steer, Inc.*, reversing the district court's invalidation of an administrative subpoena duces tecum.<sup>415</sup> In *Lone Steer*, the manager of a motel-restaurant refused permission for inspection to a compliance officer of the Wage and Hour Division of the United States Department of Labor until the reasons for the inspection were disclosed.<sup>416</sup> The department responded to the request for disclosure negatively, citing the Fair Labor Standards Act:<sup>417</sup> "[T]he Secretary may institute an investigation whether or not a complaint has been filed and, thus, the motive for the investigation will not be given."<sup>418</sup> The compliance officer scheduled to conduct the inspection was instructed to attempt the investigation and in the event of refusal, to serve Lone Steer with an administrative subpoena duces tecum.<sup>419</sup>

---

414. *Oklahoma Press*, 327 U.S. at 201. The Court plainly stated that "[t]he very purpose of the subpoena . . . is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so." *Id.*

415. 464 U.S. 408 (1984). The district court found that the Secretary of Labor fulfilled all the statutory requirements of the Fair Labor Standards Act, but that to compel the production of evidence without a warrant is a violation of the fourth amendment. *Lone Steer, Inc. v. Donovan*, 565 F. Supp. 229, 231-32 (D.N.D. 1982), *rev'd*, 464 U.S. 408 (1984).

416. *Lone Steer, Inc. v. Donovan*, 565 F. Supp. 229, 231 (D.N.D. 1982), *rev'd*, 464 U.S. 408 (1984). In fact the manager was not present at the time of the inspection, but had previously notified the agency through her lawyer, that unless the nature of any complaints or the reasons for the inspection were disclosed, permission to inspect would be denied. *Id.* at 230-31.

417. 29 U.S.C. § 211(a) (1982).

418. 565 F. Supp. at 230. The department did give a very general description of its planned investigation—to review and make transcripts of records and to interview employees. *Id.*

419. *Id.* at 231.

The officers attempted to inspect the premises but after some delay, they served an administrative subpoena duces tecum—which they had ready on hand for just such a contingency—upon a Lone Steer employee.<sup>420</sup> A few days later, counsel for Lone Steer contacted the Labor Department and advised them that Lone Steer would not comply with the subpoena duces tecum arguing that a warrant pursuant to the holding in *Marshall v. Barlow's* was required.<sup>421</sup> Rather than obtain a warrant, however, the department secured an administrative subpoena; in a letter confirming its position, the restaurant requested resolution of the issue of warrantless inspections in the appropriate forum.<sup>422</sup>

At trial, the district court acknowledged that the Secretary of Labor “unquestionably comport[ed] with the provisions of the Fair Labor Standards Act,” but disagreed with the Secretary’s assertion that a warrant was not required.<sup>423</sup> Instead, the court found that the purposes in *Barlow's* for conducting the search—health and safety—were even more compelling than the purposes in the instant case—the determination of compliance with wage and hour regulations—and yet, a warrant was still required in *Barlow's*.<sup>424</sup> Therefore, the court concluded that under the circumstances of this case, the *Barlow's* rationale “applies with equal—if not greater—force.”<sup>425</sup>

This case thus afforded the Supreme Court the opportunity to put to rest the ad hoc method, promulgated by the *Barlow's* Court, of judging each statute’s inspection standards individually. A decision that every non-consensual inspection of premises and/or records requires a warrant issued by an independent magistrate would resolve any procedural question and simultaneously rid the statutes of semantical variations which could be perceived as linguistic exercises designed to avoid the warrant process. However, Justice Rehnquist, speaking for a unanimous court, did not reach this conclusion, declaring instead that the district court had ruled on a “case” not before it;<sup>426</sup> he subsequently ruled

---

420. *Id.*

421. *Id.* Lone Steer’s counsel argued that a subpoena without any probable cause basis could not be used to obtain the same result that would otherwise require a warrant pursuant to *Barlow's*. *Id.*

422. *Id.*

423. *Id.* at 231-32.

424. *Id.* at 232.

425. *Id.*

426. *Lone Steer*, 464 U.S. at 413. Justice Rehnquist distinguished between a request for records, as in the facts of this case, and an actual entrance upon one’s premises for the purpose of an actual inspection, as the district court had

merely that a judicial warrant is not a prerequisite to a valid administrative subpoena for records.<sup>427</sup>

The Court found no non-consensual "entry" in *Lone Steer* because, once the inspection was refused, the employee was served with a subpoena duces tecum which did not authorize entry or inspection of premises, but rather directed Lone Steer to produce relevant wage and hour records at the regional office.<sup>428</sup> This governmental action was not, the Court contended, the sort with which *Barlow's*, *Camara*, and *See* were concerned: "It is plain to us that those cases turned upon the effort of the government inspectors to make nonconsensual *entries* into areas not open to the public;"<sup>429</sup> since that was neither the intention of agency officers nor the outcome in *Lone Steer*, those cases do not govern.<sup>430</sup> The Court noted that because the constitutionality of the administrative subpoena duces tecum had been challenged, as opposed to a non-consensual entry to search, the Court was governed by the decision in *Oklahoma Press*,<sup>431</sup> where a similar subpoena issued under section 9 of the Federal Trade Commission Act<sup>432</sup> was

---

ruled was involved. *Id.* at 413-14. Justice Rehnquist distinguished this case from the type in *Barlow's*, in that in the instant case, the only "entry" upon Lone Steer's premises, was that of the inspectors when they went into a public lobby. *Id.* The subpoena did not authorize any entry or inspection of the *premises* and therefore no fourth amendment protections attached. *Id.* at 414-15.

427. *Id.* at 415.

428. *Id.* at 414-15. For a further discussion of the Court's distinction between a request for relevant data and a fourth amendment "entry," see *supra* note 426.

429. *Id.* at 414 (emphasis added).

430. *Id.*

431. *Id.* For a discussion of the distinction between the relevancy of *Oklahoma Press* as opposed to *Barlow's*, see *supra* note 426. The *Oklahoma Press* case involved a constitutional challenge to a subpoena duces tecum issued pursuant to the Fair Labor Standards Act and the Federal Trade Commission Act. *Oklahoma Press*, 327 U.S. at 189. For a more thorough discussion of the facts of *Oklahoma Press* and the Court's holding, see *supra* note 395.

432. Section 209 of the Fair Labor Standards Act had incorporated section 9 of the Federal Trade Commission Act:

For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U.S.C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau and the industry committees.

Fair Labor Standards Act, ch. 676, 52 Stat. 1065 (1938) (current version at 29 U.S.C. § 209 (1982)). Section 9 of the Federal Trade Commission Act further provided that, for the purposes of the authorized investigations, the Commission or its agents "shall have access to and the right to copy" any documentary evidence of any corporation being investigated or proceeded against, with the power to require by subpoena "the attendance and testimony of witnesses and

challenged. The *Lone Steer* Court thus rejected the invalidity argument, relying on the holding in *Oklahoma Press*:

The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections. . . .<sup>433</sup>

The holding in *Lone Steer*, however, does not remove the administrative subpoena from constitutional scrutiny. In *See* and other Supreme Court decisions,<sup>434</sup> the reasonableness standard of the fourth amendment has been inviolate.

It is now settled that, when an administrative agency subpoenas corporate books or records, the fourth amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.<sup>435</sup>

This standard, contended the Court, although it does not require a warrant, does still safeguard the employer's interests by

---

the production of all such documentary evidence relating to any matter under investigation." Federal Trade Commission Act, ch. 311, 38 Stat. 722 (1914) (current version at 15 U.S.C. § 49 (1982)).

The section then proceeds:

[I]n case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

*Id.*

433. *Lone Steer*, 464 U.S. at 414-15 (quoting *Oklahoma Press*, 327 U.S. at 195).

434. *See, e.g., Morton Salt*, 338 U.S. at 652 (scope of investigation must not exceed agency's proper investigatory powers).

435. *See*, 387 U.S. at 544. For a discussion of the holding in *See*, see *supra* notes 30-38.

allowing the employer to question the reasonableness of the subpoena by raising objections in a district court.<sup>436</sup> Employers are, therefore, not defenseless against unreasonable subpoenas; they simply do not have the defense of the right to insist on a judicial warrant.<sup>437</sup>

#### 4. *Whither the Warrant?*

The district court in *Lone Steer* saw little distinction between the subpoena and the warrant, given the practical circumstances in which the Department of Labor sought to elicit information. By ruling otherwise, has the Supreme Court given federal administrators carte blanche to obtain whatever non-criminal records, documents, papers, etc. they seek, so long as they employ the administrative subpoena duces tecum? If so, that subpoena is a powerful weapon. Unfortunately, it was beyond the scope of our empirical investigation to study such uses of the subpoena. The responses to our questions about warrants, however, persistently touched on the limits of the warrant-subpoena distinction in practice and thus prompt us to suggest to future researchers that there is a potential problem here worthy of exploration. We should reiterate that the authors only have intimations that the very broad grant of subpoena power might be misapplied in some cases where the more circumscribable, judicially approved administrative warrant would be more appropriate; the question thus calls for further study.

In many respects, we have merely scratched the surface as far as the questions raised by our initial research are concerned. The importance of those questions, however, should not be unduly minimized if for no other reason than that they do touch upon even more probing concerns. We have established that the vast majority of administrative searches are consensual;<sup>438</sup> what has not been addressed, however, is what that means. We are aware

436. *Lone Steer*, 464 U.S. at 414-15; See 387 U.S. at 544-45; *Oklahoma Press*, 327 U.S. at 208-09.

437. *Lone Steer*, 464 U.S. at 415. The Court seemed to reason that by objecting to the subpoena, thus forcing a court to rule on its reasonableness, the employer receives the same protections as if a magistrate had ruled on the existence of probable cause (in the administrative sense) before the search was attempted. *Id.* However, in his dissent in *Oklahoma Press*, Justice Murphy argued that the ability to protect the validity of a subpoena would not always protect the party served from unreasonable demands for information because often the party will yield to the agent's "air of authority." *Oklahoma Press*, 327 U.S. at 219 (Murphy, J., dissenting).

438. For an analysis of the data gathered concerning consensual searches, see *supra* text accompanying notes 381-83.

that, with regard to such criminal procedural matters as searches, confessions, identifications and guilty pleas, the troublesome concept of freely willed consent has been much considered.<sup>439</sup> In the administration law context, however, the authors find that there has been little, if any, exploration given to the realities of that term. Implicit in our interviews with agency representatives and small business managers was an acceptance that, if entry to inspect was ever denied then their licenses would either be revoked or not granted at all and their enterprise would be out of business.<sup>440</sup> This is never an explicit threat but it appears to be an acceptance by owners of a reality which on its face raises a multitude of questions concerning why so many agencies report 100% consensual inspections.<sup>441</sup> It is the authors' view that the guarantees of fourth amendment protections for administrative searches must be met in all senses, thus, the area regarding the true nature

---

439. See generally Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127 (1984) (comparative analysis between probable cause standard in criminal law with balancing of law enforcement and privacy interests test in civil cases).

Regarding consent to searches, see *Survey, Criminal Law in the Ninth Circuit: Recent Developments*, 16 LOY. L.A.L. REV. 707, 800-01 (1983) (voluntariness of consent to search is question of fact and hinges upon appellant's awareness of freedom to leave).

For the breakdown of the factors which a court must consider when examining the voluntariness of a confession, see 18 U.S.C. § 3501(b) (1983). See also *Survey, supra*, at 855-61 (recent court analyses in interpreting voluntariness of confessions).

Regarding identifications, see *Simmons v. United States*, 390 U.S. 377, 384 (1968) (identification cannot be so "suggestive so as to give rise to a very substantial likelihood of irreparable misidentification"); see also *Survey, supra*, at 970-73 (analysis of the factors courts weigh in judging suggestiveness: witness' opportunity to view perpetrator, witness' attention, accuracy of witness, prior description of perpetrator, witness' certainty at identification, delay between crime and identification, and corrupting effect of any suggestiveness found).

Finally, for a review of the voluntariness requirement for a guilty plea, see FED. R. CRIM. P. 11(d); see also Craft and Alacron, *Criminal Law and Procedure*, 29 LOY. L. REV. 689, 698-700 (1983) (coerciveness of guilty pleas and plea bargaining).

440. This coercive reality is similar to Justice Murphy's hypothesized objection in *Oklahoma Press* that business owners would consent to administrative searches due to the "authority" of the demand. *Oklahoma Press*, 327 U.S. at 219 (Murphy, J., dissenting). For a further discussion of this objection, see *supra* note 437.

441. A variation of this theme was played out in the various Department of Agriculture services which conduct literally millions of inspections, not one of which ever required a warrant. As one official explained it to us, if a food inspector were refused entry, there would be no Department of Agriculture grading, no seal of approval, and the food could not be sold legitimately; thus, the company would very soon be out of business.

of the consent to administrative searches might be ripe for further investigation.

We saw, when researching the statutory language issues, that consistency of terms is generally nonexistent. The significance of such inconsistency is two-fold:

(1) For the purposes of statutory construction and/or interpretation, should language relating to searches be consistent and narrowly drawn so that one may read any administrative agency's statutes or regulations and have an understanding of the terms used?

(2) Is there a necessity for a flexible definition of a search—one that may be adopted by individual agencies even though the structure and function of each agency's investigatory approach is different?

Again, we can draw no definitive conclusion except to suggest that, since the interpretation of language is of primary importance to the ascertainment of Congressional intent, further research and study may lead to the conclusion that the need for more consistent use of clearly defined terms is required.

The questions raised by our study of the scope and application of the administrative subpoena clearly have not been answered by our concededly preliminary research. The authors suggest, however, that in this area a case-by-case determination may perhaps be most appropriate in assessing the reasonableness and scope of a particular subpoena *duces tecum*, but that a Congressional (or even a judicial) policy determination should be made declaring a clear preference for a search warrant when the subpoena, functioning in place of that protection, is used in an apparent effort to circumvent the warrant requirement.

We stress again that our initial research into agency data, statutory language and administrative subpoena case law was quite preliminary in nature, and produced inconclusive results, but we feel it was a fruitful venture primarily because it provided indicators that future, more detailed, study is warranted; areas requiring investigation have been more clearly delineated.

The protections of the fourth amendment require more than acknowledging "some" warrant requirement; the authors suggest that the intensity of study hitherto applied to the criminal area needs now to be focused on administrative searches so that the mandates of the Constitution, via *Camara*, *See*, *Barlow's*, and *Dewey*, can be carried out in practice as well as in theory.



## D. Conclusion

This article began with an analysis of the constitutional foundation supporting inspections made by administrative agencies. That foundation must not be obscured by the many and varied issues raised; it must remain the base upon which the protections of the fourth amendment are carefully structured.

The applicability of these protections to administrative searches is now substantially documented.<sup>442</sup> When the Supreme Court rendered its opinion in *Marshall v. Barlow's*, many, in and out of government, believed it would usher in the era of the "paper warrant"—a useless rubber stamp approving governmental intrusions.<sup>443</sup> Others, primarily those within the government structure, were convinced that the effectiveness of the investigatory agencies would be diminished by the constraints of seeking and implementing a warrant.<sup>444</sup> In the authors' view, however, neither the case law nor the data indicate that either condition has materialized in practice; rather, the vast majority of administrative searches remain consensual.<sup>445</sup>

---

442. For a discussion of the development of the courts' application of fourth amendment requirements to administrative searches, see *supra* notes 26-40 & 122-74 and accompanying text.

443. See, e.g., *Barlow's*, 436 U.S. at 327-28 (danger is not in warrantless searches but in warrants issued under diluted requirements).

444. See, e.g., *id.* at 317.

445. The following agencies reported the consequent increase or decrease in numbers of inspections:

|                                                                                                                                                                                                                                                                                                                                                   |                                                                                  |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------|
| Comptroller of Currency                                                                                                                                                                                                                                                                                                                           | 7% increase overall                                                              |
| Consumer Product Safety Commission                                                                                                                                                                                                                                                                                                                | 31% decrease overall                                                             |
| Department of Agriculture Markets & Animal Inspections                                                                                                                                                                                                                                                                                            | 50% decrease overall<br>127% increase in 1980                                    |
| Federal Grain Inspection Service                                                                                                                                                                                                                                                                                                                  | 50% decrease in 1982                                                             |
| Federal Communications Commission                                                                                                                                                                                                                                                                                                                 | 75% increase overall                                                             |
| Federal Deposit Insurance Corporation                                                                                                                                                                                                                                                                                                             | 6% increase overall                                                              |
| Federal Energy Regulatory Commission                                                                                                                                                                                                                                                                                                              | 12% increase in 1980                                                             |
| U.S. Department of Labor                                                                                                                                                                                                                                                                                                                          | 63% increase overall                                                             |
| Mine Safety & Health Administration                                                                                                                                                                                                                                                                                                               | 12% increase in 1980<br>6% decrease in 1982<br>(still a 4.7% increase over 1977) |
| Federal Railroad Administration                                                                                                                                                                                                                                                                                                                   |                                                                                  |
| Safety Division                                                                                                                                                                                                                                                                                                                                   | 16% increase in 1980                                                             |
| Department of Transportation National Highway Traffic Safety Administration and Motor Vehicle Information and Cost Savings Act. Both reported substantial decreases in inspections, 81% respectively, however, the agency reports that no separate account has been kept of the inspections under the Safety Act so the figures are not complete. |                                                                                  |

What effect then did *Barlow's* and *Dewey* have? Primarily, they reinforced *Camara* and *See*—searches and seizures of commercial property are subject to the same guarantees of the fourth amendment ordinarily accorded the private citizen. *Barlow's* was not a decision which turned the tide of warrantless inspections. As the analysis of case law demonstrates, the lower federal courts had been requiring warrants for nonconsensual searches in the four years preceding *Barlow's*.<sup>446</sup> Nonetheless, *Barlow's* does carry the imprimatur of the Supreme Court and any similarly challenged inspections will fall (and have fallen) under its rationale. This has not, however, profoundly affected the inspection practices of the various agencies due to the fact that most searches are consensual.<sup>447</sup> In brief, this means that a warrant is not required:

1. if the inspection is nonconsensual;<sup>448</sup>
2. if the inspection is not made pursuant to an administrative plan which clearly establishes a pattern of inspections (haphazard or random selection is not sufficient);<sup>449</sup>
3. if the purpose of the inspection as articulated in the statute does not necessitate a consistent element of surprise;<sup>450</sup> and
4. if the burden placed upon the agency to secure a warrant does not outweigh the invasion of privacy alleged.<sup>451</sup>

---

|                                                                                 |                                              |
|---------------------------------------------------------------------------------|----------------------------------------------|
| Nuclear Regulatory Commission                                                   | 12% decrease in 1980<br>18% increase in 1982 |
| United States Customs Service                                                   | 23% decrease in 1980<br>34% increase in 1982 |
| Department of Labor Employment Standards Administration, Wage and Hour Division | 23% increase overall                         |
| OSHA:                                                                           |                                              |
| year #1: 63,394 inspections                                                     |                                              |
| year #2: 68,840 inspections                                                     |                                              |
| increase of 5,446 inspections, or 8.6%                                          |                                              |

446. For a breakdown of many of these decisions, see *supra* notes 126-27.

447. The .0246% of warrants required out of the total number of inspections reported is hardly a compelling statistic heralding a breakdown of the system.

448. See *Barlow's*, 436 U.S. at 322-25; *Camara*, 387 U.S. at 534; *See*, 387 U.S. at 543-44.

449. For a discussion of the rationale behind requiring a warrant where the statute requires periodic searches, see *supra* notes 70-72 and accompanying text.

450. For a discussion of the necessity of surprise searches, see *supra* notes 162-68 and accompanying text.

451. See *Biswell*, 406 U.S. 316-17. For a discussion of the weighing of the burden on the agency, see *supra* notes 68-71 and accompanying text.

The Environmental Protection Agency, and to some degree, the Consumer Product Safety Commission are agencies which have experienced some impact from the *Barlow's* decision. This is primarily because, like OSHA, they oversee several dissimilar industries and their powers are broad and subject to indiscriminate exercise over often otherwise minimally regulated employers or businesses.<sup>452</sup>

The next question that flowed from this substantially documented warrant standard was whether, and in what circumstances, the warrant requirement may be suspended and subsequent agency action be deemed not violative of the fourth amendment.

We first concluded that the requirement may be suspended, and, further, that the grounds for excepting it have expanded since *Colonnade* and *Biswell*.<sup>453</sup> Nevertheless, this expansion has not diluted the requirement enough to "swallow the rule."<sup>454</sup> The case law discussed above prescribes, ultimately, a balancing of the intrusion upon individual (and business) privacy rights as against the governmental interest in acting pursuant to a legitimate administrative plan.

*Dewey* laid out the parameters for legislation which permits inspections without search warrant requirements.<sup>455</sup> It has not led to the circumvention of the fourth amendment, as Justice Stewart suggested it might; rather, its progeny have adhered strictly to its standards and thereby provided a tailored and well defined inspection scheme as a reasonable substitute for, rather than an erosion of, constitutional protections.<sup>456</sup>

452. In regard to the variety of powers of the Environmental Protection Agency, see, e.g., 42 U.S.C. § 7410 (1983) (ability to set air quality standards); 42 U.S.C. § 7412 (1982) (ability to control air pollution). The variety of entities which the agency can investigate is virtually limitless as the agency can enter and or inspect records to determine compliance of *any* person. 42 U.S.C. § 7414(a) (1982).

Similarly, the Consumer Products Safety Commission's powers reach a broad spectrum of businesses: the agency can promulgate rules regulating "consumer products" which basically include any residential or recreational goods produced for the public (but excluding food, drugs, tobacco and most motorized vehicles). See 15 U.S.C. § 2052 (1983).

453. For a discussion concerning the various exceptions to the warrant requirement for administrative searches, see *supra* notes 41-121 and accompanying text.

454. For a review of this argument, see *supra* note 44.

455. For an analysis of the *Dewey* decision, see *supra* notes 281-309 and accompanying text.

456. For a discussion of the post-*Dewey* line of decisions, see *supra* notes 311-75 and accompanying text.

In particular, the following circumstances may render a warrantless administrative search valid:

- 1) The industry in question is so pervasively regulated as to establish an implied consent as part of the licensing plan.<sup>457</sup> Three limitations are placed upon this exception:
  - a) such inspections must further an urgent federal interest;<sup>458</sup>
  - b) the possibility of abuse and the threat to privacy must be minimal;<sup>459</sup> and
  - c) the inspection must be specifically authorized by statute;<sup>460</sup>
- 2) The statute in question establishes a predictable regulatory presence by its specificity, is tailored as to the scope and frequency of inspections, and puts the inspectee on notice as to the regulatory presence;<sup>461</sup> or
- 3) There is an emergency situation.<sup>462</sup>

Justice Stewart, in his dissent in *Dewey*, concluded with a warning: "Congress is left free to avoid the Fourth Amendment industry by industry even though the Court held in *Barlow's* that Congress could not avoid that Amendment all at once. Congress after today can define any industry as dangerous, regulate it substantially, and provide for warrantless inspections of its members."<sup>463</sup>

One thrust of our empirical research amounted to an effort on our part to ascertain the validity of Justice Stewart's fear. We have found, in practice, that there has been no demonstrable evidence that Congress has so acted since *Dewey*, nor has the Court been so inclined in its interpretations. The authors' view is that

---

457. See *Biswell*, 406 U.S. at 316 (where dealer engages in pervasively regulated business, he does so with knowledge that his records are open to inspection).

458. See *id.* at 317 (no warrant required where search of regulated business furthers "urgent federal interest").

459. See *id.* at 316-17 (threat to privacy minimal; thus, court finds inspection of regulated business pursuant to statute reasonable). For a further discussion of the privacy element, see *supra* note 71 and accompanying text.

460. See *Biswell*, 406 U.S. at 317.

461. See *Dewey*, 452 U.S. at 600; see also *Barlow's*, 436 U.S. at 323 (warrantless inspection objectionable if so random and unpredictable that owner has no real expectation of search).

462. See *Dewey*, 452 U.S. at 598 n.6 (exigency might justify warrantless search in commercial context).

463. *Dewey*, 452 U.S. at 613-14 (Stewart, J., dissenting).

*Dewey's* progeny have strictly adhered to the model set forth in *Dewey* and the courts have been reluctant to expand that model.

The last section of this article addressed questions raised by the case law and suggested that further and more in-depth study is warranted on a number of issues.<sup>464</sup> One final area of particular interest to the authors—that concerning the continuing vitality of the probable cause standard—was not raised as a research topic, essentially because it is an area worthy of the most intense scrutiny and, at this writing, time constraints would not permit the exhaustive study required. The *Barlow's Court's* reiteration of the lesser probable cause standard is an echo of *Camara*. The specificity requirement was replaced by a balancing test—the need to search against the invasion entailed.<sup>465</sup> The *Camara* and *Barlow's Courts* perceived a diminished danger of abuse in administrative searches and thus justified the lesser probable cause standard. We feel strongly that a very large area of concern remains to be addressed and it entails this basic criminal/administrative distinction. The length and breadth of the case law focuses on guaranteeing fourth amendment rights to all sectors, but the “floating” probable cause standard applied to administrative searches deserves much closer investigation as it relates to these guarantees. The “reasonableness” standard of administrative inspections may, indeed, be the appropriate test—perhaps in the criminal area as well—but the continued promulgation of two different standards, each purportedly guaranteeing what amounts to essentially the same protections, requires much more study and reflection and far less reflexive acceptance.

---

464. See *supra* notes 376-83 and accompanying text.

465. *Camara*, 387 U.S. at 535-36 (probable cause becomes question of reasonableness, weighing need against privacy).

## APPENDIX A

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION FIELD  
OPERATIONS MANUAL  
(selected pages)

- (1) When the owner or operator is not present at the beginning of the inspection, identify the agent in charge. This may be the foreman, leadman, gang boss or senior member of the crew.
- (2) When the identity of the agent in charge cannot be determined, contact the employer's establishment by telephone and request the presence of the owner, operator, or agent in charge. The inspection should not be delayed unreasonably in order to await the arrival of the employer's representative.
- (3) If the agent in charge at the workplace cannot be determined by (1) and (2) above, record the extent of the CSHO's inquiry on an OSHA—1A Form and proceed with the physical inspection. If the agent in charge appears on the scene during the inspection, he should be given an abbreviated opening conference, apprised of the status of the inspection, and included in the continued walkaround.

## Refusal to Permit Inspection

- (1) General. Section 8 of the Act provides that CSHO's may enter without delay and at reasonable times any establishment covered under the Act for the purpose of inspecting with reference to safety and health standards issued under the Act.
- (2) Refused entry or inspection. When the CSHO encounters a refusal to permit entry upon presenting proper credentials or an employer allows him to enter but refuses to permit an inspection, the CSHO should tactfully advise the employer that the Act (Section 9(a)) provides for an inspection and should endeavor to ascertain the reason for such refusal. If the employer persists in his refusal, the CSHO shall advise him as follows: "Due to your refusal to comply with section 8(a) of the Occupational Safety and Health Act of 1970, I will be compelled to seek appropriate legal process to order your compliance." The CSHO will leave the premises and immediately report to the Area Director, who shall immediately consult with the Regional Administrator and the Regional Solicitor, who shall promptly take appropriate action.
- (3) Employer intent. When permission is not clearly given, the CSHO should make every effort to clarify the employer's intent; if the CSHO has any doubt as to whether the employer intends to

permit an inspection he should not proceed. When the employer's intent is clarified the CSHO should either conduct the inspection or proceed as outlined in the preceding paragraph (2).

(4) Questionable refusal. When permission is not clearly given, the employer is hesitant, or absents himself for a period of time, the CSHO shall use professional judgment to determine whether to proceed with the inspection or delay until the Area Director is consulted. The CSHO should not engage in argument or discussion concerning refusal but inquire as to the reason. The CSHO may answer reasonable questions presented by the employer, e.g., scope of inspection, purpose, etc., but should avoid giving any impression of insistence or intimidation concerning the right to inspect.

(5) Employer interference. Where entry has been allowed, but the employer interferes with or limits an important aspect of the investigation, the CSHO shall proceed as outlined in D. 1. c.(2) of this chapter. Examples are: refusal to permit the walkaround or examination of records which are essential to the inspection or the inspection of a particular part of the premises.

(6) Compulsory process. Once the Regional Solicitor obtains a court order requiring an employer to allow an inspection, the CSHO will be authorized to conduct the inspection at reasonable times during ordinary business hours and to inspect in a reasonable manner and extent. This will include collection of samples, if necessary, examination of the establishment and all pertinent equipment, finished and unfinished materials, structures, machines, records and other things therein which bear on occupational safety and health. All questions arising concerning reasonableness of any aspect of an inspection conducted pursuant to compulsory process shall be referred to the Office of the Regional Solicitor.

(7) Obtaining compulsory process. The Regional Administrator and the Regional Solicitor should be alerted immediately by telephone by the Area Director when it becomes necessary to request the obtaining of a compulsory process. Within 48 hours after the Area Director determines such action is necessary, he will transmit in writing to the Regional Solicitor through the Regional Administrator:

- (a) A summary of all facts leading to the refusal of entry or limitation on inspection;
- (b) All previous investigations of the employer, including previous safety and health investigations under such

acts as the Walsh-Healey Public Contracts Act and Longshoremen and Harbor Worker's Compensation Act;

(c) So much of the current inspection report as has been completed;

(d) Information as to the name and position of the individual or individuals barring entry or limiting inspection; and

(e) The names and addresses of any witnesses to the refusal or limitation of the inspection.

(8) Action to take upon receipt of compulsory process. On a first priority basis, the inspection will be commenced within 24 hours of receipt of the compulsory process, and any conflict with this requirement will have to be cleared with the Regional Solicitor. Except in unusual circumstances, which are cleared with the Regional Solicitor, there shall be no advance notice to the employer concerning compulsory process or pending inspection. The CSHO shall serve a copy of the compulsory process on the employer, and make a separate notation as to the time, place, name and capacity of the individual served. Each compulsory process will have a space for return of service entry by the CSHO in which he shall enter the exact dates of the inspection made pursuant to the compulsory process. Upon completion of the inspection, the CSHO will complete this return on the original compulsory process, sign, and forward it to the Regional Solicitor's office. As this compulsory process must then be filed in court, care should be taken not to mutilate or incorrectly complete it.

(9) Refused entry or interference with a compulsory process. No force shall be used by the CSHO seeking entry or completion of the inspection. But the facts of such refusal or interference shall immediately be reported to the Area Director and Regional Solicitor by telephone, and followed up with a written memorandum through the Area Director within 24 hours thereafter. The Regional Solicitor will then take necessary court action for unlawful resistance to the compulsory process. The CSHO should make notations as to all witnesses to the refusal or partial refusal, and otherwise fully report all the facts surrounding such refusal.

(10) Deletion

OSHA Notice CPL 2,

March 5, 1979

(4) When an inspection is programmed for a military base or other Federal facility, the CSHO shall contact the



base commander or other government person in charge to inform him or her of OSHA's presence on the facility for purposes of inspecting a contractor.

- (5) On multi-employer sites the superintendent, project manager or other representative of the general or prime contractor shall be asked to identify the subcontractors or other contractors on the site together with the names of the individuals in charge of their operations.

(a) The CSHO shall then request that these individuals be contacted and asked to assemble in the general contractor's office or other suitable location, together with their employee representatives, if any.

(b) The inspection shall not be postponed or unreasonably delayed because of the unavailability of one or more representatives.

(c) If a federal contracting agency representative is on-site, the general contractor's representative shall be requested to contact that representative, advising him or her of the inspection and extending an invitation to attend the opening conference.

- d. *Refusal to Permit Inspection.* Section 8 of the Act provides that CSHO's may enter without delay and at reasonable times any establishment covered under the Act for the purpose of conducting an inspection. An employer may insist, however, that a CSHO seek an inspection warrant prior to entering an establishment and may refuse entry without such warrant.

- (1) *Refusal of Entry or Inspection.* The CSHO shall not engage in argument concerning refusal. When the employer refuses to permit entry upon presenting proper credentials or allows entry but refuses to permit an inspection, a tactful attempt shall be made to obtain as much information as possible about the establishment. (See D.1.d.(5)(b)(7) for the information the CSHO should attempt to obtain.)

(a) If the employer refuses to allow an inspection of the establishment to proceed, the CSHO shall leave the premises and immediately report the refusal to the supervisor. The Area Director shall notify the Regional Administrator who shall in turn advise the Regional Solicitor of the refusal.

(b) If the employer raises no objection to the inspec-

tion of portions of the workplace, the CSHO, after informing the supervisor of the partial refusal, shall normally continue the inspection, confining it to the portions concerning which the employer has raised no objections.

- (c) In either case the CSHO shall advise the employer that the refusal will be reported to the supervisor and that the agency may choose to take further action including obtaining legal process.

(2) *Questionable Refusal.* When permission to enter or inspect is not clearly given, the CSHO shall make an effort to clarify the employer's intent.

(a) If there is any doubt as to whether the employer intends to permit an inspection, the CSHO *shall not proceed*. When the employers' intent is clarified, the CSHO shall either conduct the inspection or proceed as outlined in D.1.d.(1).

(b) When the employer hesitates or leaves for a period of time so that permission is not clearly given within one hour of initial entry, the CSHO shall decide whether or not permission is being refused. The CSHO may answer reasonable questions presented by the employer; e.g., the scope of the inspection, purpose, anticipated length, etc., but shall avoid giving any impression of unyielding insistence or intimidation concerning the right to inspect. If it becomes clear that the employer is refusing permission to enter, the CSHO shall leave the establishment and contact the supervisor.

(3) *Employer Interference.* Where entry has been allowed but the employer interferes with or limits any important aspect of the inspection, the CSHO shall immediately contact the supervisor for instruction on whether or not to consider this action as a refusal. Examples of interference are refusals to permit the walkaround, the examination of records essential to the inspection, the taking of photographs, the inspection of a particular part of the premises, private employee interviews, or the refusal to allow attachment of sampling devices.

(4) *Administrative Subpoena.* If the employer refuses to allow the CSHO access to the injury or illness records needed to perform a records review for purposes of determining whether the employer is to receive a comprehensive inspection, the CSHO shall proceed as for any other case of refused entry. Upon receipt of notification of refusal to produce injury and/or illness records required by OSHA, the following procedures apply:

- (a) The Area Director shall notify the Regional Administrator of such refusal as soon as possible. (Telephone notification with a memorandum for the file will suffice.)
  - (b) Upon notification, the Regional Administrator shall consult with the Regional Solicitor when appropriate to determine if an administrative subpoena or a warrant should be sought under the circumstances. If the decision is to obtain an administrative subpoena, the Regional Administrator shall request the Regional Solicitor to take appropriate steps to obtain a subpoena from the Assistant Secretary through the National Solicitor's Office.
  - (c) Unless otherwise requested by the Regional Administrator or the Regional Solicitor, the National Solicitor's Office will forward the subpoena directly to the Area Director. Upon receipt of the signed subpoena, the Area Director shall prepare it for service on the employer.
  - (d) The subpoena shall normally be served by personal service. In exceptional circumstances service may be by certified mail with return receipt requested when deemed appropriate by the Area Director.
  - (e) The employer shall be informed that he is legally bound to honor the subpoena by making the establishment's injury and/or illness records and employment data for the reference years available to the CSHO.
  - (f) The employer may comply with the subpoena by making these materials available immediately to the CSHO upon service. He may also comply by contacting the Area Director and arranging for an acceptable method of delivery of the required documents or by mailing them to the Area Office.
  - (g) Arrangements for compliance with the subpoena must be made prior to the date for production of the documents if such a date is indicated on the subpoena document. The Area Director shall not normally allow more than 5 days beyond the date for production (or the date of service) to produce the records.
  - (h) If the employer honors the subpoena, the LWDI rate shall be calculated in accordance with the directions in D.2.a.
  - (i) If the employer refuses to honor the subpoena, the Area Director shall proceed as usual for cases involving a refusal of entry and shall refer the matter through the Regional Administrator, to the Regional Solicitor for appropriate action.
- (5) *Obtaining Compulsory Process.* Upon receipt of notification of a

refusal of entry (total or partial), the Area Director shall inform the Regional Administrator (by telephone with a memorandum for the file) and consult with the Regional Solicitor as soon as practicable.

(a) If it is determined that a warrant will be sought, the Area Director shall proceed according to guidelines and procedures established in the Region for warrant applications. With the approval of the Regional Administrator and the Regional Solicitor, compulsory process may be obtained by the Area Director.

(b) If the warrant is to be obtained by the Regional Solicitor, the Area Director shall transmit in writing to the Regional Solicitor, within 48 hours after the determination is made that compulsory process (warrant) is necessary, the following information:

- 1 Area/District Office, telephone number (FTS), and the name of supervisor involved.
- 2 Name of CSHO attempting inspection and inspection number, if assigned. Identify whether inspection to be conducted included safety items, health items or both.
- 3 Legal name of establishment and address including city, State and county. Include site location if different from mailing address.
- 4 Estimated number of employees at inspection site.
- 5 SIC Code and high hazard ranking for that specific industry within the State, as obtained from statistics provided by the National Office.
- 6 Summary of all facts leading to the refusal of entry or limitation of inspection, including the following:
  - a Date and time of entry.
  - b Date and time of denial.
  - c Stage of denial (entry, opening conference, walkaround, etc.)
- 7 Narrative of all actions taken by the CSHO leading up to, during and after refusal including, as a minimum, the following information:
  - a Full name and title of the person to whom CSHO presented credentials.
  - b Full name and title of person(s) who refused entry.
  - c Reasons stated for the denial by person(s) refusing entry.

- d* Response, if any, by CSHO to 3 above.
- e* Name and address of witnesses to denial of entry.
- 8 All previous inspection information, including copies of the previous citations.
- 9 Previous requests for warrants. Attach details, if applicable.
- 10 As much of the current inspection report as has been completed.
- 11 If a construction site involving work under contract from any agency of the Federal Government, the name of the agency, the date of the contract, and the type of work involved.
- 12 Other pertinent information such as description of the workplace; the work process; machinery, tools and materials used; known hazards and injuries associated with the specific manufacturing process or industry.
- 13 Investigative techniques which will be required during the proposed inspection, e.g., personal sampling, photographs, examination of records, access to medical records, etc.
- 14 The specific reasons for the selection of this establishment for the inspection including proposed scope of the inspection and the rationale.
  - a* *Imminent Danger.*
    - Description of alleged imminent danger situation.
    - Date received and source of information.
    - Original allegation and copy of typed report, including basis for reasonable expectation of death or serious physical harm and immediacy of danger.
    - Whether all current imminent danger processing procedures have been strictly followed

## APPENDIX B

### TERMS FOR "SEARCH" AND "SEARCH WARRANT"

DEPARTMENT OF AGRICULTURE  
Animal & Plant Health Inspection  
Service

9 C.F.R. § 115.1(a)

“Any inspector shall be permitted to *enter . . . and . . . to inspect . . . the entire premises . . . and all equipment . . . and all methods . . . and all records. . . .*”

Veterinary Service

9 C.F.R. § 115.2

“All biological products . . . may be *inspected* at any time or place.”

Federal Grain Inspection Service

7 U.S.C. § 76(a)

“The Administrator is authorized to *investigate* the handling, weighing, grading and transportation of grain . . . .”

7 U.S.C. § 79(a)

“The Administrator is authorized to cause official *inspection* under the standards provided. . . .”

7 U.S.C. § 87e(a)

“The Administrator is authorized to conduct *investigations*; hold such *hearings*; require such *reports* from any official agency . . . to effectuate the purposes and provisions of this Act.”

7 C.F.R. § 800.26(a)

CIVIL AERONAUTICS BOARD

49 U.S.C. § 407(e)

“. . . *access* to all the records . . . .”

“. . . have *access* to . . . authority . . . to *inspect* and *examine*. . . .”

COMMODITY FUTURES

TRADING COMMISSION

17 C.F.R. § 11.2

“. . . .” “Director may obtain evidence . . . through *exercise of inspection powers* . . . .”

CONSUMER PRODUCT SAFETY COMMISSION

15 U.S.C. § 2065(a), (b)

“. . . are authorized (1) to *enter* . . . and (2) to *inspect* . . . those areas of such factory, warehouse, or establishment where such products are manufactured, held or transported. . . . Upon request . . . every such manufacturer . . . shall permit the *inspection* of appropriate books, records, and papers relevant to determining whether . . . has acted or is acting in compliance . . . .”

16 C.F.R. § 1118.2(d)

If . . . the person . . . refuses to allow *entry* or *inspection*, the Commission may then seek a *search warrant*.

ENVIRONMENTAL PROTECTION AGENCY (EPA)

42 U.S.C. § 7414(a)(2)

“ . . . the Administrator . . . (A) shall have a *right of entry* to, upon, or through any premises . . . in which any records are required to be maintained . . . and (B) may at reasonable times *have access* to and copy any records, *inspect* any *monitoring* equipment . . . and *sample* any emissions . . . ”

EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION  
29 C.F.R. §§ 1620.19, 1626.15,  
1626.16,

“ . . . may *investigate* and gather data.” “ . . . authority to issue a *subpoena*.”

FEDERAL COMMUNICATIONS  
COMMISSION  
47 C.F.R. § 1.1, 47 U.S.C. § 215(a)

“The Commission shall have *access* to and the right of *inspection* and *examination* of all accounts, records and memoranda . . . ”

FEDERAL DEPOSIT INSURANCE  
CORPORATION  
12 U.S.C. § 1820(b)

“ . . . shall have power . . . to *examine* any . . . bank . . . ” “ . . . power . . . to make . . . *examination* . . . ”

FEDERAL ELECTION  
COMMISSION  
2 U.S.C. § 438(b), 11 C.F.R.  
§ 9039.3(2)

. . . audits and field *investigations*  
. . . conduct an inquiry . . . ”

FEDERAL ENERGY REGULATORY  
COMMISSION  
16 U.S.C. § 796(b), 825(b)

“ . . . right to *inspect* and *examine*  
. . . ”

FEDERAL HIGHWAY  
ADMINISTRATION  
23 C.F.R. § 17.5(f)

“All records shall be available at all reasonable times for *inspection* by any authorized representative of the Federal Government . . . ”

FEDERAL MARITIME  
COMMISSION  
6 C.F.R. §§ 502.283-291

“when the commission has determined that an *investigation* is necessary”

FEDERAL MINE SAFETY &  
HEALTH REVIEW COMMISSION  
Mine Safety & Health Review  
Administration

Not Applicable

30 C.F.R. Part 43  
FEDERAL RAILROAD  
ADMINISTRATION

“ . . . representative . . . who has reasonable grounds . . . has a right to . . . *inspection* . . . ”

1986]

ADMINISTRATIVE SEARCHES

831

45 U.S.C. § 437(b)

“. . . agents of the Secretary . . . are authorized to enter upon, inspect and examine rail facilities, equipment, rolling stock, operations and pertinent records . . .”

FEDERAL TRADE COMMISSION

15 U.S.C. § 46(a)

“To gather and compile information concerning, and to investigate from time to time. . . .”

15 U.S.C. § 49

“. . . shall at reasonable times have access to, for the purpose of examination . . . documentary evidence. . . .”

DEPARTMENT OF HEALTH & HUMAN SERVICES

Drug Enforcement Administration

21 U.S.C. § 880

“INVESTIGATIONS”

“. . . the Attorney General is authorized to enter . . . and . . . conduct administrative inspections . . .”

21 C.F.R., Part 1316, Subpart A

Food & Drug Administration

*Administrative Inspections Warrants*

“. . . upon presenting appropriate credentials . . . and a written notice to the owner . . . shall have the right to enter . . . and conduct inspections at reasonable times and in a reasonable manner. . . .”

IMMIGRATION & NATURALIZATION SERVICE

8 U.S.C. § 1225(a), 8 U.S.C. § 1357(a)

“. . . authorized and empowered to board and search. . . .” “. . . shall have power without warrant to interrogate . . . arrest . . . to board or search. . . .”

INTERSTATE COMMERCE COMMISSION

49 U.S.C. § 1144(b)

“. . . may on demand and display of proper credentials . . . inspect . . .”

MINE SAFETY AND HEALTH ADMINISTRATION

30 C.F.R. § 50.11

“. . . Manager will promptly decide whether to conduct an accident investigation . . .”

NUCLEAR REGULATORY COMMISSION

10 C.F.R. § 21.41

“. . . representatives . . . to inspect . . . records, premises, activities, and basic components as necessary . . .”

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION



29 C.F.R. § 1903.3

*“authorized to enter without delay and at reasonable times . . . workplace or environment . . . to inspect and investigate . . . and within reasonable limits and in a reasonable manner . . .”*

OFFICE OF FEDERAL CONTRACT  
COMPLIANCE PROGRAMS

41 C.F.R. Part 60-1, Subpart B

*“. . . Director . . . may conduct . . . such investigations . . . as may be necessary or appropriate . . .”*

SECURITIES AND EXCHANGE  
COMMISSION

17 C.F.R. § 202.5

*“. . . Commission may . . . make such formal investigations . . . as it deems necessary. . . .”*

DEPARTMENT OF THE  
TREASURY

Comptroller of the Currency

12 U.S.C. § 481

*“. . . power to make a thorough examination of all affairs of the bank . . .”*

Internal Revenue Service

26 U.S.C. § 7602

*“. . . authorized . . . to examine any books, papers, records . . . to summon the person . . .”*