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Search and Seizure—Administrative Law—Warrantless Inspection Provision of the Federal Mine Safety and Health Act of 1977 Held Constitutional

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NOTE

SEARCH AND SEIZURE—ADMINISTRATIVE LAW—WARRANT-LESS INSPECTION PROVISION OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 HELD CONSTITUTIONAL. *Donovan v. Dewey*, 101 S. Ct. 2534 (1981).

In July 1978 a federal mine inspector attempted to inspect, pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Safety Act),¹ quarries owned by Waukesha Lime and Stone Company.² Waukesha's president, Douglas Dewey, refused to allow the inspection unless a warrant was obtained.³ The Secretary of Labor

1. 30 U.S.C. §§ 801-961 (Supp. III 1979). Section 103(a) of the Act, 30 U.S.C. § 813(a) (Supp. III 1979), provides for inspections as follows:

Authorized representatives of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare 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 decision 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, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary [of Labor] 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. . . . For the purpose of making any inspection or investigation under this chapter, the Secretary [of Labor], or the Secretary of Health, Education, and Welfare, . . . shall have a right of entry to, upon, or through any coal or other mine.

2. It was undisputed that the quarry operated by Waukesha fell within the Federal Mine Safety and Health Act of 1977 which grants mine inspectors "a right of entry to, upon, or through any coal or other mine." 30 U.S.C. § 813(a) (Supp. III 1979). The Act defines "coal or other mine" to include "an area of land from which minerals are extracted in non-liquid form or, if in liquid form, are extracted with workers underground." 30 U.S.C. § 802(h)(1)(A) (Supp. III 1979).

3. Administrative inspections are considered "searches" within the meaning of the fourth amendment and must be conducted according to the protections of that amendment. *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967). The term "inspection" is used in this casenote and is synonymous with the term "search" as it relates to the fourth amendment.

sought a preliminary injunction to prevent Dewey from refusing to allow the inspection.⁴ The district court granted summary judgment in favor of Waukesha⁵ on the ground that the fourth amendment⁶ prohibited warrantless inspections of stone quarries as authorized by the Act.⁷ On appeal, the United States Supreme Court held that warrantless inspections required by section 103(a)⁸ do not violate the fourth amendment but instead are reasonable within the meaning of that amendment. *Donovan v. Dewey*, 101 S. Ct. 2534 (1981).

The fourth amendment protects the right of persons to be free from unreasonable searches and seizures.⁹ Only recently has the application of the fourth amendment been extended to include routine inspections made by administrative agencies.¹⁰ The Supreme Court has stated that the constitutionality of warrantless administrative inspections pursuant to regulatory statutes must be determined on what the Court termed "a case-by-case basis under the general Fourth Amendment standard of reasonableness."¹¹ This approach has led to varying decisions concerning whether administrative inspectors must obtain a warrant before conducting inspections pursuant to a regulatory statute.¹²

4. *Marshall v. Dewey*, 493 F. Supp. 963 (E.D. Wis. 1980). The Mine Safety Act stipulates, "The Secretary may institute a civil action for relief, including a permanent or temporary injunction, . . . in the district court of the United States . . . whenever such operator or his agent . . . refuses to admit such representatives to the coal or other mine, [or] . . . refuses to permit the inspection of the coal or other mine . . ." 30 U.S.C. § 818(a)(1) (Supp. III 1979).

5. The district court relied heavily upon *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (holding the warrantless inspection provision of the Occupational Safety and Health Act of 1970 unconstitutional).

6. 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.

7. *Marshall v. Dewey*, 493 F. Supp. 963 (E.D. Wis. 1980).

8. 30 U.S.C. § 813(a) (Supp. III 1979), reproduced *supra* note 1.

9. U.S. CONST. amend. IV, reproduced *supra* note 6.

10. The issue was first addressed by the Supreme Court in *Frank v. Maryland*, 359 U.S. 360 (1959) (overruled in *Camara v. Municipal Court*, 387 U.S. 523 (1967)). For a general review of administrative inspections and the fourth amendment, see Comment, *Administrative Searches and the Fourth Amendment's Warrant Requirement*, 32 ARK. L. REV. 755 (1979); Note, *Camara, See, and Their Progeny: Another Look At Administrative Inspections Under The Fourth Amendment*, 15 COLUM. J.L. & SOC. PROBS. 61 (1979).

11. See *v. City of Seattle*, 387 U.S. 541, 546 (1967).

12. Some cases held a warrant to be necessary. *E.g.*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (health and safety inspection of electrical and plumbing business); See *v. City of Seattle*, 387 U.S. 541 (1967) (fire code inspection of warehouse); *Camara v. Muni-*

The constitutionality of warrantless administrative inspections was first addressed by the Supreme Court in *Frank v. Maryland*.¹³ In *Frank* a city health code inspector who did not have a warrant was refused permission by a homeowner to inspect a house for possible violations of the city health code.¹⁴ The Supreme Court held that the warrantless inspection was constitutional because no evidence was sought for a criminal prosecution¹⁵ and because the health code's inspection provision contained adequate safeguards against any significant intrusion into the homeowner's privacy rights.¹⁶ The Court also relied upon the significant governmental interest in maintaining minimum health standards¹⁷ and the necessity of warrantless inspections for proper enforcement of the health code.¹⁸

Eight years later, the Supreme Court overruled *Frank* in *Camara v. Municipal Court*.¹⁹ In *Camara* the Court held that, except in certain carefully defined classes of cases, an inspection was "unreasonable" unless it had been authorized by a valid search warrant.²⁰ The necessity of obtaining a warrant depended upon whether the burden of obtaining that warrant was likely to frustrate the government's purpose behind the inspection.²¹ The Court held that obtaining a warrant would not frustrate enforcement of the city health code involved.²² The holding in *Camara* was extended to warrantless inspections of commercial establishments in the companion case of *See v. City of Seattle*.²³

pal Court, 387 U.S. 523 (1967) (health code inspection of residence). Other cases dispensed with the warrant requirement. *E.g.*, *United States v. Biswell*, 406 U.S. 311 (1972) (inspection of firearms dealer); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (inspection of liquor dealer); *Marshall v. Sink*, 614 F.2d 37 (4th Cir. 1980) (inspection of coal mine); *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980) (health and safety inspection of mineral preparation facility); *Marshall v. Nolichuckey Sand Co., Inc.*, 606 F.2d 693 (6th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980) (health and safety inspection of sand and gravel operation).

13. 359 U.S. 360 (1959) (overruled in *Camara v. Municipal Court*, 387 U.S. 523 (1967)).

14. *Id.* at 361.

15. *Id.* at 366.

16. *Id.* at 367. The health code provided that valid grounds had to exist for suspicion of the existence of a nuisance, the inspection had to be conducted in the daytime, and no forcible entry was permitted. *Id.* at 366.

17. *Id.* at 371-72.

18. *Id.* at 372.

19. 387 U.S. 523 (1967). The appellant had refused to permit a public health official to conduct a warrantless inspection of his residence.

20. *See id.* at 538-39.

21. *Id.* at 533.

22. *Id.*

23. 387 U.S. 541 (1967).

However, the holdings in *Camara* and *See* did not completely prohibit warrantless inspections. Subsequently, in *Colonnade Catering Corp. v. United States*,²⁴ the Supreme Court found the liquor industry to be an exception to *Camara's* general rule that warrantless inspections are prohibited by the fourth amendment. The warrantless inspection was allowed because of the long history of regulation in the liquor industry and the broad powers of inspection traditionally granted to federal agents charged with enforcing liquor laws.²⁵ The Court stated "Congress has broad authority to fashion standards of reasonableness for searches and seizures."²⁶ Concluding that the inspection procedures were necessary to effectively regulate the liquor industry, the Court held inapplicable the rule of *See*, which requires a warrant for administrative inspections of commercial premises.²⁷

Another case recognizing an exception to the general rule requiring a warrant was *United States v. Biswell*²⁸ in which the Court upheld the constitutionality of warrantless inspections in the firearms industry.²⁹ The Court acknowledged that federal regulation of the interstate traffic in firearms was not as deeply rooted in history as governmental control of the liquor industry, but stated that close scrutiny of such traffic was of central importance to prevent violent crime and to assist the states in regulating firearms traffic.³⁰ Also, the necessity of obtaining a warrant in *Biswell* could have easily frustrated enforcement of the regulatory scheme.³¹ Finally, warrantless inspections in such a pervasively regulated industry posed only limited threats to fourth amendment expectations of privacy.³²

Lower federal courts expanded the *Colonnade-Biswell* excep-

24. 397 U.S. 72 (1970). The petitioner was a caterer who was licensed to serve alcoholic beverages. Federal Internal Revenue Service agents asked to inspect the petitioner's locked liquor storeroom, but were refused because the agents did not have a search warrant. The agents broke the lock and entered anyway.

25. *Id.* at 75. The Government emphasized that the liquor industry had been regulated first in England and later in the American Colonies since the 1600s.

26. *Id.* at 77.

27. *Id.* at 76.

28. 406 U.S. 311 (1972).

29. *Id.* at 312-13. A federally licensed dealer in sporting weapons attempted to suppress criminal trial evidence seized by a Federal Treasury agent during a warrantless inspection of the dealer's premises.

30. *Id.* at 315.

31. *Id.* at 316.

32. *Id.*

tion,³³ but in *Marshall v. Barlow's, Inc.*³⁴ the Supreme Court curtailed expansion of the exception. The Court in *Barlow's* struck down, as unconstitutional, routine warrantless inspections conducted under the Occupational Safety and Health Act of 1970 (OSHA).³⁵ The Secretary of Labor argued that the *Colonnade-Biswell* exception should govern OSHA inspections,³⁶ but the Court distinguished those cases as involving unique circumstances in which the industries involved had such a history of government regulation and oversight that no reasonable expectation of privacy could exist.³⁷ Nor was the "pervasively regulated" test of *Biswell* met because the industries covered by OSHA did not have a sufficient history of pervasive regulation.³⁸ The Court concluded that

33. Some lower courts upheld warrantless inspections based on consent. *E.g.*, *United States v. Thriftmart, Inc.*, 429 F.2d 1006 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970) (casual consent to Food and Drug Administration inspectors' request for permission to inspect held valid as knowing and voluntary even though inspectors did not warn defendant warehouse managers of their right to insist on a warrant); *United States v. Hammond Milling Co.*, 413 F.2d 608 (5th Cir. 1969), *cert. denied*, 396 U.S. 1002 (1970) (consent to a routine Food and Drug Administration inspection held valid when the company vice-president did not refuse inspection, even though he did not expressly consent to it).

The licensing exception to the warrant requirement was similarly expanded. *E.g.*, *United States ex rel. Terraciano v. Montanye*, 493 F.2d 682 (2d Cir.), *cert. denied*, 419 U.S. 875 (1974) (warrantless search and seizure of pharmacist's records pursuant to a state law limiting search to particular items subject to heavy regulation held constitutional, because "the warrant, which would be issued for the asking, would simply track the statute and would give the person who was the object of the search nothing more than he already had." *Id.* at 685).

The *Colonnade-Biswell* exception was also expanded to allow the warrantless inspection of a coal mine under the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, the predecessor to the 1977 Mine Safety Act, in *Youghioghney & Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973). This decision was noted with approval by Congress when debating the 1977 Mine Safety Act. *See infra* note 80.

34. 436 U.S. 307 (1978). Federal inspectors sought to conduct a warrantless inspection of an electrical and plumbing installation business. The owner of the business denied the inspector access to the non-public area of the business.

35. 29 U.S.C. § 657(a) (1976) provides:

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

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

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

36. 436 U.S. at 313.

37. *Id.* *See also* *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973).

38. 436 U.S. at 314.

there was no evidence that OSHA enforcement would be crippled by a warrant requirement³⁹ and held the Act "unconstitutional insofar as it purports to authorize inspections without [a] warrant or its equivalent."⁴⁰ However, the Court did temper its holding as it might be applied to other statutes by stating that the reasonableness of a warrantless inspection would "depend upon the specific enforcement needs and privacy guarantees of each statute."⁴¹

Consequently, even after *Barlow's*, federal district courts and United States courts of appeals continued to find exceptions to the warrant requirement by upholding the warrantless inspection provision of the Federal Mine Safety and Health Act of 1977.⁴² Thus, in *Marshall v. Stoudt's Ferry Preparation Co.*,⁴³ the first post-*Barlow's* decision in which an appellate court considered the constitutionality of the Mine Safety Act's warrantless inspection provision, the Third Circuit distinguished the Mine Safety Act from OSHA. While OSHA applies to a wide range of enterprises affecting commerce,⁴⁴ the Mine Safety Act covers only a single, pervasively regulated industry that has long been recognized as very dangerous.⁴⁵ OSHA authorized entry for inspection into any area where work was being performed.⁴⁶ The Mine Safety Act's inspection provision limits the purposes for which inspections may be made,⁴⁷ limits inspections in which no advance notice is given,⁴⁸ and is more narrowly drawn than the comparable OSHA section.⁴⁹ The Mine Safety Act also provides for immediate judicial participation by allowing the Secretary of Labor to secure an injunction in the district court if he is refused entry.⁵⁰ Recognizing legislative intent concerning the necessity of surprise inspections in the context of mine safety,⁵¹ the court concluded that the privacy expectations of the appellant were adequately protected and that the Mine Safety Act satisfied *Barlow's* reasonableness standard.⁵²

39. *Id.* at 316-20.

40. *Id.* at 325.

41. *Id.* at 321.

42. This provision of the Act is reproduced *supra* note 1.

43. 602 F.2d 589 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980).

44. *Id.* at 593.

45. *Id.* at 593-94.

46. 29 U.S.C. § 657(a) (1976), reproduced *supra* note 35.

47. 602 F.2d at 594.

48. *Id.*

49. *Id.*

50. *Id.* See 30 U.S.C. § 818(a)(1) (Supp. III 1979), reproduced *supra* note 4.

51. 602 F.2d at 594. See S. REP. NO. 181, 95th Cong., 1st Sess. 1, 27, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3401, 3427.

52. 602 F.2d at 594. For further study of the *Stoudt's Ferry* case, see Comment, *War-*

The holding in *Stoudt's Ferry* was cited with approval in *Marshall v. Nolichuckey Sand Co., Inc.*,⁵³ *Marshall v. Sink*,⁵⁴ and *Marshall v. Texoline Co.*⁵⁵ These cases, each in a different circuit of the court of appeals, upheld the warrantless inspection provision of the Mine Safety Act when applied to fact situations similar to those in *Stoudt's Ferry* and *Donovan v. Dewey*.⁵⁶

*Donovan v. Dewey*⁵⁷ provided the United States Supreme Court with its first opportunity to consider the constitutionality of warrantless inspections under the Federal Mine Safety and Health Act of 1977,⁵⁸ which authorizes warrantless inspections of underground and surface mines. The Court recognized that fourth amendment protections extend to administrative inspections of private commercial property,⁵⁹ but stated that legislative schemes authorizing warrantless administrative inspections of commercial property do not necessarily violate that amendment.⁶⁰ Because of the Mine Safety Act's certainty and the regularity of its application, the legislative scheme involved here provided a constitutionally adequate substitute for a warrant.⁶¹ For instance, the Court noted that the Act requires inspection of all surface mines at least twice annually and of all underground mines at least four times annually.⁶² Additional follow-up inspections must be conducted when violations of the Act have been discovered.⁶³ The standards with which a mine operator must comply are specifically set forth in the Act or in title 30 of the Code of Federal Regulations.⁶⁴ The owner is thus aware of the purpose of the inspection and the limits of the search, each being limited to the health and safety standards set forth in the regulatory

warrantless Administrative Searches Permissible Under the Federal Mine Safety and Health Act of 1977: Marshall v. Stoudt's Ferry Preparation Co., 64 MINN. L. REV. 1076 (1980).

53. 606 F.2d 693 (6th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980) (health and safety inspection of sand and gravel operation).

54. 614 F.2d 37 (4th Cir. 1980) (inspection of coal mine).

55. 612 F.2d 935 (5th Cir. 1980) (inspection of gravel pit).

56. 101 S. Ct. 2534 (1981).

57. *Id.*

58. 30 U.S.C. § 813(a) (Supp. III 1979), reproduced *supra* note 1.

59. 101 S. Ct. at 2537. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); See *v. City of Seattle*, 387 U.S. 541 (1967).

60. 101 S. Ct. at 2537-38. See *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

61. 101 S. Ct. at 2540.

62. 30 U.S.C. § 813(a) (Supp. III 1979), reproduced *supra* note 1.

63. "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 . . ." 30 U.S.C. § 813(a) (Supp. III 1979).

64. 101 S. Ct. at 2541.

scheme.⁶⁵ Further, the regulation of mines as specified by the Act is sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he "will be subject to effective inspection."⁶⁶

Significantly, the Court said specific privacy concerns of mine owners are accommodated by the Act.⁶⁷ Forcible entries are prohibited, and the Secretary's remedy, when refused entry onto a mining facility, is limited to filing an action for an injunction against future refusals. Because of the specific nature of the Act, a warrant requirement would not provide any additional protection.⁶⁸

The Court distinguished *Marshall v. Barlow's, Inc.*⁶⁹ by contrasting the provisions of the Mine Safety Act with those of OSHA.⁷⁰ OSHA imposes health and safety standards on all businesses engaged in or affecting interstate commerce that have employees.⁷¹ Section 8(a) of OSHA⁷² authorized warrantless inspections of any area where work was performed at any place of employment.⁷³ The only guidelines for such inspections were that they be performed "at . . . reasonable times, and within reasonable limits and in a reasonable manner."⁷⁴ Thus, the Court in *Barlow's* had held the inspection provision of OSHA unconstitutional as applied to warrantless inspections because it gave almost unbridled discretion to administrative officers concerning when and whom to inspect.⁷⁵ *Barlow's*, however, was expressly limited to the OSHA provision, leaving the reasonableness of other warrantless inspection provisions to "the specific enforcement needs and privacy guarantees of each statute."⁷⁶

Having determined that the Mine Safety Act adequately pro-

65. *Id.* These limitations were also relied upon by the Third Circuit Court of Appeals in *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980).

66. 101 S. Ct. at 2540 (citing *United States v. Biswell*, 406 U.S. 311, 316 (1972)).

67. *Id.* at 2541 (citing *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980) (inspectors ordered to keep confidential mine's trade secrets)).

68. *Id.*

69. *Id.* at 2539.

70. The inspection provision of OSHA is reproduced *supra* note 35.

71. 101 S. Ct. at 2539 (citing 29 U.S.C. § 652(5) (1976)).

72. 29 U.S.C. § 657(a) (1976).

73. 101 S. Ct. at 2539 (citing 29 U.S.C. § 657(a) (1976)).

74. 29 U.S.C. § 657(a)(2) (1976).

75. 101 S. Ct. at 2539.

76. *Id.* (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)). Indeed, this statement by the Court in *Barlow's* seems to have foreshadowed the result in the present case.

tected the privacy guarantees of mine owners, the Court examined the legislative history of the Act to determine its specific enforcement needs.⁷⁷ The Court recognized that Congress certainly has broad authority to regulate industries engaged in or affecting interstate commerce.⁷⁸ In enacting the Mine Safety Act, Congress was aware of the hazardous nature of the mining industry and the detrimental effects of its poor health and safety record on interstate commerce.⁷⁹ The warrantless inspection provision, section 103(a) of the Act, was thought necessary to properly enforce the Act.⁸⁰ In deference to the legislative findings, the Court agreed that the prerequisite of a warrant could easily frustrate the inspection process.⁸¹

The appellees contended that even if the Act were constitutional as applied to most segments of the mining industry, it still violated the fourth amendment as applied to the authorization of warrantless inspections of stone quarries and did not fall within the *Colonnade-Biswell* exception,⁸² since stone quarries do not have a long history of government regulation.⁸³ In refuting this the Court stated "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."⁸⁴ The regulatory history of a particular industry is often a factor in determining whether the scheme is sufficiently pervasive to render a warrant requirement unnecessary.⁸⁵ The Court recognized, however, that the length of regulation cannot be a controlling criterion, because new and emerging industries, such as the nuclear

77. *Id.* at 2539-40.

78. *Id.* at 2538.

79. *Id.* at 2539. Congress declared the urgent need to improve conditions in the nation's mines in the preamble to the Act. 30 U.S.C. § 801 (Supp. III 1979).

80. 101 S. Ct. at 2540. In explaining § 103(a), the Senate report notes: "[I]n light of the notorious ease with which many safety or health hazards may be concealed if advanced warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives." S. REP. NO. 181, 95th Cong., 1st Sess. 27, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 3401, 3427. The Senate Committee on Human Resources also noted with approval the decision in *Youghioghney & Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973) (upholding a parallel provision of the 1969 Coal Safety Act permitting unannounced warrantless inspections of mines). S. REP. NO. 181, 95th Cong., 1st Sess. 27, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 3401, 3427.

81. 101 S. Ct. at 2540.

82. *Id.* at 2541.

83. *Id.* Stone quarries were first subjected to federal health and safety inspections under the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. §§ 723, 724 (1976).

84. 101 S. Ct. at 2541-42.

85. *Id.* at 2542.

power industry, could pose tremendous potential health and safety problems and could never be subject to warrantless inspection.⁸⁶ Such a construction would lead to anomalous results which, the Court said, could not be tolerated under the fourth amendment's central concept of reasonableness.⁸⁷ Based upon the pervasiveness and regularity of the federal regulatory scheme, the substantial federal interest in improving the safety of the nation's mines, and the protection of privacy interests contained within the statute, the Supreme Court upheld the warrantless inspection provision of the Mine Safety Act as it relates to stone quarries and other mines.⁸⁸

Though some questions remain, *Donovan v. Dewey*⁸⁹ has shed new light on the area of warrantless administrative inspections. Previous decisions have upheld such inspections when the *Colonnade-Biswell* "historical" exception applied, but the Court has now significantly downgraded the *Colonnade* leg of the test by ruling that the pervasiveness and regularity of the regulatory scheme, and not solely its history of application, may provide the basis for a warrantless inspection. This is more logical since the history of such regulation has nothing to do with whether a warrantless inspection is necessary to effectively enforce a statute. New and emerging industries are often the very ones in which warrantless inspections may be most necessary and best justified.

In *Barlow's* the Court stated that the reasonableness of such warrantless inspections would "depend upon the specific enforcement needs and privacy guarantees of each statute."⁹⁰ Though Congress has broad authority to determine the enforcement needs, the judiciary will focus on the privacy guarantees of the fourth amendment, based upon the certainty and regularity of the application of the statute's inspection provision. More decisions are necessary to determine exactly where the line will be drawn, but based upon *Donovan v. Dewey*,⁹¹ any statute that provides for warrantless inspections with some degree of pervasiveness and regularity, that promotes a substantial federal interest in improving safety and

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 2534.

90. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321 (1978).

91. 101 S. Ct. 2534 (1981).

health, and that contains general guidelines to protect the owner's privacy interests should withstand a fourth amendment challenge.

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