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FOURTH AMENDMENT—ADMINISTRATIVE SEARCHES AND SEIZURES

Marshall v. Barlow's Inc., 98 S. Ct. 1816 (1978).

Michigan v. Tyler, 98 S. Ct. 1942 (1978).

Last term, the Supreme Court heard two cases¹ involving fourth amendment² challenges to warrantless searches and seizures by administrative agencies.³ In *Marshall v. Barlow's Inc.*,⁴ the Court held that the Occupational Safety and Health Act⁵ was unconstitutional insofar as it authorized agents of the Secretary of Labor to search employee work areas for safety hazards without first obtaining search warrants.⁶ But the Court also held that OSHA inspectors need only show that "reasonable

legislative or administrative standards for conducting an inspection"⁷ had been followed to satisfy the probable cause requirement of the warrant clause of the fourth amendment.

In *Michigan v. Tyler*,⁸ the Court upheld the admissibility of arson trial evidence that had been seized from a building during the night of a fire and shortly thereafter by fire officials acting without search warrants. But, warrantless searches conducted several days later were found to be in violation of the fourth amendment,⁹ and evidence seized during those searches was held inadmissible at trial.

Both the *Barlow's* and *Tyler* cases dealt with the fourth amendment problems posed by administrative searches for civil purposes.¹⁰ Administrative searches have long been used for enforcing health and safety codes¹¹ but have only recently been subjected to constitutional attack.¹² These administrative searches, because of their unique nature, pose a difficult constitutional problem. For example, many health and safety code violations are not observable from the outside of a structure, and

able 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.

⁷ 98 S. Ct. at 1824 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967)).

⁸ 98 S. Ct. 1942 (1978).

⁹ The fourth amendment is applied to the states through the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁰ Civil searches are searches for statutory violations, generally of health and safety codes, in which the violator is simply advised of what must be corrected, or assessed a civil penalty; usually a fine. Civil searches present problems separate from, though related to, those presented by criminal searches, where the fruits of the search may lead directly to criminal conviction.

¹¹ See 387 U.S. at 548 (Clark, J., dissenting); *Frank*, 359 U.S. at 367, 368 (1959).

¹² Prior to the enactment of OSHA, the federal government had not engaged in widescale health and safety inspections. Searches and seizures made pursuant to state and local inspection programs were not subject to federal constitutional attack before the fourth amendment was held applicable to the states in *Mapp*, 367 U.S. 643 (1961).

¹ *Marshall v. Barlow's Inc.*, 98 S. Ct. 1816 (1978); *Michigan v. Tyler*, 98 S. Ct. 1942 (1978).

² U.S. Const. amend. IV provides:

The right of 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.

³ In a third case, *Mincey v. Arizona*, 98 S. Ct. 2408 (1978), the Court held that a four-day warrantless search of an apartment in which there had been a murder was unconstitutional. The Arizona Supreme Court, in *State v. Mincey*, 115 Ariz. 472, 556 P.2d 273 (1977), had attempted to establish a rule that a search of a murder scene does not require a warrant. In a unanimous decision, the Supreme Court, citing *Michigan v. Tyler*, 98 S. Ct. 1942 (1978), held that since residents of a home in which there has been a murder are presumed innocent, they retain a recognizable privacy interest. The emergency of a murder may justify an immediate search for suspects or perishable evidence, but a four-day search is not justified by the emergency. Here the police had the apartment well under control and were not in jeopardy of losing evidence.

The Court concluded that the seriousness of a crime may not be raised to justify a warrantless search. A warrantless search will only be justified if obtaining a warrant would frustrate the purpose of the search.

⁴ 98 S. Ct. 1816 (1978).

⁵ 29 U.S.C. § 651-678 (1976).

⁶ § 657. (a) 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 reason-

often the owner, due to a lack of expertise, is unaware of any problems.¹³ The Court has recognized that health and safety codes can be effectively enforced only through the use of routine periodic inspections of all structures even where inspectors have no suspicion of a violation in a particular building.¹⁴ But, inspections such as these do not easily fit into a constitutional construct.

The fourth amendment permits two types of searches: warrantless searches that are reasonable, and searches conducted pursuant to valid warrants. Warrantless searches are generally held reasonable only¹⁵ when there are exigent circumstances in which the delay in obtaining a warrant will frustrate the purpose of the search, or when a person consents to a search.¹⁶ The Court has held that many administrative inspections are not hindered by using search warrants,¹⁷ and people do not always consent to inspections.¹⁸ Thus, many administrative searches do not appear to be reasonable under the fourth amendment if conducted without warrants. Under the fourth amendment, however, search warrants can only be issued on a showing of probable cause. Probable cause as applied in criminal searches would require evidence of a violation in a particular building prior to conducting an administrative search.¹⁹ Such a re-

quirement would seriously undermine the effectiveness of health and safety inspection programs.

The Court has recognized that administrative inspections are vital for maintaining minimal health and safety standards in a community,²⁰ yet it is apparent that such searches do not easily operate under the constitutional restraints that have been placed on criminal searches. Thus the court has been reluctant either to declare administrative searches for civil purposes unconstitutional or to apply to such searches criminal probable cause requirements. The Court has focused instead on structuring administrative searches in a way that will not conflict with the fourth amendment rights guaranteed to all citizens.

MARSHALL V. BARLOW'S INC.

In *Marshall v. Barlow's Inc.*,²¹ an inspector, acting pursuant to OSHA section 8(a),²² asked to inspect the working areas of Barlow's Inc., a plumbing and electrical installation business. The owner refused to admit the inspector, insisting that the statute's authorization of a warrantless search violated the fourth amendment. Three months later, the Secretary of Labor obtained from the United States District Court for the District of Idaho an order compelling Barlow to admit the inspector. In response to the order, Barlow brought an action to enjoin enforcement of the search provisions of OSHA.

A three-judge district court panel issued a declaratory judgment that the warrantless searches authorized by OSHA section 8 were in violation of the fourth amendment and entered an injunction against any further searches of a similar nature.²³ The district court held that the search provisions of OSHA were analogous to the statutes held unconstitutional in *Camara v. Municipal Court*²⁴ and *See v. City of Seattle*,²⁵ and were thus likewise invalid. The Supreme Court, in a five-to-three decision,²⁶ affirmed the district court's decision.

that the search will turn up either a suspect or evidence of a crime. *See* *United States v. Ventresca*, 380 U.S. 102 (1965); *Draper v. United States*, 358 U.S. 307 (1959); *Carroll*, 267 U.S. 132 (1925).

²⁰ 387 U.S. at 535.

²¹ 98 S. Ct. 1816 (1978).

²² *See* note 5 *supra*.

²³ *Barlow's Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho 1977).

²⁴ 387 U.S. 523 (1967). *See* text accompanying note 30 *infra*.

²⁵ 387 U.S. 541 (1967). *See* text accompanying note 35 *infra*.

²⁶ Justice White wrote the majority opinion, and was

¹³ *Camara*, 387 U.S. at 537.

¹⁴ *Id.* at 535-36.

¹⁵ It is well established that warrantless searches and seizures are unreasonable under the fourth amendment, subject to only a few narrowly defined exceptions. The burden is on the party seeking the exemption to justify a warrantless search and seizure. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971).

¹⁶ Some examples of the exigent circumstances principle are: *Terry v. Ohio*, 392 U.S. 1 (1968) (frisking a suspect for dangerous weapons); *Warden v. Hayden*, 387 U.S. 294 (1967) (hot pursuit of a fleeing suspect); *Schmerber v. California*, 384 U.S. 757 (1966) (delay would cause evidence to be lost); *Carroll v. United States*, 267 U.S. 132 (1925) (search of an automobile which can rapidly be moved away); *North American Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure of unwholesome food).

Some cases discussing the principle of consent are *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Lewis v. United States*, 385 U.S. 206 (1966).

There are a few other minor exceptions where warrantless searches are permitted such as the border search exception, *United States v. Ramsey*, 431 U.S. 606 (1977) (permitting the opening of international mail suspected of containing contraband), but none of these excepted searches is analogous to administrative searches for civil purposes.

¹⁷ *Camara*, 387 U.S. at 533.

¹⁸ *See* 387 U.S. at 552-53 (Clark, J., dissenting).

¹⁹ There is probable cause for a criminal search when there is sufficient evidence to justify a reasonable belief

The Court held that businesses such as Barlow's Inc. are entitled to fourth amendment protection from civil searches. The Court first looked to the historical development of the fourth amendment during the Revolutionary War and noted that the framers of the Constitution intended to protect both businesses and private residences from abusive criminal and civil searches.²⁷ The warrantless civil search of Barlow's Inc. was therefore unconstitutional unless it fit into "some recognized exception to the warrant requirement."²⁸

In determining whether OSHA inspections are a proper subject for warrantless searches, the Court had four prior²⁹ cases involving administrative searches to look to for guidance.³⁰ In one of these,

joined by Justices Powell, Stewart, Marshall and Chief Justice Burger. Justice Stevens filed a dissenting opinion, joined by Justices Blackmun and Rehnquist. Justice Brennan did not take part in the decision.

Judging by his past voting record, it appears quite certain that had Justice Brennan taken part in the decision he would have voted with the majority. Justice Brennan dissented in *Frank*, 359 U.S. 360, and voted with the majority in *Camara*, 387 U.S. 523 and *See*, 387 U.S. 541. The position he took in these three cases is quite similar to the majority's position in *Barlow's*. Thus the holding of the majority in *Barlow's* probably has the support of six Justices.

²⁷ The historical interpretation of the fourth amendment has been a disputed topic. In *Frank*, 359 U.S. at 363-67, the Court read the history of the amendment's enactment as indicating that the framers were primarily concerned with abusive searches in criminal cases. The Court held that warrantless searches were constitutional in administrative areas since civil searches touched "at most upon the periphery of the important interests safeguarded by the fourteenth amendment's protection against official intrusion." *Id.* at 367.

Frank was overruled in *Camara*, 287 U.S. 523, where the Court interpreted the fourth amendment as establishing a broad-based protection against not only criminal searches, but all official invasions of privacy.

In *Barlow's* the Court adopted the historical point of view taken in *Camara*. The Court noted that the general warrants issued to search businesses to insure compliance with revenue acts, such as the Stamp Act of 1765, were particularly offensive to the colonists. Thus the framers of the Constitution were reacting against abusive civil searches of businesses as well as against abusive criminal searches. 98 S. Ct. at 1819-20.

²⁸ 98 S. Ct. at 1820.

²⁹ *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *See*, 387 U.S. 541; *Camara*, 387 U.S. 523.

³⁰ The first case involving administrative searches for a civil purpose was *Frank*, 359 U.S. 360, in which the Court upheld warrantless searches authorized by the Baltimore city code for the purpose of discovering health hazards. The case was overruled in *Camara*, 387 U.S. at 528 (1967).

Camara v. Municipal Court,³¹ a private citizen was charged with violating the San Francisco housing code³² after refusing to allow a city inspector to enter his home without a search warrant. The Court overturned the search provision of the housing code and held that a search warrant was required.

The fourth amendment requires that search warrants only be issued upon a showing of probable cause. And, probable cause as previously defined in relation to criminal searches permits searches only where there is evidence of a violation in a particular building.³³ The *Camara* Court recognized that the success of health and safety codes depends upon routine periodic inspections without any evidence of a violation, so it established for civil administrative searches a lower standard of probable cause based on the reasonableness of the inspection.³⁴ A judge could find probable cause sufficient to issue a warrant for a health or safety inspection if "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."³⁵ This would satisfy the public need for conducting an area-based search as well as assure the private citizen that the government was acting reasonably.

In *Camara's* companion case, *See v. City of Seattle*,³⁶ the Court used the same principles to judge the validity of city fire inspections of a commercial building, although the Court did note that there may be instances when the fourth amendment would tolerate greater intrusions on businesses than on private residences. But three years later, in *Colonnade Catering Corp. v. United States*,³⁷ the Court made an abrupt change by establishing a category of administrative searches that did not require

³¹ 387 U.S. 523 (1967).

³² The inspection was conducted pursuant to the San Francisco Housing Code § 503.

³³ *See* note 18 *supra*.

³⁴ This was an unprecedented concept offered by the Court. The *Camara* Court held that "if a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." 387 U.S. at 539. The only authority cited for this proposition is *Oklahoma Press Publishing Co. v. Walling*, 372 U.S. 186 (1946), where search warrants for generalized Congressional investigations were permitted. But the warrant there had to state specific documents that related to the investigation, whereas in *Camara* no suspicion that the particular house to be searched contained any violations was required.

³⁵ 387 U.S. at 528.

³⁶ 387 U.S. 541 (1967).

³⁷ 397 U.S. 72 (1970).

search warrants at all. The *Colonnade* Court upheld a federal statute³⁸ that had permitted a fine to be imposed on a retail liquor dealer who had refused to allow agents of the Secretary of Labor to make a warrantless search of his store. The Court based its opinion on language in *See* that reserved the question of warrantless searches in heavily regulated or licensed industries for a case-by-case determination under the reasonableness standard of the fourth amendment. The Court held that since the liquor industry has had a long history of licensing and regulation, warrantless searches in that industry can be constitutional.

The Court furthered the notion of warrantless administrative searches in *United States v. Biswell*,³⁹ which involved the search of the store of a gun dealer licensed under the Gun Control Act of 1968.⁴⁰ The *Biswell* Court held that gun control was an important part of crime prevention and that since frequent surprise inspections were crucial to successful gun control, "inspections without warrant must be deemed reasonable official conduct under the fourth amendment."⁴¹ *See* was distinguished on the grounds that the building defects could not be concealed during the period of delay caused by the necessity of obtaining warrants. On the other hand, the guns in *Biswell* could be easily hidden.

In reviewing these four cases, the *Barlow's* Court held that *Camara* and *See* established the basic principles for administrative searches and that *Colonnade* and *Biswell* were the exceptions. The Court read *Colonnade* and *Biswell* as establishing a narrow exception to the fourth amendment involving only heavily regulated and licensed industries. A businessman operating in these fields "must already be aware" of the high degree of governmental supervision, and searches were seen as just one of the "burdens" of doing business.⁴² This "awareness" amounted to an implied consent to a lowering of the privacy interest protected by the fourth amendment. The Court reasoned, however, that since OSHA regulations cover virtually all industries affecting interstate commerce, "nothing but the most fictional sense of voluntary consent to later searches"⁴³ could be found. OSHA simply covered too many areas to fit into the *Colonnade/Biswell* exception to the warrant requirement.

³⁸ 26 U.S.C. §§ 5146(b), 7606, 7342 (1976).

³⁹ 406 U.S. 311 (1972).

⁴⁰ 18 U.S.C. § 923(g) (1976).

⁴¹ 406 U.S. at 316.

⁴² 98 S. Ct. at 1821.

⁴³ *Id.*

The *Barlow's* Court also recognized a general reasonableness exception to the fourth amendment where the need for a warrantless search outweighs the incremental protection a warrant would afford the subject of the search. The government had argued that surprise inspections are crucial to OSHA's success and that if inspectors have to wait to obtain warrants, many defects will be hidden. In the alternative, if OSHA inspectors decide not to risk being refused entrance to a work area, they will have to obtain search warrants prior to every inspection, which would result in a heavy burden on both OSHA and the courts.

The Court rejected both of these arguments, primarily on the basis that most businessmen could be expected to consent to warrantless searches.⁴⁴ The Court further observed that the Secretary of Labor's own OSHA regulations demonstrated that when an inspector was refused entry, the department intended to seek compulsory process rather than bring criminal charges.⁴⁵ The former was the procedure actually used in *Barlow's* case.

The *Barlow's* Court felt that the process of obtaining search warrants after an inspector is refused entry would not diminish OSHA's effectiveness. Further, the Court held that the *Camara* standard of probable cause⁴⁶ was applicable, so that OSHA inspectors would be able to obtain warrants upon a showing that:

[a] specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area. . . .⁴⁷

The government had argued that a warrant based on such minimal grounds will in actuality

⁴⁴ The Court noted that since the Secretary of Labor had not demonstrated that a pattern of widespread refusal existed, the Court can only "await the development of evidence" in this area. *Id.* at 1822 n.11.

⁴⁵ 29 C.F.R. § 1903.4 (1977) states that if an inspector is refused entrance he shall "immediately consult with the Assistant Regional Director and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary."

This action was chosen by the Secretary even though criminal proceedings were possible in the same situation; 18 U.S.C. § 111 (1976) makes it a crime to impede or interfere with a federal officer.

⁴⁶ See note 33 and accompanying text *supra*.

⁴⁷ 98 S. Ct. at 1825.

be little more than a rubber stamp that will give businessmen no real protection from governmental intrusions. However, the Court responded that a search warrant of this type would give the businessman judicial assurance that the inspections were constitutional, authorized by statute, and pursuant to a rational plan of enforcement. The warrants would in addition provide information as to the proper scope of the search. If no warrant was required, a businessman wishing to challenge the validity of a search in court had to risk possible criminal sanctions.

Justice Stevens' dissent⁴⁸ argued that warrantless searches conducted pursuant to OSHA do not violate the fourth amendment. He asserted that the fourth amendment provides a twofold protection against searches and seizures. The first half of the amendment is a general prohibition against unreasonable searches and seizures, while the second half prohibits the issuance of search warrants in the absence of the probability of locating evidence or suspects.

Unlike the majority, Justice Stevens read the history of the Revolutionary War as indicating that the fourth amendment arose in part as a response to the Crown's issuance of general warrants and writs of assistance under which nearly anyone's home could be searched. The requirement that a warrant be issued only on probable cause was adopted by the framers of the Constitution specifically to circumscribe the warrant power. Justice Stevens asserted that the majority had attempted to force inspections into a warrant scheme, thereby diluting the framers' intent behind the warrant clause of the fourth amendment. Stevens concluded that the warrant clause has no application to routine health and safety inspections. If there is justification for such programs, it must be under the first half of the fourth amendment which permits reasonable searches and seizures.

Justice Stevens agreed with the majority that balancing the public interest against a citizen's fourth amendment privacy interest is the proper method for determining the reasonableness of a warrantless search and seizure.⁴⁹ But Justice Stevens preferred to defer as much as possible to

Congressional judgment as to the proper balance between such interests. He simply did not find the majority's reasoning powerful enough to override Congress.⁵⁰

The majority in *Barlow's* did not deal with the effects of its own ruling.⁵¹ However, Justice Stevens asserted that the number of refusals will rise significantly due to the decision in this case and that this will create a dilemma for OSHA inspectors: they can either risk fruitless visits by not obtaining warrants or waste time securing warrants prior to all searches as a matter of routine. Either option will cause delay and inefficiency in enforcing the OSHA regulations.

Justice Stevens then attacked the majority's reliance on the Secretary of Labor's regulations as evidence that obtaining warrants will not burden OSHA inspectors.⁵² The regulations, he asserted, were issued on the assumption that warrantless searches were legal and that refusals to cooperate would be minimal. But, according to Stevens, the *Barlow's* decision undermines that basic assumption. Stevens charged that the Court's reliance on the Secretary's regulations as evidence indicated its discomfort "with the notion of second guessing Congress and the Secretary on the question of how the substantive goals of OSHA can best be achieved."⁵³

Additionally, Justice Stevens found merit in the government's argument that what little protection administrative search warrants will afford businessmen is already built into the statute. An administrative search warrant, he noted, will purportedly inform the employer that the inspection is authorized by statute, designate the lawful limits of the search, and assure the employer that the person demanding entry is an authorized inspector. But, in his view, since the lowered probable cause requirement will require a judge to do little more than approve an administrative inspection schedule drawn up by Labor Department officials, the search warrant will offer no added assurance that the inspection is lawful. The proper limits of an OSHA inspection, he said, are laid out in the statute,⁵⁴ and the reviewing judge will not narrow these in any way. As to the inspector's credentials,

⁴⁸ Justice Stevens was joined in his dissent by Justices Blackmun and Rehnquist.

⁴⁹ See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (highway checkpoint near Mexican border searching for illegal immigrants); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (routine inventory of an impounded car revealed narcotics); *Biswell*, 406 U.S. 311 (1972); *Terry*, 392 U.S. 1 (frisking a suspect for dangerous weapons).

⁵⁰ 98 S. Ct. at 1829 (Stevens, J., dissenting).

⁵¹ In 98 S. Ct. at 1822 n.11 the majority recognized the possible effect of its ruling but noted that it could not deal with evidence not in the record.

⁵² 98 S. Ct. at 1829-30 (Stevens, J., dissenting).

⁵³ 98 S. Ct. at 1829.

⁵⁴ 29 U.S.C. § 657(a)(1), (a)(2) (1976); 29 C.F.R. § 1903 (1977).

the statute requires an inspector to present them prior to a search, and the businessman is entitled to a toll-free call to verify them.⁵⁵ Those businessmen who refuse an inspection will learn little from the warrant they receive when the inspector returns.

Justice Stevens then cited *United States v. Martinez-Fuerte*,⁵⁶ as an example of a reasonable warrantless search. There, the Court upheld the constitutionality of warrantless searches of automobiles for illegal aliens conducted at permanent checkpoints on highways north of the Mexican border. No probable cause was required to search a vehicle since this would have thwarted the efficiency of the program. Similarly, an administrative search warrant was not required because the permanent nature of the checkpoint was held to be sufficient assurance that the police were properly authorized.

Noting the majority's broad deference to Congressional judgment in the *Colonnade* and *Biswell* cases, Stevens next pointed out that the Court's distinguishing of these cases based on the notion of a long history of regulation is not a valid method for determining when Congressionally authorized searches are reasonable. According to Stevens, such reasoning would mean that Congress could never adapt to changing circumstances. He attacked the notion of consent, noting that it is purely fictional and based solely on a businessman's awareness of governmental regulations concerning his business. And, since he believed the validity of a regulation to be based on the existence of a proper statute, he stated that the validity of a search should be based on a determination of how necessary it is to fulfill the goals of a regulatory statute.

Finally, Justice Stevens argued that the majority actually demonstrated a preference for legislation on an industry-by-industry basis as opposed to the broad-based inspection provisions in OSHA.⁵⁷ He argued that the scope of a statute should not determine the constitutionality of the searches it authorizes. As long as the "power to inspect . . . is tailored to the subject matter,"⁵⁸ the search is reasonable under the fourth amendment. Justice

Stevens thus asserted that the OSHA search provisions were just as well-designed for discovering health and safety violations as the *Colonnade* and *Biswell* search provisions were for uncovering violations of the respective statutes in those cases.

Both the majority and dissenting opinions in *Barlow's* seem to have acknowledged the importance of health and safety inspection programs,⁵⁹ and both sides seem to have agreed that civil inspection programs cannot be run successfully if the inspectors have to present evidence that a probable violation exists in a particular building prior to conducting a search. The disagreement arises as to the necessity of permitting warrantless searches as opposed to requiring search warrants based on the lower standard of probable cause.

The government had argued that warrantless searches were justified by the need for surprise searches. And, the majority refuted this by pointing out that inspectors could obtain *ex parte* warrants prior to any search that required an element of surprise. The only reply that the government could offer to this notion was that the warrant procedure would cause an administrative burden. But, the Court has held that efficiency alone is not a sufficient ground for disregarding the fourth amendment.⁶⁰ Moreover, OSHA officials will have no problem obtaining search warrants under the lower standard of probable cause. Ninety-five percent of OSHA's work involves dangerous industries⁶¹ where the nature of the industry itself would probably be sufficient justification for an administrative search warrant. OSHA officials seemed to recognize this, for soon after the *Barlow's* decision, OSHA issued an order instructing inspectors to seek search warrants promptly if refused entry for inspection.⁶²

The main issue then appears to be whether the administrative search warrant will be a rubber stamp and thus a needless waste of time. In dissent, Justice Stevens argued that the statute offers the same protections as the search warrant. Yet, this argument ignores one of the main purposes of a search warrant, the interposition of a neutral judicial authority between the government and a citizen before his privacy can be invaded.⁶³ The

⁵⁵ Although Justice Stevens asserted the right of a toll free call unequivocally, this right has been recognized in only one prior court opinion, and there was no mention of the call's being toll free. *Usery v. Godfrey Brake and Supply Service Inc.*, 545 F.2d 52, 54 (8th Cir. 1976).

⁵⁶ 428 U.S. 543 (1976).

⁵⁷ In *Colonnade* the statute covered the liquor industry, and in *Biswell* the statute covered gun dealers. OSHA, on the other hand, covers all employers with businesses affecting interstate commerce.

⁵⁸ 98 S. Ct. at 1833 (Stevens, J., dissenting).

⁵⁹ For a good statistical analysis of the importance of such inspection programs, see 387 U.S. at 550-52 (Clark, J., dissenting).

⁶⁰ *Mincey*, 98 S. Ct. at 2214; *Coolidge*, 403 U.S. at 481. U.S. at 481.

⁶¹ *The New York Times*, May 24, 1978, § D at 21, col. 3.

⁶² *Id.*, June 4, 1978 § 1(news) at 53, col. 4.

⁶³ *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). The Court there held that although the evidence of a

statute does not provide any means of preventing OSHA officials from abusing the search provisions.⁶⁴ A search warrant will provide judicial assurance that a search is part of a legitimate inspection program.

In *Barlow's*, the Court was faced with the difficult task of trying to preserve the effectiveness of OSHA inspections without violating fourth amendment protections against official intrusions. The warrant system based on the lower standard of probable cause for civil inspections appears to be the only logical solution. In an increasingly crowded and industrialized society, the number of health and safety inspections will probably increase, and citizens will need some protection from potentially abusive searches. The search warrant based on the lower standard of probable cause will afford the government a great deal of flexibility and at the same time prevent most abusive searches. While Justice Stevens may be correct that historically, the probable cause requirement was intended to prevent generalized warrants, the Constitution must be flexible enough to adapt to new situations and new problems.

The one problem, however, with the *Barlow's* decision was its attempt to distinguish the warrantless searches permitted in the *Colonnade* and *Biswell* cases. The decisions in those cases relied heavily on the need for surprise searches, but the *Barlow's* Court was not able to cite this as grounds for distinguishing those cases, since the need for surprise searches had been rejected in *Barlow's* as a justification for warrantless administrative searches. The Court instead attempted to distinguish *Colonnade* and *Biswell* based on the notion of implied consent.⁶⁵ The Court held that because of

crime would probably have been sufficient for a search warrant, the police can not act on their own.

⁶⁴ In *Johnson v. United States*, 333 U.S. 10, 14 (1948), the Court noted that police officers engaged on the often-competitive enterprise of crime detection are not properly suited for judging when a situation warrants an invasion of a citizen's privacy. OSHA officials may be subject to similar pressures.

⁶⁵ This was an unprecedented concept offered by the Court. See *Bumper*, 391 U.S. 543; *Katz*, 389 U.S. 347; *Lewis*, 386 U.S. 206 (1966). In *Bumper*, the Court held that permitting a search when a police officer presents a search warrant did not constitute consent when the warrant later turned out to be invalid. In *Katz*, the Court held a wiretap of a phonebooth conversation unconstitutional because the person expected his words to be private. In *Lewis*, the Court held that a person who sold narcotics to an undercover narcotics agent in his home consented to the seizure of the narcotics.

In all of the above cases, the Court required voluntary

the high degree of regulation, the owners of gun and liquor stores in those cases impliedly consent to searches and thus search warrants are not required. But this is a confusing concept as the owner of a heavily regulated business has no more desire to permit searches of his premises than does an employer covered by OSHA. The fact that a business is subjected to a high degree of governmental regulation may increase the public need for inspections, but it is difficult to see how this lowers the owner's fourth amendment privacy interest. However, given the factual similarity among the statutes in *Barlow's*, *Colonnade*, and *Biswell*, it appears that the Court is actually strictly limiting the *Colonnade* and *Biswell* cases to their facts. Those two decisions are still valid precedents for warrantless administrative searches, but the Court in light of *Barlow's*, will probably be very cautious in using them in the future.⁶⁶

MICHIGAN V. TYLER

In *Michigan v. Tyler*,⁶⁷ a fire had broken out at midnight in a store owned by the defendant and a business partner. Approximately two hours later, the fire chief arrived and began to search the premises to determine the cause of the fire.⁶⁸ After discovering two plastic containers of flammable liquid, the chief concluded that arson may have been the cause of the fire, so he called a police

consent to a specific search. There is no precedent for the notion of implied consent to searches other than *Biswell*.

⁶⁶ There may soon be an indication of the extent of the *Colonnade/Biswell* type exception. The Supreme Court recently vacated and remanded to the Fifth Circuit two cases in light of *Barlow's* and *Tyler*. 98 S. Ct. 2841. These two cases, *United States v. New Orleans Public Service, Inc.*, 553 F.2d 459 (5th Cir. 1977) and *United States v. Mississippi Power and Light*, 553 F.2d 480 (5th Cir. 1977) both involve an executive order that permits warrantless searches of the records of certain public contractors to insure compliance with federal non-discrimination requirements. The cases involve public utilities which have a long history of regulation similar to the gun and liquor industries in *Colonnade* and *Biswell*. The Fifth Circuit vacated and remanded the cases to the district court for further consideration. *United States v. New Orleans Public Service, Inc.*, 557 F.2d 1030 (5th Cir. 1978); *United States v. Mississippi Power and Light*, 553 F.2d 480. If these cases reach the Supreme Court again they should provide an excellent opportunity for the Court to clarify the nature of the *Colonnade/Biswell* exception.

⁶⁷ 98 S. Ct. 1942 (1978).

⁶⁸ The Court says that it is the fire chief's "job" to determine the origin of all fires that occur within the township. *Id.* at 1946. It is unclear if this duty is statutory or customary.

detective. The detective arrived at approximately three-thirty in the morning, entered the building with the fire chief, and took several pictures. At around four o'clock, smoke and steam made further investigation impossible, so the fire chief and the detective locked up the building and left.⁶⁹ The fire chief returned for a quick examination the next morning and then returned with the detective later in the day for a further investigation into the cause of the fire. At this time several pieces of evidence of arson were found. Approximately three weeks later, several other searches were made and further evidence of arson was discovered. All of the searches were made without search warrants.

Tyler and a co-defendant were tried for conspiracy to burn real property,⁷⁰ and Tyler was tried individually for burning real property⁷¹ and burning real property with the intent to defraud.⁷² The defendants challenged the evidence gathered during all of the searches as constitutionally inadmissible since the police and fire officials did not use search warrants. But, both defendants were convicted on all counts, and the convictions were upheld on first appeal.⁷³

The Michigan Supreme Court reversed all of the convictions,⁷⁴ holding that although a fire is an emergency that permits public officials to enter a building without a search warrant, when the fire—and thus the emergency—had ended, by four a.m. there was no justification for the warrantless searches. Since no consent had been obtained for the searches, all of the evidence gathered during them was held inadmissible. The United States Supreme Court upheld the reversal of the convictions but modified the state court's holding to allow admission of the evidence obtained in searches the morning after the fire.⁷⁵

The state of Michigan argued that the owner of a building in which there has been a recent fire has no expectation of privacy. If the owner set the blaze, then he has abandoned his fourth amend-

ment privilege, the state argued, and if he is a victim of a fire, then fire officials treat him as a victim and enter the building only to aid in discovering the cause of the fire.

However, the Court⁷⁶ rejected this argument, first establishing that commercial premises are entitled to protection from searches for criminal or civil purposes. When there has been a fire in a building one must assume that the owner is innocent, and even if most innocent victims of fires have little privacy interest in the damaged building, those who do have a recognizable privacy interest. Thus property damaged by fire is no exception to the general rule that "except in certain carefully defined classes of cases, a search of private property is unreasonable unless it has been authorized by a valid search warrant."⁷⁷

The State had also argued that since the fact that there had been a fire would automatically satisfy the probable cause requirement for an administrative search warrant, the warrant would not even serve the *Barlow's*-type purpose of assuring the owner that the inspection was part of a rational administrative plan. The Court rejected the argument that all fire searches are identical, pointing out that a judge would be able to consider the purpose of the search, its scope, how many prior searches had been made, and any other factors in order to insure that "harassment"⁷⁸ of the owner is kept to a minimum. The Court also pointed out that although a fire probably justifies a search, an owner has no way of knowing the limits or purpose of such a search if a fire official is not forced to present a warrant.

The Court set up a double standard for the type of warrant necessary to carry out a search. If the search is for the sole purpose of discovering the cause of the fire so as to prevent possible reoccurrence, then the probable cause standard developed for civil searches in *Camara v. Municipal Court* would be appropriate. But as soon as the authorities begin to seek evidence for a criminal prosecution, the usual standards of probable cause will apply.⁷⁹

Since an owner of a building that has been

⁶⁹ Although there was still smoke and steam, the fire had been put out. At four a.m. all of the firefighters left also.

⁷⁰ Mich. Comp. Laws § 750.157a (Mich. Stat. Ann. § 28.354(1) (Callaghan 1978)).

⁷¹ Mich. Comp. Laws § 750.73 (Mich. Stat. Ann. § 28.268 (Callaghan 1972)).

⁷² Mich. Comp. Laws § 750.75 (Mich. Stat. Ann. § 28.270 (Callaghan 1972)).

⁷³ *People v. Tyler*, 50 Mich. App. 414, 213 N.W.2d 221 (1973).

⁷⁴ *People v. Tyler*, 399 Mich. 564, 250 N.W.2d 467 (1977).

⁷⁵ *Michigan v. Tyler*, 98 S. Ct. 1942 (1978).

⁷⁶ The opinion of the Court was written by Justice Stewart, and was joined by Justice Powell and Chief Justice Burger.

⁷⁷ 98 S. Ct. at 1948 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967)).

⁷⁸ 98 S. Ct. at 1949.

⁷⁹ *Id.* at 1949-50. Since all of the searches were made without warrants, the Court did not address the issue of what warrants would have been proper under the circumstances.

destroyed by a fire is still entitled to fourth amendment protection; the Court held that warrantless searches are justifiable if they fit into one of the narrow categories of action where there is no time to wait for a search warrant. According to the Court, burning buildings clearly fit into this category, and fire fighters are thus allowed to enter the scene of a fire without first obtaining a search warrant. The Court also held that once inside a building, firemen may seize evidence of arson that is in plain view; thus the seizures by the fire chief and the detective while the fire still continued during the first early morning search, were constitutional even without a search warrant.

The Court also found that the Michigan Supreme Court's holding that the exigency permitting warrantless searches ends with the last flame was too narrow. Fire officials are charged with finding the cause of a fire so as to prevent any recurrence, and this often requires a careful examination of the premises. There would have been no purpose in forcing the fire chief and the detective to stay in the building while the smoke cleared, so the Court held that officials do not need a warrant to search a building during a fire and for a reasonable time afterwards.⁸⁰ The Court placed no importance on the fact that the fire chief and the detective physically left the building, because all of their actions were part of the same investigation. The Court held that all entries after the fire's expiration were detached from the initial emergency and deserving of fourth amendment protection. Thus all evidence gathered during those searches should have been inadmissible at trial.

Justice Stevens agreed with the judgment of the Court that the searches up until the next morning required no search warrants. But, as in *Barlow's*, he again took issue with the majority's notion of an administrative search warrant.⁸¹ A warrant authorizes an unannounced entry by force, and, absent suspicion of a crime or any special enforcement need, Justice Stevens saw no need to trigger "an abrupt and preemptory challenge between sovereign and citizen."⁸² He thus proposed a system in which the government would notify citizens in advance of any administrative search, thereby affording the citizen the chance to challenge the

search in court.⁸³ Since under this system the fire official would have to notify the owner of a building prior to any searches after the emergency has ended, Justice Stevens was able to concur in the judgment excluding evidence gathered in searches the day of the fire.

Justice Blackmun joined in the judgment of the Court but only concurred in parts I, III, and IV-A of the opinion.⁸⁴ This is extremely difficult to interpret since part IV-B simply says that all searches conducted after the date of the fire were warrantless and not based on consent, thus any evidence gathered in them must be excluded. If one disagrees with this it is difficult to see how one could concur in the judgment. Justice Blackmun would not join in parts II and V because they espouse the concept of an administrative search warrant based on the lower standard of probable cause.⁸⁵

Justice White concurred⁸⁶ with most of the Court's judgment but dissented from overruling the Michigan Supreme Court's finding that the exigency that permitted a warrantless search ended at the time the fire was extinguished. White asserted that if the firemen were able to leave the building and lock it up for four hours, clearly the exigent circumstances had terminated. He pointed out that fire officials will need more carefully-drawn guidelines than those outlined in the majority opinion, so he would insist on a warrant for all searches after the fire has been put out. Thus, he would have excluded evidence gathered from all of the searches conducted on the morning after the fire.⁸⁷

⁸³ The only authority cited for this proposed inspection system is a law review article that notes a similar procedure with administrative subpoenas in the United States, and health inspections in England, whereby the government agency gives the citizen notice of the impending action. LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 THE SUP. CT. REV. 1, 31-32, (Kurland, ed.).

⁸⁴ Part I gives the facts, Part II establishes the need for administrative warrants in fire inspections, Part III held that fires are an exception permitting warrantless searches during the actual fire, Part IV-A held that the searches up until the next morning were constitutional, Part IV-B held that all of the other searches were unconstitutional, and Part V summarized the holding in the case.

⁸⁵ Maintaining this same position in *Barlow's*, Justice Blackmun joined Justice Stevens' dissent. 98 S. Ct. at 1827 (Stevens, J., dissenting).

⁸⁶ Justice White was joined by Justice Marshall.

⁸⁷ Justice White also noted the state court's factual finding that the searches on the morning of January 22 were for the purpose of collecting evidence for a criminal prosecution. 98 S. Ct. at 1953-54. This would imply that

⁸⁰ 98 S. Ct. at 1950. In footnote 6 the Court points out that this reasonable time will vary depending upon the type of building and the needs of the owner.

⁸¹ This is the same position that he took in *Barlow's*, 98 S. Ct. at 1827 (Stevens, J., dissenting).

⁸² 98 S. Ct. at 1952.

Justice Rehnquist dissented from the entire judgment on the grounds that no warrants were required for any of the searches. He noted that the building was damaged beyond use and that Tyler gave no indication of an intent to repair and use the building. Tyler never objected to the searches; in fact, he even accompanied the police and fire officials on some of them and once suggested that the fire might have been caused by arson. Justice Rehnquist felt that since the searches were reasonable, they did not constitutionally require search warrants.

All eight justices involved in the decision agreed that a fire official may search the premises of a fire without a warrant during the course of a fire. One justice⁸⁸ would extend this privilege indefinitely, five⁸⁹ would allow it to continue for a reasonable time after the fire, and two⁹⁰ would end the privilege as soon as the flames are quenched. As to administrative search warrants, five⁹¹ favored them being required after the fire for civil searches and three⁹² denied their validity. Thus at least five justices concurred on the three main points of the decision: no warrants during a fire, no warrants for a reasonable time afterwards, and administrative search warrants for all searches after the reasonable time.

In *Tyler*, one can see an application of the principles developed for administrative searches in *Barlow's*. The *Tyler* Court held that a fire is a civil emergency that permits a warrantless search. The need for immediate action to bring the fire under control and discover its cause was considered to outweigh the privacy interest of the property owner. After the emergency has ended, however, the usual requirements for searches apply. If the post-emergency search is for the civil purpose of discovering the cause of the fire, the lower standard of probable cause applies; but if the search is for

evidence to be used in a criminal prosecution, then the strict standard of probable cause must be met.

It is interesting to note that the *Tyler* Court implicitly rejected the principle of implied consent developed in *Barlow's* in the context of a fire. The State of Michigan had argued that the owner of property destroyed by a fire has no recognizable privacy interest since he is either an arsonist or a victim of a fire. This argument gave the Court a perfect opportunity to extend the notion of implied consent as it could have held that the owner of a building destroyed by a fire impliedly consents to searches by public officials to determine the cause of the fire. The extent of the damage done by a fire might have been seen as analogous to the degree of governmental regulation of business which was held to imply consent to searches in *Colonnade* and *Biswell*. The *Tyler* Court, however, rejected this line of reasoning and held that the fact that most people would welcome an inspection of their property after a fire "is irrelevant to the question of whether the . . . inspection is reasonable within the meaning of the fourth amendment."⁹³ The few property owners who would object to such searches retain the full protection of the fourth amendment.

Tyler also illustrates the problems that the administrative search warrant will cause in the future. The *Tyler* decision leads to the anomalous situation in which different search warrants are required depending upon the motivation of the public official conducting the search. The line between civil and criminal searches will be difficult to draw, and such a situation provides an opportunity for an overzealous public official to lie about the purpose of a search. Another problem will arise when criminal evidence is accidentally discovered during a civil search. Admitting such evidence at trial would seriously undermine the protection given by the probable cause requirement of the warrant clause in criminal cases.⁹⁴

the searches were unconnected with the initial emergency and actually the start of a criminal investigation.

⁸⁸ Justice Rehnquist. 98 S. Ct. at 1954 (Rehnquist, J., dissenting).

⁸⁹ 98 S. Ct. at 1951 (Burger, C.J., Stewart, Powell, JJ.); *Id.* at 1952 (Blackmun, J., concurring); *Id.* at 1953 (Stevens, J., concurring).

⁹⁰ 98 S. Ct. at 1953 (Marshall, White, JJ., concurring in part, dissenting in part).

⁹¹ 98 S. Ct. at 1951 (Burger, C.J., Stewart, Powell, JJ.); *Id.* at 1953 (Marshall, White, JJ., concurring in part, dissenting in part).

⁹² 98 S. Ct. at 1954 (Rehnquist, J., dissenting); *Id.* at 1952 (Blackmun, J., concurring); *Id.* at 1952 (Stevens, J., concurring).

⁹³ 98 S. Ct. at 1948 (quoting *Camara v. Municipal Court*, 387 U.S. at 526).

⁹⁴ The Supreme Court may soon rehear a case involving a similar problem. *United States v. Consolidation Coal*, 560 F.2d 214 (6th Cir. 1977), involves the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* (1976). This statute has a search provision similar to OSHA's except that if evidence of a willful violation of the statute's provisions is found, there are criminal sanctions.

Government agents, informed of a willful violation, proceeded to conduct a search of six company offices which yielded evidence that resulted in criminal convictions. Although the warrants were based on the lower standard of probable cause used for administrative

CONCLUSION

In the *Barlow's* and *Tyler* cases, the Court established a structure for requiring administrative search warrants that parallels the structure involving criminal search warrants, but that is based on a different standard of probable cause. In *Barlow's*,

searches, the court held them sufficient for all searches, civil or criminal, authorized by the statute.

The Supreme Court vacated and remanded the case in light of *Barlow's* and *Tyler*, 98 S. Ct. 2841. On remand, the circuit court upheld its original decision. *United States v. Consolidation Coal*, 579 F.2d 1011 (6th Cir. 1978). This appears to ignore the *Tyler* holding that requires the application of the strict criminal standards of probable cause if the purpose of the search is the discovery of evidence for a criminal prosecution. If this case reaches the Supreme Court again, it will provide an excellent opportunity for a clarification of the line separating criminal from civil searches.

the Court reaffirmed the holding of *Camara* in which it was established that warrants would be required for all administrative searches except in a few narrowly-defined cases. These exceptions will be based on exigent circumstances such as the fire in *Tyler* or on some notion of consent as in *Colonnade* and *Biswell*. It appears that as in criminal searches, the party seeking the exemption from the fourth amendment will carry a heavy burden of proof.

The Court had set up a conflict by requiring search warrants in *Camara* and *See* and yet permitting warrantless searches in *Colonnade* and *Biswell*. By resolving this conflict, *Barlow's* will probably become the basic precedent for all future administrative search cases. The importance of *Tyler* lies in its indication that the Court intends a strict adherence to the separate standards established for civil and criminal searches.