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Fourth Amendment--Warrantless Administrative Inspections of Commercial Property

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FOURTH AMENDMENT—WARRANTLESS ADMINISTRATIVE INSPECTIONS OF COMMERCIAL PROPERTY

Donovan v. Dewey, 101 S. Ct. 2534 (1981).

Last term the Supreme Court again addressed the issue of warrantless administrative inspections of commercial property. In *Donovan v. Dewey*¹ the Court upheld a provision of the Federal Mine Safety and Health Act of 1977² which authorizes warrantless inspections of underground and surface mines.³ In reaching its decision, the Court emphasized the strong federal interest in regulating extremely hazardous industries such as mining, the necessity of warrantless inspections for effective enforcement of the statute, and the statute's comprehensive and predictable procedural provisions.⁴ However, the Court again failed to provide a clear explanation of when the fourth amendment⁵ requires a warrant for administrative inspections of commercial property. Consequently, the confusion which has characterized this area of fourth amendment law continues.

This Note first examines the major precedents leading up to *Dewey* and points out their inconsistencies. Next, the facts of *Dewey* and its majority, concurring, and dissenting opinions are presented. Third, the extent to which *Dewey* is consistent with precedent is discussed. Fourth, the correctness of the Court's decision, apart from considerations of *stare decisis*, is evaluated. Finally, the Note addresses the importance of *Dewey* for future litigation and legislation in the area of administrative warrants.

I. BACKGROUND

Until fairly recently, the Supreme Court considered administrative

¹ 101 S. Ct. 2534 (1981).

² 30 U.S.C. §§ 801-962 (Supp. III 1979).

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

⁴ 101 S. Ct. at 2540-41.

⁵ The fourth amendment provides:

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.

inspections beyond the scope of the fourth amendment. In *Frank v. Maryland*,⁶ the Court narrowly upheld a Baltimore city ordinance which permitted the warrantless inspection of any dwelling thought to contain a nuisance.⁷ Justice Frankfurter, writing for the Court, stressed that such inspections promoted the public health, were based on at least a suspicion of wrongdoing, and were conducted in a reasonable manner.⁸ Justice Frankfurter concluded that the type of inspection at issue "touch[ed] at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion. . . ."⁹

Frank was overruled eight years later in the companion cases of *Camara v. Municipal Court*¹⁰ and *See v. City of Seattle*.¹¹ At issue in *Camara* was a provision of the San Francisco Housing Code authorizing certain city employees to make warrantless inspections of buildings.¹² In invalidating the provision, the Court concluded that it had erred earlier in upholding warrantless administrative inspections on the grounds that the affected interests were "merely 'peripheral' " to the fourth amendment.¹³ Justice White, writing for the majority, reasoned that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."¹⁴ Consequently, the Court held that a warrant is necessary for administrative inspections of dwellings in order to assure residents that an inspection is within the scope of a valid ordi-

⁶ 359 U.S. 360 (1959), *overruled in*, *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

⁷ The Baltimore City Code provides:

Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars.

359 U.S. at 361 (quoting BALTIMORE, MD., CITY CODE art. 12, § 120 (1950)).

⁸ 359 U.S. at 366-67.

⁹ *Id.* at 367. In dissent, Justice Douglas, with Chief Justice Warren and Justices Black and Brennan concurring, argued that the fourth amendment protects citizens from warrantless inspections of their homes regardless of the purpose of the inspection. *Id.* at 374 (Douglas, J., dissenting).

¹⁰ 387 U.S. 523 (1967). The Court stated that it was necessary to re-examine *Frank* because of the increased use of administrative inspection plans and refined fourth amendment analysis since *Frank* was decided. *Id.* at 525.

¹¹ 387 U.S. 541 (1967).

¹² Section 503 of the San Francisco Housing Code provides:

Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.

Quoted in 387 U.S. at 526.

¹³ *Id.* at 530. The Court agreed with the *Frank* premise that administrative inspections are less intrusive than searches related to criminal investigations.

¹⁴ *Id.* (footnote omitted).

nance or statute.¹⁵ However, because of the substantial government interest in building code inspections and the relatively unintrusive nature of such inspections, the Court further held that warrants for administrative inspections need not be based on "probable cause" that a particular building contains code violations.¹⁶ The Court also noted that there was no evidence that effective enforcement of the building code required warrantless inspections.¹⁷

In *See v. City of Seattle*, the holding of *Camara* was extended to include commercial enterprises.¹⁸ At issue in *See* was the refusal by the owner of a commercial warehouse to permit a local fire department official to conduct a routine warrantless inspection of his property.¹⁹ In reversing criminal sanctions against the warehouse owner, the Court stated that the constitutional rights of the businessman, like those of occupants of residential buildings, are "placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant."²⁰

Just three years later, however, the Court held that the fourth amendment was not a bar to a warrantless administrative inspection of a liquor dealer's premises by authorized agents of the Internal Revenue Service. In *Colonnade Catering Corp. v. United States*,²¹ federal agents inspected the cellar of a caterer authorized to sell liquor under a federal license.²² After the caterer had refused to open a locked liquor storeroom, the agents broke the lock, entered the storeroom, and seized liquor bottles they believed to have been refilled in violation of federal law.²³ The agents sought to justify the forcible entry on the grounds that federal law permitted entry "so far as it may be necessary" of any place where "any articles or objects subject to tax are made, produced, or kept. . . ."²⁴ Claiming that the exclusive remedy for a refused entry

¹⁵ *Id.* at 532-33.

¹⁶ *Id.* at 534.

¹⁷ *Id.* at 533.

¹⁸ 387 U.S. at 543.

¹⁹ *Id.* at 541. City of Seattle Ordinance No. 87870, § 8.01.050 provides:

INSPECTION OF BUILDING AND PREMISES. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards.

Quoted in 387 U.S. at 541.

²⁰ 387 U.S. at 543.

²¹ 397 U.S. 72 (1970).

²² 26 U.S.C. § 5121(a) (1976).

²³ 26 U.S.C. § 5301(c) (1976) forbids the refilling of liquor bottles with any substance other than that contained in the bottles at the time of stamping.

²⁴ 26 U.S.C. § 5146(b) (1976) provides:

was the imposition of a fine,²⁵ the Court disagreed and held that the liquor bottles had to be returned to the caterer and suppressed as evidence.²⁶

The most notable aspect of the *Colonnade* decision was that the only limitation the Court recognized on the seizure of the liquor bottles was statutory; none of the justices found the forcible entry unconstitutional.²⁷ In finding no fourth amendment violation, Justice Douglas relied almost entirely on the long history of close supervision and inspection of the liquor industry.²⁸

A second exception to the warrant requirement for administrative inspections arose in *United States v. Biswell*.²⁹ There, the issue was the constitutionality of a provision of the Gun Control Act of 1968³⁰ which authorized warrantless inspections of records, documents, or firearms kept by firearms dealers.³¹ In upholding the provision, the Court's anal-

The Secretary or his delegate 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. § 7606 (1976) provided:

(a) Entry during day.

The Secretary or his delegate 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 or his delegate may enter them while so open, in the performance of his official duties.

²⁵ 26 U.S.C. § 7342 (1976) provides for a \$500 fine for anyone refusing to submit to a request for an authorized inspection.

²⁶ 397 U.S. at 77.

²⁷ In his dissenting opinion, Chief Justice Burger, with whom Justices Black and Stewart joined, argued that the statute permitted even forcible entries if necessary. *Id.* at 81 (Burger, J., dissenting).

²⁸ Justice Douglas quoted from *Boyd v. United States*, 116 U.S. 616, 623 (1886), in which the Court reasoned that because the same Congress that proposed the fourth amendment enacted a statute which authorized warrantless administrative inspections as a means of enforcing liquor regulations, the fourth amendment could not have been intended to bar such inspections. 397 U.S. at 76.

²⁹ 406 U.S. at 311 (1972).

³⁰ 18 U.S.C. §§ 921-28 (1976).

³¹ 18 U.S.C. § 923(g) (1976) 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 such 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 regu-

ysis differed markedly from that in *Colonnade*. In *Biswell*, the Court emphasized the need for warrantless inspections in order effectively to enforce the statute.³² The Court also stressed that a gun dealer's reasonable expectations of privacy are minimal because all licensed dealers are informed yearly of comprehensive regulations, including the possibility of inspection.³³ Consequently, "[w]hen 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."³⁴ While recognizing that federal firearms regulations were only recently enacted, the Court observed that, nonetheless, "close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime. . . ."³⁵ The opinion concluded with what the majority³⁶ presumably considered to be a practical rule to govern warrantless administrative inspection cases: "where . . . regulatory inspections further urgent federal interest, [*sic*] 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."³⁷

An inspection program considered by the Court to have excessive potential for abuse was held unconstitutional in *Marshall v. Barlow's, Inc.*³⁸ At issue was section 8(a) of the Occupational Safety and Health Act of 1970 (OSHA)³⁹ which authorized warrantless inspections of workplaces subject to OSHA's jurisdiction for the purpose of determining the existence of safety hazards or violations of OSHA regulations.⁴⁰

lations issued under this chapter, and (2) any firearms or ammunition kept or stored by such importer, manufacturer, dealer, or collector at such premises. . . .

³² 406 U.S. at 316. For example, the Court distinguished *See* by observing that violations of building codes, unlike gun control regulations, are "relatively difficult to conceal or to correct in a short time." *Id.*

³³ 18 U.S.C. § 921(a)(19) (1976).

³⁴ 406 U.S. at 316.

³⁵ *Id.* at 315.

³⁶ Justice Douglas, the lone dissenter, argued that the statute in *Biswell* was similar to that at issue in *Colonnade* and, therefore, prohibited forcible entries. Because the gun dealer consented to the search only after being informed of the statute, Douglas reasoned that entry had been forcible and invalid. *Id.* at 317-19 (Douglas, J., dissenting).

³⁷ *Id.* at 317.

³⁸ 436 U.S. 307 (1978). Barlow, the president and general manager of an electrical and plumbing installation business, sought an injunction against the warrantless inspection of the non-public areas of his business. *Id.* at 310. A three-judge panel, believing *Camara* and *See* to be controlling, held that OSHA agents could not inspect Barlow's business without a warrant. *Barlow's v. W.J. Usery*, 424 F. Supp. 437 (D. Idaho 1976).

³⁹ 29 U.S.C. §§ 651-78 (1976).

⁴⁰ 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,

The Supreme Court concluded that permitting warrantless inspections "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search."⁴¹ The Court distinguished *Colonnade* and *Biswell* by asserting that "they represent responses to relatively unique circumstances."⁴² Industries such as liquor (*Colonnade*) and firearms (*Biswell*) have "a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware" and, consequently, any person who enters such a business has "voluntarily chosen to subject himself to a full arsenal of governmental regulation."⁴³ Quoting from *Almeida-Sanchez v. United States*,⁴⁴ the Court concluded: "[t]he businessman in a regulated industry in effect consents to the restrictions placed upon him."⁴⁵ Thus, the owners and operators of pervasively regulated businesses have no reasonable expectation of privacy and are, therefore, subject to warrantless administrative inspections.⁴⁶ The Court intimated that the OSHA regulations, however, were not sufficiently pervasive to render unreasonable any expectations of privacy persons subject to the statute might have.⁴⁷

Marshall v. Barlow's also found that warrantless inspections were not necessary for effective enforcement of the statute, especially since the great majority of owners and operators probably would consent to inspections without a warrant.⁴⁸ As to those occasions when consent is not given, the Court stated that while OSHA "regulates a myriad of safety details that may be amenable to speedy alteration or disguise,"⁴⁹ it is not

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.

OSHA also has a general duty clause, 29 U.S.C. § 654(a)(1) (1976), which provides that each employer:

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees. . . .

⁴¹ 436 U.S. at 323.

⁴² *Id.* at 313.

⁴³ *Id.*

⁴⁴ 413 U.S. 266 (1973).

⁴⁵ *Id.* at 271, quoted at 436 U.S. 313.

⁴⁶ 436 U.S. at 313.

⁴⁷ *Id.* at 314.

⁴⁸ *Id.* at 316. The Court conceded in a footnote that its holding in *Barlow's* might result in an increased number of refusals to submit to warrantless inspections. The Court added that it would have to wait to determine "how serious an impediment to effective enforcement . . ." its decision might be. *Id.* at 316 n.11.

⁴⁹ *Id.* at 316.

"immediately apparent why the advantages of surprise would be lost if, after being refused entry, procedures were available for the Secretary to seek an *ex parte* warrant and to reappear at the premises without further notice to the establishment being inspected."⁵⁰

Additionally, the Court emphasized that an administrative warrant requirement was practical. The issuance of a warrant need not depend on a demonstration of traditional probable cause.⁵¹ In fact, "[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."⁵² The Court rejected the argument that the benefits derived from the issuance of warrants on less than probable cause are outweighed by high administrative costs. A warrant requirement will provide "assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria."⁵³

Finally, the Court stated that its holding was limited to the provisions of OSHA.⁵⁴ Whether provisions of other statutes authorizing warrantless inspections are constitutional "will depend upon the specific enforcement needs and privacy guarantees of each statute."⁵⁵ The Court observed that statutes pervasively regulating a single industry

⁵⁰ *Id.* at 319-20 (footnote omitted). After the decision in *Barlow's*, the Secretary of Labor amended OSHA regulations to include provisions for obtaining *ex parte* warrants after entry is refused. A warrant may be obtained even before entry is attempted if the employer's past practice indicates that a warrantless inspection will not be allowed. 29 C.F.R. § 1903.4(b), (d) (1980). In promulgating the amended provisions, the Secretary stressed the need for surprise inspections in order to enforce effectively OSHA regulations. 45 Fed. Reg. 65918 (1980). The Court in *Barlow's* does not explain how OSHA inspectors avoid losing the advantage of surprise when they must rely on a warrant after their initial attempts to inspect are unsuccessful. Even if the return visit is unannounced the owner or manager will, in many cases, have been given ample time to comply with regulations and avoid sanctions. Such tactics do result in compliance with the regulations; however, such compliance may be short-lived. Furthermore, persons not wishing to comply with OSHA regulations may simply delay compliance until an OSHA official first attempts to conduct an inspection. *Barlow's* also failed to account for the different approach taken in *Biswell* where warrantless inspections were justified on the basis of the relative ease of concealing regulatory violations.

⁵¹ 436 U.S. at 320. In his dissenting opinion, Justice Stevens, with whom Justices Blackmun and Rehnquist joined, attacked the majority opinion for being unfaithful to the intentions of the framers of the fourth amendment by permitting warrants to issue on less than full probable cause. In Stevens' opinion, "the Warrant Clause has no application to routine, regulatory inspections of commercial premises." *Id.* at 328 (Stevens, J., dissenting). Stevens argued that the proper test of such programs is whether they are "reasonable." *Id.*

⁵² *Id.* at 321 (footnote omitted).

⁵³ *Id.* at 323 (footnote omitted).

⁵⁴ *Id.* at 321-22.

⁵⁵ *Id.* at 321.

might be upheld on the basis of the *Colonnade-Biswell* exception.⁵⁶ The Court also approvingly cited inspection schemes requiring inspectors to obtain court orders when refused entry.⁵⁷ Despite these indications, a clear test for the constitutionality of statutes authorizing warrantless administrative inspections was not established by *Barlow's*. In *Colonnade*, the focus was almost entirely on the long history of regulation; in *Biswell* the Court emphasized the strong federal interest in gun control, the need for warrantless inspections, and the lack of any reasonable expectations of privacy on the part of firearms dealers. In *Barlow's*, the Court stressed the excessive discretion possessed by OSHA inspectors and the practicality of a warrant requirement based on less than traditional probable cause. It was against this confused background that the Court addressed the issues in *Donovan v. Dewey*.

II. DONOVAN V. DEWEY

Section 103(a) of the Federal Mine Safety and Health Act of 1977 ("FMSHA" or "Act")⁵⁸ requires that federal mine inspectors inspect surface mines at least twice a year for the purpose of enforcing FMSHA regulations. The Act defines a "mine" in such a way as to include stone quarries.⁵⁹

In 1978, a federal mine inspector attempted to inspect a lime and

⁵⁶ *Id.*

⁵⁷ *Id.*, n.18. The Court cited a provision of the Federal Metal and Nonmetallic Mine Safety Act of 1966, formerly 30 U.S.C. § 733(a) (1976), now incorporated into the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 818(a) (Supp. III 1979).

⁵⁸ 30 U.S.C. § 813(a) (Supp. III 1979) provides:

(a) Authorized representatives of the Secretary 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 the 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 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, Education, and Welfare, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

⁵⁹ 30 U.S.C. § 802(h)(1)(A) (Supp. III 1979) defines a "mine" as "an area of land from

stone quarry to determine whether 25 safety and health violations uncovered earlier had been corrected.⁶⁰ Douglas Dewey, president of the company, insisted that the inspector obtain a search warrant before continuing his inspection of Dewey's quarry.⁶¹ The official issued a citation to Dewey for refusing to permit the inspection⁶² and the Secretary of Labor filed suit in district court seeking to have Dewey enjoined from refusing to permit a warrantless inspection.⁶³ The district court granted⁶⁴ Dewey's motion for summary judgment on the grounds that section 103(a) of FMSHA was unconstitutional as applied to the inspection of stone quarries. The court read *Barlow's* as requiring warrants for all administrative inspections of commercial property except those involving industries with long histories of pervasive regulation.⁶⁵ Noting that stone quarries were not subject to federal regulation until 1966,⁶⁶ the court concluded that Dewey's stone and lime business did not fall within the *Colonnade-Biswell* exception.⁶⁷ The Secretary of Labor appealed directly to the Supreme Court.⁶⁸

In an 8-1 decision, the Supreme Court reversed the district court's decision.⁶⁹ The opinion, written by Justice Marshall, began with a review of significant precedents. Citing *Biswell*, Justice Marshall observed that while a warrant requirement applied generally to inspections of

which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground."

⁶⁰ 101 S. Ct. 2534, 2537.

⁶¹ *Id.*

⁶² Under 30 U.S.C. § 820(a) (Supp. III 1979), the Secretary of Labor is required to adopt penalties for violations of the Act. The Secretary established that anyone who fails "to permit an authorized representative of the Secretary of Labor to perform an inspection or investigation . . ." is subject to penalty. 30 C.F.R. § 100.4 (1980). The maximum penalty is \$10,000. 30 C.F.R. § 100.3 (1980).

⁶³ 101 S. Ct. at 2537.

⁶⁴ *Marshall v. Dewey*, 493 F. Supp. 963 (E.D. Wis. 1980), *rev'd*, 101 S. Ct. 2534 (1981).

⁶⁵ *Id.* at 964.

⁶⁶ *Id.* at 966. Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. §§ 723-24 (1976) (repealed 1977).

⁶⁷ 493 F. Supp. at 965.

⁶⁸ 28 U.S.C. § 1252 (1976) provides in part: "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional. . . ."

⁶⁹ 101 S. Ct. at 2536. Three courts of appeals had upheld section 103(a) of the Act as it applied to quarries. In upholding section 103(a) as applied to a gravel pit, the Fifth Circuit emphasized that it was more narrowly drawn than the OSHA provision at issue in *Barlow's*, that FMSHA provides for immediate judicial review if entry is refused, and that the mining industry has long been subject to federal regulation. *Marshall v. Texoline Co.*, 612 F.2d 935, 937-38 (5th Cir. 1980). Similar reasoning was employed in *Marshall v. Nolicheckey Sand Co., Inc.*, 606 F.2d 693 (6th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980) (upholding inspection of sand and gravel operation) and *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980) (upholding inspection of plant in which low-grade fuel was extracted from dredged sand).

commercial property, the privacy interest of the owner "may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections."⁷⁰ Schemes permitting warrantless inspections of businesses may, however, 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."⁷¹ The Court cited both *Colonnade* and *Biswell* as cases which involved statutes providing such assurances.⁷² The opinion stated that these cases

make clear that 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 for specific purposes.⁷³

This test, the Court noted, was applied in *Barlow's* to hold unconstitutional the OSHA provision permitting warrantless inspections.⁷⁴ The OSHA provision "fail[ed] 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"⁷⁵ and gave too much discretion to federal agents in terms of which businesses to inspect, when to inspect them, and what standards to employ during the course of inspection.⁷⁶

In finding the FMSHA provision authorizing warrantless inspections free of the defects besetting the OSHA provision, the Court emphasized three factors: first, FMSHA addresses a specific and substantial government interest; second, warrantless inspections are necessary for the statute's effective enforcement; and third, the statute is a constitutionally adequate substitute for a warrant.

Justice Marshall began his analysis by observing that "it is undisputed that there is a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines."⁷⁷ He pointed out that "[i]n enacting the statute, Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has

⁷⁰ 101 S. Ct. at 2538.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 2539.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* See note 41 & accompanying text *supra*.

⁷⁷ 101 S. Ct. at 2539.

significant deleterious effects on interstate commerce.”⁷⁸ Justice Marshall also observed that FMSHA’s focus on a dangerous industry was not characteristic of the statute at issue in *Barlow’s*.⁷⁹

The second factor stressed in the Court’s decision is the need for warrantless inspections in order to enforce effectively FMSHA regulations. The Court quoted a Senate report which emphasized the “notorious ease with which many safety or health hazards may be concealed” by mine operators.⁸⁰ Finding “no reason not to defer to this legislative determination,”⁸¹ the Court accepted the conclusion of Congress that a warrant requirement would make proper enforcement of FMSHA impossible.

Persuaded of the need for warrantless inspections, Justice Marshall stated that “the only real issue before us is whether the statute’s inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant.”⁸² Because FMSHA is “specifically tailored” to the health and safety concerns which gave rise to its enactment and its regulations are “sufficiently pervasive and defined,” the Act meets the test.⁸³ The Court noted that there is little uncertainty as to which mines will be inspected and how frequently.⁸⁴ The Court also observed that there is little uncertainty regarding the standards with which mine operators are required

⁷⁸ *Id.* (footnote omitted). Concerning stone quarries, Justice Marshall stated that while they are not explicitly mentioned in FMSHA, the hazardous nature of quarries may be inferred from their falling within the definition of “mine” in a statute “narrowly and explicitly directed at inherently dangerous industrial activity. . . .” *Id.* at 2539-40, n.7.

⁷⁹ *Id.* at 2540. It is not clear why Justice Marshall considered this to be so important, for while OSHA applies to industries not generally regarded as being dangerous, the statute also applies to very hazardous employment. A recent study conducted by the Center for Policy Alternatives at the Massachusetts Institute of Technology indicates that OSHA regulations have significantly reduced work-related injuries. The study found that during 1974 and 1975 OSHA safety regulations saved 60,000 workdays, 350 deaths, and 15 billion dollars. See Worsham, *OSHA, Labor’s “Big Stick”, May Be Turned Into a Twig*, Chicago Tribune, Sept. 7, 1981, § 1, at 1, col. 1.

⁸⁰ 101 S. Ct. at 2540 (quoting S. REP. NO. 95-181, 95th Cong., 1st Sess. 27, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3401, 3427). The Senate Report also notes with approval the decision in *Youghioghien & Ohio Coal Company v. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973), in which the court upheld the constitutionality of warrantless inspections as provided, by the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801-960 (1976), *superseded by* 30 U.S.C. §§ 801-962 (Supp. III 1979). S. REP. NO. 95-181, *supra*, at 27, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS, *supra*, at 3427.

⁸¹ 101 S. Ct. at 2540.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* Underground mines will be inspected at least four times each year, surface mines at least twice. Mines generating explosive gasses must be inspected at irregular 5, 10, or 15 day intervals. Additionally, mines where Code violations have been discovered during prior inspections, such as Dewey’s lime and stone quarry, must be reinspected. 30 U.S.C. § 813(a) (Supp. III 1979). See note 58 *supra* for text of provision.

to comply.⁸⁵ As was the case with the firearms statute in *Biswell*,⁸⁶ FMSHA requires that mine operators be notified of relevant regulations.⁸⁷ The Court further noted that FMSHA prohibits forcible entries.⁸⁸ If a mine operator refuses to permit a federal agent to conduct a warrantless inspection, the Secretary of Labor must seek an injunction against such a refusal.⁸⁹ The Court stressed that this provision acts as a safeguard against unreasonable invasions of unique privacy interests.⁹⁰ In light of FMSHA's specificity, predictability, and safeguards, Justice Marshall concluded that a warrant requirement would fail to provide additional protection for the fourth amendment privacy interest of mine operators.⁹¹

Concerning the relatively short time that stone quarries have been subject to federal regulation, the Court stated that the length of time an industry has been regulated is an important but not controlling factor in determining the regulatory scheme's constitutionality.⁹² If a lengthy history were required to uphold a statute's constitutionality, recently developed industries, regardless of how potentially dangerous, would remain forever immune from warrantless inspections. Such a result, the Court concluded, is "absurd" and is precluded by the fourth amendment's "central concept of reasonableness. . . ."⁹³

In a brief concurring opinion,⁹⁴ Justice Stevens reiterated his dissatisfaction with the Court's decisions in *Camara* and *Barlow's*.⁹⁵ According to Justice Stevens, "neither the longevity of a regulatory program nor a businessman's implied consent to regulations imposed by the Federal Government determines the reasonableness of a Congressional judgment that the public interest in occupational health or safety justifies a program of warrantless inspections of commercial premises."⁹⁶ However, because Justice Stevens agreed with the majority that the statutes in *Barlow's* and *Donovan* are distinguishable, he concurred without discuss-

⁸⁵ 101 S. Ct. at 2541. The regulations appear in the statute and in Title 30 of the CODE OF FEDERAL REGULATIONS.

⁸⁶ 18 U.S.C. §§ 921-28 (1976).

⁸⁷ 30 U.S.C. § 811(3) (Supp. III 1979).

⁸⁸ 101 S. Ct. at 2541 (citing 30 U.S.C. § 818(a) (Supp. III 1979)).

⁸⁹ *Id.*

⁹⁰ *Id.* The Court cited *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980), as an example of how FMSHA can protect unique privacy interests. There, the court ordered inspectors to maintain the confidentiality of a mine's trade secrets. *Id.* at 594.

⁹¹ 101 S. Ct. at 2541.

⁹² *Id.* at 2541-42.

⁹³ *Id.* at 2542.

⁹⁴ *Id.* at 2542-43 (Stevens, J., concurring).

⁹⁵ See note 51 *supra*.

⁹⁶ 101 S. Ct. at 2542 (Stevens, J., concurring).

ing the merits of overruling *Camara*.⁹⁷

Justice Rehnquist, concurring in the judgment,⁹⁸ argued that the Court's reasoning does not support its holding. Justice Rehnquist perceived the Court's rationale to be that mines are so pervasively regulated that an owner or operator could have no reasonable expectation of privacy. He expressed doubt that the Court would uphold a similarly detailed criminal statute authorizing warrantless searches of property on which illegal drug activity was reasonably suspected.⁹⁹ However, because Dewey's stone and lime quarry "was largely visible to the naked eye without entrance onto [his] property," Justice Rehnquist concluded that the warrantless inspection was valid under the "open-fields" doctrine of *Hester v. United States*.¹⁰⁰

Justice Stewart began his lone dissent by stating that, although he dissented in *Camara*, he "must, nonetheless, accept the law as it is. . . ."¹⁰¹ According to Justice Stewart, the law as developed in *Colonade*, *Biswell*, and *Barlow's* is that a warrant is required to conduct an administrative inspection of commercial property unless the businesses subject to the inspection "are both pervasively regulated *and* have a long history of regulation."¹⁰² Justice Stewart believed that the majority "conveniently discards" the requirement of a lengthy history of regulation and, with it, the rationale for the exception itself.¹⁰³ For Justice Stewart, a long regulatory history permits the inference that an operator or owner has, in effect, consented to warrantless inspections. If a lengthy history of regulation is not required then it is possible that some owners or operators will enter a business *before* warrantless inspections are authorized by statute.¹⁰⁴ In such a case, Justice Stewart argued, it makes

⁹⁷ *Id.*

⁹⁸ *Id.* at 2543.

⁹⁹ *Id.* Justice Rehnquist's comment unaccountably ignores the distinction the Court has made between administrative and criminal searches. *See, e.g.,* *Wyman v. James*, 400 U.S. 309 (1971). Moreover, Justice Rehnquist misrepresents the majority's reasoning. The Court did not uphold the provision at issue simply because the mining industry is pervasively regulated. *See* notes 12-16 & accompanying text *supra*.

¹⁰⁰ 265 U.S. 57 (1954). *Hester* held that a trespass by government agents onto a privately owned field is not a violation of the fourth amendment as long as the agents do not enter the area immediately surrounding the owner's dwelling. In *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974), the Court cited *Hester* in upholding the warrantless trespass onto private commercial land in order to obtain a smoke sample. Justice Rehnquist's use of the "open fields" doctrine is inappropriate. The inspection of Dewey's quarry was of areas well beyond the "open fields" surrounding his operation. That the quarry may have been "largely visible" to a person standing outside of Dewey's property does not, by itself, justify a thorough inspection of its operation.

¹⁰¹ 100 S. Ct. at 2543 (Stewart, J., dissenting).

¹⁰² *Id.* at 2544 (emphasis added).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

little sense to say that the businessman has consented to the restriction. Applying this analysis to the facts at issue, Justice Stewart concurred with the district court's holding that because quarries have only recently been regulated, FMSHA, as applied to quarries, is unconstitutional.¹⁰⁵

III. ANALYSIS

Dewey can be analyzed in three ways: first, the extent to which it is consistent with *Colonnade*, *Biswell* and *Barlow's*; second, whether the decision was, apart from these precedents, decided correctly; and, third, whether the decision has significant precedential value.

A. DEWEY AND ITS PRECEDENTS

The Court in *Colonnade*, *Biswell*, and *Barlow's* examined in various ways the following factors: the length of time the industry subject to a statute has been federally regulated; the necessity of warrantless inspections for effective enforcement of the statute; the amount of discretion given federal inspectors; the presence or absence of a provision safeguarding unique privacy interests; the reasonable privacy expectations of persons subject to the statute; the amount of additional protection against unreasonable invasions of privacy an administrative warrant would provide; whether the statute applies to a single industry; and the nature of the federal interest.

History of Regulation

In *Dewey*, the Court's position on the importance of a lengthy regulatory history differed considerably from its position in *Barlow's*. The Court in *Barlow's* ruled that the distinguishing feature of valid warrantless inspection programs is that they are directed at industries long subject to detailed federal regulation.¹⁰⁶ Since stone quarries have been subject to such regulation for only a relatively short period, the Court in *Dewey* was forced to de-emphasize the significance of this brief history in order to uphold the provision of FMSHA authorizing warrantless inspections.¹⁰⁷ In considering the duration of a regulatory scheme to be only one factor affecting its constitutionality, the Court in *Dewey* is consistent with *Biswell* which upheld warrantless inspections of an industry which had been federally regulated for less than five years.¹⁰⁸ For this reason, Justice Stewart was incorrect when he stated in his dissent that the *Colonnade-Biswell* exception is limited to industries pervasively regu-

¹⁰⁵ *Id.* at 2545-46.

¹⁰⁶ 436 U.S. at 313.

¹⁰⁷ 101 S. Ct. at 2541.

¹⁰⁸ 406 U.S. at 315.

lated and having a lengthy history of regulation.¹⁰⁹

Necessity of Warrantless Inspections

In stressing the ease with which FMSHA violations can be concealed,¹¹⁰ the Court's opinion is similar to *Biswell*. There, the Court concluded that because violations of firearms regulations are easy to conceal, warrantless inspections are necessary for effective enforcement of the Gun Control Act.¹¹¹ While the Court in *Colonnade* did not explicitly indicate the need for warrantless inspections, it did recognize 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."¹¹² Acknowledging that many OSHA violations are easy to conceal, the Court in *Barlow's* nonetheless ruled that warrantless inspections are unnecessary because the element of surprise can be preserved by an *ex parte* warrant obtained either after entry is refused or before an inspection is attempted.¹¹³ It would seem that this conclusion would apply equally to the inspection of mines for violations of FMSHA regulations. If obtaining *ex parte* warrants would not jeopardize enforcement of those OSHA regulations the violations of which are easy to conceal, it is unclear why having to obtain such warrants would interfere with the enforcement of FMSHA.

The Court's position on the significance of the OSHA¹¹⁴ and FMSHA¹¹⁵ provisions which require inspectors to seek court orders when entry is refused is also confusing. In *Barlow's*, the Court concluded that the existence of such a provision is evidence that warrantless inspections are unnecessary.¹¹⁶ The Court in *Dewey* approved of a similar provision without discussing its impact on the necessity of warrantless inspections.¹¹⁷ Finally, the Court in *Barlow's* stressed that one reason warrantless OSHA inspections are unnecessary is that the "great majority" of employers will consent to warrantless inspections.¹¹⁸ While the same can probably be said about inspections under FMSHA,¹¹⁹ the Court in *Dewey* did not make such a statement.

¹⁰⁹ 101 S. Ct. at 2545 (Stewart, J., dissenting).

¹¹⁰ See note 80 & accompanying text *supra*.

¹¹¹ 406 U.S. at 316.

¹¹² 397 U.S. at 76.

¹¹³ See notes 48-50 & accompanying text *supra*.

¹¹⁴ 29 C.F.R. § 1903.4 (1977).

¹¹⁵ 30 U.S.C. § 818(a) (Supp. III 1979).

¹¹⁶ 436 U.S. at 317-19.

¹¹⁷ 101 S. Ct. at 2541 (discussing 30 U.S.C. § 818(a) (Supp. III 1979)).

¹¹⁸ 436 U.S. at 316.

¹¹⁹ The government presented no evidence that a significant number of mine owners and operators refuse entry. See generally Brief for Appellee, *Donovan v. Dewey*, 101 S. Ct. 2534 (1981).

Inspector Discretion

It is difficult to reconcile the Court's conclusion in *Dewey* that the discretion of FMSHA inspectors is minimal¹²⁰ with the Court's statement in *Barlow's* that OSHA inspectors are given "almost unbridled discretion."¹²¹ In *Barlow's*, the Court declared unconstitutional a statute which authorized warrantless inspections of workplaces for the purpose of inspecting working conditions and questioning employers and employees.¹²² Inspections were required to be made "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner. . . ."¹²³ Inspectors were required to show credentials¹²⁴ and explain the nature and purpose of the visit.¹²⁵ Inspections were also conducted in accordance with an administrative plan "based upon accident experience and the number of employees exposed in particular industries."¹²⁶ The Court in *Dewey* described the OSHA inspection scheme as "leaving the frequency and purpose of inspections to the unchecked discretion of government officers. . . ."¹²⁷ In distinguishing FMSHA, the Court stressed the requirement that all mines be inspected every year.¹²⁸ It is unclear how mandatory inspections substantially diminish the discretion of field inspectors. Furthermore, in neither *Biswell* nor *Colonnade* were periodic inspections mandatory. Equally confusing, in light of the reasoning in *Barlow's*, is the Court's view that the discretion exercised by the inspectors in *Biswell* was not excessive. The Gun Control Act authorizes warrantless inspections of the premises, including non-public areas, of firearms dealers, manufacturers, importers, and collectors for the purpose of examining records, firearms, or ammunition.¹²⁹ The only restriction on such inspections is that they must occur during business hours.¹³⁰

Safeguard Provisions

In *Dewey*, the Court for the first time emphasized the significance of provisions safeguarding unique privacy interests of persons subject to

¹²⁰ 101 S. Ct. at 2541.

¹²¹ 436 U.S. at 323.

¹²² 29 U.S.C. § 657(a) (1976). For the full text of provision, see note 40 *supra*.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ 29 C.F.R. § 1903.7 (1977).

¹²⁶ U.S. Department of Labor, Occupational Safety and Health Administration, Field Operations Manual, 1 EMPLOYMENT SAFETY & HEALTH GUIDE (CCH) ¶ 4327.2 (1976), cited at 436 U.S. at 321.

¹²⁷ 101 S. Ct. at 2541.

¹²⁸ See note 84 *supra*.

¹²⁹ 18 U.S.C. § 923(g) (1976).

¹³⁰ *Id.*

warrantless inspection schemes.¹³¹ In *Colonnade*, the Court saw no constitutional violation in forcible entries made pursuant to a statute authorizing warrantless inspections.¹³² Similarly, in *Biswell*, the Court upheld a statute which makes it a crime to refuse entry to authorized inspectors,¹³³ stating that consent to a lawful warrantless administrative inspection "is analogous to a householder's acquiescence in a search pursuant to a warrant when the alternative is a possible criminal prosecution for refusing entry or a forcible entry."¹³⁴ Only in *Barlow's* were inspectors required to seek compulsory process if entry was refused.¹³⁵ While FMSHA also prohibits forcible entries,¹³⁶ regulations promulgated by the Secretary of Labor allow a fine to be imposed on any mine operator who refuses entry to an authorized inspector.¹³⁷ The statute upheld in *Colonnade* imposed a penalty on persons refusing entry;¹³⁸ the OSHA inspection program invalidated in *Barlow's* did not.

Privacy Expectations

The analysis in *Dewey* of the privacy expectations of owners and operators of business subject to federal regulation is similar to that found in *Barlow's* but somewhat different than in *Biswell*. In *Biswell*, the emphasis was on a firearms licensee's justifiable expectations of privacy. The Court reasoned that a firearms dealer who chooses to enter a pervasively regulated industry can have no justifiable expectation of privacy because he should expect the regulations to be enforced.¹³⁹ In contrast, the Court in *Barlow's*¹⁴⁰ and *Dewey*¹⁴¹ focused on whether the inspection scheme itself creates an expectation that inspections will occur. Thus, the Court in *Dewey* stated that an inspection program is invalid if inspections are "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."¹⁴² Additionally, *Dewey* does not rely on the notion that mine owners and operators impliedly consent to warrantless inspections. This omission is significant in light of the position taken in *Barlow's* that owners and operators of businesses covered by

¹³¹ 101 S. Ct. at 2541.

¹³² See note 27 & accompanying text *supra*.

¹³³ 18 U.S.C. § 924 (1976).

¹³⁴ 406 U.S. at 315.

¹³⁵ 29 C.F.R. § 1903.4 (1977).

¹³⁶ 30 U.S.C. § 818(a) (Supp. III 1976).

¹³⁷ 30 C.F.R. § 100.4 (1980). *Dewey* was fined \$1,000 for refusing entry to the FMSHA inspector. 101 S. Ct. at 2537, n.3.

¹³⁸ 26 U.S.C. § 7342 (1976).

¹³⁹ 406 U.S. at 316.

¹⁴⁰ 436 U.S. at 313-14.

¹⁴¹ 101 S. Ct. at 2540.

¹⁴² *Id.* at 2538 (emphasis added).

the *Colonnade-Biswell* exception in effect consent to warrantless inspections.¹⁴³

Value of an Administrative Warrant

The amount of additional protection a warrant will provide against unreasonable invasions of privacy will depend in part on how great the possibilities of abuse are under the regulatory scheme authorizing warrantless inspections. The Court in *Dewey* stated that when administrative inspections are "random, infrequent, or unpredictable," warrants are required in order to provide the "assurance of regularity" necessary to protect the privacy interests of the person subject to the inspection.¹⁴⁴ The Court then added that the inspection schemes in *Colonnade* and *Biswell* did not require such an assurance.¹⁴⁵ The natural inference would be that under those schemes inspections were not "random, infrequent, or unpredictable." However, it was not for this reason that the Court upheld the statutes at issue. In *Colonnade*, the Court based its decision on the long history of "close supervision and inspection" of the alcoholic beverage industry.¹⁴⁶ The Court in *Biswell* stressed that a traditional warrant requirement would frustrate the enforcement of the statute and that the protections of an administrative warrant would be "negligible" if it preserved "the necessary flexibility as to time, scope, and frequency."¹⁴⁷ Thus, it appears that the Court in *Dewey* recast the rationales of *Colonnade* and *Biswell* in order to justify the holding that warrants were not required.

The Court in *Dewey* also did not satisfactorily explain why the conclusion reached in *Barlow's* that "[a] warrant . . . would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan . . ." ¹⁴⁸ is not applicable to inspections under FMSHA. Certainly a mine owner's interest in the constitutionality and legality of a FMSHA inspection is no less than that of an employer subject to OSHA inspections. Such an interest is not, as the Court suggests,¹⁴⁹ served by mandatory periodic inspections and notification of relevant health and safety standards.

¹⁴³ 436 U.S. at 313.

¹⁴⁴ 101 S. Ct. at 2538.

¹⁴⁵ *Id.*

¹⁴⁶ 397 U.S. at 77.

¹⁴⁷ 406 U.S. at 316.

¹⁴⁸ 436 U.S. at 323.

¹⁴⁹ 101 S. Ct. at 2540-41.

Single Industry Restriction

In seeking to distinguish FMSHA from OSHA, the Court in *Dewey* observed that FMSHA, unlike OSHA, is limited to a single industry.¹⁵⁰ *Barlow's* contained a suggestion that the constitutionality of a warrantless inspection scheme may depend in part on whether it is directed at a single industry.¹⁵¹ While neither *Colonnade* nor *Biswell* discussed the issue, both dealt with statutes regulating a single industry.

Nature of the Federal Interest

In *Dewey*, the Court emphasized the dangerousness of mining and the strong federal interest in enforcement of safety and health standards.¹⁵² Similarly, *Biswell* stressed the need to regulate firearms traffic in order to reduce violent crime.¹⁵³ While the OSHA inspection scheme was invalidated in *Barlow's*, the Court nonetheless stressed the strong federal interest in promoting employee safety in concluding that inspection warrants would not require a demonstration of traditional probable cause.¹⁵⁴ Only in *Colonnade* was the federal interest not one of health and safety; there, the interest was the collection of tax revenue from federal licensees.¹⁵⁵

B. DEWEY: CORRECTLY DECIDED?

In upholding the constitutionality of section 103(a) of FMSHA, the Court arrived at the proper conclusion but not altogether for the right reasons. By attempting to reconcile the holding in *Dewey* with *Colonnade*, *Biswell*, and *Barlow's*, the Court emphasized factors which should not affect the constitutionality of a warrantless inspection scheme.

In rejecting the district court's conclusion that because stone quarries have only recently been regulated they cannot be inspected without a warrant,¹⁵⁶ the Court seemed to recognize the weakness of the *Colonnade* doctrine. Noting that "the duration of a particular regulatory scheme will often be an important factor" in determining the scheme's constitutionality,¹⁵⁷ however, the Court still attached too much significance to regulatory history. As Justice Stevens pointed out in his concurring opinion in *Dewey*¹⁵⁸ and in his dissent in *Barlow's*,¹⁵⁹ the

¹⁵⁰ *Id.* at 2539.

¹⁵¹ 436 U.S. at 321.

¹⁵² 101 S. Ct. at 2539.

¹⁵³ 406 U.S. at 315.

¹⁵⁴ 436 U.S. at 320.

¹⁵⁵ 397 U.S. at 75.

¹⁵⁶ 101 S. Ct. at 2541-42.

¹⁵⁷ *Id.* at 2542.

¹⁵⁸ *Id.*

longevity of a regulatory program is irrelevant to its reasonableness.¹⁶⁰ It makes no sense to say that one of two statutes identical in almost all respects is "more" constitutional because it was enacted fifty years before the other. A bad law does not improve with age.

Similarly, the constitutionality of a statute authorizing warrantless inspections of commercial property should not depend on whether the statute addresses a single industry. Instead, as Justice Stevens stressed in his dissent in *Barlow's*, the Court's concern ought to be whether the inspection program is directed at only those health and safety dangers the statute seeks to alleviate.¹⁶¹ An inspection scheme closely tailored to federal interests is not more intrusive to the privacy interests of persons subject to the statute simply because the statute applies to two industries rather than one. Moreover, even if a single industry restriction has some validity, it is difficult to see how FMSHA is strictly limited to a single industry. As Justice Stewart noted in his dissent: "[F]MSHA, like OSHA, relates to many different industries with widely disparate characteristics and occupational injury rates."¹⁶² In addition to traditional coal mining, FMSHA applies to the processing of minerals.¹⁶³ Thus, the Act is designed to protect machine operators in a plant above ground as well as coal miners below ground.

Most important, however, is that the Court failed to identify the major issue. Concluding that a warrant requirement would impede the enforcement of FMSHA, Justice Marshall stated that "the *only* real issue before us is whether the statute's inspection program, *in terms of the certainty and regularity of its application*, provides a constitutionally adequate substitute for a warrant."¹⁶⁴ While Justice Marshall noted the hazardous nature of mining, his conclusion that the FMSHA inspection scheme provides "certainty and regularity" rested instead on his belief that mine owners and operators have no actual expectation of privacy.¹⁶⁵ Justice

¹⁵⁹ 436 U.S. at 336.

¹⁶⁰ Obviously, a certain amount of time is necessary for persons affected by a regulatory scheme to learn of its enactment. A requirement of a lengthy regulatory history cannot be justified, as Justice Stewart attempts to do, on the basis that consent to warrantless inspections cannot otherwise be inferred. Even if implied consent were important to a regulatory program's constitutionality, the program's history need not be lengthy. If a person enters an industry before it becomes pervasively regulated, then a decision by that person to *continue* in the business can be construed as consenting to the restrictions.

¹⁶¹ 436 U.S. at 338 (Stevens, J., dissenting).

¹⁶² 101 S. Ct. at 2545-46 n.6 (Stevens, J., dissenting).

¹⁶³ 30 U.S.C. § 802 (Supp. III 1979).

¹⁶⁴ 101 S. Ct. at 2540 (emphasis added).

¹⁶⁵ Justice Marshall's opinion illustrates the confusion surrounding the issue of whether a lack of privacy expectations establishes the "reasonableness" or absence of fourth amendment activity. *Katz v. United States*, 389 U.S. 347 (1967), held that government activities not invading justifiable expectations of privacy are beyond the scope of the fourth amendment. In *Barlow's*, the Court, citing *Katz*, stated that persons subject to the statutes at issue in *Colon-*

Marshall reasoned that because all mines must be inspected at least twice each year and because the Secretary of Labor is required to inform owners and operators of applicable regulations, owners and operators "cannot help but be aware" that they "will be subject to effective inspection."¹⁶⁶ Justice Marshall's concern with actual expectations of privacy is also clear from his statement that an employer subject to OSHA had "little *real* expectation that his business will be subject to inspection. . . ."¹⁶⁷

Justice Marshall's position is surprising. The actual privacy expectation of mine owners and operators is irrelevant to the constitutionality of FMSHA. The critical inquiry concerns the *legitimate* expectations of privacy.¹⁶⁸ Thus, in holding that the use of pen registers to record dialed telephone numbers is not a "search," the Court in *Smith v. Maryland*¹⁶⁹ concluded that while the person placing the calls may have had an actual expectation of privacy, he had no legitimate privacy interest.¹⁷⁰ Determining the legitimacy of privacy expectations inevitably in-

nade and *Biswell* had "no reasonable expectation of privacy." 436 U.S. at 313 (emphasis added). However, the Court's reasoning in *Colonnade* and *Biswell* assumed that the inspection schemes are within the scope of the fourth amendment. Similarly, Justice Marshall, while stressing that mine owners and operators have no expectations of privacy, nevertheless concluded that the FMSHA inspection scheme was "reasonable within the meaning of the Fourth Amendment. . . ." 101 S. Ct. at 2536.

¹⁶⁶ 101 S. Ct. at 2540 (quoting *United States v. Biswell*, 406 U.S. at 316).

¹⁶⁷ 101 S. Ct. at 2539 (emphasis added).

¹⁶⁸ The Court has used different expressions synonymously. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 740 (1979) ("legitimate expectation of privacy"); *Marshall v. Barlow's, Inc.*, 436 U.S. 306, 313 (1978) ("reasonable expectation of privacy"); *Katz v. United States*, 389 U.S. 347, 353 (1967) (justified reliance on privacy).

¹⁶⁹ 442 U.S. 735 (1979).

¹⁷⁰ In *Smith*, the Court illustrates how the constitutionality of a statute is not determined by the actual privacy expectations of those subject to it:

For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation or privacy regarding their homes, papers, and effects. Similarly, if a refugee from a totalitarian country, unaware of this Nation's traditions, erroneously assumed that police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding the contents of his calls might be lacking as well. In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a "legitimate expectation of privacy" existed in such cases, a normative inquiry would be proper.

442 U.S. 735, 740-41 n.5. Neither is the privacy expectation of the "reasonable person" determinative. Although a "reasonable person" would not expect that a government agent equipped with a transmitting device would be hiding in a closet in the kitchen of an acquaintance with whom he was negotiating an illicit sale of drugs, the Court has held that such a practice does not invade a justifiable expectation of privacy. *United States v. White*, 401 U.S. 745 (1971) (plurality opinion).

volves judgments about societal values.¹⁷¹ In the case of the FMSHA inspection scheme, such an analysis must assess the value of mine safety and health regulations, the necessity for warrantless inspections, the costs and benefits of an administrative warrant requirement, and the intrusiveness of warrantless inspections.

FMSHA undeniably addresses a substantial government interest. Mining is a hazardous industry. The costs of injuries and death to individual miners, their families, and society are substantial.¹⁷² Given the ease with which violations of FMSHA regulations can be concealed,¹⁷³ Congress reasonably concluded that surprise is essential for effective enforcement of the statute. The further conclusion that warrantless inspections are necessary is justified by the inability of *ex parte* warrants to preserve surprise if obtained after entry is refused¹⁷⁴ and the likelihood that the benefits of *ex parte* warrants obtained prior to attempted inspection will be outweighed by the administrative costs incurred.

If a warrant were required, it would, under *Camara* and *Barlow's*, be an "administrative" warrant issued on less than traditional probable cause. Such a warrant would only ensure that an inspection is pursuant to FMSHA and regulations promulgated by the Secretary of Labor. It would not reflect judicial approval of the inspection scheme itself. For this reason, administrative warrants would provide no significant additional protection of fourth amendment privacy interests. Furthermore, the administrative costs of a warrant requirement could be substantial.¹⁷⁵ Finally, administrative warrants under FMSHA would trivialize the meaning of a warrant requirement and could jeopardize privacy interests when a traditional warrant should be required.¹⁷⁶

Warrantless administrative inspections under FMSHA are relatively unintrusive. An owner or operator of an extremely hazardous industry subject to detailed safety and health regulations cannot

¹⁷¹ See 1 W. LAFAVE, *SEARCH AND SEIZURE*, § 2.2 (1978).

¹⁷² See note 78 & accompanying text *supra*.

¹⁷³ See note 80 & accompanying text *supra*.

¹⁷⁴ See note 50 & accompanying text *supra*.

¹⁷⁵ It is difficult to predict the cost of an administrative warrant requirement. The cost would reflect the number of refused entries and the ease with which warrants could be obtained. Obviously, if warrants were issued almost as a matter of course in an *ex parte* proceeding, the cost of a warrant requirement would be less than if warrant requests were commonly denied in adversarial proceedings. Furthermore, rote issuance of such warrants diminishes their protective purpose.

¹⁷⁶ In his dissenting opinion in *Barlow's*, Justice Stevens argued that the Court "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." 436 U.S. at 328. Similarly, Justice Clark, dissenting in *Camara* and *See*, predicted that if an administrative warrant requirement were adopted, warrants would be issued in "pads of a thousand or more." 387 U.S. 541, 554 (1967).

reasonably expect that such regulations will not be strictly enforced through inspections. Any slight privacy interest of a mine owner or operator is not unconstitutionally invaded by warrantless inspections limited in scope to the safety and health regulations and in time to the operating hours of the mine or quarry.

Under a system of warrantless inspections, it is inevitable that an occasional inspector will abuse an owner's privacy interests by improperly conducting an inspection. However, the risk and damage of such abuse is outweighed by the benefits to society of a system of warrantless inspections of mines and quarries.¹⁷⁷ Furthermore, unique privacy interests arguably can be better protected by a safeguard provision, such as FMSHA's requirement¹⁷⁸ that inspectors seek compulsory process if entry is refused, than by an administrative warrant requirement.¹⁷⁹ The FMSHA provision provides a mine owner with the opportunity of presenting his case to a district court; under *Barlow's*, an administrative warrant can be obtained *ex parte* before a magistrate.¹⁸⁰

C. THE VALUE OF DEWEY AS PRECEDENT

Considered together, *Colonnade*, *Biswell*, and *Barlow's* are inconsistent on the issue of what characteristics a statute authorizing warrantless administrative inspections of commercial property must have in order to be constitutional. By reaffirming these precedents and analogizing or distinguishing FMSHA, the Court in *Dewey* failed to clarify the issue. It is difficult to understand how the Court in *Dewey* upheld by an 8-1 margin an inspection scheme so similar to OSHA's. Consequently, the major questions concerning the limits of inspector discretion, the necessity of warrantless inspections, and the additional protection of administrative warrants remain unanswered.

Some of the key questions are empirical: the number of employers subject to OSHA who refuse warrantless inspections, the standards of probable cause magistrates employ for administrative inspections, and the actual administrative costs of a warrant requirement. If the benefits of a warrant requirement for OSHA inspections are found to be outweighed by the costs, *Dewey* could become the key precedent, replacing *Colonnade* and *Biswell*; if the benefits are found to outweigh the costs, the

¹⁷⁷ Balancing the interest of the individual against the interests of society where the individual's reasonable expectations of privacy are slight is consistent with the Court's prior analysis of the fourth amendment. In upholding the police practice of "stop and frisk," the Court in *Terry v. Ohio* concluded that the government interest in crime prevention and the safety of police officers was greater than the intrusiveness of a "stop and frisk." 392 U.S. 1 (1967).

¹⁷⁸ See note 89 & accompanying text *supra*.

¹⁷⁹ See 3 W. LAFAYE, *supra* note 171, § 10.2.

¹⁸⁰ See note 50 & accompanying text *supra*.

holding in *Dewey* could be limited to its facts and the reasoning of *Barlow's* would prevail.

In the meantime, the lesson of *Dewey* may be, as Justice Stewart suggested in dissent, that Congress "can define any industry as dangerous, regulate it substantially, and provide for warrantless inspections of its members."¹⁸¹ If so, Congress may, to some extent, be able to circumvent the holding of *Barlow's* by separating OSHA regulations according to industry and informing employers that warrantless inspections will be made periodically.

IV. CONCLUSION

In *Donovan v. Dewey*, the Court upheld a provision of the Federal Mine Safety and Health Act of 1977 which requires periodic warrantless administrative inspections of mines and quarries in order to promote the effective enforcement of detailed safety and health regulations. The holding of *Dewey* seems to be that warrantless administrative inspections of commercial property are constitutional when Congress has reasonably determined that such inspections are necessary to enforce a regulatory scheme so comprehensive in its detail that a person subject to the authorizing statute is certain that his business will be inspected periodically to determine whether he has complied with well defined health and safety standards. However, because the Court reaffirmed prior decisions upholding statutes authorizing warrantless inspections but lacking the characteristics of the FMSHA provision, it is difficult to determine whether in future cases the Court will require that statutes authorizing warrantless administrative inspections of commercial property possess these characteristics.

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¹⁸¹ 101 S. Ct. at 2545-46 (Stewart, J., dissenting).