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Fourth Amendment--Warrantless Administrative Inspections of Commercial Property

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FOURTH AMENDMENT—WARRANTLESS ADMINISTRATIVE INSPECTIONS OF COMMERCIAL PROPERTY


Last term the Supreme Court again addressed the issue of warrantless administrative inspections of commercial property. In Donovan v. Dewey1 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

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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*, the Court narrowly upheld a Baltimore city ordinance which permitted the warrantless inspection of any dwelling thought to contain a nuisance. 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. 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. . . ."  

*Frank* was overruled eight years later in the companion cases of *Camara v. Municipal Court* and *See v. City of Seattle*. At issue in *Camara* was a provision of the San Francisco Housing Code authorizing certain city employees to make warrantless inspections of buildings. 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. 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." 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-

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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)).
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.
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. 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. The Court also noted that there was no evidence that effective enforcement of the building code required warrantless inspections.

In See v. City of Seattle, the holding of Camara was extended to include commercial enterprises. 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. 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."

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, federal agents inspected the cellar of a caterer authorized to sell liquor under a federal license. 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. 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. . . ." Claiming that the exclusive remedy for a refused entry

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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.
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:
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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-

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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).


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 majority\(^ {36}\) 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.\(^ {40}\)

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\(^{32}\) 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.*


\(^{34}\) 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).


\(^{40}\) 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."\(^4\) The Court distinguished *Colonnade* and *Biswell* by asserting that "they represent responses to relatively unique circumstances."\(^3\) 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."\(^3\) Quoting from *Almeida-Sanchez v. United States*,\(^4\) the Court concluded: "'[t]he businessman in a regulated industry in effect consents to the restrictions placed upon him.'\(^4\) Thus, the owners and operators of pervasively regulated businesses have no reasonable expectation of privacy and are, therefore, subject to warrantless administrative inspections.\(^6\) 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.\(^7\)

*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.\(^8\) 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,"\(^9\) it is not

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\(^1\) Id. at 323.
\(^2\) Id. at 313.
\(^3\) Id.
\(^4\) 413 U.S. 266 (1973).
\(^5\) Id. at 271, quoted at 436 U.S. 313.
\(^6\) 436 U.S. at 313.
\(^7\) Id. at 314.
\(^8\) 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.
\(^9\) 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.”

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. 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.” 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.”

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

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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

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\(^{56}\) *Id.*


\(^{58}\) 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.\textsuperscript{60} Douglas Dewey, president of the company, insisted that the inspector obtain a search warrant before continuing his inspection of Dewey’s quarry.\textsuperscript{61} The official issued a citation to Dewey for refusing to permit the inspection\textsuperscript{62} and the Secretary of Labor filed suit in district court seeking to have Dewey enjoined from refusing to permit a warrantless inspection.\textsuperscript{63} The district court granted\textsuperscript{64} 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 \textit{Barlow’s} as requiring warrants for all administrative inspections of commercial property except those involving industries with long histories of pervasive regulation.\textsuperscript{65} Noting that stone quarries were not subject to federal regulation until 1966,\textsuperscript{66} the court concluded that Dewey’s stone and lime business did not fall within the \textit{Colonnade-Biswell} exception.\textsuperscript{67} The Secretary of Labor appealed directly to the Supreme Court.\textsuperscript{68}

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

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\item which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground.”
\item \textsuperscript{60} 101 S. Ct. 2534, 2537.
\item \textsuperscript{61} \textit{Id.}
\item \textsuperscript{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).
\item \textsuperscript{63} 101 S. Ct. at 2537.
\item \textsuperscript{65} \textit{Id.} at 964.
\item \textsuperscript{67} 493 F. Supp. at 965.
\item \textsuperscript{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. . . .”
\item \textsuperscript{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 \textit{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. Nolichuckey Sand Co., Inc., 606 F.2d 693 (6th Cir. 1979), \textit{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), \textit{cert. denied}, 444 U.S. 1015 (1980) (upholding inspection of plant in which low-grade fuel was extracted from dredged sand).
\end{itemize}
commercial property, the privacy interest of the owner "may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections." 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." The Court cited both Colonnade and Biswell as cases which involved statutes providing such assurances. 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.

This test, the Court noted, was applied in Barlow's to hold unconstitutional the OSHA provision permitting warrantless inspections. 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" 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.

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." 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

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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.


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 gases 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. As was the case with the firearms statute in *Biswell*, FMSHA requires that mine operators be notified of relevant regulations. The Court further noted that FMSHA prohibits forcible entries. 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. The Court stressed that this provision acts as a safeguard against unreasonable invasions of unique privacy interests. 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.

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. 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.

In a brief concurring opinion, Justice Stevens reiterated his dissatisfaction with the Court’s decisions in *Camara* and *Barlow’s*. 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.” However, because Justice Stevens agreed with the majority that the statutes in *Barlow’s* and *Donovan* are distinguishable, he concurred without discuss-

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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.\textsuperscript{97}

Justice Rehnquist, concurring in the judgment,\textsuperscript{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.\textsuperscript{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 \textit{Hester v. United States}.\textsuperscript{100}

Justice Stewart began his lone dissent by stating that, although he dissented in \textit{Camara}, he "must, nonetheless, accept the law as it is. . . ."\textsuperscript{101} According to Justice Stewart, the law as developed in \textit{Colonnade}, \textit{Biswell}, and \textit{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{104} In such a case, Justice Stewart argued, it makes

\textsuperscript{97} Id.
\textsuperscript{98} Id. at 2543.
\textsuperscript{99} Id. Justice Rehnquist's comment unaccountably ignores the distinction the Court has made between administrative and criminal searches. \textit{See}, \textit{e.g.}, \textit{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. \textit{See} notes 12-16 & accompanying text \textit{supra}.
\textsuperscript{100} 265 U.S. 57 (1954). \textit{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 \textit{Air Pollution Variance Board v. Western Alfalfa Corp.}, 416 U.S. 861 (1974), the Court cited \textit{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.
\textsuperscript{101} 100 S. Ct. at 2543 (Stewart, J., dissenting).
\textsuperscript{102} Id. at 2544 (emphasis added).
\textsuperscript{103} Id.
\textsuperscript{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. D_EWEY 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.\textsuperscript{109}

\textit{Necessity of Warrantless Inspections}

In stressing the ease with which FMSHA violations can be concealed,\textsuperscript{110} the Court's opinion is similar to \textit{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.\textsuperscript{111} While the Court in \textit{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."\textsuperscript{112} Acknowledging that many OSHA violations are easy to conceal, the Court in \textit{Barlow's} nonetheless ruled that warrantless inspections are unnecessary because the element of surprise can be preserved by an \textit{ex parte} warrant obtained either after entry is refused or before an inspection is attempted.\textsuperscript{113} It would seem that this conclusion would apply equally to the inspection of mines for violations of FMSHA regulations. If obtaining \textit{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 OSHA\textsuperscript{114} and FMSHA\textsuperscript{115} provisions which require inspectors to seek court orders when entry is refused is also confusing. In \textit{Barlow's}, the Court concluded that the existence of such a provision is evidence that warrantless inspections are unnecessary.\textsuperscript{116} The Court in \textit{Dewey} approved of a similar provision without discussing its impact on the necessity of warrantless inspections.\textsuperscript{117} Finally, the Court in \textit{Barlow's} stressed that one reason warrantless OSHA inspections are unnecessary is that the "great majority" of employers will consent to warrantless inspections.\textsuperscript{118} While the same can probably be said about inspections under FMSHA,\textsuperscript{119} the Court in \textit{Dewey} did not make such a statement.

\textsuperscript{109} 101 S. Ct. at 2545 (Stewart, J., dissenting).
\textsuperscript{110} See note 80 & accompanying text supra.
\textsuperscript{111} 406 U.S. at 316.
\textsuperscript{112} 397 U.S. at 76.
\textsuperscript{113} See notes 48-50 & accompanying text supra.
\textsuperscript{114} 29 C.F.R. § 1903.4 (1977).
\textsuperscript{116} 436 U.S. at 317-19.
\textsuperscript{117} 101 S. Ct. at 2541 (discussing 30 U.S.C. § 818(a) (Supp. III 1979)).
\textsuperscript{118} 436 U.S. at 316.
\textsuperscript{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. 2334 (1981).
Inspector Discretion

It is difficult to reconcile the Court's conclusion in Dewey that the discretion of FMSHA inspectors is minimal$^{120}$ 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 credentials$^{124}$ 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

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$^{120}$ 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.
$^{130}$ Id.
warrantless inspection schemes.\textsuperscript{131} In \textit{Colonnade}, the Court saw no constitutional violation in forcible entries made pursuant to a statute authorizing warrantless inspections.\textsuperscript{132} Similarly, in \textit{Biswell}, the Court upheld a statute which makes it a crime to refuse entry to authorized inspectors,\textsuperscript{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.”\textsuperscript{134} Only in \textit{Barlow’s} were inspectors required to seek compulsory process if entry was refused.\textsuperscript{135} While FMSHA also prohibits forcible entries,\textsuperscript{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.\textsuperscript{137} The statute upheld in \textit{Colonnade} imposed a penalty on persons refusing entry;\textsuperscript{138} the OSHA inspection program invalidated in \textit{Barlow’s} did not.

\textbf{Privacy Expectations}

The analysis in \textit{Dewey} of the privacy expectations of owners and operators of business subject to federal regulation is similar to that found in \textit{Barlow’s} but somewhat different than in \textit{Biswell}. In \textit{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.\textsuperscript{139} In contrast, the Court in \textit{Barlow’s}\textsuperscript{140} and \textit{Dewey}\textsuperscript{141} focused on whether the inspection scheme itself creates an expectation that inspections will occur. Thus, the Court in \textit{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.”\textsuperscript{142} Additionally, \textit{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 \textit{Barlow’s} that owners and operators of businesses covered by

\textsuperscript{131} 101 S. Ct. at 2541.
\textsuperscript{132} See note 27 & accompanying text supra.
\textsuperscript{133} 18 U.S.C. § 924 (1976).
\textsuperscript{134} 406 U.S. at 315.
\textsuperscript{135} 29 C.F.R. § 1903.4 (1977).
\textsuperscript{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.
\textsuperscript{139} 406 U.S. at 316.
\textsuperscript{140} 436 U.S. at 313-14.
\textsuperscript{141} 101 S. Ct. at 2540.
\textsuperscript{142} Id. at 2538 (emphasis added).
the Colonnade-Biswell exception in effect consent to warrantless inspections.\footnote{436 U.S. at 313.}

\textit{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 \emph{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.\footnote{101 S. Ct. at 2538.} The Court then added that the inspection schemes in \emph{Colonnade} and \emph{Biswell} did not require such an assurance.\footnote{Id.} 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 \emph{Colonnade}, the Court based its decision on the long history of "close supervision and inspection" of the alcoholic beverage industry.\footnote{397 U.S. at 77.} The Court in \emph{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."\footnote{406 U.S. at 316.} Thus, it appears that the Court in \emph{Dewey} recast the rationales of \emph{Colonnade} and \emph{Biswell} in order to justify the holding that warrants were not required.

The Court in \emph{Dewey} also did not satisfactorily explain why the conclusion reached in \emph{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 . . . "\footnote{436 U.S. at 323.} 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,\footnote{101 S. Ct. at 2540-41.} served by mandatory periodic inspections and notification of relevant health and safety standards.
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. 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. 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. Similarly, *Biswell* stressed the need to regulate firearms traffic in order to reduce violent crime. 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. 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.

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, 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, however, the Court still attached too much significance to regulatory history. As Justice Stevens pointed out in his concurring opinion in *Dewey* and in his dissent in *Barlow's*, the
longevity of a regulatory program is irrelevant to its reasonableness.\footnote{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 \textit{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.\footnote{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."\footnote{162} In addition to traditional coal mining, FMSHA applies to the processing of minerals.\footnote{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 \textit{only} real issue before us is whether the statute's inspection program, \textit{in terms of the certainty and regularity of its application}, provides a constitutionally adequate substitute for a warrant."\footnote{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.\footnote{165} Justice

\begin{footnotes}
\item[159] 436 U.S. at 336.
\item[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 \textit{continue} in the business can be construed as consenting to the restrictions.\footnote{163} 30 U.S.C. § 802 (Supp. III 1979).
\item[161] 436 U.S. at 338 (Stevens, J., dissenting).
\item[162] 101 S. Ct. at 2545-46 n.6 (Stevens, J., dissenting).
\item[163] 101 S. Ct. at 2540 (emphasis added).
\item[164] 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. \textit{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 \textit{Barlow's}, the Court, citing \textit{Katz}, stated that persons subject to the statutes at issue in \textit{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." 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. . . ."

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. Thus, in holding that the use of pen registers to record dialed telephone numbers is not a "search," the Court in *Smith v. Maryland* concluded that while the person placing the calls may have had an actual expectation of privacy, he had no legitimate privacy interest. Determining the legitimacy of privacy expectations inevitably in-
volves judgments about societal values. 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. Given the ease with which violations of FMSHA regulations can be concealed, 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 refused 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. 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.

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. Furthermore, unique privacy interests arguably can be better protected by a safeguard provision, such as FMSHA’s requirement that inspectors seek compulsory process if entry is refused, than by an administrative warrant requirement. 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.

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. LAFAVE, 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 *Bar-
low*'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 danger-
ous, regulate it substantially, and provide for warrantless inspections of
its members." If so, Congress may, to some extent, be able to circum-
vent 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 reason-
ably determined that such inspections are necessary to enforce a regula-
tory scheme so comprehensive in its detail that a person subject to the
authorizing statute is certain that his business will be inspected periodi-
cally to determine whether he has complied with well defined health
and safety standards. However, because the Court reaffirmed prior de-
cisions upholding statutes authorizing warrantless inspections but lack-
ing 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 prop-
erty possess these characteristics.

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\(^{181}\) 101 S. Ct. at 2545-46 (Stewart, J., dissenting).