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EPA and Administrative Inspections

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I. INTRODUCTION

Although the Occupational Safety and Health Administration (OSHA) is not the only federal agency that engages in administrative inspections as part of its enforcement program, it was in the context of an OSHA inspection that the United States Supreme Court most recently considered the question of the validity of warrantless administrative inspections. The Court held in *Marshall v. Barlow's, Inc.*[1] that the fourth amendment required OSHA to obtain a search warrant for routine nonconsensual inspections. Therefore, section 8(a) of the Occupational Safety and Health Act of 1970[2] was held unconstitutional insofar as it purported "to authorize inspections without [a] warrant or its equivalent . . . ."[3] The Court did not go so far as to say that there would be a necessity of showing "probable cause in the criminal law sense" before OSHA could obtain a search warrant.[4] Rather, the Court indicated that probable cause could be based upon "specific evidence of an existing violation" as well as upon a showing that " 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied . . . .' "[5]

While the Court in *Barlow's, Inc.* specifically limited its opinion

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

2. 29 U.S.C. § 657(a) (1970). This section provides:

> In order to carry out the purposes of this chapter, the Secretary [of Labor], upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
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> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
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> (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.

3. 436 U.S. at 325.

4. *Id.* at 320.

5. *Id.* A recent OSHA inspection case decided after *Barlow's, Inc.*, however, indicates that the courts may not be following the diluted probable cause guideline set in *Barlow's, Inc. See* Marshall v. Weyerhouser Co., 47 U.S.L.W. 2183 (D.N.J. Sept. 7, 1978). The Supreme Court may have to offer further guidelines as lower courts try to avoid becoming rubber stamps in the administrative search warrant process.

to the facts and law concerned with OSHA,[6] this article will examine the implications of that decision upon administrative inspections conducted pursuant to various regulatory statutes administered by the Environmental Protection Agency (EPA). To date, there has not been a reported judicial decision concerning a challenge to a warrantless inspection conducted by EPA.[7]

II. THE UNITED STATES SUPREME COURT AND ADMINISTRATIVE INSPECTIONS

Although the line of Supreme Court decisions on the issue of the validity of warrantless administrative inspections is relatively short, it can be most confusing. Part of the confusion results from a basic dilemma. The Court has attempted to maintain equilibrium between the need for periodic inspections by various administrative agencies and the constraints imposed by the history and language of the fourth amendment.[8]

In *Frank v. Maryland*,[9] the Court first determined the legality of warrantless administrative inspections.[10] There, in response to a resident's complaint that she had rats in her cellar, a city health inspector began an inspection of the houses in the vicinity of the complainant's house. The inspector approached Frank's home and, after getting no response to his knocks, "proceeded to inspect the

6. 436 U.S. at 321-22.

7. Recently, however, Dow Chemical Co. filed a suit against the Environmental Protection Agency (Dow Chemical Co. v. Costle, No. 78-10044 (E.D. Mich., filed April 11, 1978)) alleging, *inter alia*, a violation of Dow's fourth amendment rights. "The complaint asks the court to declare that EPA's conduct in photographing its facilities constituted an unreasonable search and seizure and deprived the company of its right to privacy in violation of the Fourth Amendment." 46 U.S.L.W. 2533 (E.D. Mich. April 11, 1978). *See also* note 50 *infra*.

8. In *Barlow's, Inc.* the Court stated:

> The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the American colonial experience. . . . The general warrant was a recurring point of contention in the colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists [citing the Stamp Act of 1765, the Townsend Revenue Act of 1767 and the tea tax of 1773 as notable examples].

436 U.S. at 311 (citing O. M. DICKERSON, *Writs of Assistance as a Cause of the Revolution*, in THE ERA OF THE AMERICAN REVOLUTION 40 (R. Morris, ed. 1939)).

9. 359 U.S. 360 (1959).

10. There were two other cases that the Supreme Court had decided earlier that arguably could be classified as administrative inspection cases. Boyd v. United States, 116 U.S. 616 (1886); Murray's Lessee v. Hoboken Land Improvement Co., 59 U.S. (18 How.) 272 (1856). However, Frank v. Maryland was the "Supreme Court's first attempt to define the restrictions applicable to administrative searches." *See also* Note, *Administrative Search Warrants*, 58 MINN. L. REV. 607, 611 (1974); 22 VILL. L. REV. 1214, 1216 (1977).

area outside the house."[11] The inspector found the house to be in an "extreme state of decay," and discovered approximately a half ton of waste in the backyard.[12] Frank refused to allow the inspector to enter his house and was subsequently found guilty of violating the city code for refusing entry to a health inspector who under the standards of the Baltimore City Code, had "cause to suspect a nuisance" existed in the house.[13] Frank appealed to the United States Supreme Court challenging the constitutionality of the city code that purported to allow warrantless inspections. As in *Barlow's, Inc.* the Court reviewed the history of the fourth amendment but, unlike *Barlow's, Inc.*, concluded that the fourth amendment was not applicable because "[n]o evidence for criminal prosecution [was] sought to be seized."[14] Therefore, the Court held that no warrant was required. It was in this context that the Supreme Court first spoke of the need to distinguish administrative inspections from criminal searches:

> That there is "a total unlikeness" between "official acts and proceedings," for which the legal protection of privacy requires a search warrant . . . and the situation now under consideration is laid bare by the suggestion that the kind of an inspection by a health official with which we are concerned may be satisfied by what is, in effect, a synthetic search warrant, an authorization "for periodic inspections."[15]

Thus the Court in *Frank*, having recognized an ongoing public need for administrative inspections, apparently felt that imposing a search warrant requirement would frustrate such inspections since the concomitant requirement of a showing of probable cause was then assumed to be inflexible. The Court altered its rigid approach in *Camara v. Municipal Court,*[16] however, and held that while a warrant was required to conduct an administrative inspection, it could be obtained upon less than a showing of probable cause in the criminal law sense.[17]

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11. 359 U.S. at 361.
12. *Id.*
13. *Id.*
14. *Id.* at 366.
15. Id. at 372-73 (citing Boyd v. United States, 116 U.S. 616, 624 (1886)) (other citations omitted).
16. 387 U.S. 523 (1967).
17. *Id.* at 534, 538. This notion of a diluted probable cause requirement finds no support in the language of the fourth amendment.

The dissent in *Barlow's, Inc.* could be said to prefer an adoption of the analysis of Frank v. Maryland absent the civil-criminal distinction:

> Since the general warrant, not the warrantless search, was the immediate evil at

In *Camara* the appellant had refused to allow a warrantless inspection of his apartment by city housing inspectors who had entered the apartment building "to make a routine annual inspection."[18] The Court recognized the compelling public need for administrative inspections, but refused to totally disregard fourth amendment protections:

> [T]he reasons put forth in *Frank v. Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections . . . . The *Frank* majority gave recognition to the unique character of these inspection programs by refusing to require search warrants; to reject that disposition does not justify ignoring the question whether some other accommodation between public need and individual rights is essential.[19]

The "other accommodation" that the *Camara* court chose was to eliminate the traditional showing of probable cause typically required for a search warrant. While the *Frank* Court had focused on the "reasonableness" of administrative inspections to dispense with the warrant requirement completely, the *Camara* Court, in the context of an area search, held that this same "reasonableness" justified only a less stringent probable cause requirement. The Court in *Camara* reasoned that:

> [E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. . . .
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> . . . .
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> . . . But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. Such

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which the Fourth Amendment was directed, it is not surprising that the Framers placed precise limits on its issuance. The requirement that a warrant only issue on a showing of particularized probable cause was the means adopted to circumscribe the warrant power. While the subsequent course of Fourth Amendment jurisprudence in this Court emphasizes the dangers posed by warrantless searches conducted without probable cause, it is the general reasonableness standard in the first Clause, not the Warrant Clause, that the Framers adopted to limit this category of searches. It is, of course, true that the existence of a valid warrant normally satisfies the reasonableness requirement under the Fourth Amendment. But we 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.

18. 387 U.S. at 526.

19. *Id.* at 534.

> an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. *It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government intrusions of privacy.*[20]

In a companion case, *See v. City of Seattle,*[21] the Court extended its holding in *Camara* to include administrative inspections of commercial premises. Although the *Camara* Court recognized that consent and emergency situations were exempt from the warrant requirement, those were the only two exceptions mentioned by the Court.[22] Since *Camara,* however, the Court has gone on to recognize other exceptions to the warrant requirement in the context of administrative inspections.

This is an unfortunate development, since the *Camara* doctrine of "flexible cause" could have provided a sensitive accommodation to the competing interests involved. A lesser probable cause standard for administrative search warrants as authorized by *Camara* would obviate the necessity for new exceptions to the warrant requirement. There would remain only the exceptions that existed

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20. *Id.* at 528-29, 539 (citations omitted) (emphasis added). A "synthetic search warrant" argument similar to that in *Frank* was made by Justice Stevens in dissent in *Barlow's, Inc.* There he said:

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

436 U.S. at 328 (footnote omitted).

21. 387 U.S. 541 (1967). It has also become clear that what the Court said in *Camara* concerning the requirement of a search warrant does not extend only to "area searches." *See, e.g.,* Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974). An area search "is the search of an entire municipal area . . . based upon legislative or administrative assessment of broad factors such as the area's age or condition." 387 U.S. at 532.

22. 387 U.S. at 539. Although not mentioned as an exception to the warrant requirement, the *Camara* Court did state: "in the case of routine area inspections, . . . it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry." *Id.* at 539-40. Even if such a requirement of "prior refusal" is still valid in the context of a search of a residence as in *Camara,* the Court in *See* seems to contemplate warrants issued in advance of the search of businesses in order to preserve the element of surprise. The Court did indicate, however, that the reasonableness of these advance warrants will vary with the nature of the regulation involved. *Id.* at 545 n.6.

before *Camara*, which are based on considerations more compelling than the dictates of sound administration: express consent, emergency, and open fields.[23]

The three additional exceptions to the warrant requirement that have been approved by the Court since *Camara* are: (1) "Effective enforcement." This exception is said to be necessary because effective inspection requires a surprise element; (2) "Pervasive regulation." This exception is said to be justified when the particular industry engaged in by the corporation or individual subject to the inspection is "pervasively regulated" and therefore the corporation or individual has from the outset only a limited expectation of privacy; (3) "Statutory restraints." This exception is said to be applicable if a legislative scheme imposes conditions on the exercise of the inspection power that assumes the "reasonableness" of the search.[24]

There is some question as to whether these exceptions are independent or whether all three must coexist in order for an inspection to be valid without a search warrant.[25] Assuming however that each operates as an independent exception, it will be shown that each is an unnecessary exception to the *Camara* rule both in the context of EPA enforcement or in any other context.[26]

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23. For a discussion of the "open fields" exception see section III.*D. infra*. "Emergency" and "express consent" are outside the scope of the present discussion.

24. *See* United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

In *Colonnade*, federal agents from the Alcohol and Tobacco Tax Division of the Internal Revenue Service visited the catering establishment and without a search warrant or consent of the manager or owner inspected the cellar. When the owner refused to open a locked room, the agents broke the lock, entered the room, and removed liquor bottles which they believed had been refilled in violation of 26 U.S.C. § 5301(c). In finding the warrantless inspection valid, the Court noted the long history of governmental supervision and inspection of the liquor industry.

In *Biswell*, although the Court noted that federal regulation of the firearms industry was not as deeply rooted in history as is governmental control of the liquor industry . . . close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crimes and to assist the states in regulating the firearms traffic within their borders . . . large interests are at stake, and inspection is a crucial part of the regulatory scheme . . . .

406 U.S. at 315.

25. 29 BAYLOR L. REV. 283, 290 (1977).

26. It may be argued that two other exceptions to the *Camara* rule were created by the Court's decisions in Wyman v. James, 400 U.S. 309 (1971) and United States v. Martinez-Fuerte, 428 U.S. 543 (1976). In *Wyman* the question before the Court was the validity of a warrantless visit to the home of a welfare recipient. The Court held that the visit did not constitute a "search" within the meaning of the fourth amendment and that even if it had been a search, it was "reasonable." *See also Administrative Search Warrants, supra* note 10, at 616-17.

In *Martinez-Fuerte*, the Court held "that [automobile] stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant." 428 U.S. at 566. However, the Court specifically stated

The types of EPA inspections to be examined are: (1) routine inspections and (2) inspections that are based upon specific evidence of an existing violation. In either case, it is the conclusion of this article that EPA should be required to obtain a warrant prior to conducting such an inspection unless the inspection is done pursuant to one of the pre-*Camara* exceptions: consent, "open fields" or emergency.[27] The fact that criminal liability under some of the environmental statutes could result from evidence discovered during an administrative inspection does not change the conclusion that only a diluted showing of probable cause should be required.[28]

III. The Post-*Camara* Exceptions to the Warrant Requirement

A. *Effective Enforcement*

The desirability and perhaps the necessity of surprise inspections has been used by the Court to justify warrantless inspections in some contexts. In *United States v. Biswell*,[29] the Court said:

> In *See v. City of Seattle*, 387 U.S. 541 (1967), the mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or correct in a short time. . . . Here [in the context of enforcing

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in *Barlow's, Inc.*:

> The automobile-search cases cited by the Secretary are even less helpful to his position than the labor cases. The fact that automobiles occupy a special category in Fourth Amendment case law is by now beyond doubt due, among other factors, to the quick mobility of a car, the registration requirements of both the car and the driver, and the more available opportunity for plain-view observations of a car's contents.

436 U.S. at 315 n.10.

27. *But see* 29 Baylor L. Rev. 283 (1977): "The Environmental Protection Agency's inspection powers have not yet been subjected to judicial scrutiny, but it would appear that they would come nearer to meeting the 'pervasive regulation' and 'effective enforcement' exceptions than would OSHA." *Id.* at 307.

28. In *Camara*, the Court recognized that "[l]ike most regulatory laws, fire, health, and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to a criminal complaint." 387 U.S. at 531 (footnote omitted). From this it is clear that the Court in *Camara* thought the general rules laid down in that case should apply whether the inspection could uncover criminal or civil violations. One author has specifically pointed to Wyman v. James, 400 U.S. 309 (1971) as making this point clear:

> [In *Wyman*] [t]he Court distinguished *Camara* and *See* by noting that in both cases searches for criminal violations were involved, whereas in *Wyman* no criminal sanctions could be imposed; if the beneficiary's consent to the visit was not granted, aid would simply be denied. The Court thus partially reinstated the civil-criminal distinction of *Frank* without overruling *Camara* by redefining "criminal" to encompass the facts of both the *Frank* and *Camara* cases.

Administrative Search Warrants, *supra* note 10, at 616. *Contra*, Wyman v. James, 400 U.S. at 344 n.4 (Marshall, J., dissenting).

29. 406 U.S. 311 (1972).

> the Gun Control Act of 1968], if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisites of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.[30]

The Court in *Barlow's, Inc.* nevertheless has rejected the effective enforcement rationale. Agreeing that the element of surprise is advantageous and prevents "speedy alteration or disguise" of violations, the Court provided the solution by suggesting that "warrants may be issued *ex parte* and executed without delay and without prior notice, thereby preserving the element of surprise . . . ."[31] The Court further asserted that such ex parte warrants will not impose serious burdens upon the administrators of the inspection system or upon the courts.

This assertion is somewhat difficult to accept and will require empirical study to determine its accuracy.[32] Since the normal inspection procedure for EPA requires some advance preparation and advance decisions concerning which facilities to inspect, the additional step of obtaining a search warrant does not seem to be a tremendous burden in light of the constitutional rights involved. Moreover, there is nothing preventing EPA from obtaining, in one trip to the courthouse, search warrants for all the facilities scheduled to be searched in any given week. Thus, at least for the agency, the administrative burden may be minimized.

B. Pervasively Regulated Industry

The pervasively regulated exception is based upon the *Colonnade Catering Corp. v. United States*[33] and *Biswell* concept of a limited expectation of privacy for those individuals or corporations engaged in a heavily or "pervasively regulated" industry.[34] This exception is based upon nothing more than fictional consent and seems only to serve the purpose of reducing the administrative and judicial bur-

30. *Id.* at 316.

31. 436 U.S. at 316.

32. It is interesting to note, however, that: "Since the U.S. Supreme Court issued its decision in *Barlow's, Inc.* on May 23, only 291 employers of the 19,216 visited by the Occupational Safety and Health Administration have demanded that inspectors obtain search warrants to conduct inspections, according to the agency [OSHA]." 47 U.S.L.W. 2051 (July 25, 1978).

33. 397 U.S. 72 (1970).

34. 436 U.S. at 313. The *Barlow's, Inc.* Court, in recognizing this exception, pointed out that a person engaging in the types of industries contemplated by the exception has "voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Id.*

den of obtaining a *Camara*-type warrant. But administrative convenience cannot justify such "inroads on fourth amendment safeguards,"[35] and there are further reasons which render this exemption unjustifiable. The three justifications stated in *Camara* for requiring an administrative warrant also exist in the context of a pervasively regulated industry. Those three reasons are: (1) to inform the employer that the inspection is authorized by statute; (2) to advise him of the lawful limits of the inspection; and (3) to assure that the person demanding entry is an authorized inspector.[36] Although an individual engaged in a pervasively regulated industry may be constructively on notice that he is subject to statutorily authorized inspections, the individual is not necessarily assured that the person demanding entry is an authorized inspector. And there is no assurance that the particular inspection is not a discriminatory or harrassment inspection. Such assumptions are not rationally related to the fact that the industry is highly regulated.

Aside from the question of the validity of this exception, its application has been consistently restricted to the liquor and firearms industries,[37] and would appear to be inapplicable in the context of most EPA regulated industries. EPA, like OSHA, regulates all kinds of industries. Once again, the test is not whether the industry is regulated, but whether it is *pervasively* regulated. Although certain environmental statutes, the Federal Water Pollution Control Act (FWPCA)[38] for example, are licensing statutes in the very broadest sense,[39] such licensing and regulation is distinguishable from that which was present in *Colonnade* or in *Biswell*.[40] The scope of the FWPCA is much more akin to the kind of regulation that exists under the auspices of OSHA. Both OSHA and EPA regulate a broad spectrum of different industries pursuant to legislative

35. Brennan v. Gibson's Prod., Inc., 407 F. Supp. 154, 161 (E.D. Tex. 1976).

36. 387 U.S. at 532.

37. The Court in *Barlow's, Inc.* stated that:

> The Secretary [of Labor] urges that an exception from the search warrant requirement has been recognized for "pervasively regulated business[es]" . . . . These cases are indeed exceptions, but they represent responses to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type . . . .

436 U.S. at 313 (citations omitted).

38. 33 U.S.C. §§ 1251-1376 (1976) (*as amended*, 33 U.S.C.A. §§ 1251-1376 (1978)). This Act is commonly referred to as the Clean Water Act.

39. The licensing provision of the FWPCA provides that no discharge of pollutants from a point source into navigable waters of the United States is allowed without first obtaining a permit from EPA or in some cases from a state environmental agency. *Id.* §§ 1341-1342.

40. *But see* 29 BAYLOR L. REV. 283, 307 (1977) (written before the Court's decision in *Barlow's, Inc.*).

mandates. However, these myriad businesses are not necessarily highly regulated industries which may be said by implication to consent to warrantless inspections. In that sense, *Barlow's, Inc.*'s finding of the non-applicability of this exception in an OSHA context also applies to EPA.[41]

Thus, while the Court has left intact the restrictions on the application of the pervasively regulated exception, to this date, only the gun and liquor industries have met the rigorous exemption standards.

C. *Statutory Restraints*

The statutory restraints exception was first enunciated by the Court in *Biswell*: "Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority. . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task."[42]

Although this exception could be justified on the ground that it places some limitations on the scope of the inspections, it ignores the discretion left in the hands of the field inspector with regard to the frequency of inspections at any single establishment.[43] This is one form of discretion that a judicial officer could and should insure is not abused. As the Court has stated, "[t]he historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech."[44]

The Court in *Barlow's, Inc.* recognized this need to restrict the discretion of field inspectors.

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41. In *Barlow's, Inc.* it was stated that:

> Industries such as [firearms and liquor] fall within the "certain carefully defined classes of cases," referenced in *Camara* . . . . The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware.
>
> The clear import of our [line of administrative inspection] cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the *exception*. . . . Nor can any but the most fictional sense of voluntary consent to later searches be found in the single fact that one conducts a business affecting interstate commerce; under current practice and law, few businesses can be conducted without having some effect on interstate commerce.

436 U.S. at 313-14 (citations omitted) (emphasis added).

42. 406 U.S. at 316 (citation omitted).

43. The inspection provision of the statute involved in *Biswell* may be found at 18 U.S.C. § 923(g) (1976).

44. United States v. United States Dist. Court, 407 U.S. 297, 317 (1972) (footnote omitted); *accord*, See v. City of Seattle, 387 U.S. at 545.

> The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, 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 containing specific neutral criteria.[45]

There is no reason to believe that these concerns are or will be alleviated by a statute restricting the scope of the search. A restriction on the frequency of inspections, however, may serve to prevent discriminatory or harrassment inspections. Yet, although the various statutes administered by EPA that provide for administrative inspections all speak in terms of reasonableness (and some have more safeguards than others), none limit the frequency of inspections.[46] Moreover, even if the "statutory restraints" exception were valid outside the context of a pervasively regulated industry such as existed in *Biswell,* the limitations on the scope of an EPA inspection under its various statutes are more analogous to those in the OSHA statute, which were held insufficient in *Barlow's, Inc.*

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45. 436 U.S. at 323 (footnote omitted). *See also Camara,* 387 U.S. at 532.

46. The Safe Drinking Water Act provides for "inspection, at reasonable times, of records, files, papers, processes, controls and facilities, or in order to test any feature of a public water system including its raw water source." Detailed notice requirements are also imposed. 42 U.S.C. § 300j-4(b) (1976).

The Resource Conservation and Recovery Act states that persons handling hazardous wastes shall allow EPA officers or employees "at all reasonable times to have access to, and to copy all records relating to such wastes." In addition, the officers or employees may "enter at reasonable times any establishment or other place maintained by any person where hazardous wastes are generated, stored, treated, or disposed of . . . to inspect and obtain samples. . . . [e]ach such inspection shall be commenced and completed with reasonable promptness." 42 U.S.C. §§ 6927-29 (1976).

The Toxic Substances Control Act provides for the inspection of "premises in which chemical substances or mixtures are manufactured, stored, or held before or after their distribution in commerce . . . . [e]ach such inspection shall be commenced and completed with reasonable promptness and shall be conducted at reasonable times, within reasonable limits, and in a reasonable manner." In order to examine certain types of data, the nature and extent of the data must be "described with reasonable specificity in . . . written notice." 15 U.S.C. § 2610 (1976).

The Federal Water Pollution Control Act provides in similar terms for inspection at reasonable times pursuant to reasonable requirements of the Administrator. 33 U.S.C. § 1318(a) (1976) (*as amended,* 33 U.S.C.A. § 1318(a) (1978)).

Reasonable promptness of commencement and completion of an inspection is similarly required by the Federal Insecticide, Fungicide and Rodenticide Act. 7 U.S.C. § 136g(a) (1976) (*as amended,* 7 U.S.C.A. § 136g(a) (West Supp. 1978)).

Finally, the Clean Air Act calls for reasonable requirements with regard to information which the Administrator may compel, and access to records and emission monitoring devices may be had at reasonable times. 42 U.S.C.A. § 7401 (West Supp. 1977).

D. The Open Fields Exception

Aside from the emergency and consent exceptions created prior to *Camara*, there is one other that could be particularly helpful to EPA. The open fields exception was first articulated in *Hester v. United States*.[47] There federal agents concealed themselves outside and saw the defendant hand another individual a bottle of spirits. At the time that the agents saw the defendant, there was a question about whether the agents were trespassing on land owned by the defendant's father. "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."[48]

The open fields doctrine was recently reaffirmed in *Air Pollution Variance Board v. Western Alfalfa Corp.*[49] There a state (Colorado) inspector entered the outdoor premises of Western Alfalfa with neither a warrant nor the consent of the company to perform some pollution tests. The Court relying upon the open fields exception held that there was no constitutional violation.[50] Significantly, however, the Court seemed to indicate that absent the applicability of the open fields exception, it would have adhered to *Camara* and *See* in the context of an environmental inspection:

> We adhere to *Camara* and *See* but we think they are not applicable here. The field inspector did not enter the plant or offices. . . . He had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke. . . . The field inspector was on

47. 265 U.S. 57 (1924).

48. *Id.* at 59 (citation omitted).

49. 416 U.S. 861 (1974).

50. *Id.* at 861. The recently filed Dow Chemical case against EPA referred to in note 7 *supra*, seems to involve a fact situation where the open fields exception may have some applicability. However, aerial surveillance would seem to push the exception too far. Although E.I. duPont de Nemours and Co., Inc. v. Christopher, 431 F.2d 1012 (5th Cir. 1970), *cert. denied*, 400 U.S. 1024, *rehearing denied*, 401 U.S. 967 (1971), involved industrial espionage carried out by means of aerial surveillance, what the court said there would seem to apply at least in spirit to the Dow Chemical case:

> [We] realize that industrial espionage of the sort here perpetrated has become a popular sport in some segments of our industrial community. However, our devotion to free wheeling industrial competition must not force us into accepting the law of the jungle as the standard of morality expected in our commercial relations.

431 F.2d at 1016. The important question that has to be faced is what is constitutionally offensive scrutiny. It would be fallacious to extend the open fields exception to the facts in *Dow* because if it were, advanced technology has given us microphones and cameras that can make an enclosed room an "open field." Spatially based criteria of eligibility for fourth amendment protection ignore the pertinent question as to what it is we wish to see preserved from the offensive scrutiny.

respondent's property but we are not advised that he was on premises from which the public was excluded.[51]

IV. Effect of Warrant Requirement on EPA Enforcement Program

If, in fact, the Supreme Court does eventually hold that EPA inspections fall within the general rule enunciated in *Camara, See* and *Barlow's, Inc.* rather than the exceptions noted in *Colonnade* and *Biswell,* what will be the effect on EPA's enforcement program? There have been claims that such a holding would drastically reduce EPA's effectiveness.[52] A close examination of the regulatory statutes that EPA administers, however, reveals that none of those statutes contemplate forced entry by EPA. Therefore, the statutes that EPA administers compel EPA to go to court once entry is refused, even if the Court were to find EPA inspections distinguishable in a fourth amendment sense from OSHA inspections.

The majority in *Barlow's, Inc.* has already indicated that they interpret the inspection provision contained in the Clean Air Act[53] not to contemplate forced entry without either judicial or administrative review.[54] A close examination of the inspection provisions in the other regulatory statutes that EPA administers, in light of *Barlow's, Inc.*, reveals that none of these statutes contemplates forced entry without review.

The FWPCA, like the Clean Air Act, provides that the Administrator of EPA "shall issue an order . . . or he shall bring a civil action" whenever he finds that there has been a refusal to allow an inspection.[55] The FWPCA further provides for criminal penalties, as does the Clean Air Act, when the refusal to allow the inspection was willful or negligent.[56] Nevertheless, there is no provision purporting to allow for forcible entry, even when such an illegal refusal occurs.[57]

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51. 416 U.S. at 864-65.

52. In an amicus brief filed by the Sierra Club in *Barlow's, Inc.*, it was stated that "invalidation of warrantless inspections will have a 'devasting effect' on the enforcement of environmental laws, including the Federal Water Pollution Control Act and Clean Air Act." The Sierra Club was joined by the Oil, Chemical and Atomic Workers International Union as well as by another environmental group, Friends of the Earth. [1977] 8 Envir. Rep. (BNA) 427.

53. 42 U.S.C.A. §§ 7401-7508 (West Pamphlet 1977).

54. 436 U.S. at 321-22.

55. 33 U.S.C. § 1319(a)(3)(1976) (*as amended*, 33 U.S.C.A. § 1319 (a)(3)(1978)).

56. *Id.* § 1319(c)(1).

57. The legislative history of the FWPCA supports the view of the Court in *Barlow's, Inc.* that forced entry was not contemplated in the Clean Air Act and further supports the position that forced entry was also not contemplated in the FWPCA: "As under the Clean Air Act, the Committee expects that authority to enter will be used judiciously and upon any challenge to entry the Committee expects the Administrator to obtain the necessary warrant."

In enforcing the Resource Conservation and Recovery Act, (RCRA),[58] the Administrator must in fact give *notice* to the violator of his failure to comply with any requirement under that Act, including the failure to allow an inspection. After waiting thirty days from the issuance of such notice, the Administrator may commence a civil action in district court or he may issue an Administrative Order.[59] There are, however, no criminal sanctions imposed for failure to allow an inspection under RCRA, and once again no provision for forced entry.

The Federal Insecticide, Fungicide and Rodenticide Act[60] specifically states that "upon a showing to an officer or court of competent jurisdiction that there is reason to believe that the provisions of this subchapter have been violated, officers or employees duly designated by the Administrator are empowered to obtain and to execute warrants authorizing . . . entry for the purpose of this section. . . ."[61] Once again, no provision for forced entry exists in this Act.

The Toxic Substances Control Act[62] provides for both civil and criminal penalties for refusing to permit entry or inspection as provided for in that Act.[63] In light of *Barlow's, Inc.*, as well as the plain meaning of the Act, it is clear that forced entry is not contemplated.

Finally, the Safe Drinking Water Act[64] simply states: "Whoever fails or refuses to comply with any requirement of subsection (a) of this section or to allow the Administrator, the Comptroller General, or representatives of either, to enter and conduct any audit or inspection authorized by subsection (b) of this section may be fined not more than $5,000."[65] Obviously, no forced entry is contemplated here.

Since forced entry is not possible whenever EPA is refused entry, a decision such as *Barlow's, Inc.* in the context of EPA, would have little or no effect on EPA's enforcement program. As the statutes discussed above indicate, the administrative burden of obtaining a warrant after entry is refused already exists.

S. REP. No. 92-414, 92d Cong., 1st Sess. 62 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3729.

58. 42 U.S.C. §§ 6901-87 (1976).

59. *Id.* § 6928(a).

60. 7 U.S.C. § 136g(a) (1976) (*as amended*, 7 U.S.C.A. § 136g(a) (West Supp. 1978)).

61. *Id.* § 136g(b).

62. 15 U.S.C. §§ 2601-29 (1976).

63. *Id.* §§ 2614-16.

64. 42 U.S.C. §§ 300f-300j-9 (1976) (*as amended*, 42 U.S.C.A. §§ 300f-300j-10 (West Supp. 1978)).

65. *Id.* § 300j-4(c).

V. CONCLUSION

Although the Supreme Court in *Barlow's, Inc.* did limit its decision to the "facts and law concerned with OSHA,"[66] one cannot ignore the fact that in dicta the Court indicated that where a regulatory statute already contemplates "resort to federal-court enforcement when entry is refused,"[67] the Court would not be inclined to allow warrantless inspections. Moreover, in the one environmental inspection case that has reached the Court, *Western Alfalfa,* the Court again in dicta indicated that but for the open fields exception, they would have followed the general rule of *Camara* and *See.*[68] All this, coupled with the apparent inapplicability of the three exceptions enunciated in *Colonnade* and *Biswell,* leads to the conclusion that EPA must obtain a search warrant, albeit with the diluted probable cause requirement specified in *Camara,* before conducting administrative inspections. This conclusion, however, would not have a detrimental effect on EPA's enforcement program because the statutes that authorize EPA to conduct inspections do not contemplate forced entry in any event.

66. 436 U.S. at 322.
67. *Id.* at 321.
68. 416 U.S. at 864-65.