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Stoudt's Ferry Preparation Company produces low-grade fuel from a material that is extracted from sand and gravel dredged from a riverbed. When a Labor Department safety inspector attempted to inspect the Stoudt's Ferry plant pursuant to the Federal Mine Safety and Health Act of 1977, he was denied entry. Relying on the recent Supreme Court decision in

1. 30 U.S.C. §§ 801-961 (1976 & Supp. II 1978). The Federal Mine Safety and Health Act of 1977 will be referred to throughout this Comment as the Mine Safety Act. Section 813(a) of the Act provides for inspections. Authorized representatives of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary [of Labor] shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. . . . For the purpose of making any inspection or investigation under this chapter, the Secretary [of Labor], or the Secretary of Health, Education, and Welfare, . . . shall have a right of entry to, upon, or through any coal or other mine.


2. In denying entry to the inspector, Stoudt's Ferry initially claimed that the plant did not come within the Mine Safety Act's definition of a mine. The Third Circuit determined, however, that the Stoudt's Ferry operation was within the scope of the Act. See Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592 (3d Cir. 1979), cert. denied, 100 S. Ct. 665 (1980). Given the broad coverage of the statute, this decision was undoubtedly correct. See 30 U.S.C. § 802(h) (Supp. II 1978). Moreover, the legislative history of the Mine Safety Act emphasizes that "what is considered to be a mine and to be regulated under [the] Act [should] be given the broadest possibility [sic] interpretation," and that doubts are to "be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 3401, 3414.
Marshall v. Barlow's, Inc., which held that warrantless inspections under the Occupational Safety and Health Act (OSHA) violated the fourth amendment, Stoudt's Ferry contended that the warrantless search provision of the Mine Safety Act was likewise unconstitutional. The district court disagreed and granted the Secretary of Labor's request for a preliminary injunction to require Stoudt's Ferry to permit the inspection. On appeal, the Court of Appeals for the Third Circuit affirmed, holding that "warrantless inspections and the procedure provided for enforcement in the Mine Safety Act meet the standards of reasonableness in [the] pervasively regulated [mining] industry." Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), cert. denied, 100 S. Ct. 665 (1980).

The fourth amendment to the Constitution was enacted "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." The first clause of the amendment prohibits searches that are unreasonable, and the second clause prescribes the form and content of warrants. The relationship between these two clauses has been the subject of inconsistent interpretation by the Supreme Court. Be-
cause the prevailing interpretation emphasizes the reasonableness clause,\textsuperscript{11} the current test of the constitutionality of a warrantless search is "not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable."\textsuperscript{12}

For many years, the protections of the fourth amendment were not thought to apply to administrative searches conducted pursuant to a regulatory scheme.\textsuperscript{13} But in 1967, the Supreme Court held in \textit{Camara v. Municipal Court}\textsuperscript{14} that administrative inspections of residential premises are subject to the fourth amendment's warrant requirements.\textsuperscript{15} In \textit{See v. City of Seattle},\textsuperscript{16} decided the same day as \textit{Camara}, the Court extended the warrant requirement to administrative inspections of commercial premises.\textsuperscript{17} Since those decisions, the issue has


\textsuperscript{11.} See, e.g., Cady v. Dombrowski, 413 U.S. 433, 439 (1973).


\textsuperscript{13.} It was widely believed that the fourth amendment applied only to criminal investigations. See, e.g., Frank v. Maryland, 359 U.S. 360, 365-67 (1959); Rothstein & Rothstein, \textit{Administrative Searches and Seizures: What Happened to Camara and See?}, 50 Wash. L. Rev. 341, 341-42 (1975).

\textsuperscript{14.} 387 U.S. 523 (1967).

\textsuperscript{15.} In \textit{Camara}, a municipal health inspector attempted to conduct a routine annual inspection for possible violations of the city's housing code. A lessee refused to allow the inspector to search his apartment without a warrant and was subsequently faced with criminal charges for refusal to permit a lawful inspection. \textit{Id.} at 525-27. The Court found:

\begin{quote}
Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization... The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.
\end{quote}

\textit{Id.} at 532-33.

\textsuperscript{16.} 387 U.S. 541 (1967).

\textsuperscript{17.} In \textit{See}, the owner of a commercial warehouse refused to allow an inspector from the Seattle Fire Department to inspect his locked building without a warrant and probable cause to believe that a violation of any city ordinance actually existed. The inspection was part of a routine, periodic canvass conducted throughout the city to obtain compliance with the city's fire code. The owner's refusal led to his arrest and prosecution. \textit{Id.} at 541-42. The Court applied the rule of \textit{Camara} because it found that
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undergone much development, particularly with respect to statutorily authorized warrantless inspections.\textsuperscript{18} Despite this development, the Court has failed to articulate precise guidelines to which individuals and businesses subject to administrative inspections can conform.\textsuperscript{19} Nonetheless, two general precepts are clear. First, the governing principle of \textit{Camara} has not been abandoned: "[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."\textsuperscript{20} Second, the standard of probable cause required for the issuance of a warrant in an administrative search is less stringent than its criminal counterpart.\textsuperscript{21} Administrative probable cause need not be based on specific knowledge of a violation in a particular place, but may be based merely on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to . . . particular [premises]."\textsuperscript{22}

[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right 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.


22. \textit{Id.} Under this less stringent standard, administrative probable cause may be based on such factors as the passage of time, the nature of a building, or the condition of an entire area. \textit{Id.} It is also sufficient to show that a specific business has been chosen for inspection "on the basis of a general administrative plan for the enforcement of [an] Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area." \textit{Marshall v. Barlow's, Inc.}, 436 U.S. 307, 321 (1978). For a thoughtful criticism of the use of a flexible probable cause standard, see LaFave, \textit{supra} note 17, at 11-20.
The uncertainty in this area of law centers around the exceptions to the warrant requirement expressly or impliedly sanctioned by the *Camara*-See Court and the application of these exceptions in subsequent cases. The *Camara*-See Court authorized warrantless searches in four situations: when the inspection is prompt and is conducted in response to an emergency situation;\(^2\) when there is consent to the inspection;\(^3\) when the inspection is conducted in an area open to the public;\(^4\) and when the inspection is conducted in connection with a licensing program.\(^5\) The licensing exception has been the catalyst for much of the subsequent litigation. In *Colonnade Catering Corp. v. United States*,\(^6\) the Supreme Court intimated that Congress could reasonably mandate warrantless inspections in an industry with a long history of close government regulation.\(^7\) Two years later, the Court articulated

\(^2\) Camara v. Municipal Court, 387 U.S. 523, 539 (1967).
\(^3\) See v. City of Seattle, 387 U.S. 541, 545 (1967). The exception is implicit in the language that "administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." *Id.* (emphasis added). See United States v. Thriftmart, Inc., 429 F.2d 1006, 1010 (9th Cir.), cert. denied, 400 U.S. 926 (1970); United States v. Hammond Milling Co., 413 F.2d 608, 610-11 (5th Cir. 1969), cert. denied, 396 U.S. 1002 (1970). See also United States v. Litvin, 353 F. Supp. 1333, 1338 (D.D.C. 1973); Rothstein & Rothstein, *supra* note 13, at 353-58.
\(^4\) See v. City of Seattle, 387 U.S. 541, 545 (1967). It should be noted that where the public has as much access to the premises as the inspector, the inspection is not actually a search. See United States v. Various Gambling Devices, 478 F.2d 1194, 1200 (5th Cir. 1973); United States v. Golden, 413 F.2d 1010, 1011 (4th Cir. 1969); Rothstein & Rothstein, *supra* note 13, at 366-70.
\(^5\) See v. City of Seattle, 387 U.S. 541, 545 (1967). The Court declined to rule on inspections required prior to operating a licensed business or marketing a product that is part of a licensing program. "Any constitutional challenge to such programs," the Court stated, "can only be resolved . . . on a case-by-case basis under the general Fourth Amendment standard of reasonableness." *Id.* By 1970, however, the Court had implicitly sanctioned a broader licensing exception, see *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970), and has since done so explicitly. See Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973); United States v. Biswell, 406 U.S. 311, 316-17 (1972); Rothstein & Rothstein, *supra* note 13, at 358-66.
\(^7\) In *Colonnade*, the petitioner ran a catering establishment that was licensed to serve alcoholic beverages. Internal Revenue Service agents attempted to inspect petitioner's locked storeroom for a possible violation of the federal excise tax law, but were refused entry because they had no search warrant. The agents subsequently broke the lock on the storeroom, entered, and seized a number of bottles of liquor that had allegedly been refilled in violation of federal law. *Id.* at 72-73.

The Supreme Court noted that regulation of the liquor industry dated back to seventeenth century England and was carried over to the American Colonies. Under those early liquor laws, federal officers were given broad powers to inspect the premises of distillers and importers without a warrant. *Id.* at 75.
that notion in *United States v. Biswell*,29 plainly carving out an exception to the warrant requirement in administrative inspections for industries that are "pervasively regulated."30

In *Biswell*, the Court found the exception necessary for several reasons. First, inspection was a crucial part of a regulatory scheme that furthered urgent federal interests.31 Second, since effective enforcement could not be accomplished without frequent and unannounced inspections, a warrant requirement was at odds with Congress' purpose in regulating the specific activity.32 Finally, inspections for compliance with the regulatory scheme "pose[d] only limited threats to the [businessman's] justifiable expectations of privacy," because an individual who chooses to engage in a licensed and pervasively regulated business does so with the knowledge that the regulated aspects of the business will be subject to effective inspection.33 The Court thus found warrantless inspections to be

The Court recognized that, with respect to an industry with such a long history of "close supervision and inspection, . . . Congress has broad authority to fashion standards of reasonableness for searches and seizures." Id. at 77. The Court found, however, that the standard selected by Congress under the statute in question did not allow forcible entries without a warrant, and that the seized evidence must therefore be suppressed. Id.


30. Id. at 316. In *Biswell*, a Federal Treasury agent searched respondent's locked gun storeroom and seized unlicensed firearms found therein. The search was made without a warrant as part of an inspection procedure authorized by the Gun Control Act of 1968, 18 U.S.C. § 923(g) (1976). Respondent, a pawnshop operator who had a federal license to deal in sporting weapons, allowed the search on the basis of the statute's purported authority. See 406 U.S. at 311-12. The Court held that 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." Id. at 317.

31. 406 U.S. at 315-16. The Court stated that "close scrutiny of [firearms] traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders." Id. at 315. Similarly, the Court in *Colonnade* recognized that "[i]n the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment." 397 U.S. at 76 (quoting *Boyd v. United States*, 116 U.S. 616, 624 (1886)).

32. *See* 406 U.S. at 316. The Court distinguished *See v. City of Seattle*, noting that in *See* the conditions that constituted violations of the building code were "relatively difficult to conceal or to correct in a short time," and that therefore the delay in time required to obtain a warrant when entry was denied would not threaten the effectiveness of the inspection system. Id. In *Biswell*, however, the objects being searched for were easy to move or conceal in a short period of time. The delay attendant to a search warrant requirement could result in removal or concealment of the illegal objects, thereby frustrating the purpose of the regulatory scheme. Id.

33. Id. *See also* *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973).
“reasonable official conduct under the Fourth Amendment.”

In subsequent cases many lower courts, hampered by unclear guidelines, expanded the Colonnade-Biswell exception in ways that threatened to swallow up the rule of Camara and See. But in Marshall v. Barlow’s, Inc., the Supreme Court ended expansion of the exception. In Barlow’s, the Court held that inspections under the Occupational Safety and Health Act (OSHA) without a warrant or its equivalent violate the fourth amendment. The Court first reiterated the governing principle of Camara and See, that “warrantless searches are generally unreasonable.” Next, it analyzed the recognized exceptions to the warrant requirement. The Court narrowly

34. 406 U.S. at 316.
35. Apparently, lower courts initially ignored the Supreme Court’s mandate in Camara and See that a warrant was required for all but a few exceptional, carefully defined situations. The consent exception to the warrant requirement, with a standard considerably more lax than that of the criminal law, was often used by lower courts to find that an individual had waived his fourth amendment rights. See United States v. Thriftimart, Inc., 429 F.2d 1006, 1010 (9th Cir.), cert. denied, 400 U.S. 926 (1970) (casual consent to Food and Drug Administration inspectors’ request for permission to inspect held valid as knowing and voluntary even though inspectors did not warn defendant warehouse managers of their right to insist on a warrant); United States v. Hammond Milling Co., 413 F.2d 608, 610-11 (5th Cir.), cert. denied, 396 U.S. 1002 (1969) (consent to a routine Food and Drug Administration inspection held valid where the company vice-president did not refuse inspection, even though he did not expressly consent to it); United States v. Litvin, 353 F. Supp. 1333, 1338 (D.D.C. 1973) (warrantless search of warehouse pursuant to the Food, Drug, and Cosmetic Act held valid due to voluntary consent of the warehouseman where the evidence showed there was no official intimidation and that inspectors regularly conducted monthly inspections of the premises); Rothstein & Rothstein, supra note 13, at 335-58.

The licensing exception to the warrant requirement was similarly expanded until it appeared that the exception would become the rule. See United States ex rel. Terracino v. Montanye, 493 F.2d 682, 684-85 (2d Cir. 1974) (warrantless search and seizure of pharmacist’s records pursuant to a state law limiting search to particular items subject to heavy regulation held constitutional, because “the warrant, which would be issued for the asking, would simply track the statute and would give the person who was the object of the search nothing more than he already had”); Brennan v. Buckeye Indus., Inc., 374 F. Supp. 1350, 1354 (S.D. Ga. 1974) (licensing exception expanded to include inspections pursuant to OSHA); Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45, 51-52 (S.D. Ohio 1973) (licensing exception applied to a pervasively regulated but unlicensed industry); Rothstein & Rothstein, supra note 12, at 358-66.

38. 436 U.S. at 325. It has been suggested that the existing OSHA provision for warrantless searches could be functionally equivalent to a warrant. See Comment, supra note 19, at 240-41. The Barlow’s Court mentioned but did not rule on the issue. See 436 U.S. at 325 n.23.
39. 436 U.S. at 312. The Court later noted that this is a “constitutional requirement.” Id. at 324.
construed the *Colonnade-Biswell* exception\(^{40}\) and concluded that it could not be applied to OSHA.\(^{41}\) The Court rejected the argument that effective enforcement of OSHA would be impaired by a warrant requirement, reasoning that the advantages of surprise could be preserved even if warrants were required,\(^{42}\) and that the burdens of obtaining a warrant would not be so great as to lessen the effectiveness of OSHA inspections.\(^{43}\)

The *Barlow's* Court rejected the appellant's argument that requiring a warrant for OSHA inspections would, as a practical matter, invalidate the warrantless search provisions of other regulatory statutes.\(^{44}\) The Court explicitly limited its holding to "the facts and law concerned with OSHA" and left the issue of the constitutionality of other administrative inspection schemes to resolution on a case-by-case basis.\(^{45}\) In future cases, "[t]he reasonableness of a warrantless search [will] de-

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\(^{40}\) *Id.* at 313 ("The clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception.").

\(^{41}\) *Id.* at 313-14. The Court rejected the argument that businesses subject to OSHA are pervasively regulated. "[Nothing] but the most fictional sense of voluntary consent to later searches [can] be found in the single fact that one conducts a business affecting interstate commerce . . . ." *Id.* at 314.

\(^{42}\) *Id.* at 316-20. The Court first asserted that most businessmen would consent to inspection without warrant. The Court noted, however, that *Barlow's* might have an impact on whether owners choose to resist such searches. Next, the Court reasoned that although there were indications that surprise searches were contemplated, there was also a regulation providing that upon refusal to allow an inspector a right of entry, the inspector must report the reasons for the refusal to his superior, who must take appropriate action, "including compulsory process, if necessary." *Id.* at 317 (quoting 29 C.F.R. § 1903.4 (1977) (current version at 29 C.F.R. § 1903.4(a) (1979))). There was no showing that the Act was any less effective as a result of the time lapse that ensued when a businessman refused the initial requested entry and the inspector had to obtain the necessary process. *See* 436 U.S. at 317-19. Finally, the Court offered an alternative suggestion: if refused initial entry, the inspector could obtain an *ex parte* warrant and reappear at some later date without further notice to the establishment being inspected. *Id.* at 319-20.

\(^{43}\) 436 U.S. at 320-21. The Court noted that the probable cause required to obtain a warrant is not measured by the strict standard of criminal law. Rather, the standard is that delineated in *Camara*, requiring only that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Id.* at 320 (quoting Camara v. Municipal Court, 387 U.S. 523, 538 (1967)). In the context of OSHA inspections, this administrative probable cause standard would be satisfied by a showing that a specific business has been chosen for inspection "on the basis of a general administrative plan for the enforcement of [OSHA] derived from neutral sources." 436 U.S. at 321. The Court expressed doubt "that the consumption of enforcement energies in the obtaining of such warrants [would] exceed manageable proportions." *Id.*

\(^{44}\) 436 U.S. at 321.

\(^{45}\) *Id.* at 321-22.
pend upon the specific enforcement needs and privacy guarantees of each statute."

Stoudt's Ferry\textsuperscript{46} is the first appellate court decision to consider, in light of the Barlow's decision, the constitutionality of the Mine Safety Act's warrantless search provision.\textsuperscript{47} In Stoudt's Ferry, the Third Circuit found that there were sufficient differences between the Mine Safety Act and OSHA to support the constitutionality of warrantless searches under the Mine Safety Act.\textsuperscript{48} The court first drew distinctions between the statutes by focusing on the types of businesses affected: while OSHA applies to a wide range of enterprises affecting interstate commerce,\textsuperscript{49} the Mine Safety Act covers only a single, pervasively regulated industry that has long been characterized as very dangerous.\textsuperscript{50} Further distinctions were made with respect to the scope of inspection authorized by each statute: while OSHA authorizes entry for inspection into any area where work is being performed,\textsuperscript{51} the Mine Safety Act limits the purposes for which inspectors may enter,\textsuperscript{52} limits searches for which no advance notice can be given,\textsuperscript{53} and provides an opportunity for immediate judicial review.\textsuperscript{54} The court thus found

\begin{footnotesize}
\begin{itemize}
  \item[46] Id. at 321.
  \item[49] See 602 F.2d at 593.
  \item[50] Id. at 593-94.
  \item[51] 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—
    \begin{enumerate}
      \item 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
      \item 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.
    \end{enumerate}
  \item[52] 602 F.2d at 594. See note 1 supra.
  \item[53] 602 F.2d at 594.
  \item[54] Id. Under the Mine Safety Act, the Secretary of Labor may seek judicial relief in district court if an inspector is denied entry. See 30 U.S.C. § 818(a)
\end{itemize}
\end{footnotesize}
that the inspection provision of the Mine Safety Act was more narrowly drawn than that of OSHA, and that there was "consequently less likelihood of the abuses of 'unbridled discretion of executive and administrative officers' which Barlow's found objectionable." Finally, although the Barlow's Court found that surprise inspections were not essential to the effective enforcement of OSHA, the Stoudt's Ferry court was "not prepared to say that the legislative judgment as to their necessity in the context of mine safety [was] misplaced." These distinctions persuaded the court that the Mine Safety Act's enforcement scheme justified warrantless inspections and that the Act's restrictions on search discretion satisfied Barlow's reasonableness standard.

The court's reasoning in Stoudt's Ferry is vague and misleading. The court paid too little attention to fourth amendment rationale and relied too heavily on mechanically drawn distinctions from Barlow's. It reached the correct result in finding the statute "reasonable," but a close examination of the court's rationale indicates that some of the distinctions stressed do not, in fact, support the decision.

The Third Circuit panel made invalid distinctions concerning the privacy guarantees of the Mine Safety Act, guarantees like those relied on by the Barlow's Court in determining the reasonableness of a warrantless search. These distinctions formed the basis for the court's statement that there is less likelihood that the "abuses of 'unbridled discretion'" found objectionable in Barlow's will occur under the more narrowly drawn Mine Safety Act provision. A careful analysis of these differences, however, indicates that they are merely facial distinctions that fail to justify a different legal result.

The court first distinguished the Mine Safety Act from

(Supp. II 1978); note 6 supra. Note, however, that although OSHA does not provide for judicial review in the body of the statute, regulations promulgated pursuant to it do permit such relief. See 29 C.F.R. § 1903.4 (1979).


56. See 436 U.S. at 316; note 42 supra and accompanying text.

57. 602 F.2d at 594.

58. The court interpreted the Barlow's test as follows: "[O]nly if [a statute] comes within a carefully defined exception may [it] validly authorize a search without a warrant . . . Otherwise, the reasonableness of a warrantless administrative search will depend upon the specific enforcement needs and privacy guarantees of the particular statute under review." Id. at 593.

59. See 436 U.S. at 321.

OSHA by noting that the Mine Safety Act's inspection provision "places limitations upon the purposes for which searches may be made." On a superficial level, the distinction seems valid. OSHA inspectors are authorized to enter and inspect "in order to carry out the purposes of [the Act]," and the list of statutory purposes is quite extensive. In contrast, the Mine Safety Act permits inspections for only four specific purposes: to gather or disseminate information relating to health and safety conditions; to gather information about mandatory health and safety standards; to determine whether imminent danger exists; and to determine whether there is compliance with the mandatory standards of the Act. Although the Mine Safety Act allows searches only for these four purposes, these purposes are, in the aggregate, broad enough to encompass any search that would carry out the purposes of OSHA. The Mine Safety Act is thus no more narrow than OSHA in terms of the purposes for which inspections may be conducted.

The second distinction made by the Stoudt's Ferry court was that the Mine Safety Act limits those searches for which no advance notice may be given, while OSHA does not. The court, however, misconstrued the inspection provision of the Mine Safety Act. The statute mandates that no advance notice be given when an inspection is conducted either to determine whether imminent danger exists or to determine whether there is compliance with the statute. When an inspection is conducted to gather or disseminate information, the statute pro-

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61. 602 F.2d at 594.
63. Id. § 651. The enumerated purposes and policies of OSHA include: encouraging the reduction of safety hazards, id. § 651(b)(1); "authorizing the Secretary of Labor to set . . . safety and health standards," id. § 651(b)(3); "providing for research in the field of occupational safety and health," id. § 651(b)(5); "exploring ways to discover latent diseases," id. § 651(b)(6); providing medical criteria to ensure the good health of employees, id. § 651(b)(7); "providing an effective enforcement program," id. § 651(b)(10); "providing for appropriate reporting procedures," id. § 651(b)(12); and "encouraging joint labor-management efforts to reduce injuries and disease arising out of employment," id. § 651(b)(13).
64. 30 U.S.C. § 813(a) (Supp. II 1978), quoted in note 1 supra.
65. For example, one purpose of the Mine Safety Act, "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," could conceivably encompass a number of OSHA's purposes. Compare 30 U.S.C. § 813(a) (Supp. II 1978) (emphasis added) with 29 U.S.C. § 651(b)(1), (4), (5), (6), (7), (13) (1976).
66. 602 F.2d at 594.
vides that the Secretary "may give advance notice." The statute thus does not restrict the types of searches for which no advance notice is required, but merely emphasizes the situations in which advance notice is proscribed, and sets out the situations in which the inspector is authorized to give advance notice if he so desires. Similarly, OSHA prohibits advance notice of any inspection unless authorization is obtained from the Secretary. Because there is no significant distinction between the advance notice provisions of the two statutes, the court's reliance on this distinction was misplaced.

The third distinction made in Stoudt's Ferry was that the search provision of the Mine Safety Act is "more narrowly drawn" than OSHA's inspection provision. Presumably the court was referring to the scope of search authorized by the statutes. Again, this distinction does not withstand close examination. OSHA's search provision specifically creates a broad right of entry into virtually any employee work area to inspect almost anything found there. The Mine Safety Act, however, is equally broad; the regulation of health and safety standards in the mining industry necessitates access to the entire active work area of the mine. The court's emphasis on this distinction is therefore misleading; the scope of search authorized under either statute is quite broad.

The fourth distinction made by the court was that the provision in the Mine Safety Act for immediate judicial review when entry is refused affords greater protection to the business's privacy expectations than does OSHA. Although the court found this distinction "significant," examination of

68. Id. (emphasis added).
69. 29 U.S.C. § 666(f) (1976). Both statutes prohibit advance notice without authorization. The Mine Safety Act, however, appears to be more narrow than OSHA because in the Mine Safety Act there are two specific situations in which advance notice can never be authorized. See 30 U.S.C. § 813(a) (Supp. II 1978). Under OSHA, advance notice can be authorized in any circumstances deemed appropriate. See 29 C.F.R. § 1903.6(a) (1979). For all practical purposes, however, this difference is negligible.
70. 602 F.2d at 594.
71. See note 51 supra and accompanying text.
72. See Youghiohgheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45, 51 (S.D. Ohio 1973) (to enforce the Act's regulations, the scope of inspection must be "coterminous with the operation of the mine"). But cf. United States v. Consolidation Coal Co., 560 F.2d 214, 217 (6th Cir. 1977) (warrant required to inspect "offices on the mining property" or like areas where the mine operator expects privacy), vacated and remanded, 436 U.S. 942, judgment reinstated, 579 F.2d 1011 (6th Cir. 1978).
73. 602 F.2d at 594 (citing 30 U.S.C. § 818).
74. 602 F.2d at 594.
the two statutes reveals that their review provisions are practically indistinguishable. OSHA regulations state that when an inspector is refused entry, he must report the reason for the refusal to his superiors, who must "promptly take appropriate action, including compulsory process, if necessary."\(^7\) If the businessman continues to refuse entry, OSHA administrators must resort to judicial process to gain entry. Both statutes thus require the intervention of a judicial officer when an inspector cannot gain entry to inspect. However, the protection this requirement affords the privacy expectations of the businessman is negligible. Because the Mine Safety Act's inspection provision was constitutionally upheld,\(^7\) the mine owner's only meritorious claim in an injunction proceeding under the Act would be that the attempted inspection is outside the scope of the statute.\(^7\) Such an attack is likely to prevail only if the operation being inspected does not fall within the Act's definition of a mine\(^7\) or if blatant harassment is involved.\(^7\) The same consequences inhere in any compulsory action taken under OSHA. Therefore, the court's distinction is misleading. The two statutes provide essentially identical relief when an inspector is refused entry to work premises; however, such relief provides only minimal protection of privacy expectations.

75. 29 C.F.R. § 1903.4(a) (1979). "Compulsory process" is defined as "the institution of any appropriate action, including ex parte application for an inspection warrant or its equivalent." Id. § 1903.4(d).
76. See note 48 supra and accompanying text.
77. The Stoudt's Ferry court assumes that the employer would be able to claim more, stating that in the injunction proceeding "[a]ny unusual privacy expectations may be fully explored . . . and a reasonable accommodation may be achieved." 602 F.2d at 594. But since three circuit courts have now upheld the inspection provision of the Mine Safety Act, see note 48 supra and accompanying text, a mine owner probably could not successfully argue that warrantless searches under the Act are unconstitutional.
78. Given the Act's expansive definition of a mine, see note 2 supra, the attack would likely fail.
79. This second avenue of attack would probably be a claim of denial of equal protection because of harassment or selective enforcement. However, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." Oyler v. Boles, 368 U.S. 448, 456 (1962). To establish a violation of equal protection because of selective enforcement or selective prosecution, the mine owner bears the burden of establishing (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974). See also United States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978).
It is apparent that these four distinctions do not adequately support the court's decision. Nonetheless, the four remaining distinctions drawn by the court, relating to the nature of the industry and the importance of warrantless searches to enforcement of the regulatory scheme of the Act, provide a firm basis for the decision. Unfortunately, the court's vague analysis not only obscures the significance of these distinctions, but also fails to explain how they relate to the Colonnade-Biswell exception to the fourth amendment's warrant requirement.80

First, the court alluded several times81 to the fact that although the Mine Safety Act applies only to a single industry,82 OSHA applies to every business and industry that affects interstate commerce.83 It is likely that this overwhelming coverage was a major factor in the Supreme Court's refusal to validate warrantless inspections in Barlow's. OSHA applies to more than six million businesses and industries.84 "Approval of warrantless inspections in such an 'across the board' manner would have eviscerated [the rule established in Camara and See, and] would have turned the exception into the rule."85 Thus, the Mine Safety Act is more constrained than OSHA simply because it applies to just one industry.

Second, the Third Circuit noted that the Mine Safety Act regulates an industry that has a "history of [pervasive] governmental regulation."86 This distinction is well supported by both the legislative history of the Mine Safety Act87 and case law.88 Federal regulation of the mining industry can be traced back to 1910,89 and state regulation began even earlier.90 In contrast,

80. See notes 27-30 supra and accompanying text.
81. See 602 F.2d at 593-94.
83. OSHA was promulgated as an "exercise of [Congress'] powers to regulate commerce among the several States and with foreign nations." 29 U.S.C. § 651(b) (1976).
86. 602 F.2d at 593.
90. See Brief for the Appellee at 25, Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979) (citing 3 ROCKY MOUNTAIN MINERAL LAW FOUN-
OSHA applies to every industry involved in interstate commerce; it can hardly be claimed that all such industries are pervasively regulated. The Mine Safety Act is thus distinguishable from OSHA in that it applies to a pervasively regulated industry.91

Third, the court found that the Mine Safety Act "is aimed at an industry with an acknowledged history of serious accidents."92 This finding is documented in both the legislative history of the Act93 and case law.94 The extremely hazardous nature of mining has led to the enactment of increasingly comprehensive and punitive laws designed to reduce the dangers present in the occupation.95 No similar claim can be made about the majority of industries regulated under OSHA. Clearly, not every industry affecting interstate commerce is extremely dangerous.

Finally, the count addressed the need for surprise inspections under the Mine Safety Act. In Barlow's, the Court rejected the claim that a warrant requirement would impair effective enforcement of OSHA.96 The Stoudt's Ferry court noted the Barlow's rejection but was reluctant to make a similar judgment with respect to mine safety inspections.97 The legislative history of the Mine Safety Act, unlike that of OSHA,

92. 602 F.2d at 594.
93. See S. REP. No. 181, supra note 2, at 1-4, reprinted in [1977] U.S. CODE CONG. & AD. NEWS at 3401-04. At the time of the Senate Report, statistics showed that "every working day of the year, at least one miner is killed and sixty-six miners suffer disabling injuries in our nation's mines." Id. at 4, reprinted in [1977] U.S. CODE CONG. & AD. NEWS at 3404.
94. See Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45, 52 n.7 (S.D. Ohio 1973) (mining industry characterized as "nearly inherently dangerous").
96. 436 U.S. at 316. See notes 42-43 supra and accompanying text.
97. 602 F.2d at 594.
specifically emphasized the need for unannounced inspections. Congress was concerned with "the notorious ease with which many safety or health hazards [could] be concealed if advance warning of inspection [was] obtained." Because such hazards can be temporarily remedied, a warrant requirement could impair effective enforcement of the Mine Safety Act. A mine owner could refuse an inspector entry until a warrant was obtained in order to take cosmetic safety steps before the inspector's return. Although the Barlow's Court found that such delays had not impaired the effectiveness of OSHA inspections, there is a strong possibility that such delays could frustrate inspection under the Mine Safety Act and that "a warrant requirement would seriously undercut [the] Act's objectives." Thus, there is a more urgent need for surprise inspections to effectuate the purpose of the regulatory scheme under the Mine Safety Act than under OSHA.


100. Of course, an inspector could eliminate this problem by obtaining a warrant prior to every search he makes. The Supreme Court indicated, however, that it does not intend such a procedure to be followed; rather, it wants an inspector to obtain a warrant only after entry has been refused. See Camara v. Municipal Court, 387 U.S. 523, 539-40 (1967). See also Marshall v. Barlow's, Inc., 436 U.S. 307, 319-20 (1978) (Court suggests using ex parte warrant procedures only after entry has been refused).


102. Similar concerns were urged in Barlow's with respect to OSHA, but were rejected by the Supreme Court. See 436 U.S. at 316-20; note 42 supra and accompanying text. Several factors, however, make the argument a stronger one in the context of the Mine Safety Act. First, the risk that was thought to follow in Barlow's was that the time delay would allow for the correction of violations. See 436 U.S. at 316. Under the Mine Safety Act, however, the risk is that hazardous conditions would be temporarily disguised, thus avoiding not only detection but also correction. Since correction of safety violations is the goal of the statute, the delay attendant to a search warrant requirement could frustrate the purpose of the Mine Safety Act.

Second, the nature and history of the mining industry militate in favor of surprise inspections. Unlike all businesses regulated by OSHA, the mining industry has long been pervasively regulated and is highly dangerous. See notes 86-95 supra and accompanying text. Regulatory efforts prior to 1977, although intensive, failed to prevent the numerous tragic deaths and injuries that occurred in the mining industry. See S. Rep. No. 181, supra note 2, at 4, reprinted in [1977] U.S. Code Cong. & Ad. News at 3404. The need for more comprehensive and punitive legislation to combat the situation was a major factor motivating Congress to require that no advance notice of inspection be given. Id. at 27, reprinted in [1977] U.S. Code Cong. & Ad. News at 3427.

Third, while the legislative history of the Mine Safety Act contains a clear
Although the *Stoudt's Ferry* court did not explain how the decision affects the *Colonnade-Biswell* exception, it is clear that the court has, in effect, broadened that exception. Both *Colonnade* and *Biswell* dealt with inspection schemes that were “carefully limited in time, place, and scope.” By contrast, the inspection provision of the Mine Safety Act is quite broad; it is not limited in time or scope and is only slightly limited in place. The court therefore seems to have relaxed the requirement that the search be narrowly circumscribed.

Although the court's decision to uphold the statute required it to broaden one aspect of the *Colonnade-Biswell* exception, its decision is justifiable because the overriding congressional mandate for unannounced inspections, see *id.*, OSHA contains only vague indications that surprise searches were contemplated. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 317 (1978); 29 U.S.C. § 666(f) (1976); 29 C.F.R. § 1903.6 (1979). Moreover, because Congress twice considered the need for unannounced inspections of mines, see note 98 *supra* and accompanying text, Congress' mandate for such inspections is entitled to much greater deference than are the implicit statutory and administrative references contained in OSHA.

Finally, the Court indicated in *Biswell* that when a warrant requirement would frustrate regulatory inspection of a pervasively regulated industry because the objects of inspection could be easily concealed or moved, warrantless inspections should be considered reasonable conduct under the fourth amendment. See *United States v. Biswell*, 406 U.S. 311, 316 (1972).

103. For a discussion of the exception, see notes 27-34 *supra* and accompanying text.


The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

The provision is limited in time and scope. Further, its particularity in describing the objects of inspection serves to limit the places open to search. In *Biswell*, the applicable statutory provision is similarly constrained:

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

105. See notes 61-72 *supra* and accompanying text.

106. See note 1 *supra*.

107. See note 72 *supra* and accompanying text.
requirements of the exception were satisfied. The mining industry is pervasively regulated. The hazardous nature of the industry, evidenced by the high injury and death rate, demonstrates that regulatory inspections are necessary in order to further an urgent federal interest in mine safety. The ease with which hazards can be disguised demonstrates that warrantless inspections are necessary to ensure compliance with the Act. Because the mining industry is so thoroughly regulated, the mandated inspections "pose only limited threats to the [businessman's] justifiable expectations of privacy." Moreover, the Act regulates only one industry; there is little danger that expansion of the exception will destroy the fundamental principles of Camara and See.

In upholding the statute, the court, in effect, held that it is always reasonable to search in the mining industry. This holding could have broad significance in the developing law of administrative searches. It demonstrates that Congress may confer on administrative officers a virtually boundless right to search in industries that are pervasively regulated and acutely dangerous. Moreover, it indicates that, despite judicial references to the contrary, the current application of the Colonnade-Biswell exception to the fourth amendment's warrant requirement is triggered not by limitations on the statutorily authorized right to search, but by the history, nature, and size of a particular industry.

108. See notes 92-95 supra and accompanying text.
110. See Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45, 51-52 (S.D. Ohio 1973). In Youghiogheny, the district court stated that "Congress has, in effect, pursuant to its police powers, substituted a legislative pronouncement for case by case judicial determinations." Id. at 51. It has, through [enactment of the Federal Coal Mine Health and Safety Act of 1969], essentially determined that probable cause or exigent circumstances exist in the coal industry so as to make warrantless searching of its mines reasonable. Congress has further determined that the conditions that prevail in many mines endanger or potentially endanger the health and safety of the miners who work in this industry. While neither Congress nor public opinion are free to suspend constitutional protections by either statutory enactment or popular referendums, . . . Congress may, through the valid exercise of its Commerce Clause powers, attempt to delineate and define the limits of these protections. In the Fourth Amendment area, where the essence of the right hinges on a concept of reasonableness, the Congressional definition is entitled to great weight.

Id. at 51-52 (citations omitted).