Warrantless Searches under Federal Environmental Statutes

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Many federal environmental statutes contain provisions that authorize administrative inspections of commercial property to ensure that statutory requirements are being met. A constitutional issue raised by these provisions is whether the federal agency seeking to conduct an inspection must first ask a court to issue an administrative inspection warrant. The resolution of this issue depends on the constitutionality of a warrantless search under the statute in question.

The Supreme Court has held that the protections of the Fourth Amendment against unreasonable searches extend to commercial property as well as to private residences. Since the general rule deems warrantless searches unreasonable under the Fourth Amendment, a warrantless administrative inspection conducted without the permission of the property owner must fall within an exception to this rule to be constitutional. In the context of searches of commercial property, the courts have developed an exception to the warrant requirement: a warrantless search is permissible if the business establishment is part of an industry that is "pervasively regulated" or has been "long subject to close supervision and inspection." The rationale for this exception argues that a long tradition of close federal scrutiny of an industry precludes any reasonable expectation of privacy; in essence, a proprietor is presumed to have consented to substantial regulation and, therefore, warrantless administrative inspections, by entering the business.

Within the past three years, the Supreme Court has decided two cases (the most recent, last June) involving the applicability of this exception to warrantless searches authorized by particular statutes. In these cases, the Court has further developed the standards for determining whether a warrantless search of commercial property falls within an exception to the warrant requirement, and to some extent, has shifted the analytical focus away from the "closely regulated industry" exception toward a concern with balancing the enforcement needs of the agency and the privacy protections afforded by the statute. This article discusses these evolving standards and their implications for the constitutionality of warrantless searches authorized by the inspection provisions of federal environmental statutes. In addition, agency actions to ensure the constitutionality of inspections are examined.

FOURTH AMENDMENT STANDARDS FOR STATUTORY INSPECTIONS

In *Marshall v. Barlow's Co.*,[1] the Supreme Court considered the constitutionality of Section 8(a) of the Occupational Safety and Health Act (OSHA), which authorized the inspection of the working areas of virtually any establishment to ensure that employee working conditions met the statutory requirements. The case arose when the owner of an electrical and plumbing installation business refused to allow an OSHA inspector into employee areas without a

search warrant. Although the statute required an inspector to present appropriate credentials to the owner and to conduct the inspection "in a reasonable manner," the Court found these requirements insufficient to meet Fourth Amendment standards and held Section 8(a) of the act unconstitutional insofar as it purported to authorize inspections without a warrant.

In issuing its ruling, the Court distinguished prior cases that had fallen into its "closely regulated industry" exception, emphasizing that "the degree of federal involvement in employee working circumstances has never been of the order of specificity and pervasiveness that OSHA mandates." In addition, the Court was unconvinced by arguments that warrantless searches were required for effective enforcement of the statute. The Court noted that most owners of businesses voluntarily complied with inspections, and suggested that OSHA inspectors might obtain ex parte warrants and reappear at the premises without further notice if entry were refused. The Court also rejected the argument that imposing a warrant requirement would create a substantial administrative burden.

But the Court was careful to limit its holding in *Barlow's* to Section 8(a) of OSHA, stressing that "the reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute." Thus, the Court appeared to outline a balancing test, in which a federal agency's requirements for effective enforcement of a statute would be weighed against a proprietor's interests in privacy.[2]

In the more recent case, *Donovan v. Dewey*,[3] the Court considered a statutory inspection provision that satisfied the *Barlow's* test. The case involved a warrantless search of a stone quarry conducted pursuant to Section 103(a) of the Federal Mine Safety and Health Act of 1977. The Court upheld the constitutionality of the warrantless search, citing as its rationale the congressional determination of the enforcement needs of the agency and the statutory protections afforded to privacy interests, rather than relying upon any long tradition of federal regulation in the mining industry.

In considering the enforcement needs of the agency, the Court deferred to the congressional finding that a warrant requirement would significantly frustrate effective enforcement of the Federal Mine Safety and Health Act. This legislative determination was evident both in the language of the statute itself, which provided that "no advance notice of inspection shall be provided to any person," and in the legislative history underlying the act.

The Court next examined the protections of privacy interests afforded by the statute and found three important statutory provisions. First, the act required the inspection of *all* mines, and specifically defined the frequency of inspection. Second, the standards with which a mine operator was required to comply were specified either in the statute or in the implementing regulations, and the act itself required the Secretary of Labor to inform mine operators of all standards proposed pursuant to the act. Thus, the Court determined that the act established "a predictable and guided federal regulatory presence," which would check the unbridled discretion of government officials. Finally, the act provided a mechanism for accommodating any "special privacy concerns" of mine operators by requiring the Secretary, if refused entry to a mining facility, to file a civil action in federal court to obtain an injunction against future refusals. The Court construed this proceeding as furnishing mine operators with a forum in which to demonstrate that a particular search was outside the inspection authority or to seek an order accommodating the mine owner's unique privacy interests. Given these provisions, the Court believed it unlikely that a warrant requirement would provide additional protection.

The Court's brief discussion of the "closely regulated industry" exception evidenced a concern that an exception to the warrant requirement based primarily on the duration of a particular regulatory scheme could frustrate the effective regulation of new and emerging industries that pose potential safety and health problems. In refusing to find that the relative recentness of federal regulation of stone quarries necessitated the imposition of a warrant requirement, the Court stated that "it is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment."

Thus, while the "closely regulated industry" exception to the warrant requirement appears intact after *Dewey*, it is clear that both the enforcement needs of the agency and the protections provided for privacy interests by individual statutory inspection terms are also central to any analysis of their constitutionality. An examination of the inspection provisions of federal environmental statutes in terms of these factors, therefore, should prove helpful in determining whether warrantless searches are constitutional under these statutes.

THE CONSTITUTIONALITY OF ENVIRONMENTAL INSPECTION TERMS

The two statutory inspection provisions examined by the Supreme Court in *Barlow's* and *Dewey* represent opposite ends of a broad spectrum. The OSHA inspection provision

evaluated in *Barlow's* authorized warrantless searches of virtually any workplace to obtain information on any condition pertinent to employee working situations. Beyond the vague requirements that the inspection be conducted "at reasonable times" and "within reasonable limits and in a reasonable manner," the statute placed no limits on the discretion of the official conducting inspections. In contrast, the inspection terms of the Federal Mine Safety and Health Act provided a highly structured regulatory scheme. All mine operators were on notice that inspections would be conducted, and possessed information on the frequency of, and the standards to be applied, during those inspections.

The inspection provisions of federal environmental statutes generally fall somewhere between these two extremes. While no environmental statute establishes as comprehensive a standard for the administration of inspections as did the Federal Mine Safety and Health Act, most environmental statutes provide for more limited inspections than those authorized under OSHA.

For example, the Clean Water Act and the Clean Air Act authorize entry onto the premises of any establishment required to keep records under those statutes. The Resource Conservation and Recovery Act (RCRA) and the Federal Hazardous Substances Act (FHSA) authorize entry onto the premises of any establishment involved in the production, storage, or treatment of hazardous wastes; similar provisions in the Toxic Substances Control Act (TSCA) authorize entry onto the premises of any establishment in which chemical substances are manufactured, processed, stored, or held. As was the case with OSHA, these provisions open up the premises of many different types of industries to federal inspection. Unlike the OSHA provision, however, the provisions of the Clean Water Act and the Clean Air Act provide some protection of privacy interests by placing limits on the materials to be inspected. Under both statutes, inspectors are limited to examining records required under the statute, monitoring equipment, and emissions or effluents. Thus, while many industries are federally regulated under these statutes, only a relatively discrete corner of each is subject to inspection.

Some restrictions on the scope of searches are also evident in the statutory provisions of RCRA and TSCA, although the areas that may be inspected are somewhat broader. RCRA authorizes the inspection and sampling of hazardous wastes. TSCA authorizes inspections of all things bearing on whether the requirements of the statute have been met, but exempts financial, sales, pricing, personnel, or research data, unless the nature and extent of such data are specifically described in the notice of inspection. A similarly broad provision can be found in FHSA, which authorizes the inspection of "all pertinent equipment, finished and unfinished materials, and labeling therein." The less restricted scope of searches authorized by these provisions may make the constitutionality of warrantless inspections more questionable, since the statutes provide fewer protections of the regulated business's privacy interests.

On a relative scale, statutes such as the Clean Air Act, the Clean Water Act, TSCA, and RCRA are recent enactments; they represent attempts to regulate the environmental safety problems of the 1960s and 1970s, rather than a continuation of a long tradition of federal regulation. Since the Supreme Court appears to have deemphasized the "closely regulated industry" exception by noting that the duration of federal regulation alone is not determinative, the recent origin of such statutes would not necessarily preclude the constitutionality of warrantless inspections conducted under them.

Other federal environmental statutes, such as the Federal Food, Drug and Cosmetic Act (FDCA) and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), apply to particular industries, rather than a broad range of businesses, and continue a long tradition of federal regulation of these areas. Under the "closely regulated industry" exception, these facts weigh in favor of the constitutionality of warrantless inspections conducted under the statutes. However, the scope of authorized searches, and thus the protection of privacy interests, vary. For example, FDCA authorizes the inspection of "all pertinent equipment, finished and unfinished materials; containers, and labeling therein;" while FIFRA limits the scope of a search to "inspecting and obtaining samples of any pesticides or devices, packaged, and released for shipment, and samples of any containers or labeling for such pesticides or devices." Such differences in the scope of authorized searches might prove important to the constitutionality of a warrantless inspection under the statute if the differences were deemed to reflect differing levels of protections for privacy interests.

Nevertheless, a warrantless search under even the broad provision of the FDCA has been held constitutional by a federal district court, on the grounds of the pervasive nature and long history of federal regulation of the food and drug industry, the applicability of the provision to a particular industry rather than to a broad range of business establishments, and the urgent public health interest furthered by enforcement of the statute.[4]

Many federal environmental statutes lack two of the elements that militated in favor of the constitutionality of the statutory provision in *Dewey*. First, most environmental statutes do not direct the federal agency to obtain an in-

junction if permission to enter is initially refused. Thus, under such statutes, business proprietors are not provided with a forum in which to test whether the search is within the parameters of the statutory authority or to present particular privacy concerns that should be taken into account.

Second, neither the statutory provisions nor the legislative history of most federal environmental statutes evidence the same degree of congressional concern with preventing advance notice of an inspection that was apparent in connection with the Federal Mine Safety and Health Act. One exception is the Clean Air Act, which forbids state agencies to give advance notice to the establishment to be inspected. The legislative history of that act emphasized that the requirement of prior notice to state agencies of proposed federal inspections to enforce a state regulatory plan was designed to protect the state, not the businesses to be inspected. To the extent that this language reflected a congressional concern about the ease with which violations of the act might be concealed or temporarily corrected if businesses had prior warnings of inspections, it would support the constitutionality of warrantless inspections under the Clean Air Act.[5]

To support the constitutionality of other federal environmental statutes whose language and legislative history offer no evidence of a congressional determination of the necessity of warrantless searches for effective enforcement, federal agencies might attempt to argue that statutory violations could easily be covered up if advance notice of inspection were given. As noted previously, however, the Supreme Court was not receptive to such arguments in *Barlow's*, since ex parte warrants could obviate this problem.

The foregoing examination of various federal environmental statutes indicates that the constitutionality of warrantless searches thereunder remains an unsettled question. Therefore, it is appropriate to ask whether administrative steps have been or could be taken to clarify the means by which inspections under these statutes will meet the requirements of the Fourth Amendment.

AGENCY EFFORTS TO ENSURE CONSTITUTIONALITY

In the wake of *Barlow's*, two federal agencies took steps intended to ensure the constitutionality of inspections carried out under their particular statutes. The Environmental Protection Agency has issued regulations under the Noise Control Act requiring that inspectors obtain a warrant if refused entry for an inspection. These regulations also authorize the Administrator to proceed ex parte to obtain a warrant, with or without a prior refusal by a manufacturer to permit entry.[6]

The Consumer Product Safety Commission also has promulgated regulations that require the use of search warrants, or "their functional equivalents," in situations in which entry is refused for an inspection under the Consumer Product Safety Control Act (CPSCA). In addition, the regulations further define the data to which the Commission is authorized to obtain access, making clear that only data relevant to a firm's compliance with the act or its rules are covered.[7] The issuance of these regulations may have reflected a realistic appraisal of the likely constitutionality of warrantless searches under the inspection provisions of the CPSCA. One federal district court has found that the CPSCA must necessarily authorize courts to issue administrative inspection warrants, since warrantless searches under that statute would probably be unconstitutional under *Barlow's*.[8]

The enforcement practices of federal agencies may have shifted toward a greater use of warrants since the *Barlow's* decision. In one case, EPA obtained administrative inspection warrants after being refused entry for an inspection under the Clean Air Act, even though no warrant is expressly required by the act or regulations issued under it. The federal district court upheld the warrants, noting in dicta that, under *Barlow's*, if entry were refused, a warrant would be required for an inspection pursuant to the Clean Air Act.[9]

While the use of administrative inspection warrants, even when not specifically required by statute, may be helpful in individual cases, the federal agencies administering environmental statutes should take a more structured approach to the Fourth Amendment concerns raised by inspections under those statutes. These agencies should issue regulations that clarify their positions on warrantless searches, either by requiring inspectors to obtain a warrant if entry is refused, or by promulgating standards for inspection similar to those provided in the Federal Mine Safety and Health Act.[10] Either form of regulation would provide businesses with some assurance that the inspections to which they may be subjected are being conducted "pursuant to an administrative plan containing specific neutral criteria," and thus further the purposes of Fourth Amendment protections. In addition, such regulations could make explicit the situations in which businesses have a right to insist on a warrant before permitting the inspection of their premises.

Since the Supreme Court has made clear that each statute requires a separate analysis, the final resolution of the constitutionality of warrantless searches under federal environmental laws must await any future decisions of the

courts. Nevertheless, agency promulgation of regulations similar to those proposed above would impose standards for conducting warrantless inspections under environmental statutes that might obviate the necessity for further court challenges to the constitutionality of those inspection provisions.

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

[2] The guarantees of privacy interests that the Court considered sufficient to meet Fourth Amendment standards were evident in its explication of the probable cause necessary for a warrant to issue. The Court pointed out that specific evidence of an existing violation, while sufficient to justify the issuance of a warrant, was not necessary in all cases; warrants could also issue if it were shown that the establishment had been chosen for a search "on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources." Additionally, the warrant should specify "the scope and objects of the search, beyond which limits the inspector is not expected to proceed."

[3] 452 U.S. ____, 101 S. Ct. 2534 (1981).

[4] *United States v. New England Grocers Supply Co.*, 488 F. Supp. 230 (D. Mass. 1980).

[5] Most environmental statutes contain provisions similar to those that required an OSHA inspector to present appropriate credentials and to conduct the inspection "in a reasonable manner." Many of these statutes, such as TSCA, FHSA, and FDCA, also mandate that written notice of the inspection be given to the owner at the time of the inspection. FIFRA requirements regarding notice are among the most stringent: an inspector must present a written statement as to the reason for the inspection, specifying whether or not a violation is suspected. These administrative notices do not provide the same protection as a warrant obtained from a neutral magistrate, however. Under *Barlow's*, it is doubtful that such notice requirements alone could suffice to uphold the constitutionality of warrantless searches conducted under these statutes, unless the notice requirements were viewed as compelling the federal agency to develop "a general administrative plan for the enforcement of the Act derived from neutral sources."

[6] 43 *Fed. Reg.* 27988 (1978).

[7] 44 *Fed. Reg.* 34924 (1979).

[8] *State Fair of Texas v. United States Consumer Products Safety Commission*, 481 F. Supp. 1070 (N.D. Tex. 1979).

[9] *Public Service Co. v. United States Environmental Protection Agency*, 509 F. Supp. 720 (S.D. Ind. 1981).

[10] FIFRA contains a statutory provision that specifically empowers the Administrator to obtain and execute warrants authorizing entry for the purpose of inspection. While other environmental statutes do not contain a similar provision, it appears that the absence of such statutory authorization does not preclude the agency's issuance of regulations requiring a warrant in certain circumstances. The warrant regulations issued by the Consumer Products Safety Commission, for example, were promulgated under the authority of the inspection and enforcement provisions of the CPSCA, which do not provide explicit statutory authorization to require warrants.