Constitutionality of Warrantless Environmental Inspections

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I. INTRODUCTION

The past twenty-five years have seen an incredible expansion of government regulation in the environmental area. With the passage of such laws as the Resource Conservation Recovery Act (RCRA), industry's use, storage, transport and disposal of hazardous materials, as well as other activities affecting the environment, have been subjected to comprehensive supervision by Federal, state and local governments. An integral part of this regulatory structure is the regular inspection of facilities in which such materials are used, stored or disposed to ensure uniform levels of safety.

To implement this system of inspection and ensure that officials have access to regulated facilities, nearly every environmental statute, both on the Federal and state levels, contains a provision giving inspectors a "right of entry" to the regulated facility. Under this "right of entry", the inspector may conduct searches, take samples of materials, inspect monitoring equipment and examine records without first obtaining a search warrant.[1]

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1. *See* Clean Water Act of 1977 § 308, 33 U.S.C. § 1318(a)(B) (1986) (giving the Administrator a right of entry to, upon or through a facility in which an effluent source is located or in which any records required to be maintained under the Act are located and to have access to or copy such records, inspect monitoring equipment and sample effluents); Comprehensive Environment Response, Compensation and Liability Act of 1980 (CERCLA) § 104(e), 42 U.S.C. § 9604(e) (West Supp. 1985) (giving any officer, employee, or representative of the President, duly designated by the President, the right to enter at reasonable times, any vessel, facility, establishment or other place or property where any hazardous substance may be or has been generated, stored, treated, disposed of or transported from, from which or to which a hazardous substance has been or may have been released, where such a release is or may be threatened or where entry is needed to determine the need for or the appropriate response or to effectuate a response action) (amended by SARA 1986); Resource Conservation and Recovery Act of 1976 (RCRA) § 3007, 42 U.S.C. § 6927(a) (1982) (giving the Administrator a right of entry to, upon or through in which an effluent source is located or in which any records required to be maintained under the Act are located and to have access to or copy such records, inspect monitoring equipment and sample emissions); Hazardous Liquid Pipeline Safety Act of 1979 § 211(c), 49 U.S.C. § 2010(c) (West Supp. 1988)); Hazardous Materials Transporta-

Business owners typically consent to such inspections voluntarily. However, reasons such as the protection of trade secrets or perceived harassment by a government agency may lead a company to withhold its consent to such an inspection and insist that the inspector obtain a search warrant.

The government commonly justifies its need for warrantless searches by claiming that, without the ability to conduct surprise inspections, the owner or operator of the facility might hide or correct violations the inspector would otherwise have found.[2]

The Supreme Court has held, however, that the fourth amendment limits the government's ability to conduct warrantless inspections.[3] Under present law, the government may only conduct warrantless administrative searches of businesses so highly regulated that the owner, simply by engaging in that business, is held to have consented implicitly to searches of his premises.[4] Further, even for these "pervasively regulated" industries, a warrantless inspection will be deemed constitutionally "reasonable" only if the statute authorizing the search provides the regulated entity the same constitutional protections as a search warrant.[5] Thus, the validity of a warrantless search depends on the type of industry being regulated, the activities being regulated and the extent to which the statute restricts on the time, manner and scope of the inspection.

This article will describe the constitutional framework that limits the government's ability to conduct inspections without obtaining a search warrant, examine statutes that provide for such warrantless inspections and suggest ways in which unlimited warrantless searches may ultimately disserve the regulators and the public.

tion Act of 1974 § 109(c), 49 U.S.C. § 1808(c) (1982); Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) § 9, 7 U.S.C. § 136g(a) (1980); Toxic Substances Control Act (TSCA) § 11, 15 U.S.C. § 2610 (1982).

2. New York v. Burger, __ U.S. __, 107 S.Ct. 2636, 2648 (1987); Marshall v. Barlow's, Inc., 436 U.S. 307, 316 (1978); See v. City of Seattle, 387 U.S. 541, 545 n.6 (1967).

3. *See infra* notes 12-31 and accompanying text.

4. *See infra* notes 25-46 and accompanying text.

5. *See* infra notes 51-70 and accompanying text.

II. The Constitutional Framework

A. *The Early Cases*

The United States Supreme Court first considered the constitutional validity of warrantless regulatory inspections in *Frank v. Maryland*.[6] In that case, the Court held that, unlike searches performed for the purpose of obtaining evidence for use in a criminal prosecution, searches performed for the purpose of enforcing compliance with health and safety regulations were not covered by the fourth or fourteenth amendments and that no warrant was required.[7]

In *Frank*, the Court examined the validity of a section of the Baltimore City Code. The section provided that, where the Commissioner of Health had reason to believe that a nuisance existed in a house, he had the right to demand entry; if entry was refused, the owner would be fined twenty dollars.[8] The City inspector requested entry to Frank's house after receiving a complaint of rats in the neighborhood and observing a large pile of trash outside the house. After Frank refused to allow the inspector to enter the house, the inspector returned with two policemen but without a warrant. He reinspected the exterior of the house and then swore out a warrant for Frank's arrest.[9] Frank appealed his conviction, claiming that it violated the fourth and fourteenth amendments.[10]

The Court upheld his conviction, holding that the fourth amendment's protection against unlawful criminal searches does not apply to administrative searches. According to the Court, where a search is an "adjunct to a regulatory scheme for the general welfare of the community," no warrant is required.[11]

In 1967, however, the Supreme Court drastically restricted the availability of warrantless administrative searches in two cases, *Camara v. Municipal Court of the City and County of San Francisco*[12] and *See v. City of Seattle*.[13] In these cases, the Court overruled *Frank* and held that warrantless administrative searches of resi-

6. 359 U.S. 360 (1959).
7. *Id.* at 373.
8. *Id.* at 361
9. *Id.*
10. *Id.* at 362.
11. *Id.* at 367.
12. 387 U.S. 523 (1967).
13. 387 U.S. 541 (1967).

dences (*Camara*) and commercial structures (*See*) are "presumptively unreasonable" under the fourth amendment, stating that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the fourth amendment only when the individual is suspected of criminal behavior."[14] The Court held that the fourth amendment did not require a person to choose between refusing to admit an inspector and submitting to a warrantless search. If the person bars the inspector, he risks criminal prosecution. If he allows the search, he may not be aware of the lawful limits of the inspector's power, or whether, in fact, the inspector is acting with proper authorization.[15] In *See*, the Court refused to distinguish between private residences and commercial property, finding that "[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."[16]

In both *Camera* and *See*, however, the Court held that, to obtain an administrative warrant, the official need not show that he has probable cause to believe that a violation of the applicable regulation has occurred, as he would in the criminal context. Administrative searches are normally conducted to ensure "universal compliance" with the regulatory statutes. Effective enforcement of such statutes usually depends on routine, periodic inspections that must be conducted whether or not an inspector actually believes that a violation has occurred.[17] Thus, to obtain an administrative warrant, the government need only present evidence relating to the purpose of the regulatory statute, e.g., the passage of time since the last inspection, the nature of the building or the condition of the entire area.[18] As the Court in *Camara* noted, "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." [19] The purpose of such a warrant, according to the Court in *See*, is to ensure that "[t]he decision to enter and inspect will

14. *Camara*, 387 U.S. at 530.

15. *Id.* at 532.

16. *See*, 387 U.S. at 543.

17. *Camara*, 387 U.S. at 535-36.

18. *Id.* at 538.

19. *Id.* at 539. Both *Camara* and *See*, however, provide for warrantless searches in emergency situations.

not be the product of the unreviewed discretion of the enforcement officer in the field."[20]

III. Exceptions to the Bar on Warrantless Inspections

A. *"Pervasive Regulation"*

Since *Camara* and *See*, courts have examined the circumstances under which warrantless administrative inspections are permitted under the fourth amendment and, if permitted, how they must be authorized and conducted. The most important factor is whether the business which the government seeks to search is "pervasively regulated." This rule was first formulated in *Colonnade Catering Corp. v. United States*[21], where the Supreme Court held that a statute making it an offense for a caterer holding a liquor license to refuse admission to an inspector was constitutional because the liquor industry has "long [been] subject to close supervision and inspection."[22] The Court held that, because of the history of Federal regulation of the liquor industry, such searches were reasonable and did not violate the fourth amendment.[23]

This rule was extended in *United States v. Biswell*,[24] where the Court held that a warrantless inspection of a pawnshop, a licensed firearms dealer, was valid because the firearms industry is pervasively regulated, even though it has not been regulated as long as the liquor industry.[25] The Court found that, because of the nature of the industry, "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential."[26]

The *Biswell* Court's rationale for finding the warrantless search "reasonable" under the fourth amendment is the principle that has justified all subsequent warrantless searches of such businesses: simply by choosing to engage in a "pervasively regulated" business, the owner of that business has implicitly waived his fourth amendment right not to be subject to a warrantless admin-

20. *See*, 387 U.S. at 545. The *See* Court did not decide whether a warrant to inspect business premises may only be issued after access is refused, "since surprise may often be a crucial aspect of routine inspections of business establishments," finding that the reasonableness of such procedure would vary with the regulation involved. 387 U.S. at 545 n.6.

21. 397 U.S. 72 (1969).

22. *Id.*, at 77.

23. *Id.*

24. 406 U.S. 311 (1972).

25. *Id.* at 315.

26. *Id.* at 316.

istrative search.[27] As the Court held in *Biswell*, "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a Federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." [28]

The limits of the "pervasive regulation" exception were set forth in *Marshall v. Barlow's, Inc.*[29], where the Supreme Court held, contrary to the government's contention, that "pervasive regulation" was the exception, not the rule. In that case, an inspector from the federal Occupational Safety and Health Administration attempted to perform a routine inspection of the nonpublic areas of Barlow's electrical and plumbing installation business. The inspector was barred because he had failed to get a warrant.[30]

The government argued that warrantless OSHA inspections were reasonable under the fourth amendment because businesses involved in interstate commerce have long been subjected to close government supervision with respect to employee safety and health conditions and that this supervision constituted the kind of "pervasive regulation" required by *Biswell*.[31] The Court rejected this argument, holding that an owner does not implicitly waive his fourth amendment rights simply because his business affects interstate commerce.[32] In order to justify a warrantless search on the grounds of pervasive regulation, the government must show that the business is so heavily regulated that the owner understands that simply by "embark[ing] upon such a business, [he] has voluntarily chosen to subject himself to a full arsenal of government regulation."[33] As the Court noted, "the closely reg-

27. *Id.*

28. *Id. See also* Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973) (holding that "[t]he businessman in a regulated industry in effect consents to the restrictions placed upon him").

29. 436 U.S. 307 (1978).

30. *Id.* at 309-10.

31. *Id.* at 314.

32. *Id.* ("[n]or 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").

33. *Id.* at 313.

ulated industry of the type involved in *Colonnade* and *Biswell* is the exception," not the rule.[34]

Since *Barlow's*, the most important factor in determining whether a warrantless search is valid is whether the regulation is sufficiently "pervasive" to justify the assumption that the owner, by operating the business, has implicitly consented to the search. Courts have found such "pervasive regulation" in the following industries: fishing[35], nursing homes[36], mining[37], auto parts dealers, scrap processors and auto parts rebuilders[38], family day care homes[39], drug manufacturers[40], slaughterhouses[41] and operators of underground gasoline storage tanks.[42]

The constitutionality of warrantless searches performed under environmental statutes, which may regulate all of a business's activities or merely its infrequent use of one chemical, is therefore governed by two factors: (1) the extent to which the business being inspected is "pervasively regulated" by the law authorizing the inspection; and (2) whether the statutory restrictions on such warrantless inspections provide sufficient constitutional protections.

With respect to environmental statutes, the "pervasiveness" of the regulation is governed by the extent to which the law regulates the business's primary activities. If the statute deals with the core activity of the business, a warrantless inspection probably will be upheld. If the statute regulates a merely peripheral activity, the owner will not be deemed to have consented to the search, and a warrant must be obtained. This distinction was made in *In*

34. *Id.* However, the Court noted that, to obtain a warrant, an OSHA inspector need only show that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources." *Id.* at 321.

35. Balelo v. Baldridge, 724 F.2d 753, 765 (9th Cir. 1984), *cert. denied*, 467 U.S. 1252 (1984); United States v. Tsuda Maru, 470 F.Supp. 1223, 1230 (D.Alaska 1979).

36. People v. Firstenberg, 92 Cal.App.3d 570, 579, 155 Cal. Rptr. 80, 85 (1979), *cert. denied*, 444 U.S. 1012 (1980).

37. Donovan v. Dewey, 452 U.S. 594, 602-03 (1981) and United States v. Blue Diamond Coal Co., 667 F.2d 510, 515 (6th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982).

38. Bionic Auto Parts and Sales, Inc. v. Fahner, 721 F.2d 1072, 1079 (7th Cir. 1983) and New York v. Burger, 107 S. Ct. 2636, 2644-45 (1987).

39. Rush v. Obledo, 756 F.2d 713, 720 (9th Cir. 1985).

40. United States v. Jamieson-McKames Pharmaceuticals, Inc., 651 F.2d 532, 537 (8th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

41. State v. Bonaccurso, 227 N.J.Super. 159, 167, 545 A.2d 853, 857 (1988).

42. V-1 Oil Co. v. State of Wyoming Department of Environmental Quality, 696 F.Supp. 578, 582 (D. Wyo. 1988).

re State Department of Environmental Protection Certification Approving Application of Vineland Chemical Co.[43], where the applicant's permit to build a waste water treatment plant was conditioned on granting the New Jersey Department of Environmental Protection the right to conduct warrantless inspections of the premises.

The state maintained that the condition was valid because the plant would be "pervasively regulated" by state agencies. The court said its ruling on this question would depend on the way it characterized Vineland's activity. If the court had found that Vineland's activity was related solely to the chemical industry, or to the construction and operation of a waste water treatment plant, the condition the state had demanded would not be valid, as neither of those activities was "pervasively regulated" by New Jersey. However, the court held that Vineland's activity was integrally related to water pollution and conservation of resources, both of which were extensively regulated by the state. The court upheld the condition.[44]

The Pennsylvania Supreme Court in *Commonwealth v. Lutz*[45], stated that businesses handling hazardous wastes are pervasively regulated because of the severe public health risks associated with these substances. The court concluded that random, warrantless searches of such operations were justified. Businesses dealing with non-hazardous solid wastes would not be subject to random, warrantless searches because the health risks such wastes posed were not as great; any such inspections would have to be conducted pursuant to a "flexible inspection schedule" or a "reasonable definition of the circumstances under which such searches will be conducted."[46]

B. *Constitutional Requirements for Statutory Restrictions*

Even where, in theory, warrantless inspections are permissible because of the pervasive regulation of the industry, the inspections must be restricted so that the business being inspected has the same degree of protection that a search warrant would provide.[47] In *Donovan v. Dewey*, the United States Supreme Court held that, because of the pervasive regulation of the mining in-

43. 177 N.J.Super. 304, 313, 426 A.2d 534, 539 (1981).
44. *Id.* at 539.
45. 512 Pa. 192, 203, 516 A.2d 339, 345 (1986), *vacated*, 480 U.S. 927 (1987).
46. *Id.* at 345.
47. Donovan v. Dewey, 452 U.S. 594 (1981).

dustry, warrantless inspections of mines were constitutionally permissible. However, the Court noted that the government's right to conduct such inspections is not unlimited:

> [W]arrantless inspections of commercial property may be constitutionally objectionable if their occurrence is so random, infrequent or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials. . . . In such cases, a warrant may be necessary to protect the owner from the 'unbridled discretion [of] executive and administrative officers' . . . by assuring him that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' [48]

The Court found that the inspection program of the Mine Safety and Health Act, "in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant," and thus held that a warrantless inspection conducted under the Act was constitutionally valid.[49]

The Court reiterated and clarified the statutory restrictions that must be placed on warrantless inspections in *New York v. Burger*[50], which involved an automobile junkyard. Police entered the defendant's junkyard and asked to see his license and the records of the automobiles and vehicle parts in his possession. After the defendant said he had neither a license nor the required records, the officers said they would search the property. They performed the search without objection.[51] The search revealed that several vehicles were stolen. Burger was arrested and charged with possession of stolen property.[52] He moved to suppress the evidence, challenging the constitutionality of the statute under which the inspection was conducted.[53]

48. *Id.* at 599 (citations omitted).

49. *Id.* at 603. The Court noted the following factors which provided such certainty of application. First, the Act specifically requires inspection of all mines and defines the frequency of inspection. Second, the standards with which a mine operator is expected to comply are set forth in the Act or in the regulations promulgated thereto. Finally, the Act, rather than permitting forcible entries if entry is refused, requires the Secretary to file a civil action in Federal Court to enjoin future refusals. *Id.* at 604. As the Court noted, "[u]nder these circumstances, it is difficult to see what additional protection a warrant requirement would provide." *Id.* at 605.

50. __ U.S. __, 107 S.Ct. 2636 (1987).

51. *Id.* at 2639-40.

52. *Id.*

53. *Id.*

The Court, in holding that the search was constitutional, first determined that the operation of a junkyard, part of which is devoted to vehicle dismantling, was a "closely regulated" business in New York, both because of the extensive regulations imposed by the State and the length of time such regulations had been in place.[54]

The Court said that a warrantless search of a closely regulated business must also be "reasonable." A warrantless inspection, even of a pervasively regulated business, is reasonable only if three criteria are met. First, there must be a " 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made," such as mine safety (*Donovan v. Dewey*), regulation of firearms (*United States v. Biswell*) or fraud (*Colonnade*).[55] Second, the warrantless inspections must be " 'necessary to further the regulatory scheme,' " as in *Dewey*, where surprise inspections were deemed necessary to effective enforcement of mine safety regulations.[56] Third, the inspection program, "in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant. . . . [T]he regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers," including restrictions on time, place and scope.[57]

The Court held that the statute permitting warrantless inspections of junkyards met all of these criteria. The state had a substantial interest in regulating the junkyard industry because of its suspected connection with motor vehicle thefts. Regulation of the industry reasonably served the State's interest in eradicating such thefts, and warrantless administrative searches were necessary to promote this regulatory scheme.[58] The Court found that,

54. *Id.* at 2644-46.

55. *Id.* at 2644.

56. *Id.*

57. *Id. See* Serpas v. Schmidt, 827 F.2d 23, 29 (7th Cir. 1987) (warrantless searches of "backstretchers' " dormitory rooms by the state of Illinois were invalid because they did not restrict such inspections of plaintiff's personal effects and living quarters.); *V-1 Oil Co.* 696 F.Supp. at 582 (warrantless search of service station valid because of importance of regulating underground storage tanks, necessity of warrantless inspections to further this regulatory scheme and limits placed on the inspectors by Wyoming statute in question).

58. New York v. Burger, 107 S.Ct. at 2646-47.

in this industry, surprise inspections were crucial if the regulations designed to combat auto theft were to function at all.[59] Finally, the Court held that the statute provided a constitutionally adequate substitute for a warrant because it informed the business owner that inspections would be made on a regular basis, defined the scope of the inspections, authorized certain officials to conduct them and limited the discretion of those officials by restricting inspections to "regular and usual business hours."[60]

Similarly, the Seventh Circuit, in *Bionic Auto Parts and Sales, Inc. v. Fahner*, held that the Illinois statute permitting warrantless inspections of auto scrap dealers sufficiently limited the government's activity by allowing only "reasonable" searches. The statute delineated what operations could be searched, described how searches were to be conducted [61] and limited the number of searches that could be conducted in any one year.[62]

Courts have struck down warrantless searches where the authorizing statute failed to provide inspectors guidance as to the scope or frequency of the inspections. Provisions also have been struck down where they failed to give owners any certainty regarding the regularity of inspection activity. Such statutory schemes have not withstood scrutiny even where the industry is pervasively regulated. In *Commonwealth v. Lutz*[63], the Pennsylvania Supreme Court said that warrantless searches of facilities processing non-hazardous solid waste "cannot withstand constitutional scrutiny absent proper adoption by the Department of a flexible inspection schedule or a reasonable definition of the circumstances under which such searches will be conducted."[64]

In *Flacke v. Onondaga Landfill Systems Inc.*[65], the court held that, although the defendant's sanitary landfill was sufficiently regu-

59. *Id.* at 2648.

60. The Court also rejected the defendant's argument that the statute was invalid because it was "really" designed to gather evidence for criminal prosecutions, because, in the course of an administrative search, an officer may discover evidence of a crime in addition to violations of the regulatory scheme or because police officers, rather than "administrative" agents conducted the search.

61. 721 F.2d at 1080. By confining them to business hours, allowing the licensee or a representative to be present, and placing a maximum limit of twenty-four hours on any search. *Id.*

62. *See also Jamieson-McKames*, 651 F.2d at 538 (Food, Drug and Cosmetic Act); *Balelo*, 724 F.2d at 753 (Marine Mammal Protection Act).

63. 512 Pa. 192, 516 A.2d 339 (1986), *vacated*, 480 U.S. 927 (1987).

64. *Id.* at 345.

65. 127 Misc.2d 984, 487 N.Y.S.2d 651 (Sup. Ct. Onondaga County 1985).

lated to justify warrantless inspections, the statute authorizing such inspections was invalid because of the "absence of appropriate limitations of time, place and scope and the failure to minimally establish some guidelines as to regularity and frequency of inspection. . . . Where the statute serves as a substitute for the warrant, it must contain limitations which restrict the inspector's capacity to harass based upon improper motive or arbitrarily discriminate in the extent of enforcement."[66]

C. *Open Fields*

Facilities deemed to be "open fields" constitute another exception to the bar on warrantless inspections. Under this theory, a property owner does not expect privacy in the unoccupied or undeveloped portions of his property lying outside of the "curtilage," the area surrounding the building. This theory was applied in *Oliver v. United States*[67], where agents made a warrantless search of a field lying behind "No Trespassing" signs and a locked gate. The Court held that, despite the locked gate and the signs, the area was an "open field" in which the owner did not have a reasonable expectation of privacy. Therefore, the Court reasoned, the search did not violate the fourth amendment.

The Supreme Court, however, has limited the application of the open fields doctrine. In *Dow Chemical Co. v. United States*[68], the Environmental Protection Agency did a flyover inspection of Dow's 2,000-acre complex and took pictures with a sophisticated camera. Dow argued that an industrial plant, even if it occupies 2,000 acres, is not an "open field" under *Oliver*, but rather an "industrial curtilage," with constitutional protections equal to the curtilage of a private residence. The company asserted that any aerial photography of this "industrial curtilage" intrudes upon the owner's reasonable expectations of privacy. Dow compared its exposed manufacturing facilities to the curtilage surrounding a home, pointing out that it had "taken every possible step to bar access from ground level."[69]

66. 487 N.Y.S.2d at 660-61. *See also* Commonwealth v. Fiore, 88 Pa. Commw. 418, 491 A.2d 284, 287 (1984) (provisions of the Pennsylvania Solid Waste Management Act held invalid because the law did not provide a predictable scheme of inspection sufficiently certain and regular to provide an adequate substitute for a warrant).

67. 466 U.S. 170 (1984).

68. 476 U.S. 227 (1986).

69. *Id.* at 236.

The Court rejected Dow's argument, holding that the plant should be characterized as something between an open field and curtilage. Although the Court recognized that a warrantless physical inspection by the EPA might pose fourth amendment problems, the mere taking of photographs from an airplane, where Dow had not taken any precautions against aerial intrusions, did not constitute an illegal search. The fact that a sophisticated camera was used, rather than simply the naked eye, did not raise any constitutional concerns.[70]

IV. Warrantless Inspections under Federal Environmental Statutes

In light of the restrictions courts have placed on warrantless inspections, it is questionable whether many of the federal environmental statutes containing a "right of entry" are constitutionally adequate. Some of these statutes regulate activities of industries that are clearly not "pervasively regulated." For example, RCRA regulates the treatment, storage and disposal of all hazardous waste, whether or not the company is in the business of dealing with such material.[71] Similarly, the Federal Insecticide, Fungicide and Rodenticide Act regulates the activities of all persons dealing with pesticides, not just the manufacturers.[72] The fact that these statutes have such broad application, similar to that of the OSHA statute in *Barlow's*, makes their inspection schemes constitutionally suspect. The fact that a business owner uses hazardous waste in some part of his operation does not mean that he has "voluntarily chosen to subject himself to a full arsenal of government regulation." [73] Such an owner has not necessarily consented to a warrantless search. For environmental statutes such

70. The Court did note, however, that "[a]n electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions." *Id.* at 239.

71. 42 U.S.C. § 6927(a) (1983).

72. 7 U.S.C. § 136g(a) (1980). *See also* Note, *EPA Inspections of Hazardous Waste Sites: A Valid Exception to the Warrant Requirement for Administrative Searches?*, 65 U. Det. L. Rev. 333 (1988) (arguing that the right of entry under CERCLA created in the SARA amendments is unconstitutional).

73. Perhaps recognizing this constitutional infirmity, the RCRA Inspection Manual, prepared for the use of EPA inspectors, does not allow for warrantless inspections. It provides that entry should only be conducted "at reasonable times or during normal business hours," and provides that, if entry is refused or the inspector anticipates that the business owner will refuse entry, the inspector must obtain a search warrant. U.S. Environmental Protection Agency, *Resource Conservation & Recovery Act Inspection Manual* V1-V3 (1982); *See*

as RCRA, which regulate industries not in the business of dealing with hazardous materials, warrantless searches may be impermissible.

For industries that are "pervasively regulated" by the environmental statutes, it is unclear whether the laws provide enough restrictions on the frequency and scope of inspections to ensure the statutes' constitutionality. For example, the Toxic Substances Control Act provides only that the "inspection shall be commenced and completed with reasonable promptness and shall be conducted at reasonable times, within reasonable limits, and in a reasonable manner."[74] In *Burger*, the Supreme Court found that a restriction no more onerous than that the inspection be conducted during normal business hours sufficiently limited the discretion of the inspector. However, even that limited restriction is missing from the environmental statutes. Simply providing that the timing and scope of the inspection be "reasonable" would not, under *Barlow's* and *Burger*, be constitutionally sufficient. A warrantless inspection conducted under one of these statutes could be successfully challenged if the owner could show that it was "unreasonable" in terms of time, place or scope.

A business regulated by environmental statutes in any respect may not need to consent to a warrantless inspection of its facilities if either of the following criteria are met: (1) the inspector is acting under the authority of a statute that does not regulate the primary activities of the business, but, for example, deals only with its handling or disposal of a chemical used occasionally or in small amounts; or (2) the scope of the inspection is unreasonable, e.g., outside the areas in which the regulated substance is used or after normal business hours. In these cases, the business owner may be justified in demanding that the inspector obtain a warrant before any inspection proceeds.

also U.S. Environmental Protection Agency, *Toxic Substances Control Act Inspection Manual* 3-7 to 3-14 (1982).

74. 15 U.S.C. § 2610(a); *See* CERCLA § 104(e), 42 U.S.C. § 9604(e) (inspection at reasonable times); RCRA § 3007, 42 U.S.C. § 6927(a) (entry at reasonable times, with inspections commenced and completed with reasonable promptness); Hazardous Liquid Pipeline Safety Act § 211(c), 49 U.S.C. § 2010(c) (entry, inspection and examination of records to be at reasonable times and in a reasonable manner); Hazardous Materials Transport Act § 109(c), 49 U.S.C. § 1808(c) (entry, inspection and examination of records to be at reasonable times and in a reasonable manner); FIFRA § 9, 7 U.S.C. § 136g; TSCA § 11, 15 U.S.C. § 2610.

V. Conclusion

Environmental statutes, both on the state and federal level, represent a political and social consensus that regulation of industry's use of hazardous materials is vital to the public safety and that regular inspections by government regulators are an important part of such regulation. However, statutes that provide for warrantless searches by inspectors without setting limits on the time, place or scope of such searches either evade or ignore the constitutional problem.

There is no question that, in the appropriate circumstances, warrantless searches of facilities that use hazardous materials extensively are both necessary and constitutionally permissible. Expecting regulators to obtain warrants or limit their inspections to business hours in the midst of an emergency is neither good public policy nor required by the Constitution. On the other hand, a regulatory structure that permits unlimited warrantless inspections can lead to abuses and harassment. Lawsuits based on the findings of such searches may be legitimately challenged.

By glossing over important constitutional issues in an effort to give environmental inspectors the greatest possible leeway in searching regulated properties, Congress may have done the regulatory agencies, as well as the public, a disservice. A business, even one that is "pervasively regulated," may well escape punishment for serious violations of environmental laws simply because a warrantless search was not conducted in a constitutionally permissible manner. It is up to Congress and the state legislatures to ensure that such inspections are tightly regulated so that they do not find the courts doing that job for them.