

LIMITING THE CLOSELY REGULATED BUSINESS  
EXCEPTION TO THE WARRANT REQUIREMENT:  
*V-1 OIL CO. V. WYOMING, DEPARTMENT OF  
ENVIRONMENTAL QUALITY*, 902 F.2d 1482  
(10TH Cir. 1990)

The fourth amendment protects against “unreasonable searches and seizures” and declares that “no Warrant shall issue, but upon probable cause.”<sup>1</sup> Historically, the Supreme Court interpreted these two clauses to mean that most warrantless searches are unreasonable.<sup>2</sup> In recent times, the Court has carved out a limited exception for administrative searches pursuant to regulatory legislation.<sup>3</sup> As public health and safety concerns have increased, so have the number of government inspection schemes<sup>4</sup> to ensure that businesses comply with certain mini-

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1. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

2. See *Camara v. Municipal Court*, 387 U.S. 523 (1967). In *Camara*, the Court held that “except 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.” *Id.* at 528-29.

3. See *infra* notes 28-64 and accompanying text for discussion of the evolution of the Court’s interpretation of the fourth amendment in regard to warrantless administrative searches.

The validity of a warrantless search presently depends upon whether the industry involved is pervasively regulated and whether the authorizing statute limits the search in time, manner, and scope to provide an adequate substitute for a warrant. See Cauley, *Constitutionality of Warrantless Environmental Inspections*, 15 COLUM. J. ENVTL. L. 83, 84 (1990). See also *infra* notes 46-49, 54-63 and accompanying text for a discussion of cases dealing with this issue.

4. See, e.g., Gun Control Act, 18 U.S.C. § 923(g)(1)(B)-(C) (1988) (allowing the Secretary of the Treasury or his representative to enter the premises of licensed gun dealers at reasonable times to examine their records and firearms); Occupational Safety and Health Act, 29 U.S.C. § 657(a) (1988) (allowing the Secretary of Labor to inspect work places “during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner”); Federal Mine Safety and Health Act,

mum standards.<sup>5</sup> Correspondingly, businesspersons have pursued civil rights claims alleging that warrantless administrative searches violate their fourth amendment rights.<sup>6</sup> In *V-1 Oil Co. v. Wyoming, Department of Environmental Quality*,<sup>7</sup> the Tenth Circuit held that a warrantless search of a gasoline station under the Wyoming Environmental Quality Act<sup>8</sup> violated the fourth amendment by failing to provide proper notice.<sup>9</sup>

In *V-1 Oil*, Steven Gerber, a supervisor for the Wyoming Department of Environmental Quality (DEQ),<sup>10</sup> inspected without a warrant<sup>11</sup> open storage tanks on the premises of the V-1 Oil Station<sup>12</sup>

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30 U.S.C. § 813(a) (1988) (allowing the Secretary of Labor or one of his authorized representatives to enter any coal mine to inspect the conditions or investigate compliance with new health and safety standards).

5. In 1970 the federal government passed the Occupational Safety and Health Act (OSHA). 29 U.S.C. §§ 651-678 (1988). OSHA regulates all work areas within its jurisdiction and allows for inspections to ensure that employers comply with its regulations. In 1977, Congress passed the Federal Mine Safety and Health Act (FMSHA). 30 U.S.C. §§ 801-962 (1988). FMSHA requires all mines to meet mandatory safety and health standards set by the Secretary of Labor and enforced by inspectors. More recently, in 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 42 U.S.C. §§ 9601-9675 (1988). CERCLA regulates the release, storage, and removal of hazardous substances.

6. See, e.g., *New York v. Burger*, 482 U.S. 691, 693, 696 (1987) (junkyard owner claimed law enforcement officers violated his fourth amendment rights when they executed a warrantless inspection of his business premises pursuant to a New York statute aimed at reducing auto theft); *Donovan v. Dewey*, 452 U.S. 594, 597 (1981) (Secretary of Labor filed suit to enjoin mine operator from preventing FMSHA inspectors to make warrantless searches); *United States v. Biswell*, 406 U.S. 311, 312-13 (1972) (pawn shop owner claimed that a warrantless search under the Gun Control Act of his locked store-room resulting in his arrest and conviction for illegally dealing firearms violated his fourth amendment rights).

7. 902 F.2d 1482 (10th Cir.), *cert. denied*, 111 S. Ct. 295 (1990); *cert. denied*, 111 S. Ct. 295 (1990).

8. WYO. STAT. § 35-11-109(a)(v)-(vi) (1988).

9. 902 F.2d at 1487.

10. *V-1 Oil Co. v. Wyoming, Dep't of Env'tl. Quality*, 696 F. Supp. 578, 579 (D. Wyo. 1988). "As part of Mr. Gerber's duties, he investigates discharges of pollution, such as petroleum products, into groundwater." *Id.*

11. *Id.* at 581-82. The officer could not obtain a search warrant before the inspection due to an Assistant Attorney General's inability to find an available judge. *Id.* at 579.

12. *Id.* Prior investigations had indicated that the V-1 station was a source of gasoline pollution. *Id.* Gerber sought quick inspection because the covers were off the storage tanks. *Id.*

pursuant to the Wyoming Environmental Quality Act.<sup>13</sup> V-1 Oil filed a civil rights suit<sup>14</sup> against the State of Wyoming, the Department of Environmental Quality, and Gerber,<sup>15</sup> alleging that the warrantless search violated the fourth amendment.<sup>16</sup> The district court granted defendants' motion for summary judgment,<sup>17</sup> holding that the Wyoming statute authorized the warrantless search of the gas station<sup>18</sup> and that the inspection was reasonable.<sup>19</sup> On appeal, the Tenth Circuit affirmed

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13. WYO. STAT. § 35-11-109(a)(vi) (1988) provides in pertinent part:

(a) In addition to any other powers and duties imposed by law, the director of the department shall . . . :

. . . .  
(vi) Designate authorized officers, employees or representatives of the department to enter and inspect any property, premise or place, except private residences, on or at which an air, water or land pollution source is located or is being constructed or installed, or any premises in which any records required to be maintained by a surface coal mining permittee are located. Persons so designated may inspect and copy any records during normal office hours, and inspect any monitoring equipment or method of operation required to be maintained pursuant to this act at any reasonable time upon presentation of appropriate credentials, and without delay, for the purpose of investigating actual or potential sources of air, water or land pollution and for determining compliance or noncompliance with this act, and any rules, regulations, standards, permits or orders promulgated hereunder.

*Id.*

14. The plaintiff filed suit pursuant to 42 U.S.C. § 1983 (1982), which provides that anyone who deprives another of "any rights, privileges, or immunities secured by the Constitution" may be held liable in an action at law.

15. V-1 Oil Co. v. Wyoming, Dep't of Env'tl. Quality, 696 F. Supp. 578, 580 (D. Wyo. 1988).

16. *Id.*

17. *Id.* In V-1's brief opposing defendants' motion for summary judgment, V-1 admitted "[t]he defendant State of Wyoming's Motion for Summary Judgment should be granted, pursuant to the State's immunity as provided by the 11th Amendment to the Constitution." *Id.* V-1's attorney later attempted to change his view on this matter arguing that no case law supported this position. *Id.* The district court, however, agreed with his prior statement and dismissed the State of Wyoming and the Department of Environmental Quality from the suit because the State of Wyoming failed to consent to the suit as required under the Constitution. *Id.* Although the state and the Department of Environmental Quality remained named parties on appeal, the case proceeded solely against Mr. Gerber. *Id.*

18. *Id.* at 581. The court held that although the Wyoming statute does not contain the words "warrantless search," numerous courts in other jurisdictions do not require explicit reference to the term before warrantless searches may proceed. *Id.* The defendant argued, and the court agreed that he conducted the search in conformity with the statute because the defendant was qualified as one entitled to investigate the gas station and the search took place at a "reasonable time upon presentation of appropriate credentials and without delay." *Id.*

19. *Id.* at 581-82. The district court used a three-part test in determining whether

and remanded,<sup>20</sup> but held that the warrantless search under the Wyoming statute violated the fourth amendment because the statute did not provide a constitutionally adequate substitute for a warrant.<sup>21</sup>

The Supreme Court has held that the fourth amendment's<sup>22</sup> reasonableness and warrant provisions were intended "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."<sup>23</sup> The Court has further held that the fourth amendment's guarantee of freedom from illegal searches for the purpose of obtaining incriminating evidence applies to individuals' homes and to commercial property.<sup>24</sup>

More recently, the Court has addressed the problem of how to bal-

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the defendant conducted a reasonable search. *Id.* at 581 (citing *New York v. Burger*, 482 U.S. 691, 702-03 (1987)). First, the court found that the potential danger to the groundwater system posed by faulty gasoline storage tanks satisfied the requirement that a "substantial government interest" exists. *Id.* Second, the court found that warrantless searches under the Wyoming statute were "necessary to further [the] regulatory scheme" emphasizing that Gerber attempted to obtain a warrant before making the warrantless search. *Id.* at 581-82 (quoting *Donovan v. Dewey*, 452 U.S. 594, 600 (1981)). Third, the court found that the statute provided an adequate substitute for a warrant. *Id.* at 582. In reaching its conclusion, the court found that the state pervasively regulated the gasoline industry, effectively giving notice to persons engaged in the business that the state might subject their premises to warrantless administrative searches. *Id.* at 582.

20. The three judge panel affirmed the judgment in favor of Gerber on the ground of qualified immunity, but remanded to determine the amount of attorney fees recoverable to the plaintiff. *V-1 Oil Co. v. Wyoming, Dep't of Envtl. Quality*, 902 F.2d 1482, 1490 (10th Cir. 1990). Judge Ebel dissented from the opinion, but only on the issue of Gerber's qualified immunity from the suit. *Id.* at 1490-93.

21. *Id.* at 1487. A unanimous court agreed that the statute failed to provide the owner of V-1 Oil Station with adequate notice that the state might subject his business to periodic inspections by officers of the DEQ. *Id.*

On July 23, 1990, V-1 Oil filed a petition for writ of certiorari to the Supreme Court of the United States on the issue of Gerber's immunity from the suit. *V-1 Oil Co. v. Gerber*, 111 S. Ct. 195 (1990) (denying certiorari). In August, 1990, Gerber filed a cross-petition for writ of certiorari to the Supreme Court of the United States on the issues of the constitutionality of warrantless searches under the Wyoming Environmental Quality Act, V-1's reasonable expectation of privacy, and Gerber's qualified immunity. *Gerber v. V-1 Oil Co.*, 111 S. Ct. 295 (1990) (denying certiorari).

22. See *supra* note 1 for language of the fourth amendment.

23. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

24. See *Payton v. New York*, 445 U.S. 573, 585-86 (1979) (holding that police are prohibited from making a warrantless entry into a suspect's home for a routine felony arrest, in part because "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed" (citing *United States v. United States District Court*, 407 U.S. 297 (1971)); *G.M. Leasing Corp. v. United States*, 429 U.S.

ance<sup>25</sup> fourth amendment rights against the public interest embodied in administrative inspection schemes.<sup>26</sup> This inquiry has led the Court to its current recognition of an exception to the warrant requirement for certain closely regulated businesses.<sup>27</sup>

The Supreme Court first addressed the constitutionality of warrantless administrative searches in *Frank v. Maryland*.<sup>28</sup> In *Frank*, the Court held that an investigating officer for the Baltimore City Health Department did not violate a homeowner's fourth amendment rights when the officer made a warrantless inspection of the homeowner's residence.<sup>29</sup> The Court announced that administrative inspections of residences could be constitutional even though no warrant had been obtained.<sup>30</sup> Because of the long history of general consent to such

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338, 353 (1976) (stating that the Court's past holdings stand clearly for the proposition that business premises are protected by the fourth amendment).

The fourth amendment protects persons situated in other enclosures as well. See *Katz v. United States*, 389 U.S. 347, 351-52 (1967) (warrantless wiretap placed by the FBI on a public telephone booth used by the plaintiff is unconstitutional).

25. The Court recognizes a limited number of situations in which it will balance the searched person's privacy interest against the public interest. See *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990) (brief detention of motorists at sobriety checkpoints); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (drug testing of railroad employees under federal regulations); *Illinois v. Lafayette*, 462 U.S. 640 (1983) (inventory search of possessions on arrestee's person subsequent to custodial arrest); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (citizenship checks at fixed checkpoints); *Terry v. Ohio*, 392 U.S. 1 (1968) ("stop and frisk" of suspected criminals).

The balancing test cases stand in contradistinction to the traditional, generalized rule which presumes that only searches or seizures for which the police had a warrant or probable cause are reasonable. See *Illinois v. Gates*, 462 U.S. 213 (1983) (outlining the "totality of circumstances" test for probable cause to uphold search warrant involving home and car).

26. Many administrative regulations drafted to protect the public from health and safety risks necessitate unannounced, warrantless inspections of businesses. See *supra* note 4 for examples of such regulations; see also W. LAFAVE, *SEARCH AND SEIZURE* 629-68 (2d ed. 1987) (discussing inspections of business); Remer, *The "Junking" of the Fourth Amendment: The Closely Regulated Industry Exception to the Warrant Requirement*, 25 AM. CRIM. L. REV. 791, 792 (1988) (discussing the constitutionality of administrative inspections designed to enforce regulatory statutes).

27. *New York v. Burger*, 482 U.S. 691, 712 (1987). See *infra* notes 59-64 and accompanying text for a discussion of *Burger*.

28. 359 U.S. 360 (1959). *Frank* involved a Baltimore City Code provision subjecting homeowners to a fine if they refused to allow city health officials to inspect their homes for nuisances based upon cause. *Id.* at 361. In this case the health official acted on a neighbor's complaint that rats infested plaintiff's home. *Id.*

29. *Id.* at 373.

30. *Id.*

searches, the court found that the circumstances surrounding the search would have to be extreme to violate the fourth amendment.<sup>31</sup> The Court then determined that the importance of health inspections outweighed an individuals' right of privacy.<sup>32</sup>

The *Frank* rule required no warrant to prove that an administrative search was reasonable, and thus constitutional. In 1967, the Court abruptly changed direction in two separate cases. *Camara v. Municipal Court*<sup>33</sup> held that an administrative agency needed a warrant to conduct a search of a private residence without the owner's consent.<sup>34</sup> The Court overturned *Frank*, ruling that fourth amendment protections are not merely "peripheral" but are as necessary in health and safety inspections as they are in criminal investigations.<sup>35</sup>

In the companion case to *Camara*, *See v. City of Seattle*,<sup>36</sup> the Supreme Court extended the warrant requirement to include administrative searches of commercial premises. The Court held that a warrantless inspection of a warehouse pursuant to a city ordinance violated the business owner's fourth amendment rights.<sup>37</sup> The Court ruled that constitutional challenges to searches shall be determined on a case-by-case basis using the reasonable expectation of privacy standard implicit

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31. *Id.* at 370.

32. *Id.* at 372. The *Frank* Court expressed concern that allowing, in the alternative, one warrant to suffice for multiple residences would pose a great potential for abuse. *Id.* at 363.

33. 387 U.S. 523 (1967).

34. 387 U.S. at 540. The case involved a warrantless inspection of an apartment building by the San Francisco Department of Health pursuant to the City Housing Code. *Id.* at 526. Although the landlord permitted the inspectors to enter the lobby of the building, the landlord refused them access to the actual apartments. *Id.* at 540.

35. *Id.* at 530. The Court noted that in non-urgent situations, law enforcement officials must obtain a warrant where entry is refused. *Id.* at 539-40. In the administrative search context, the Court held that "[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539. Although the Court continued to require a search warrant, it did so under a lower standard of reasonableness of the governmental interest. This standard requires a lesser showing than the probable cause necessary to obtain a search warrant in a criminal investigation. Probable cause is defined as "where facts and circumstances within officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed." BLACK'S LAW DICTIONARY 1201 (6th ed. 1990).

36. 387 U.S. 541 (1967).

37. 387 U.S. at 546. Fire department inspectors conducted the search under a routine, city-wide probe to enforce fire code standards for commercial businesses. *Id.* at 541.

in the fourth amendment.<sup>38</sup> Under this test, the Court determined that the plaintiff at bar could not be subject to such unannounced inspections.<sup>39</sup> A warrant thereby became a constitutional precondition to an administrative search of commercial premises.<sup>40</sup>

The *Camara-See* proposition shortly gave way to a limited exception to the warrant requirement for administrative searches of certain regulated businesses. The exception was first recognized in 1970 in *Colonnade Catering Corp. v. United States*.<sup>41</sup> In *Colonnade*, a federal inspector made a warrantless search of the business premises of a federally licensed liquor dealer.<sup>42</sup> The Court held this inspection did not violate the fourth amendment.<sup>43</sup> Emphasizing that the liquor industry had been regulated since the founding of the republic, during which time Congress established procedures to govern inspections,<sup>44</sup> Justice Douglas concluded that closely regulated industries with a history of inspections are exempt from the warrant requirement laid out in *See*.<sup>45</sup>

In 1972, the Court further widened the exception in *United States v. Biswell*.<sup>46</sup> The *Biswell* Court determined that a pawn shop owner's fourth amendment rights were not violated when federal agents made a warrantless search of his locked storeroom pursuant to the Gun Con-

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38. *Id.* at 546.

39. *Id.* at 543. The Court found that ordinary businesspersons have the right to operate free from unreasonable searches. *Id.*

40. Later that year, the Court reasserted the proposition that the fourth amendment protects against warrantless administrative searches in the home or "[w]herever a man may be." *Katz v. United States*, 389 U.S. 347, 359 (1967). In his concurring opinion, Justice Harlan explained the reasonable expectation of privacy under the fourth amendment, stating, "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring).

41. 397 U.S. 72 (1970).

42. *Id.* at 73. The liquor dealer ran a catering business but also held a federal tax stamp for retail sales of liquor. *Id.* at 72. Federal agents visited the dealer's premises during a party at which liquor was served. *Id.* at 73. When the agents sought to inspect the locked storeroom, the president of the catering business resisted the inspection because the agents could not produce a warrant. *Id.* One agent broke the lock and inspected the storeroom over the president's protestations. *Id.*

43. *Id.* at 76-77.

44. The Court distinguished *See v. City of Seattle* on the ground that the federal officer in *Colonnade* was not "using force without definite authority to break down doors." *Id.* at 77.

45. *Id.*

46. 406 U.S. 311 (1972).

trol Act.<sup>47</sup> Although the firearms industry did not have a long history of government regulation, the Court nevertheless found the search reasonable due to the importance of the federal interest involved.<sup>48</sup> The Court also noted that the inspection was "limited in time, place, and scope,"<sup>49</sup> a point that became significant in later cases.

Two subsequent cases illustrate the special emphasis the Supreme Court came to place on the comprehensiveness of regulatory statutes. In *Marshall v. Barlow's Inc.*,<sup>50</sup> the Court held that a warrantless inspection of an electrical and plumbing installation business subject to regulation under the Occupational Safety and Health Act (OSHA)<sup>51</sup> violated the fourth amendment.<sup>52</sup> The Court reasoned that because OSHA regulated virtually all businesses involved in interstate com-

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47. *Id.* at 312. The Gun Control Act, 18 U.S.C. § 923(g)(1)(B)-(C) (1988), allows representatives of the Secretary of Treasury to enter the premises of gun dealers at reasonable times to examine their records and firearms. In *Biswell*, the pawn shop operator was also a federally licensed gun dealer. 406 U.S. at 312. A federal treasury agent entered his shop and requested the dealer permit him to view records and the contents of a locked storeroom. Although the agent did not have a warrant, he did provide the dealer with a copy of the section of the Gun Control Act authorizing such searches. *Id.*

48. 406 U.S. at 315, 317. The Court appeared to reject this rationale a year later in *Almeida-Sanchez v. United States*, 413 U.S. 266, 271-72 (1973). In *Almeida-Sanchez*, the Court held unconstitutional a warrantless "roving patrol" search by the Border Patrol of a Mexican citizen's automobile. *Id.* at 273. The Court explained that the valid government interest in controlling the entry of illegal aliens did not justify the invasion of fourth amendment guarantees, but added that its decision did not overrule *Colonnade* or *Biswell*. *Id.* at 270-71. The Court stated, "[a] central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business." *Id.* at 271.

49. 406 U.S. at 315. The Court also mentioned that requiring a warrant prior to inspections under the Gun Control Act may frustrate the officers' efforts by giving the businesspersons time to hide any contraband. *Id.* at 316.

50. 436 U.S. 307 (1978).

51. 29 U.S.C. §§ 651-678 (1988).

52. 436 U.S. at 325. The Court rejected the Secretary of Labor's argument that the electrical and plumbing installation business was pervasively regulated. *Id.* at 313-14. The Secretary reasoned that since the Walsh-Healy Act of 1936, 41 U.S.C. § 35-45, all businesses involved in interstate commerce have been subjected to close health and safety supervision. 436 U.S. at 314. In making its determination, the Court declared that the warrant exception only applies to businesses with "a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Id.* at 313. Accordingly, the Court found that the OSHA regulations, which reflect the generality of prior regulations addressed to businesses involved in interstate commerce, did not adequately prepare those businesses for specific and pervasive regulations. *Id.* at 314.



merce, the theory of implied consent was inappropriate.<sup>53</sup>

In *Donovan v. Dewey*,<sup>54</sup> however, the Court declared that the Federal Mine Safety and Health Act<sup>55</sup> was sufficiently specific in its guidelines to authorize warrantless inspections of mines.<sup>56</sup> The Court's new emphasis appeared to focus on the adequacy of the notice given to businesses through the language in the statute.<sup>57</sup>

The *Barlow's* and *Donovan* clarifications left some observers perplexed as to the constitutionality of warrantless administrative searches.<sup>58</sup> In *New York v. Burger*,<sup>59</sup> the Supreme Court attempted to lend order to the situation by propounding a more detailed test than that outlined in *Donovan*.<sup>60</sup> First, the state must have a substantial

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53. *Id.* at 313-15. The Court referred to language in *Almeida* stating that "[t]he businessman in a regulated industry in effect consents to the restrictions placed upon him." *Id.* at 313 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973)). The Court stated that imposing a warrant requirement for OSHA inspections burdened neither the inspectors nor the courts. *Id.* at 316. Further, the Court noted that most health and safety infractions are difficult to conceal even if the business owner received advance notice, and that the issuance of warrants takes up little of the court's time. *Id.* at 316-20. In the alternative, the Court suggested the possibility of using *ex parte* warrants. *Id.* at 320 n.15.

54. 452 U.S. 594 (1981).

55. 30 U.S.C. §§ 801-962 (1988). See *supra* note 5 for a discussion of FMSHA.

56. 452 U.S. at 606. The Court stated "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." *Id.* The statute in question provided for at least four inspections per year of all federal underground mines, two inspections per year for surface mines, and added that no advance notice would be given. *Id.* at 596.

57. *Id.* at 600. The *Donovan* Court applied a two-step inquiry to determine the constitutionality of warrantless administrative inspections. The Court asked (1) whether "Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme" and (2) whether "the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that the property will be subject to periodic inspections undertaken for specific purposes." *Id.*

58. See W. LAFAVE, SEARCH AND SEIZURE 661-69 (2d ed. 1987); Note, *Administrative Searches- The Ninth Circuit Extends the Closely Regulated Industry Exception to the Fourth Amendment*, 1985 ARIZ. ST. L.J. 973 (1985) (illustrating differences between the two decisions); Note, *Constitutional Law- Warrantless Administrative Searches and the Two-Step Test of Donovan v. Dewey*, 56 TUL. L. REV. 1467 (1982) (examining differences in analysis between the *Donovan* and *Barlow's* decisions).

59. 482 U.S. 691 (1987). In *Burger*, the Court upheld a warrantless administrative inspection of an automobile junkyard. The investigators acted under a New York statute authorizing such inspections in order to curtail motor vehicle theft. *Id.* at 694 n.1.

60. See *supra* note 57 and accompanying text for a discussion of the *Donovan* test.

interest in regulating the industry.<sup>61</sup> Second, regulation of the industry must serve the state's interests and warrantless administrative inspections must be necessary to further the regulation's purpose.<sup>62</sup> Third, the statute must provide a reasonably adequate substitute for a warrant.<sup>63</sup> Critics of the three-part test charge that the *Burger* Court sacrificed fourth amendment values in favor of doctrinal clarity.<sup>64</sup>

*V-1 Oil Co. v. Wyoming, Department of Environmental Quality*<sup>65</sup> presented the Tenth Circuit with an opportunity to determine the limits of the warrantless administrative search in an environmental law context.<sup>66</sup> In *V-1 Oil* the court confined the administrative search exception to "narrow statutes which regulate particular industries" and provide "assurance of regularity" of inspections.<sup>67</sup> The court began by holding that the Wyoming Environmental Quality Act authorized warrantless inspections of storage tanks.<sup>68</sup> Although the statute does not mention the words "warrantless search," the court determined that a general authorization for inspections sanctions warrantless inspections.<sup>69</sup> The court also found that inspection of storage tanks was necessary to detect violations of the statute.<sup>70</sup>

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61. 482 U.S. at 702. In effect, the industry must pose a significant threat to society and the state must have an interest in regulating the industry to minimize such harm. *Id.* at 708.

62. *Id.* The regulation must reduce or prevent the social problem which justified the regulation. *Id.* at 710. Additionally, the element of surprise must be necessary to the scheme for remedying the social problem. *Id.*

63. 482 U.S. at 702-03. The statute can satisfy the third element of the test if it puts regulated businesses on notice that authorized officials will subject the premises to warrantless inspections, and will limit inspections in time, place and scope. *Id.* at 711-12.

64. In the wake of *Burger*, some commentators question whether the decision represented a complete erosion of the fourth amendment safeguards from administrative inspections. See Remer, *supra* note 26 at 792 (*Burger* arguably stretches the regulated industry exception beyond its intended limits); Note, *The Widening Exception to the Warrant Requirement In the Area of Administrative Searches*, 29 B.C.L. REV. 1009 (1988) (*Burger* signifies an erosion of the fourth amendment).

65. 902 F.2d 1482 (10th Cir. 1990). See *supra* notes 7-21 and accompanying text for a description of the facts.

66. 902 F.2d at 1485-87. See *supra* notes 59-63 and accompanying text for a discussion of the standards a warrantless administrative search must meet in order to pass constitutional muster.

67. 902 F.2d at 1487.

68. *Id.* at 1485. The court reached this conclusion as a matter of statutory construction. *Id.*

69. *Id.*

70. *Id.* The court interpreted the Act liberally, in accord with the overriding public

Applying the three-part *Burger* test,<sup>71</sup> the court concluded that a warrantless search pursuant to the Act must be unconstitutional.<sup>72</sup> The court noted the exception to the warrant requirement for closely regulated businesses,<sup>73</sup> and determined that the gasoline industry qualified as a pervasively regulated industry.<sup>74</sup> The case therefore satisfied the first step of the *Burger* test.<sup>75</sup>

The court then examined whether the statute provided a constitutionally adequate substitute for a warrant.<sup>76</sup> The court found that the Wyoming Environmental Quality Act was not so specific that commercial property owners would know their property was subject to unannounced administrative inspections of specific scope.<sup>77</sup> Although purporting to follow *Burger*, the court in effect narrowed the administrative search exception by requiring that regulatory statutes be tailored to specific industries.<sup>78</sup>

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interest embodied in the Act. *Id.* The state enacted the statute to prevent and detect violations. *Id.*

71. *Id.* at 1485-86 (citing *New York v. Burger* 482 U.S. 691 (1987)). See *supra* notes 59-63 and accompanying text for a discussion of the *Burger* test.

72. 902 F.2d at 1487.

73. *Id.* at 1485 (citing *United States v. Biswell*, 406 U.S. 311 (1972); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)).

74. *Id.* at 1486. The court pointed to WYO. STAT. §§ 39-6-203(b), 213(a), 205, 209 (1988), WYO. STAT. §§ 39-6-204, 206, 208 (1989), and 42 U.S.C. §§ 6991-6991i (1988), among the many statutes regulating the gasoline industry. 902 F.2d at 1468.

75. 902 F.2d at 1486-87. The court artfully avoided what might have been the most difficult prong of the *Burger* test, namely whether warrantless inspections are necessary to the regulatory scheme. *Id.* at 1486 n.1. The record provided insufficient facts from which to make this determination, but the court had no need to reach the issue because of its findings regarding the third prong. *Id.*

76. *Id.*

77. *Id.* (citing *Burger v. New York*, 482 U.S. 691, 703 (1987)). The court noted that, as written, the Wyoming Act applies to virtually all businesses within the state and therefore fails to notify any particular industry that warrantless searches may take place. *Id.* at 1487. The court remarked that the Act also failed to adequately limit the time, place, and scope of such searches. *Id.* (citing *Donovan v. Dewey*, 452 U.S. 594 (1981)).

78. *Id.* See *supra* note 39 for a discussion of reasonable expectations of privacy. Although both the Wyoming Statute in *V-1 Oil* and the OSHA regulations in *Barlow's* control environmental matters, one pertinent difference between them could produce opposite results under the *Burger* test. In *Barlow's* the Court refused to recognize the electrical and plumbing installation business as a closely regulated business simply because it was involved in interstate commerce. See *supra* note 50. Yet the Wyoming statute in *V-1 Oil* governs only businesses which have a source of air, water, or land pollution. See *supra* note 14. Such businesses have been pervasively regulated in the past. See *Clean Air Act*, 42 U.S.C. §§ 7401-7642 (1970); *Federal Water Pollution Con-*

The court's decision in *V-1 Oil* demands reconsideration for an important practical reason. The narrower warrant exception for administrative searches to "very closely regulated industries with stringent authorizing statutes"<sup>79</sup> will induce legislatures to redraft many of their statutes to conform with judicial readings of the fourth amendment's particularity requirement. Although the court's analysis reflects increased concern for fourth amendment safeguards regarding administrative searches,<sup>80</sup> the holding in *V-1 Oil* will invalidate many administrative inspection schemes as presently codified. For example, warrantless inspections under environmental protection statutes as broad as the Wyoming Environmental Quality Act may be deemed unconstitutional for not providing adequate notice of inspection to owners of particular commercial businesses.<sup>81</sup> As new industries emerge, legislatures cannot know in advance the dangers they may pose to society. Administrative inspections may be necessary to protect the public from such unknown dangers. Therefore, some generalization may be necessary in crafting regulatory programs.

Because courts determine the constitutionality of warrantless admin-

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control Act, 33 U.S.C. §§ 1251-1387 (1972); Toxic Substance Control Act, 15 U.S.C. §§ 2601-2671 (1976). More specifically, Wyoming regulates the gasoline industry for purposes of pollution prevention, licensing, and record keeping. See WYO. STAT. § 35-9-141 (1977).

79. Remer, *supra* note 26, at 810. Remer offered four alternative analyses the Court could select from to redefine the post-*Burger* fourth amendment standard. *Id.* at 809-10. The Tenth Circuit apparently followed Remer's suggestion to narrow the exception to the warrant requirement for administrative searches to include only "very closely regulated industries with stringent authorizing statutes." *Id.* at 810.

80. See *supra* notes 58-63 and accompanying text for the constitutionality of a warrantless administrative search.

81. See, e.g., Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) § 9, 7 U.S.C. 136g(a) (1988); Toxic Substances Control Act (TSCA) § 11, 15 U.S.C. § 2610 (1988). Clean Water Act of 1977 § 308, 33 U.S.C. § 1318(a)(B) (1988) (allowing administrators to search facilities where effluent sources are located, to inspect the facility's equipment, and to sample effluents); Resource Conservation and Recovery Act of 1976 (RCRA) 42 U.S.C. § 6927(a) (1988) (allowing administrators to enter facilities where effluent sources are located, inspect the facility's monitoring equipment, and to take samples); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9604(e) (1988) (allowing representatives, when they believe a threat is posed, to enter at any reasonable time a facility where hazardous substances may be generated, stored, treated, or disposed so they may determine an appropriate response); Hazardous Materials Transportation Act of 1974 § 109(c), 49 U.S.C. § 1808(c) (1982 & Supp. II 1984); Hazardous Liquid Pipeline Safety Act of 1979 § 211(c), 49 U.S.C. § 2010(c) (1982 & Supp. IV 1986); Unwarranted searches pursuant to these statutes are necessary to advance the important national interest of protecting the environment.

istrative searches on a case-by-case basis,<sup>82</sup> it is unclear whether the Tenth Circuit's analysis in *V-1 Oil* would invalidate most environmental regulatory programs. Each statute in and of itself must satisfy the criteria set forth in *Burger*.<sup>83</sup> Nonetheless, it has been suggested that the standards for constitutionality should be less strict where the warrantless investigations do not seek evidence of criminal conduct, but only violations of administrative regulations.<sup>84</sup>

The Supreme Court in *Burger* indicated that time, place, and scope limitations were crucial to determining the constitutionality of a warrantless inspection scheme.<sup>85</sup> In *V-1 Oil*, the Tenth Circuit attempted to define the extent to which these characteristics must be limited. Unless courts acknowledge the realities of the legislative and administrative processes in articulating fourth amendment standards, many public health and safety statutes and regulations could be rendered unenforceable.

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82. See *Camara v. Municipal Court*, 387 U.S. 523, 534-38 (1967); see also *supra* notes 33-35 and accompanying text for a discussion of *Camara*.

83. See *supra* notes 58-63 and accompanying text for a discussion of the *Burger* test.

84. W. LAFAYE, *supra* note 26, at 180 (2d ed. 1987).

85. W. LAFAYE, SEARCH AND SEIZURE 41 (Supp. 1989).

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