

In the

# Supreme Court of the United States

RAYMOND J. DONOVAN, SECRETARY OF  
LABOR, UNITED STATES DEPARTMENT  
OF LABOR,

APPELLANT,

V.

( DOUGLAS DEWEY ET AL.

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) No. 80-901  
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Washington, D.C.  
April 28, 1981

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IN THE SUPREME COURT OF THE UNITED STATES

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RAYMOND J. DONOVAN, SECRETARY OF :  
LABOR, UNITED STATES DEPARTMENT :  
OF LABOR, :  
:   
Appellant, : No. 80-901  
:   
v. :   
:   
DOUGLAS DEWEY ET AL. :  
:   
- - - - - :

Washington, D. C.  
Tuesday, April 28, 1981

The above-entitled matter came on for oral ar-  
gument before the Supreme Court of the United States  
at 2:07 o'clock p.m.

APPEARANCES:

KENNETH S. GELLER, ESQ., Deputy Solicitor General,  
United States Department of Justice, Washington,  
D.C. 20530; on behalf of the Appellant.

FRANCIS R. CROAK, ESQ., Cook & Franke, 660 East Mason  
Street, Milwaukee, Wisconsin 53202; on behalf of  
the Appellees.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

KENNETH S. GELLER, ESQ.,  
on behalf of the Appellant

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FRANCIS R. CROAK, ESQ.,  
on behalf of the Appellees

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KENNETH S. GELLER, ESQ.,  
on behalf of the Appellant -- rebuttal

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1                                   P R O C E E D I N G S

2                   MR. CHIEF JUSTICE BURGER: We'll hear arguments next  
3 in Donovan v. Dewey. Mr. Geller, I think you may proceed.

4                   ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

5                   ON BEHALF OF THE APPELLANT

6                   MR. GELLER: Thank you, Mr. Chief Justice, and may it  
7 please the Court:

8                   The issue in this case is whether a federal mine in-  
9 spector is required to obtain a search warrant before conducting  
10 a routine safety and health inspection of mine facilities such  
11 as stone quarries pursuant to the Federal Mine Safety and Health  
12 Act of 1977.

13                   The four courts of appeals that have addressed this  
14 question have upheld the constitutionality of the Act. However,  
15 the district court in this case concluded that a warrant was  
16 required to search appellee's quarry and therefore declared the  
17 warrantless inspection provisions of the statute unconstitu-  
18 tional. The Government has taken a direct appeal from that  
19 ruling.

20                   The facts may be briefly stated. The appellee,  
21 Waukesha Lime and Stone Company, operates a limestone quarry and  
22 mill facility in Wisconsin. The quarry consists of two open  
23 pits that are as deep as 30 feet in some places. Generally,  
24 about three times a day workers use explosives to dislodge  
25 pieces of rock from the wall of the quarry. The limestone is



1 then taken to a crushing facility where it is crushed and sorted  
2 according to size, and the stone is then taken to a building  
3 known as the dust house where it is dried, ground, and bagged  
4 for direct sale to customers.

5           Waukesha's facility has been subject to regular safety  
6 and health inspections by state officials for about 60 years  
7 and it has been subject to federal safety and health inspection  
8 since 1966 when Congress passed the predecessor of the Federal  
9 Mine Safety and Health Act. Now, in April, 1978, a federal mine  
10 inspector showed up at Waukesha's mine to conduct a routine  
11 health and safety inspection. Following the inspection he cited  
12 Waukesha for 25 violations of mandatory health and safety stan-  
13 dards. A few months later the same inspector showed up to con-  
14 duct a followup inspection to determine whether Waukesha had  
15 corrected the most serious of these violations, specifically,  
16 whether the airborne concentrations of silica dust in the dust  
17 house had been lowered. Inhalation of excessive amounts of  
18 silica dust leads to a condition known as silicosis which is  
19 a very serious respiratory disease, even more serious than black  
20 lung disease.

21           Waukesha's president, appellee Douglas Dewey, refused  
22 to allow the inspector to undertake the followup inspection  
23 without a search warrant. At that point the inspector discon-  
24 tinued the inspection and issued a citation to the company for  
25 denial of entry. The citation was followed by a proposed civil

1 penalty of \$1,000. In addition, the Secretary thereafter  
2 brought this action in the United States District Court for the  
3 Eastern District of Wisconsin, to enjoin appellees from refusing  
4 to permit warrantless inspections of their quarry pursuant to  
5 the Mine Safety Act. And as I noted a moment ago, the district  
6 court denied that injunction and instead held in reliance on  
7 this Court's decision in Marshall v. Barlow's that the Act's  
8 warrantless inspection provisions violate the Fourth Amendment.

9 QUESTION: Mr. Geller, you're doubtless familiar with  
10 the Steagald case that this Court decided a couple of weeks ago,  
11 where it said that law enforcement officers, even though they  
12 possess an arrest warrant, could not go into the house of a  
13 third person to seize the person for whom they had the warrant.  
14 Now, certainly crime has been a heavily regulated business in the  
15 last 50 or 60 years just like mining. If one were to apply the  
16 Steagald to this type of case, don't you think the district  
17 court's opinion probably has something to be said for it?

18 MR. GELLER: I think if Steagald were applicable to  
19 this sort of case, the district court's opinion would have a lot  
20 to be said for it, but we don't read Steagald as wiping out the  
21 exception to the warrant requirement exemplified by cases such  
22 as Biswell, for pervasively regulated businesses.

23 QUESTION: What about a pervasively regulated business  
24 like organized crime?

25 MR. GELLER: Well, Congress has not attempted to pass

1 that sort of a statute. It's passed a statute which we think is  
2 quite similar to the statute that this Court upheld in Biswell,  
3 and I don't recall that there was anything in the Steagald  
4 opinion which cast any doubt on the continuing validity of  
5 Biswell, and therefore we continue to rely on Biswell. This  
6 is a regulatory search, for purposes of finding whether there  
7 are health and safety violations and not for purposes of finding  
8 evidence of a crime.

9 QUESTION: Do you think for the Biswell doctrine to  
10 apply that pervasive regulation is sufficient? Or must there  
11 be a long -- whatever "long" means -- history of pervasive regu-  
12 lation?

13 MR. GELLER: Well, I think -- there are two key cases  
14 that -- of course, we rely on Colonnade and Biswell, and there's  
15 a tendency which we have fallen into as much as the other party  
16 does, to lump the two exceptions together in sort of a Colonnade-  
17 Biswell exception. I think analytically there are really two sepa-  
18 rate exceptions. Colonnade, I think dealt with a situation in which  
19 there had been an extremely long history of pervasive government  
20 regulation in an area --

21 QUESTION: That was of alcoholic beverages?

22 MR. GELLER: Alcoholic beverages. In fact, it pre-  
23 dated the Constitution, government regulation. And the Court  
24 found in that situation that Congress could reasonably authorize  
25 warrantless inspections to carry out the purposes of the statute.



1 Without any further inquiry having to be made as to the need for  
2 warrantless searches it's interesting to read the Court's opin-  
3 ion. There's no discussion of that. However, a couple of years  
4 later in the Biswell case, the Court confronted a situation in  
5 which there hadn't been that long history --

6 QUESTION: And that involved commercial traffic in  
7 firearms?

8 MR. GELLER: Firearms. That's right. It was the  
9 Gun Control Act of 1968. The Court noted that there wasn't  
10 the same long history of government regulation of firearms --

11 QUESTION: There was a history, and it was pervasive.

12 MR. GELLER: There was a history, there was current  
13 pervasive regulation, and the Court then went on to say that  
14 when you have that sort of a situation, the Court will determine  
15 reasonableness by looking at the enforcement needs and privacy  
16 guarantees of the statute.

17 QUESTION: Well, what's that kind of a situation?  
18 There was a history, wasn't there?

19 MR. GELLER: There was a history, as there is --

20 QUESTION: And, in other words, do you think Congress  
21 could enact legislation today, pervasively regulating a certain  
22 element of industry and providing for inspections and searches  
23 and seizures without a warrant? And if it could not, would that  
24 provision become constitutional ten years from now?

25 MR. GELLER: No, I don't think, I think that I have to

1 know more about the situation, Justice Stewart, but I think if  
2 Congress can, consistent with its other constitutional powers,  
3 move into an area for the purposes of regulation, and if --

4 QUESTION: And if the regulation is pervasive enough,  
5 it can provide for warrantless searches and seizures without  
6 violating the Constitution, is that it?

7 MR. GELLER: If the enforcement needs of the statute  
8 require warrantless searches and if there are privacy guarantees  
9 in the statute that take the place of a warrant, as there was  
10 in Biswell and as we contend that there is in this case --  
11 although in this case we also are dealing with an industry  
12 which --

13 QUESTION: Of course, my brother Rehnquist would sug-  
14 gest that the police would always say that their enforcement  
15 needs require them to violate the Fourth Amendment.

16 MR. GELLER: Well, we're not talking here, first of  
17 all, about any criminal enforcement. We're talking about health  
18 and safety inspections, for which this Court has said, routine  
19 warrantless inspections are frequently necessary in order to  
20 carry out the purposes of the statute. That's certainly not  
21 the case with criminal law enforcement. And the situations, in  
22 fact, in which it is necessary to conduct warrantless searches  
23 in order to enforce the criminal laws, the Court has recognized  
24 exceptions, such as exigent circumstances, even in tradi-  
25 tional criminal law enforcement areas.

1 But we're dealing here with an industry which we sub-  
2 mit has been pervasively regulated for many, many years and  
3 therefore it's an even stronger situation in many ways than the  
4 situation that confronted the Court in Biswell. But even if  
5 the Court were to view this case as not involving a long his-  
6 tory of regulation but simply a current pervasive regulation,  
7 we think the statute can be upheld under the standard that was  
8 announced in Biswell, which requires looking into the privacy  
9 guarantees of the statute. In other words, is there a real  
10 need for a warrant?

11 QUESTION: So, in other words, your answer to my  
12 hypothetical case of Congress enacting a statute pervasively  
13 regulating an industry and providing for the warrantless sear-  
14 ches and seizures of elements in that industry without securing  
15 a warrant, if there was a showing that there was a need to  
16 do so --

17 MR. GELLER: If there was an urgent federal interest.

18 QUESTION: There would be no constitutional violation.  
19 Right, today, the day the statute's enacted.

20 MR. GELLER: Yes, yes. That's right. We don't think  
21 it can be the case that if this case had arisen 30 years from  
22 now it might be different.

23 QUESTION: Well, then, Kahriger was rightly decided  
24 and Coin and Currency was wrongly decided? The pervasive  
25 federal regulation of gambling that was upheld in 345 or



1 whatever U.S. and that was subsequently overruled in 390 or  
2 395 U.S., those cases were simply topsy-turvy?

3 MR. GELLER: I'm not familiar with that line of cases,  
4 Justice Rehnquist, or its relevance to --

5 QUESTION: They involve compulsory self-incrimination,  
6 those cases.

7 QUESTION: Supposing the Government for 100 years has  
8 pervasively regulated gambling?

9 MR. GELLER: Well --

10 QUESTION: Does that make any sort of warrantless  
11 inspection of a nightclub that might be thought to be carrying  
12 on gambling -- ?

13 MR. GELLER: No, I think -- let me say, first of all,  
14 we think that the length of regulation and the pervasiveness  
15 of regulation are relevant to what are the reasonable expecta-  
16 tions of privacy that a person in that industry may have. If  
17 there's been a long history of regulation for 200 years, as  
18 there was in Colonnade, then there really can't be any expecta-  
19 tion of freedom from government inspection. I think for that  
20 reason in Colonnade the Court didn't go any further than  
21 saying that, didn't engage in any analysis as to the need for  
22 warrantless -- .

23 QUESTION: Let me try another hypothetical on you.  
24 Suppose, passing over the problems of whether building con-  
25 struction is in the area of interstate commerce, for the moment,

1 that on all buildings and I suppose all commercial buildings  
2 would clearly be covered, random inspections by federal inspec-  
3 tors during the process of construction until the building was  
4 completed. Would you think that's constitutional?

5 MR. GELLER: There would be nothing unconstitutional  
6 on the face of such a scheme. You'd have to inquire into what  
7 the urgent federal interest is, and I said, you have to inquire  
8 as to the need for warrantless inspections. There's not always  
9 a need for warrantless inspections and when there isn't a need  
10 then the traditional warrant requirement should certainly apply.

11 QUESTION: There is such a statute with respect to  
12 constructing bridges, I think, across any navigable stream,  
13 that federal inspectors may come on the site and inspect it at  
14 any time without a warrant. I suppose it's to see whether the  
15 steel and concrete is going to be enough to hold the bridge up,  
16 so it won't fall on the boats or drop the people.

17 MR. GELLER: I think in that sort of a situation  
18 there's a minimal expectation of privacy and it's certainly  
19 reasonable for those sorts of inspections to take place.  
20 I learned of another example of a very recent industry in which  
21 there hasn't been a long history of regulation and yet there's  
22 pervasive government regulation and no one has challenged the  
23 fact that it's constitutional. That's the nuclear power indus-  
24 try, which has not been in existence for a very long period of  
25 time. You don't have the long history that you even had in

1 Biswell.

2 QUESTION: Of course, your expectation of privacy,  
3 that's kind of a circular argument. If Congress today enacts a  
4 statute pervasively regulating an industry and you're an element  
5 in that industry and if that legislation provides for the  
6 warrantless inspections of elements of that industry, then if  
7 the statute's valid, you've lost your expectation of privacy.

8 MR. GELLER: That's right, for that.

9 QUESTION: But that doesn't mean you have no standing  
10 to attack it.

11 MR. GELLER: Not at all. But that's just one element,  
12 as I've repeated, of the test that Biswell sets up, as to whe-  
13 ther a statute is reasonable.

14 QUESTION: Mr. Geller, to what extent is the require-  
15 ment of a license relevant in these cases? Of course, that  
16 isn't so here, I take it.

17 MR. GELLER: Well, the appellees --

18 QUESTION: It was in the gun case.

19 MR. GELLER: Well, there was a licensed gun dealer in  
20 that case. There is no physical reason --

21 QUESTION: You could either agree to a search in  
22 advance or you don't get a license?

23 MR. GELLER: Well, I think the same argument could be  
24 made in the mining industry, Justice White. There's no piece  
25 of paper that is labelled a license, but we don't think that



1 that's all that significant. To begin with, every mine that's  
2 covered by the Mine Safety Act has to register with the Secre-  
3 tary of Labor.

4 QUESTION: By the way, are we talking here about the  
5 stone quarry business or all mines?

6 MR. GELLER: We're talking about the non-coal portion  
7 of the mining industry.

8 QUESTION: So all non-coal mines you're talking about,  
9 not just stones?

10 MR. GELLER: This case involves stone.

11 QUESTION: Not just the ones that perhaps would be  
12 where your enforcement needs to be very great because the danger  
13 to health is very great. There are some mines that qualify  
14 as mines that aren't all that dangerous.

15 MR. GELLER: Well, there may be some cases at the  
16 fringe. This case involves a stone quarry. The courts of  
17 appeals cases that have arisen under this statute involve  
18 stone quarries and gravel pits. That's the sort of situation  
19 that this Act was addressed to, where there was a need for fur-  
20 ther regulation, the non-coal portion of the mining industry.

21 QUESTION: What about the coal? Warrants in the  
22 inspection of coal mines?

23 MR. GELLER: No, no. There aren't.

24 QUESTION: We had a combination of cases four years  
25 ago on that subject, didn't we?

1 MR. GELLER: Yes, there are no warrants either under --  
2 this Act involves the coal portion of the mining industry as  
3 well, but neither these appellees nor any other plaintiff has  
4 chosen to attack that section of the statute, presumably on  
5 the theory that that portion of the industry has been subject to  
6 pervasive government regulation even though --

7 QUESTION: I suppose there's a greater privacy inter-  
8 est in a coal mine than there is in a big open pit, isn't there?  
9 A little harder to see inside it?

10 MR. GELLER: Well, I think one of the things that I  
11 think is, I should say, is that the distinction between coal and  
12 non-coal portions of the industry is not coterminous with the  
13 distinction between underground and surface mines. Fifteen  
14 percent of the miners in the limestone and quarry industry are  
15 underground, and 35 percent of the miners in the coal industry  
16 work in surface mines. So there isn't the same --

17 QUESTION: But there has historically been pervasive  
18 regulation of the coal mining industry.

19 MR. GELLER: Yes.

20 QUESTION: And at least in this case there's no attack  
21 upon warrantless searches provided by the statute of coal mines.

22 MR. GELLER: There is not. That's correct, although  
23 the Federal Government only got into the business of regulating  
24 the non-coal portions of the industry in 1966. But the states  
25 had been regulating non-coal portions of the industry for many,

1 many decades.

2 QUESTION: Particularly this state of this particu-  
3 lar entity.

4 MR. GELLER: Wisconsin had been regulating this quarry  
5 since 1922, but other states had gone back even further than  
6 that. So we think that the test is whether there's an urgent  
7 federal interest, and whether the privacy, whether the statute  
8 involved protects the privacy of the individual, and whether  
9 there's a need for warrantless searches. That is, we think, what  
10 Biswell says and we think this case falls under Biswell.

11 I don't think I have to spend very much time trying  
12 to convince the Court of the urgent federal interest involved  
13 in frequent safety and health inspections of mine facilities.  
14 What I would like to spend my remaining time on is --

15 QUESTION: The federal interest is precisely the same  
16 as in OSHA, isn't it?

17 MR. GELLER: Excuse me?

18 QUESTION: It's precisely the same federal interest  
19 as was present in the OSHA case?

20 MR. GELLER: Well, except that we're dealing here with  
21 an industry that Congress found to be among the most hazardous  
22 in the nation. It deals with a specific industry with an  
23 acknowledged history of safety and health violations. The most  
24 dangerous --

25 QUESTION: In OSHA they found a history of all sorts



1 of dangerous things that justified the same program.

2 MR. GELLER: Well, as to certain portions of the  
3 industries that OSHA covered, but OSHA also covered a lot of  
4 industries that weren't all that dangerous --

5 QUESTION: What you're saying is, there's a constitu-  
6 tional distinction between something that's very dangerous and  
7 something that's just pretty dangerous?

8 MR. GELLER: Well, I think one of the tests that  
9 Biswell sets up is whether there's an urgent federal interest  
10 for the warrantless searches.

11 QUESTION: Well, would you say that there's an urgent  
12 federal interest in the apprehension of felons?

13 MR. GELLER: Yes. But I wouldn't think it could meet  
14 the other parts of the Biswell test, Mr. Justice Rehnquist.

15 Now, I think it's important, in trying to focus on  
16 why there isn't the need for a warrant in this case, to look at  
17 what the statutory protections are for mine operators in order  
18 to determine what further protection a warrant would provide.  
19 Now, I think the best way to demonstrate that a warrant would  
20 be of virtually no practical value in the mine safety context,  
21 and would add virtually no protection to these minimal privacy  
22 interests that we think mine operators have in these open pits,  
23 is to contrast mine inspections with the sorts of inspections  
24 that were involved in the Camara and See cases, where the Court  
25 held that a warrant was required for routine housing inspections,

1 and in Barlow's, which involved health inspections under the  
2 Occupational Safety and Health Act.

3 The Court stated in Camara and it repeated in Barlow's  
4 that a warrant would serve a valuable purpose in those situa-  
5 tions because it would limit the unbridled discretion of the  
6 inspector as to when and whom to search. The Court stated, in  
7 addition, that a warrant would assure the homeowner or the  
8 businessman that the inspection was authorized by statute, and  
9 was conducted pursuant to an administrative plan containing  
10 specific neutral criteria, and that it would advise the owner  
11 of the precise scope and objects of the search.

12 Now, these points make a great deal of sense, espe-  
13 cially Camara, but also in the Barlow's situation, Camara --  
14 ~~being~~ QUESTION: Well, the Government didn't think so in  
15 Barlow.

16 MR. GELLER: I think that the Court found that there  
17 was not the factual basis that the Government thought there was  
18 for a need for warrantless inspections in the Barlow's situation.  
19 But I think we concede freely that Barlow's involved a situation  
20 where six million businesses were subject to the Occupational  
21 Safety and Health Act, but only about 80,000 businesses were  
22 searched every year. Therefore, when an OSHA inspector showed  
23 up at the door, the businessman really had no reason to know  
24 whether he properly was there, whether it was in fact an OSHA  
25 inspector or what were the standards that we used to pick that

1 particular business, what were the limits of the search power  
2 of the officer? I think it's a totally different situation  
3 when we're dealing with mine inspectors. Every mine subject  
4 to the Mine Safety Act -- and that includes virtually every mine  
5 in the nation -- has to register with the Secretary of Labor,  
6 has to be familiar with all of the health and safety standards  
7 promulgated by the Secretary of Labor, gets a copy of every  
8 health and safety standard promulgated by the Secretary of  
9 Labor. The statute that regulates this industry sets forth a  
10 minimum number of inspections that have to take place every  
11 single year. It's a minimum of two for surface mines and four  
12 for underground mines. It's generally the same inspector who  
13 shows up periodically every few months to conduct the inspec-  
14 tion.

15 The inspector in this case submitted an affidavit  
16 saying that he had been making all of the inspections of stone  
17 quarries in Waukesha County over the previous five years. He  
18 had been showing up at this limestone quarry repeatedly to make  
19 these inspections.

20 QUESTION: Well, if they sent a new guy maybe they'd  
21 let him in.

22 QUESTION: This comes close to a bank examiner situa-  
23 tion, doesn't it?

24 MR. GELLER: I think that's right, Justice Blackmun.  
25 You have the inspector showing up every few months. The mine



1 operator knows why he's there, he knows who he is, knows what  
2 the limits of his search power are. The statute itself sets  
3 forth the neutral criteria that would allow the search to take  
4 place. One has to ask what additional value a warrant would  
5 provide in that situation?

6 Now, the point of all this, I think, is that a warrant  
7 here, just as in Biswell -- and in Biswell, I might add, the  
8 Court made the same analysis. The Court pointed out in Biswell  
9 that someone who engaged in a licensed business of dealing in  
10 firearms is given a copy of all the regulations that are appli-  
11 cable to his business and is told in advance of what the limits  
12 of the searching officer's powers are. And the Court said, we  
13 don't think that the additional benefits that a warrant would  
14 provide in that situation are very meaningful or outweigh the  
15 need for frequent, unannounced inspections, which the Court  
16 found in the Biswell situation and we assert in this case, Con-  
17 gress found were essential to accomplishing of the statutory  
18 purpose.

19 And the point of all this is that a warrant here,  
20 just as in Biswell, would tell the mine operator absolutely  
21 nothing that he doesn't already know. And because the Act con-  
22 tains legislative standards that would certainly satisfy the  
23 administrative probable cause standard of Camara and Barlow's,  
24 we think that mine inspectors could procure a warrant prior to these  
25 frequent routine inspections virtually for the asking.

1           Moreover, mine inspectors don't have the unbridled  
2 discretion under the Act, but are carefully limited by statute  
3 as to who, when, and how often they are to search. It's there-  
4 fore difficult to see how even the minimal privacy interests  
5 that a mine operator might have in these pits would be benefited  
6 in any meaningful way by requiring resort to the warrant process.  
7 A warrant would simply become an empty gesture, we think, under  
8 these circumstances.

9           Now, even though a warrantless context serves no use-  
10 ful purpose, I suppose there would be no great lasting harm in  
11 insisting on a warrant if the mine safety and health enforcement  
12 program would not be adversely affected. But Congress reason-  
13 ably concluded that a warrant requirement would seriously under-  
14 cut the Act's enforcement objectives because of the "notorious  
15 ease" -- and that's the phrase taken from the Senate report --  
16 the notorious ease with which many mine hazards may be concealed  
17 or corrected temporarily if an inspector has given advance warn-  
18 ing of an inspection.

19           QUESTION: What if Congress had endowed the Drug En-  
20 forcement Administration with the same sort of power saying that  
21 it's notoriously easy to flush drugs down the toilet and there-  
22 fore you're entitled to perform a maximum of 12 warrantless  
23 searches of disco dancing places every year? Do you think that  
24 would get around the Fourth Amendment?

25           MR. GELLER: No, we don't want to get around the

1 Fourth Amendment. We don't think it would get around the war-  
2 rant requirement because in that sort of a situation a warrant  
3 would still serve a very valuable purpose when the inspector  
4 showed up at the door to make the inspection. It would tell the  
5 person in the house that he is who he says he is, he has proba-  
6 ble cause to make the search, and it would explain what the  
7 limits of the search power are. I think that none of that is  
8 applicable to the mine safety situation where the mine operator  
9 knows full well why the mine inspector is there and what the  
10 limits of the search power are. So we don't think that that  
11 sort of a situation would meet the test of Biswell.

12 QUESTION: I thought you were arguing now about the  
13 congressional finding of urgency and necessity to --

14 MR. GELLER: I am, but I think that's just one portion  
15 of the Biswell test, Mr. Justice Rehnquist, and we think that  
16 for a statute to meet the Biswell test it has to satisfy all of  
17 these criteria, not just one.

18 Now, we mentioned one of these particularly egregious  
19 examples in which unannounced inspections would have perhaps  
20 saved some lives, in our brief. That's the Scotia mine disaster  
21 which took the lives of 23 miners and three mine inspectors in  
22 1976. There the evidence showed after the fact that the mine  
23 operator had been moving certain brattices which controlled the  
24 amount of ventilation in the mine after the inspector had left,  
25 but had made it appear through some sort of cosmetic changes



1 that there had been adequate ventilation. And in fact, in this  
2 very case -- this is a very useful example -- what the inspector  
3 was going back in to see was whether this quarry had controlled  
4 the level of silica dust in the dust house. Now, it seems clear  
5 that if advance notice had been given, such as by showing up  
6 and being refused entry until he went back and got a warrant,  
7 a quarry could well take cosmetic changes such as shutting down  
8 the machines for awhile or opening up the windows for awhile to  
9 make it seem as if the dust levels were lower than they really  
10 are.

11 Of course, mine inspectors could try to solve this  
12 problem by getting a warrant before showing up in the first  
13 place, but I think that would produce a massive administrative  
14 burden. You have 1,900 mine inspectors who have to make, by  
15 statute are mandated to make a minimum number of inspections  
16 every year. Last year they made more than 120,000 inspections  
17 of mine facilities.

18 I see my white light, and I'd like to reserve the  
19 balance of my time, if I may.

20 MR. CHIEF JUSTICE BURGER: Mr. Croak --

21 ORAL ARGUMENT OF FRANCIS R. CROAK, ESQ.,

22 ON BEHALF OF THE APPELLEES

23 QUESTION: Let me put to you at the outset a question  
24 I put to your friend. What about the hypothetical: Congress  
25 after identifying building construction as being within the

1 reach of federal legislative power, laying that aside, then  
2 decided that they were going to have inspectors who could come  
3 on the on-site of any building more than 100 feet high at any  
4 time during the course of construction to inspect. Let's make it  
5 100 so they don't come into one-story houses. Is that all right?

6 MR. CROAK: No, I don't think so. I don't think  
7 there's any history of pervasive regulation. I don't think --

8 QUESTION: Well, there is a pervasive degree of regula-  
9 tion at the local level.

10 MR. CROAK: Yes, but I don't think that -- at least  
11 so far --

12 QUESTION: And it is random, it is random inspection  
13 by building inspectors. I don't know that 100 feet is the limit  
14 but tall buildings always have random inspections during con-  
15 struction. Now that's pervasive throughout the country, municipi-  
16 pal, sometimes the state.

17 MR. CROAK: Well, I think Camara and See answered  
18 that question, though. Those were building, one was a building  
19 inspection, one was a fire inspection, and the requirement there  
20 was for warrants. So I think your question really is Justice  
21 Stewart's question, can you select an industry and having  
22 selected an industry avoid the normal Fourth Amendment require-  
23 ments of a warrant?

24 QUESTION: But under your argument, it wouldn't be  
25 valid the day the legislation was enacted but it might be valid

1 25 years later. By then you'd have 25 years of history.

2 MR. CROAK: I see your point, and you only gave my  
3 friend here ten years to worry about, but I don't think the ten  
4 or the 25 is dispositive of the issue. I agree with him. The  
5 nuclear industry from day one. But, if I may, let me say that  
6 some industry, such as nuclear, the Government really started  
7 the nuclear industry. The Government controls every facet of  
8 the nuclear industry and has since day one. I think that that's  
9 a distinguishing factor in that situation.

10 I think in this issue of pervasive regulation, there  
11 are some considerations. If you analyze the industries that  
12 this Court has found to be pervasively regulated, they cover a  
13 broad spectrum of activities within the industry. The liquor  
14 concerns are taxed going back to the Revolution, but after  
15 Prohibition we enacted 27 U.S. Code, which tells the distiller  
16 or the brewer what size, or he has to have a permit to have a  
17 brewery or distillery, he has to -- the size bottles that he  
18 puts in, the makeup of what he sells, is regulated; who he sells  
19 to is regulated. There's even some regulation in there about  
20 his pricing arrangements. And --

21 QUESTION: Well, the history of local inspection of  
22 buildings is at least 100 years old, is it not?

23 MR. CROAK: Yes.

24 QUESTION: Well, isn't that pervasive?

25 MR. CROAK: I don't think so. I think you want me to



1 say that you can build a multistatute pyramid which will reach  
2 pervasive regulation, some of it being local regulation, some  
3 of it being federal, some --

4 QUESTION: Well but the history of this country is  
5 that a great deal of regulation that once was considered entire-  
6 ly local has, as you well know, in the last 40 years become  
7 pretty much federalized; maybe even more than 40.

8 MR. CROAK: I don't dispute that and I don't imagine  
9 we're here today --

10 QUESTION: I'm not arguing in favor of it.

11 MR. CROAK: No.

12 QUESTION: I'm just observing the history of the fact.

13 MR. CROAK: I think we'd all agree it's a fact and  
14 we won't discuss our own particular views on the wisdom, but the  
15 fact is that if this approach is used, I suppose one could  
16 fashion an argument that every business in America today is  
17 pervasively regulated.

18 QUESTION: Your argument is that the history of per-  
19 vasive regulation has to be regulation by the jurisdiction that  
20 is now asserting the right to search and seize without a war-  
21 rant?

22 MR. CROAK: That's right. Distinguished from --

23 QUESTION: In order to come under the Biswell --

24 MR. CROAK: Piggyback on the federal, and the federal  
25 on the state or the local; that's my argument. I'm afraid there

1 is no litmus test for pervasive regulations. There is no one  
2 thing, I think, that I agree that licensing is but a factor.  
3 Obviously, this business is not licensed nor has it ever been.  
4 The other factors which are important are the statute itself.  
5 I think that that's something that you have to look at. The  
6 peppered -- that was a pervasive -- pardon the use of the word  
7 -- consideration, perhaps, in Colonnade. And if you look at  
8 the history of this particular industry, I think you find that  
9 there was really no meaningful federal regulation of this  
10 quarry until, really, 1978, when the 1977 Act become effective,  
11 because the Act of 1966 merely established certain advisory  
12 standards. It provided that there was really no citation au-  
13 thority in the inspecting agents; it provided for one inspection  
14 a year, and now we've gone to two -- I don't regard that change  
15 as significant. It also provided that in a very narrow area of  
16 cases involving non-coal mines, inspectors could issue what  
17 were known as withdrawal orders, which would have the effect of  
18 a temporary shutdown. The nature, if you read those orders,  
19 it's hard to equate those with a limestone quarry, an open-pit  
20 limestone quarry especially. But what I'm trying to say is  
21 that the language of the Court in Barlow's talks about a long  
22 tradition of close governmental supervision. And I suggest to  
23 the Court that there's no way you can look at this particular  
24 industry and say there's a long tradition of close governmental  
25 supervision.

1 I'd also point out to the Court that I think what the  
2 Government is trying to do is to piggyback the long tradition,  
3 if you will, of government control of the coal mine by -- because  
4 what happened in 1977 was that Congress amended the Coal Act,  
5 did away with the act that affected us, the act of '66, and in-  
6 corporated by amendment and by definition everything that was  
7 in the various mining industries and brought them all under the  
8 same strictures that had controlled the coal industry.

9 And, I don't challenge the wisdom or the right of the  
10 Congress to do that. I'm only saying that that doesn't give the  
11 Congress the right, however, to do away with the Fourth Amend-  
12 ment expectations of this particular industry.

13 The other concern which I have is the argument, or the  
14 suggestion of an argument that solely because of the injury  
15 rate, or the dangerousness, if you will, of a particular indus-  
16 try, that this standing alone gives the Congress the right to  
17 mandate warrantless entry. Now, I don't think any of us are  
18 unsympathetic with the goals of government to cut down injuries,  
19 but I think that there is no case that this Court has ever de-  
20 cided which ever said that injury alone is a justification for  
21 waiver of the Fourth Amendment. If we go that route and start  
22 establishing those criteria, I suggest we'll be plowing new  
23 ground, and perhaps, Justice Rehnquist, opening the door for  
24 some of the things that you suggested by your questions.

25 There are certainly areas in American life where



1 everyone would agree -- the Congress, or us, or everyone --  
2 would agree that there is a significant dangerousness to most of  
3 us as citizens, whether we be workers involved or citizens  
4 exposed to certain hazards.

5 QUESTION: I just took another look at Camara, which  
6 you seem to rely on, Mr. Croak, and that didn't involve the  
7 building inspection while a tall building was in the process of  
8 being constructed. That was an occupied ground-floor area. Do  
9 you think that controls anything -- ?

10 MR. CROAK: If you're asking me, do I see the dis-  
11 tinction between a completed and an uncompleted building, no,  
12 I don't. For constitutional purposes, I don't.

13 QUESTION: Suppose Congress, after holding some hear-  
14 ings, recited the great incidence of the fires out in the gam-  
15 bling town out west somewhere -- I forget the name of the town.

16 MR. CROAK: Las Vegas?

17 QUESTION: Las Vegas. And there have been three or  
18 four of those. And then went on to show the loss of life and  
19 went on to show the failure to have adequate safety provisions  
20 in those buildings, complying with requirements, and then cited  
21 all of the cases -- and there are quite a few of them -- of  
22 buildings collapsing during the process of construction, with  
23 three, four, five, twenty people, workmen, getting killed.  
24 Do you say they could not legislate for random inspection of  
25 buildings in process of construction if that hazard existed?

1 MR. CROAK: Maybe I'm not making myself clear. I have  
2 no problem with the Government inspecting the buildings.

3 QUESTION: Random inspection of the building while  
4 it's under construction to see that they're using the proper  
5 amount of cement, the proper sealed structure, in compliance  
6 with prescribed standards, and fire safety provisions, and so  
7 forth?

8 MR. CROAK: If you're asking me, may government legis-  
9 late to provide for that inspection? My answer is yes. If  
10 you're asking me, may government provide for warrantless entry?

11 QUESTION: Yes, random.

12 MR. CROAK: My answer is no.

13 QUESTION: Random inspection.

14 MR. CROAK: I don't have any problem -- I think, pro-  
15 bably somewhere in OSHA there is a provision which today is per-  
16 mitting government inspectors to look at the tall building that  
17 you talk about, but as this Court said in Barlow's, such an  
18 inspection requires a warrant.

19 QUESTION: Well, is your view of the matter that that  
20 is a federalism proposition, or view, that that's a matter of  
21 local and state government --

22 MR. CROAK: No, I do not maintain that. The inter-  
23 esting thing is that, now that I think about it, I think this  
24 is reflected in the brief of one of the amici, that that acci-  
25 dent rate is higher in the construction industry than it is in

1 the surface mining industry which my client is involved in. I  
2 don't know whether it means anything in this particular case.

3 QUESTION: Well, how about, once again, the nuclear.  
4 That's okay?

5 MR. CROAK: I think it's all right because I can't  
6 conceive that anybody could reasonably argue that that's not  
7 pervasively regulated. From day one at the University of  
8 Chicago the Government has been involved in the industry.

9 QUESTION: Well, is it because it's always been, or  
10 that it is now?

11 MR. CROAK: That it always has.

12 QUESTION: I for one am not too worried about  
13 lives 20 years ago. I'm worried about lives today.

14 MR. CROAK: I feel it's always been -- it was per-  
15 vasively developed by Government and it is pervasively --

16 QUESTION: The first year, was it okay? The first  
17 year that it was regulated, was that okay?

18 MR. CROAK: I think so, Mr. Justice Marshall, because  
19 in my view the regulation came with the development of the  
20 industry.

21 QUESTION: Well, if that's the point, it has to go  
22 along with it, we can never learn? Is that your position?

23 MR. CROAK: I think my position is -- although I see  
24 your point, what you're suggesting, my position remains that the  
25 nuclear industry is pervasively regulated, however, but I



1 appreciate your point.

2 QUESTION: Yes, you've got a problem; you've got a  
3 problem.

4 QUESTION: You can run mines and build buildings with-  
5 out the permission of the Federal Government but you can't en-  
6 gage in the nuclear power business except on a license from  
7 what was formerly the Atomic Energy Commission, is that not so?

8 MR. CROAK: That's correct. You can't even obtain  
9 some of the materials necessary to generate nuclear power, for  
10 example, without obtaining them through licensing.

11 QUESTION: At one time there was a statutory prohibi-  
12 tion against any private individuals even engaging in the  
13 nuclear power industry, wasn't there, before 1954?

14 MR. CROAK: I'm not familiar with that but it wouldn't  
15 surprise me at all, and it doesn't offend me. I think that  
16 government can reserve activities solely to itself. I think  
17 that there is one other concern that I have and that is the  
18 Government's argument that -- and this is kind of an unusual  
19 situation, the Government is telling us what's good for us, and  
20 what's good for us is not to request a warrant because there  
21 are other provisions within the law that will take care of us  
22 and we are saying we don't want that, we want the Government to  
23 get a warrant. It's kind of a backwards situation, if you will,  
24 but if I could discuss it?

25 The Government says that the injunctive procedures are

1 the equivalent of a warrant. There was language in Barlow's  
2 talking about administrative warrants or their equivalent.  
3 I suggest that an injunctive procedure is not that. If one  
4 examines the record in this case the pleadings of the Government  
5 really allege that we didn't let them in. And so who did it  
6 shift the burden to, then? The record is clear, the Solicitor  
7 General has advised the Court, that administrative action was  
8 commenced against us for not letting them in, and we were fined  
9 \$1,000. I don't think that the injunctive procedure provision  
10 was probably even necessary, because if in fact the government  
11 inspector had a right to enter, I think that there was adequate  
12 remedy in the law as it exists now for an injunctive procedure  
13 of some sort to let him in, so that by putting it in the statute  
14 I don't think that it gave us any rights, any more or less  
15 than existed before. But the more

16 But the more important thing is that the hearing that  
17 one gets at this time is, whether you let us in or not. And  
18 the relief sought here was a permanent injunction against us  
19 ever to keep government inspectors out. I don't think anybody  
20 would seriously stand here and argue that one could issue a  
21 permanent search warrant for the examination of our premises  
22 or --

23 QUESTION: That's exactly what the Government is ar-  
24 guing.

25 MR. CROAK: I know they are.

1 QUESTION: The statute is a permanent search warrant.

2 MR. CROAK: But they're telling us that the equivalent  
3 of the search warrant hearing is the hearing on injunctive  
4 relief. And --

5 QUESTION: They really don't even need that, if they're  
6 right under the statute; that the statute itself is a permanent  
7 authorization to go in without notice or without --

8 MR. CROAK: Yes. I also question the position that  
9 the Government takes about the absence of a provision for  
10 entry, when entry is denied. I find nothing in the statute  
11 that prohibits the agent from forcing his way in. I understand  
12 that it's the administrative policy of the Secretary of Labor  
13 at the present time to direct people not to do that, but  
14 there's nothing that you can read that I can read in the statute  
15 that prohibits that.

16 QUESTION: Mr. Croak, just as a matter of information,  
17 is there anything in this statute -- and perhaps I should know  
18 from the papers, that talks about inspecting records. Or are we  
19 only talking about inspection of physical premises?

20 MR. CROAK: There is a record provision of the records  
21 that are required to be kept and to be made available to the  
22 Secretary. Is that what you mean?

23 QUESTION: Well, can they make -- if they win this  
24 case, will they be able to not only come in and look around  
25 and test the amount of dust in the air and that sort of thing



1 but also can they say, we want to see your records for the last  
2 three weeks of how much dust your own tests showed and that  
3 sort of thing?

4 MR. CROAK: I believe so.

5 QUESTION: They could do that.

6 MR. CROAK: Yes, I believe so.

7 QUESTION: On your permanent search warrant, there are  
8 some. Isn't there one the Customs people have?

9 MR. CROAK: I'm sorry?

10 QUESTION: To search without a warrant?

11 MR. CROAK: Customs people?

12 QUESTION: Yes. There are permanent search warrants.  
13 Provided for --

14 MR. CROAK: All right --

15 QUESTION: I think so, I'm not sure.

16 MR. CROAK: No, I think you're right. And I think as  
17 a matter of fact one of the cases we rely on in our brief is a  
18 search without a warrant 20 or 30 miles from the border, so  
19 that Immigration was involved in Almeida-Sanchez, and this  
20 Court discussed in that case the --

21 QUESTION: The question was whether it was or was not  
22 a border search.

23 MR. CROAK: Yes. There's no question about the  
24 legality of border searches; that's right.

25 I think that some of your questions have suggested to

1 me something which really isn't, perhaps, directly discussed in  
2 the brief and that is the almost, the ability, almost, to have a  
3 piecemeal disintegration of the Fourth Amendment in administra-  
4 tive search situations, because Congress declares, as they did  
5 in Barlow's and as they do here, their concern, proper concern  
6 for the safety of the American worker. I think that the Govern-  
7 ment's position would say that any time they identify an injury-  
8 ridden industry, that they could say that -- and then pass  
9 some regulations that this is pervasively regulated, is  
10 a proper area of congressional concern.

11 QUESTION: What do you think turned the trick in  
12 Biswell? Do you accept Biswell?

13 MR. CROAK: I accept Biswell; yes. As a matter of  
14 fact, Biswell supports our position.

15 QUESTION: In what respect?

16 MR. CROAK: Well --

17 QUESTION: It can't support both sides.

18 MR. CROAK: No, I understand. Biswell is important,  
19 I think, for our point of view because it points out that there  
20 are few exceptions to the Fourth Amendment requirement of a  
21 warrant.

22 QUESTION: What do you think turned the trick in  
23 Biswell, that a warrantless search would be all right?

24 MR. CROAK: I think the public interest --

25 QUESTION: There wasn't a long history of regulation.

1 MR. CROAK: No, and the Court specifically said that.  
2 You specifically said that, that it wasn't a long history --

3 QUESTION: The Court did; yes.

4 MR. CROAK: That's right. The Court did, and it  
5 pointed out, though, the concerns of the public in firearms  
6 control, pointing to the --

7 QUESTION: So the interest, then, the enforcement  
8 interest turned the trick?

9 MR. CROAK: Yes. That's right. Because there was  
10 an enforcement entered.

11 QUESTION: Do you think there was some other attack  
12 in Biswell?

13 MR. CROAK: May I answer this?

14 QUESTION: Yes.

15 MR. CROAK: Because the enforcement interest, I think,  
16 affected the entire public in America. Or at least in the  
17 Court's view it did, where in this case the enforcement interest  
18 really affects the miners.

19 QUESTION: And is measured by the extent of the  
20 danger to the miners?

21 MR. CROAK: Yes.

22 QUESTION: And to every miner? So Congress found.

23 MR. CROAK: So Congress found; that's right.

24 QUESTION: Then you distinguish Colonnade on the  
25 ground that it was the long history of pervasive regulation of



1 the grog shops and the liquor business generally?

2 MR. CROAK: Yes. Our experience with prohibition;  
3 what have you. Mr. Justice Stewart, I interrupted you. I'm  
4 sorry.

5 QUESTION: Well, it was really the same question. In  
6 Biswell there was a license required to go into the business --

7 ~~and it was~~ MR. CROAK: There was a license.

8 QUESTION: And it could be argued at least that in ap-  
9 plying for the license the proprietor of the gun shop accepted the  
10 conditions of the license and therefore in effect consented to  
11 the warrantless searches?

12 MR. CROAK: That's right. I don't say that any one of  
13 those things is dispositive. I say that one --

14 QUESTION: A consent would be dispositive?

15 MR. CROAK: Yes, but this is certainly not a  
16 consent case and I -- contrary to some suggestions in the  
17 Government's brief, it's not an open view case, it's not plain  
18 view, it's not the Alfalfa case situation where the inspector  
19 stood and watched the smoke come out of the smokestack.

20 QUESTION: I think you are making the difference be-  
21 tween an open mine and a closed mine. Why does it make any  
22 difference there?

23 MR. CROAK: Well, it may be --

24 QUESTION: Well, I mean, you can't see inside of a  
25 closed mine?

1 MR. CROAK: No, and you can't see inside of most, many  
2 open mines, because they're removed from areas where the pub-  
3 lic --

4 QUESTION: Don't say that to me, because I might be  
5 tempted to feel that you can't see it because of the dust.

6 QUESTION: To pursue one of Justice Marshall's earlier  
7 questions on this duration of the tradition, of the pervasive-  
8 ness, before we had elevators in buildings there wasn't any  
9 need to have random inspection of elevators and elevator shafts,  
10 and then elevators which made possible high-rise buildings,  
11 because without elevators they couldn't have had them. ~~connection~~  
12 They had to begin somewhere, with random inspections of eleva-  
13 tors, did they not?

14 MR. CROAK: Yes, and I don't have as much trouble  
15 with the initial inspection, because that hinges on the expec-  
16 tation of privacy, which is one of the considerations here. But  
17 this mine has been operated at this location since the turn of  
18 the century. And I think that's different than the case --

19 QUESTION: At the turn of the century they didn't know  
20 much about black lung and brown lung, or if they did they  
21 tolerated it. Is that not so?

22 MR. CROAK: Oh, I think that's true. But the history  
23 of coal regulation and the attempts at coal regulation go back  
24 to 1911, as I recall. The effectiveness of some of it might be  
25 questioned. Obviously, the example the Solicitor General gave

1 of the tragedy was a coal mine explosion. I think that  
2 government regulation of coal -- I don't think my case stands  
3 or falls on the regulation of the coal mines. I also point out  
4 that if my recollection is correct for several years, 34 years  
5 ago, at the end of World War II, the Government ran the coal  
6 industry in America.

7 QUESTION: Well, suppose, suppose this was a coal mine  
8 case, and we decided that warrantless inspection is all right.  
9 Would it, wouldn't you expect it to just rest on the strength  
10 of the enforcement interest in the sense that hazard to the  
11 miners, and the necessity of saving lives, and the effectiveness  
12 of the search, is that -- that's sort of Biswell, isn't it?

13 MR. CROAK: I don't think it's as much as Biswell and  
14 I would, if I were defending the coal mine search -- although  
15 I realize I'm on the other side here, I would point to the  
16 regulation in the national public interest in coal as a fuel  
17 and the energy problems and I come back to what I said, I think  
18 there was a '46 --

19 QUESTION: I know, you might help solve the energy  
20 problem by staying out of the hair of the miners, and let them  
21 go without any inspections at all, but if you were going to  
22 defend the warrantless inspection of coal mines, you would have  
23 to get to the health hazards sooner or later.

24 MR. CROAK: Oh, and I don't mean that health hazards  
25 aren't a consideration, to take it -- there were considerations



1 in Barlow's.

2 QUESTION: Yes.

3 MR. CROAK: And I'm only saying that if I were defend-  
4 ing coal I'd also point out two years of -- involving the operation  
5 of the coal mining industry in this country in the '40s as an  
6 example of the pervasiveness of Government regulation.

7 QUESTION: Before they began coal mine inspections,  
8 it was near the turn of the century, there probably was a his-  
9 tory of illness, disease, injury, explosions, and what not that  
10 led to those enactments. Isn't that so?

11 MR. CROAK: Oh, yes. And I don't dispute that the  
12 enactments are motivated by a desire to cut injuries. That was  
13 Barlow's, too, the concern was to cut injury. And my only  
14 statement is that I don't think that standing alone that that's  
15 a proper basis or criterion, or you will have completely eroded  
16 the Fourth Amendment. And also, then, we get into a situation  
17 that I don't think --

18 QUESTION: Isn't that always -- isn't the fulcrum of  
19 the Fourth Amendment "reasonable," "unreasonable," or "reason-  
20 able"?

21 MR. CROAK: Yes.

22 QUESTION: So what might have been unreasonable at  
23 one time -- our cases have said that -- determines reasonable  
24 or the reverse of that proposition.

25 MR. CROAK: But really, I'm arguing that my case is

1 Barlow's, which is not that old, and there's been no change.  
2 As a matter of fact, the change, if anything, is it's a little  
3 safer now than it was three years ago, I think, although there  
4 really isn't any significant change since then. I'm saying  
5 that that alone is not the basis, safety considerations alone  
6 are not the basis to justify an erosion of the normal Fourth  
7 Amendment rights of the operator in court.

8 QUESTION: You wouldn't think that would be enough  
9 then to sustain the coal mine inspection, warrantless coal mine  
10 inspection?

11 MR. CROAK: No, I don't think so, because --

12 QUESTION: Do you think you have to add a long his-  
13 tory of regulation? But that just goes, that goes to expecta-  
14 tions of privacy, doesn't it?

15 MR. CROAK: Yes, it does. And a long history of  
16 regulation is only one factor, as I said before. Licensing  
17 is another thing. Coal mines have to be licensed as opposed to  
18 this registration of the kind of mine that we're operating.  
19 I don't know whether that's a significant consideration, but  
20 I think you weigh all of these things and the problem I get is  
21 this piecemeal attacking of the industry concern, and --

22 QUESTION: Well, have the states -- have the states  
23 inspected premises like these for quite a while or not?

24 MR. CROAK: Yes. In Wisconsin there is a warrant  
25 procedure. I would be candid, this operator has never insisted

1 it be used, but it exists and our reference is in our brief to  
2 the statute, that there is a provision. And the Government  
3 alluded to the fact that this mine has been inspected since 1922  
4 1922. I think, in all candor, though, I must say that that  
5 inspection -- and I think the record bears me out in this, was the  
6 kind of inspection that you get under the Wisconsin worker's  
7 compensation law, and I think the testimony showed that the same  
8 people that were inspecting the department store, were inspect-  
9 ing the factory, were involved in mine inspection, for many,  
10 many years because Wisconsin had a comprehensive worker's  
11 compensation law that covered anybody that employed more than  
12 two people. But there is, as I say, under that law today there  
13 exists a statutory provision for obtaining what is called an  
14 inspection warrant. Thank you.

15 MR. CHIEF JUSTICE BURGER: Do you have anything  
16 further, Mr. Geller?

17 MR. GELLER: Just one or two things, Mr. Chief Justice.

18 ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

19 ON BEHALF OF THE APPELLANT -- REBUTTAL

20 MR. GELLER: I'd like to just speak for a moment to  
21 to what I think is the key question in the case. Certainly  
22 it's the key question as posed by Biswell, but it's not something  
23 that I think the appellee has addressed. And that is, if in  
24 order to satisfy an urgent federal interest Congress determines  
25 that warrantless searches are essential, and if the warrant



1 requirement would not provide any meaningful additional protec-  
2 tions to the businessman in terms of either limiting discretion  
3 of the searching officer or in giving the businessman informa-  
4 tion as to why the officer is there, why is Congress's decision  
5 to set up a provision such as that unreasonable under the Fourth  
6 Amendment? What is the benefit of insisting on a warrant  
7 procedure under those circumstances, especially if it means  
8 that the urgent federal interest can't be accomplished?

9 Now, the appellee has never identified what a warrant  
10 would bring him in a case like this. He's mentioned one thing  
11 in his brief. He says, if there had been a warrant, the  
12 inspector couldn't have done what he did here, which is to show  
13 up and walk around our premises for an hour without telling us  
14 he was there. But

15 But I think that a warrant wouldn't have done anything  
16 about that. He could have had a warrant and still walked  
17 onto the premises and not identified himself for an hour.

18 By the way, I should add that the statute prohibits  
19 showing up without identifying yourself to the mine operator,  
20 who has a right to walk around with you. So the statute pro-  
21 vides that protection. In fact, the Stoudt's Ferry case, which  
22 is a case that was decided by the 3rd Circuit under the statute,  
23 shows that a warrant was really not a meaningful protection, but  
24 the injunction procedure under the statute may well be.

25 The mine operator in Stoudt's Ferry refused to let

1 the inspector in claiming that he had some trade secrets he  
2 wanted to protect. When the Secretary sued for an injunction  
3 the district court molded the injunction to take account of  
4 these trade secrets. But if the inspector had simply gotten  
5 the warrant, if this Court would have decided that one is  
6 necessary, and showed up, it wouldn't have taken account of any  
7 of these trade secrets.

8 By the way, Justice Stevens, I think that the statute  
9 does prohibit forcible entries for the same reason I think the  
10 statute in Colonnade did, because there's no specific provision  
11 in there that allows it, and the Court interpreted the statute  
12 involved in Colonnade as not allowing forcible entries unless  
13 Congress specifically says so. Here Congress has provided  
14 alternative remedies when an inspector is refused entry. One  
15 is the civil penalty and another is the injunction proceedings.

16 And just finally, Justice Stewart, about the licens-  
17 ing requirement, I think the situation is really no different  
18 than it was under the Gun Control Act, even though there was a  
19 license there. When the Gun Control Act was passed people who  
20 were in that business had to comply with the provisions of that  
21 statute or go out of business. The same way here: the Secre-  
22 tary or whatever can shut down mines that refuse to comply with  
23 the provisions of the Mine Safety Act, including this provision  
24 that they comply with health and safety standards and allow for  
25 inspections. People who don't want to continue under those

1 circumstances are free to go out of business but I don't know  
2 that it makes that much difference whether there's a physical  
3 piece of paper labeled a license. Congress could easily, if  
4 that, if this Court finds that that's what the defect in the  
5 statute is, put in a licensing requirement. That wouldn't  
6 change any of the other provisions of the statute. Thank you.

7 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The  
8 case is submitted.

9 (Whereupon, at 3:05 o'clock p.m., the case in the  
10 above-entitled matter was submitted.)  
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CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 80-901

RAYMOND J. DONOVAN, SECRETARY OF LABOR,  
UNITED STATES DEPARTMENT OF LABOR

V.

DOUGLAS DEWEY ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Will J. Wilson

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