

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 82-1684

**TITLE** RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., Appellants  
v. LONE STEER, INC.

**PLACE** Washington, D. C.

**DATE** November 29, 1983

**PAGES** 1 thru 28



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1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -x  
3   RAYMOND J. DONOVAN, SECRETARY OF       :  
4       LABOR, ET AL.,                       :  
5                   v.                       :   No. 82-1684  
6   LONE STEER, INC.                       :  
7   - - - - -x

8                                   Washington, D.C.  
9                                   Tuesday, November 29, 1983

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States  
12   at 2:09 p.m.

13   APPEARANCES:  
14   ALAN I. HOROWITZ, ESQ., Office of the Solicitor General,  
15       Department of Justice, Washington, D.C.; on behalf of  
16       the Appellants.  
17   RICHARD G. PETERSON, ESQ., Fargo, N. Dak.; on behalf of  
18       Appellee.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

ALAN I. HOROWITZ, ESQ.,

on behalf of the Appellants

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RICHARD G. PETERSON, ESQ.,

on behalf of the Appellee

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- - -

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

2                   CHIEF JUSTICE BURGER: Mr. Horowitz, I think  
3 you may proceed whenever you are ready.

4                   ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,  
5                   ON BEHALF OF APPELLANTS

6                   MR. HOROWITZ: Mr. Chief Justice, and may it  
7 please the Court:

8                   This case is here on direct appeal under 28  
9 U.S.C. 1252 from the United States District Court for  
10 the District of North Dakota. Under review is the  
11 District Court's decision holding unconstitutional the  
12 investigative provisions of the Fair Labor Standards  
13 Act, specifically the Court's holding that the Fourth  
14 Amendment prohibits the use of an administrative  
15 subpoena for the inspection of documents and rather  
16 requires that a search warrant be obtained before any  
17 documents may be examined.

18                   Because some of the briefs here have generated  
19 some confusion about the issue presented I think it  
20 would be useful to summarize briefly the background of  
21 this litigation.

22                   On January 6, 1982 Al Godes, the Wage Hour  
23 compliance officer, telephoned Appellee, a  
24 restaurant-motel, located in Steele, North Dakota to  
25 schedule an inspection for the following day and to ask



1 that certain wage and payroll records be made available  
2 for inspection at that time.

3           When Appellee's manager informed Godes that  
4 the time was not convenient he rescheduled the  
5 inspection for the following week. In the interim  
6 Appellee's counsel wrote to Mr. Godes stating that  
7 Appellee would not consider the request for an  
8 inspection until it was informed of either the nature of  
9 the complaint that triggered the investigation or the  
10 scope of the investigation.

11           The government responded with a letter  
12 outlining the general scope of a fair labor standards  
13 investigation and declining to give the reason for this  
14 particular investigation. In this letter the government  
15 rescheduled the inspection for two weeks hence.

16           The letter also requested Appellee to inform  
17 the government whether it would decline to permit the  
18 inspection so that an administrative subpoena could be  
19 obtained in that event. Appellee responded that  
20 permission would be refused under the authority of  
21 Marshall v. Barlow's and thereafter Appellee was served  
22 with a subpoena duces tecum requiring production of  
23 specified payroll records at the Department of Labor's  
24 Wage Hour Offices in Bismarck, North Dakota.

25           Appellee's counsel informed the Department of

1 Labor that it would not comply with the subpoena on the  
2 ground that it was invalid under Barlow's, and to date  
3 it has not produced the subpoena documents.

4 QUESTION: Mr. Horowitz, do the Appellees  
5 suggest that maybe this was really an attempt by the  
6 government to get unauthorized entry into the premises?  
7 Would you comment on that?

8 MR. HOROWITZ: I just do not think there is  
9 any support for that in the record. All we know is that  
10 they phoned and -- The government phoned and said that  
11 it wanted to conduct an inspection the next day.

12 Appellee obviously did not feel compelled to  
13 comply with this. It simply first stated that it wasn't  
14 convenient and then later declined to permit the  
15 government to enter. In the brief --

16 QUESTION: The question is not really before  
17 us here, of course, but do you think the statutory  
18 authority under the Act to enter and inspect the  
19 premises is possibly invalid under Barlow's?

20 MR. HOROWITZ: Well, it has never come up  
21 because the general practice of the Labor Department is  
22 not to conduct these entries without consent so they did  
23 not try to do it here. They have never tried to do it.  
24 If they did --

25 QUESTION: Do you think it is possibly

1   invalid?

2                   MR. HOROWITZ:  If they did I think unlike this  
3   case Barlow's would be quite relevant and there would be  
4   a serious question under Barlow's, but the question  
5   would be whether Barlow's was distinguishable or not.  
6   It might be difficult to distinguish.

7                   Barlow's itself was careful to confine itself  
8   to the OSHA context so arguably it might be  
9   distinguishable, but it would certainly be a close  
10  case.

11                  QUESTION:  Well, did the subpoena here  
12  actually request entry?

13                  MR. HOROWITZ:  No.  The subpoena specifically  
14  said that it was returnable off the premises, that the  
15  documents were to be produced at the Labor Department's  
16  office in Bismarck, North Dakota.

17                  I should say also in response to Justice  
18  O'Connor's original question the Appellee has said and  
19  the briefs in this Court have characterized the  
20  Department of Labor's initial phone call as sort of a  
21  demand for entry and tried to paint the picture that we  
22  were trying to force our way in.  That's something  
23  that's come up in the course of litigation.

24                  I think if you look at the more  
25  contemporaneous discussion of what was going on the

1 letter that I just referred to that Appellee sent to the  
2 government that is reproduced at page 13 of the Joint  
3 Appendix Mr. Peterson stated "I represent Lone Steer  
4 Cafe. Before we consider your request to conduct an  
5 inspection we would like the following information."

6 So I think at least at the time everyone  
7 understood that this was just a request to enter the  
8 premises. It was only later that this has been  
9 characterized more as a demand.

10 QUESTION: May I ask was the subpoena ever  
11 served?

12 MR. HOROWITZ: Yes, the subpoena was  
13 served.

14 QUESTION: Did you ever file a motion for  
15 contempt for failing --

16 MR. HOROWITZ: We filed as I was about to say  
17 we filed a petition with the District Court to compel  
18 Appellees to comply with this subpoena.

19 QUESTION: The judge's order does not rule on  
20 that though does it?

21 MR. HOROWITZ: Well, the cases were  
22 consolidated so the order does rule on it. It is a  
23 little cryptic.

24 QUESTION: But he does not mention it?

25 MR. HOROWITZ: He does not mention it, no.



1           QUESTION: All he denies -- Really all he says  
2 you have no right to enter the premises.

3           MR. HOROWITZ: Well, that is what the order  
4 says. In the course of the court's opinion he states  
5 that the Appellee's contention is that they are not  
6 required to turn over these documents in response to  
7 this subpoena so the court seems to have understood that  
8 what this case was about was a subpoena, but then when  
9 it gets to drafting the order it just says that  
10 government can't enter on the premises.

11           At that point the government filed a motion to  
12 amend the judgment pointing out to the court that all we  
13 wanted was for the documents to be turned over at our  
14 offices. The court did not really address that very  
15 well either so perhaps the District Court did not  
16 exactly focus on what was going on here, but I think it  
17 is made clear enough in all the papers that have been  
18 filed.

19           When Appellee declined to permit the  
20 inspection originally the government responded with a  
21 letter that outlined the general scope of the  
22 investigation of a fair labor standards general  
23 investigation but declined to give the reason for this  
24 particular investigation, and as I said we requested  
25 that Appellee inform the government whether it would

1 consent -- decline to permit the inspection so the  
2 subpoena could be obtained.

3           When Appellee declined to permit the  
4 inspection a Department of Labor officer went to the  
5 premises on February the 2nd and served him with the  
6 subpoena. The Appellee brought this law suit seeking  
7 declaratory and injunctive relief on the grounds that  
8 the Fair Labor Standards Act was unconstitutional and  
9 quoting from the complaint "insofar as it purports to  
10 authorize a warrantless inspection of records by way of  
11 administrative subpoena after entry to inspect has been  
12 denied."

13           This action was consolidated with the  
14 government's action as discussed earlier petitioning the  
15 District Court to compel Appellee to comply with the  
16 subpoena, and the District Court found for the Appellee  
17 without really explaining why. The court's opinion  
18 relied exclusively on Marshall v. Barlow's and accepted  
19 the Appellee's contention that the subpoena was invalid  
20 under Barlow's.

21           QUESTION: I did not find that the court  
22 referred to Oklahoma Press at all.

23           MR. HOROWITZ: No. The court --

24           QUESTION: Was this pressed upon the court by  
25 the United States Attorney?

1           MR. HOROWITZ: It certainly was featured quite  
2 heavily in the government's motion for summary judgment,  
3 the Oklahoma Press case, but it was not really discussed  
4 by the Appellee and the court did not see fit to discuss  
5 it either.

6           QUESTION: Judge Van Sickle had Oklahoma  
7 Press.

8           MR. HOROWITZ: Yes, he did.

9           As we've stated in our briefs we view this as  
10 a straightforward case governed by principles that have  
11 been well settled by this Court.

12          QUESTION: Mr. Horowitz, maybe I've already  
13 asked it but I just want to be sure. Not only in his  
14 judgment but also in his opinion all he mentions is the  
15 right to enter. He did not write another opinion that  
16 somehow did not get in the papers did he because the  
17 strangest thing to me about this case is the judge's  
18 total failure to mention anything about complying with  
19 the subpoena.

20          MR. HOROWITZ: Well, it is certainly strange.  
21 At the beginning of the court's opinion or at least at  
22 the beginning of discussing the issues at the bottom of  
23 page 6A in framing the issue the court says in the last  
24 paragraph there on page 6A "Lone Steer asserts that the  
25 statutory scheme is constitutionally impermissible and

1 that the records described in the administrative  
2 subpoena issued in this case need not be produced except  
3 in response to a warrant."

4 So the court certainly took cognizance there  
5 of the fact that there had been a subpoena issued, and  
6 that's what was involved. But then the court just goes  
7 on to discuss Barlow's and then kind of falls back onto  
8 this discussion of entry onto the premises.

9 QUESTION: You thought it was so strange that  
10 you suggested summary reversal.

11 MR. HOROWITZ: We did suggest summary  
12 reversal, but the court did not see fit to act on that  
13 suggestion.

14 The case is here today because of the direct  
15 appeal provisions of Section 1252 in light of the  
16 District Court's finding of unconstitutionality. It is  
17 not because this case presents an unsettled  
18 constitutional question.

19 I would like if I might briefly to emphasize  
20 just a few points in this connection. At the outset let  
21 me emphasize again that the only issue presented in this  
22 case is the constitutionality of the subpoena duces  
23 tecum served upon Appellee, that is, requiring the  
24 production of documents off premises without resort to a  
25 search warrant.



1           Perhaps because the validity of such subpoena  
2 is so clearly established by this Court's precedent  
3 Appellee and the amici supporting it have sought to  
4 cloud this issue by suggesting that this case involves  
5 an attempted nonconsensual entry onto private premises.

6           This is simply not so. There is no question  
7 here of an entry onto private premises without consent  
8 as there was in Barlow's. The government never made any  
9 attempt to enter and the Department of Labor's general  
10 policy is not to make such entries.

11           From the time the subpoena was served almost  
12 every document in the record perhaps with the exception  
13 of the District Court's opinion confirms that this  
14 litigation has focused on the validity of the subpoena.  
15 Only one week after the subpoena was served Appellee  
16 wrote the government, sent a copy of this letter to the  
17 District Court stating that it would not comply with the  
18 subpoena because it was invalid under Barlow's.

19           Appellee's complaint, the government's  
20 petition to enforce this subpoena, the District Court's  
21 own description of the issue presented in its opinion  
22 and the motions for summary judgment all focus on the  
23 issue of the validity of the subpoena. On this issue  
24 Appellee's contention is foreclosed by a long line of  
25 precedent of this Court.

1           In Oklahoma Press this Court unequivocally  
2 held that an administrative subpoena, indeed in that  
3 case a subpoena issued under the very statute involved  
4 here, the Fair Labor Standards Act, a subpoena is not  
5 governed by the requirements of the warrant clause.  
6 That is, neither a warrant nor probable cause is  
7 required for the issuance of a subpoena.

8           The Court explained that a subpoena does not  
9 involve any actual search of private matters. It is a  
10 search only in a theoretical sense, what the Court  
11 termed a constructive search.

12           The Court concluded, therefore, that a  
13 subpoena is reasonable within the meaning of the Fourth  
14 Amendment if the request is authorized by law, is not  
15 indefinite or unduly burdensome and seeks documents that  
16 are relevant to the investigation. This rule has been  
17 reaffirmed by this Court in Morton Salt and several  
18 other subsequent cases and has been routinely and  
19 uniformly applied to administrative subpoenas for the  
20 last 40 years.

21           Neither Appellee or the District Court  
22 discusses Oklahoma Press and its progeny. No defect in  
23 the reasoning of the Court in those cases nor any reason  
24 for concluding that those cases were wrongly decided has  
25 been suggested.

1           The sole basis for the decision below and for  
2 Appellee's argument is the assumption that this long  
3 line of cases has been wiped off the books overruled sub  
4 silentio by Barlow's. There is absolutely no basis for  
5 this assumption.

6           Barlow's has nothing to do with this case or  
7 with Oklahoma Press. Barlow's involved an actual  
8 search, an entry onto a manufacturer's private business  
9 premises and a search of those premises for evidence of  
10 safety and health violations.

11           This is the precise sort of investigative tool  
12 with which the Court in Oklahoma Press contrasted a  
13 subpoena and drew a distinction. Barlow's did not  
14 suggest any erosion of the traditional distinction  
15 between subpoenas and actual searches.

16           Indeed Barlow's relied heavily on See v. City  
17 of Seattle an earlier case where the Court had  
18 established a warrant requirement for fire inspections,  
19 inspections that required an entry onto private  
20 premises. In the course of that decision, however, the  
21 Court expressly reaffirmed the distinction drawn in  
22 Oklahoma Press between subpoenas and actual searches and  
23 reaffirmed the standards set forth there under which  
24 such subpoenas are to be judged.

25           Barlow's and following See did not interfere

1 with these standards. Moreover, the problems with OSHA  
2 inspections primarily concerned the Court in Barlow's.  
3 That is, the unbridled expression of officers in the  
4 field to conduct inspections and the unlimited nature of  
5 the search involved do not exist with subpoenas.

6 The subpoena is not open ended. It  
7 specifically identifies the documents sought. The  
8 subpoena is not left to the unbridled discretion of the  
9 officer in the field.

10 It may be issued only by the Wage Hour  
11 administrator and enforced only by resort to adversary  
12 court proceedings. In short, nothing in Barlow's casts  
13 any doubt on the continued validity of Oklahoma Press or  
14 on the validity of the subpoena returnable off premises  
15 that was issued in this case.

16 Thus, to repeat we believe that well settled  
17 Supreme Court precedent clearly controls the disposition  
18 of this case and requires reversal of the judgment  
19 below.

20 Unless there are any questions, I will reserve  
21 the remainder of my time.

22 QUESTION: I have one, Mr. Horowitz. Again, I  
23 do not think it is really raised here but do you think  
24 there are any limits in addition to those spelled out in  
25 Oklahoma Press on the government's subpoena power?



1 Could a person whose records are being subpoenaed, for  
2 example, seek a protective order from the court on the  
3 grounds that he'd been singled out or was being  
4 harassed and, therefore, the subpoena wouldn't issue?  
5 Are there any limits?

6 MR. HOROWITZ: I am not sure whether the  
7 Fourth Amendment would give any protection or not  
8 against sort of being singled out. It might be that the  
9 due process clause or something could have some sort of  
10 selective prosecution kind, but I think it would be a  
11 difficult standard to meet certainly.

12 CHIEF JUSTICE BURGER: Mr. Peterson.

13 ORAL ARGUMENT OF RICHARD G. PETERSON, ESQ.,  
14 ON BEHALF OF APPELLEE

15 MR. PETERSON: Mr. Chief Justice, and may it  
16 please the Court:

17 First of all, this is not a simple subpoena  
18 case. Such characterization is misleading and  
19 erroneous. It is somewhat glib, and it is made by  
20 government appellate attorneys from afar.

21 Those who have been directly involved with  
22 this case including the District Court judge were  
23 intimately aware of the facts. The issues basically  
24 involved entry, and if you look at the facts and the  
25 facts were stipulated there were at the outset

1 unilateral scheduling of an inspection appointment  
2 date.

3 QUESTION: Mr. Peterson.

4 MR. PETERSON: Yes.

5 QUESTION: Where do we find the stipulation?  
6 In the briefs or the appendix?

7 MR. PETERSON: I believe it is in the --

8 QUESTION: Is it in the appendix somewhere?

9 MR. PETERSON: Yes, it is in the appendix,  
10 Justice Rehnquist.

11 QUESTION: Page 11.

12 MR. PETERSON: Right.

13 The Labor Department basically was informing  
14 Lone Steer that it was about to enter and inspect the  
15 premises, question employees and generally conduct its  
16 normal investigation.

17 QUESTION: Did they enter?

18 MR. PETERSON: Yes, they did ultimately.

19 The issue became --

20 QUESTION: When did they enter?

21 MR. PETERSON: They entered I believe it was  
22 February 2nd of 1981.

23 QUESTION: What is that in relation to this  
24 case?

25 MR. PETERSON: Excuse me?

1 QUESTION: Was that when the hearing was had?

2 MR. PETERSON: They entered following the  
3 institution of a law suit by Lone Steer to get a  
4 declaratory judgment on Section 11.

5 QUESTION: Well, does that apply to this case?

6 MR. PETERSON: Yes, it does, Your Honor.

7 QUESTION: Is it in the record?

8 MR. PETERSON: Yes, it is, Your Honor.

9 The Labor Department, a compliance officer,  
10 Mr. Godes from Bismarck together with some high ranking  
11 Labor Department official flown in from Denver entered  
12 the Lone Steer to attempt to conduct the investigation  
13 on the premises showing, attempting to show that Section  
14 11 --

15 QUESTION: Well, did they enter? You now said  
16 they attempted to enter.

17 MR. PETERSON: Well, they entered and  
18 attempted to conduct the investigation.

19 QUESTION: Isn't there a difference between  
20 entering and attempting to enter?

21 MR. PETERSON: They entered the Lone Steer  
22 Cafe in Steele, North Dakota and sought to conduct an  
23 investigation there..

24 QUESTION: A cafe? They entered it?

25 MR. PETERSON: They did enter it.

1 QUESTION: And they were excluded.

2 MR. PETERSON: They were turned away, right.

3 QUESTION: They were turned away.

4 MR. PETERSON: Right.

5 QUESTION: Mr. Peterson, you used the word  
6 "enter" as if to give almost a feeling of breaking down  
7 the door. Your paragraph 10 of the stipulation says  
8 that at approximately 10:30 a.m. Godes and Hill entered  
9 the Lone Steer establishment to attempt to conduct an  
10 investigation.

11 They asked for Ms. White and were told she was  
12 not available but expected shortly. They were offered  
13 some coffee and waited in the lobby area. After 20 to  
14 30 minutes when Ms. White had not appeared Mr. Godes  
15 served an administrative subpoena on employee Karen  
16 Arnold.

17 Do you mean by the use of the word "entered"  
18 kind of entered against the will of the parties?

19 MR. PETERSON: No, Your Honor, and I certainly  
20 did not seek to give the Court that impression. If I  
21 could give you a short scenario of what exactly happened  
22 --

23 QUESTION: Well, is it something different  
24 from the stipulation in paragraph 10?

25 MR. PETERSON: Only from a -- No, it is not,



1 Your Honor. It is basically in the stipulated facts.  
2 We had two instances where Lone Steer's attorney told  
3 the Labor Department that they did not have authority or  
4 consent to conduct its investigation on the premises of  
5 Lone Steer.

6 QUESTION: Are you suggesting they had no  
7 authority to enter to serve the subpoena?

8 MR. PETERSON: No, Your Honor, definitely  
9 not.

10 QUESTION: You are not arguing that?

11 MR. PETERSON: No. We're saying --

12 QUESTION: That is a public place. Anyone  
13 could enter it, could they not?

14 MR. PETERSON: Yes, it is, Your Honor.

15 QUESTION: How else would they serve the  
16 subpoena except to enter it?

17 MR. PETERSON: Your Honor, in the first  
18 instance what they sought to do was to conduct the  
19 investigation.

20 QUESTION: We are not concerned about what  
21 they thought to do. What did they do?

22 MR. PETERSON: They informed us by way of a  
23 letter that they were going to attempt to conduct the  
24 investigation and if they were prohibited -- That was  
25 the word used -- if they were prohibited from conducting

1 the investigation they were going to leave an  
2 administrative subpoena.

3 QUESTION: Mr. Peterson, the stipulation goes  
4 on and says they did properly serve the subpoena.

5 MR. PETERSON: Yes, Your Honor.

6 QUESTION: The subpoena commands the  
7 production of a person to testify and to bring with him  
8 certain records to the Federal Building in Bismarck.

9 MR. PETERSON: Yes, Your Honor.

10 QUESTION: Why did you not do that?

11 MR. PETERSON: Your Honor, at that point prior  
12 to that the issue was under Section 11 whether or not  
13 the inspection powers of the Labor Department were  
14 limited by the Fourth Amendment as interpreted by  
15 Barlow's, and the issue before the Court as the Court  
16 perceived it and as we perceived it we wanted a  
17 declaratory judgment as to whether or not the Labor  
18 Department did have the right to conduct the  
19 investigation without the consent of the owner.

20 QUESTION: Do you understand the District  
21 Court to have ruled that you did not have to comply with  
22 the subpoena.

23 MR. PETERSON: Yes, Your Honor.

24 QUESTION: What reason did he give for that  
25 ruling?

1                   MR. PETERSON: He did not really give a reason  
2 for that ruling other than to say that the inspection  
3 power under Section 11 of the Fair Labor Standards Act  
4 was clearly in his mind at least subject to the warrant  
5 clause under the Fourth Amendment as interpreted in  
6 Barlow's.

7                   QUESTION: He talked only of entries onto the  
8 premises.

9                   MR. PETERSON: Yes, Your Honor.

10                  QUESTION: The subpoena asks for production  
11 elsewhere. Is there any reason why you should not  
12 comply with a subpoena to produce elsewhere?

13                  MR. PETERSON: The subpoena as we understand  
14 the subpoena is an enforcement device as a part of  
15 Section 11's conferring of inspection powers to enter  
16 and inspect the premises.

17                  QUESTION: Had they not first tried to get in  
18 would you be making the same argument?

19                  MR. PETERSON: I believe, Your Honor, that  
20 either Section 11 is subject to the warrant clause or it  
21 isn't. I believe that it is subject to Section 11, and  
22 the Labor Department did not or left undisturbed the  
23 judgment with respect to entry.

24                  The judgement with resoect to entry right now  
25 stands that Section 11 is subject to the warrant

1 clause.

2 QUESTION: Well, let me give you a  
3 hypothetical. The same type of subpoena is issued to  
4 another corporation which has only been in business a  
5 week. Would you be arguing the same thing?

6 MR. PETERSON: I would argue --

7 QUESTION: I said only been a week because I  
8 do not want anything in the past to have anything to do  
9 with it.

10 MR. PETERSON: I would argue there, Your  
11 Honor, that a subpoena is subject to Barlow principles.  
12 A subpoena can be enforced under Barlow principles, and  
13 it would be subject to the --

14 QUESTION: So they have no subpoena power.

15 MR. PETERSON: Yes, they have subpoena power  
16 which I believe was limited by Barlow's --

17 QUESTION: How would they exercise the  
18 subpoena power?

19 MR. PETERSON: I think what this Court has to  
20 do consistent with Barlow's is to look at the entire  
21 investigatory scheme and see that a subpoena is being  
22 used and enforced in Federal District Court, and the  
23 test there would be whether or not the subpoena and an  
24 enforcement would be the functional equivalent of a  
25 warrant.



1           QUESTION: And every subpoena would have to  
2 have court approval?

3           MR. PETERSON: Ultimately in an enforcement  
4 action. It could have in this case.

5           QUESTION: Why does this type of subpoena need  
6 court action, others do not?

7           MR. PETERSON: Because of the particular way  
8 the statute is postured in terms of entry.

9           QUESTION: When it involves this particular  
10 statute?

11          MR. PETERSON: Yes, Your Honor.

12          QUESTION: Mr. Peterson, does not Oklahoma  
13 Press clearly say that subject to the requirements  
14 spelled out there administrative subpoenas can issue  
15 without the concerns expressed in Barlow's?

16          MR. PETERSON: Your Honor, I believe that --

17          QUESTION: Barlow's did not overrule Oklahoma  
18 Press.

19          MR. PETERSON: No, I do not believe so, Your  
20 Honor. I believe that Oklahoma Press Publishing was  
21 perhaps altered to a certain extent and perhaps certain  
22 grey areas were filled in in that a subpoena could issue  
23 but the test of reasonableness would involve Barlow  
24 substantive principles, for example, the issue of  
25 probable cause limiting properly the scope of the

1 investigation to the purpose of the investigation.

2 QUESTION: Well, you have to read a lot into  
3 Barlow's to think that do you not?

4 MR. PETERSON: No, Your Honor.

5 QUESTION: To what extent did Barlow's deal  
6 with papers and records?

7 MR. PETERSON: To the extent that the Labor  
8 Department there sought certain I believe it was health  
9 accident reports and so forth that are required by the  
10 OSHA law. An inspection was sought of those documents.

11 QUESTION: Did Barlow's even cite Oklahoma  
12 Press?

13 MR. PETERSON: No, it did not, Your Honor.  
14 However, in footnote 22 you pointed out that delineating  
15 the scope of a search with some care is particularly  
16 important where documents are involved. At a certain  
17 point you indicated it is the secretary's position which  
18 we reject that an inspection of documents of this scope  
19 may be effective without a warrant.

20 QUESTION: Well, you can get relief with  
21 respect to the scope of the subpoena under Oklahoma  
22 Press, under Walling.

23 MR. PETERSON: We believe, Your Honor, that  
24 because of the entry provisions of this particular  
25 statute, Section 11, which there is no question in my

1 mind, there is no question in the District Court's mind  
2 and apparently there is no question in the Labor  
3 Department's mind, is subject to the warrant clause on  
4 Barlow's. It is very difficult for me to then say  
5 Section 11 is subject to the warrant clause; however,  
6 the subpoena is not which is the enforcement device.

7 I believe that essentially the cases are the  
8 same, Barlow's and Lone Steer. The only difference  
9 occurred when entry was denied and an enforcement  
10 mechanism under a particular statute was utilized.

11 In the Barlow's case it involved a compulsory  
12 process to enter, and as I read Barlow's the Labor  
13 Department did not contend that that compulsory process  
14 was the equivalent of a warrant. You did indicate that  
15 it could be viewed as such in one of your footnotes.

16 The same is true in this particular case. We  
17 have to look at the enforcement mechanism of Section 11,  
18 and in this case it is the subpoena, a subpoena that is  
19 issued by the Labor Department itself without regard to  
20 probable cause and without properly limiting the scope  
21 of the investigation to the purpose or the probable  
22 cause involved.

23 Again, I would have to iterate and reiterate  
24 that the case involved a declaratory judgment at a  
25 particular time. On February 1, 1981 there was a

1 dispute as to whether or not the Labor Department had a  
2 right to come in and conduct an investigation over the  
3 objection of an owner.

4           When Lone Steer objected twice through its  
5 attorney that you cannot come in without a warrant or  
6 its functional equivalent, the Labor Department then  
7 cited in its letter its inspection powers under Section  
8 11 to enter and conduct an inspection. At that point  
9 there was a dispute as far as the District Court was  
10 concerned as to whether or not the Labor Department did  
11 in fact have a right to enter and inspect.

12           Following the initiation of that law suit the  
13 Labor Department despite all these protestations through  
14 the legal counsel and through the court system the Labor  
15 Department still sought to conduct that inspection on  
16 the premises of Lone Steer. It is --

17           QUESTION: So what you say is basically you  
18 are entitled to a declaratory judgment that would say  
19 the Labor Department does not have the authority to  
20 enter and inspect notwithstanding --

21           MR. PETERSON: Without the consent of --

22           QUESTION: Without the consent of the owner  
23 notwithstanding that we might resolve the subpoena  
24 question in favor of the government. You see them as  
25 two distinct issues I take it.



1                   MR. PETERSON: Yes, they are two distinct  
2 issues, but if Section 11 is subject to the warrant  
3 clause under a Barlow's test type of analysis it seems  
4 clear to me that you have to also apply that analysis to  
5 the enforcement mechanism of that right under Section  
6 11.

7                   In fact the Labor Department is saying that it  
8 is seeking to inspect the documents under the subpoena  
9 under Section 11. They are citing Section 11 and  
10 Section 9.

11                   I seriously question whether or not the Labor  
12 Department can conduct its investigation without  
13 utilizing the authority of Section 11 which is a right  
14 to enter provision.

15                   Thank you, Mr. Chief Justice.

16                   CHIEF JUSTICE BURGER: Thank you.

17                   Do you have anything further, Mr. Horowitz?

18                   MR. HOROWITZ: I have nothing further unless  
19 there are any questions.

20                   CHIEF JUSTICE BURGER: Thank you, gentlemen.

21                   The case is submitted.

22                   (Whereupon, at 2:41 p.m., the case in the  
23 above-entitled matter was submitted.)

24

25

CERTIFICATION

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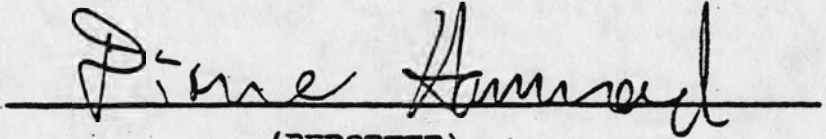
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#82-1684

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BY

A handwritten signature in cursive script, appearing to read "Pina Amos", is written over a horizontal line.

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