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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-80

TITLE NEW YORK, Petitioner, Vs. JOSEPH BURGER

PLACE Washington, D. C.

DATE February 23, 1987

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 NEW YORK :

4 Petitioner, :

5 v. : No. 86-80

6 JOSEPH BURGER :
7 -----x

8 Washington, D.C.

9 Monday, February 23, 1987

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 1:00 p.m.

13 APPEARANCES:

14 ELIZABETH HOLTZMAN, ESQ., District Attorney of Kings
15 County, Brooklyn, N.Y., on behalf of the
16 Petitioner.

17 STEPHEN R. MAHLER, ESQ., Kew Gardens, N.Y., on behalf
18 of the Respondent.
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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument first this afternoon in Number 86-80, New York against Joseph Burger.

Ms. Holtzman, you may proceed whenever you are ready.

ORAL ARGUMENT OF ELIZABETH HOLTZMAN, ESQ.

ON BEHALF OF THE PETITIONER

MS. HOLTZMAN: Mr. Chief Justice, may it please the Court:

The question here is whether the Constitution allows states, as it has allowed the federal government, to regulate a specific industry in order to meet a compelling public need and to enforce that regulatory scheme with warrantless inspections.

New York State's effort to regulate the vehicle dismantlers industry for the purpose of curbing the serious problem of auto theft with its attendant economic burdens and physical safety burdens falls squarely under the well settled criteria of *Biswell*, *Colonnade* and *Donovan versus Dewey*.

The New York regulatory scheme under 415-a of the Vehicle Traffic law is aimed at vehicle dismantlers and has three interrelated components: registration and

1 re-registration on a periodic basis, comprehensive
2 record keeping requirements, and warrantless inspections.

3 The administrative purposes of the regulatory
4 scheme are as follows: the protection of legitimate
5 vehicle dismantlers; to return more stolen cars to
6 owners, which is an important purpose in and of itself
7 and also to reduce insurance costs; by the record
8 keeping requirement to deter would-be auto thieves; to
9 trace cars back to the auto thieves; and to prevent the
10 vehicle dismantling industry from being used as a
11 mechanism for fencing stolen cars.

12 The statute at issue here has been criticized
13 as being designed to allow police officers to conduct
14 warrantless searches of inventory, and that the statute
15 serves no real administrative purpose. That reasoning
16 is wrong.

17 It is wrong for a number of reasons. It is
18 wrong, first, because of the legislative history of the
19 statute which establishes clearly that New York State
20 first set up a regulatory scheme that included no
21 inspection of inventory.

22 The inspection of inventory was added only six
23 years -- was added six years after the statute went into
24 effect. And the purpose of doing that was to make sure
25 that the other components of the regulatory scheme

1 worked; namely, the registration and the record keeping
2 components.

3 QUESTION: What would the difficulty be, Ms.
4 Holtzman, of getting an administrative warrant, which of
5 course can be obtained more easily than a warrant in a
6 criminal case on probable cause?

7 MS. HOLTZMAN: Well, the simple answer is
8 there is no scheme allowing that in New York State, but
9 beyond that --

10 QUESTION: There is no authority --

11 MS. HOLTZMAN: Exactly.

12 QUESTION: -- under New York State law to
13 permit obtaining an administrative warrant?

14 MS. HOLTZMAN: Exactly. And it's also, under
15 the case of Biswell, clear that under a routine
16 administrative search, that with clearly delimited
17 criteria on the basis of which a search can be
18 conducted; in other words, in terms of reasonable time
19 and the place and the scope of the search, that
20 administrative warrant is not necessary under the prior
21 holdings of this Court.

22 The complaint about the inventory inspection
23 is that it was not really done for administrative
24 purposes because there were no records there. Our
25 answer to this is that it is clear that inspections of

1 inventory are crucial to enforce both the registration
2 requirement and the record keeping requirement, first to
3 make sure that the records are accurate, but in this
4 case since there were no records there, the purpose of
5 the administrative examination of the inventory was to
6 make sure that vehicle dismantlers didn't develop this
7 huge loophole.

8 If vehicle dismantlers knew that they could
9 not produce records and thereby forestall a search,
10 inspection of inventory, then clearly unscrupulous
11 vehicle dismantlers would decide not to produce their
12 records at the scene.

13 In addition --

14 QUESTION: There is some suggestion in cases
15 that one of the factors we would look at would be
16 whether there are limits placed on the discretion of the
17 inspectors, in this case the officers?

18 MS. HOLTZMAN: Yes.

19 QUESTION: And I wonder if you would like to
20 comment on the extent to which you think that these
21 particular statutes have such limits. I guess we have
22 two here, the city of New York and the state law.

23 MS. HOLTZMAN: Yes.

24 QUESTION: I don't think I saw any limits at
25 all on the city's ordinance, and I am not sure there are

1 very many in the state statute.

2 MS. HOLTZMAN: Let me address the state
3 statute first. Under the state statute, there are clear
4 limits as to time. The only times at which the
5 administrative search can take place are during regular
6 and usual business hours.

7 Secondly, with respect to the place, the only
8 place that the administrative inspection can take place
9 is on the premises; with respect to records and
10 inventory or materials covered by the record keeping
11 requirement that are on the premises; with regard to the
12 scope, only with respect to the records and with regard
13 to inventory covered by or required to be kept by the
14 records.

15 There is no suggestion whatsoever in the
16 record, and in fact it doesn't exist, that this search
17 was anything other than a normal, routine administrative
18 search for books and records to ensure compliance with
19 the statute.

20 QUESTION: Well, Ms. Holtzman, doesn't the
21 statute limit to six in six months the number of
22 warrantless searches that may be made?

23 MS. HOLTZMAN: No. There is no maximum limit
24 on the number of searches permissible under the
25 statute. But to answer Justice O'Connor's second

1 question about the New York City ordinance, the city
2 ordinance has been construed by a trial court, not by a
3 higher court, as requiring reasonable -- inspections
4 during reasonable business hours.

5 While that statute might need more creative
6 construction to bring it into line with some of the
7 Court's prior precedents, we believe that it could and
8 would be so construed by the New York State courts.

9 QUESTION: Why don't they use administrative
10 officers, if this is an administrative search? I mean,
11 isn't that part of the problem here, you are using just
12 ordinary law enforcement officials to conduct what you
13 say is an administrative search?

14 MS. HOLTZMAN: Well, there is nothing in the
15 record, Your Honor, with respect to why New York State
16 used police officers, but they do use Department of
17 Motor Vehicles officers to conduct administrative
18 searches under the statute as well. But in the Biswell
19 case, the statute was the government's licensing scheme
20 with respect to gun owners, was enforced by U.S.
21 Treasury agents who are, in effect, the equivalent of
22 New York City police officers.

23 They were carrying -- they have the authority
24 to carry guns and they have the authority to make
25 arrests of all federal crimes, just as a New York City

1 police officer has the authority to make arrests within
2 the limited jurisdiction of crimes under the New York
3 City statute.

4 In addition, under the prior rulings of the
5 Court, the reasonableness of the administrative scheme
6 has to be weighed against the expectations of privacy on
7 the part of the defendant, and the expectations of
8 privacy with respect to the industry or people involved
9 in the industry here.

10 QUESTION: Who administers this administrative
11 scheme? Who is in charge of overseeing the entire
12 operation of these laws?

13 Is there an administrator? I mean, is there
14 somebody with a title, administrator of chop shops or
15 something?

16 MS. HOLTZMAN: There is really nothing in the
17 record that completely explains the administrative
18 scheme, to respond to your question, except to say that
19 the scheme is enforced both by Department of Motor
20 Vehicles personnel. It is my understanding that in the
21 past, from time to time Department of Consumer Affairs
22 personnel also enforce the regulatory scheme and then
23 police officers, as part of a special auto crimes unit,
24 would engage in routine inspections under the
25 administrative statute.

1 And indeed the routine -- the administrative
2 quality of this inspection is shown by the questions
3 that were asked when the police originally arrived. As
4 the record shows, the police had no hint, suspicion,
5 hunch or anything, or tip that there was any criminal
6 activity going on, on these premises.

7 When they arrived the first questions that
8 they asked were, are you registered as a vehicle
9 dismantler under the registration requirement, and do
10 you have the police book, the records required to be
11 kept. Then when they answered no to that, they went
12 ahead and inspected the inventory which is, as the
13 record shows, the normal procedure whether the records
14 are there or not.

15 With respect to the privacy interests involved
16 here, they are marginal and negligible at best. In the
17 first place you have, in this case, the business of the
18 vehicle dismantler being conducted in an open field, if
19 you can imagine an open field in Brooklyn.

20 There were no structures on the field.
21 Indeed, there was no demarcation of what was public and
22 what was private. This is typical of junk yards.
23 Indeed, the word "junk yards" suggests that much of the
24 business is going to be conducted out in the open as is
25 typical with regard to large vehicles which are

1 dismantled, and the scrap business.

2 In addition, there was a very wide entranceway
3 to this vehicle dismantler's premises, of 20 to 25 feet
4 in width. Moreover, people were admitted to these
5 premises. The public came on to sell the dealer
6 refrigerators, scrap, automobiles, and this is typical
7 of the vehicle dismantlers business.

8 Vehicle dismantlers must do commerce with
9 people coming in for the purpose of buying the vehicles
10 to begin with, and of selling the results of their
11 dismantling.

12 Third, what was the nature of the inspection
13 of inventory that took place? It was simply the
14 inspection of vehicle identification numbers or VINs
15 which, as this Court has recognized in the past, for
16 which the Court has recognized in the past, there is no
17 expectation of privacy. It was at most an extremely
18 unintrusive search of the inventory.

19 And in addition, this is an industry that has
20 been pervasively regulated, so the expectations of a
21 person entering into the vehicle dismantler business,
22 with regard to privacy, are low. With regard to
23 junkyards, a lower court in New York has found that
24 secondhand dealers, junkyard dealers, have been
25 regulated for more than 140 years.

1 QUESTION: Do you think the length of time
2 makes a difference, Ms. Holtzman? I mean, does it have
3 to have gone on for a given period of time before the
4 service scheme will be upheld?

5 MS. HOLTZMAN: Not necessarily, Your Honor. I
6 think, however, in this case where you do have a very
7 lengthy scheme of regulation, both with regard to the
8 secondhand -- people who deal in secondhand goods, with
9 regard to people who sell motor vehicles, that you do
10 have a reduced expectation of privacy.

11 In addition, Your Honor, as this Court has
12 mentioned in the past, you have a registration
13 requirement under this administrative scheme, so that
14 the person engaged in the vehicle dismantlers business
15 has, it seems to me for these reasons, a lower
16 expectation of privacy than someone who wasn't in this
17 business.

18 The final --

19 QUESTION: Ms. Holtzman, before you go on, I
20 am not sure what was the relevance of the factors you
21 mentioned a little bit earlier, that this was an open
22 field in Brooklyn and the entrance was very wide and the
23 public came on.

24 What do you mean to establish by that? Do you
25 assert that the search would have been valid even

1 without the justification of the regulatory scheme?

2 MS. HOLTZMAN: No, no.

3 QUESTION: Well, then how does that have any
4 -- how does that have bearing to your case?

5 MS. HOLTZMAN: The regulatory scheme itself,
6 we argue, is reasonable. But in addition, in this case
7 you have lower expectations of privacy in part because
8 of the nature of the business that was conducted, and in
9 part because of the premises of this defendant, and in
10 part because of the regulation, the pervasive regulation
11 of the industry that the defendant --

12 QUESTION: Well, are you inviting us to hold
13 that this is okay, at least where what you are doing is
14 going into an open field that has a 20-foot entrance and
15 where the public come on, but it might not be okay if it
16 were walled in, if it were an inside premises, if the
17 public was only admitted through a narrow door and after
18 checking their credentials or whatever?

19 I'm not sure what you want us to do with
20 these, you know, specific factors that you have brought
21 out.

22 MS. HOLTZMAN: They are not determinative,
23 Your Honor. They simply suggest -- the determinative
24 factor is the nature of the administrative scheme and
25 the pervasive regulation of the industry.

1 But we also think that in addition to that you
2 have other factors affecting the nature of this industry
3 that reduce the level of privacy interest.

4 QUESTION: It's not the whole industry. The
5 factors you have mentioned just apply to this particular
6 yard, and I don't know how that's relevant to your
7 defensive scheme on its face, which is what I assume you
8 are interested in doing here.

9 MS. HOLTZMAN: Perhaps I didn't make myself
10 clear. I am not sure that -- I didn't say that these
11 factors applied only to the defendant.

12 I think it is typical of the vehicle
13 dismantlers industry in general that much of the
14 activity is conducted in the open, that in addition to
15 that there is commerce back and forth of people who come
16 to do business.

17 The final reason that we would urge that the
18 defendant's interest in privacy is low is because of the
19 -- is because he cannot create an expectation of privacy
20 by committing an illegal act. A legitimate vehicle
21 dismantler, under New York State, who is obeying the
22 regulatory scheme would have had books and records there
23 and therefore the inventory could have been inspected
24 both for the purpose of checking against the books and
25 records to determine the books and records were

1 accurate, and for the other administrative purposes I
2 have mentioned.

3 This vehicle dismantler would have this Court
4 believe that by violating the law, by removing his books
5 and records or by never keeping them in the first place,
6 he can create a new special privacy interest in an
7 inventory that a law-abiding vehicle dismantler would
8 not have.

9 And I think that position is untenable, as
10 this Court has held in *Class, New York versus Class*, the
11 artificial creation -- the creation of an artificial
12 encumbrance doesn't undo lack of privacy that existed in
13 the inventory to begin with.

14 So, in conclusion, I would say that this --

15 QUESTION: May I just on that last argument,
16 I'm not really sure I follow it because if, as your
17 opponent contends, the statute is unconstitutional, then
18 the dismantler who keeps the records could show them and
19 say, but I'm not going to let you look at anything.

20 MS. HOLTZMAN: That's true.

21 QUESTION: So then, he's really no better off
22 by not keeping records than if he kept records, so he
23 has not created an additional expectation of privacy by
24 refusing to obey the law?

25 MS. HOLTZMAN: But the statutory scheme

1 creates a low level of expectation of privacy because
2 vehicle dismantlers are required to keep books and
3 records.

4 QUESTION: Right.

5 MS. HOLTZMAN: And can expect that there will
6 be an inspection, not only of the books and records but
7 of the inventory to match against the books and records.

8 This vehicle dismantler says, I have a higher
9 expectation of privacy in my inventory because I am not
10 keeping books and records. I am violating the law and
11 that gives me a higher interest of privacy in this
12 inventory.

13 And I submit, respectfully, that that argument
14 is absurd.

15 QUESTION: It doesn't give him any higher
16 expectation of privacy than one who keeps records and
17 says, I am going to violate the law by not letting you
18 see the vehicle because I think the statute is
19 unconstitutional?

20 MS. HOLTZMAN: Well, you could make the
21 argument, the statute is unconstitutional. But that
22 doesn't mean --

23 QUESTION: It's certainly not a frivolous
24 argument.

25 MS. HOLTZMAN: That's not a frivolous argument

1 but it wouldn't depend, therefore, on the privacy
2 interest in an inventory created by not keeping
3 records. And that's the problem with the Court of
4 Appeals decision in this case.

5 The Court of Appeals said that the reason this
6 statute was not a legitimate administrative statute and
7 had no legitimate administrative purposes was because
8 there could be an inspection of an inventory in the
9 absence of records.

10 QUESTION: I see.

11 MS. HOLTZMAN: I reserve the balance of my
12 time.

13 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
14 Holtzman.

15 We will hear now from you, Mr. Mahler.

16 ORAL ARGUMENT OF STEPHEN R. MAHLER, ESQ.

17 ON BEHALF OF THE RESPONDENT

18 MR. MAHLER: Mr. Chief Justice, and may it
19 please the Court:

20 The facts of this case and the collection of
21 New York State appellate cases that we cite in our brief
22 amply demonstrate the infirmities of the statute under
23 consideration. We submit this was an ordinary type
24 warrantless search by regular New York City police
25 officers without any discernible administrative

1 function, who did not even consult with any
2 administrative agency either before or after they took
3 their action.

4 And petitioner conceded in a New York State
5 Court of Appeals brief that the immediate purpose of the
6 action was to uncover evidence of crime, and that led
7 the New York Court of Appeals, which quoted that
8 concession in their opinion and led them to construe the
9 statutes -- it's really convenient devices to enforce
10 the penal law without a warrant.

11 QUESTION: Well, don't you think in Colonnade
12 and Biswell, one of the purposes of the law enforcement
13 officers was to discover some evidence of crime?

14 MR. MAHLER: Yes, and Mr. Chief Justice, the
15 petitioner falls back to try to dilute that concession
16 in this Court, falls back on the argument that there may
17 be some secondary administrative value to these
18 so-called inspections.

19 Well, that's true in any case. Any time you
20 have a criminal -- a search for criminal evidence where
21 the target is a licensee, it could be a law office and
22 if you go in without probable cause and you search a law
23 office for criminal evidence and you find criminal
24 evidence and you report it to the bar association,
25 conceivably it's going to have some administrative

1 effect secondarily.

2 But this Court in none of the line of cases
3 has ever held that where the immediate purpose, the very
4 immediate purpose --

5 QUESTION: Well, what does the word
6 "immediate," modifyiing the word "purpose," add to the
7 word "purpose"?

8 MR. MAHLER: Well, it was their prime goal in
9 this case, was to uncover evidence of crime, Mr. Chief
10 Justice, and this Court has never held that when the
11 prime goal was to uncover evidence of crime, that the
12 search warrant requirement of the Fourth Amendment was
13 unnecessary.

14 QUESTION: Don't you think that's the prime
15 goal of the administrative scheme? Don't you think the
16 administrative scheme would have that as its prime goal
17 even if it were administered not by policemen but by --
18 I don't know, commissioners?

19 MR. MAHLER: Justice Scalia, I don't think
20 that that's their prime goal. I think the prime goal
21 under an administrative scheme is administrative.

22 The petitioner relies heavily, for instance,
23 on Biswell.

24 QUESTION: Why are they administering this
25 scheme? Is it a health factor, they are worried about

1 contagion from junkyards?

2 MR. MAHLER: No.

3 QUESTION: The whole purpose of it is to
4 prevent people from chopping up stolen vehicles, isn't
5 that the whole purpose of the entire --

6 MR. MAHLER: That's correct, but that's
7 administrative. Find the evidence that you did it, is
8 criminal. That's the -- there's a distinction between
9 what starts out as an administrative scheme and what is
10 directly seeking to recover evidence of criminality.

11 QUESTION: I must say, I don't see the
12 distinction. The purpose of the administrative scheme
13 is to make sure that anybody who runs a disassembly
14 operation and is fencing stolen cars can be found out
15 because you make them keep records and you make them
16 allow the things to be inspected.

17 The whole purpose of doing that is to assure
18 that if he has a stolen car there, it will be
19 discovered. Isn't that the whole purpose of the scheme?

20 MR. MAHLER: No. I respectfully disagree.

21 I think it's to -- step one I agree with, but
22 I think it's to prevent the traffic in the stolen
23 vehicle. But for step two, to find out if they
24 possessed the stolen vehicle, I think that requires a
25 warrant.

1 QUESTION: I think Justice Scalia's question
2 was addressed to the purpose of the administrative
3 scheme, not whether it required a warrant or not.

4 Well, if we can go back to *Eiswell* which is so
5 heavily relied upon by the petitioner, petitioner
6 ignores the evolution of the law in the most recent
7 cases of the Court, by the way, but I'll get back to
8 that.

9 In *Eiswell* and in *Colonnade*, I believe, the
10 alcohol and tobacco and firearms officers in those
11 cases, they were actually administrative enforcement
12 officers without general police duties, and the --

13 QUESTION: Well, what difference does that
14 make?

15 MR. MAHLER: Because it comes from an
16 administrative agency. It's supposed to be an
17 administrative statute.

18 QUESTION: Well, what is an administrative
19 statute? I mean, I think you're just using a lot of
20 terms that may not have a great deal of meaning.

21 MR. MAHLER: Well, Mr. Chief Justice, we're
22 trying to bring out that an administrative statute
23 serves a strictly administrative purpose. It's not to
24 recover evidence of crime. It's perhaps to --

25 QUESTION: Well, when these people walk in --

1 when the inspectors walk into the yard here and they
2 say, do you have your police book, the guy answers no.
3 Now, that's evidence of crime right there, isn't it?

4 MR. MAHLER: Yes. In fact, the person who
5 says that he doesn't have a police book and who is taken
6 to be a dismantler is guilty of a misdemeanor under New
7 York State law.

8 QUESTION: So, any time you have an
9 administrative statute or, as you call it, an
10 administrative scheme, the requirement requires the
11 keeping of records and someone is going to come around
12 to see if you have records and they ask you the
13 question, do you have any records, you answer no. There
14 is evidence of crime right there.

15 MR. MAHLER: Yes, but the difference between
16 that and the actual search for evidence of the crime is
17 that the New York Court of Appeals saw fit to draw the
18 line at that point and to say that it would be quite all
19 right for the police to ask to inspect the records, but
20 not to go further to try to seek out criminal evidence.

21 QUESTION: In other words, if a man complies
22 with the law and keeps records, they can be inspected
23 but if he doesn't keep records the police are stopped
24 stone cold?

25 MR. MAHLER: Well, they are not. In this

1 particular instance, under these statutes, if the man
2 doesn't keep records he's guilty of a misdemeanor. And
3 conceivably the police at that point can go and seek a
4 search warrant based on the fact that he obviously has a
5 junkyard filled with automobile parts and hasn't
6 catalogued them and hasn't kept the police book.

7 QUESTION: Well, they could perhaps get a
8 search warrant. I guess the question here is, does the
9 Constitution require them to.

10 QUESTION: Well, in Biswell it was a Treasury
11 agent, wasn't it?

12 MR. MAHLER: Treasury agent, yes.

13 QUESTION: And they are the ones with the
14 authority to enforce that Act?

15 MR. MAHLER: Yes, but Mr. Justice White, again
16 a Treasury agent --

17 QUESTION: And furthermore, the agent was
18 accompanied by a policeman.

19 MR. MAHLER: Well, that's true. In that case
20 he was accompanied by a policeman. But the facts of
21 that case -- that case did not turn upon that fact. The
22 agent was still --

23 QUESTION: It doesn't turn on -- or it didn't
24 seem to me to turn on the fact that he was to be
25 considered an administrative officer --

1 MR. MAHLER: He was connected --

2 QUESTION: -- rather than a policeman. The
3 case didn't even mention it.

4 MR. MAHLER: The Treasury agent again, Mr.
5 Justice White, is someone who is an administrative
6 enforcement agent. He actually comes out of an
7 administrative agency.

8 QUESTION: He's got power of arrest.

9 MR. MAHLER: He has power of arrest, but not
10 general police duties. The same way, an Alcohol,
11 Tobacco and Firearms person. He's there to enforce an
12 administrative statute, not to gather evidence of crime,
13 as we had in this case.

14 QUESTION: You assert that this would be
15 perfectly okay if they had used administrative officers
16 instead of policemen?

17 MR. MAHLER: Well, that gets to part two.

18 QUESTION: Even though, as I think the whole
19 purpose of the statute is to uncover evidence of crime?

20 MR. MAHLER: Yes. Well, that gets to part two
21 of the argument, actually. If I just may delineate
22 between the two statutes, clearly there are two statutes
23 at hand here.

24 Clearly the city statute cannot be conceived
25 as being constitutional in any way, shape or form. The

1 city statute merely is authority for the Police
2 Commissioner to conduct his police duties. It really
3 authorizes nobody else but the Police Commissioner. It
4 doesn't speak of anybody in an administrative capacity.

5 And, 415-a of the state law, the Vehicle
6 Dismantler Law, that authorizes any police officer to
7 search. That doesn't really try to even separate out a
8 regular police officer with general police duties from
9 anyone else that wants to use this particular statute to
10 make warrantless searches.

11 The Auto Crime Division in New York State have
12 a wonderful gift in this statute. It certainly
13 separates them from any other police officer.

14 It certainly could be said in that same vein
15 that a drug enforcement officer could -- or the Drug
16 Enforcement Administration in New York State could
17 petition the legislature to pass a similar statute and
18 call it administrative and declare that there's a great
19 health problem as far as possessing and using drugs are
20 concerned, and to search any premises administratively
21 to recover evidence of drug trafficking.

22 We think there are two issues in the case, the
23 first being whether the subject matter of the statutes
24 is one to be granted exemption from the warrant
25 requirement of the Fourth Amendment, and two, whether

1 the statutes themselves in this instance are
2 sufficiently tailored to the state's proper objectives
3 to adequately minimize the dangers inherent in the
4 unbridled exercise of administrative discretion.

5 These statutes have really no requirements.
6 There's no strictures at all. They speak not of any
7 target selection. They don't speak of the frequency of
8 the inspection or the scope of the inspection, the
9 duration of the inspection or the prohibition against
10 forcible entry.

11 There is no standard for the industry to guide
12 the licensee. The statutes contain nothing. And under
13 your -- the most recent cases by this Court, in Donovan
14 against Dewey and Marshall against Barlows, certainly
15 these statutes in 415-a wouldn't be an adequate
16 substitute for a search warrant.

17 QUESTION: Mr. Mahler, can I ask you a
18 question? Supposing they amended the statute to provide
19 that these searches shall be conducted by -- a police
20 officer should have an administrative warrant in his
21 possession at the time he makes such search, and the
22 Commssioner or Police is authorized to issue
23 administrative warrants designating the order in which
24 searches shall be made, but he can just pick anybody out
25 of a hat and say, I want you to search these five or six

1 people today.

2 But then, you just have them grind out an
3 administrative warrant on a form and sign it. Would
4 that make the statute constitutional?

5 MR. MAHLER: We don't believe so. We would
6 urge that it wouldn't. We would urge that police
7 officers should never be administrative inspectors,
8 police officers with general police duties.

9 QUESTION: What if they refined it by saying,
10 there shall be created within the police department an
11 auto inspection division -- an auto inspection
12 administration headed by a lieutenant who has been on
13 the force in auto work for five years or more, and then
14 he had the authority to give the warrant?

15 MR. MAHLER: Well, we urge that that's to the
16 entire point of this. The Auto Crime Division, that's
17 precisely what their primary function is, to search for
18 criminal evidence of auto crime, and we don't believe
19 that they could ever really be really, truly
20 administrative inspectors.

21 Yes, maybe something secondarily might fall
22 off in an administrative vein.

23 QUESTION: Well, let me amend it once more.
24 Say they created a new administration which shall be
25 composed of those officers who heretofore have been

1 engaged in work of this kind at the police department
2 and the former lieutenant in charge of that division
3 shall be the new administrator, and that in order to
4 qualify for that job you have to have five years of
5 police work in auto crimes.

6 Would then it be constitutional?

7 MR. MAHLER: As long as the prime focus is not
8 to gather evidence of crime.

9 QUESTION: Well, it's to conduct a lot of
10 inspections which will discourage people from engaging
11 in this sort of activity, in criminal activity, and
12 catch them if they do engage in it?

13 MR. MAHLER: It's just too fine a line to
14 draw, we would urge, the difference between someone who
15 is basically a cop and someone who is basically an
16 administrator.

17 QUESTION: So, it's not that the absence of an
18 administrative warrant; it's the fact they used police
19 officers?

20 MR. MAHLER: Well, no. We are urging both.
21 We think that there should be at least an administrative
22 warrant and it shouldn't be by police officers at any
23 time.

24 QUESTION: And if you asked the administrator,
25 whoever it was, what's your job, what do you think he'd

1 say his job was? "My job is inspecting inventory"?
2 He'd say, "My job is to try to prevent stolen autos from
3 being chopped up."

4 Isn't he doing the same thing that the police
5 are -- in other words, isn't it -- although you purport
6 to be objecting only to the fact that this statute is
7 being implemented by police officers, isn't your basic
8 objection that you cannot have -- and it may well be a
9 valid one, but isn't basically what you are saying, that
10 you can't have a regulatory statute whose purpose is not
11 somehow to regulate the operations of an industry but
12 whose whole purpose is to determine whether that
13 industry is violating some other laws?

14 MR. MAHLER: I would agree.

15 QUESTION: So you are -- I don't think you'd
16 be contented if there was an administrator who did the
17 same thing that the policeman did here. You'd still say
18 the whole object of --

19 MR. MAHLER: His immediate purpose as --

20 QUESTION: But doesn't it have to be his
21 immediate purpose under this law? What else is the law
22 for? It's to uncover stolen cars.

23 MR. MAHLER: I think that the law is to
24 regulate and not to take the further step of actually
25 gathering the evidence of a crime.

1 QUESTION: Well, Mr. Mahler, for many years, I
2 don't know if they're still doing it but I think it was
3 the Harrison Act, required all pharmacies to keep a
4 poison register where you had to sign if you took out
5 any of a number of scheduled substances, and I daresay
6 there were inspections provided to see if the poison
7 registers were kept.

8 Now, would that fall afoul of these strictures
9 that you find in the Constitution? I mean, I'm sure the
10 poison register was just to see whether the pharmacists
11 were complying with the law.

12 MR. MAHLER: Well, the New York State Court of
13 Appeals actually drew that line. They said that there
14 was nothing wrong with merely inspecting the records,
15 but the Judge Friendly case that is cited, Turashiano
16 against Montaigne, dealt with a problem in that field.

17 Judge Friendly emphasized that the New York
18 statute authorizing inspections of druggists, narcotic
19 records, had been amended to restrict the right of
20 inspection to representatives of the Health Department
21 rather than all peace officers within the state. He
22 emphasized that distinction, but I think the New York
23 Court of Appeals was willing to let police officers have
24 the right to come in and actually inspect the books.

25 But what the objection was, was to step two

1 where you try to compare the book with the products in
2 the art.

3 QUESTION: Well, here there were no books to
4 compare.

5 MR. MAHLER: Here there was nothing. Here the
6 officer conceded that he had no administrative purpose.

7 QUESTION: Well, you know, I don't know who
8 conceded what. You could say equally well the defendant
9 conceded he didn't have any books.

10 MR. MAHLER: But the whole idea of it was,
11 there was no purpose at all. There was nothing
12 administrative. He had no administrative purpose at
13 all. He didn't even have a book.

14 He didn't call any administrative agency, and
15 he was stuck with the fact that when cross examined, as
16 you can see from the record, he was stuck by the fact
17 that all he was in there for was to write down VIN
18 numbers and to call them in to see if the parts that
19 were found in the yard were stolen.

20 QUESTION: Did you argue the case in the Court
21 of Appeals?

22 MR. MAHLER: Yes, I did.

23 QUESTION: And did you argue it on a state
24 constitutional basis?

25 MR. MAHLER: I did, yes. It was argued on a

1 state constitutional basis.

2 QUESTION: And did the state court deal with
3 that at all, or just passed it?

4 MR. MAHLER: Yes, they did.

5 QUESTION: And preferred to put it on the
6 Fourth Amendment?

7 MR. MAHLER: Yes. That's what happened.
8 If there are no other questions.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Mahler.

11 Ms. Holtzman, you have 12 minutes left should
12 you choose to use them.

13 ORAL ARGUMENT OF ELIZABETH HOLTZMAN, ESQ.

14 ON BEHALF OF THE PETITIONER - REBUTTAL

15 MS. HOLTZMAN: Mr. Chief Justice, I'll just
16 take one or two minutes simply to point out that the
17 purpose of the statute and the purpose of the
18 administrative scheme is not to uncover evidence of
19 crime in a particular case.

20 The purpose of the scheme is to, in the end,
21 deter auto theft, to make sure that the vehicle
22 dismantlers industry is not a tool for fencing, to trace
23 cars, and to return stolen cars. There is no purpose in
24 the administrative scheme to uncover evidence of crime
25 in a particular case.

1 Indeed, the administrative scheme in Biswell,
2 and as the Chief Justice pointed out, it's hard to
3 envision an administrative scheme that's not enforced in
4 some way with criminal penalties.

5 I would also like to point out that the
6 administrative search here involved no home and involved
7 the inspection of the kind that I noted before. Under
8 the prior precedents of the Court, I believe the
9 administrative scheme is wholly reasonable in terms of
10 the State of New York's desire to deal with the problem
11 of auto theft, to trace problems of stolen cars, and we
12 urge that the statute --

13 QUESTION: Ms. Holtzman, are you familiar with
14 the laws in other state that deal with this same
15 problem, generally speaking?

16 MS. HOLTZMAN: Yes, Justice O'Connor. There
17 are --

18 QUESTION: Some 33 states?

19 MS. HOLTZMAN: Yes, 33 states. It may be
20 more. I can't tell you that our search --

21 QUESTION: Do most of those statutes have
22 provisions for administrative warrants?

23 MS. HOLTZMAN: I don't know the answer to
24 that, but we could provide it for you.

25 QUESTION: That's all right. Thank you.

1 MS. HOLTZMAN: Thank you.

2 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
3 Holtzman. The case is submitted.

4 (Whereupon, at 1:35 o'clock p.m., the case in
5 the above-entitled matter was submitted.)

6
7 and these attached pages constitutes the original
8 transcript of the proceedings for the records of the court.

9 *Paul A. Richardson*

10 (REPORTER)

CERTIFICATION

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86-80 - NEW YORK, Petitioner V. JOSEPH BURGER

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BY Paul A. Richardson

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