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The New-Fangled Warrant
by Mark Henckel

Although the Supreme Court had applied the Fourth Amendment to state administrative searches1 involving municipal fire, health and housing inspection programs, the Court's position as to the applicability of the Fourth Amendment to federal administrative codes and procedures was unclear. The Supreme Court settled that question in Marshall v. Barlow's Inc., 436 U.S. 307 (1978).

In Marshall, an inspector from the Occupational Safety and Health Administration attempted to inspect an electrical and plumbing installation business without a search warrant pursuant to federal statute.2 The owner refused to permit any search of the warehouse without a warrant. The inspector was limited to the public area of the premises. An injunction was obtained against the search, and the Secretary of Labor appealed.

On appeal, the Supreme Court, in a 5-3 decision, applied Camara v. Municipal Court, 387 U.S. 523 (1967) and See v. City of Seattle, 387 U.S. 541 (1967) and held that the Fourth Amendment mandated a warrant for OSHA inspections. Justice White, speaking for the majority, began by stating that the "Warrant clause of the Fourth Amendment protects commercial buildings as well as private homes." 436 U.S. at 311. After reaffirming the holdings in Camara and See, Justice White turned to the government's position that an exception from the search warrant requirement had been recognized for "pervasively regulated business[es]," United States v. Biswell, 406 U.S. 311, 316 (1972), and for "closely regulated" industries "long subject to close supervision and inspection." Colonnade Catering Corp. v. United States, 397 U.S. 72, 74, 77 (1970). The majority quickly distinguished these cases due to the types of industry involved (firearms and liquor, respectively). The Court stated that when an "entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation. . . . The clear import of our cases is that the closely regulated industry of the type involved in Colonnade and Biswell is the exception." 436 U.S. at 313. Nor did the mere fact that businesses in interstate commerce are closely regu-

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2 The statute authorized the Secretary of Labor to empower agents to enter and at reasonable times any "environment where work is performed by an employee of an employer"; it further permitted the agent to "inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner . . . all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials . . . and to question privately any such employer, owner, operator, agent, or employee." 29 U.S.C. §657 (a) (1970).

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4 See note 1 supra. Maryland law regarding illegitimate children inheriting from their fathers is as follows:

A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his father only if the father (1) Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings; or (2) Has acknowledged himself, in writing, to be the father, or (3) Has openly and notoriously recognized the child to be his child; or (4) Has subsequently married the mother and has acknowledged, orally or in writing, to be the father. MD. EST. & TRUST CODE ANN. §1-208(b) (1974).
lated exempt them from the protection of the Fourth Amendment.

The government then argued that the searches permitted under the statute were reasonable and necessary to the enforcement of the statute, since to obtain a search warrant would sacrifice the advantages of surprise. The Court, however, was not convinced that "requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspections necessary to enforce the statute, or will make them less effective." Id. at 316. The Secretary weakened his position by promulgating a regulation which contemplated the use of a search warrant when admission had been refused. 29 CFR §1903.4 Justice White stated that if a warrant "endangers the efficient administration of OSHA, the Secretary should never have adopted it, particularly when the Act does not require it." Id. at 319.

Turning to the issue of probable cause, the majority held that for the purposes of an administrative search, probable cause justifying the issuance of a warrant may be based "not only on specific evidence of an existing violation, but also on a showing that 'reasonable legislative or administrative standards for conducting an...inspection are satisfied with respect to a particular [establishment].' Camara v. Municipal Court, supra, at 538." Id. at 320-321. In closing, the Court limited its holding to the OSHA statute saying that the "reasonableness of a warrantless search would depend upon the specific enforcement needs and privacy guarantees of each statute." Id. at 321.

Mr. Justice Stevens, joined by Justices Blackman and Rehnquist, based his dissent on two premises: (1) that the inspection contemplated by the statute fell outside the command of the Fourth Amendment, and (2) that the warrant could be issued on grounds that constituted less than the traditional measure of probable cause.

Justice Stevens looked first to the probable cause argument. He believed that the searches involved need only be analyzed under the reasonableness clause of the Fourth Amendment. 436 U.S. at 327. The dissenters claimed the application of the warrant clause was unfaithful to the balance struck by the framers of the Fourth Amendment—the requirement of probable cause to prevent the issuance of general search warrants. Justice Stevens pointed out, however, that a warrantless search is to be governed and controlled through the use of the reasonableness clause. Such searches would be valid because they conform to the measurements of the reasonableness clause.

Justice Stevens and his fellow dissenters then applied a balancing test to determine whether a warrant is a necessary safeguard in a given class of cases. In the test the Court "weighed the public interest against the Fourth Amendment interest of the individual..." Id. at 329. The minority felt that the balance should be struck in favor of the routine inspection due to policy consideration. The dissenters looked to the fact that Congress had determined that regulation and supervision of safety in the workplace furthered an important public interest and that "the power to conduct warrantless searches is necessary to accomplish the safety goals of the legislation." Id. Yet, in light of Camara and See, the dissenters could not point out any statistics or studies which showed that enforcement of city and state health and safety regulation were hindered by a warrant requirement. Mr. Justice Stevens also pointed to an impending increase in "the rate at which employers deny entry to inspectors...", 436 U.S. at 329, but again he failed to point out any statistics that support his claim over the ten years since Camara and See were decided.

The dissenters also disagreed with the majority's interpretation of 29 CFR, §1903.4. The statute, according to the Justice, was "promulgated against the background of a statutory right of immediate entry." 436 U.S. at 330. The resort to process was to be a step used to obtain entry in the "occasional denial of entry" cases.

But Justice Stevens failed to realize that surprise is not lost to the inspector when a warrant is obtained even in the "occasional case of denial entry." A warrant is obtained in an ex parte proceeding and no notice needs to be given to the subject of the warrant. Where entry was denied, the warrant may be obtained and the agent may reappear at the premises without further notice to the establishment being inspected. By creating 29 CFR §1903.4, the Secretary acknowledged that even if surprise is needed, it is not destroyed by an ex parte warrant.

Finally, the minority turned to the three functions a warrant would serve: (1) to inform the employer that the

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4 See note 3 supra.
inspection was authorized by statute; (2) to advise him of the lawful limits of the inspection; and (3) to assure him that the person demanding entry is an authorized inspector. The dissenters felt that these functions added little to the protection already afforded by statute. In fact, they concluded that the warrant was “essentially a formality.” 436 U.S. at 334. The dissenters accepted the Secretary’s argument that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private contract. Justice Stevens would apply this rationale to any business regardless of the nature of its business. Yet it would make a mockery of the Fourth Amendment to limit its application, in the administrative law contest, to only private residences. Such a reading would pave the way to a challenge by business establishments on equal protection grounds under the Fifth Amendment’s Due Process clause. The majority avoids such a confrontation by universally applying the Fourth Amendment to administrative searches of residences as well as businesses.

Fair Representation vs. Systematic Exclusion

by J. Michael Earp

The Supreme Court in Duran v. Missouri, 99 S.Ct. 664 (1979) overturned a Missouri defendant’s first degree murder conviction in holding that a “systematic exclusion of women [which] results in jury venires averaging less than 15% females violates the Constitution’s fair-cross-section requirement.” 99 S.Ct. at 666. The decision, delivered by Justice White, represents a further progression in the Whitus to Castaneda line of cases establishing and defining the meaning of a fair trial under the Sixth and Fourteenth Amendments.

In Taylor v. Louisiana 419 U.S. 522 (1975) the Supreme Court had ruled that a jury selection system which automatically excluded all women unless they chose to register for jury service violated a defendant’s Sixth and Fourteenth Amendment rights in that “petit juries must be drawn from a source fairly representative of the community.” 419 U.S. at 538. The Missouri statute here involved, however, did not, ab initio, automatically exclude women from the jury selection process but rather provided them with blanket exemptions, if they chose to exercise their exemption privilege.

The present case arose when petitioner Duren’s convictions for first degree murder and first degree robbery were affirmed by the Supreme Court of Missouri after the lower court had denied both a pretrial motion to quash his petit jury panel and a post-conviction motion for a new trial. Duren claimed that his right to trial by a jury chosen from a fair-cross-section of his community was denied because of the Missouri statute granting women an automatic exemption from jury service upon their mere request to be exempt. The statute provided for either disqualification or exemption from jury service for several listed occupations and other categories, including men over 65 and women. A further exemption for women resulted in practice, because a prospective woman juror was allowed to claim her exemption at any time prior to being sworn in as a juror and was treated as having claimed the exemption if she failed to appear for jury service on the day for which she was summoned. Other prospective jurors were required either to make written or personal application to the court for an exemption or be subject to contempt of court sanctions if they did not appear for jury service. The effect of the statute, established by statistical evidence undisputed at the trial level, was that when Duren’s trial began only 15.5% of those on the weekly venires were women.

On appeal, the Missouri Supreme Court affirmed the convictions, holding that the number of females summoned and appearing in the jury selection process were well above acceptable constitutional limitations. State v. Duren, 556 S.W.2d 11 (1977). The state court questioned the adequacy of the statistical evidence presented by the petitioner and found that the petitioner had failed to show unequivocally that the low percentage of women appearing for jury service was the result of the automatic exemption for women and not some other cause.

The Supreme Court, in reversing the Missouri Supreme Court, based its decision on Taylor which held, as stated previously, that “petit jurors must be drawn from a source fairly representative of the community.” 419 U.S. at 538. To establish a prima facie violation of the fair-cross-section requirement, the Court held that three standards must be demonstrated by the person challenging the selection process:

(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this representation is due to systematic exclusion of the group in the jury selection process.

99 S.Ct. at 668. The Court, in the present case, found that the petitioner had successfully met his burden for each of the three standards.


2 Missouri Revised Statutes §494.031(2) (Supp. 1978). See also Missouri Const. Art. 1, §22(b).