Ecology Law Quarterly

Volume 10 | Issue 1 Article 10

January 1982

Donovan v. Dewey

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101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981)

INTRODUCTION

Donovan v. Dewey[1] concerned the constitutionality of warrantless inspections authorized by section 103(a) of the Federal Mine Safety and Health Act (MSHA) Amendments of 1977.[2] This section requires federal mine inspectors to inspect underground mines at least four times a year, and surface mines at least twice a year, to ensure compliance with health and safety regulations.[3] If violations are discovered, they must make follow-up inspections to verify that the violations have been corrected.[4] The inspectors have the right to enter any mine, and need not give the mine owners and operators advance notice of any inspection.[5] Should entry for inspection be refused, the Secretary of

1. 101 S. Ct. 2534 (1981).

2. 30 U.S.C. § 813(a) (Supp. III 1979). This section provides:

> Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For the purpose of making any inspection or investigation under this chapter, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

3. *Id.*

4. *Id.*

5. *Id.* "No advance notice" of an impending inspection is required for those searches conducted pursuant to subsection (3) (to determine whether an imminent danger exists), and subsection (4) (to monitor compliance with safety standards). Notice may be given in advance where the purpose of the search is only to gather statistical data as to causes of mine hazards, *id.* § 813(a)(1) (Supp. III 1979); and gathering information in connection with the standard-setting process. *Id.* § 813(a)(2) (Supp. III 1979).

Labor may bring a civil action for injunctive or other relief.[6]

The case came to trial after appellee Douglas Dewey, president of the Waukesha Lime and Stone Company, refused to allow the continuance of a follow-up inspection of the company's stone quarry.[7] The Secretary of Labor filed suit in the District Court for the Eastern District of Wisconsin, seeking to enjoin the company from further refusals.[8] After an initial motion for a preliminary injunction failed, the Secretary of Labor moved for summary judgment in another attempt to gain immediate entry to conduct an inspection of the quarry for possible safety violations.[9] The district court noted prior decisions in both the Eastern District of Wisconsin and in other circuits finding the MSHA injunction procedure for conducting warrantless searches constitutional,[10] but ultimately declared the warrantless search provision constitutionally unenforceable.[11] The court reasoned that stone quarries have not had the long history of regulation necessary to bring them within the *Biswell-Colonnade*[12] exception of the warrant clause of the fourth amendment, and further that the cost to the mine owner of defending his rights at the injunction proceeding was unreasonable.[13] It

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6. *Id.* § 818(a)(1)(c) (1976 & Supp. III 1979). This section provides:

> The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent . . . refuses to admit such representatives to the coal or other mine. . . .

7. 101 S. Ct. at 2537.

8. *Id.* The lower court opinion is Marshall v. Dewey, 493 F. Supp. 963 (E.D. Wis. 1980).

9. 493 F. Supp. at 964. The Secretary was parenthetically seeking relief under 30 U.S.C. § 818(a)(1)(C). Thus this motion for summary judgment served as a second attempt for a preliminary injunction.

10. *E.g.*, Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980) (MSHA warrantless searches upheld as not violative of the fourth amendment because: (1) periodic inspections without advance warning are mandated; (2) the purposes of such inspections are strictly limited; (3) the legislature found surprise inspections to be necessary in the context of mine safety; and (4) immediate judicial review via the Secretary's injunction remedy accommodates any unusual privacy expectations on the part of mine owners); Marshall v. Nolichuckey Sand Co., 606 F.2d 693 (6th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980) (MSHA warrantless inspections justified by severe health and safety hazards posed by mine work in general, though the particular segment of the industry may have neither a long history of regulation nor an extensive licensing and regulatory scheme); Marshall v. Sink, 614 F.2d 37 (4th Cir. 1980) (MSHA upheld on the basis of the overriding government interest in the miners' safety and the adequate protection of mine owners' privacy interests provided by the injunction procedure).

11. 493 F. Supp. at 965-66.

12. United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). For a discussion of these cases see notes 29-39 *infra* and accompanying text.

13. 493 F. Supp. at 965. See note 10 *supra*. The district court's monetary cost of privacy reasoning was not addressed by the Supreme Court.

thus granted summary judgment for the mine company.[14] The Supreme Court reversed, holding that the warrantless searches authorized by MSHA are reasonable within the meaning of the fourth amendment.[15]

I

BACKGROUND OF THE FOURTH AMENDMENT'S APPLICATION TO ADMINISTRATIVE INSPECTIONS

The Supreme Court historically refused to extend fourth amendment protections to searches conducted by administrative agencies.[16] In 1967, the Court brought inspections to monitor compliance with municipal housing codes within the purview of the Constitution in *Camara v. Municipal Court*.[17] The Court reasoned that an interest in privacy remains worthy of protection from arbitrary governmental intrusion whether a search is used to gather evidence for a criminal prosecution or to monitor compliance with administrative regulations.[18] To the Court, this interest in privacy necessitated review by a neutral, disinterested party of a decision to inspect in individual cases.[19] The justices argued that "broad statutory safeguards" of privacy provide no substitute for individualized review.[20] In the companion case of *See v. City of Seattle*,[21] the Court extended the *Camara* rule to protect those areas of commercial establishments closed to the public, arguing that a businessman has a similar right to be free from unreasonable government entries onto his property.[22]

The warrant required by *Camara* and *See*, however, does not require an individualized showing of probable cause to believe that a targeted dwelling contains violations of the housing code.[23] The Court in *Camara* noted that probable cause to search would exist so long as "reasonable legislative or administrative safeguards for conducting an area inspection are satisfied with respect to the particular dwelling."[24] These standards could base the decision to search upon the passage of time since the last search or upon the condition of the entire geographic area, rather than upon specific knowledge as to the targeted dwelling.[25]

14. *Id.* at 966.
15. 101 S. Ct. at 2542.
16. Franks v. Maryland, 359 U.S. 360 (1959).
17. 387 U.S. 523 (1967).
18. *Id.* at 531.
19. *Id.* at 532.
20. *Id.* at 533.
21. 387 U.S. 541 (1967).
22. *Id.* at 543.
23. 387 U.S. at 534.
24. *Id.* at 538.
25. *Id.*

The Court felt that the reasonableness requirement of the warrant clause would be met by this standard, given the "valid public interest" justifying such inspections.[26] In addition, the Court noted that the warrant to search need not be obtained prior to the search unless the occupant refuses the initial request for entry; in this situation, the occupant has the right to insist that the inspector obtain a warrant.[27]

In *See*, the Court expressly reserved the question of whether warrants should be required where inspectors monitor compliance with the terms of a government-issued license.[28] In *Colonnade Catering Corp. v. United States*,[29] the justices drew the first exception to the *Camara-See* rule. The plaintiff was a catering establishment holding a liquor dealer's occupational tax stamp.[30] The Supreme Court, in upholding a warrantless search by Internal Revenue Service agents or possible violations of federal excise tax law,[31] placed considerable emphasis on the tradition of pervasive regulation of the liquor industry dating back to the pre-fourth amendment period.[32] The Court then deferred to Congress' decision not to require IRS agents first to obtain a warrant, and to make it an offense for a licensee to refuse admission to the agents.[33]

In *United States v. Biswell*,[34] the Court deemphasized the *Colonnade* "long history of regulation" standard by stressing instead the importance of the government interests involved and the impossibility of effective enforcement of the regulatory scheme without frequent unannounced inspections.[35] *Biswell* upheld the inspection of a firearms dealer as authorized by the Gun Control Act of 1968.[36] Admitting that federal regulation of firearms traffic "is not as deeply rooted in history"[37] as is regulation of the liquor industry, the Court recognized other reasons to allow warrantless inspections, such as preventing violent crime, assisting states in their regulatory efforts,[38] and deterring unsafe practices through frequent unannounced inspections.[39]

The Supreme Court seemed to find a limit to its permissiveness with *Marshall v. Barlow's, Inc.*,[40] in which the justices held that

26. *Id.* at 539.
27. *Id.* at 540.
28. 387 U.S. at 546.
29. 397 U.S. 72 (1969).
30. *Id.* at 72.
31. *Id.* at 73.
32. *Id.* at 75-76.
33. *Id.* at 77.
34. 406 U.S. 311 (1971).
35. *Id.* at 315-16.
36. 18 U.S.C. §§ 921-928 (1976 & Supp. III 1979).
37. 406 U.S. at 315.
38. *Id.*
39. *Id.* at 316.
40. 436 U.S. 307 (1978).

searches for possible violations of Occupational Safety and Health Act standards were subject to the warrant requirement. The Court found three bases for the decision. First, it rejected the government's argument that *Colonnade* and *Biswell* should be extended to cover OSHA inspections, stressing that these two cases represented exceptions to the warrant requirement based upon the closely regulated nature of the businesses.[41] Entering such a closely-regulated business implies that the owners have voluntarily chosen to be subject to inspection.[42] The Court noted that "the degree of federal involvement in employee working circumstances has never been of the order of specificity and pervasiveness that OSHA mandates," and thus there could be no implied consent to search.[43] Second, the Court objected to the failure of warrantless searches to delineate the scope and objects of the search with precision; such searches would grant unbridled discretion to OSHA inspectors as to whom and when to search.[44] Finally, the Court did not believe that compliance with the warrant requirement would decrease the effectiveness of the statute, as it had with the statute at issue in *Biswell*.[45]

With this series of cases, then, the Supreme Court seemed to have adopted three basic considerations in examining statutory grants of authority to conduct warrantless inspections. First, the Court apparently limited the number of statutory schemes in which it would find implied consent on the part of proprietors, by looking both to the history of regulation and to the pervasiveness of the existing scheme.[46] Second, unannounced, warrantless inspections must be necessary to effectuate the substantive regulations.[47] Finally, the inspection provisions must limit the discretion of officers in the field as to when and where to search, and must delineate the scope and objects of the search.[48]

II

THE SUPREME COURT DECISION

A. The Majority Opinion

Writing for the Court, Justice Marshall relied on *Colonnade*, *Biswell*, and *Barlow's* for his analysis of section 103(a). He stated that the validity of any warrantless search provision depends on three factors: the nature of the federal interest, the need for the warrantless inspec-

41. *Id.* at 313.
42. *Id.*
43. *Id.* at 314.
44. *Id.* at 323.
45. *Id.* at 316-20.
46. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1969).
47. United States v. Biswell, 406 U.S. 311 (1971).
48. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

tion scheme, and the comprehensiveness of the procedures for conducting inspections.[49] He found a substantial federal interest in the health and safety conditions in the nation's mines, an industry that he noted is among the most hazardous.[50] Justice Marshall argued that Congress may design warrantless inspection schemes where it feels that notice would "significantly frustrate" enforcement of its substantive standards,[51] but the congressional determination that a system of warrantless inspections is necessary must be reasonable.[52] Citing *Biswell*, Marshall saw "no reason not to defer" to Congress' judgment with regard to the need for warrantless searches of mines under MSHA, arguing that a warrant requirement would impede the detection of violations, and lessen the deterrent effect of the inspection program.[53]

With regard to whether the regulation is "sufficiently comprehensive" for there to be some form of implied consent to search, Marshall refused to hold that the absence of regulation of stone quarries prior to 1966 invalidated the warrantless inspection scheme.[54] He relied instead on the "pervasiveness and regularity" of MSHA today,[55] thus limiting the applicability of *Colonnade* by holding that a history of pervasive regulation is an important consideration but not the deciding factor.[56]

The Court found additional ground for permitting warrantless inspections on the theory that section 103(a) created a "constitutionally adequate substitute" for the warrant requirement.[57] This judgment was based on the certainty and regularity of the Act's application. Section 103(a) delineates the intervals of inspection, and mandates follow-up inspections where violations are discovered.[58] Standards for inspection are set forth in the Act and in accompanying regulations,[59] and the Secretary must inform operators of all regulations promulgated pursuant to the Act.[60] Marshall thus found that the statute created a "predictable and guided federal presence,"[61] which was lacking in the OSHA inspection provision invalidated in *Barlow's*.

The court found further protections of privacy rights in MSHA's

49. 101 S. Ct. at 2537-41.
50. *Id.* at 2539.
51. *Id.* at 2540. Marshall, citing the Senate report on MSHA, notes the "notorious ease with which many safety or health hazards may be concealed." *Id.* at 2540 (quoting S. REP. No. 181, 95th Cong., 1st Sess. at 27, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 3401).
52. 101 S. Ct. at 2540.
53. *Id.*
54. *Id.* at 2541-42.
55. *Id.* at 2541.
56. *Id.* at 2541-42.
57. *Id.* at 2540.
58. *Id.*
59. *Id.* at 2541.
60. *Id.*
61. *Id.*

provision allowing the government to seek injunctive relief in the event a mine owner refuses entrance to an inspector.[62] This procedure provides both sides with a forum for presenting evidence as to the need for a search and, where necessary, a federal court order for inspection that accommodates any special privacy interests of the individual mine owner.[63] The Court thus found that the purposes of the warrant requirement were served with regard to predictability, notice, and individualized privacy protection.[64] Addition of a pre-inspection warrant procedure would, Justice Marshall argued, offer no additional protections.[65]

B. The Concurring Opinions

Though he accepted the majority's distinction of OSHA and *Barlow's* from MSHA and *Dewey*, and thus concurred with Justice Marshall as to the result, Justice Stevens criticized the Court's decision in *Camara*.[66] He referred to his dissent in *Barlow's*,[67] where he argued that a business owner's implied consent to inspection programs is fictional in every sense, regardless of the degree of pervasiveness of the regulatory scheme.[68] He also argued both in this case and in *Barlow's* that neither implied consent nor the longevity of the inspection program has any bearing on its reasonableness.[69]

Justice Rehnquist, in a separate concurrence, emphasized the inconsistency between the majority's standards for warrantless administrative searches and warrantless searches for criminal evidence.[70] He compared the strong federal interest in stopping drug traffic with a similar strong interest in mine safety, and noted that if Congress were to authorize warrantless inspections of private property reasonably thought to house illegal drug activity, the statute would be struck down despite the fact that the history of regulation in this area is longer than with the mine industry.[71] He nonetheless concurred with the result reached by Marshall because the Fourth Amendment's protections do not extend to items readily "visible to the naked eye without entrance,"[72] and the quarry was "largely visible to the naked eye."[73]

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62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 2542.
67. 436 U.S. at 336-39 (Stevens, J., dissenting).
68. *Id.* at 337-38.
69. 101 S. Ct. at 2542; 436 U.S. at 336-39.
70. 101 S. Ct. at 2543.
71. *Id.*
72. *Id.*
73. *Id.*

C. Dissent

Justice Stewart, though also criticizing *Camara*,[74] adhered to the doctrine of *stare decisis* and argued that *Camara* requires that section 103(a) be invalidated.[75] He saw *Biswell* and *Colonnade* merely as exceptions to *Camara*, further clarified by the *Barlow's* requirement of a long tradition of pervasive regulation by the government.[76] He noted that implied consent, the rationale for granting those exceptions, is based on charging the owner with knowledge of the regulation, making a long tradition a necessary element.[77]

III
CRITIQUE

Justice Marshall argued that warrantless inspections were justified in *Dewey* by both the importance of the interests to be protected[78] and the necessity of unannounced and regular inspections for effective enforcement.[79] While there can be little disagreement as to the importance of protecting workers from the mayhem of mine accidents, Marshall disposed of the second premise too quickly. Congress sought to protect the health and safety of workers in general and mine workers in particular by enacting schemes for warrantless inspections of workplaces.[80] Justice Marshall gave minimal scrutiny to Congress's judgment as to their necessity, looking only to see if Congress had some belief in necessity, and found "no reason not to defer" to this belief.[81] Using this approach, the OSHA provision struck down in *Barlow's* would be as unimpeachable as section 103(a). Yet in *Barlow's* the Court questioned Congress's judgment.[82] Thus the focus of the Court's suspicion apparently shifted from 1978 to 1981. In *Barlow's*, the justices sought evidence that Congress' judgment was reasonable;[83] with *Dewey* they simply accepted Congress' judgment.[84] The reason behind this shift is not explained in Justice Marshall's opinion.

The Court conducted a rather cursory review of MSHA with regard to the implied consent issue. Marshall made it clear that the focus of inquiry in future cases would be the pervasiveness of the existing regulatory scheme. Historical tradition remains a factor in the analysis;

74. *Id.*
75. *Id.* at 2543-44.
76. *Id.* at 2544-45.
77. *Id.* at 2544.
78. *Id.* at 2539.
79. *Id.* at 2540.
80. *Id.* at 2539.
81. *Id.*
82. 436 U.S. at 316-17.
83. *Id.*
84. 101 S. Ct. at 2539-40.

it is, however, a relatively unimportant factor, since the absence of a long history of regulation will not preclude a finding that the existing scheme is sufficiently comprehensive to put owners on notice that they may be subject to inspection. Marshall argued that if the history of regulation were a controlling factor, new or emerging industries posing possibly serious dangers to safety and health, such as the nuclear power industry, would never be subject to warrantless inspection programs even where such programs were carefully constructed.[85] Thus, although the Court cited the *Colonnade* "long history of regulation" standard as supporting authority throughout its opinion, it effectively ignored the holding of that case. The Court also ignored *Barlow's* to the extent that it relies on the *Colonnade* rule. Marshall's interpretation of precedent in this area indicates that the question of implied consent to inspection will depend on the comprehensiveness of regulatory schemes and not on the history of an industry.

The history of regulation within an industry, however, should not be determinative of the reasonableness of searches under the fourth amendment. As Justice Stewart pointed out in his dissent, strict reliance on the *Colonnade* history of regulation test would make the validity of administrative inspection schemes dependent upon whether a proprietor goes into business before or after the enaction of a regulatory scheme.[86] Under such a test, merely going into business would not be said to impute knowledge of and consent to regulations enacted at a later date. Even with a history of regulation in an industry, moreover, knowledge of even existing regulations should not always be assumed, and consent to the regulatory scheme should not always be implied from simply entering into a particular business. Further, the history of regulation in an industry is unrelated to the reasonableness of a congressional decision to require warrantless inspections.[87] For example, the Federal Communications Commission has a long history of regulating television, yet a congressional scheme to inspect television stations may not be reasonable for the regulation of the industry or even related to the prior regulation.

As a practical matter, it may be unwise to rely upon the *Colonnade* principle to find implied consent. As technology advances, the potential hazards of uncorrected industrial safety violation becomes more complex and strict enforcement of regulatory schemes becomes more imperative. Strict enforcement is particularly necessary in industries that may endanger the environment or the health and safety of employees who may not be able to recognize, correct, or alter dangerous conditions themselves.

85. *Id.* at 2542.
86. *Id.* at 2545.
87. *Id.* at 2542.

Marshall upheld section 103(a) largely because, in his view, it provides a "constitutionally adequate substitute" for the warrant requirement.[88] The Court had invalidated the OSHA provision in *Barlow's* because it did not fulfill that function.[89] Citing *Camara* and *See*, the *Barlow's* Court listed four important functions of a warrant proceeding "which underlie the Court's prior decisions that the Warrant Clause applies to inspections for compliance with regulatory statutes:"[90] (a) the proceeding provides a mechanism for a neutral determination of reasonableness under the Constitution; (b) it ensures that the determination of reasonableness is based on specific neutral criteria; (c) it places limits on the scope and objects of the search; and (d) it requires that the inspection be authorized by statute.[91] OSHA's authority to make warrantless searches allowed executive and administrative officers almost unbridled discretion as to when and whom to search.[92] In MSHA, by contrast, Congress provided the neutral determination of reasonableness through its decision to allow warrantless inspections in the case of mines and stone quarries, and established the neutral criteria for deciding on searches in individual cases by requiring all mine operations to be searched at specified intervals of time.[93] The statute limits inspections as to scope and objects by setting forth the standards with which the mine owners are expected to comply and notifying operators as to those regulations.[94] Moreover, in prohibiting forcible entries and providing a civil injunction procedure, the statute allows mine owners a day in court to argue any special privacy interests they might wish to protect.[95] Thus, the authors of MSHA have included the protections missing from OSHA; inspectors have no real discretion as to the place, time, scope, or objects of their search. Indeed, "it is difficult to see what additional protection a warrant requirement would provide."[96]

Applied only to commercial premises, and buttressed by functional privacy protections, the *Dewey* decision is acceptable considering the importance to the health of millions of mine employees. However, only the detailed limits and restrictions placed on MSHA's warrantless inspection authority insulate this statute from constitutional attack. All

88. *Id.* at 2540.
89. 436 U.S. at 323-24.
90. *Id.*
91. *Id.*
92. *Id.* at 323.
93. 101 S. Ct. at 2540-41.
94. *Id.* By notifying operators about regulations, the object of the search is specified in advance, and inspectors are thus not given unbridled discretion.
95. *Id.* at 2541. If the inspectors are refused entry, the Secretary of Labor's remedy is a civil action. Thus, the imposition of criminal penalties for refusal to permit warrantless administrative searches, which the Court objected to in *Camara* and *See*, is not present here.
96. *Id.*

of these limits as to time, place, scope, objects, and enforcement of right of entry must be present to keep the statute from becoming a vehicle to circumvent the Fourth Amendment, and these limits must be preserved as requirements in the future. Moreover, in future interpretations of this decision it is vital that the majority's distinction between private and commercial premises remain a strict and inviolate demarcation. Using this ruling to validate statutes allowing warrantless searches, where the statutes protect less compelling interests or include less clear restrictions on the discretion of field officers would make damaging inroads on the individual liberties protected by the Fourth Amendment.[97]

CONCLUSION

Civil liberties are precious and delicate things. They are won only at great cost, and they can easily be lost through mere inattention or complacency. Individual liberties are hardest to defend when they are narrowed piecemeal, with almost imperceptible slowness and with ostensibly good ends in mind.[98] The protections of the Fourth Amendment in particular have been increasingly weakened by loose construction and profuse exceptions. While *Donovan v. Dewey*, with its precisely drawn restrictions on warrantless searches, does not vitiate the Fourth Amendment, it has dangerous potential as a precedent. It must be treated as an extreme outpost, only tolerable because of its peculiar justifications and limitations, and not as a stepping-stone to a more flexible and expansive definition of the reasonable warrantless search.

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97. *Id.* at 2543.

98. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).