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## John Adams and administrative searches

One evening in February 2008, the owner of ANC Heating and Air Conditioning, Lloyd Knecht, sat in the Village of Endicott, N.Y. watching the HBO series about John Adams.

The following day, two members of the local fire department appeared at ANC and demanded entry to conduct an inspection. Lloyd had consented to such searches in the past, but this time he told the inspectors politely that they would have to obtain a warrant.

Later that day, the officials issued Lloyd an appearance ticket, alleging he had violated the village code by declining the inspection.

The Endicott Village Court rejected Lloyd's motion to dismiss on Fourth Amendment grounds. Following a jury trial, he was convicted. He was fined \$50,000 and tentatively sentenced to 270 years in prison.

The court then offered Lloyd a conditional discharge if he would allow the fire department to conduct the inspection. Facing more than two centuries in prison, he accepted the offer. (Predictably, the inspection revealed no violations.)

Lloyd appealed his conviction to county court, arguing that "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See v. City of Seattle*, 387 U.S. 541, 543 (1967).

The Supreme Court has carved out an exception to the principle for a "closely regulated industry."

In such industries, "the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." *Donovan v. Dewey*, 452 U.S. 594, 603 (1980).

In closely regulated industries, the violations being looked for often can be concealed quickly.

"[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." *U.S. v. Biswell*, 406 U.S. 311, 316 (1972).

Still, the closely regulated industry of the type involved in *Biswell* is the exception, not the rule.

"Administrative searches conducted pursuant to statutes of general applicability require search warrants." *V-1 Oil Co. v. State of Wyoming*, 902 F2d 1482, 1487 (10th Cir. 1990).

For a warrantless search scheme to be valid, there also must be a "substantial government interest that informs the regulatory scheme," "the warrantless inspections must be necessary to further the regulatory scheme" and the "inspection program, in terms of the certainty and regularity of its application, must pro-

vide a constitutionally adequate substitute for a warrant." *New York v. Burger*, 482 U.S. 691, 702-03 (1987).

The Village of Endicott argued Lloyd's business is "pervasively regulated," because he must comply with the state's Fuel Gas Code and Property Maintenance Code. Those codes apply to every building in New York, however. If they constitute pervasive regulation, then every business in New York is pervasively regulated, and warrants never would be required.

In New York, "obligations to register with the government, to pay a fee and to maintain certain prescribed books and records are not, in themselves, sufficient" to constitute a pervasive regulatory scheme. *People v. Keta*, 79 NY2d 474, 499 (1992).

No municipality "may require, as a condition of doing business, a blanket submission to warrantless searches at any time and for any purpose." *Matter of Finn's Liquor Shop v. New York State Liq. Auth.*, 24 NY2d 647, 658 (1969).

A county court reversed Lloyd's conviction last month, holding that the section of Endicott's code under which he was convicted is unconstitutional: "The defendant cannot be penalized for insisting on his right to be free from an unreasonable search under either the state or federal constitution."

The court pointed out the circularity of the village's logic, which "essentially seeks to argue that because they choose to conduct a search of ANC, it is highly regulated, and it is highly regulated because they choose to conduct an annual search of it."

The court also held that the massive fine and conditional discharge were "not only unduly harsh and excessive, but unlawful." *People v. Knecht*, Index No. N-2591 (Broome Co. Ct. 2010).

The New York State Court of Appeals has described statutes authorizing administrative searches as "the 20th century equivalent of colonial writs of assistance."

In 1761, James Otis, appearing before the Colonial Court of the Commonwealth of Massachusetts, denounced the writs as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that was ever found in an English law-book."

A young attorney in Otis's audience by the name of John Adams wrote later that American "independence was then and there born."

As Otis inspired Adams, so too did Adams inspire Lloyd.

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