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## THE SEARCH WARRANT REQUIREMENT FOR OSHA INSPECTIONS: UPHOLDING BUSINESS OWNER'S FOURTH AMENDMENT RIGHTS— *MARSHALL V. BARLOW'S, INC.*

A current government survey indicates that each year over five million Americans are either injured while employed or afflicted with occupational diseases. The actual figure may be as high as ten million.<sup>1</sup> The economic impact of such occupational maladies is overwhelming, particularly since they are considered to be largely preventable.<sup>2</sup>

In response to the growing concern for occupational safety and health, Congress enacted the Occupational Safety and Health Act of 1970 (OSHA).<sup>3</sup> The stated purpose of the Act was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. . . ."<sup>4</sup> In an effort to ensure effective enforcement of the regulations promulgated under OSHA, Congress adopted section 8(a)<sup>5</sup> which provides for warrantless surprise inspections.<sup>6</sup> How-

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1. Ingersoll, *It's Your Job or Your Life*, Chicago Sun-Times, June 18, 1978, at 5, col. 1.

2. The cost to society for workplace deaths, injuries, and illnesses is \$8 billion a year. 123 CONG. REC. H164 (daily ed. January 6, 1977) (remarks of Rep. Steiger).

3. Occupational Safety and Health Act of 1970, 29 U.S.C. §§651-78 (1970) [hereinafter cited as OSHA].

OSHA's legislative history began on May 16, 1969, when Senators Williams (D-N.J.), Kennedy (D-Mass.), Mondale (D-Minn.), and Yarborough (D-Texas) introduced S. 2193. 115 CONG. REC. 12855 (1969). The bill passed the Senate on November 17, 1970, 116 CONG. REC. 37632 (1970), and was brought to the House floor by unanimous consent on November 24, 1970, as H.R. 16785. 116 CONG. REC. 38724 (1970). A modification of the bill, H.R. 19200, was introduced by Congressmen Steiger and Sikes. This bill described the workplace with more particularity and required that an inspector's entry into a workplace be permitted "without delay." 116 CONG. REC. 31875 (1970). H.R. 19200 was adopted by the House as an amendment to S. 2193. 116 CONG. REC. 38715, 38724, & 38733 (1970). After both the Senate and House agreed to the conference report (H. Rep. 91-1765), 116 CONG. REC. 41753, 41965, & 42199 (1970), the Occupational Safety and Health Act of 1970 was finally approved on December 29, 1970, as Pub. L. No. 91-596. 116 CONG. REC. 44064 (1970). See also White, *OSHA 1-26 to 1-32* (Ill. Inst. For Cont. Legal Educ., 1974).

4. 29 U.S.C. §651(b)(1970).

5. *Id.* §657(a) (1970). This section of the Act provides:

In order to carry out the purposes of this Chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

6. The legislative history surrounding §8(a) is scant. Section 9(a) of the original H.R. 16785 authorized the Secretary of Labor to enter, inspect and investigate any pertinent conditions or

ever, section 8(a), promulgated to secure factual information needed by OSHA to assure a safe and healthful working environment,<sup>7</sup> has come in conflict with certain privacy interests protected by the Fourth Amendment.<sup>8</sup> Various district courts have tried to resolve the conflict between these competing interests and have reached inconsistent conclusions.<sup>9</sup>

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equipment for health and safety violations. H.R. REP. NO. 91-1291, 91st Cong., 2d Sess. 6 (1970). This section was amended by H.R. 19200 and became §8(a) of the final Act. H.R. REP. NO. 91-1765, 91st Cong., 2d Sess. 10, 36 (1970). The author of the amendment reminded the House that inspections would have to be conducted in accordance with applicable constitutional protections. 116 CONG. REC. 38709 (1970) (remarks of Rep. Steiger). The minority views on the House version of the bill pointed out that searches conducted without a warrant are a violation of the Fourth Amendment. H.R. REP. NO. 1291, 91st Cong., 2d Sess. 55 (1970).

7. To exercise its substantial power, OSHA needs to acquire information within the area of its authority. OSHA's enforcement procedures are a vital means to obtain needed information to insure compliance with occupational health and safety standards. Warrantless inspections provide the maximum of administrative efficiency. The author of the Act stated: "[I]t is important to note that warrantless civil inspections are both absolutely essential to this Act's enforcement and a longstanding Federal practice." 123 CONG. REC. H163 (daily ed. January 6, 1977) (remarks of Rep. Steiger).

8. As agencies grow and their regulations correspondingly intensify, it is probable that many refinements of Fourth Amendment rights will result from cases involving searches by administrative compliance officials rather than police officers. A partial list of administrative standards with which the American businessman must comply include those which regulate air and water pollution, quality of food, sale of securities, safety of modes of transportation, labor practices, and advertising as well as occupational health and safety. K. DAVIS, ADMINISTRATIVE LAW TEXT 3 (3d ed. 1972).

9. In upholding the constitutionality of §8(a), the Georgia district court, in *Brennan v. Buckeye Indus. Inc.*, 374 F. Supp. 1350 (D. Ga. 1974), stated that the federal government has broad regulatory powers including the right to authorize unannounced inspections in response to compelling administrative needs. The court also pointed out that existing provisions of the Act amply protect a business owner's privacy interests. This court construed *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), narrowly.

In *Camara*, a housing code provision permitting warrantless inspections of residential property was held to be a violation of the Fourth Amendment. Similarly, in *See*, a fire code provision authorizing warrantless inspections of commercial premises was held to be a violation of the Fourth Amendment. The court viewed *United States v. Biswell*, 406 U.S. 311 (1972), and *Colonnade Catering Co. v. United States*, 397 U.S. 72 (1970), as broad retreats from the insistence on strict Fourth Amendment standards. *Biswell* held that warrantless inspections pursuant to the Gun Control Act were reasonable and not a violation of the Fourth Amendment. Similarly, *Colonnade Catering Co.* held that a warrantless administrative entry pursuant to a provision of the Alcohol and Tobacco Tax Division of the Internal Revenue Service was not a violation of the Fourth Amendment. Some commentators feel, however, that the *Buckeye Industries* case can best be explained by the fact that the district court could not consider subsequent Supreme Court decisions that relied heavily on a broad interpretation of the *Camara* and *See* decisions. See Note, *OSHA Inspections and the Fourth Amendment: Balancing Private Rights and Public Need*, 6 FORDHAM URB. L.J. 101, 112 (1977); Note, *The Constitutionality of Warrantless OSHA Inspections*, 22 VILL. L. REV. 1214, 1221 (1977).

The district court in *Brennan v. Gibson's Products, Inc.*, 407 F. Supp. 154 (1976), held that §8(a) authorized OSHA inspections only when accompanied by a search warrant based upon probable cause standards appropriate to administrative searches. The court felt that "the Fourth Amendment is not to be viewed as in a condition of general retreat before an administrative advance." *Id.* at 161. Therefore, the statute was construed in a manner consistent with the

This controversy over the applicability of the Fourth Amendment to section 8(a) of OSHA was recently resolved by the United States Supreme Court in *Marshall v. Barlow's, Inc.*<sup>10</sup> This Note will analyze the Court's treatment of Mr. Barlow's Fourth Amendment claim to be free from unwarranted government intrusion. Attention will be directed toward the factors applied by the Court when determining the reasonableness of a business owner's expectation of privacy. Particular emphasis will be placed upon the Court's redefinition of the probable cause standard in light of OSHA's compelling enforcement needs. In addition, comments will be made regarding the possible effect of the *Marshall* holding upon other regulatory schemes.

#### FACTS AND BACKGROUND

Pursuant to section 8(a) of OSHA, an Occupational Health and Compliance Officer properly identified himself<sup>11</sup> and requested permission to conduct a safety and health inspection of Barlow's, Inc.<sup>12</sup> The inspection was part of a random routine selection process of the agency and was not made in response to a specific complaint by an employee.<sup>13</sup> In the absence of a search warrant, Mr. Ferrol G. "Bill" Barlow, president and general manager of Barlow's, Inc., refused to allow the inspection, relying on his Fourth Amendment right to be free from unreasonable searches. The Secretary of Labor, after petitioning the district court of Idaho, obtained an

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Fourth Amendment. If Congress could intend nothing beyond its constitutional powers, the court felt the requirement of a search warrant for restricted inspections was presumed and not explicitly made a part of the statute. The court construed *Camara* and *See* broadly, while *Colonnade* and *Biswell* were thought to be narrow exceptions based upon an implied consent to unwarranted inspections. See Note, *Fourth Amendment Prohibits Warrantless OSHA Searches—Brennan v. Gibson's Products, Inc.*, 11 SUFFOLK U. L. REV. 156 (1976).

Other lower court decisions concerning OSHA inspections include: *Accu-Namics, Inc. v. OSHA Review Comm'n*, 515 F.2d 828 (5th Cir. 1975) (employer's Fourth Amendment rights not violated when a compliance officer did not immediately show his credentials upon arriving at the scene of a construction accident); *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F.2d 84 (5th Cir. 1975) (routine inspection of a clothing manufacturer's plant held consensual for purposes of the Fourth Amendment in that the plant president accompanied the compliance officer); *Marshall v. Chromalloy Am. Corp.*, 433 F. Supp. 330 (E.D. Wis. 1977) (probable cause to issue a warrant for inspection of a metal-working industry based upon a showing of congressional purpose together with the nature of the business); *Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp. 627 (D. N.M. 1976) (OSHA can conduct a non-consensual inspection of an employer's premises only pursuant to a search warrant based upon probable cause sufficient to justify an administrative search).

10. 98 S. Ct. 1816 (1978).

11. The inspector's right to enter a premises is conditioned upon the presentation of appropriate credentials. 29 U.S.C. §657(a)(1) (1970). At least one court has stated that if the employer wishes, he may make a phone call to verify the inspector's authority. *Usery v. Godfrey Brake & Supply Service, Inc.*, 545 F.2d 52, 55 (8th Cir. 1976).

12. *Barlow's Inc.* is an electrical and plumbing installation business located in Pocatello, Idaho. 98 S. Ct. at 1819.

13. For a discussion of OSHA's inspection scheme see note 101 and accompanying text *infra*.

order compelling entry, inspection and investigation of the premises.<sup>14</sup> When this order was presented to Mr. Barlow, he again refused to allow the inspection and filed an action to enjoin enforcement of the inspection provisions of OSHA.<sup>15</sup>

A three-judge district court<sup>16</sup> found the section 8(a) enforcement provision, authorizing warrantless inspections of business establishments,<sup>17</sup> to be a violation of the Fourth Amendment<sup>18</sup> stating that "except in certain carefully defined classes of cases, the search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."<sup>19</sup> On appeal,<sup>20</sup> the United States Supreme Court, in a 5-3 decision,<sup>21</sup> affirmed the district court's holding and declared section 8(a) of OSHA an unconstitutional intrusion upon Mr. Barlow's Fourth Amendment rights.

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14. If an inspection is refused, 29 C.F.R. §1903.4 (1977) provides that:

The Compliance Safety and Health Officer shall endeavor to ascertain the reason for such refusal, and he shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall immediately consult with the Assistant Regional Director and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary.

15. The district court issued a permanent injunction restraining the government from engaging in further warrantless inspections of nonpublic portions of commercial premises. The United States Solicitor General, on behalf of the Secretary of Labor, then sought a Supreme Court order limiting the effect of the decision to Barlow's premises. Justice Rehnquist granted the government's request, noting that the district court decision had invalidated part of an Act of Congress. Justice Rehnquist took the position that OSHA enforcement should remain in effect pending a final decision on the merits. Thus, OSHA inspections continued until the Supreme Court decided the constitutional issue. *Marshall v. Barlow's, Inc.*, 429 U.S. 1347 (1977).

16. *Barlow's, Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho 1976).

17. The court extended the warrant protection to include administrative inspection of commercial property. *Id.* at 440 citing *See v. City of Seattle*, 387 U.S. 541, 545 (1967).

18. The district court in Idaho also addressed itself to two legal issues. First, the court held that it should not dismiss the action for lack of subject matter jurisdiction on the ground that Mr. Barlow did not exhaust his administrative remedies. It reasoned that the issue presented in this case was constitutional and outside the expertise of the administrative agency. Second, the court order authorizing the inspection reserved the constitutional issue. Therefore, Barlow's failure to appeal the order did not bar his Fourth Amendment claim on res judicata grounds.

19. 424 F. Supp. 437, 440 (D. Idaho 1976) citing *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

20. Direct appeal to the Supreme Court from a three-judge district court opinion is provided for in 28 U.S.C. §1253 (1970) as a matter of right. *See also* *Radio Corp. of America v. United States*, 95 F. Supp. 660 (N.D. Ill. 1950), *aff'd*, 341 U.S. 412 (1951). The statute applies to injunction suits involving the constitutionality of a federal act. This section should be narrowly construed in view of the overriding policy of minimizing the mandatory docket of the Supreme Court in the interests of sound judicial administration. *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974).

21. Justice White wrote the opinion, joined by Chief Justice Burger and Justices Stewart, Marshall, and Powell. Justice Stevens filed the dissenting opinion joined by Justices Blackmun and Rehnquist. Justice Brennan took no part in the consideration or decision of the case.

## ANALYSIS OF THE DECISION

In holding section 8(a) warrantless inspections to be a violation of the Fourth Amendment, the Court considered and rejected the following arguments as presented by the Secretary of Labor: (1) OSHA inspections involve pervasively regulated businesses and therefore are not subject to the warrant requirement;<sup>22</sup> (2) all businesses involved in interstate commerce are subject to close government supervision; therefore, inspections of such businesses are exempt from the warrant requirement;<sup>23</sup> (3) a business owner does not have a reasonable expectation of privacy concerning commercial property;<sup>24</sup> (4) OSHA's administrative efficiency requires warrantless inspections;<sup>25</sup> and (5) requiring a search warrant would have adverse effects upon regulatory schemes similar to OSHA.<sup>26</sup>

The Secretary alleged that OSHA inspections fall within recognized exceptions to the warrant requirement for pervasively regulated businesses and for those regulated industries long subject to close supervision and inspection.<sup>27</sup> Owners of such regulated businesses are deemed to have impliedly consented to inspections and, therefore, have no reasonable expectation of privacy from intrusions by regulatory agencies.<sup>28</sup> The Court, however, rejected this contention.<sup>29</sup> Ordinary businesses, such as Barlow's, Inc., were distinguished from pervasively regulated businesses because they lack a "long tradition of close government supervision."<sup>30</sup>

The Court also rejected the suggestion that Barlow's business was part of a closely regulated industry subject to lawful warrantless inspections because his operations were not necessarily confined to the state of Idaho.<sup>31</sup> Mr. Barlow was held not to have impliedly consented to the search simply because his business had some effect on interstate commerce.<sup>32</sup> In that re-

22. 98 S. Ct. at 1820-21.

23. *Id.* at 1821.

24. *Id.* at 1820.

25. *Id.* at 1822.

26. *Id.* at 1825.

27. *Id.* at 1820-21. The Supreme Court delineated the exception for "pervasively regulated business[es]" in *United States v. Biswell*, 406 U.S. 311, 316 (1972), and "closely regulated" industries "long subject to close supervision and inspection" in *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970).

28. 98 S. Ct. at 1821.

29. *Id.* The Supreme Court construed these exceptions narrowly based upon the unique circumstances presented in each case.

30. *Id.*

31. Similarly, the fact that the Walsh-Healy Act of 1936, 41 U.S.C. §§35-45 (1970), imposes a minimum wage and maximum hour on all employees of businesses contracting with the government does not mean that these businesses are under close government regulation. 98 S. Ct. at 1821.

32. *Id.* The Supreme Court disregarded the fact that §2 of OSHA states that Congress, through the exercise of its power to regulate commerce among the several states, enacted this legislation to alleviate the substantial burdens placed upon interstate commerce "in terms of lost production, wage loss, medical expenses, and disability compensation payments." 29 U.S.C. §651(a) (1970).

gard, the Court stated that "under current practice and law, few businesses can be conducted without having some effect on interstate commerce."<sup>33</sup>

It was further held that Mr. Barlow's expectations of privacy within his commercial premises were reasonable.<sup>34</sup> The Court, however, distinguished between observations made by employees and those of government inspectors.<sup>35</sup> Employee observations, within the scope of employment, were held to be beyond the owner's reasonable expectation of privacy. Government inspectors without search warrants, though, were considered to stand in no better position than members of the public.<sup>36</sup>

The Secretary of Labor urged the Court to consider the crucial administrative necessities of OSHA inspections in light of the minimal protection a warrant could afford the business owner's privacy interests.<sup>37</sup> Stressing the unique administrative considerations presented in this case, the Secretary contended that warrantless inspections were essential to the proper enforcement of the statute.<sup>38</sup> The warrant requirement, he argued, would destroy the element of surprise needed to insure that employers would have no opportunity to hide or alter unsafe working conditions.<sup>39</sup>

The Supreme Court resolved this issue by suggesting that *ex parte* warrants<sup>40</sup> would neither seriously burden OSHA or the courts nor prevent

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33. 98 S. Ct. at 1821.

34. *Id.* at 1820.

35. *Id.* at 1821-22.

36. *Id.* at 1821. What is observable to the public is observable by the government official without a warrant. *See generally* Air Pollution Variance Bd. of Colorado v. Western Alfalfa Corp., 416 U.S. 861 (1974).

37. An inspection warrant purports to serve the following three functions: (1) to inform the employer that the inspection is authorized by statute; (2) to advise him of the lawful limits of the inspection; and (3) to assure him that the inspector is authorized personnel. *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1830 (1978) (Stevens, J., dissenting) *citing* *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967). In examining these functions in the OSHA context, Justice Stevens felt that existing protections within the Act adequately protected Fourth Amendment rights. *Id.* at 1830-31 (Stevens, J., dissenting).

The majority felt, however, that the requirement of a search warrant would protect a business owner's rights in two ways. First, a search warrant issued for OSHA inspections would replace the discretion of an administrative field officer with a neutral magistrate's assurance that the inspection is reasonable and pursuant to an administrative plan containing specific neutral criteria. Second, the warrant would perform the important function of advising the owner of the scope and objects of the search. *Id.* at 1826.

38. *Id.* at 1822.

39. *See* note 94 and accompanying text *infra*.

40. A judicial proceeding is said to be *ex parte* when it is granted for the benefit of only one party. The person adversely interested is given no notice of the proceedings. BLACK'S LAW DICTIONARY 662 (4th ed. 1968).

One commentator feels that the *ex parte* warrant proceeding is far less a safeguard than an adversarial process. It is suggested that a better procedure would be to allow the affected individual representation during the warrant procedure so that any constitutional claims can be raised at that time. This advance judicial determination of Fourth Amendment rights would afford the business owner the most protection. LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1, 31 [hereinafter cited as *Administrative Searches*].

effective inspections necessary to enforce the statute. The advantage of surprise, the Court noted, would not be lost if an *ex parte* warrant were issued and the inspector permitted to reappear at the premises without further notice. The Court also felt that the great majority of businessmen would continue to consent to warrantless inspections. However, in cases where the business owner refused inspection, an *ex parte* warrant procedure would be no more burdensome than the Secretary's own provision for refusals.<sup>41</sup>

Finally, the Court also rejected the notion that requiring a search warrant for OSHA inspections would jeopardize the constitutionality of other regulatory statutes which provide for warrantless searches. The reasonableness of such other provisions would depend upon their specific enforcement needs and the privacy guarantees.<sup>42</sup>

Another important aspect of the decision is the redefinition of probable cause in the context of an OSHA inspection. For the purpose of OSHA's administrative searches, a warrant could be issued based on specific evidence of an existing violation or on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular establishment."<sup>43</sup> Recognizing the distinction between administrative inspections and criminal investigations, the Court stated that the Fourth Amendment does not require that probable cause be defined in the criminal law sense.

#### PROTECTION OF REASONABLE EXPECTATIONS OF PRIVACY

In determining the scope of the Fourth Amendment's<sup>44</sup> protection with respect to OSHA's warrantless inspections, the *Marshall* Court focused

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41. 29 C.F.R. §1903.4 (1977). See note 14 *supra* for the text of this provision. The Supreme Court felt that this provision represented a choice to proceed by process where entry is refused. Since the Act does not require such a provision, the *Marshall* Court reasoned that if the efficient administration of OSHA was endangered by this safeguard, the Secretary should never have adopted or retained it. 98 S. Ct. at 1823-24.

42. *Id.* at 1825. The *Marshall* Court added that it based its opinion "on the facts and law concerned with OSHA and [did not] retreat from a holding appropriate to that statute because of its real or imagined effect on other, different administrative schemes." *Id.*

43. *Id.* at 1824. See note 85 and accompanying text *infra*.

44. The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The Fourth Amendment was intended to protect the right of the people to be secure against the arbitrary invasion of their privacy by the government. Drafted as a reaction to the abuses of the general warrant in England, and the writs of assistance in the Colonies, the Amendment protects privacy interests by prohibiting unreasonable searches and seizures, and by requiring that search warrants be based upon probable cause. *United States v. Chadwick*, 433 U.S. 1 (1977). Today, the Fourth Amendment, viewed as a right which is basic to a free society, is a vital remedy and safeguard against unwarranted government intrusion. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).



primarily on the business owner's reasonable expectations of privacy, a concept developed in *Katz v. United States*.<sup>45</sup> Before *Katz*, the focus of Fourth Amendment protection was on whether the location searched could be characterized as a constitutionally protected area.<sup>46</sup> This emphasis on location was replaced in *Katz* by an examination of the individual's expectation of privacy at the location of the search.<sup>47</sup> Justice Harlan's concurring opinion in *Katz*<sup>48</sup> further refined this shift by outlining a two-fold requirement for determining such protected rights. First, a person must exhibit an actual, subjective expectation of privacy. Second, the expectation of privacy must be one that society will recognize as "reasonable."<sup>49</sup> Thus, the final determination of whether to protect an individual's privacy interests should be based upon the reasonableness of that person's expectations.<sup>50</sup>

In determining the reasonableness of a business owner's expectation of privacy with respect to section 8(a) of OSHA's regulatory scheme, the Supreme Court in *Marshall* considered the following analytic dichotomies: (1) private vs. commercial premises,<sup>51</sup> (2) public vs. nonpublic areas,<sup>52</sup> (3) employees vs. government officials,<sup>53</sup> and (4) pervasively regulated and supervised industries vs. nonregulated industries.<sup>54</sup>

The Amendment's protective umbrella has been modified and expanded over the years to meet the needs and circumstances of a changing society, evolving to encompass a comprehensive variety of privacy interests. These privacy interests are found in homes as well as telephone booths, *Katz v. United States*, 389 U.S. 347 (1967); hotel rooms, *United States v. Jeffers*, 342 U.S. 48 (1951); and offices, *Mancusi v. DeForte*, 392 U.S. 364 (1968).

Of immediate concern is the degree of protection afforded to commercial privacy interests, which are infringed upon by federal agency regulations such as OSHA. See Note, *OSHA v. the Fourth Amendment: Should Search Warrants Be Required for "Spot Check" Inspections?*, 29 BAYLOR L. REV. 283 (1977); Comment, *The Validity of Warrantless Searches under the Occupational Safety and Health Act of 1970*, 44 CIN. L. REV. 105 (1975); Note, *OSHA Inspections and the Fourth Amendment: Balancing Private Rights and Public Need*, 6 FORDHAM URB. L. J. 101 (1977).

45. 389 U.S. 347 (1967). In *Katz*, a telephone conversation was obtained by attaching an electronic listening and recording device to the outside of a public telephone booth. This government action was considered to be a search and seizure within the meaning of the Fourth Amendment; thus, a valid search warrant was required.

46. *Id.* at 350-51. The Supreme Court has described its conclusions in terms of "constitutionally protected areas" in the following decisions: *Berger v. New York*, 388 U.S. 41, 57, 59 (1967); *Lopez v. United States*, 373 U.S. 427, 438-39 (1963); *Silverman v. United States*, 365 U.S. 505, 510, 512 (1961).

47. The Court noted that "the Fourth Amendment protects people, not places." 389 U.S. 347, 351 (1967).

48. *Id.* at 360.

49. *Id.* at 361.

50. For example, a person's home is a place where privacy is expected and protected. However, objects, activities or statements that a person willingly exposes to the public exhibit no intention of privacy. They are not protected because expectation of privacy under the circumstances is unreasonable. *Id.*

51. 98 S. Ct. at 1820.

52. *Id.* at 1821-22.

53. *Id.*

54. *Id.* at 1820-21.

*Private vs. Commercial Premises*

With little analysis, the *Marshall* Court stated that Mr. Barlow had a reasonable expectation of privacy in his commercial as well as private premises.<sup>55</sup> In so holding, the Court relied upon *See v. City of Seattle*.<sup>56</sup> The *See* Court, in an opinion equally sparse in analysis, supported its holding by referring to prior decisions which required an administrative subpoena for inspection of corporate books and records.<sup>57</sup> Instead of citing *See*, the *Marshall* Court could have applied the two-fold test presented by Justice Harlan in *Katz*<sup>58</sup> to more definitively explain its holding.

A business owner obviously exhibits a subjective expectation of privacy in a commercial premises in that he or she does not wish to expose to the public the maintenance and operation of the commercial enterprise. Thus, because an expectation of this nature is objectively reasonable as well, the business owner would be entitled to Fourth Amendment protection. A businessman, like the occupant of a residence, has a constitutional right to go about his business free from warrantless government intrusion upon his commercial property.<sup>59</sup> Therefore, regardless of which analysis is used, the *Marshall* decision illustrates that the Supreme Court is continuing to uphold the principle that the Constitution does not provide a separate or lower standard of Fourth Amendment protection for commercial premises.<sup>60</sup>

*Public vs. Nonpublic Areas*

The *Marshall* Court narrowed the area where an owner could reasonably expect to be free from warrantless intrusions to include only the "nonpublic areas" of the commercial premises.<sup>61</sup> This limits the importance of the individual's intent, thereby deviating from the basic Fourth Amendment rationale. According to *Katz*, what a person knowingly exposes to the public, either within the home or the office, is not subject to protection. What an individual seeks to preserve as private, however, even in an area accessible

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55. *Id.* at 1820.

56. 387 U.S. 541 (1967).

57. 387 U.S. 541, 544-45. The Court reiterated in *See* that the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. *See United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946).

58. For a discussion of the test formulated by Justice Harlan in this case *see* note 48 and accompanying text *supra*.

59. *See v. City of Seattle*, 387 U.S. 541, 543 (1967).

60. *See United States v. Rosenberg*, 416 F.2d 680 (7th Cir. 1969) (a warrantless search of an unoccupied office was an unreasonable search); *United States v. Hagarty*, 388 F.2d 713 (7th Cir. 1968) (warrantless electronic eavesdropping in a government office was a violation of the Fourth Amendment); *City News Center, Inc. v. Carson*, 298 F. Supp. 706 (M.D. Fla. 1969) (a warrantless search of a store and seizure of magazines by police officers violated Fourth Amendment rights; therefore, the store owner was entitled to a temporary injunction).

61. 98 S. Ct. at 1821-22.

to the public, may under certain circumstances be constitutionally protected.<sup>62</sup>

Although the Court does not resolve this apparent anomaly, there are two possible explanations. First, using Justice Harlan's two-fold standard from *Katz*,<sup>63</sup> even though Mr. Barlow had an expectation of privacy within the public area of his commercial property, this expectation of privacy was not reasonable. Although this explanation is probably accurate,<sup>64</sup> the *Marshall* Court's limitation could also suggest a return to the pre-*Katz* locational analysis.<sup>65</sup> Such an analysis, however, would be contradictory to the consistent application of the reasonable expectation of privacy standard to private as well as commercial premises.<sup>66</sup>

A pre-*Katz* location analysis would seem to suggest that public areas of commercial premises are not constitutionally protected, regardless of the expectation of privacy concerning those locations. This approach would initiate a different constitutional standard to be applied when commercial property is involved.<sup>67</sup> Such an inconsistency should be avoided. Since the *Marshall* Court did not directly address this issue, it remains for subsequent decisions

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62. *Katz v. United States*, 389 U.S. 347, 351-52 (1967). If the *Marshall* Court strictly followed the *Katz* principle, Mr. Barlow's privacy within the public area of his commercial premises should also be protected if he had a subjective intent of privacy in that location.

63. See note 48 and accompanying text *supra*.

64. The *Marshall* Court could have assumed that the Fourth Amendment guaranty against unwarranted government intrusion did not apply to a public place; therefore, the majority did not discuss this concept in the opinion. The "plain view" and the abandoned property doctrines support this theory. It is well settled that objects in plain view of an officer are subject to seizure and may be introduced in evidence. *Harris v. United States*, 390 U.S. 234 (1968). See *United States v. Wilkes*, 451 F.2d 938 (2d Cir. 1971) (a remark overheard by agents stationed in a public place near the door of an apartment was admissible as evidence); *Nunez v. United States*, 370 F.2d 538 (5th Cir. 1967) (officers standing on public property looking into a car window did not violate the Fourth Amendment); *People v. Wright*, 41 Ill.2d 170, 242 N.E.2d 180 (1968) (officers looking into the window of a dwelling from public property were not in violation of the Fourth Amendment). It is also permissible for officers to search for and seize property which is abandoned, as long as the abandonment was not caused by illegal police conduct. See *United States v. Minker*, 312 F.2d 632 (3d Cir. 1962), *cert. denied*, 372 U.S. 953 (1963) (a warrantless search of garbage cans located on the premises but outside the building is not unreasonable). *Accord United States v. Jackson*, 448 F.2d 963 (9th Cir. 1971).

65. See note 46 and accompanying text *supra*.

66. See note 60 and accompanying text *supra*.

67. The Supreme Court, in *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977) citing *United States v. Biswell*, 406 U.S. 311 (1972) and *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) stated: "[t]he Court, of course, has recognized that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context." *Id.* at 353. See also *Davis v. United States*, 328 U.S. 582 (1946) (a warrantless arrest of a filling station attendant and seizure of ration coupons was not a violation of the Fourth Amendment in that less strict requirements of reasonableness apply to a business premises); *Peeples v. United States*, 341 F.2d 60 (5th Cir. 1965) (the Fourth Amendment's prohibition against unreasonable searches and seizures is less stringent where federal officers search for public documents to verify a tax stamp within the regulated business of retail liquor).

to clarify whether the Court actually intends to return to a careful examination of location when determining Fourth Amendment rights within commercial premises. Regardless of which approach is taken in the future, emphasis on a unified constitutional standard to commercial premises is imperative to insure predictability for the business community and for the agencies regulating those businesses.

#### *Employees vs. Government Officials*

In limiting a business owner's reasonable expectation of privacy, the *Marshall* Court distinguished between observations made by employees as compared with those of government officials. What an employee observes in the nonpublic areas of the premises is beyond the employer's reasonable privacy expectations.<sup>68</sup> Employees occupy the nonpublic areas of a commercial premises for a considerable period of time during each work day, and the business owner voluntarily consents to this occupation.

Although the Court appears to be limiting a business owner's reasonable expectation of privacy by using a consent theory, the need for administrative efficiency would also provide justification for this position. Since employees are in the best position to notice and report occupational health and safety hazards, the effective operation of OSHA depends upon voluntary employee complaints.<sup>69</sup> The *Marshall* Court seems to acknowledge this necessity by encouraging employees to report occupational health and safety hazards without the burdensome procedural impediment of obtaining a search warrant.

#### *Pervasively Regulated and Closely Supervised Industries vs. Nonregulated Industries*

The *Marshall* Court also considered a business owner's reasonable expectation of privacy in light of the type of business being regulated by the government agency.<sup>70</sup> The Court has recognized two specific exceptions<sup>71</sup>

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68. 98 S. Ct. at 1821. The *Marshall* Court appropriately did not consider government inspectors to be within the employee category. Without a search warrant or consent of the owner, a government official cannot legally inspect the nonpublic areas of the premises. The fact that an employee is free to report, and the government is free to use, what the employee sees and experiences within nonpublic areas does not preclude the owner from a reasonable expectation of privacy from government intrusion. *Id.* at 1822.

69. 29 C.F.R. §1903.11(a) (1977) provides that "[a]ny employee or representative of employees who believe that a violation of the Act exists in any workplace where such employee is employed may request an inspection of such workplace by giving notice of the alleged violation to the Area Director or to a Compliance Safety and Health Officer. . . ."

70. 98 S. Ct. at 1820-21.

71. It also appears that the *Marshall* Court considers warrantless regulatory inspections reasonable only when a regulatory statute is aimed at a specific industry. *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1833 (1978) (Stevens, J., dissenting). In adopting this rationale, the Court appears to be focusing on the specific nature of the enforcement scheme, and requiring that all warrantless inspection provisions be narrowly defined, such as those provisions which concern

to the warrant requirement in regulatory inspections: (1) closely regulated industries long subject to close supervision and inspection,<sup>72</sup> and (2) pervasively regulated businesses.<sup>73</sup> Both exceptions were founded upon an implied consent theory.<sup>74</sup> Even though the *Marshall* Court acknowledged that a business owner consents to inspections pursuant to enforcement regulations simply by engaging in a pervasively or closely regulated industry,<sup>75</sup> it refused to apply similar reasoning to OSHA inspections. The fact that all types of industries are subject to OSHA regulations was not sufficient to establish consent to OSHA's inspections.<sup>76</sup>

The analysis used by Justice Stevens in his dissent presents a more enlightening discussion of this issue.<sup>77</sup> An industry's long tradition of govern-

only liquor, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and firearms dealers, *United States v. Biswell*, 406 U.S. 311 (1972). Presumably, the Supreme Court did not uphold OSHA's warrantless inspections because OSHA regulations are directed at numerous health and safety hazards in all commercial work places. The underlying purpose, however, for OSHA and liquor and gun control inspection provisions are similar. OSHA inspections apply to virtually every industry, as occupational health and safety hazards occur in all businesses. In contrast, gun and liquor inspections are confined to dealers in those items because virtually no other industry handles the products. The scope of the federal agency's regulations in each case is determined by the location of possible violations. Thus, the pertinent question is "not whether the inspection program is authorized by a regulatory statute directed at a single industry," but "whether Congress has limited the exercise of the inspection power to those commercial premises where the evils at which the statute is directed are to be found." *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1833 (1978) (Stevens, J., dissenting).

72. *Colonnade Catering Corp. v. U.S.*, 397 U.S. 72 (1970). In upholding the warrantless inspection provision pursuant to Alcohol and Tobacco Tax regulations, the *Colonnade* Court commented upon the long history of liquor regulation predating the Fourth Amendment, both in England and the American colonies. *Id.* at 75. Supported by this historical precedent, Congress has broad powers to design inspection procedures under the liquor laws that are necessary to meet what was considered "the evil at hand." *Id.* at 76.

73. *United States v. Biswell*, 406 U.S. 311 (1972). In this case, the Court upheld a warrantless inspection pursuant to the Gun Control Act of 1968 on three grounds. First, the firearms industry was pervasively regulated by federal, state and local laws. *Id.* at 315. Second, the Court felt that effective inspections must be unannounced. Finally, the *Biswell* Court, relying on the "implied consent theory," stated that a dealer who chooses to engage in a pervasively regulated industry consents to government inspections. Therefore, the threat to the dealer's justifiable expectation of privacy is minimal. *Id.* at 316.

74. It is well established that an exception to the warrant requirement based upon probable cause is a search that is conducted pursuant to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Davis v. United States*, 328 U.S. 582, 593-94 (1946); *Zap v. United States*, 328 U.S. 624, 628, 630 (1946). Officers may lawfully search the premises with the voluntary permission of the owner or person rightfully in possession of the property. *United States v. Novick*, 450 F.2d 1111 (9th Cir. 1971); *Cutting v. United States*, 169 F.2d 951 (9th Cir. 1948). See also J. ISRAEL & W. LAFAYE, *CRIMINAL PROCEDURE—CONSTITUTIONAL LIMITATIONS* 143-155 (2d ed. 1975).

75. 98 S. Ct. at 1821. See, e.g., notes 72 and 73 *supra*.

76. In reality, however, consent to either regulatory inspection is a legal fiction. No business owner, simply by engaging in an industry, whether pervasively regulated or not, actually consents to warrantless government searches. *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1833 (1978) (Stevens, J., dissenting).

77. It must be noted, however, that by adopting Stevens' position, the result in the case would be changed.

ment regulation does not imply consent to enforcement provisions or negate any reasonable expectation of privacy.<sup>78</sup> As Justice Stevens noted, the longevity of a regulatory program should have no bearing on the constitutionality of its routine inspections.<sup>79</sup> It is Congress, not the judiciary, which should determine the types of businesses to be regulated, the extent of the regulation, and the enforcement provisions needed to ensure compliance. As society's needs and concerns change, new regulatory schemes are enacted and applied to various industries.<sup>80</sup> These new regulations should carry the same presumption of constitutional validity as do the older schemes.<sup>81</sup> Similarly, although OSHA was enacted only eight years ago, Congress determined that routine warrantless inspections were necessary. Thus, they should be just as valid as similar provisions in older schemes.

#### REDEFINITION OF THE PROBABLE CAUSE STANDARD

The majority in *Marshall* articulated a less demanding criterion for the issuance of a search warrant in the context of OSHA inspections. This standard was first defined in *Camara v. Municipal Court*<sup>82</sup> as "reasonable legislative or administrative standards for conducting an . . . inspection . . . with respect to a particular dwelling."<sup>83</sup> The crucial factor was considered to be the "reasonableness" of the legislative and administrative standards that accomplish the government's goals.<sup>84</sup>

In adopting the *Camara* standard, the *Marshall* Court stated that OSHA inspection warrants need not be based on probable cause to believe that violations exist on a particular premises,<sup>85</sup> but instead may be based on reasonable legislative or administrative standards. Therefore, a specific business can be chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act if it can be shown that the overall

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78. 98 S. Ct. 1816, 1833 (1978) (Stevens, J., dissenting).

79. *Id.*

80. The dissent correctly pointed out that "Congress' conception of what constitutes urgent federal interests need not remain static." *Id.*

81. The Supreme Court in *Biswell* even admitted that the regulation of firearms did not have as long a history of government control as the liquor industry; however, Congress had the right to enact appropriate enforcement procedures in response to both urgent federal interests. *United States v. Biswell*, 406 U.S. 311, 315 (1972).

82. 387 U.S. 523 (1967).

83. *Id.* at 538.

84. The *Camara* Court pointed out that the ultimate standard is still "reasonableness." *Id.* at 539. The Court suggested that the need to search be balanced against the invasion of privacy that the search entails on a case by case basis. *Id.* at 536-37. The Court examined three relevant factors in determining the reasonableness of area code-enforcement inspections: (1) the program's long history of judicial and public acceptance; (2) public interests demanding that all dangerous conditions be prevented or abated; and (3) the relatively limited invasion of the urban citizen's privacy since the inspection does not seek evidence of a crime and is not directed toward the resident's person. *Id.* at 537.

85. 98 S. Ct. at 1824.

plan was derived from neutral sources. Two possible neutral sources were suggested: (1) the dispersion of employees in various types of industries across a given area; or (2) the desired frequency of searches in any of the lesser divisions of the area.<sup>86</sup>

Although the *Marshall* Court did not feel it necessary to elaborate on these neutral criteria,<sup>87</sup> they could encompass the following common situations: (1) industries with a high injury/illness rate that employ a large number of workers;<sup>88</sup> and (2) a predetermined number of inspections of less dangerous industries that employ fewer workers, or industries which operate on a cyclical basis with inactivity for several months of the year.<sup>89</sup> Although the existence of neutral sources was emphasized in order to limit the previously unbridled discretion of administrative or inspection officers,<sup>90</sup> it appears that the Court intentionally framed the suggested sources in vague language so the agency could continue to develop its own determinations in light of crucial administrative needs.

#### *Administrative Concerns*

This redefined probable cause standard could be considered a compromise to accommodate certain of OSHA's compelling administrative concerns. First, warrantless inspections were considered essential to the proper enforcement of OSHA because they preserve the advantages of surprise.<sup>91</sup> Second, it was contended that a warrant requirement would place an excessive burden on OSHA's personnel and financial resources.<sup>92</sup> Finally, there was concern that a search warrant based upon a strict probable cause standard would delay or actually eliminate one of the four OSHA inspection categories.<sup>93</sup> Upon careful analysis, it can be concluded that the flexible probable cause solution proposed by the *Marshall* Court will destroy the surprise element and exacerbate OSHA's present economic and personnel burdens, but will preserve existing inspection categories.

The element of surprise will be preserved only if the warrant is obtained in advance. If the inspection official seeks a search warrant after being refused entry, it is obvious that the initial surprise of a routine inspection is

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86. *Id.* at 1825.

87. The next area of litigation will probably be a further refining of the probable cause standard in OSHA cases. 8 OCCUPATIONAL SAFETY AND HEALTH REP. 4 (June 1, 1978).

88. This example resembles the Fatality/Catastrophe Investigations category outlined by OSHA's priority system. See UNITED STATES DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, FIELD OPERATIONS MANUAL, Chapter IV, at IV-1 (Amended March 29, 1978) [hereinafter cited as FIELD OPERATIONS MANUAL].

89. This example resembles the Regional Programmed Inspections category of OSHA's priority system. *Id.* at IV-2.

90. 98 S. Ct. at 1825-26.

91. *Id.* at 1822.

92. *Id.*

93. See note 101 and accompanying text *infra*.

lost.<sup>94</sup> Even though the inspection official can reappear without notice, the business owner has the benefit of a period of time<sup>95</sup> to remedy or conceal<sup>96</sup> violations. However, unlike the strict probable cause standard, the flexible standard will make it easier to obtain advance warrants.<sup>97</sup>

Despite the fact that a flexible probable cause standard will allow a quick and uncomplicated warrant procedure, the warrant requirement alone will create financial and personnel burdens for the agency. Currently, the Act covers nearly 65 million workers engaged in their respective labor in approximately five million workplaces. Previously most employers willingly consented to inspections without a warrant. With this cooperation, the Secretary has conducted more than 80,000 inspections yearly with only 1,300 inspectors.<sup>98</sup> It is not unreasonable to conclude that the rate of denied entries will increase because business owners may now demand a search warrant.<sup>99</sup> The

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94. By refusing to directly address this issue, the *Marshall* Court seems to indicate that it is acceptable for a business owner to use this time to remedy any violations of which he is aware. It is likely that structural defects and other violations that are not quickly hidden or remedied will not escape the issuance of citations. In all probability, however, the easily concealed violations will escape the inspector's notice. It is not clear whether the *Marshall* Court felt that critical violations could not be easily concealed or that employees would report any substantial violations to the agency. Nevertheless, the Court did not provide for the problem of easily concealed violations that accompany advance notice of inspections.

95. The *Marshall* court points out that the Secretary's own provision for refusal to permit or complete an inspection, 29 C.F.R. §1903.4 (1977), also affords the business owner a period of time for delay. See note 14 *supra*.

96. The Court indicated that "[w]hile the dangerous conditions outlawed by the Act include structural defects that cannot be quickly hidden or remedied, the Act also regulates a myriad of safety details that may be amenable to speedy alteration or disguise." 98 S. Ct. at 1822.

97. See *Administrative Searches*, *supra* note 40, at 20-27; McAdams & Miljus, *OSHA and Warrantless Inspections*, 1978 LAB. L. J. 49, 58; Note, *Warrantless Nonconsensual Searches under the Occupational Safety and Health Act of 1970*, 46 GEO. WASH. L. REV. 93, 110 (1977).

98. Brief for Appellant at 40, *Marshall v. Barlow's, Inc.*, No. 76-1143 (D. Idaho May 23, 1978).

99. The *Marshall* Court felt that the great majority of business owners would consent to inspections without warrants; therefore, burden on the agency would not be significant. 98 S. Ct. at 1822. The Court itself, however, pointed out the weakness of this statement. This decision might itself have an impact on whether owners choose to resist requested searches. The Supreme Court can only wait for future developments to determine how serious an impediment to effective enforcement this might be. *Id.* at n.11.

However, studies indicate that denials will increase. Inspection programs authorizing warrantless searches have a low rate of denials. "Figures from the Baltimore Health Department show that while 157,914 [mandatory] inspections were conducted in 1954 through 1958, prosecutions for refusal to admit a health inspector were estimated to average one a year." *Administrative Searches*, *supra* note 40, at 3 n.5. On the other hand, approximately one householder out of six refused inspection under the Portland Oregon voluntary home inspection program. Roughly the same rate of refusal was experienced under a voluntary Home Fire Safety Program in San Francisco. *Id.* at 3 n.9.

In addition, as business owners refuse inspection, their competitors will also be forced to refuse or face the added safety costs other industries can easily prolong by requiring a search warrant. 123 CONG. REC. H164 (daily ed. January 6, 1977) (remarks of Rep. Steiger).



increased costs generated by futile trips to inspection sites where entry is denied would eventually necessitate the costly practice of obtaining a search warrant in advance.<sup>100</sup>

Although administrative burdens will increase, the flexible probable cause standard will allow OSHA to continue to conduct inspections based upon its current priority system.<sup>101</sup> Under this system, first priority is investigations of imminent danger. Next, efforts are directed toward investigations of fatalities or catastrophes. Then, priority is given to inspections of valid employee complaints. Final priority is regional programmed inspections.<sup>102</sup> Without this flexible probable cause standard, regional programmed inspections, which by definition are not based on the belief that violations exist at a particular location, would be jeopardized.<sup>103</sup>

The adoption of the flexible probable cause standard can also be interpreted as the Supreme Court's recognition of and support for the important social interests embodied in the Act. American workers deserve protection from unsafe and unhealthy working conditions afforded by the Act. Recognizing that the Act could not accomplish this purpose if warrants could be issued only upon the showing of strict probable cause, the Court sought to establish a flexible standard that would allow the agency continued effective operation.

#### CONCLUSION

The Supreme Court has formulated a constitutional standard that delineates a business owner's Fourth Amendment rights within administrative enforcement schemes. Although the decision deals specifically with section 8(a) of OSHA,<sup>104</sup> the factors presented can arguably be applied to numerous federal regulatory statutes that provide for similar warrantless inspections of business premises.<sup>105</sup>

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100. *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1829 (1978) (Stevens, J., dissenting). According to OSHA, "there currently is no plan . . . to obtain warrants before an inspection is made . . ." 8 OCCUPATIONAL SAFETY AND HEALTH REP. 3 (June 1, 1978). However, if OSHA does not obtain the expected cooperation from business owners, it is probable that an advance warrant procedure will be necessary.

101. FIELD OPERATIONS MANUAL, *supra* note 88, at chapter IV. For the Act's original priority system see Health, *The Implementation and Philosophy of the Williams-Steiger Occupational Safety and Health Act of 1970*, 25 U. FLA. L. REV. 249, 254 (1973).

102. FIELD OPERATIONS MANUAL, *supra* note 88, at chapter IV.

103. *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1827 (1978) (Stevens, J., dissenting). Routine OSHA inspections are analogous to regional programmed inspections.

104. *Id.* at 1825.

105. Similar or identical provisions are included in many federal statutes. See, e.g., 7 U.S.C. §136(g) (Supp. V 1976) (Environmental Pesticide Control Act); 7 U.S.C. §2146(a) (1976) (Animal Welfare Act of 1970); 8 U.S.C. §1225(a) (1976) (Immigration and Nationality Act); 15 U.S.C. §1270 (1976) (inspection of any factory or warehouse for "hazardous substances" by Secretary of Health, Education and Welfare); 15 U.S.C. §1401(a)(2) (Supp. V 1975) (National Traffic and Motor Vehicle Safety Act); Toxic Substances Control Act, Pub. L. No. 94-469, §11, 90 Stat.

It is most likely that the United States Supreme Court will continue to use the reasonable expectation of privacy concept in determining protected Fourth Amendment rights within commercial locations. However, it is unlikely that Fourth Amendment protection will be extended to the entire commercial premises or to everyone within those premises. Instead, various limitations will be imposed upon the expectation of privacy standard based upon the specific needs of each statute and the degree of infringement on Fourth Amendment rights.<sup>106</sup>

One important factor which must be examined in future cases is the particular administrative problems posed by the warrant requirement. The importance of unannounced random inspections along with concern for increased financial and personnel burdens that accompany a warrant requirement are not unique to OSHA inspections.<sup>107</sup> In response to these concerns, it is likely that the Supreme Court will again resort to the flexible probable cause standard as a compromise between the divergent interests. By varying the probable cause standard, a delicate balance can be struck between protected rights and effective administrative enforcement.

It should be remembered that in criminal cases, courts will not balance divergent interests. Instead a showing of strict probable cause has traditionally been required before a warrant could be issued. By deviating from this traditional Fourth Amendment requirement, therefore, the Court has provided administrative agencies with the opportunity to exercise control over the accomplishment of their objectives through the formulation of standards

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2003 (1976); 21 U.S.C. §603 (1976) (Secretary of Agriculture's inspection of meat and meat products); 21 U.S.C. §1034(a), (b), (d) (1976) (Egg Products Inspection Act); I.R.C. §5146(b); I.R.C. §7606; 29 U.S.C. §211(a) (1976) (Fair Labor Standards Act) 30 U.S.C. §723, 724 (1976) (Metal and Nonmetallic Mine Safety Act); 30 U.S.C. §813 (1976) (Coal Mine Health and Safety Act); 33 U.S.C. §467(a) (Supp. V 1975) (Water Pollution Control Act); 41 U.S.C. §38 (1970) (Walsh-Healey Act); 41 U.S.C. §53 (1970) (Anti-Kickback Act); 42 U.S.C. §262(c) (1970) (Public Health Service Act); 42 U.S.C. §263(i) (1970) (Clinical Laboratories Improvement Act); 42 U.S.C. §1857c-9 (1970) (Clean Air Act); 42 U.S.C. §1857f-6 (1970) (Air Pollution Control Act); 42 U.S.C. §2035(c), 2051 (1970) (Atomic Energy Act); 42 U.S.C. §5413(a) and (b) (Supp. V 1975) (National Mobile Home Construction and Safety Standards Act of 1974); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, §3007, 90 Stat. 2810 (1976); 45 U.S.C. §437(c) (Supp. V 1975) (Railroad Safety Act); 46 U.S.C. §369(a) (1975) (Bureau of Marine Inspection Act); 46 U.S.C. §408 (1970) (Coast Guard inspection of vessel boiler plates at manufacturer's plant); 49 U.S.C. §1425(b) (1970) (Federal Aviation Act); 49 U.S.C. §§1677(a)(3), 1681(b) (1970) (Natural Gas Pipeline Safety Act); 49 U.S.C. §1808(c) (Supp. V 1975) (Transportation Safety Act of 1974). See Brief for Appellants at 49, *Marshall v. Barlow's, Inc.*, No. 76-1143 (D. Idaho May 23, 1978).

106. 98 S. Ct. at 1825.

107. The author of the Act stated, "OSHA inspections do not depart in any degree from American custom. Identical provisions for warrantless civil inspections of business premises have been commonplace for at least 70 years since passage of the Railroad Safety Appliance Act of 1908. . . ." 123 CONG. REC. H163 (daily ed. January 6, 1977) (remarks of Rep. Steiger).

For example, "the efficacy of the Food, Drug, and Cosmetic Act depends upon the Food and Drug Administration's ability to make unannounced random inspections." Brief for Appellant at 47, *Marshall v. Barlow's, Inc.*, No. 76-1143 (D. Idaho May 23, 1978).

based upon the agency's own statistical and technical criteria. A magistrate, utilizing such standards in an *ex parte* warrant procedure, need not reformulate administrative enforcement plans, but need only review the administrative plan proposed to determine whether it is based upon neutral criteria.<sup>108</sup> Thus, even though OSHA must obtain a warrant, the agency will maintain ultimate control over inspection procedures.<sup>109</sup>

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108. The dissent felt that the only "question for the magistrate's consideration is whether the contemplated inspection deviates from an inspection schedule drawn up by higher-level agency officials." *Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816, 1830 (1978) (Stevens, J., dissenting). See also *Administrative Searches*, *supra* note 40, at 23-27.

109. At least one commentator feels that this circumstance breeds the risk that the warrant procedure will become a rubber-stamp process. Because inspection warrants may be issued upon general facts and upon request of an administrative specialist, it seems even more likely that magisterial control will become a fiction in such cases. *Administrative Searches*, *supra* note 40, at 27.