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Constitutional Law: OSHA Searches--A Fourth Amendment Warrant Requirement

Robert I. Goldfarb

under section 1983.[90] Indeed, even this limited grant of liability seems aberrant in light of that pattern.[91]

The instant decision will not open floodgates of section 1983 litigation against municipalities. The Court has merely legitimized a course already followed by most lower courts — the "official capacity" device used to allow individuals to attack an allegedly unconstitutional policy. The Court has recognized the validity of these "official-capacity" suits, allowing the true defendant, the city, to be openly sued. Yet, by limiting municipal liability under a respondeat superior theory, individuals whose constitutional rights have been violated by a municipal officer will continue to be frustrated in their attempts to recover damages for such injuries.

PENNY HERSHOFF

CONSTITUTIONAL LAW — OSHA SEARCHES: A FOURTH AMENDMENT WARRANT REQUIREMENT

Marshall v. Barlow's, Inc., 98 S. Ct. 1816 (1978)

Pursuant to the Occupational Safety and Health Act[1] (the Act) inspection

90. For an analysis of the Burger Court's approach to §1983, see Note, *Section 1983 and Federalism: The Burger Court's New Direction*, 28 U. FLA. L. REV. 904 (1976).

91. For examples of the current Court's restrictive pattern *see* Wainwright v. Sykes, 433 U.S. 72, *reh. denied*, 98 S. Ct. 241 (1977) (petitioner's noncompliance with state contemporaneous objection rule prohibits federal habeas review); Judice v. Vail, 430 U.S. 327 (1977) (federal court cannot interfere with state contempt process); United States v. Kras, 409 U.S. 434 (1973) (debtor denied access to federal courts for discharge of bankruptcy because of inability to pay federally imposed fee).

1. 29 U.S.C. §651 (1975). The purpose of the Occupational Safety and Health Act of 1970 is to establish safe and healthful working conditions for every worker in the nation. *Id.* The Act authorizes the Secretary of Labor to set national mandatory safety and health standards for businesses affecting interstate commerce, *id.* §655, and to assure compliance with the standards of the Act a comprehensive inspection scheme was formulated. *Id.* at §§651, 657. For text of inspection provision, see note 2 *infra*. Civil penalties up to $10,000 may be assessed by the inspector for each instance of noncompliance. If an employer through willful violation of any standard causes death to any employee, the Secretary of Labor is authorized to transfer the matter to the Department of Justice. Upon conviction, an employer may receive a fine of not more than $10,000 or imprisonment for not more than six months or both. Determinations of inspectors may be appealed to the Occupational Safety and Health Review Commission. *Id.* §§660, 661 & 666. At this hearing, the burden is on the Secretary to establish the elements of the alleged violation and proposed penalty. The judge, an administrative law judge appointed for a six-year term, is empowered to affirm, modify or vacate any or all items, giving due consideration in his penalty assessment to "size of the business of the employer," the gravity of the violation, good faith of the employer, and history of violations. *Id.* §666. *See* Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S.

provisions, a compliance officer arrived at appellee Barlow's business premises to conduct a "general inspection."[2] Appellee[3] refused the officer entry without a warrant and the OSHA officer departed, returning four months later with a court order compelling entry.[4] Appellee again refused him entry and filed his

442 (1975) (holding that in cases "in which the Government sues in its sovereign capacity to enforce Public rights created by statutes within the power of Congress to enact — the Seventh amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible"). *Id.* at 445. *But see* Comment, 10 HOUSTON L. REV. 426, 440 (1973); Comment, 10 IDAHO L. REV. 223, 234 (1974); Comment, 11 SUFFOLK U.L. REV. 156, 200 (1977). Because the terms of the OSHA statute are so broad, it covers virtually all commercial establishments in the United States. By one estimation approximately 62 million people, or over 80% of the nation's work force, are covered by the Act. Shaffer, *Job Health and Safety*, 1976 EDITORIAL RESEARCH REPORTS 903, *cited in* Comment, 29 BAYLOR L. REV. 283 (1977).

The Act has been so controversial that in the 1977 Congressional session a bill to repeal the entire OSHA statute was introduced. H.R. 1579, 95th Cong., 1st Sess., 123 Cong. Rec. H.R. 324E 117-18 (daily ed. Jan. 11, 1977). In the 95th session of Congress a national stop-OSHA campaign was begun. The funds raised on this campaign paid a large percentage of the appellee Barlow's legal fees. 95th Cong., 2d Sess., 193 Cong. Rec. E2921 (daily ed. May 31, 1978).

2. 29 U.S.C. §657(a) (1975): "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, work place 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." OSHA inspections fall into four general categories and are conducted in a decreasing priority as: (1) investigation of catastrophes and fatalities; (2) investigation of valid employee complaints; (3) investigation in target area health classifications such as construction, transportation equipment, lumber, longshoring; (4) random cross-section investigation of establishments (the instant case being an example of the general inspection). *See* GBNA Occupational Safety and Health Reporter, ch. 92, parts B(1), (2), (3) at 77:2301-04 (1974). *See also* Steiger, *The Implementation and Philosophy of the Williams-Steiger Occupational Safety and Health Act*, 25 U. FLA. L. REV. 249 (1973). The random inspection has been the most widely debated procedure due to the fact that searches are to be made without warrant.

3. Appellee, Ferral Barlow is the president of Barlow, Inc., an Idaho corporation in the business of installing electrical and plumbing fixtures. The corporation was within the reach of OSHA because it engaged in interstate commerce.

4. 29 C.F.R. §1903.4 (1977). The regulation with respect to inspection provides as follows: "Upon a refusal to permit a Compliance Safety and Health Officer in the exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records or to question any employer, owner, operator, agent or employee . . . the Compliance Safety and Health Officer shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. 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." Upon appellee's refusal to allow entry, officials filed an application for Affirmative Order to gain entry and for an Order to Show Cause why the order should not issue. The district court issued the order, and the officer presented it to Barlow.

own lawsuit seeking an injunction against enforcement of OSHA's inspection provision. Arguing before a three-judge federal district court,[5] appellee alleged that the inspection provision authorizing warrantless inspections of business establishments was unconstitutional under the fourth amendment.[6] The appellant asserted that Congress, through the Commerce Clause, had excepted pervasively regulated businesses[7] from the search warrant requirement and that appellee's business qualified as such an exception. The district court held for the appellee, declaring the statutory provision unconstitutional.[8] On appeal the United States Supreme Court affirmed and HELD, inspections without a warrant pursuant to the Act's inspection provisions violated the fourth amendment and were therefore unconstitutional.[9]

Initially, the Supreme Court distinguished civil from criminal investigations for fourth amendment purposes. The Court formerly considered the central purpose of the fourth amendment to be protection of the individual against official searches for evidence to convict him of a crime.[10] Entries upon private property for a civil purpose were considered of peripheral concern and not a true invasion of personal privacy.[11]

This distinction between civil and criminal investigations was abrogated in

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5. This case came before the three-judge court under the provisions of the former 28 U.S.C. §2282, providing for such a tribunal in cases in which the plaintiff seeks an injuction against a federal act. That section was repealed subsequent to the date trial commenced in the instant case. Pub. L. 94-381, §4, Aug. 12, 1976, 90 Stat. 1119.

6. Barlow's, Inc. v. Usery, 424 F. Supp. 437 (D. Idaho 1977). The *Barlow* suit was originally against W.T. Usery, then Secretary of Labor. When President Carter came into office, Secretary Marshall was appointed Secretary of Labor; thus the case name changed.

U.S. CONST. amend. IV 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 person or thing to be seized."

7. Barlow v. Usery, 424 F. Supp. 437, 440 (D. Idaho 1977). For complete discussion on pervasively regulated businesses, see note 28 *infra* and accompanying text.

8. *Id.* at 441. The Court enjoined all inspections. Justice Rehnquist stayed decision pending appeal to the United States Supreme Court. 430 U.S. 964 (1977).

9. 98 S. Ct. at 1820. Direct appeal from the three-judge court was pursuant to 28 U.S.C. §1253 (1976).

10. *See* Wolf v. Colorado, 338 U.S. 25, 27 (1949) (holding that the security of one's privacy against arbitrary intrusion by the police is fundamental to free society); Agnello v. United States, 269 U.S. 20 (1925) (warrantless search of dwelling for cocaine considered unconstitutional); Boyd v. United States, 116 U.S. 616 (1886) (holding that unreasonable searches made for the purpose of compelling a man to give evidence against himself in criminal cases condemned by the fifth amendment).

11. Frank v. Maryland, 359 U.S. 360, 365 (1959). The *Frank* Court upheld a fine for the refusal to allow public health inspectors to inspect a private residence. The Court stated that warrants were not required for such inspections because no evidence for criminal prosecution was being sought. *Id.* at 366. The Court rejected the suggestion that there be issued a "synthetic" warrant, an authorization for periodic inspections. *Id.* at 373. *Contra* District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds,* 339 U.S. 1 (1950) (holding that a warrant was needed for an administrative entry, Justice Prettyman stated: "[T]o say that a man suspected of crime has a right to protection against search of his home without a warrant but that a man not suspected of crime has no such protection is a fantastic absurdity."). *Id.* at 17. *See also* Comment, 41 CONN. B.J. 242 (1967).

the twin cases of *Camara v. Municipal Court*[12] and *See v. City of Seattle.*[13] In *Camara* the defendant challenged the constitutionality of the San Francisco building code by refusing to permit building inspectors to inspect his residence without a warrant.[14] The Supreme Court deemed the inspection an intrusion upon the interests sufficient to be protected by the fourth amendment, and held the housing inspection provision unconstitutional.[15] The Court asserted that except in certain carefully defined cases[16] a search of private property without consent is unreasonable unless authorized by a valid search warrant.[17] The Court acknowledged, however, that routine inspections are critical to effective enforcement of housing codes.[18] To assure that necessary administrative inspections were not jeopardized by its ruling, the Court adopted a modified standard for establishing the requisite probable cause for search warrant issuance. Under this administrative probable cause standard, a warrant could issue upon showing that "reasonable legislative or administrative standards for conducting an area inspection [were] satisfied with respect to a particular building."[19] In *See,* the Court made this new standard applicable to all com-

12. 387 U.S. 523 (1967).

13. 387 U.S. 541 (1967).

14. The inspection was requested by city housing inspector pursuant to §86(3) of the San Francisco Municipal Code with entry based on §504 of the San Francisco Housing Code. That section authorized employees of the city, upon presenting proper credentials, to enter at reasonable times any building, structure, or premises in the city. 387 U.S. 523, 526 (1967). That provision is very similar to 29 U.S.C. §657 (1975). See note 4 *supra.*

15. 387 U.S. at 538-40. "A warrantless inspection qualified as a sufficient intrusion because the individual had no way of knowing the lawful limits of the inspector's power to search or whether the search was authorized by law. The only way to determine the validity of the Code was to subject oneself to criminal prosecution for failure to allow the inspection." Comment, 29 BAYLOR L. REV. 283, 285 (1977). The instant case differs from *Camara* in that the employer in the instant case was not subject to criminal penalties for refusing the inspector entry. Comment, 22 VILL. L. REV. 1214 (1977).

16. The Court did not explain what these carefully defined cases were, but case law has established several areas where warrantless searches are still permissible, such as the search of automobiles. *See* South Dakota v. Opperman, 428 U.S. 364, 368 (1976); Cady v. Dombrowski, 413 U.S. 433 (1973) (evidence found in car where police have custody of car is admissible); Harris v. United States, 390 U.S. 234 (1947) (evidence found while lawfully impounding car without a warrant was admissible). *See also,* Terry v. Ohio, 392 U.S. 1 (1968) (evidence found in stop and frisk where police officer perceived his safety in danger not considered unreasonable search).

17. 387 U.S. at 529 (1967). One principle that has consistently been followed is that an unconsented search of private property is unreasonable unless authorized by valid search warrant. *Id. See* Coolidge v. New Hampshire, 403 U.S. 443 (1971); Stoner v. California, 376 U.S. 483 (1964).

18. 387 U.S. at 535-36. Numerous courts have upheld municipalities' use of their police power to impose such minimum standards, realizing that the only way to seek universal compliance is through routine inspection designed to prevent crime and the development of conditions that are hazardous to the public. *See* City of Louisville v. Thompson, 339 S.W.2d 869 (Ky. 1960); Abbate Bros. v. City of Chicago, 11 Ill. 2d 337, 142 N.E.2d 691 (1957); Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937).

19. 387 U.S. at 538 (1967). If a valid public interest justifies the inspection and the inspection is within the existing legislative or administrative standards imposed to assure that inspections would be carried out in a reasonable manner, than the probable cause standard would be satisfied. Warrants were to set forth general standards as to the passage of time, the

mercial enterprises.[20] Yet the Court intimated a limitation on this sweeping application by omitting consideration of the validity of warrantless inspections pursuant to licensing programs.[21]

The Supreme Court did consider the licensing issue in *Colonade Catering Corp. v. United States*.[22] In that case, the owner of a liquor establishment refused to allow federal agents to inspect his locked storeroom without a warrant. The agents disregarded the owner's objection and used force to gain entry into the storeroom.[23] Although holding that the forceful entry was an illegal search, the Court acknowledged Congress' power to design such inspection schemes as it deemed necessary. Thus, the Court held that in an industry long subject to close supervision and regulation, the *Camara* and *See* protections would be inapplicable.[24] This case was soon followed by *United States v. Biswell*,[25] in which the Court upheld a warrantless search of a pawnshop operator federally licensed to sell firearms.[26]

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nature of the building, or the condition of the entire area. *Id.* at 538. In establishing this test for probable cause, the *Camara* Court rejected the appellant's suggestion that warrants issue only when the inspector had probable cause to believe that a particular dwelling was in violation of the standard by law. To adopt such a standard would eliminate routine inspections because an inspector would rarely know ahead of time whether conditions at a specific site were in violation of the law.

Justice Clark, joined by Justices Harlan and Stewart, wrote the dissent in *Camara* and *See* emphasizing what he foresaw as the practical effect of the decision. *Id.* at 546. Following the *Frank* rationale, he contended that the warrant would be a "synthetic" warrant, and that the issuance of such warrants would degrade the judicial process. *Id.* at 554. Agreeing with Justice Clark, commentators have subsequently seen the magistrate's role limited to determining whether the inspection sought had been consistent with the established inspection policy. *See* LaFave, *Administrative Searches and the Fourth Amendment: The* Camara *and* See *Cases*, 1967 S. CT. REV. 1, 36. *But see* McMannis & McMannis, *Structuring Administrative Inspections: Is There Any Warrant for a Search Warrant*, 26 AM. U.L. REV. 943, 943-71 (1977); Comment, 29 BAYLOR L. REV. 283, 287-88 (1977). *See also* Greenberg,*The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since* Camara *and* See, 61 CAL. L. REV. 1011, 1014 (1973).

20. *See* involved a prosecution under the Seattle Fire Code for refusal to permit a warrantless fire department inspection of defendant's locked commercial warehouse.

21. *Id.* at 546. The Court in dictum questioned whether all warrants to inspect business premises could be obtained only after access had been refused. "[S]ince surprise may often be a crucial aspect of routine inspections of business establishments, the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved and may differ from standards applicable to private homes." *Id.* at 545 n.6.

22. 397 U.S. 72 (1970).

23. 26 U.S.C. §5146(b) (1975) states: "The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer . . . and any distilled spirits, wines, or beer kept or stored by such dealer on such premises." If the owner denies agents entry, the recourse permitted by statute was to fine the owner for his refusal to allow the inspection.

24. 397 U.S. at 77.

25. 406 U.S. 311 (1972).

26. The search was authorized by the Gun Control Act of 1968. 18 U.S.C. §§921-928 (1975). Section 923(g) authorizes official entry "during business hours into the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises."

Together the *Colonade* and *Biswell* rulings set fourth a two-tier test to determine the reasonableness of a warrantless search.[27] First, the industry must be regulated pervasively by federal, state and local laws, and have a long history of governmental supervision.[28] From the fact of an employer's voluntary operation under federal and state regulation the Court implied his consent to administrative searches.[29] Second, warrantless inspections must be necessary to effectuate the purpose of the act.[30] Applying this test, lower courts considering the constitutionality of administrative searches generally upheld warrantless inspections,[31] emphasizing that the employer had no justifiable expectation of privacy sufficient to override the government's interest in conducting such searches.[32]

In ruling on the constitutionality of administrative searches by OSHA inspectors, lower courts suggested three diverse approaches to warrantless inspec-

27. 406 U.S. at 316-18. For discussion on the *Biswell* test, *see generally* Comment, 29 BAYLOR L. REV. 283, 288-89, 297-98 (1977); Comment, 11 SUFFOLK U.L. REV. 162 (1976).

28. 406 U.S. at 316. This tier is known as the pervasive regulation tier. Most commentators have argued that whether an industry is pervasively regulated should be decided in the context of a particular industry. Regulation of firearms, for example, traditionally has been an area of governmental concern. Comment, 29 BAYLOR L. REV. 283, 297 (1977) (interpreting United States v. Biswell, 406 U.S. 311 (1972)). However, several lower courts have applied this test in the context of a particular regulation in controversy rather than the industry regulated, resulting in a broader inspecting power. *Id.* (interpreting Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45, 60 (S.D. Ohio 1973)). *See generally* Comment, 11 SUFFOLK U.L. REV. 162 (1976). Justice Stevens took this approach in the dissent in the instant case. See notes 46-48 *infra* and accompanying text.

29. *Id.* at 316. This implicit consent theory was first used in Zap v. United States, 328 U.S. 624 (1945) (holding that through participation in government contract, defendant consented to inspection of records; consequently, evidence found in warrantless search was later usable against him). *See also,* Neuman v. District of Columbia, 268 A.2d 605 (1970) (owner of building applying for license implicitly consented to inspection of the premises).

30. 406 U.S. at 316. Justice White, referring to §923 of the Gun Control Act, argued that for inspections "to be effective and serve as a credible deterrent" the inspections must be frequent and unannounced.

31. Despite these holdings the Supreme Court in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), reaffirmed its commitment to the *Camara* and *See* warrant requirements when it invalidated a warrantless search of an automobile by a roving patrol of the Immigration and Naturalization Service. The search had been authorized under 8 U.S.C. §1357(a)(3) (1975) which provided for warrantless searches of aliens without a showing of probable cause or consent within a reasonable distance of any external boundary of the United States. According to the Court, "[t]he search embodied precisely the evil the Court saw in *Camara* when it insisted that the 'discretion of the official in the field' be circumscribed by obtaining a warrant prior to the inspection." 413 U.S. 226, 260 (1973).

32. In regulated areas courts upheld warrantless searches based on the pervasive regulation test. *See* Terraciono v. Montanye, 493 F.2d 682 (2d Cir.), *cert. denied,* 417 U.S. 875 (1974) (upholding warrantless search of pharmacist's records to obtain evidence of violations of narcotics laws); Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973) (permitting warrantless inspections of coal mines under Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §1813 (1975), because statute dealt with inherently dangerous activity); United States v. Business Builders, 354 F. Supp. 141 (N.D. Okla. 1973) (upholding warrantless inspection of warehouse containing food products); United States v. Del Campo Baking Mfg. Co., 345 F. Supp. 1371 (D. Del. 1972) (upholding warrantless inspection of bakery under Food, Drug and Cosmetic Act, 21 U.S.C. §374 (a) (1975)). *See also* Comment, 12 VILL. L. REV. 1214, 1219 (1977).

tions. First, in *Brennan v. Buckeye Industries, Inc.*,[33] the court held that under the regulatory power of the federal government, the "compelling need for unannounced inspections" rendered valid the warrantless inspection of a clothing manufacturer's plant.[34] That court, aligning itself with *Colonade* and *Biswell*, declared that the effectiveness of the OSHA inspection was dependent on surprise.[35] *Brennan v. Gibson Products, Inc.*[36] illustrates a second approach. Finding that the warrantless search in that case did not satisfy the two-tier *Colonade-Biswell* test, the court implied a warrant requirement to preserve the constitutionality of the inspection provisions of the Act.[37] Finally, the district court in the instant case not only found the warrantless search unlawful, but, holding that Congressional intent contemplated warrantless searches, also declared the inspection provision of the Act unconstitutional.[38]

Affirming that decision, the Supreme Court in the instant case examined the history of the fourth amendment. Stating that the Warrant Clause protected homes and commercial buildings from unreasonable searches, and citing *Camara* and *See* as controlling precedent, the Court declared that warrantless searches of such premises were presumptively unreasonable.[39] Realizing that the Court in *Colonade* and *Biswell* had created an exception to *Camara*'s warrant requirement, the majority sought to ascertain whether that exception embraced the facts of the instant case. First, the Court considered whether the appellee had been engaged in any regulated or licensed business; they rejected the idea that the imposition of minimum wages and maximum hours was a sufficient governmental regulation to constitute pervasive regulation.[40] Moreover, the Court refused to imply abrogation of the employer's privacy rights with respect to employees' working areas. The Court concluded that merely by employing workers the appellee did not relinquish such rights to any public third party, reasoning that the OSHA inspector without a warrant was merely a member of the public and, as such, was not allowed in areas closed to the public.[41] Second, the Court considered whether requiring a warrant would im-

33. 374 F. Supp. 1350 (S.D. Ga. 1974).

34. *Id.* at 1356.

35. *Id.* at 1354. *Buckeye* was decided before the Supreme Court decision in Air Pollution Variance Bd. v. Western Alfalfa, 416 U.S. 861 (1974). Since that time no court has upheld a warrantless OSHA search. *See, e.g.*, Usery v. Centrif-Air Machine Co., 424 F. Supp. 959 (N.D. Ga. 1977); Dunlop v. Hertzler Enterprises, Inc., 418 F. Supp. 627 (D.N.M. 1976); Brennan v. Gibson's Prods., Inc., of Plano, 407 F. Supp. 154 (E.D. Tex. 1976); Woods-Rohde, Inc. v. State Dep't of Labor, 565 P.2d 138 (Alaska 1977); Yocom v. Burnette, 555 S.W.2d 823 (Ky. 1977).

36. 407 F. Supp. 154 (E.D. Tex. 1976).

37. *Id.* at 162. The Court followed guidelines for statutory construction approved by Justice Brandeis. *See* Ashwander v. TVA, 297 U.S. 288, 341 (1935) (Brandeis, J., concurring).

38. 424 F. Supp. 437, 442 (D. Idaho 1977).

39. 98 S. Ct. at 1816 (1978).

40. The Court stated that if the Secretary could successfully invoke the Walsh-Healey Act, 41 U.S.C. §§35-45 (1976), as a regulation, it would make *Colonade* and *Biswell* the rule, not a mere exception. The Court reasoned that the degree of federal involvement in employee working conditions was never the order of specificity and pervasiveness that OSHA mandates; therefore the wage and hour regulations could not be implemented as an extension of a preexisting regulatory body.

41. *Id.* at 1821.

pose serious burdens on the inspection system or the courts; they concluded that the inspections could still be effectively performed under the *Camara* administrative probable cause standard.[42]

Despite easy access to administrative warrants, the majority asserted that such a warrant would protect the employer's privacy rights from the unbridled discretion of the inspector in the field.[43] Such a warrant, the Court reasoned, would provide assurances from a neutral officer that the inspection is reasonable, authorized by statute, and pursuant to an administrative plan containing specific neutral criteria.[44]

In dissent, Justice Stevens[45] questioned whether the warrantless searches authorized by the statute were unreasonable within the meaning of the Search and Seizure Clause of the fourth amendment.[46] To determine the reasonableness of the warrantless search, the dissent proposed weighing the public interest in worker protection against employers' privacy interests and concluded that such a balance would favor the warrantless searches authorized by Congress.[47]

Asserting that the search fell within the *Colonade-Biswell* exception, and thus required no warrant, the dissent also disputed the majority's manner of applying that exception. With respect to the first phase of the test, Justice Stevens contended that the crucial determinant was not a mere history of extensive regulation, but rather "a Congressional determination that federal regulation would further significant public interests."[48] Moreover, according to the dissent, consent to warrantless inspections, implied from an employer's voluntary operation under pervasive regulation, was a fiction.[49]

Considering the second phase of the *Colonade-Biswell* test, the dissent stated that the majority's warrant requirement would frustrate the legislative

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42. *Id.* The Court asserted that requiring warrants would not impose serious burdens on the judicial system. Indeed, the Court believed that the great majority of the businessmen would still consent to inspection without a warrant. The Court also argued that if a surprise inspection were preferred, an ex parte warrant would be available. *See* Comment, 41 CONN. B.J. 242, 255, 263 (1967).

43. 98 S. Ct. at 1826. The majority perceived that the warrant issued by the neutral magistrate would advise the owner of the scope and objects of the search beyond which limits the inspection would not be expected to proceed.

44. *Id.* The Court believed that neutral magistrates and neutral criteria would best provide protection for the employer.

45. Justice Stevens' dissent was joined by Justices Blackmun and Rehnquist. 98 S. Ct. at 1827.

46. U.S. CONST. amend. IV, cl. 1. 98 S. Ct. at 1827. Justice Stevens asserted that the Court should not focus its attention on the Warrant Clause since the warrant requirement, linked to the probable cause concept, was not apposite. The random OSHA inspections by definition were not based on cause to believe there were violations. Applying the first clause of the fourth amendment to such inspections, Justice Stevens determined that the search was reasonable under that amendment.

47. 98 S. Ct. at 1829.

48. *Id.* at 1833. Justice Stevens asserted that Congress' conception of what constitutes a federal interest should not remain static. If there is a great public interest in protecting the worker, the recentness of that determination, giving less time for promulgation of rules, should not be a basis for treating it with any less respect.

49. *Id.*

purpose of the Act.[50] Justice Stevens contended that the warrant would not protect the employer's fourth amendment rights. Rather, the employer's privacy interest would be served only if a magistrate, taking a position between the investigator and the employer, could objectively determine the existence of probable cause.[51] However, under the relaxed probable cause standard, the dissent viewed the magistrate's role as essentially limited to deciding whether the inspection deviated from the inspection schedule drawn by higher level agency officials.[52] Thus, the warrant would serve only to inform the employer of the inspector's role. Contending that the statute and its inspection provision achieved the same purpose,[53] Justice Stevens would not have required a warrant.

By requiring a warrant in OSHA inspections, the Court has struck a balance between the governmental interest in assuring employees a safe working place, and the privacy interests of the employer. Whether warrants predicated upon relaxed probable cause standards will protect both interests is not yet clear.[54] To assure the protection of those interests, the majority relied on the expectation that a magistrate will issue warrants based upon an administrative plan containing neutral criteria.[55] However, a magistrate faced with a large number of routine warrants will not be likely to give careful attention to each warrant.[56] His role will be merely to enforce compliance with the administrative

50. *Id.* at 1829. The dissent suggested that employers would often consent to inspection, eliminating the necessity of a warrant. The minority, deeming the practice of obtaining ex parte warrants burdensome and costly, reasoned that the Court should not attempt to predict the effect of a warrant procedure on the behavior of an employer. Rather, the dissent asserted, it was better to defer to Congress' judgment regarding the importance of a warrantless search power to the OSHA enforcement scheme.

51. *Id.* at 1830.

52. *Id.*

53. *Id.* at 1831. The dissent saw the warrant as a mere formality. "In view of the obviously enormous cost of enforcing a health and safety scheme of the dimensions of OSHA, this Court should not, in the guise of construing the Fourth Amendment, require formalities which merely place an additional strain on already overtaxed federal resources." *Id.*

54. In establishing a warrant requirement based upon a relaxed probable cause, the Court rejected the appellee's suggestion that an inspector be required to show specific facts demonstrating that the statutory recognition of a present danger to safety and health of employees applied to a reasonably relevant fact situation, such as an area health hazard or specific complaints directly affecting the business to be investigated. Brief for Appellee, Marshall v. Barlow's, Inc., at 55, 98 S. Ct. 1816 (1978).

55. 98 S. Ct. at 1826.

56. Commentators comparing the function of a magistrate in administrative investigations to that of a magistrate in a criminal investigation have seen the administrative role as rather limited. In the context of a criminal investigation, the magistrate must weigh the facts of a particular case and determine that it is probable that an offense has been committed and that certain seizable items connected with that offense are to be found at a specified place. The administrative probable cause standard permits the finding of probable cause upon general facts such as passage of time and the nature of the establishment. Thus, the judicial review of a finding of probable cause for the inspection will occur without a reassessment of the administrative plan, and will only reflect whether the inspection conforms to the general administrative plan. LaFave, *Administrative Searches and the Fourth Amendment: The* Camara *and* See *Cases*, 1967 SUP. CT. REV. 1, 27. *See generally* McMannis & McMannis, *Structuring Administrative Inspections: Is There any Warrant for a Search Warrant*, 26 AM. U.L. REV.

plan, thereby eliminating the unsupervised discretion of the field inspector.[57]

The Court intended to expand the employer's right to privacy, but has actually provided an opportunity for the abridgement of these rights. Until the instant decision, if an owner refused the inspector entrance, the inspector was forced to file an application for an affirmative order to gain entry.[58] Presently, the inspector can obtain an ex parte warrant and require entry. Thus, after the initial period of adjustment to the warrant, the OSHA inspector may use the warrant requirement to his benefit.

An alternative that would provide protection for the employer while still preserving the employees' interests would be Congressional imposition of a notice requirement in the place of an ex parte warrant.[59] Although such notice would give the employer time to do minor remedial work so as to meet OSHA safety standards, it would not provide the time required to remedy the structural defects the Act originally was designed to prohibit. At the same time, the employer would be made aware of the ensuing inspection, thus causing less disruption to his daily business and assuring him his right to privacy.

Although the instant decision can be viewed as a symbolic victory for the employer, the decision has not substantively supplemented any of his privacy rights. The warrant procedure initially will slow the inspection procedure, but once the administrative procedures are understood, little administrative delay in their implementation will occur. Thus, for the employer to sustain his right to privacy, he must successfully challenge the administrative plan in the courts, resulting in actual judicial review of the administrative standards. If the employer is unable to defeat the administrative standard, the result will be, as

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942, 942-71 (1977); Note, *Administrative Search Warrants*, 58 MINN. L. REV. 607 (1974); Note, *The Right of the People to be Secure: The Developing Role of the Search Warrant*, 42 N.Y.U.L. REV. 1119 (1967); Comment, 65 COLUM. L. REV. 288 (1965); Comment, 3 GONZ. L. REV. 172 (1968). Yet even in criminal searches there is some question as to the attention given to each warrant by the magistrate. "In regard to wiretap warrants under the 1968 Omnibus Crime Control and Safe Streets Act from 1960 through 1976 applications by police for search warrants totaled 5,563 and only 15 of these applications were denied by judges or magistrates. In 1977 not one of 626 applications was denied." 95th Cong., 2d Sess., 193 Cong. Rec. 23376-7 (daily ed. June 21, 1978). These statistics demonstrate the tendency of judicial officers to rubberstamp applications for criminal search warrants. Thus, in a situation in which a magistrate deals with general administrative standards, it is not likely that he will attentively determine the probable cause before issuing the warrant. The court in Marshall v. Chromalloy Am. Corp., 433 F. Supp. 330 (E.D. Wis. 1977) found probable cause solely upon the high injury and illness rate prevalent in the metal industry. 442 F. Supp. 195 (W.D. Va. 1977). *Contra,* Marshall v. Shellcast Corp., No. 77-P-0995-E (N.D. Ala., filed Aug. 10, 1977) (holding statistics of industry as a whole not sufficient probable cause for issuance of a search warrant).

57. Results of unfettered inspector discretion have included Weyerhauser Co. v. Maurice S. Reizen, No. 77162 (E.D. Mich., filed May 2, 1977) (employer was inspected seven times with respect to the same standard in a short period of time and was acquitted on each occasion); Dunlop v. Hertzler Enterprises, Inc., 418 F. Supp. 627 (D.N.M. 1976) (where inspectors attempt to inspect the employer's home because some of his employees keep their lunches in his home refrigerator, inspection was refused for lack of probable cause).

58. See note 4 *supra.*

59. For further discussion of legislative alternatives to the Court's warrant procedure, *see* Note, *Administrative Search Warrants*, 58 MINN. L. REV. 607, 650-56 (1974).