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NOTES

OSHA INSPECTIONS AND THE FOURTH AMENDMENT: BALANCING PRIVATE RIGHTS AND PUBLIC NEED.

I. Introduction

The Occupational Safety and Health Act of 1970 (OSHA),¹ is the result of the Federal government's concern about safe working conditions. The purpose of OSHA is to assure safe and healthful working conditions and to preserve our human resources.² To effectuate its goal of promoting industrial safety, OSHA authorizes the Secretary of Labor to establish mandatory occupational safety and health standards applicable to businesses affecting interstate commerce.³ It also authorizes the Secretary to enter and inspect any work place during regular working hours and at other reasonable times⁴ to ensure compliance with the health and safety standards.

1. 29 U.S.C. §§ 651-78 (1970). For in depth discussions of OSHA and its legislative history, see Gross, *The Occupational Safety & Health Act: Much Ado About Something*, 3 Loy. Chi. L.J. 247 (1972); Comment, *The Occupational Safety and Health Act of 1970: An Overview*, 4 Cum.-Sam. L. Rev. 525 (1974); Note, *The Occupational Safety and Health Act of 1970: Some Unresolved Issues and Potential Problems*, 41 Geo. Wash. L. Rev. 304 (1972).

2. 29 U.S.C. § 651 (1970).

3. *Id.* § 651(3). In addition, OSHA contains a general duty clause that requires both the employer and employee to abide by the occupational and safety standards promulgated by the Secretary of Labor. *Id.* § 654. This general duty clause is not a substitute for the standards, but rather allows the Secretary of Labor to insure the protection of employees who are working under special circumstances for which no standard has yet been adopted. S. REP. NO. 2, 92d Cong., 1st Sess. 10, reprinted in [1970] U.S. Code Cong. & Ad. News 5186.

4. 29 U.S.C. § 657 (1970). Inspections, investigations and recordkeeping.

(a) Authority of Secretary to enter, inspect, and investigate places of employment; Time and Manner.

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.

The inspection provision of OSHA has been attacked on the ground that warrantless OSHA inspections violate the search and seizure safeguards of the fourth amendment⁵ of the United States Constitution. This Note will explore recent Supreme Court decisions dealing with administrative searches and seizures and consider the effect of these decisions on fourth amendment challenges to the OSHA inspection provisions.

II. Fourth Amendment Tests

In *Camara v. Municipal Court*,⁶ appellant violated the San Francisco Housing Code⁷ because he refused to allow a warrantless inspection of his premises, which he used partly as a personal residence in violation of the building's commercial occupancy permit.⁸ Appellant claimed that housing inspections, without a search warrant and not based on probable cause, violated the fourth amendment. The Supreme Court held that a search warrant was required in order for city housing inspectors to investigate violations of the San Francisco Housing Code.⁹

In holding that the fourth amendment applied to administrative inspections of residential premises, *Camara* overruled the holding of *Frank v. Maryland*¹⁰ that search and seizure safeguards of the fourth

5. The fourth amendment provides that: "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.

6. 387 U.S. 523 (1967).

7. Section 503 of the Housing Code provided:

"Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

8. 387 U.S. at 526-27.

9. *Id.* at 539.

10. 359 U.S. 360 (1959). In *Frank*, appellant violated the Baltimore City Code because she refused to allow a Baltimore City health inspector, pursuant to a complaint, to search her basement for evidence of rodent infestation. *Id.* at 361. Section 120 of Article 12 of the Baltimore City Code provided:

Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars.

Id.

amendment are only applicable to criminal investigations. Although *Camara* required a search warrant, it recognized the public interest in the maintenance of safe housing conditions and specifically held that the need to conduct safety code inspections throughout a neighborhood satisfies the probable cause requirement for obtaining a warrant under the fourth amendment.¹¹

In *See v. City of Seattle*,¹² the companion case to *Camara*, appellant sought reversal of a conviction for his refusal to allow a representative of the Seattle Fire Department to enter and inspect his locked commercial warehouse without a warrant and without probable cause that there was a violation of a municipal ordinance. The inspection, similar to the neighborhood inspection in *Camara*, was part of a routine, periodic city-wide canvass to ensure compliance with Seattle's Fire Code.¹³

The Court held that the businessman's right to fourth amendment protection is indistinguishable from that of the private homeowner, and extended the requirement of a search warrant to administrative inspections of non-public areas of commercial premises.¹⁴ Mr. Justice White, writing for the majority, stated:

[T]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in

The court held that the search and seizure safeguards of the fourth amendment are only applicable to criminal investigations. *Id.* at 365-67.

11. First, such programs have a long history of judicial and public acceptance. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.

387 U.S. at 537. "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539.

12. 387 U.S. 541 (1967).

13. *Id.* at 541. § 8.01.050 of the Seattle Fire Code provided:

Inspection of Building and Premises. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any ordinance concerning fire hazards.

Id.

14. "[A]dministrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." *Id.* at 545.

jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.¹⁵

The reasonableness of the public policy that the particular statute seeks to implement determines whether there is sufficient probable cause to meet the requirements of *Camara* and *See*¹⁶ for the issuance of a search warrant. *See* requires the enforcement officer to obtain a search warrant,¹⁷ but the need for effective enforcement of a particular statute meets the requirements of probable cause, for obtaining such a warrant.

See did not decide whether refusal of entry is a necessary predicate to the issuance of an administrative search warrant. Probable cause standards may be even more flexible where a search warrant is issued in advance of inspection.¹⁸ Mr. Justice Clark, dissenting in *See*, questioned the need for a search warrant at all:

It is interesting to note that in each of the cases here [*Camara* and *See*] the authorities were making periodic area inspections when the refusals to allow entry occurred. Under the holding of the Court today, "probable cause" would therefore be present in each case and a "paper warrant" would issue as a matter of course. This but emphasizes the absurdity of the holding.¹⁹

Several commentators share the sentiments expressed by Mr. Justice Clark. One theory is that *Camara* and *See* are not radical departures from *Frank v. Maryland*, although they require a search warrant for administrative inspections.²⁰ Another commentator suggests that since time is unimportant in the typical administrative inspection case, the best way to protect privacy would be to give

15. 387 U.S. at 543.

16. "The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved." *Id.* at 545.

17. *Id.*

18. *Id.* at 545 n. 6.

19. *Id.* at 553 n. 4.

20. The shift in the Court's doctrine from *Frank* to *Camara* and *See* is probably only a slight one, both with respect to the increased burden on the officers and the increased protection to the private party. The burden on the officers may be no greater, because getting a search warrant is as easy as any other method of compelling compliance and may even be easier. The protection to the private party is not significantly enhanced, because warrants are likely to be issued on a wholesale basis, since the Court specifically approves area inspection.

1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.05, at 99 (1st. ed. Supp. 1970).

notice to the private party of the officer's application for a warrant and to allow a hearing before the magistrate on the question of issuance of the warrant.²¹ A third view is that, in light of subsequent administrative search decisions, *Camara* and *See* are a highwater mark in the Supreme Court's application of the fourth amendment to protect the individual's right to privacy.²²

III. The *Colonnade-Biswell* Exception to *Camara-See*

In *Colonnade Catering Co. v. United States*,²³ agents of the Alcohol and Tobacco Tax Division of the Internal Revenue Service visited a catering establishment to inspect for a possible violation of the federal excise tax law. The agents requested the president of the catering establishment to open a locked liquor storeroom. When he refused, the agents broke down the door to the storeroom and removed bottles of liquor.

The Court upheld Section 7606 of the Internal Revenue Code which grants agents of the Internal Revenue Service authority to enter premises for inspection of articles subject to tax.²⁴ Mr. Justice Douglas expressed the opinion of the Court when he wrote:²⁵

We agree that Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand. The general rule laid down in *See v. City of Seattle*, . . ., "that administrative entry, without consent, upon the portions of commercial premises which are

21. LaFave, *Administrative Searches and the Fourth Amendment*, 1967 Sup. Ct. Rev. 1, 6 [hereinafter cited as LaFave, *Administrative Searches*]. In Professor LaFave's opinion, enforcement was impossible as a practical matter under the traditional probable cause test because most housing code violations occur within private premises and cannot be detected from outside, most serious violations are noticeable only in the aggregate, and a relatively small number of complaints, many anonymous, are received. *Id.* at 15-16. Moreover, the typical routine inspection does not stigmatize an individual as a subject of police interest, and does not require surprise. *Id.* at 18-19.

22. See Note, *AFDC Caseworker's Visit to Home of Nonconsenting Welfare Recipient Not Prohibited by Fourth Amendment*, 24 Vand. L. Rev. 821, 827 (1971); Note, *Administrative Investigations of Welfare Recipients*, 22 Case W. Res. L. Rev. 581, 588 (1971).

23. 397 U.S. 72 (1970).

24. (a) Entry during day.

The Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purposes of examining said articles or objects.

(b) Entry at night.

When such premises are open at night, the Secretary or his delegate may enter them while so open, in the performance of his official duties.

25. 397 U.S. at 76.

not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure"—is therefore not applicable here.

The Court made it clear that if Congress had enacted penalties other than a fine, the fourth amendment's requirement of "reasonableness" would be satisfied.²⁶ However, the only penalty contained in the statute was a fine for failure to consent to inspection.²⁷ In the absence of statutory authorization, the forcible warrantless seizure of the liquor violated the fourth amendment.

The question of whether forcible breaking and entering, if authorized by statute, violates the fourth amendment, was answered in *United States v. Biswell*.²⁸ A police officer and a Federal Treasury agent visited respondent pawnshop owner, who had a federal license to sell sporting weapons. The agent identified himself, inspected respondent's books, and requested entry into a locked gun storeroom. Respondent asked whether the agent had a search warrant, and the agent responded that he did not. The agent contended that the Gun Control Act of 1968²⁹ authorized such inspections.³⁰ When respondent unlocked the storeroom, the Treasury agent found and

26. 397 U.S. at 77.

I.R.C. §7342. PENALTY FOR REFUSAL TO PERMIT ENTRY OR EXAMINATION.

Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of Section 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit \$500.

27. Mr. Justice Douglas explained the distinctive characteristics of the liquor industry that result in allowing warrantless administrative inspections but for the specific statute involved:

We deal here with the liquor industry long subject to close supervision and inspection. As respects that industry, and its various branches including retailers, Congress has broad authority to fashion standards of reasonableness for searches and seizures. Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector.

397 U.S. at 77.

28. 406 U.S. 311 (1972).

29. 18 U.S.C. §§ 921-28 (1970).

30. 18 U.S.C. §923 (1970).

The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector 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 importer, manufacturer, dealer, or collector at such premises.

confiscated two rifles for which respondent did not possess a license.³¹

The Court upheld the warrantless seizure because "in the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute."³² Although the federal policy of close supervision of the gun industry did not have as long a history as supervision of the liquor industry, the Court concluded that inspecting the firearm industry is a valid public policy.³³ It held that requiring a search warrant to inspect gun importers, dealers, manufacturers and collectors would frustrate the efficacy of gun control.³⁴

Colonnade and *Biswell* create an exception to the general rule prohibiting warrantless administrative inspections. When specifically authorized by a licensing statute, a warrantless search does not violate the fourth amendment.³⁵ Even though the Court emphasized that this exception applies only within the confines of a specific statute, numerous commentators objected to the exception under any circumstances. One critic charged that in *Biswell* the Court rejected judicial precedent for judicial expediency because it placed the public's need for warrantless inspections ahead of the individual

31. 406 U.S. at 312.

32. *Id.* at 315.

33. *Id.*

34. *Id.* at 316. Mr. Justice White stated: "[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible." *Id.*

35. See 1972 Wash. U. L. Q. 313, 327. Consent to the search is another exception. In *United States v. Thriftmart, Inc.*, 429 F.2d 1006 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970), the court stated that any manifestation of assent "no matter how casual" could reasonably be accepted as proper consent. 429 F.2d at 1010. This approach is accepted even if the person is not aware of his rights. *United States v. Hammond Milling Co.*, 413 F.2d 608 (5th Cir. 1969) *cert. denied* 396 U.S. 1002 (1970); *cf. United States v. Kendall Co.*, 324 F. Supp. 628 (D. Mass. 1971); *United States v. Morton Provision Co.*, 294 F. Supp. 385 (D. Del. 1968) (consent obtained without apprising the defendants that the investigation and any evidence discovered could be used against them). Emergency is the third exception. "Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations." *Camara v. Municipal Court*, 387 U.S. at 539. *Camara* also cited: *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Compagnie Francaise v. Board of Health*, 186 U.S. 380 (1902); *Kroplin v. Truax*, 119 Ohio St. 610, 165 N.E. 498 (1929).

citizen's right to privacy.³⁶ Other critics charged that *Colonnade* and its extension in *Biswell* create the potential for harassment by overzealous officials³⁷ and the possibility that treasury agents, under the guise of searching for weapons, may work in collusion with local police to search for narcotics, stolen property or other incriminating evidence.³⁸ In contrast, other writers noted that businessmen in extensively regulated industries impliedly consent to warrantless inspections³⁹ and that a sufficiently precise statute serves the same function as a search warrant.⁴⁰ One commentator even called for extension of the *Biswell* reasoning to such regulatory agencies as the Interstate Commerce Commission (ICC).⁴¹ The Supreme Court decision in *See* suggests application of both points of view in future decisions. As the majority in *See* stated: "[a]ny constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness."⁴²

IV. Application of the *Camara-See* and *Colonnade-Biswell* Rules

The Supreme Court's flexible⁴³ construction of the fourth amendment is illustrated by *Air Pollution Variance Board v. Western Alfalfa Corp.*⁴⁴ An inspector of the Colorado Department of Health entered the outdoor premises of respondent Western Alfalfa without the knowledge or consent of its president. The purpose of the daylight inspection, which was carried out without a warrant, was to conduct an air pollution test. The inspector found that smoke emit-

36. 11 Duq. L. Rev. 253, 258 (1972).

37. Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 Calif. L. Rev. 1011, 1023 (1973).

38. 22 Cath. L. Rev. 496, 502 (1973).

39. 43 Miss. L. J. 562, 567 (1972).

40. 49 Notre Dame Law. 879, 890 (1974). See note 58 *infra*.

41. Schwartz, *Administrative Law Cases During 1972*, 25 Ad. L.Rev. 97, 110 (1973).

42. 387 U.S. at 546.

43. "The Fourth Amendment proscription against 'unreasonable . . . seizures,' applicable to the States through the Fourteenth Amendment, must not be read in a vacuum. A seizure reasonable . . . as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973).

44. 416 U.S. 861 (1974).

ted from Western Alfalfa's chimneys violated air quality standards.⁴⁵

The Court held that there was no violation of the fourth amendment because the inspection was not an invasion of privacy comparable to that in either *Camara* or *See*.⁴⁶ Rather the inspection concerned sights seen in the "open fields"⁴⁷ which are not protected by the fourth amendment.⁴⁸

In *Western Alfalfa*, the company's expectation of privacy was not violated because the inspector did not enter a private area.⁴⁹ This was not the case in *United States v. Del Campo Baking Mfg. Co.*,⁵⁰ which involved an inspection pursuant to the Food, Drug, and Cosmetic Act.⁵¹

In *Del Campo*, FDA inspectors made a routine warrantless inspection of defendants' premises pursuant to Section 374 of the Food, Drug, and Cosmetic Act.⁵² As a result of material seized during the inspection, the defendants faced criminal prosecution for the introduction and delivery of adulterated food⁵³ into interstate commerce.

The United States District Court for the District of Delaware,

45. *Id.* at 862-63.

46. Writing for the Court, Mr. Justice Douglas emphasized that: "[t]he field inspector did not enter the plant or offices. He was not inspecting stacks, boilers, scrubbers, flues, grates, or furnaces; nor was his inspection related to respondent's files or papers." *Id.* at 864-65.

47. *Hester v. United States*, 265 U.S. 57, 59 (1924).

48. *Id.* "The invasion of privacy . . . if it can be said to exist, is abstract and theoretical." 416 U.S. at 865.

49. See note 47 *supra*. This was not the type of inspection involved in *Camara*, *See*, *Biswell*, and *Colonnade*.

50. 345 F. Supp. 1371 (D. Del. 1972).

51. 21 U.S.C. §§ 301-92 (1970).

52. 21 U.S.C. §374 provides:

(a) Right of agents to enter; scope of inspection; notice; promptness; exclusions.

For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials; containers, and labeling therein

53. 345 F. Supp. at 1373.

relying on *Biswell*, held that consent to the inspection was not at issue.⁵⁴ In so holding, *Del Campo* equated the pervasive regulation of the Food, Drug, and Cosmetic Act with the federal license in *Biswell*. The court stated:

The fact that Congress has not required the *Del Campo* business to obtain federal licenses to operate is wholly immaterial. Defendants' business of manufacturing, processing, packing and distributing food products for introduction into interstate commerce is as "pervasively regulated" by the Federal Food, Drug and Cosmetic Act, and the regulations promulgated thereunder, as if it were federally licensed. No rational or valid distinction can be drawn for compliance inspections between a federally licensed business and one so completely regulated by the Act under the commerce power. The rationale of *Biswell* makes no such differentiation. The inspection, as conducted of the defendants' facilities, was entirely proper under *Biswell*.⁵⁵

In *United States v. Business Builders, Inc.*,⁵⁶ the facts were similar to those in *Del Campo*.⁵⁷ The United States District Court for the Northern District of Oklahoma relied on *Biswell* to hold that a warrantless administrative search which is "carefully limited in time, place and scope . . . does not depend on consent but on the authority of a valid statute."⁵⁸ The court in *Business Builders* viewed the public interest in regulation of the food industry as more important than regulation of the liquor and firearms industries.⁵⁹ The decision reinforces the Food, Drug, and Cosmetic Act's place in the *Biswell*-line of administrative search decisions.⁶⁰

54. *Id.* at 1376. "The thrust of the opinion is that there is no issue of consent to a regulatory inspection conducted without a warrant when such a compliance inspection is authorized by federal statute in a 'pervasively regulated business.'" *Id.*

55. *Id.* at 1377.

56. 354 F. Supp. 141 (N.D. Okla. 1973). See also *United States v. Litvin*, 353 F. Supp. 1333 (D.D.C. 1973).

57. 354 F. Supp. at 142.

58. *Id.* at 143, quoting *United States v. Biswell*, 406 U.S. 311, 315 (1972). "In effect, the statute takes the place of a valid search warrant." 354 F. Supp. at 143.

59. *Id.* at 143 n.1. The court stated:

Presumably, federal interest in liquor is pecuniary, due to the great amount of taxes collected from that industry. Likewise, federal interests in firearms is the prevention of violent crime. However, it would seem to this Court that the public health and welfare under any system of values would be more important than revenue and suppression of criminal activity.

Id.

60. See *United States v. Acri Wholesale Grocery Co.*, 409 F. Supp. 529 (S.D. Iowa 1976) (photographic evidence held to be within ambit of reasonable warrantless administrative search).

The *Camara-See* and *Colonnade-Biswell* rules provide the framework for determining the relationship⁶¹ between the fourth amendment and administrative searches. Some commentators read *Colonnade* and *Biswell* as applicable only to the liquor and firearms fields;⁶² however, lower courts occasionally apply these same rules to other regulated areas.⁶³

V. OSHA Inspections and the Fourth Amendment

A. The Isolation of *Brennan v. Buckeye Industries, Inc.*

In *Brennan v. Buckeye Industries, Inc.*,⁶⁴ an OSHA inspector attempted an inspection of the premises of Buckeye Industries without a warrant.⁶⁵ Buckeye Industries did not have any citations for violations of OSHA, nor were there any employee complaints of unsafe working conditions.⁶⁶ Nevertheless, the Secretary sought and received a court order compelling Buckeye Industries to submit to an inspection.⁶⁷

The United States District Court for the Southern District of Georgia held that the *Colonnade* and *Biswell* decisions govern OSHA inspections.⁶⁸ In allowing the inspection the court focused on the specific OSHA warrantless inspection provisions.⁶⁹ "It is clear that the Act confers no right upon any representative of the Secretary to make inspections or searches unconnected with the objects of the legislation. The right to inspect is confined to structures,

61. See Administrative Searches and the Implied Consent Doctrine: Beyond the Fourth Amendment, 43 Brooklyn L. Rev. 91 (1976).

62. Currie, *OSHA*, 1976 ABF Res.J. 1107, 1159 (1976).

63. United States *ex rel.* Terraciano v. Montanye, 493 F.2d 682 (2d Cir.), *cert. denied*, 419 U.S. 875 (1974) (licensed pharmacies); *Youghiogheny & Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973) (mine safety).

64. 374 F. Supp. 1350 (S.D. Ga. 1974).

65. 29 U.S.C. §657(a) (1970).

66. The Secretary or his authorized representative may conduct an investigation at the instigation of any employee or employee representative who believes that a violation of a safety or health standard exists and that it threatens an employee's physical safety or presents an imminent danger. *Id.* §657(f)(1).

67. 374 F. Supp. at 1351-52.

68. Chief Judge Lawrence relied on the decisions in *Biswell*, *Terraciano*, and *Youghiogheny*. See *Brennan v. Buckeye Industries, Inc.: The Constitutionality of a OSHA Warrantless Search*, 1975 Duke L.J. 406, 413 (1975), where the author properly criticized the Buckeye court's reliance on these cases involving regulated industries. Buckeye Industries manufactured clothing which is not a regulated industry. 374 F. Supp. at 1351.

69. *Id.* at 1356.

machines, equipment and material as well as conditions having relevance to those purposes."⁷⁰ In addition, the *Buckeye* court emphasized that a requirement of a search warrant to conduct OSHA inspections would frustrate the purpose of surprise inspections.⁷¹ This is clearly an erroneous view of *Camara* and *See*,⁷² and subsequent OSHA inspection decisions repudiated it.

B. OSHA Inspections Require a Search Warrant

In *Brennan v. Gibson's Products, Inc.*,⁷³ OSHA inspectors attempted to inspect the non-public area of a shoe store to determine if its owner was complying with OSHA regulations. Lacking probable cause, the Secretary did not seek a search warrant but rather sought a court order compelling the store to submit to inspection.⁷⁴ The United States District Court for the Eastern District of Texas denied the Secretary's petition on the ground that a warrantless OSHA inspection violates the fourth amendment.⁷⁵ The *Gibson's Products* court noted that OSHA inspections encompass all forms of industry⁷⁶ and therefore warrantless inspections would permit a

70. *Id.* at 1354. The *Buckeye* court ignored the *Western Alfalfa* decision, where Mr. Justice Douglas implied that if the inspector entered private areas he would have violated the fourth amendment. See note 47 *supra*. Moreover, the *Buckeye* court took an incorrectly narrow view of OSHA's scope. OSHA does not just apply to structures and machinery. As one Senator observed, OSHA applies to ". . . every business affecting commerce in the entire United States, ranging anywhere from a big steel company to a shoeshine shop." 116 Cong. Rec. 36, 509 (1970) (remarks of Senator Dominick).

71. The court stated:

Viewed in the frame of the regulatory powers of the federal government and the compelling need for unannounced inspections, there is no unreasonable entry under the Fourth Amendment. The necessity of showing probable cause as a requisite would serve to destroy the object of the legislation. In effect, it would require an employee to report a violation in order for any investigation to be made as a predicate to corrective action.

374 F. Supp. at 1354.

72. The correct interpretation is that inspections may be made without probable cause. See *Currie, OSHA*, 1976 ABF Res. J. at 1159.

73. 407 F. Supp. 154 (E.D. Tex. 1976).

74. *Id.* at 155-56.

75. *Id.* at 156. "[b]road and indiscriminate inroads on fourth amendment safeguards, wrought in the name of administrative expedience and weighty governmental interest, are to be viewed with no [great] favor . . ." *Id.* at 161.

76. "It [OSHA] thus embraces indiscriminately steel mills, automobile plants, fishing boats, farms and private schools, commercial art studios, accounting offices, and barber shops—indeed, the whole spectrum of unrelated and disparate activities which compose private enterprise in the United States." *Id.*

roving commission of inspectors to conduct inspections with unfettered discretion.⁷⁷ The court held that OSHA inspections are authorized “. . . only when made by search warrant issued by a United States Magistrate or other judicial officer of the third branch under probable cause standards appropriate to administrative searches—that is, in a constitutional manner.”⁷⁸

*Dunlop v. Hertzler Enterprises, Inc.*⁷⁹ is in accord with *Gibson's Products*. In *Dunlop*, two OSHA inspectors failed to gain access for a routine inspection of Hertzler Enterprises. The inspectors returned with a search warrant⁸⁰ but were again denied entry. Thereupon, the Secretary sought a court order to compel Hertzler Enterprises to submit to an inspection.⁸¹

The court first enumerated the requirements that an administrative inspection must meet to come within the *Colonnade* and *Biswell* rules.⁸² It then emphasized that in the absence of pervasive federal regulation⁸³ and because of OSHA's broad application, *Camara* and *See* govern OSHA inspections⁸⁴ and require a search warrant based on probable cause.⁸⁵

77. *Id.* at 162. The *Gibson's Products* court cited *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (warrantless auto search by United States Immigration and Naturalization Service inspector violates the fourth amendment). Furthermore, the *Gibson's Products* court indicated that the store was not licensed by the federal government nor did the industry have a history of close regulation. 407 F. Supp. at 162.

78. *Id.*

79. 418 F. Supp. 627 (D. N.M. 1976).

80. The inspectors did not have proof of probable cause when they applied for the search warrant. *Id.* at 628-29.

81. *Id.*

82. First, the enterprise sought to be inspected must be engaged in a pervasively regulated business. The presence of this factor insures that warrantless inspection will pose only a minimal threat to justifiable expectations of privacy. Second, warrantless inspection must be a crucial part of a regulatory scheme designed to further an urgent federal interest. And third, the inspection must be conducted in accord with a statutorily authorized procedure, itself carefully limited as to time, place, and scope.

Id. at 631-32.

83. Hertzler Enterprises manufactured ammunition and paper boxes. *Id.*

84. “[I]t is presumed that Congress intended to empower the Administration to conduct nonconsensual inspections only pursuant to the authority of a warrant issued upon satisfaction of standards of probable cause which have been articulated in the area of administrative searches.” *Id.* at 634.

85. The *Gibson's Products* court declined to declare the OSHA inspection provision unconstitutional. To achieve this result, the court did not interpret the phrase “enter without delay” found in 29 U.S.C. §657(a) to be the equivalent for “without a warrant.” 407 F. Supp. at 162. The only suggestion that the statute contemplates warrantless searches is in the

In *Barlow's, Inc. v. Usery*,⁸⁶ the United States District Court for the District of Idaho, unlike the courts in *Gibson's Products* and *Hertzler Enterprises*, construed the OSHA inspection provision literally. The president of Barlow's⁸⁷ denied entry to an OSHA inspector because he did not have a search warrant.⁸⁸ The Secretary then sought and received a court order compelling entry, inspection and investigation. The president again refused the inspection and requested that a three-judge court be convened to enjoin enforcement of the Act on the ground that it violated the fourth amendment.⁸⁹

The three-judge court, in its literal reading of OSHA, concluded it was not the intention of Congress that a warrant be obtained for an OSHA inspection because there was no language in the statute requiring a warrant.⁹⁰ Rejecting the decision in *Buckeye Industries*, the *Barlow's Inc.* court held, nevertheless, that such warrantless OSHA inspections are controlled by *Camara* and *See*, and require a search warrant.⁹¹ The court stated: "We . . . hold that the inspec-

minority views of a rejected version of the bill. See H.R. Rep. No. 1291, 91st Cong., 2d Sess. 55 (1970) (views of Representatives Scherle, Ashbrook, Eshleman, Collins, Landgrebe, and Ruth). The only discussion of the "without delay" phrase shows that it was intended to prevent an employer from preventing inspections by avoiding the inspector's presentation of credentials. 116 Cong. Rec. 38,709 (1970) (remarks of Congressman Galifianakas, quoting Congressman Steiger). The author of the "without delay" phrase reminded the House that inspections would have to be conducted in accordance with "applicable constitutional protections." *Id.* (remarks of Congressman Steiger). Yet during the hearings on the 1974 Review of OSHA, Senator Curtis submitted an amendment to the inspection provision. "(2) No inspection or investigation shall be undertaken . . . unless the Secretary has probable cause to believe that there is . . . a violation . . ." See Occupational Safety and Health Act Review, 1974, 93d. Cong., 2d Sess. 17, 61 (1974) (statement of Senator Curtis).

86. 424 F. Supp. 437 (D. Idaho 1977).

87. Barlow's Corporation engaged in the installation of electrical and plumbing fixtures, heating and air conditioning units. *Id.* at 438.

88. *Id.* Nor did the inspector have probable cause to believe that a violation existed. *Id.* at 438-39.

89. *Id.* at 439.

90. [W]e decline the invitation to judicially redraft an enactment of Congress.

Unlike the *Gibson's Products* court, we cannot accept the proposition that the language of the OSHA inspection provisions envision the requirement that a warrant be obtained before any inspection is undertaken. Certainly, Congress was able, had it wished to do so, to employ language declaring that a warrant must first be obtained, . . . and other necessary regulations. Congress did not do so and we refuse to accept that duty. *Id.* at 441 n. 4.

91. *Id.* at 440. The court relied on *Camara*, *See*, and *Western Alfalfa*. "[E]ach was involved with statutory and regulatory schemes aimed at promoting and protecting public health and safety. The warrantless inspections authorized under OSHA likewise seek to promote public health and safety . . ." *Id.* at 441.

tion provisions of OSHA which have attempted to authorize warrantless inspections of those business establishments covered by the Act, are unconstitutional as being violative of the Fourth Amendment."⁹²

Barlow's Inc., is an unfortunate digression⁹³ from a decisional trend that properly balances the safeguards of the fourth amendment with the need to ensure the health and safety of the worker. *Marshall v. Shellcast Corp.*,⁹⁴ follows the trend but adds a new element to the requirement of probable cause for an OSHA inspection. Two foundry companies denied access to OSHA inspectors who attempted to conduct an inspection pursuant to the National Emphasis Program (NEP).⁹⁵ The issue before the court was whether a report indicating that the accident rate in the iron and steel foundry industry was approximately three times that of employers generally was sufficient for probable cause in the absence of any particular violation or hazard on the defendant companies' premises.⁹⁶

The United States District Court for the Northern District of Louisiana acknowledged that the use of an incident measure is appropriate for "singling out target industries."⁹⁷ However, to meet the probable cause requirement for inspection of a specific corporation, OSHA must first seek any available information about the accident rate at that specific corporation.⁹⁸ Therefore, the court held "that

92. *Id.* at 442. However, the Acting Solicitor General applied for a stay of the *Barlow's Inc.* decision. Upon order of Mr. Justice Rehnquist of the Supreme Court of the United States, the *Barlow's Inc.* decision was "stayed insofar as it purports to restrain the conduct of applicant outside the District of Idaho, pending receipt of a response from respondent and further order of the Circuit Justice or of the Court." 45 U.S.L.W. 3517 (Feb. 1, 1977), *appeal docketed*, No. 76-1143, 45 U.S.L.W. 3587 (Mar. 1, 1977).

93. The *Barlow's Inc.* court confuses judicial redraftmanship with proper statutory construction. See note 85 *supra*.

94. 46 U.S.L.W. 2079 (Aug. 23, 1977).

95. *Id.* NEP involves compliance inspections of particular industries, one of which is the iron and steel foundry industry. NEP is similar to the OSHA Target Industry Program (TIP). R. SMITH, *THE OCCUPATIONAL SAFETY AND HEALTH ACT 66* (1976), provides an excellent statistical analysis of TIP's effect on the reduction of work-related injuries.

96. 46 U.S.L.W. at 2079-80. One company also claimed that the OSHA inspection provision is unconstitutional. The court disagreed. "The failure of Congress to explicitly provide a procedure by which warrants can be obtained and probable cause established does not render the section itself unconstitutional. Constitutionality can, in essence, be saved by a requirement that such a showing and procedure be followed." *Id.* at 2079.

97. *Id.* at 2080.

98. There is dictum to the effect that a NEP report would meet the requirement of

where individualized information is present, OSHA or other similarly situated organizations cannot close their eyes to the individual situation, relying upon some national accumulated group of statistics."⁹⁹

VI. Conclusion

Administrative inspections of industries that are not subject to pervasive federal regulation must be based on the *Camara-See* rules that require probable cause for the issuance of a search warrant. Although the degree of probable cause varies with the public policy that the particular inspection statute seeks to implement, a warrantless administrative inspection clearly violates the fourth amendment. The *Colonnade-Biswell* rules pertain to administrative inspections of industries that are subject to pervasive regulation in the form of a federal license or a highly specific federal statute. Businessmen who engage in such regulated industries impliedly consent to inspection and therefore a warrantless inspection does not violate the fourth amendment.

The impact of OSHA on the reduction of work-related injuries is not yet clear;¹⁰⁰ however, the constitutionality of the inspection provision seems settled in the lower courts. Since OSHA inspections are applicable to all areas of industry, it is necessary that they be conducted with some restraint. It is therefore reasonable to require a search warrant based on the *Camara-See* rules of probable cause. Yet protection of the health and safety of the worker must not be sacrificed.¹⁰¹

As regulation has expanded and intensified, the administrative quest for facts and more facts has gained momentum and has seemingly become an

probable cause if no specific information were available. "If the court were faced with a situation that certain industry measures, such as used in the NEP selection mechanism, were the only data available, the inference certainly could be drawn that those individual plants within the industry bore some investigation." *Id.*

99. *Id.*

100. One author states that "it would not be surprising to find that OSHA has had a negligible impact on the overall injury rate in industry." See R. SMITH, *THE OCCUPATIONAL SAFETY AND HEALTH ACT* 67 (1967). Yet another concludes: "OSHA is an interesting combination of bold legislative initiative and faulty drafting In the main the procedures of the Act are daring and progressive." See Currie, *OSHA*, 1976 ABF RES.J. 1107, 1160 (1976).

101. The National Occupational Health Survey released a survey that indicates one out of four American workers is exposed on the job to some substance thought to be capable of causing death or disease. N.Y. Times, Oct. 3, 1977, at 1, col. 3.

irresistible force. This force has collided with what at first were apparently immovable constitutional principles concerning . . . searches and seizures The constitutional principles remained firm for a time but gradually weakened and crumbled. The force proved irresistible. Remnants of the constitutional principles are left standing, but only to an extent clearly consistent with permitting administrative agencies freely to secure factual materials needed to carry out the programs they administer.¹⁰²

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102. K. DAVIS, ADMINISTRATIVE LAW TEXT §3.01, at 53 (3d Ed. 1972).

