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MARSHALL V. BARLOW'S, INC.: ARE WARRANTLESS ROUTINE OSHA INSPECTIONS A VIOLATION OF THE FOURTH AMENDMENT?

Lynn G. Weissberg*

I. INTRODUCTION

One out of every four American workers is exposed on the job to some substance capable of causing death or disease.1 One hundred thousand workers die each year from job-related injuries and diseases.2 In 1970, Congress responded to the growing national problem of workplace safety and health by passing the Occupational Safety and Health Act (OSH Act).3 The OSH Act created the Occupational Safety and Health Administration (OSHA), which sets mandatory standards governing the condition of various workplaces and conducts inspections to ensure compliance with the standards.4 One of the most controversial and frequently litigated aspects of the OSH Act is the constitutionality of its provision that authorizes OSHA inspections without a search warrant.5

On September 11, 1975, Mr. Ferrol G. Barlow, President of Barlow's, Inc. of Pocatello, Idaho, challenged the authority of OSHA to make a routine warrantless inspection of his electrical, plumbing, and air-conditioning installation business by denying admittance to an inspector.6 Several months later, Mr. Barlow again refused to

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* Staff Member, ENVIRONMENTAL AFFAIRS.
1 N.Y. Times, Oct. 3, 1977, at 1, Col. 2.
2 Id., Dec. 20, 1976, §I, at 1, Col. 4. Black lung, asbestosis, asbestos-caused cancer, beryllium disease, and vinyl chloride-caused liver cancer are the most familiar examples of occupational illness. While statistics for occupational diseases are difficult to obtain, HEW estimates some 390,000 new cases of occupational disease each year, and as many as 100,000 deaths. N. ASHFORD, CRISIS IN THE WORKPLACE 3-4 (1976).
4 Id. §§ 654(a)(2), 657(a).
5 Id. § 657(a).
admit an OSHA inspector, who this time had a court order\textsuperscript{7} to compel entry, inspection, and investigation. The next day, Barlow filed a complaint in federal district court seeking temporary and permanent injunctions against OSHA inspections on the ground that they are inconsistent with the Fourth Amendment. A three judge panel held that the provisions of the OSH Act that “attempted to authorize warrantless inspections . . . are unconstitutional as being violative of the Fourth Amendment.”\textsuperscript{8} In \textit{Marshall v. Barlow’s, Inc.},\textsuperscript{9} the United States Supreme Court will hear the appeal of the panel’s decision and will consider for the first time whether the Act’s warrantless inspection provision violates the Fourth Amendment’s guarantee against unreasonable searches.\textsuperscript{10}

This article will explore the constitutional ramifications of the \textit{Barlow’s} case, examining whether the Fourth Amendment permits routine OSHA inspections without a warrant and whether constitutionally sufficient probable cause exists to justify these inspections. This examination will be preceded by a discussion of the statutory and regulatory requirements of OSHA inspections and by a look at basic Fourth Amendment doctrine, as applied to traditional criminal searches and administrative inspections.

\section{II. OSHA Inspections}

The OSH Act is the first comprehensive piece of legislation in the area of occupational safety and health.\textsuperscript{11} Its ambitious purpose is “to assure so far as possible every working man and woman in the nation safe and healthful working conditions.”\textsuperscript{12} The Act authorizes OSHA\textsuperscript{13} to set mandatory occupational safety and health standards

\begin{itemize}
\item \textsuperscript{7} \textit{Id.} at 439. At a show cause hearing on Dec. 30, 1975, the Secretary’s order was granted. Brief for Appellants at 9, \textit{Marshall v. Barlow’s, Inc.}, \textit{prob. juris. noted}, 430 U.S. 964 (1977).
\item \textsuperscript{8} \textit{Barlow’s, Inc. v. Usery, 424 F. Supp.} at 442. The court permanently enjoined the Secretary from conducting inspections pursuant to 29 U.S.C.\textsuperscript{14}§ 657(a) (1970), and specifically from inspecting Barlow’s. On Feb. 3, 1977, Mr. Justice Rehnquist stayed the district court’s order except as it applied to Barlow’s.429 U.S. 1347 (1977).
\item \textsuperscript{10} U.S. Const. amend IV: “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, the person or things to be seized.”
\item \textsuperscript{12} 29 U.S.C. § 651 (1970).
\item \textsuperscript{13} Although OSHA is charged with administering the Act, it is just one of five federal bodies
\end{itemize}
for businesses affecting commerce and requires each employer to comply with these standards. In cases not covered by specific standards, the employer has a general statutory duty to "furnish . . . a place of employment . . . free from recognized hazards that are causing or likely to cause death or serious physical harm." The Act requires OSHA officers to inspect and investigate all pertinent conditions, structures, and machines of any place of employment. Different categories of inspections—routine, emergency, and those prompted by an employee complaint—are set out in the statute. OSHA Area Directors select the sites for routine inspections according to established scheduling procedures. Routine inspections are based on accident experience and the number of employees exposed to a hazard and are planned after consideration of the injury/illness rate for that industry.

Advance notice of an inspection is statutorily prohibited; ac-

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12 29 U.S.C. § 654(a)(1). This provision is commonly referred to as the general duty clause. It is the basis of many citations issued against employers. See Morey, The General Duty Clause of the Occupational Safety and Health Act of 1970, 86 HARV. L. REV. 988 (1973). The general duty obligation does not appear as useful as the specific OSHA standards since the level of safety it establishes is predicated on what is already considered normal for any given industry, regardless of how patently hazardous that may be. It is particularly problematic because most of the 13,000 toxic substances in commercial use today are not covered by specific OSHA standards and, therefore, can only be covered by the general duty norm. See Ashford and Katz, Unsafe Working Conditions: Employee Rights Under the Labor Management Relations Act and the Occupational Safety and Health Act, 52 NOTRE DAME LAWYER 802 (1977).
14 Id. § 657(a), (f). The OSHA Field Operations Manual, reprinted in [1976] 1 EMPLOYEE SAFETY & HEALTH (CCH) ¶4009, establishes the priorities of these categories as follows: 1) imminent dangers, 2) fatality and catastrophe inspections, 3) employee complaints, 4) regional programmed (routine) inspections. In a typical three-month period, 33% of OSHA inspections were initiated by employee complaints, 24% were accident and follow-up, and 43% were routine.
16 Id. ¶4327.2(3)(d).
cordingly, persons providing such notice are subject to criminal sanctions. Upon presenting credentials to the employer, an OSHA inspector is authorized by the Act to enter the workplace without delay. However, the inspector must call during regular working hours or at other reasonable times, and the inspection must be conducted within reasonable limits and in a reasonable manner. Further, representatives of both the employer and the employees have the opportunity to accompany the inspector on the tour. Regulations provide that inspectors must explain the nature and purpose of the inspection and avoid unreasonable disruption in the operations of the employer’s business. The scope of the inspection is limited to areas, materials, and machines with which employees have contact, and to records directly relevant to the purpose of the inspection — the detection of safety and health hazards. OSHA inspectors have statutory authority to inspect only for OSHA violations. Although the Act contains no provision concerning what action an inspector should take if an employer refuses to permit an inspection, a regulation instructs inspectors to consult with his/her superiors who will then take “appropriate action, including compulsory process, if necessary.”

III. BACKGROUND: THE FOURTH AMENDMENT

A. Traditional Doctrine in Criminal Searches

The Fourth Amendment was passed in reaction to the general
warrants in England\textsuperscript{29} and the writs of assistance in the colonies,\textsuperscript{30} which authorized general searches with unlimited discretion based on mere suspicion.\textsuperscript{31} Its basic purpose is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. To achieve this end, it establishes a broad prohibition against unreasonable searches and seizures, and goes on to proscribe the issuance of search warrants except on a showing of probable cause.\textsuperscript{32}

No search is reasonable under the Fourth Amendment if conducted without probable cause.\textsuperscript{33} In an ordinary criminal case, probable cause exists when there is sufficient evidence to warrant a person of reasonable caution to believe that an offense has been or is being committed and that the premises to be searched contain legally seizable material.\textsuperscript{34} Before a warrant issues, a judicial officer must make a determination of probable cause based on evidence presented by the police,\textsuperscript{35} thereby interposing an impartial and detached magistrate between the private citizen and the law enforcement agent.\textsuperscript{36} A valid search warrant contains a particular description of both the premises to be searched and the objects to be seized. When a search is made without a warrant, the initial determination of probable cause rests with the law enforcement officer. This determination can be challenged later at a pre-trial judicial proceeding.

\textsuperscript{29} A general warrant was a general arrest warrant issued by the Secretary of State on mere suspicion. \\
\textsuperscript{30} Writs of assistance enabled customs officers to conduct general searches. Such writs could be used with unlimited discretion. See J. Landyski, Search and Seizure and the Supreme Court (1966); N. Lasson, History and Development of the Fourth Amendment to the United States Constitution (1937). \\
\textsuperscript{32} See Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1973-74). \\
\textsuperscript{33} See Agnello v. United States, 269 U.S. 20, 33 (1925). \\
\textsuperscript{35} The test established in Aguilar v. Texas, 378 U.S. 108 (1964), for the reliability of an informant's information is that it must reveal (1) underlying circumstances showing reason to believe that the informant is a credible person, and (2) underlying circumstances showing the basis of the conclusion reached by the informant. Id. at 114. \\
\textsuperscript{36} Justice Jackson has well stated the role of the magistrate:

The point of the fourth amendment, . . . is not that it denies law enforcement the support of usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right to privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer not by a policeman or government enforcement agent. \\

As a rule, a search pursuant to a warrant issued on a magistrate’s finding of traditional probable cause is "reasonable" under the Fourth Amendment.37 Indeed, the Supreme Court has expressed a strong preference for the use of search warrants.38 However, searches without a warrant are not per se unreasonable and have been upheld in a carefully defined class of cases39 — for example, emergencies where it would be impossible for the law enforcement agent to procure a warrant before taking action.40 The Supreme Court has also identified certain situations in which warrantless searches are "reasonable" even if based on less than traditional probable cause. In these situations a warrant is still preferred but not required.41

B. The Rule and Its Exceptions in Administrative Inspections

The Supreme Court has departed from traditional Fourth Amendment doctrine in the area of administrative inspections, where a governmental agency attempts to detect violations of its administrative codes or regulations. The Court has both relaxed the traditional probable cause required and started to define the circumstances in which a warrantless inspection is reasonable.

1. Camara and See

The companion cases of Camara v. Municipal Court42 and See v. City of Seattle43 are the starting points for current44 Supreme Court authority regarding administrative searches. In each case, an occupant refused a warrantless inspection on the ground that the Fourth Amendment required a search warrant, and the Court was faced with the issue of "whether administrative inspection programs violate Fourth Amendment rights as those rights are enforced against

See id.


Although not expressly exempted from the Fourth Amendment, the Supreme Court has established some specific and well-delineated exceptions to the warrant requirement, for example: a limited search of an auto on the highway, a search incident to a valid arrest, and a seizure of evidence in "plain view." Cady v. Dombrowski, 413 U.S. 433, 451-52 (1973) (dissent).


E.g., Terry v. Ohio, 392 U.S. 1, 20-22 (1968) (stop and frisk).


387 U.S. 541 (1967).

the States through the Fourteenth Amendment."\textsuperscript{45}

In \textit{Camara}, a city housing inspector attempted to inspect residential premises for building code violations\textsuperscript{46} under a municipal housing code, which authorized inspectors to enter at reasonable times to "perform any duty imposed upon them by the Municipal Code."\textsuperscript{47} In \textit{See}, a locked commercial warehouse was the subject of an inspection by the Seattle Fire Department conducted pursuant to the city's fire code, which authorized inspections "as often as may be necessary" to ascertain and correct any violations of the code or any other ordinance pertaining to fire hazards.\textsuperscript{48} Both the \textit{Camara} and \textit{See} ordinances provided criminal sanctions for refusing to consent to a warrantless inspection.\textsuperscript{49}

The Supreme Court held that both the residential occupant in \textit{Camara} and the commercial occupant in \textit{See} had a constitutional right to insist that the inspector obtain a search warrant, and, therefore, that neither could be convicted for refusing to consent to a warrantless inspection.\textsuperscript{50} The Court found that fire, health, and housing code inspection programs could operate within a reasonable search warrant requirement so that the burden of obtaining a warrant would not frustrate the purpose of the inspection.\textsuperscript{51} Noting that the discretion of the inspector needed to be circumscribed by a neutral magistrate issuing warrants,\textsuperscript{52} the Court asserted that "broad statutory safeguards are no substitute for individualized review."\textsuperscript{53}

Importantly, the Court announced a new standard of probable

\textsuperscript{45} Camara v. Municipal Court, 387 U.S. at 525.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 526; San Francisco, Cal., Housing Code §503, reads:
Right to Enter Building. 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.
\textsuperscript{48} Id.; Seattle, Wash., Fire Code §8.01.050, reads:
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 other ordinance concerning fire hazards.
\textsuperscript{49} Camara v. Municipal Court, 387 U.S. at 528 n.2; See v. City of Seattle, 387 U.S. at 542 n.1.
\textsuperscript{50} See v. City of Seattle, 387 U.S. at 546.
\textsuperscript{51} Camara v. Municipal Court, 387 U.S. at 533.
\textsuperscript{52} Id. at 532.
\textsuperscript{53} Id. at 533.
cause. Recognizing that routine administrative inspections are neither triggered by a suspicion that a specific violation exists in a particular building, nor designed to ferret out specific evidence thought to be on the premises, it found the traditional standard of probable cause to be inappropriate. The Court concluded that a less strict standard of probable cause is reasonable in this situation, since the need to search outweighs the invasion that the search entails. This conclusion was based on several factors, including the impersonal nature of the inspections, the relatively limited invasion of privacy involved, the long history of judicial and public acceptance of area code-enforcement inspections, and the fact that only door to door canvassing can prevent or abate dangerous conditions.

Accordingly, Camara announced a new, flexible standard of probable cause for administrative inspections: probable cause exists if reasonable administrative or legislative standards for conducting an area inspection are satisfied with respect to a particular dwelling, and if a valid public interest justifies the intrusion. In determining whether these reasonable legislative or administrative standards existed in the Camara case, the Court considered the amount of time since the last inspection, the nature of the building to be inspected, and the condition of the entire area. Particularized information about the condition of a certain dwelling is not required. The governmental interest at stake, the prevention of conditions hazardous to public health and safety, when viewed in combination with these standards, was sufficient to justify the intrusion. Thus the Court concluded that Camara-type inspections could thereafter be conducted under this new, flexible standard or probable cause.

2. Colonnade and Biswell

In distinguishing area code inspections from federal regulatory inspections, the See Court implied that exceptions to the Camara-
See warrant requirement were possible. One exception came three years later in *Colonnade Catering Corp. v. United States.* Without a warrant, and without the owner's permission, federal inspectors from the Alcohol and Tobacco Division of the Internal Revenue Service forcibly entered a locked storeroom and seized illegal liquor. The inspection was authorized by provisions of the Internal Revenue Code which conferred broad authority to enter and inspect the premises of federally licensed retail liquor dealers. The Court held the search constitutional. In its decision, the Court did not expressly address the issue of probable cause, but one can infer that it employed the flexible standard of probable cause developed in *Camara,* because the routine inspection would not have met the traditional standard. The Court was explicit, however, in upholding the warrantlessness of the search. It recognized Congress' broad authority to fashion standards of reasonableness for searches and emphasized the long history of governmental supervision and inspection of the liquor industry. In light of the continued federal scrutiny of all facets of the manufacture, transport, and sale of alcohol, the Court concluded that a warrantless inspection was reasonable.

Exceptions to the *Camara-*See warrant requirement were broadened again two years later in *United States v. Biswell.* In *Biswell,* the Supreme Court upheld a warrantless inspection of a federally licensed firearms dealer conducted pursuant to a provision of the Gun Control Act of 1968, which authorized entry during business hours for the purpose of inspecting records and firearms kept or

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61 See *v. City of Seattle,* 387 U.S. at 546. Two recent cases illustrate the limits of the *Colonnade-Biswell* exception. In *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), the Supreme Court invalidated a warrantless search by a roving patrol of the Immigration and Naturalization Service that was purportedly authorized by statute and regulations. Then, in *Air Pollution Variance Bd. v. Western Alfalfa Corp.,* 416 U.S. 861 (1974), an inspector of the Colorado Health Department conducted daylight visual pollution tests of smoke emissions. The inspector had entered the outdoor premises of the business without the owner's consent and without a warrant. The Court expressly reaffirmed *Camara* and *See,* but found them not applicable to the instant case. Instead, the Court relied on the "open fields" exception to the Fourth Amendment to hold that "the invasion of property, if it can be said to exist, is abstract and theoretical." 416 U.S. at 865.

65 *Id.* Actually, Congress did not authorize forcible, warrantless entries, but rather made it an offense for the licensee to refuse inspection.
stored by the dealer on the premises.\textsuperscript{68} As in \textit{Colonnade}, one must infer the use of a flexible standard of probable cause. However, the Court did mention several factors which inclined it to approve the warrantless nature of the inspection. Although the firearms industry does not have as deeply rooted a history of governmental control as the liquor industry, firearms dealers are subject to pervasive government regulation.\textsuperscript{69} Thus, the Court viewed the inspections as an essential part of the regulatory scheme and only a limited threat to a justifiable privacy expectation. If the inspections are to serve as credible deterrents, the Court reasoned, unannounced inspections are crucial, and a warrant prerequisite could easily frustrate the success of the inspection.\textsuperscript{70} Further, it was observed that the regulatory inspection procedure is carefully limited with respect to time, place, and scope.\textsuperscript{71} It remains unclear exactly how these considerations were weighed; nevertheless the Court concluded that, because “inspections further an urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute.”\textsuperscript{72}

IV. THE CONSTITUTIONALITY OF WARRANTLESS ROUTINE OSHA INSPECTIONS

A. Applicability of the Biswell Considerations

Whether OSHA inspectors can conduct warrantless routine inspections depends on whether the \textit{Colonnade-Biswell} exceptions to the \textit{Camara-See} warrant requirement control. A close reading of the \textit{Biswell} decision reveals a comprehensive treatment of the frequently overlapping factors which lead the Supreme Court to find a warrantless inspection constitutional: (1) whether the statute is sufficiently limited to curtail the discretion of the inspector,\textsuperscript{73} (2) whether there is pervasive federal regulation to further a valid governmental interest,\textsuperscript{74} (3) whether the owners or occupants of the premises have a reasonable expectation of privacy,\textsuperscript{75} and (4) whether

\begin{itemize}
  \item \textsuperscript{68} Id. § 923(g).
  \item \textsuperscript{69} United States v. Biswell, 406 U.S. 311, 315-16 (1972).
  \item \textsuperscript{70} Id. at 316.
  \item \textsuperscript{71} Id. at 315.
  \item \textsuperscript{72} Id. at 315.
  \item \textsuperscript{73} Id. at 316.
  \item \textsuperscript{74} Id.
  \item \textsuperscript{75} Id. at 315.
  \item \textsuperscript{76} Id. at 316.
\end{itemize}
a warrant requirement would frustrate the purpose of the inspection. It is difficult to assess fully the factors that entered into the Court’s decision in Biswell because the Court has neither provided guidelines concerning the weight and relationship of the various factors nor articulated the necessity of having all of the factors present for the Biswell exception to control. Nevertheless, an analysis of these factors with respect to routine OSHA inspections indicates that the Biswell exception should control and that warrantless routine OSHA inspections are constitutional.

1. Sufficient Statutory Limits on the Discretion of the Inspector

In Camara, the Supreme Court perceived a need for a neutral third party, a magistrate, to review the discretionary aspects of the inspection. The Court was concerned that the occupant in this situation has "no way of knowing whether enforcement of the municipal code involved inspection of his premises, no way of knowing the lawful limits of the inspector’s power to search, and no way of knowing whether the inspector himself is acting under proper authorization." In both Colonnade and Biswell, by contrast, the Court found that the inspector did not possess undue discretion because of the limited nature, in terms of time, place, and scope, of the inspections. In Biswell, for example, each business received information about the inspections that described the dealer’s obligations and defined the inspector’s authority; thus, "the dealer is not left to wonder about the purposes of the inspector or the limits of his task."

In administrative inspection cases since Biswell the lower federal courts have continued to examine whether the inspector’s discretion is sufficiently limited by the statutory scheme itself. The Food, Drug and Cosmetic Act authorizes inspectors "to enter, at reasonable times, any factory . . . in which food, drugs, or devices or cosmetics are manufactured . . . and . . . to inspect, at reasonable

77 See note 145, infra.
79 Id.
81 21 U.S.C. §§ 301-392 (1970). A similar situation existed in United States ex rel. Terraciano v. Montanye, 493 F.2d 682 (2d Cir. 1974), cert. denied, 419 U.S. 875 (1974), in which a state narcotics statute authorizing warrantless inspections by the Health Department of pharmacist's records relating to narcotics and other drugs was upheld. The court took special notice of the fact that the inspections were confined to business hours.
times and within reasonable limits and in a reasonable manner, such factory." In upholding warrantless FDA inspections courts have stressed the limiting aspects of the inspections, such as the fact that inspections are conducted regularly in a reasonable manner during business hours by inspectors who are unarmed. In reviewing a warrantless inspection of a coal mine made pursuant to the Federal Coal Mine Health and Safety Act of 1969, a federal district court found "no real danger that a federal mine inspector will exceed his authority." Since the mine owners have a legal obligation to be familiar with and to comply with the Act's mandatory health and safety standards, they are aware of the limits of the inspectors' lawful powers to search, and they understand that the inspectors have authority to inspect the mines for health and safety conditions.

The OSH Act, like the FDA statute, stipulates that the inspection is limited with regard to time, place, and scope. Routine sites are selected by the Area Director, not the inspector; thus the discretion of an OSHA inspector is at a minimum. As in the case of coal mine owners, employers covered by the OSH Act have a statutory obligation to be familiar with and to comply with the occupational health and safety standards promulgated under the Act. In addition, OSHA inspectors are required to present credentials and outline the scope of the inspection to the employer before inspection. OSHA inspectors have statutory authority to inspect only for OSHA violations, and the inspection is limited to areas, materials, and machines with which employees have contact, and to records directly relevant to the purpose of the inspection. Thus, the Camara Court's concerns about the discretion of the inspector are not appli-

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83 E.g. United States v. Thriftmart, Inc., 429 F.2d 1006, 1009 (9th Cir. 1970).
85 Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45, 51 (S.D. Ohio 1973). The court found that the inspectors have power to search only to further the purpose of the legislation. Id. at 50 n.4. The Act does not authorize inspectors to conduct a general search of the mine owner's offices. Id. at 51 n.5.
86 Id. at 51.
88 Id. § 654(a)(2).
89 29 C.F.R. § 1903.3 (1976).
90 Id. It does not appear that OSHA inspectors are empowered to search offices or desks to inspect records if the employer does not produce them upon request. 29 U.S.C. § 657(c)(1). Instead, compulsory process commanding production of the records is sought on refusal.
cable to an OSHA inspection. The OSH Act and regulations so prescribe and limit the inspection that a warrant should not be required.

2. Pervasive Federal Regulation to Further a Valid Governmental Interest

Both Colonnade and Biswell involved federally licensed businesses which were pervasively regulated and, therefore, subject to frequent government intervention. Subsequent cases upholding warrantless administrative inspections have also involved industries with extensive federal controls. For example, a federal district court reviewing warrantless coal mine inspections reasoned that regulated businesses like coal mines in effect consent to the restrictions placed on them. Indeed, although both Colonnade and Biswell dealt with businesses which were federally licensed, lower courts reviewing FDA inspections have found pervasive federal regulation even without federal licensing, citing the comprehensive and rigorously enforced regulations that require frequent inspections.

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 is as 'pervasively regulated' by the Federal Food, Drug and Cosmetic Act, and the regulations promulgated thereunder, as if it were federally licensed. The rationale of Biswell makes no such differentiation.

Some courts reviewing OSHA inspections have found that businesses covered by the Act are not pervasively regulated because they

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81 Another distinction between the Camara-See type of inspection is that the OSH Act provides an administrative review mechanism to deal with unauthorized actions of the inspector. 29 U.S.C. § 661 (1970). Camara and See had no comparable review process available to the occupant.


83 Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973). The court noted that if the business under consideration were not so inherently dangerous, then its decision might be otherwise; the court in this instance could reconcile the statute with the Fourth Amendment. Id. at 52 n.7.

84 Id. at 49.


86 Id. at 1377.
are not federally licensed and do not have a history of close regulation, and because OSHA standards, although very detailed, apply to only one aspect of the business. Moreover, the OSH Act deals with all businesses affecting commerce: it is not industry-specific, as were the statutes in Colonnade and Biswell. These courts thus always look at the issue of pervasive regulation from the perspective of the statute which authorizes the inspection. But it is possible for one statute to be a part of an overall picture of pervasive regulation. OSHA businesses, for instance, are subject to other federal controls concerning labor, civil rights, and environmental protection. The cumulative effect of these numerous regulatory statutes could result in as equally pervasive regulation as does a single statute such as that authorizing FDA inspections. The same situation exists in either case, namely that a business is frequently intruded upon by the government. Thus, multi-statute pervasive regulation should satisfy the Biswell factor. If the Supreme Court adopts this less rigid view of regulation, then an OSHA business would seem to meet it, and a warrant for the inspection would not be required.

An issue coupled with the factor of federal regulation is whether the statutory inspection scheme promotes an important federal interest. The federal interest in Colonnade was securing revenue from the liquor industry; in Biswell, it was preventing violent crimes and assisting the states in regulating firearms traffic. In cases concerning FDA inspections, courts have acknowledged that the importance of the regulations to public health puts FDA inspections "within the same category of highly-scrutinized endeavors which justifiably includes both the liquor and firearms industries."

Although the term "pervasive regulation" has been used extensively, it is unclear whether all courts use it with a uniform meaning.

References:


89 Although the term "pervasive regulation" has been used extensively, it is unclear whether all courts use it with a uniform meaning.


stated that "[i]t would be an affront to common sense to say that the public interest is not as deeply involved in the regulation of the food industry as it is in the liquor and firearms industries." Similarly, in examining coal mine inspections, a federal district court considered that the health, safety, and very lives of coal miners are jeopardized when mandatory health and safety laws are violated. In comparison, the federal interest in OSHA inspections—occupational safety and health—is of equal, if not greater, magnitude.

3. Reasonable Expectation of Privacy in the Premises

Yet another factor that courts consider in evaluating the constitutionality of warrantless administrative inspections is the relative intrusiveness of the inspection. The Camara Court conceded that a housing code inspection is "a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime." It found, however, that the Fourth Amendment interests at stake are not "merely peripheral." In See, the Court admitted that the expectation of privacy is presumably less for business premises than for a noncommercial building, but held that inspections in both instances result in significant intrusions on Fourth Amendment rights and demand the safeguards of a search warrant.

The Biswell Court, on the other hand, determined that firearms inspections do not pose a threat of impressive dimensions to privacy. Dealers in a regulated business like firearms must know that all aspects of their business, including records and stock, will be the subject of thorough inspections. Similarly, coal mine owners have been held to have a small privacy interest because they must reasonably expect that there will be intrusions onto their premises. The mine owners, in the court's view, have a diminished privacy expectation because the mines are open to a large number of workers, thus giving the public the right to ensure that the working

104 Id. at 143. See also id. at n.1.
107 Id.
109 Id.
111 Id. at 316.
conditions meet safety standards. The privacy interest of the mine operators, according to this view, is far outweighed by the governmental interest in promoting mine safety.

In evaluating the degree of intrusiveness of an OSHA inspection, one must keep in mind that only employee work areas are within the scope of the inspection; private offices or any place not frequented by employees would not be included. There is relatively less intrusiveness in an OSHA inspection than in the Camara and See inspections. Camara involved a residential dwelling; See concerned a locked storeroom. Clearly an OSHA inspection of employee work areas is a more impersonal inspection than is an inspection of a dwelling or a locked storeroom. Moreover, an OSHA inspection is even less intrusive than the inspections in Colonnade and Biswell. The areas inspected in Colonnade and Biswell, a locked liquor storeroom and a gun storeroom respectively, are more private than the semi-public work areas inspected by OSHA. An OSHA inspector would have no authority to enter the kinds of areas inspected in Colonnade and Biswell. An OSHA business owner, therefore, should have a low justifiable expectation of privacy in an employee work area.

4. Possible Frustration of the Purpose of the Inspection

The final consideration affecting the constitutionality of a warrantless administrative inspection is whether a warrant requirement would frustrate the purpose of the inspection. Courts are worried that an unscrupulous occupant might not allow an inspector to enter without a warrant, and then attempt to alter the area to be inspected while the inspector procures a warrant from a magistrate. Thus, what begins as an unannounced inspection quickly is transformed into one for which the occupant has notice — and time to prepare.

In Camara, the Supreme Court concluded that warrants could be required without threatening the effectiveness of the inspection.

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113 Id.
114 Id. See also id. at n.5.
116 See Lake Butler Apparel Co. v. Sec. of Labor, 519 F.2d 84 (5th Cir. 1975).
117 See v. City of Seattle, 387 U.S. 541, 554 (1967) (dissent). The dissent recognized that an area code inspection is impersonal in nature, a factor which contributes to its reasonableness.
Since the object of the Camara inspection was to detect building code violations, and since such conditions are not easily concealed or quickly rectified, the delay caused by obtaining a warrant for an objected-to inspection would be insignificant. It was not essential that the inspection be unannounced. Significantly, the Court noted that the City did not argue that the fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement.¹²⁰

In contrast, the objects of the inspections in Colonnade and Biswell, liquor and firearms, are easily removed or hidden. Recognizing this important distinction, the Court found that a warrant prerequisite could easily frustrate the inspection because the business people would have an opportunity to conceal or remove illegal goods from their premises while a warrant was being sought.¹²¹ Thus, unannounced, and even frequent, inspections were necessary.¹²² Similarly, the need for unannounced warrantless inspections has been affirmed in both coal mine¹²³ and FDA inspections.¹²⁴ One court noted that the statutory scheme of warrantless coal mine inspections depends on frequent unannounced inspections, and held that imposing a warrant requirement would tend to frustrate the legislative purpose of the Federal Coal Mine Health and Safety Act.¹²⁵ A comparable need for unannounced inspections in FDA cases has also been found by the courts.¹²⁶

OSHA inspections, like those in Colonnade and Biswell, involve illegal conditions which could be concealed or temporarily corrected by the employer while the inspector secured a warrant.¹²⁷ For example, employers who have permitted spray-booth ventilating fans, designed to remove toxic and flammable substances, to become clogged with residues may rapidly restore them to operating condi-

¹²⁰ Id.
¹²² Id.
¹²⁷ It must be conceded that if the employer successfully and permanently abated an OSHA violation after objecting to a warrantless inspection (while a warrant was sought), then the purpose of the OSH Act would be furthered.
tion and then allow them to deteriorate again after inspection.128 Or, guards on hazardous machines may be turned off or removed by individual operators.129 Moreover, OSHA enforcement may be blocked by temporarily disconnecting machines or barricading particular work areas: proof of a violation requires a showing that workers had access to hazardous machines or areas.130

Both the statutory language and legislative history of the OSH Act show that unannounced OSHA inspections are essential to the purpose of the Act. The inspection provision of the Act requires inspectors to enter "without delay."131 The legislative history indicates that Congress considered the warrantless nature of these inspections essential to their effectiveness. During a House debate on November 24, 1970, the sponsor of the House bill, Representative Steiger, asserted that the "inspector should gain entry to a business or work-place with an absolute minimum of delay."132 Later that same day, Steiger stated that "the Secretary, of course, would have to act in accordance with applicable constitutional protections."133

This statement has been seized upon as evidence that the Fourth Amendment requires a warrant for OSHA inspections.134 The two statements by Steiger taken together are inconclusive on the issue, but what he intended becomes clear from his remarks in the Congressional Record of January 6, 1977. Commenting on the Barlow's, Inc. v. Usery decision135 that held OSHA's inspections to be unconstitutional, Steiger emphatically and unequivocally asserted that "the right to make unannounced inspections is the cornerstone of the act"136 and "warrantless civil inspections are both absolutely essential to this act's enforcement and a long standing Federal practice."137 He further noted that no bill was introduced, reported, or

133 Id.
137 Id.
passed in either house which did not include such authority, and added that Congress had provided for warrantless civil inspections in other instances which had withstood attack in the courts. The only other specific reference in the legislative history to the issue of warrantless inspections is found in the minority view of six representatives which is included in the House Report. In a section entitled, "Ill-advised inspection provisions," they voice their opposition to warrantless searches, relying on a Fourth Amendment argument. The logical inference is that Congress intended warrantless inspections.

The statutory prohibition of advance notice of inspections, coupled with the overriding purpose of the OSH Act, indicates that the drafters realized that advance notice could frustrate the purpose of the inspection because the employer would have time to conceal violations of the standards. The House Report sheds light on this point:

Essential to the effective enforcement of this Act is the premise that employers will not be forewarned of inspections of their plants. Experience under the Walsh-Healey Act has indicated that the practice of advance notice to an employer has been a prime cause of the breakdown in that statute's enforcement provisions.

Thus, the House was aware of the difficulties surrounding advance notice in the OSH Act's predecessor and wanted to avoid that problem. Congress did not want an employer to have a grace period, a result which might flow from a warrant requirement, because that

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138 Id. In addition, Rep. Steiger stated, "And the fact remains that any requirement which would permit employers to turn inspectors away during lengthy warrant proceedings thus securing time to temporarily conceal or 'clean up' safety and health hazards, would make this carefully-considered scheme virtually powerless to reach many injurious working conditions." Id. This is the clearest statement of congressional intent on warrantless inspections, but it post-dates the legislation by seven years.


140 Id.

141 The Act, 29 U.S.C. § 651(10) (1970) and the regulations, 29 C.F.R. § 1903.6 (1976), contain general prohibitions against the giving of advance notice of inspections, "except as authorized by the Secretary or his designees." The prohibition is intended, in large part, to prevent employers from creating a misleading impression of conditions in an establishment. There may be occasions when advance notice is necessary to conduct an effective investigation within the framework of the Act. These occasions are narrow exceptions to the statutory prohibition against advance notice. OSHA Field Operations Manual, reprinted in [1976] 1 Employee Safety & Health, (CCH) ¶4330.3.


would be tantamount to advance notice. Surprise, a factor recognized by the Court in See,\textsuperscript{144} is crucial to a routine OSHA inspection to ensure that the workplace is inspected in the actual state that exists for the employees and not in a readied state for the OSHA inspector.

In comparing a routine OSHA inspection to that in Biswell, an OSHA inspection clearly meets three of the considerations: first, the OSH Act and regulations sufficiently limit the discretion of the inspector; second, the employer does not have a justifiable expectation of privacy; and third, a warrant would frustrate the purpose of the inspection. An OSHA inspection fails to meet the other Biswell consideration, pervasive regulation to further a valid public interest, unless it is broadly construed. If the Supreme Court fails to adopt this view of pervasive regulation, then the constitutionality of the warrantlessness of routine OSHA inspections depends on whether all four Biswell factors must be satisfied.\textsuperscript{145} Several OSHA inspection cases have held that all the factors are needed before the Biswell exception to the warrant requirement will control.\textsuperscript{146} However, this seems to be an overly technical approach to the problem of the reasonableness of a search under the Fourth Amendment. Pervasive regulation is primarily an indication that the occupant’s privacy expectation is low. In an OSHA inspection, the privacy expectation is already reduced because the areas to be inspected are open to employees. Moreover, weighing against this low privacy

\textsuperscript{144} See v. City of Seattle, 387 U.S. 541, 545 n.6 (1967).
\textsuperscript{145} Commentators have viewed the factors differently. One position involves viewing the factors in two tiers. First, an urgent federal interest in a pervasively regulated industry must be involved, and second, the inspection procedures themselves must be reasonable in time, manner, and scope. Only if the first factor is met, need one look at the second. That is, only within the context of a qualifying regulatory scheme will the reasonableness of the statute be explored. This two tiered approach is developed in Note, Brennan v. Buckeye: Constitutionality of OSHA Warrantless Search, DUKE L.J. 406 (1975). Another approach is to consider the factors either independently or dependently. An analysis of the factors as dependent would mean that a case would be controlled by Biswell only if it met all of the Biswell factors. This distinction is discussed in Comment, OSHA v. The Fourth Amendment: Should Search Warrants Be Required for ‘Spot Check’ Inspections?, 29 BAYLOR L. REV. 283 (1977).
\textsuperscript{146} See Dunlop v. Hertzler Enterprises, Inc., 418 F. Supp. 627 (D.N.M. 1976), appeal docketed, No. 76-2020 (10th Cir. Oct. 7, 1976); Usery v. Centrif-Air Machine Co., 424 F. Supp. 959 (N.D. Ga. 1977). The court did not consider any other factors because the pervasive regulation issue was not met. In Centrif-Air, the court discussed it in terms of the factors being cumulative not repetitive. Thus, these two courts viewed the factors dependently although no language in Biswell expressly directs this interpretation. Barlow's, Inc. v. Usery, 424 F. Supp. 437 (D. Idaho 1976), also impliedly used this approach; once the court concluded that there was no pervasive regulation it went no further. Direction from the Supreme Court is clearly needed at this juncture.
expectation are the socially important purposes of the OSH Act and the stringent restrictions it places on the inspector's discretion. A neutral, detached magistrate seems unnecessary here; hence, the warrantlessness of the inspection should be "reasonable" under the Fourth Amendment.

One way of conceptualizing the relaxation of the warrant requirement in the OSHA context is to view the statute as taking the place of a search warrant as a means of ensuring a "reasonable" search. A warrant would neither provide the employer with any added protection nor further delineate the limits on the inspector. Thus, warrantless OSHA inspections can be viewed as reasonable under the Fourth Amendment because they are adequately limited and offer a minimal potential for abuse.

B. Consequences of a Warrant Requirement

If the Supreme Court maintains that warrantless OSHA inspections are unconstitutional, then it could read into the OSH Act a warrant requirement for nonconsensual routine inspections. This approach was taken by a federal district court in Brennan v. Gibson's Products, Inc. and followed in several other cases. This would conform to the constitutional principle of construing a statute, if possible, in a manner consistent with the Constitution. It would conflict with the legislative intent to permit warrantless inspections, but the alternative is striking down the OSH Act.


118 This approach was taken in Youghiogheny & Ohio Coal Co., 364 F. Supp. 45, 51 (S.D. Ohio 1973).

119 The dissent in Camara-See questioned the effectiveness of warrants issued according to flexible probable cause. The dissent envisioned "paper warrants," issued pro forma, and affording no meaningful protection. See v. City of Seattle, 387 U.S. 541, 554 (1967) (dissent). In the alternative, the dissent suggested administrative warrants instead of ones issued by a magistrate. Id. at 548 n.1. See South Dakota v. Opperman, 428 U.S. 364, 383 (1976) (Powell, J., concurring) (no special facts for magistrate to review).


inspection provisions entirely.\textsuperscript{153}

If the Court interprets the OSH Act as requiring a warrant, it could salvage some of OSHA's effectiveness by establishing an \textit{ex parte} warrant requirement. The Court has yet to take this route for administrative inspections. In \textit{Camara}, it noted that as a "practical matter" warrants would normally be sought after entry is refused.\textsuperscript{154} The See Court specifically refrained from holding that warrants could be issued only after entry is denied, recognizing that "surprise may often be a crucial aspect of routine inspections of business establishments."\textsuperscript{155} An OSHA inspection requires entry "without delay," and only an \textit{ex parte} warrant would make this possible.

V. \textbf{Camara Flexible Probable Cause Applied to Routine OSHA Inspections}

Whether or not a warrant is required, no search can be conducted except upon probable cause; that is, there must be a constitutionally sufficient reason to enter the premises.\textsuperscript{156} As noted earlier, the \textit{Camara} Court introduced a new flexible standard of probable cause for administrative inspections\textsuperscript{157} because traditional probable cause would make it impossible to obtain a warrant. Balancing the nature of the intrusion against the need for the administrative inspection, the Court concluded that the Fourth Amendment was satisfied if there are reasonable legislative or administrative standards for an inspection,\textsuperscript{158} and if a valid public interest is served thereby.\textsuperscript{159} As in \textit{Camara} and See, the only type of probable cause relevant to a routine OSHA inspection is the flexible \textit{Camara} kind. A routine OSHA inspection, by its very nature, means that no specific complaint or information triggered it. Routine OSHA inspections have employee safety and health, a valid governmental interest, as their

\begin{footnotesize}

\textsuperscript{154} This generality would not apply where there is a citizen complaint or a reason for securing immediate entry. Camara v. Municipal Court, 387 U.S. 523, 539 (1969).

\textsuperscript{155} See v. City of Seattle, 387 U.S. 541, 545 n.6 (1967).


\textsuperscript{157} See text at notes 50-56, \textit{supra}.

\textsuperscript{158} Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

\textsuperscript{159} \textit{Id.} at 539. See United States v. Thriftmart, 429 F.2d 1006, 1008-09 (9th Cir. 1970), for a good discussion of \textit{Camara} probable cause as compared with criminal probable cause. \textit{Camara} probable cause would probably require that the inspector (1) describe agency's standard for inspection, (2) allege that standards are reasonable, and (3) present other available information on condition of building or general area.
\end{footnotesize}
goal. Further, they are conducted according to the statutory limits on time, place, and scope, and an Area Director selects the sites according to established procedures. Thus, whenever a business is inspected pursuant to the OSH Act, the inspection should meet Camara probable cause.160

Although this new standard of probable cause for administrative inspections was explicitly outlined in Camara, lower courts have misapplied it to routine OSHA inspections. In Brennan v. Buckeye Industries, Inc.,161 the court commented that the requirement of showing probable cause would destroy the object of the OSH Act because it would, in effect, “require an employee to report a violation in order for any investigation to be made.”162 This view of probable cause is inconsistent with the flexible standard articulated in Camara, and is more closely aligned with the traditional standard, since it is concerned with whether there is probable cause to believe a violation existed in the particular business instead of whether there is probable cause to routinely inspect that type of business.163 Indeed, the Barlow's164 court was also confused about Camara probable cause. The court's categorical statement that the OSHA inspector did not have “any cause, probable or otherwise, to believe a violation existed,”165 indicates that the court was using the traditional standard, because a showing that a violation existed should play no role in Camara probable cause.

In other routine OSHA inspection cases, courts ostensibly apply Camara probable cause but do so incorrectly. In Brennan v. Gibson's Products, Inc.,166 the court purportedly used “probable cause standards appropriate to administrative searches,” but did not find probable cause for the inspection,167 as there was no reason or certainty to believe that hazardous working conditions existed in the

160 The standards suggested by Camara as supporting a finding of probable cause are not particularly useful for OSHA inspections. Passage of time is not very helpful because often an OSHA inspection has never been done before (unlike periodic housing or fire code inspections that occur yearly or more frequently). However, the Camara Court only suggested some standards relevant to that case, and the standards should be flexible depending on the type of inspection.


162 Id. at 1354.

163 The court reported that “no probable cause for a search warrant was attempted.” Id. at 1351.


165 Id. at 438-39.


167 Id. at 162.
area to be searched. Camara, however, would not require reason to believe that a violation definitely existed. In Dunlop v. Hertzler Enterprises, Inc., the court was clearly aware of a different standard of probable cause for administrative inspections, but still applied it incorrectly. When the employer objected to the routine OSHA inspections, the inspector obtained a warrant from a magistrate that ordered entry, inspection, and investigation. The court observed that “no showing of probable cause was made as a basis for issuance of the warrant.” In a footnote it was added that the warrant application included only a recitation of the OSHA inspection provisions as authority for the proposed inspection, plus statements that the inspection was necessary to determine compliance with OSHA and that OSHA inspectors previously had been denied entry. The warrant itself, the court complained, “contained a conclusory assertion that reasonable legislative and administrative standards had been proposed for the inspection.” The facts provided to obtain this warrant, however, were exactly the sort of information that should satisfy Camara probable cause. In Usery v. Centrif-Air Machine Co., Inc., the court analyzed probable cause, as Camara had, as a “balancing of the need to search against the intrusion which searching would entail,” but then concluded that there was no basis for issuing a warrant. In a footnote, it mentioned that the inspection site had been selected on a “semi-random” basis, that no complaint had been filed, and that the only pertinent criterion raised at the evidentiary hearing was that the site had not been inspected previously. This information, too, should be sufficient to meet Camara probable cause. Most recently, in Marshall v. Shellcast, Corp., a federal district court used Camara probable cause, but refused to allow OSHA to rely on na-
tional statistics for occupational injuries and illnesses within the iron and steel foundry industry to establish probable cause. The court ruled that more individualized figures for the particular company must be reported to the magistrate. The court was critical of OSHA for not attempting to obtain statistics for the specific businesses, yet arguably Camara probable cause would not require individual statistics.

Clearly, then, Camara probable cause has led to confusion and inconsistency in its application by lower courts. However, it has not been totally misapplied; in Marshall v. Chromolloy Corp., the court based its finding of Camara probable cause on the potentially hazardous nature of the business and the general purpose of the OSH Act. This case correctly demonstrates that as long as a routine OSHA inspection is conducted according to the carefully limited statutory and administrative standards, Camara probable cause should be satisfied.

VI. CONCLUSION

Ultimately what the Supreme Court must determine in Marshall v. Barlow's, Inc. is whether a warrantless routine OSHA inspection violates the Fourth Amendment's guarantee against unreasonable searches. Barlow's provides the Court with an opportunity to settle several important issues. Regarding the standard of probable cause, the Court should declare unequivocally that Camara probable cause is the appropriate standard for routine OSHA inspections. Since OSHA case law is replete with examples of misapplication of Camara, the Court must explain what factual showing is needed to satisfy Camara probable cause in the OSHA context. On the issue of the warrant requirement, the Court should clarify the relationship of the Biswell considerations, specifically whether all four are needed for Biswell to control, and should explain the term "pervasive regulation." In sum, warrantless OSHA inspections should be upheld as a reasonable means to promote the valid and crucial government interest in the health and safety of all working people.

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17 Shellcast Corp. was chosen as part of National Emphasis Program that selected the iron and steel foundry industry as a target industry for OSHA. This was based on the high incidence of occupational accidents and illness in this industry.

18 The Shellcast decision is a narrow one, maintaining only that if individualized information on occupational accidents and diseases exists, then OSHA cannot base its probable cause on national figures for the industry.


20 Id. at 333.