BRENNAN v. BUCKEYE INDUSTRIES, INC.: THE CONSTITUTIONALITY OF AN OSHA WARRANTLESS SEARCH

In *Brennan v. Buckeye Industries, Inc.*,[1] the Federal District Court for the Southern District of Georgia held that warrantless administrative entry of a business establishment for the purpose of an inspection pursuant to the Occupational Safety and Health Act of 1970[2] (OSHA) was not an uureasonable search within the meaning of the fourth amendment.[3] The case arose when an OSHA inspector, without first obtaining a search warrant, went to inspect the Buckeye Industries plant,[4] which was not open to the public. She sought admittance by showing the plant manager her credentials and announcing her intention to conduct a "general inspection."[5] Because of the plant manager's desire to have Buckeye's attorney from Jacksonville, Florida, present as the company's authorized representative[6] during the inspector's walk-around and the inspector's unwillingness to await the lawyer's arrival, access to the facility was denied.[7] The following day the Sec-

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1. 374 F. Supp. 1350 (S.D. Ga. 1974).

2. 29 U.S.C. §§ 651 *et seq.* (1970).

3. The fourth amendment to the United States Constitution provides:

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

The *Buckeye* case is the first in the federal courts to deal with the issue of the constitutionality of OSHA inspections. The court also discussed the issues of jurisdiction and exhaustion of administrative remedies involved in the case. A second case dealing with the constitutional issue was recently filed in Texas. *See* Brennan v. Gibson Prods., Inc., Civil No. S-75-5-CA (E.D. Tex., filed Jan. 20, 1975). The constitutional question has also been discussed at the administrative hearing level. *See* Accu-Namics, Inc., 1973-74 CCH OCC. SAFETY & HEALTH DEC. ¶ 17,936, at 22,232-33 (O.S.H.R.C., May 30, 1974); Southern Ind. Gas & Elec. Co., 1971-1973 CCH OCC. SAFETY & HEALTH DEC. ¶ 15,238 (O.S.H.R.C. 1972).

4. Buckeye Industries manufactures men's clothing. The plant is located in Wrightsville, Ga.

5. 374 F. Supp. at 1351. OSHA inspections fall into four general categories of decreasing urgency and priority: (1) catastrophe or fatality investigations, (2) complaint investigations, (3) Target Industry Program (TIP) investigations, and (4) general inspections. U.S. Dep't of Labor, Field Operations Manual, 2 BNA OCC. SAFETY & HEALTH REP., ch. IV, parts B(1), (2), (3), at 77:2301-04 (1974).

6. *See* 29 U.S.C. § 657(e) (1970).

7. 374 F. Supp. at 1351.

retary of Labor sought an order[8] from the district court requiring Buckeye to submit to an inspection of its facilities.[9] In response to the company's claim that warrantless OSHA inspections violate the fourth amendment, the government conceded the absence of probable cause for the issuance of a search warrant[10] but contended that the Secretary of Labor has the right to inspect businesses within the coverage of the Act without any showing of probable cause of violations.[11] Chief Judge Lawrence agreed with the government arguments and ruled that in the context of the regulatory power exercised by the federal government, there was a "compelling need" for unannounced inspections under OSHA[12] and that warrantless administrative entries for OSHA inspections of private commercial premises were valid.[13] The court reasoned that requiring a demonstration of probable cause for issuing an administrative search warrant would effectively render the Act useless.[14]

OSHA, which is applicable to some sixty million employees and five million businesses,[15] was enacted by Congress "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . ."[16] To effectuate this broad pur-

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8. 29 C.F.R. § 1903.4 (1974). U.S. Dep't of Labor, *supra* note 5, ch. V, parts D(2)(g), (h), at 77:2506-07.

9. 374 F. Supp. at 1351.

10. Respondents' Reply to Secretary's Memorandum of Authorities at 2, Brennan v. Buckeye Indus., Inc., 374 F. Supp. 1350 (S.D. Ga. 1974).

11. 374 F. Supp. at 1351-52.

12. The Act provides that "[a]ny person who gives advance notice of any inspection to be conducted under this chapter, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both." 29 U.S.C. § 666(f) (1970). But see notes 60-61 *infra* and accompanying text.

13. 374 F. Supp. at 1354.

14. *Id.*

15. Robbins, *Truth and Rumor About OSHA*, 33 FED. B.J. 149, 149 (1974). The author observed, "OSHA coverage is comprehensive. Virtually every private employer, except those specifically excepted by virtue of coverage under other legislation and those who are self-employed, is included." *Id.* No other piece of federal legislation so extensively and pervasively involves itself in the affairs of American private industry. PRACTISING LAW INSTITUTE, OCCUPATIONAL SAFETY AND HEALTH ACT: TRENDS AND DEVELOPMENTS 9 (M. Stokes ed. 1974). As one Senator has 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).

16. 29 U.S.C. § 651(b) (1970). Under OSHA it is the duty of each employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm . . . ." *Id.* § 654(a)(1). In addition, employers are

[t]o comply with occupational safety and health standards promulgated under

pose, the Act provides specific inspection and enforcement procedures which allow government personnel, upon presenting appropriate credentials, to enter at reasonable times the premises of all workplaces covered by the Act for the purpose of inspecting and investigating working conditions.[17] Even though the legislative history of the Act indicates congressional concern with possible conflicts between the Act's investigatory provisions and the right to privacy protected by the fourth amendment,[18] the enforcement scheme contains no search warrant requirement or other judicial protection.[19] OSHA

> the Act, . . . post notices to keep employees informed of their rights and duties, including provisions of applicable standards, . . . maintain records of all work-related injuries, illnesses, deaths and exposure of employees to toxic materials and harmful physical agents, . . . provide physical examination for employees to determine if exposure to toxic substances or potentially harmful physical agents has exceeded permissible limits, . . . [and] post copies of citations of violations at or near each place a violation has occurred. PRACTISING LAW INSTITUTE, *supra* note 15, at 11.

Failure adequately to meet these requirements may result in both civil and criminal penalties. *See* 29 U.S.C. § 666 (1970). For a recent case discussing the constitutionality of the imposition of civil penalties under OSHA, see Frank Irey, Jr., Inc. v. OSHRC, 2 BNA OCC. SAFETY & HEALTH REP. 1283 (3d Cir.), *vacated pending rehearing*, 2 BNA OCC. SAFETY & HEALTH REP. 1445 (1974).

For general discussions of the Act, see PRACTISING LAW INSTITUTE, *supra* note 15; Gross, *The Occupational Safety & Health Act: Much Ado About Something*, 3 LOYOLA CHI. L.J. 247 (1972); White, Jr., & Carney, *OSHA Comes of Age: The Law of Work Place Environment*, 28 BUS. LAW. 1309 (1973); *Symposium—Occupational Safety and Health*, 38 LAW & CONTEMP. PROB. 583 (1974); *Symposium: The Developing Law of Occupational Safety and Health*, 9 GONZAGA L. REV. 317 (1974); Comment, *The Occupational Safety and Health Act of 1970: An Overview*, 4 CUMBERLAND-SAMFORD 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); Comment, *OSHA: Employer Beware*, 10 HOUSTON L. REV. 426 (1973).

17. 29 U.S.C. § 657(a)(1), (2) (1970). The Secretary of Labor 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
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> (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. *Id.*

18. During the course of debate on OSHA, Congressman Steiger, one of the bill's co-authors, specifically stated that "in carrying out inspection duties under the legislation, the Secretary [of Labor] of course, would have to act in accordance with applicable constitutional protections." 116 CONG. REC. 38,709 (1970).

19. The legislation provides simply that representatives of the Secretary of Labor present their credentials to the agent in charge of the business and make their inspections during regular working hours and in a reasonable manner. The owner is entitled to have a representative present throughout the course of the investigation and the right to inspect is confined to those structures and conditions having relevance to the Act. 29 U.S.C. §§ 657(a)(1)(2), (e) (1970); *see* Comment, *OSHA: Employer Beware*, *supra* note 16, at 445.

provides no penalty for an employer's refusal to permit a warrantless search, and Labor Department regulations require that a warrant be sought in the face of such a refusal.[20] The central issue presented in *Buckeye* was whether a showing of probable cause for the issuance of this warrant for an administrative search was constitutionally mandated.

The Supreme Court, in two fairly recent lines of cases, has abrogated what was the traditional rule[21] of not requiring warrants for administrative searches. In *Camara v. Municipal Court*,[22] a case involving a tenant's conviction for refusal to allow a warrantless inspection of his apartment by housing inspectors, the Supreme Court held that the fourth amendment required the obtaining of a search warrant for unconsented "area"[23] inspections of private dwellings for health code violations.[24] The probable cause standard required to be

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20. U.S. Dep't of Labor, *supra* note 5, ch. V, part D(2) (Refusal to Permit Inspection—Warrants), at 77:2505-09; see PRACTISING LAW INSTITUTE, *supra* note 15, at 89; *Symposium: The Developing Law of Occupational Safety and Health, supra* note 16, at 559.

21. The traditional rule was announced in Frank v. Maryland, 359 U.S. 360 (1959), where the Supreme Court first dealt with the applicability of the fourth amendmeut to administrative searches. In a five to four decision, the Court upheld the conviction of a homeowner who had refused entry to a municipal health inspector who did not have a warrant. Viewing bealth inspections as reaching "at most the periphery" of constitutional protections against official intrusion, *id.* at 367, Justice Frankfurter relied primarily upon the distinction between the civil nature of administrative investigations and the more traditional criminal searches to make fourth amendment safeguards applicable only to criminal investigations. *Id.* at 365-67. *See also* LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1, 8 n.27.

For general discussions of administrative search warrants, see 1 K. DAVIS § 3.05 (1958); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT—A STUDY IN CONSTITUTIONAL INTERPRETATION (1966); 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 (1973); LaFave, *supra*; Note, *Administrative Searches and the Right to Privacy in the United States*, 23 INT'L & COMP. L.Q. 169 (1974); Note, *Administrative Search Warrants*, 58 MINN. L. REV. 607 (1974); Note, *Inspections by Administrative Agencies: Clarification of the Warrant Requirement*, 49 NOTRE DAME LAW. 879 (1974); Note, *Administrative Inspections and the Fourth Amendment*, 12 WASHBURN L.J. 203 (1973); Note, *The Law of Administrative Inspections: Are Camara and See Still Alive and Well?*, 1972 WASH. U.L.Q. 313.

22. 387 U.S. 523 (1967).

23. See Note, *Administrative Search Warrants, supra* note 21, at 637-640, for a discussion of area searches. *See also* Almeida-Sanchez v. United States, 413 U.S. 266, 275-85 (Powell, J., concurring) (1973).

24. 387 U.S. at 534. In rejecting the *Frank* rationale, see note 21 *supra*, the Court stated:

> [W]e cannot agree that the Fourth Amendment interests at stake in these inspections are merely "peripheral." It is surely anomalous to say that the indi-

satisfied for the issuance of an administrative warrant was to be determined by applying a "balancing test";[25] the stronger and more compelling the governmental interest in the search or entry, the lower the threshold of probable cause required.[26] In *See v. City of Seattle*,[27] a case involving fire inspections of commercial establishments, the Court extended the *Camara* warrant and flexible probable cause requirements to inspections of those portions of business premises not open to the public,[28] but suggested that licensing programs which require inspections prior to operating a business might well remain beyond the scope of the *Camara* warrant requirement.[29]

The *Camara-See* rule was refined by a line of Supreme Court cases beginning in 1970. In *Colonnade Catering Corp. v. United States*,[30] which involved a forcible warrantless inspection of a business establishment possessing a liquor license, the Court held that a statutorily authorized administrative search carried out in an "industry long subject to close supervision and inspection"[31] did not offend the fourth amendment.[32] Expanding on the narrow holding of *Colonnade*,[33]

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vidual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. *Id.* at 530.

25. *Id.* at 536-37. "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasiou which the search entails." *Id. See also* Greenberg, *supra* note 21, at 1046-47.

26. 387 U.S. at 538-39. Two important exceptions to its warrant ruling were noted by the *Camara* Court—inspections without a warrant are not to be foreclosed in emergency situations and a warrant is not necessary if proper consent is given prior to the search. *Id.* at 539.

27. 387 U.S. 541 (1967).

28. *Id.* at 545. The *See* Court, however, noted that it was not deciding

> whether warrants to inspect business premises may be issued only after access is refused; since surprise may often be a crucial aspect of routine inspections of business establishments, the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved and may differ from standards applicable to private homes. *Id.* n.6.

29. *Id.* at 545-46. The Court also indicated that it might allow business premises to be inspected in many more situations than private homes, although the warrant procedure would remain equally applicable to both. *Id.* Justice Clark, joined by Justices Harlan and Stewart, wrote the combined dissent in *Camara* and *See*, stressing what he foresaw as the disastrous practical effects of the decisions. The dissent challenged the majority's view that there would be little use of the warrant requirement, noting that human nature and the prospects for costly repairs would insure a large number of refusals of entry to inspect. *Id.* at 546-55.

30. 397 U.S. 72 (1970).

31. *Id.* at 77.

32. *Id.* Writing for the Court, Justice Douglas emphasized the long history of scrutiny the federal government has imposed on the manufacture, sale, and transport of alcoholic beverages. *Id.* at 75. Noting that Congress has broad powers to establish standards of reasonableness for searches and seizures in the closely regulated area of liquor control, *id.* at 77, it was but a small step for the Court to reason that the fourth amendment's requirement of reasonableness had been satisfied by the particular object of the

the Court in *United States v. Biswell*[34] held that a warrantless search of a locked pawnshop storeroom pursuant to the Gun Control Act of 1968[35] was valid because of the "pervasively regulated"[36] nature of the gun sales industry.[37] Recently, in *Youghiogheny and Ohio Coal Co. v. Morton*,[38] a district court, apparently for the first time, extended into the occupational safety and health field the *Biswell* "pervasively regulated" industry exception to the warrant requirement of *Camara*.[39] The court upheld warrantless searches of coal mines made pursuant to the Federal Coal Mine and Safety Act[40] and based its decision upon traditional federal regulation of the coal mining industry.[41] The *Colonnade-Biswell* line of cases adopted what is essentially a two-tiered test of the validity of warrantless administrative searches absent probable cause to suspect a violation: (1) an "urgent federal interest"[42] in a "pervasively regulated"[43] industry must be

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search in *Colonnade*. As a result, the holding did not rest primarily on the fact that the statutes involved might be considered "reasonable," but rather on the historically accepted governmental regulatory interest in liquor.

33. *Colonnade* was not at first viewed as evidence that the *Camara-See* warrant requirement was undergoing refinement. *See* Note, *Administrative Search Warrants, supra* note 21, at 615. It was not until the following year that the break became more apparent in Wyman v. James, 400 U.S. 309 (1971), where the Court held that a warrantless visit to the home of a welfare recipient, carried ont under the provisions of New York law, did not constitute a search within the fourth amendment and that even if it did, it met the fourth amendment's requirement of reasonableness.

34. 406 U.S. 311 (1972).

35. 18 U.S.C. §§ 921 *et seq.* (1970).

36. 406 U.S. at 316.

37. *Id.* at 317. The decision was clearly not intended to be limited to the facts of the case, for the Court established several prerequisites in order for a warrantless inspection statute to meet the "reasonableness" reqnirement of the fourth amendment. To allow warrantless entry, an "urgent federal interest," *id.*, must be at stake in a federally regulated industry and the inspection must be a crucial part of this established regulatory scheme, *id.* at 315. Furthermore, the Court held that flexibility and surprise as to time, scope, and frequency of entry must be deemed vital and the inspection must pose only a limited threat to justifiable expectations of privacy. *Id.* at 316; *see* Note, *Inspections by Administrative Agencies, supra* note 21, at 887-88.

38. 364 F. Supp. 45 (S.D. Ohio 1973).

39. Over the course of the past three years, the "pervasively regulated" test has also been met in such areas as the control of food products, pharmaceuticals, and drugs. *See, e.g.*, United States *ex rel.* Terraciano v. Montanye, 493 F.2d 682 (2d Cir.), *cert. denied*, 93 S. Ct. 137 (1974); United States v. Del Campo Baking Mfg. Co., 345 F. Supp. 1371 (D. Del. 1972).

40. 30 U.S.C. §§ 801 *et seq.* (1970).

41. 364 F. Supp. at 47. This district court recognized the continuing validity of the *Camara-See* rule, maintaining that "warrantless searches conducted without prior judicial approval are *per se* unreasonable under the Fourth Amendment subject only to a few jealously limited and carefully guarded exceptions." *Id.* at 48.

42. United States v. Biswell, 406 U.S. 311, 317 (1972).

43. *Id.* at 316.

involved; and (2) the inspection procedures themselves must be reasonable in time, manner, and scope.[44]

Despite considerable attention by the Court to the problem of warrantless administrative searches in both the *Camara-See* and *Colonnade-Biswell* lines of cases, there remain areas of considerable uncertainty.[45] For example, the law is unclear where a business is subject to a regulatory scheme which is not as pervasive as that found in *Biswell* or where an otherwise unregulated industry engages in specific activities that are subject to an investigatory scheme such as the one found in OSHA.[46] Use of the two-tiered analysis would provide an intelligible framework within which administrative search problems which are not clearly controlled by either the *Camara-See* line or by the *Colonnade-Biswell* line of cases could be solved.

In *Buckeye*, the court relied solely upon the second branch of the two-tiered test[47] to uphold the warrantless OSHA entry; it ignored the initial inquiry into the presence or absence of a "pervasively regulated" industry and proceeded to examine the reasonableness of the OSHA scheme in time and scope.[48] No distinction was seen between the "area"[49] searches of the *Camara-See* line on the one hand, and investigations of "pervasively regulated" businesses under *Colonnade-Biswell* on the other. The court simply reasoned that the trend in administrative search cases was toward warrantless entry.[50] Implicit in the *Buckeye* court's upholding of warrantless OSHA inspections without a showing of probable cause was the premise that the success of the investigatory scheme of the Act depended upon the "surprise" of unannounced inspections.[51]

The *Buckeye* holding is subject to criticism for its misreading of

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44. *Id.* at 315. See notes 30-41 *supra* and accompanying text. Only when the first part of the test is satisfied need one be concerned with the second requirement of a reasonable inspection procedure outlined by a valid statute. That is, only within the context of a qualifying regulatory scheme will the reasonableness of the statute be explored.

45. *See* Note, *Administrative Search Warrants, supra* note 21, at 608. However, *Camara* and *See* still have vitality, and it is misleading to contend that "the [Supreme Court] has followed the track back very close to where it began with its holding in Frank v. Maryland." Note, *Inspections by Administrative Agencies, supra* note 21, at 890.

46. *See* Note, *Administrative Search Warrants, supra* note 21, at 622-24.

47. See notes 42-44 *supra* and accompanying text.

48. 374 F. Supp. at 1354.

49. See note 23 *supra* and accompanying text.

50. 374 F. Supp. at 1354-56. The court provided only the most superficial analysis of the line of cases from *Camara* to *Biswell* and on to *Youghiogheny*.

51. *Id.* at 1354. Such a holding is not necessarily beyond the scope of the *Camara-See* line of cases. See note 28 *supra*.

both case precedent[52] and the Act itself.[53] On its facts the case appears to fit the *Camara-See* line better than the *Colonnade-Biswell* line: *Camara* and *See* both dealt with health and safety inspections,[54] just as OSHA does;[55] *Camara* and *See* involved area-wide searches not focusing on individual persons or particular businesses,[56] very much analogous to the broad sweep of OSHA;[57] and the fire and health codes in *Camara* and *See* had as their principle objective securing compliance rather than prosecution,[58] as does OSHA.[59] Also, the need for surprise inspections to insure the success of the Act, which was relied upon by the *Buckeye* court to authorize warrantless OSHA entries, appears to have been overstated.[60] The Secretary of Labor has recognized that because compliance is the goal of the Act, allowing advance notice of inspections may contribute to, not detract from, the statutory scheme by encouraging the early correction of defects before injuries occur.[61] Even if an inspector were required to obtain

52. The very cases on which the *Buckeye* court relied to support its placing of OSHA searches in the *Colonnade-Biswell* line—*Biswell,* United States *ex rel.* Terraciano v. Montanye, 493 F.2d 682 (2d Cir.), *cert. denied,* 93 S. Ct. 137 (1974), and *Youghiogheny*—all specifically based their holdings on the fact that only iu the context of a pervasively federally regulated business will the reasonableness of the statute be explored. In *Biswell,* the Supreme Court stated that "*when a dealer chooses to engage in this pervasively regulated business and to accept a federal license* . . . inspection may proceed without a warrant where specifically authorized by statute." 406 U.S. at 316-17 (emphasis added). Judge Friendly of the Second Circuit quoted approvingly from one of his colleagues' holdings that warrantless searches are acceptable only in "an inspection statutorily limited to the business records and goods of *industries that are properly subject to intensive regulation in the public interest.*" 493 F.2d at 685 (emphasis added). And the *Youghiogheny* district court also made this point when it held that "the plaintiff at bar, *a business in a pervasively regulated industry,* has consented by iuplication at least, to reasonable intrusion by federal authorities." 364 F. Supp. at 50 (emphasis added). Buckeye Industries did not meet the first part of the two-tiered test. As a clothing manufacturer, Bnckeye was not iu a pervasively regulated business.

53. See notes 60-61 *infra.*

54. See notes 22-29 *supra* and accompanying text.

55. See notes 15-17 *supra* and accompanying text.

56. 387 U.S. at 533, 541.

57. *See* 29 U.S.C. §§ 651(b), 654 (1970).

58. *See* Note, *Administrative Search Warrants, supra* note 21, at 638-39.

59. In discussing the House-Senate conference report on OSHA, one floor-leader of the bill noted that OSHA "emphasizes the preventative rather than the punitive aspect of job safety regulation." 116 CONG. REC. 42,203 (1970) (remarks of Congressman Daniels).

60. 374 F. Supp. at 1354. It is true that Congress provided that any person "who gives advance notice of [an OSHA] inspection . . . without authority" may be prosecuted. 29 U.S.C. § 666(f) (1970). The sanction, however, does not mean that advance notice of inspections is absolutely prohibited.

61. *See* 29 C.F.R. § 1903.6 (1974). U.S. Dep't of Labor, *supra* note 5, ch. V, part B (Advance Notice of Inspections), at 77:2501-03. The rules do not authorize a broad use of advance notice but do recognize its value when it "would enhance the probability

a warrant by swearing out an affidavit and obtaining a magistrate's signature, surprise would not necessarily be eliminated[62] since more than one inspection might be authorized per warrant, as is the practice in area searches, and the level of probable cause need not be unduly high.[63] Furthermore, the inconvenience of obtaining a warrant based on probable cause would not seem to be an excessive burden on the government.[64] Factors such as the type of industry inspected and the time elapsed since the last inspection could be employed to evaluate the level of probable cause required.[65] Finally, the court ignored completely possible affirmative benefits which requiring a warrant for OSHA entries might provide. In particular, a magistrate's review of warrant requests could insure a check on how businesses are targeted for inspection[66] and would help deter harassment tactics which might be employed by inspectors.[67]

The policy underlying OSHA is laudable, and the district court's fervor in enforcing the Act is understandable.[68] This enforcement,

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of an effective and thorough inspection." 29 C.F.R. § 1903.6(a)(4) (1974). *See also* Remarks of George H. Cohen before Ohio Legal Center Institute Annual Midwest Labor Law Conference, 1972-73 BNA OCC. SAFETY & HEALTH REP. 584, 587-88.

62. *See* Greenberg, *supra* note 21, at 1022-23.

63. *Id.* See notes 25-26 *supra* and accompanying text.

64. Though the swearing out of an affidavit might take a small amount of time and be an inconvenience to the OSHA inspector, it would only reach the level of an excessive burden if it served to frustrate the aim of the Act. Camara v. Municipal Court, 387 U.S. 523, 533 (1967). *See* Greenberg, *supra* note 21, at 1023.

65. Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

66. The fact that certain businesses in a given industry are inspected and fined while others are not inspected at all may result in unwarranted economic advantage to those firms passed over.

67. At the present time the worry need not be that OSHA inspectors would be making daily searches of a business as a method of harassment, since there are only some five hundred compliance officers to cover approximately five million businesses. Harassment, however, might take the form of overzealous enforcement once there is an inspection. *See* PRACTISING LAW INSTITUTE, *supra* note 15, at 89; Greenberg, *supra* note 21, at 1023.

68. The Supreme Court has yet to consider the question of the application of the warrant requirement to OSHA inspections, but last year reviewed the question of the need for a search warrant in a case involving a pollution control statute—legislation similar to OSHA in that its highly regulated standards apply across the board to numerous unregulated industries. The case involved a Colorado health inspector who had made an opacity test of smoke being emitted from a company's chimney while standing outside on the firm's property, without the firm's knowledge or consent and without a warrant. The Colorado Court of Appeals held this test to be an unreasonable search within the fourth amendment, but the Supreme Court reversed, holding that the fourth amendment protections do not extend to sights seen "in the open fields." Air Pollution Variance Bd. v. Western Alfalfa Corp., 94 S. Ct. 2114, 2115-16 (1974), *rev'g* 510 P.2d 907 (Colo. Ct. App. 1973). In emphasizing the continuing vitality of *Camara* and *See*, however, the Court indicated that its ruling might have been different if this inspection had been

however, should not extend beyond fundamental fourth amendment legal principles applicable to administrative searches. The result reached in *Buckeye* would effectively extend the warrantless entry exception now limited to "pervasively regulated" industries to all businesses in general. When Judge Lawrence observed that insistence on a search warrant based on probable cause is, "constitutionally speaking, marching to the beat of an antique drum,"[69] it was the court, not the corporation, that was out of step.

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made inside the plant in areas from which the public was excluded, as is generally the case with OSHA inspections. 94 S. Ct. at 2116.

69. 374 F. Supp. at 1356.