OSHA INSPECTIONS AFTER *MARSHALL v. BARLOW'S, INC.*

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I. INTRODUCTION

The Occupational Safety and Health Act of 1970 (OSHA)[1] is a sweeping piece of remedial labor legislation. It applies to virtually every private employer in the nation—an estimated five million workplaces and sixty-four million employees.[2] Section 8(a) of the Act,[3] which authorizes the Secretary of Labor to conduct inspections, neither authorizes the issuance of warrants nor provides whether warrants are necessary. Consequently, there have been conflicting interpretations of this section by the lower courts.[4]

In *Marshall v. Barlow's, Inc.*,[5] the Supreme Court held that nonconsensual OSHA inspections may be conducted under section 8(a) only pursuant to a warrant. The decision has raised numerous questions about the ability of the Secretary of Labor to conduct necessary inspections, the probable cause required to obtain a warrant, and the prudence of an employer's requiring a warrant. This Article traces the antecedents of the *Barlow's* case, analyzes the opinion itself, and addresses the implications of *Barlow's* for inspection procedures under OSHA.

II. THE *CAMARA* AND *SEE* CASES

In 1967, in the companion cases of *Camara v. Municipal Court*[6]

1. 29 U.S.C. §§ 651-78 (1976).

2. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL INJURIES AND ILLNESSES IN THE UNITED STATES, BY INDUSTRY, 1974, at 1 (1976); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL INJURIES AND ILLNESSES IN THE UNITED STATES, BY INDUSTRY, 1973, at vii (1975).

3. 29 U.S.C. § 657(a) (1976).

4. See text accompanying notes 70-95 *infra*.

5. 436 U.S. 307 (1978).

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

and *See v. City of Seattle*,[7] the Supreme Court first held that administrative inspections of commercial and noncommercial premises are subject to the warrant requirements of the fourth amendment. An earlier case had held that the fourth amendment was applicable only to criminal searches and seizures.[8]

In *Camara*, the lessee of an apartment refused to permit the warrantless inspection of his premises by a housing inspector who was making a routine annual inspection. The Supreme Court held that the lessee could not be prosecuted for refusing the inspection. Mr. Justice White's majority opinion stressed that the basic purpose of the fourth amendment is "to safeguard the privacy and security of individuals against arbitrary invasions by government officials."[9] Thus, the constitutional right to be protected was considered the same regardless of whether the search was administrative or criminal. Accordingly, the Court held that except in certain narrowly defined situations,[10] any nonconsensual search of private property is unreasonable unless authorized by a valid warrant.[11]

In *See*, a fire department inspector, seeking to conduct a routine inspection, was refused entry to a locked commercial warehouse. The Supreme Court reversed the owner's conviction for refusing the inspection and held that administrative searches of commercial premises also must satisfy the fourth amendment. "The 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."[12]

While extending fourth amendment protection beyond criminal searches to administrative inspections, the Court drew one significant distinction. In *Camara*, the Court held that the standard to be used in determining probable cause for the issuance of an administrative warrant is much less stringent than for issuance of a criminal warrant. An administrative warrant may issue without any founded belief that specific violations exist so long as there are reasonable legislative or administrative standards for inspections.[13]

III. ADMINISTRATIVE INSPECTION WARRANTS

The "hybrid" administrative warrant created by the *Camara* and

7. 387 U.S. 541 (1967).
8. Frank v. Maryland, 359 U.S. 360 (1959).
9. 387 U.S. at 528.
10. See text accompanying notes 27-62 *infra*.
11. 387 U.S. at 528-29.
12. 387 U.S. at 543. Criminal searches of businesses have long been held to be protected by the fourth amendment. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
13. 387 U.S. at 538.

See decisions raises several questions. First, why should warrants be required for administrative inspections? Second, if warrants are mandated by the fourth amendment, why should the probable cause standard be less than for criminal searches? Finally, with a lessened probable cause standard for administrative inspections, are individuals afforded any significant protection by the warrant?

A. *Why Require Warrants?*

The protections of the fourth amendment are not dependent upon the characterization of the search. As Judge Prettyman stated in *District of Columbia v. Little*:[14] "To say that a man suspected of a crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity." Thus, the warrant clause of the fourth amendment applies to all searches and seizures.[15]

B. *Why Use a Lessened Probable Cause Standard?*

There are several possible explanations for the lessened probable cause standard. One theory, based on probability,[16] asserts that while the average building is likely to contain some statutory violation, the average person is not likely to be a criminal. Therefore, a higher standard is required for criminal searches because additional facts are needed to increase the percentage chance of a successful search. This approach, however, appears to overestimate the significance of the search in disclosing violations or criminal evidence. A search "is good or bad when it starts and does not change character from its success."[17] Furthermore, it is small consolation to an individual whose privacy has been invaded by an official that "statistically" the search was likely to reveal either violations or criminal evidence.

A second possible reason for the difference between the two probable cause standards is that a criminal search may lead to prosecution. This theory has been criticized as extending greater rights to criminals than to other citizens.[18] Nevertheless, in *Wyman v. James*,[19] the Supreme Court upheld the validity of warrantless home visitations by

14. 178 F.2d 13, 17 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).

15. *But see* Marshall v. Barlow's, Inc., 436 U.S. 307, 326-28 (1978) (Stevens, J., dissenting).

16. Comment, *Administrative Inspection Procedures Under the Fourth Amendment—Administrative Probable Cause*, 32 ALB. L. REV. 155, 172 (1967).

17. United States v. Di Re, 332 U.S. 581, 595 (1948).

18. *See* LaFave, *Administrative Searches and the Fourth Amendment: The* Camara *and* See *Cases*, 1967 SUP. CT. REV. 1, 17-18.

19. 400 U.S. 309 (1971).

welfare officials as a precondition to the receipt or continuation of welfare benefits. The decision was based, at least in part, on the fact that refusal to permit the home visit was not a criminal offense.[20]

A third justification for "administrative" probable cause is that administrative inspections are "less intrusive" than criminal searches. Specifically, there is no probing into a person's private papers and effects, nothing is seized, and there is no stigma attached to being the object of a search.[21] As expressed by the Court in *Camara*, "[w]e may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for fruits and instrumentalities of crime."[22]

A fourth explanation is that the *Camara* and *See* decisions represent a compromise between not requiring warrants for administrative inspections at all and requiring administrative search warrants to meet criminal law probable cause standards. The Court attempted in *Camara* to balance the privacy interests of individuals against the important and remedial purposes of administrative inspections.[23] Requiring criminal law probable cause would have a crippling effect on safety and health inspection programs.[24]

C. *What is the Value of Administrative Warrants?*

There are several ways in which administrative warrants protect the privacy of individuals. First, warrants protect against harassment inspections.[25] Second, they describe the object and the bounds of the search.[26] Third, they protect, even better than an identification card or badge, against the conduct of searches by imposters. Fourth, they limit inspections to a reasonable time and a reasonable manner, and finally, they permit individuals who are suspicious of a warrantless inspection

20. In distinguishing *Camara* and *See*, the Court in *Wyman* pointed out that the refusal to permit the inspection was not a crime. The significance of this distinction is not clear. *Camara* and *See* were certainly not limited to those administrative searches in which a refusal to permit the search could lead to criminal prosecution. The difference between an administrative and a criminal search is the object of the search, not the possible consequences of refusal to permit the search. Moreover, a civil deprivation may be much more significant than a criminal sanction. "For protecting the privacy of her home, Mrs. James lost the sole means of support for herself and her infant son. For protecting the privacy of his commercial warehouse, Mr. See received a $100 suspended fine." *Id.* at 341 (Marshall, J., dissenting).

21. *See* LaFave, *supra* note 18, at 19.

22. 387 U.S. at 530.

23. *Id.* at 536-37, 539.

24. Indeed, it was feared that even the administrative warrant requirement would impede essential inspections. *See* 387 U.S. at 550-52 (Clark, J., dissenting).

25. *See* Michigan v. Tyler, 436 U.S. 499, 508 (1978).

26. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978).

to refuse the inspection without fear of sanction.

IV. EXPANSION OF THE EXCEPTIONS TO *CAMARA* AND *SEE*

In *Camara* and *See* the Supreme Court specifically provided for four exceptions to the warrant requirement: emergency, consent, open view, and licensing inspections. It was not long, however, before a series of Supreme Court and lower court decisions expanded the exceptions to such an extent that the main holdings of *Camara* and *See* were threatened.[27]

A. *Emergency.*

In *Camara* the Court declared that "nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations."[28] The Court cited cases involving the seizure of unwholesome food,[29] compulsory smallpox vaccination,[30] a health quarantine,[31] and the summary destruction of tubercular cattle,[32] as examples of emergency inspections. The reasonableness of an emergency inspection is based on the need to conduct an immediate search to protect either the public[33] or the object of the search.[34]

Genuine emergency situations justifying warrantless administrative inspections have been rare. The main expansion of the exception was in cases where the "emergency" involved the warrantless search of a building by fire officials following a fire.[35]

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27. *See* Rothstein & Rothstein, *Administrative Searches and Seizures: What Happened to* Camara *and* See?, 50 WASH. L. REV. 341 (1975).

28. 387 U.S. at 539. *See generally* Note, *The Emergency Doctrine, Civil Search and Seizure, and the Fourth Amendment*, 43 FORDHAM L. REV. 571 (1975).

29. North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

30. Jacobson v. Massachusetts, 197 U.S. 11 (1904).

31. Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380 (1902).

32. Kroplin v. Truax, 119 Ohio St. 610, 165 N.E. 498 (1929).

33. *See* McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978) (search of briefcase before entering courthouse upheld); United States v. Miles, 480 F.2d 1217 (9th Cir.), *cert. denied*, 414 U.S. 1008 (1973) (weapons search of moving van before entering Army base upheld); Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972) (briefcase search before entering federal building upheld); Scherer v. Brennan, 379 F.2d 609 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967) (warrantless search by Secret Service agents to protect President upheld). *But see* Collier v. Miller, 414 F. Supp. 1357 (S.D. Tex. 1976) (search of persons entering stadium for alcoholic beverages held invalid).

34. *See* United States v. Dunavan, 485 F.2d 201 (6th Cir. 1973) (search of briefcase of unconscious man in attempt to obtain identification or information about his condition upheld).

35. *See, e.g.*, People v. Kulick, 57 Mich. App. 126, 225 N.W.2d 709 (1974); Bennett v. Commonwealth, 212 Va. 863, 188 S.E.2d 215 (1972). In other cases, however, there were genuine emergency situations in which an immediate search was necessary to protect firemen, rescue victims, or prevent the spread of the fire. *See, e.g.*, United States v. Gargotto, 510 F.2d 409 (6th Cir.),

B. *Consent.*

Most administrative searches are conducted on the basis of consent, and the Court in *See* made it clear that valid consent constitutes an exception to the warrant requirement.[36] Nevertheless, the Court did not indicate whether the requirements for administrative consent were to be the same as those for criminal consent.

Lower court decisions after *See* held that it is not necessary for administrative consent to meet the high standards of criminal consent. In *United States v. Thriftimart, Inc.*,[37] the Ninth Circuit indicated that while the consent to a criminal search is inherently suspect,[38] "the consent to an [administrative] inspection is not only not suspect but is to be expected."[39] The court in *Thriftimart* ruled that any manifestation of assent to an administrative inspection, no matter how casual, constitutes a waiver of the warrant requirement.[40] The court also held that it was not necessary for the inspectors to give a warning that there was a right to insist on a warrant.[41] On the other hand, if specifically asked whether a warrant may be demanded, the inspectors must answer in the affirmative.[42]

Some courts have determined that the consent was invalid where there was coercion[43] or where the search went beyond the bounds of the consent.[44] In addition, one court held that there was no valid con-

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cert. denied, 421 U.S. 987, *rehearing denied*, 423 U.S. 884 (1975); Steigler v. Anderson, 496 F.2d 793 (3d Cir.), *cert. denied*, 419 U.S. 1002 (1974); United States v. Green, 474 F.2d 1385 (5th Cir.), *cert. denied*, 414 U.S. 829 (1973); Romero v. Superior Court, 266 Cal. App. 2d 714, 72 Cal. Rptr. 430 (1968). For a change in the law regarding fire inspections, see note 64 *infra* and accompanying text.

36. *See* 387 U.S. at 545.

37. 429 F.2d 1006 (9th Cir.), *cert. denicd*, 400 U.S. 926 (1970).

38. The court reasoned that in criminal searches there is an element of coercion due to the presence of uniformed, armed police. A surprise factor is also present because the searches are not routine. *Id.* at 1009.

39. *Id.*

40. *Id.* at 1010. This view has been followed in other cases. *See, e.g.*, United States v. Alfred M. Lewis, Inc., 431 F.2d 303 (9th Cir.), *cert. denied*, 400 U.S. 878 (1970); United States v. Litvin, 353 F. Supp. 1333 (D.D.C. 1973); United States v. Kendall Co., 324 F. Supp. 628 (D. Mass. 1971).

41. 429 F.2d at 1010; *accord*, United States v. Robson, 477 F.2d 13 (9th Cir. 1973), *cert. denied*, 420 U.S. 927 (1975) (IRS agents not required to tell taxpayer he could demand a warrant to search his private tax records).

42. United States v. Anile, 352 F. Supp. 14 (N.D.W. Va. 1973).

43. United States v. Kramer Grocery Co., 418 F.2d 987 (8th Cir. 1969) (no valid consent found where owner relented after inspectors insisted on the right to inspect and demanded records over owner's objection).

44. Finn's Liquor Shop, Inc. v. State Liquor Auth., 31 App. Div. 2d 15, 294 N.Y.S.2d 592 (1968), *aff'd*, 24 N.Y.2d 647, 289 N.E.2d 440, 301 N.Y.S.2d 584, *cert. denied*, 396 U.S. 840 (1969) (consent to search liquor store did not include consent to search the pockets of a coat hanging in a back room); *cf.* Olson v. State, 287 So. 2d 313 (Fla. 1973) (inspection beyond the bounds of statutory authorization held invalid).

sent where the inspectors misrepresented that the failure to permit an inspection was a criminal offense.[45]

C. *Open View.*

Another exception to the warrant requirement is found in those instances where the object of the inspection is open to public view.[46] This principle was implicitly recognized in *See*: "[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."[47] An important factor is whether there is a reasonable expectation of privacy, even if the area is open to the public.[48]

There are two types of open view searches. The "plain view" doctrine holds that an official may obtain any evidence that is in plain view if the official has a legal right to be in the location from which the observation is made.[49] The "open fields" doctrine permits an official to conduct a warrantless search of outdoor property, even if privately owned.[50] In *Air Pollution Board v. Western Alfalfa Corp.*,[51] an inspector of the Colorado Department of Health entered the outdoor premises of a company without its knowledge or consent to take readings of smoke coming from the plant's chimneys. The Supreme Court unanimously held that the inspection was valid under the open fields doctrine.

D. *Licensing.*

The most significant threat to the rule of *Camara* and *See* came from the expansion of the licensing exception. The Supreme Court in *See* did not question the assumption that licensing inspections were valid.[52] It was not long before several lower court and Supreme Court decisions upheld the legality of *warrantless* licensing and regulatory inspections of various industries.

45. United States v. Enserro, 401 F. Supp. 460 (W.D.N.Y. 1975).

46. Technically, this is not an exception because there is no search at all. Observing that which is open to public view has been held not to constitute a search. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

47. 387 U.S. at 545 (emphasis added).

48. *See* Katz v. United States, 389 U.S. 347, 351 (1967).

49. *See, e.g.*, United States v. Various Gambling Devices, 478 F.2d 1194 (5th Cir. 1973); United States v. Golden, 413 F.2d 1010 (4th Cir. 1969).

50. *See, e.g.*, United States v. Cain, 454 F.2d 1285 (7th Cir. 1972); State v. Murdock, 160 Mont. 95, 500 P.2d 387 (1972).

51. 416 U.S. 861 (1974).

52. 387 U.S. at 545-46.

In *Colonnade Catering Corp. v. United States*,[53] the Court held that Congress has the power to authorize warrantless searches of licensed liquor dealers. The decision was based on the long history of government regulation of the liquor industry. In *United States v. Biswell*,[54] the Court extended the *Colonnade* reasoning to uphold a warrantless search of a pawn shop pursuant to the Gun Control Act of 1968.[55] The Court declared that by engaging in a pervasively regulated business the individual waived his fourth amendment rights and consented to warrantless administrative inspections. "The businessman in a regulated industry in effect consents to the restrictions placed upon him."[56]

Numerous other lower federal court and state court decisions also used "implied consent" to extend the licensing-regulated industries exception to such diverse businesses as pharmacies,[57] coal mines,[58] multifamily dwellings,[59] nursing homes,[60] and lobster fishing.[61] In other instances, the granting of a license has been conditioned on the execution of a waiver authorizing warrantless searches.[62] Because of the numerous licensing requirements and the regulation of nearly all businesses by the local, state, and federal government, there were virtually no limits to this exception and it seriously threatened the rule of *See*.

V. THE PENDULUM SWINGS BACK

Although decisions after *Colonnade* and *Biswell* continued to weaken the general rule and to expand the exceptions to *Camara* and *See*, this development was not without qualification. In fact, beginning in 1975, several cases refused to extend the exceptions to *Camara* and

53. 397 U.S. 72 (1970).

54. 406 U.S. 311 (1972); *accord*, United States v. Wilbur, 545 F.2d 764 (1st Cir. 1976).

55. 18 U.S.C. § 923(g) (1976).

56. Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973).

57. Terraciano v. Montanye, 493 F.2d 682 (2d Cir.), *cert. denied*, 419 U.S. 875 (1974).

58. Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973).

59. John D. Neumann Props., Inc. v. District of Colum. Bd. of App. & Rev., 268 A.2d 605 (D.C. 1970).

60. Uzzillia v. Commissioner of Health, 47 App. Div. 2d 492, 367 N.Y.S.2d 795 (1975).

61. State v. Marconi, 113 N.H. 426, 309 A.2d 505 (1973).

62. *See* United States v. Griffin, 555 F.2d 1323 (5th Cir. 1977) (pharmacist under contract with the State); Lanchester v. State Horse Racing Comm'n, 16 Pa. Commw. Ct. 85, 325 A.2d 648 (1974) (horse trainer). *See also* United States v. Litvin, 353 F. Supp. 1333 (D.D.C. 1973) (consent to FDA inspection held to be valid even though failure to permit a search punishable by one-year imprisonment and $1,000 fine). *See generally* Note, *The Constitution and Privilege Holders: Conditioning the Issuance of a Liquor License Upon Consent to a Warrantless Search*, 48 IND. L.J. 117 (1972). Numerous pre-*Camara* state and lower federal court decisions had long upheld the validity of warrantless regulatory inspections based on implied consent or on the belief that the fourth amendment did not apply to administrative inspections. *See, e.g.*, Cooper's Express, Inc. v. ICC, 330 F.2d 338 (1st Cir. 1964); Cooley v. State Bd. of Funeral Directors and Embalmers, 141 Cal. App. 2d 293, 296 P.2d 588 (1956).

See to uphold warrantless administrative searches.

According to one district court, the unsupported assertion that contagious and debilitating diseases might be spread was not sufficient to establish an emergency exception for the warrantless inspection of massage parlors.[63] Similarly, other courts refused to apply the emergency exception to fire inspections.[64] During this time there was also a reluctance to enlarge the licensing-regulated industry exception. The Sixth Circuit held that safety inspections of coal mines require a warrant,[65] and a district court held the warrantless search of a pharmacy invalid.[66]

The most important limitation on the erosion of *Camara* and *See* was *G.M. Leasing Corp. v. United States*.[67] In that case, IRS agents went to a taxpayer's corporate office, made a warrantless forced entry, and seized books, records, and other property. The Supreme Court held that the search was illegal. It specifically rejected the government's argument that the interest in the collection of taxes is so significant as to bring the case within the *Colonnade-Biswell* exception.

> Those cases involved voluntary participation in a highly regulated activity. . . . [W]e are unwilling to hold that the mere interest in the collection of taxes is sufficient to justify a statute declaring *per se* exempt from the warrant requirement every intrusion into privacy made in furtherance of any tax seizure.[68]

VI. OSHA Cases in the Lower Courts

It is appropriate that cases concerning the inspection provisions of OSHA should serve as the watershed in determining the status of the *Camara* and *See* rule and exceptions. Certainly, if the *Colonnade-Biswell* exception were applied to OSHA, which covers virtually every private business in the nation, then the *See* decision would be rendered a nullity. Moreover, if *See* were repudiated, the demise of *Camara* might not be far away.[69]

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63. Hogge v. Hedrick, 391 F. Supp. 91 (E.D. Va. 1975).

64. Boston v. Ditson, 348 N.E.2d 116, 120-21 (Mass. App. Ct. 1976), *appeal dismissed*, 429 U.S. 1057 (1977); People v. Tyler, 399 Mich. 564, 250 N.W.2d 467 (1977), *aff'd*, 436 U.S. 499 (1978).

65. United States v. Consolidation Coal Co., 560 F.2d 214 (6th Cir. 1977), *vacated and remanded*, 436 U.S. 942 (1978).

66. United States v. Pugh, 417 F. Supp. 1019 (W.D. Mich. 1976).

67. 429 U.S. 338 (1977).

68. *Id.* at 357-58.

69. *See* Rothstein & Rothstein, *supra* note 27, at 382-84. *See also* McManis & McManis, *Structuring Administrative Inspections: Is There Any Warrant for a Search Warrant?*, 26 Am. U.L. Rev. 942, 959 (1977).

A. Brennan v. Buckeye Industries, Inc.

The first challenge to the validity of warrantless OSHA inspections was brought in *Brennan v. Buckeye Industries, Inc.*[70] In that case, the Secretary of Labor sought an order compelling an inspection after the employer refused to permit a warrantless inspection of its clothing manufacturing business.

Section 8(a) of the Act contains the statutory authorization for conducting OSHA inspections.[71] Nowhere in this or any other section of the Act, however, is an authorization for the issuance of a warrant or even an indication whether Congress believed warrants were necessary.[72] Section 8(a) merely provides that inspections are to be conducted "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner."[73] The court interpreted this language as being a sufficient limitation on "unreasonable" inspections, thereby eliminating the necessity for a warrant.[74] Furthermore, the court surmised that the "compelling need for unannounced inspections" supported the use of warrantless inspections.[75] The court also feared that the need to establish probable cause for a warrant "would require an employee to report a violation in order for

70. 374 F. Supp. 1350 (S.D. Ga. 1974).

71. Sec. 8(a): 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.

29 U.S.C. § 657(a) (1976).

72. The legislative history, however, contains the following statement of Congressman Steiger, a cosponsor of the Act: "I would add that in carrying out inspection duties under this act, the Secretary, of course, would have to act in accordance with applicable coustitutional protections." STAFF OF SUBCOMM. ON LABOR, SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 1077 (Comm. Print 1971).

73. 29 U.S.C. § 657(a)(2) (1976). In United States v. Business Builders, Inc., 354 F. Supp. 141 (N.D. Okla. 1973), the court upheld the validity of warrantless FDA inspections pursuant to 21 U.S.C. § 374 (1976), which were statutorily limited to inspections conducted at " 'reasonable times' and 'within reasonable limits.' " 354 F. Supp. at 143; *accord*, United States v. Del Campo Baking Mfg. Co., 345 F. Supp. 1371 (D. Del. 1972).

74. 374 F. Supp. at 1354-56; *cf. Camara*, 387 U.S. at 533 ("broad statutory safeguards are no substitute for individualized review"). The *Buckeye* court also observed that the Secretary's regulations, 29 C.F.R. § 1903.7(d) (1978), prohibit inspections that are an unreasonable disruption of operations. 374 F. Supp. at 1354.

75. 374 F. Supp. at 1354. Unannounced inspections and a warrant requirement, however, are not mutually exclusive concepts. See text accompanying notes 153-55 *infra*.

any investigation to be made as a predicate to corrective action."[76]

After reviewing the *Camara* and *See* decisions, the court emphasized the recent extension of the *Colonnade-Biswell* exception. It cited with approval a Second Circuit opinion[77] and a district court opinion[78] in which warrantless searches were upheld under the *Colonnade-Biswell* exception. Nevertheless, the court gave no compelling reasons for extending the regulated-industry exception to *all* industries. The bold conclusion of the court proclaimed that "Buckeye Industries is, constitutionally speaking, marching to the beat of an antique drum."[79] The *Buckeye* decision has been criticized in numerous law review articles[80] and has been rejected by other courts.[81] Indeed, the government's brief in *Barlow's* makes only one obscure citation to the decision in a string cite of seven cases.[82]

B. Brennan v. Gibson's Products, Inc.

The next case to rule directly on the validity of warrantless OSHA inspections was *Brennan v. Gibson's Products, Inc.*[83] After the employer refused to permit a warrantless routine inspection, the Secretary of Labor sought an order compelling the employer to submit to an in-

76. 374 F. Supp. at 1354. For other ways of establishing probable cause, see text accompanying notes 173-208 *infra*.

77. Terraciano v. Montanye, 493 F.2d 682 (2d Cir.), *cert. denied*, 419 U.S. 875 (1974) (upholding warrantless search of pharmacy under *Colonnade-Biswell* exception).

78. Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973) (upholding warrantless search of coal mine under *Colonnade-Biswell* exception).

79. 374 F. Supp. at 1356. This quotation is especially unfortunate. As one commentator indicated: "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,' it was the court, not the corporation, that was out of step." Note, Brennan v. Buckeye Industries, Inc.: *The Constitutionality of an OSHA Warrantless Search*, 1975 DUKE L.J. 406, 415 (footnote omitted). It is also ironic that in a decision authorizing warrantless government inspections of virtually every workplace in the country, the court paraphrased Thoreau, a celebrated opponent of government interference with individual freedom.

80. *See, e.g.*, McManis & McManis, *supra* note 69; Rothstein & Rothstein, *supra* note 27; Comment, *OSHA v. The Fourth Amendment: Should Search Warrants Be Required For "Spot Check" Inspections?*, 29 BAYLOR L. REV. 282 (1977); Comment, *The Validity of Warrantless Searches Under the Occupational Safety and Health Act of 1970*, 44 CIN. L. REV. 105 (1975); Note, *supra* note 79; Note, *Warrantless Nonconsensual Searches Under the Occupational Safety and Health Act of 1970*, 46 GEO. WASH. L. REV. 93 (1977).

81. *See, e.g.*, Empire Steel Mfg. Co. v. Marshall, 437 F. Supp. 873 (D. Mont. 1977); Usery v. Centrif-Air Mach. Co., 424 F. Supp. 959 (N.D. Ga. 1977); Dunlop v. Hertzler Enterprises, Inc., 418 F. Supp. 627 (D.N.M. 1976) (three-judge court).

82. Brief for Appellant at 46-47, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

83. 407 F. Supp. 154 (E.D. Tex. 1976), *vacated and remanded with instructions to dismiss sub nom.* Marshall v. Gibson's Prods., Inc., 584 F.2d 668 (5th Cir. 1978); *cf.* Aceu-Namics, Inc. v. Occupational Safety & Health Review Comm'n, 515 F.2d 828 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976) (earlier case upholding warrantless search based on emergency and open view exceptions).

spection. It was stipulated that no employee complaint had been filed, there was no emergency situation requiring an immediate inspection, and there was no reason to believe that Gibson's was violating the Act.

The three judge district court carefully reviewed the *Camara* and *See* decisions, the *Colonnade-Biswell* exception, and the lower court decisions expanding this exception.[84] The court also relied heavily on the Supreme Court's decisions in *Air Pollution Variance Board v. Western Alfalfa Corp.*[85] and *Almeida-Sanchez v. United States*.[86] It considered these two post-*Biswell* decisions as reaffirmations of the vitality of *Camara* and *See* in the face of rapid expansion of the regulated-industries exception:

> From [*Western Alfalfa*] and from *Almeida-Sanchez* we deduce that broad and indiscriminate inroads on fourth amendment safeguards, wrought in the name of administrative expedience and weighty governmental interest, are to be viewed with no greater favor now than at the time of *See* and *Camara*. . . . [I]t seems plain that the fourth amendment is not to be viewed as in a condition of general retreat before an administrative advance.[87]

It is also significant that the employer to be inspected, Gibson's, was a most unlikely subject for a *Colonnade-Biswell* exception. The court pointed out that as a "discount house" it neither was licensed nor had a history of close governmental regulation.[88]

Having concluded that warrantless inspections are unconstitutional, the court was faced with deciding whether section 8(a) of the Act could be construed to authorize the issuance of warrants. The court held that it could: "[W]e believe that [section 8(a)] was intended by Congress to authorize objected-to OSHA inspections only when made by a search warrant issued by a United States Magistrate or other judicial officer of the third branch under probable cause standards appropriate to administrative searches . . . ."[89] The *Gibson's* decision

84. The *Buckeye* approach was rejected. 407 F. Supp. at 161.

85. 416 U.S. 861 (1974) (*Camara* and *See* still valid, but warrantless search upheld under open fields doctrine). See text accompanying notes 50-51 *supra*.

86. 413 U.S. 266 (1973) (invalidated warrantless searches for aliens conducted within 100 miles of the border by roving patrols of the Immigration and Naturalization Service).

87. 407 F. Supp. at 161.

88. *Id.* at 162.

89. *Id.* The court went on to state:

> We think it reasonable to assume that Congress intended nothing beyond its constitutional powers and that the requirement of a search warrant for resisted inspections was not made explicit in part because the need for a warrant was clear in those days before *Biswell* and its progeny appeared. And after all, Congress need not re-enact the bill of rights as a preamble to every statute to be sure that the statute will be construed against its background and with a recognition that Congress' fidelity to fundamental rights is as firm as ours.

Id. at 163.

was followed by several courts[90] and was endorsed by most commentators.[91]

C. Barlow's, Inc. v. Usery.

The final significant lower court decision on OSHA inspections was *Barlow's, Inc. v. Usery*.[92] The employer, an installer of electrical and plumbing fixtures and heating and air conditioning units, sought injunctive and declaratory relief against enforcement of OSHA on the ground that the inspection provisions of the Act violate the fourth amendment.

The three-judge district court specifically rejected the notion in *Buckeye* "that the *Colonnade* and *Biswell* decisions envision a trend of the Supreme Court to generally narrow the holdings of *Camara* and *See*."[93] While it agreed with the reasoning of *Gibson's*, the court declined to construe section 8(a) as authorizing the issuance of warrants: "Certainly, Congress was able, had it wished to do so, to employ language declaring that a warrant must first be obtained, the procedures under which it is to be obtained, and other necessary regulations. Congress did not do so and we refuse to accept that duty."[94] The court held that the inspection provisions of OSHA are unconstitutional and it enjoined enforcement of the Act. While the case was pending before the Supreme Court, Mr. Justice Rehnquist stayed the injunction as to all workplaces except that of the cited employer.[95]

VII. *MARSHALL V. BARLOW'S, INC.*

A. *Background.*

The *Barlow's* appeal was the subject of considerable legal and political interest. Several *amicus curiae* briefs were submitted[96] and the outcome of the case was regarded as crucial by both sides. Indeed, the

90. See authorities cited in note 81 *supra*.

91. *See, e.g.*, McManis & McManis, *supra* note 69; Comment, 44 CIN. L. REV. 105, *supra* note 80; Note, 46 GEO. WASH. L. REV. 93 (1977), *supra* note 80; 11 SUFFOLK L. REV. 157 (1976).

92. 424 F. Supp. 437 (D. Idaho 1976) (three-judge court), *aff'd sub nom.* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

93. 424 F. Supp. at 440.

94. *Id.* at 441.

95. Marshall v. Barlow's, Inc., 429 U.S. 1347 (1977) (per Rehnquist, J.).

96. Of the eleven briefs filed, eight were in support of the appellee (Barlow's). This group was a most unlikely amalgam of civil libertarians and pro-business organizations. It is not every appellee that receives support from both the American Conservative Union and the Roger Baldwin Foundation of the Illinois Chapter of the American Civil Liberties Union. The three briefs on behalf of the appellant (government) were filed by eleven state governments and pro-employee groups, such as the AFL-CIO.

fate of OSHA was thought to be at stake.[97] In legal terms, the Court's three main options were represented by the different approaches taken in the lower courts. One approach would hold that OSHA inspections are not subject to the warrant requirement of the fourth amendment.[98] Adopting this *Buckeye* position, however, would almost assuredly have required the overruling of *See*. On the other hand, the Court could have affirmed the holding below that the Act is unconstitutional, and enjoined all enforcement activity under the Act. Finally, the Court could have adopted a middle position, or the *Gibson's* approach, and held that nonconsensual warrantless inspections are not permitted, but that the Act is not unconstitutional and the issuance of warrants is authorized by section 8(a).[99]

The brief for the government argued, based on *Biswell*, that Congress could constitutionally authorize reasonable and limited warrantless regulatory inspections. Furthermore, the government argued that even if a warrant is required, the district court should have upheld the constitutionality of the Act.[100] It was the government's contention that principles of constitutional adjudication require that, if possible, a statute be construed in accordance with the fourth amendment.[101] The brief for Barlow's asserted that *Colonnade* and *Biswell* apply only to licensed or pervasively regulated businesses. It also argued that because Congress intended OSHA inspections to be warrantless, section 8(a) must be declared unconstitutional and void.[102]

97. Most of the litigation expenses of Barlow's ($60,000) were defrayed by the "Stop OSHA" project of the American Conservative Union, [1978] 8 OCCUP. SAFETY & HEALTH REP. (BNA) 5. Having lost a constitutional challenge to OSHA the preceding year in Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977), where the Supreme Court unanimously held that in OSHA cases there is no seventh amendment right to a jury trial, anti-OSHA forces believed that *Barlow's* could lead to the demise of OSHA in one of three ways. First, the Court might hold that the Act is unconstitutional and prohibit all enforcement activity. Second, if congressional authorization of warrants were required, in amending § 8 of the Act, other amendments might be included that would weaken the Act. Third, even if warrants were held to be authorized by the Act, if every employer could be encouraged to demand a warrant, OSHA's enforcement capability would be crippled. As a result of the Court's decision, the third approach is being pursued. *See* [1978] 8 OCCUP. SAFETY & HEALTH REP. (BNA) 1203; [1978] EMPL. SAFETY & HEALTH GUIDE (CCH) No. 369, at 2.

98. In support of this approach, *see* Weissberg, Marshall v. Barlow's, Inc.: *Are Warrantless Routine OSHA Inspections a Violation of the Fourth Amendment?*, 6 ENVT'L AFF. 423 (1978).

99. Most commentators supported this position. See text accompanying notes 83-91 *supra*, for a discussion of the *Gibson's* approach.

100. Brief for Appellants at 50-52, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

101. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973); Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

102. Brief for Appellee at 60-65, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

B. *The Majority Opinion.*

In a five-to-three decision,[103] the Supreme Court affirmed the judgment of the district court. Mr. Justice White, author of the *Camara* and *See* decisions in 1967, wrote the opinion of the Court, joined by Chief Justice Burger and Justices Stewart, Marshall, and Powell.[104] The opinion began with a restatement of the well-settled principles that the fourth amendment protects commercial buildings as well as private homes, that warrantless searches are generally unreasonable, and that the fourth amendment protects against warrantless civil searches as well as criminal investigations.[105] "If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards."[106]

The Court rejected the Secretary's contention that OSHA inspections should come within the *Colonnade-Biswell* exception. These cases "represent responses to relatively unique circumstances,"[107] where there is such a history of governmental regulation that one engaged in such a business could not have a reasonable expectation of privacy. The Secretary's argument that warrantless inspections are essential to OSHA enforcement was also rejected. According to the Court, the vast majority of businessmen are expected to consent. Even if a search is refused, the Secretary's regulations[108] provide that compulsory process may then be obtained. Finally, under a revised regulation, a warrant could be issued ex parte, thus enabling the Secretary to reappear and inspect without further notice.

The Court held that the existence of probable cause necessary to support the issuance of a warrant is to be ascertained under the administrative standard first set out in *Camara* and *See*. Because criminal law probable cause is not required, the Secretary need not establish the likelihood of OSHA violations on the premises to be inspected. While a warrant could be based on evidence of violations, a showing that the inspection is to be conducted pursuant to reasonable legislative or administrative standards would also provide a basis for issuance of a warrant.[109]

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103. Mr. Justice Brennan did not take part in the consideration or decision of the case.

104. Mr. Justice Stewart, the only other justice participating in the decision who was a member of the Court in 1967, sided with the majority in *Camara* and *See*.

105. 436 U.S. at 311-12.

106. *Id.* at 312-13.

107. *Id.* at 313.

108. 29 C.F.R. § 1903.4 (1978).

109. See text accompanying notes 173-210 *infra*.

The Court went on to state that it did *not* agree "that the incremental protections afforded the employer's privacy by a warrant are so marginal that they fail to justify the administrative burdens."[110] A warrant would ensure that the inspection is reasonable under the Constitution, is authorized by statute, and is conducted pursuant to an administrative plan containing specific neutral criteria. Furthermore, a warrant would advise the employer of the scope, object and limits of the search.

In conclusion, the Court held that "Barlow's was entitled to a declaratory judgment that the Act is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent and to an injunction enjoining the Act's enforcement to that extent."[111] This holding, however, was "clarified" in a footnote. "The injunction entered by the District Court, however, should not be understood to forbid the Secretary from exercising the inspection authority conferred by [§ 8] pursuant to regulations and judicial process that satisfy the Fourth Amendment."[112]

C. *The Dissent.*

Mr. Justice Stevens wrote the dissenting opinion, joined by Justices Blackmun and Rehnquist. The dissent argued that a scheme of administrative warrants for OSHA inspections is not required by the fourth amendment, is an administrative burden, and is not likely to offer greater privacy protection than warrantless inspections.

The dissent asserted that the warrant clause of the fourth amendment does not apply to routine regulatory inspections of commercial premises.[113] Instead, the inspections were said to be valid because they comport with the ultimate reasonableness standard of the fourth amendment.

In asserting that warrantless OSHA inspections are reasonable under the fourth amendment, the dissent did *not* urge an extension of the *Colonnade-Biswell* exception. In fact, the dissent rejected the underlying rationale of *Colonnade* and *Biswell* that engaging in a licensed or closely regulated industry amounts to implied consent to warrantless regulatory inspections. In its view, the reasonableness of OSHA's administrative inspection scheme is based "on the existence of a federal

110. 436 U.S. at 322.

111. *Id.* at 325.

112. *Id.* n.23.

113. "[W]e should not dilute the requirement of the Warrant Clause in an effort to force every kind of governmental intrusion which satisfies the Fourth Amendment definition of a 'search' into a judicially developed, warrant-preference scheme." *Id.* at 328.

statute embodying a congressional determination that the public interest in the health of the Nation's work force . . . outweighs the businessman's interest in preventing a government inspector from viewing those areas of his premises which relate to the subject matter of the regulation."[114]

The dissent also questioned the value of a warrant based on a lessened probable cause standard. The warrant was viewed as a mere formality, with the magistrate's inquiry limited to determining whether the inspection is in accord with a schedule designed by higher-level agency officials.[115] Moreover, the administrative warrant was viewed as adding little to the protections already afforded by the statute and regulations, "and the slight additional benefit it might provide is insufficient to identify a constitutional violation or to justify overriding Congress' judgment that the power to conduct warrantless inspections is essential."[116]

According to the dissent, the administrative warrant is *supposed* to serve three functions: first, to inform the employer that the inspection is authorized by the statute; second, to advise the employer of the lawful limits of the inspection; and finally, to assure the employer that the person demanding entry is an authorized inspector.[117] The dissent contended, however, that the lawful limits of the search are already set out in section 8(a)(1) and the employer may verify the identity of the inspector by calling OSHA. Moreover, it would still be possible to conduct unauthorized (harassment or nonroutine) inspections by making bad faith representations in an ex parte warrant proceeding.[118] Thus, in the view of the dissent, the administrative warrant is of no functional value.

D. *Evaluating the Decision.*

The Supreme Court's decision in *Barlow's* represents a reasonable, middle-of-the-road approach to OSHA inspections. It attempts to reconcile the privacy interests of employers with the public interest in the enforcement of safety and health regulations. Nevertheless, both the majority and dissenting opinions contain perplexing aspects that are

114. *Id.* at 338. Justice Stevens concluded his dissent by stating: "While one may question the wisdom of pervasive governmental oversight of industrial life, I decline to question Congress' judgment that the inspection power is a necessary enforcement device in achieving the goals of a valid exercise of regulatory power." *Id.* at 339 (footnote omitted).

115. *Id.* at 332.

116. *Id.*

117. *Id.* (citing *Camara*, 387 U.S. at 532). The majority opinion in *Barlow's* discusses only the first two functions. *See* 436 U.S. at 323.

118. 436 U.S. at 333.

deserving of closer scrutiny.

A fundamental question that the majority opinion fails to resolve is whether, in section 8(a), Congress actually authorized or intended to authorize warrantless OSHA inspections. The answer to this question is of paramount importance to the ultimate relief granted by the Court. In *Gibson's*, the district court held that section 8(a) did not necessarily authorize warrantless searches. Therefore, in construing the statute in accordance with the fourth amendment, it held that authority for the issuance of warrants could be inferred from the Act.[119] On the other hand, the district court in *Barlow's* interpreted section 8(a) as authorizing warrantless OSHA inspections, and consequently, held that section 8(a) is unconstitutional.[120]

Apparently the Supreme Court attempted to embrace both concepts simultaneously: it seemed to interpret section 8(a) as authorizing *both* warrantless inspections and inspeetions pursuant to a warrant. "It is true, as the Secretary asserts, that § 8(a) of the Act, 29 U.S.C. § 657(a), purports to authorize inspections without warrant; but it is also true that it does not forbid the Secretary from proceeding to inspect only by warrant or other process."[121] It is illogical, however, to assume that Congress intended to authorize both types of inspections. If warrantless nonconsensual inspections were permitted, then there would be no need for the Secretary to obtain a warrant, even if the issuance of warrants were authorized by the statute. If an employer refused entry, the Secretary would merely seek a court order requiring the employer to submit to the inspection.[122] On the other hand, if an employer could demand that a warrant be obtained, it would be superfluous for the statute also to authorize warrantless inspections. Any warrantless inspection would be based on consent, which is an exception to the warrant clause of the fourth amendment.

The core of the majority's analysis is, nonetheless, sound and serves to reestablish the continuing validity of *Camara* and *See*. The Secretary's attempt to have the *Colonnade-Biswell* exception extended to OSHA inspections is flatly rejected.[123] Also rejected are the Secretary's contentions that warrantless inspections are essential to OSHA enforcement and that administrative warrants would add only negligi-

119. 407 F. Supp. at 162-63.

120. 424 F. Supp. at 441-42.

121. 436 U.S. at 317 n.12. The Court later observes that § 8(f)(1), 29 U.S.C. § 657(f)(1) (1976), which provides for inspections upon the filing of employee complaints, "purports to authorize a warrantless inspection in these circumstances." 436 U.S. at 320 n.16.

122. *See* 436 U.S. at 317-20 & nn.12-14.

123. *Id.* at 313-15. Even the dissent eschews such an approach, rejecting the *Buckeye* decision sub silentio. *Id.* at 335-38.

bly to the privacy of employers.

In reiterating the "traditional" analysis of *Camara* and *See* the Court, unfortunately, does not provide a detailed discussion of probable cause necessary for the issuance of a warrant. The general concepts first set forth in *Camara* and *See* are not applied to the OSHA context with sufficient particularity. Consequently, it is virtually certain that there will be considerable litigation on the question of probable cause.[124]

The most perplexing part of the Court's decision is the Court's order. The four main points of the opinion are: first, OSHA inspections do not come within the *Colonnade-Biswell* exception; second, nonconsensual inspections can only be made pursuant to a warrant; third, only administrative probable cause is needed for issuance of a warrant; and finally, warrants may be issued under section 8(a).[125] Because the district court in *Barlow's* held that warrants may *not* be issued under section 8(a) and that this section of the Act is unconstitutional, it would seem that the Court would be compelled to vacate the judgment and remand the case, or at least to modify the lower court order. Instead, the Court affirmed the district court, which had issued a declaratory judgment that section 8(a) of the Act is unconstitutional and had enjoined any enforcement activity pursuant to section 8(a). Fortunately, the Court's order was circumscribed by footnote 23, which does not prohibit the Secretary from exercising authority under section 8(a) in a manner that satisfies the fourth amendment.[126]

The main thrust of the dissenting opinion is that administrative inspection warrants are unnecessary and of minimal utility. The focus of the dissent is not so much on OSHA inspections per se, as it is on the entire framework of administrative search warrants and administrative probable cause. Logically, adherence to the rationale of the dissent would require the overruling of *See*, although the dissenting opinion does not explicitly advocate such an approach.[127]

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124. See text accompanying notes 173-210 *infra*.

125. While these points correspond identically to *Gibson's*, there is no citation to *Gibson's* anywhere in the majority opinion.

126. 436 U.S. at 325 n.23. The Court's holding will certainly affect the 23 states and territories enforcing OSHA-approved state plans, which contain analogous inspection provisions. *See generally* M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 455-65 (1978). Indeed, decisions similar to *Barlow's* already have been rendered by various state courts. *See, e.g.*, Woods & Rohde, Inc. v. State Dep't of Labor, 565 P.2d 138 (Alas. 1977); Yocom v. Burnette Tractor Co., 566 S.W.2d 755 (Ky. 1978); New Mexico v. Albuquerque Pub. Co., 91 N.M. 125, 571 P.2d 117 (1977), *cert. denied*, 435 U.S. 956 (1978); State *ex rel.* Accident Prevention Div. v. Foster, 31 Or. App. 291, 570 P.2d 398 (1977).

127. Justice Stevens believed that *See* "should be narrowly confined." 436 U.S. at 338 n.9 (Stevens, J., dissenting).

In asserting that the OSHA warrant procedure will be a mere formality, the dissent appears to have underestimated the potential role of the magistrate. The dissent envisions the magistrate's inquiry as being limited to determining whether the inspection is in accord with published regulations. The value of the magistrate's function may be better perceived, however, by considering an example. Assuming that the filing of an employee complaint establishes probable cause,[128] a warrant would normally be issued on the basis of a complaint. But, if it were disclosed during the warrant hearing that there had been ten prior identical employee complaints within the same month and that all ten had resulted in inspections that disclosed no violations, then there would be no probable cause for an inspection warrant.[129] The magistrate, therefore, should not consider the warrant application in the abstract, but should, to the extent feasible, focus on the employer to be inspected.

The dissent also may have underestimated the usefulness of the warrant to the employer. The dissent maintains that the three purported functions of a warrant are already satisfied by the general reasonableness requirement of section 8(a). First, it argues that a warrant will not necessarily ensure that the inspection is authorized by the statute because unauthorized inspections could be made pursuant to a warrant obtained through bad-faith misrepresentations by the inspector in an ex parte warrant proceeding. Nevertheless, there is a considerable difference between a slight abuse of administrative authority in the field and deliberate, premeditated perjury before a magistrate. Second, the dissent claims that a warrant is not needed to inform the employer of the lawful limits of the search because these limits are already set out in section 8(a). That section, however, is extremely general; a warrant would focus on the particular employer to be inspected. Finally, the dissent asserts that a warrant is unnecessary to assure the employer that the person demanding entry is an authorized inspector because the employer can call OSHA to verify the identity of the inspector. Yet, verification is of no value where there is an unauthorized search by a lawful inspector.

The dissent deserves praise for not taking the "easy way out" by

128. *See, e.g., In re* Chicago Magnet Wire Corp., No. 77-C-3025 (N.D. Ill. Oct. 27, 1977), 5 OSHC 2024, [1977-78] OSHD (CCH) ¶ 22,270; *In re* Blocksom & Co., No. S 76-170 (N.D. Ind. Nov. 1, 1977), 6 OSHC 1001, [1978] OSHD (CCH) ¶ 22,610, *aff'd in part, vacated & remanded in part sub nom.* Blocksom & Co. v. Marshall, 582 F.2d 1122 (7th Cir. 1978). See also text accompanying notes 173-210 *infra*.

129. *See, e.g.*, Dravo Corp. v. Marshall, No. 77-284 (W.D. Pa. Apr. 5, 1977), 5 OSHC 2057 (1977), *aff'd mem.*, 578 F.2d 1373 (3d Cir. 1978) (employer alleged that it had been harassed by 24 OSHA inspections).

simply advocating an extension of the *Colonnade-Biswell* exception. In fact, Justice Stevens astutely recognizes the flaw in the underlying rationale of *Colonnade* and *Biswell*—that employers in regulated industries impliedly consent to warrantless regulatory inspections. According to Justice Stevens, if warrantless inspections are lawful, "the validity of the regulations depends not upon the consent of those regulated but on the existence of a federal statute embodying a congressional determination that the public interest. . .outweighs the businessman's [privacy] interest."[130]

VIII. THE EFFECTS OF *BARLOW'S*

A. *Enforcement.*

In his brief before the Supreme Court, the Secretary contended that "a warrant requirement would significantly impede the enforcement of the Occupational Safety and Health Act."[131] Although a final judgment cannot be made at this time, it appears that the Court's decision will *not* have a significant adverse impact on OSHA enforcement.[132] As was true with the decision in *Camara*, "both the burdens and the benefits of a search warrant requirement . . . seem to be overstated."[133]

There are several ways in which the *Barlow's* decision will affect OSHA enforcement. First, OSHA inspections will have to be more selective. In the past, OSHA's 1400 inspectors conducted about 80,000 inspections per year. If there are no new inspectors, the total number of inspections may be decreased.[134] In any event, there must be increased concentration on the most severe safety and health hazards. According to Dr. Eula Bingham, head of the Occupational Safety and Health Administration (OSHA), the Court's requirement that a workplace be selected from a neutral administrative plan "falls right into line" with OSHA policy announced last year of directing ninety-five percent of its inspection activity toward high-hazard industries.[135] Ac-

130. 436 U.S. at 338. The dissent also indicates that questions involving the time the regulatory program has been in existence and whether the inspections are of more than one industry are irrelevant. *Id.* at 336-37. For further criticism of the Court's reasoning in *Colonnade* and *Biswell*, see Rothstein & Rothstein, *supra* note 27, at 358-66.

131. Brief for Appellants at 37, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

132. In the three- to four-month period after the *Barlow's* decision, approximately 11,000 inspections were attempted by OSHA, and employers demanded warrants in fewer than 500 cases. [1978] 8 OCCUP. SAFETY & HEALTH REP. (BNA) 564. OSHA sought warrants in about one-half of the cases of employer refusals.

133. LaFave, *supra* note 18, at 27.

134. *See* [1978] 8 OCCUP. SAFETY & HEALTH REP. (BNA) 102.

135. *Id.* 3. See also note 132 *supra*. After *Barlow's*, it is obviously in the best interest of

cording to OSHA, the high hazard industries are construction, manufacturing, transportation, oil fields, and large agriculture.[136]

A second enforcement policy decision is likely to be the continued or increased use of accident reports,[137] referrals[138] and employee complaints[139] in planning inspections. In fiscal years 1976 and 1977 approximately ninety percent of all employee complaints resulted in inspections and about one-third of all inspections were the result of employee complaints.[140]

Under OSHA's prior regulation,[141] if an employer refused to permit an inspection, the compliance officer was directed to report the refusal immediately to the area director.[142] The area director then conferred with other officials, who promptly took appropriate action,

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OSHA that as many inspections as possible be conducted on the basis of consent. To encourage employer consent to inspect, OSHA must shed its "nitpicking" and "over-enforcement" image, while simultaneously moving ahead more quickly in the area of health hazards. According to Dr. Bingham, "[w]hen we are finally doing our job effectively and fairly and with compassion, then I believe we will have earned the respect and support of the American public." Bingham, *OSHA: Only Beginning*, 29 LAB. L.J. 131, 136 (1978).

136. [1977] 7 OCCUP. SAFETY & HEALTH REP. (BNA) 51.

137. Employers are required to report, within 48 hours of its occurrence, any job-related fatality or accident requiring the hospitalization of five or more employees. *See* M. ROTHSTEIN, *supra* note 126, at 187.

138. Private consultants or state government inspectors may provide on-site consultation services to employers. OSHA will only be notified if an employer fails to eliminate immediately an imminent danger or if an employer fails to abate a serious violation discovered during a prior consultation visit. *See* M. ROTHSTEIN, *supra* note 126, at 213. Also, an industrial hygiene inspection may result from the referral from a prior safety inspection, and vice versa. See note 203 *infra*.

139. Section 8(f)(1), 29 U.S.C. § 657(f)(1) (1976), authorizes employees to file complaints with OSHA about allegedly unsafe or unhealthful conditions. *See* M. ROTHSTEIN, *supra* note 126, at 192-93.

140. [1977] EMPL. SAFETY & HEALTH GUIDE (CCH) No. 332, at 2.

141. 29 C.F.R. § 1903.4 (1978) provided:

> Objection to inspection. Upon a refusal to permit a Compliance Safety and Health Officer, in the exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employer, owner, operator, agent, or employee, in accordance with § 1903.3, or to permit a representative of employees to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace in accordance with § 1903.8, the Compliance Safety and Health Officer shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The Compliance Safety and Health Officer shall endeavor to ascertain the reason for such refusal, and he shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall immediately consult with the Assistant Regional Director and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary.

142. A May 25, 1978, memorandum from OSHA Field Coordinator Donald E. Mackenzie to regional administrators modified the procedures to be followed for objected-to inspections. "If the [inspector] is denied entry or at any time while on the employer's worksite is asked to leave, he/she will no longer ask 'Why?' Rather, the [inspector] should immediately leave the premises and notify the Area Office." [1978] 8 OCCUP. SAFETY & HEALTH REP. (BNA) 3.

including obtaining compulsory process, if necessary. Consequently, only after entry was denied could the Secretary obtain compulsory process.

The Secretary's policy of attempting to secure an injunction ordering the employer to submit to an inspection, rather than seeking an administrative warrant,[143] received a major setback in *Marshall v. Gibson's Products, Inc.*[144] In vacating a three-judge court's order compelling an inspection, the Fifth Circuit, *sua sponte*, held that the district court did not have subject matter jurisdiction. The court ruled that: first, the Act does not provide for injunctive relief in the district courts to compel inspections and Congress did not intend to provide for such actions; second, there is no jurisdiction under either section 1345[145] or section 1337[146]; and finally, OSHA's inspection regulations[147] cannot create federal jurisdiction.

The well-reasoned dissenting opinion of Judge Tuttle in the *Gibson's* case[148] has been expressly followed by the Seventh Circuit in *In re Gilbert & Bennett Manufacturing Co.*,[149] which upheld the validity of

143. This policy was consistent with the Secretary's pre-*Barlow's* position that the Act authorized warrantless inspections. Therefore, a refusal to permit an inspection was met with compulsory process in the form of an injunction and not the "unnecessary" warrant.

144. 584 F.2d 668 (5th Cir. 1978); *accord*, Usery v. Joe Summers & Co., No. C.A. 76-B-72 (S.D. Tex. Jan. 3, 1979) (dismissal of Secretary's action for an order to compel an OSHA inspection).

145. 28 U.S.C. § 1345 (1976). That section provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

The court reasoned that the Secretary of Labor rather than the United States was bringing the action, and no provision of OSHA grants the Secretary general authority to institute such a suit.

146. 28 U.S.C. § 1337 (1976). That section provides in pertinent part that "[t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . . ." The court held that while OSHA was passed pursuant to the commerce clause, the action could not arise under an Act that impliedly rejects such jurisdiction.

147. 29 C.F.R. § 1903.4 (1978). See note 141 *supra*.

148. In dissent, Judge Tuttle persuasively argues the following: first, OSHA impliedly grants the Secretary the right to bring such an action; second, the *Barlow's* case arose in exactly the same procedural setting and the Supreme Court would not have had to reach the constitutional question if it shared the Fifth Circuit's view that the district court lacked subject matter jurisdiction; and finally, the Court *expressly* sanctioned the injunction procedure in several parts of the decision, including the following: "The injunction entered by the District Court, however, should not be understood to forbid the Secretary from exercising the inspection authority conferred by § 8 pursuant to *regulations* and *judicial process* that satisfy the Fourth Amendment." 436 U.S. at 325 n. 23 (emphasis added).

Judge Tuttle also suggests that the majority opinion in *Gibson's* deprives the Secretary of the right to file suit to compel inspection, even after the issuance of a warrant, and thus renders the Supreme Court's decision in *Barlow's* a nullity. It does not necessarily follow, however, that the Court would adopt such an obdurate approach to warrant-enforcement, inasmuch as the injunction procedure was rejected in favor of the use of warrants.

149. 589 F.2d 1335, 1344 (7th Cir. 1979).

the compulsory process procedure. Nevertheless, after *Barlow's*, the important issue is how inspections pursuant to warrants are to be conducted.[150] In this area, as well, there have been problems. In *Cerro Metal Products v. Marshall*,[151] a district court issued a temporary restraining order prohibiting the Secretary from obtaining an ex parte inspection warrant. According to the court, while *Barlow's* clearly indicated that a revised regulation providing for preinspection ex parte warrants would be constitutional, the Secretary had not amended the regulation.[152]

On December 22, 1978, OSHA published an amended version of section 1903.4.[153] The new regulation was effective immediately and was couched as "an interpretive rule," thereby eliminating the requirements of a general notice of proposed rulemaking, public participation and a thirty-day delay in effective date under the Administrative Procedure Act (APA). This new regulation authorized the Secretary to obtain preinspection ex parte compulsory process, which was defined to include inspection warrants.

After promulgating this new regulation, the Secretary sought to dissolve the injunction that had been issued in *Cerro*. In ruling on this motion and in a consolidated case,[154] the court held that the revision of section 1903.4 was invalidly promulgated. The court held that the new

150. See text accompanying notes 196-200 *infra*.

151. No. 78-3713 (E.D. Pa. Nov. 10, 1978), [1978] OSHD (CCH) ¶ 23,150 (bench opinion of Pollak, J.); *cf.* Weyerhaeuser Co. v. Marshall, No. 78-479 (D.N.J. Apr. 17, 1978), 6 OSHC 1920, [1978] OSHD (CCH) ¶ 22,900 (Secretary agreed to give employer 10 days notice before seeking to obtain a warrant).

152. No. 78-3713 (E.D. Pa. Nov. 10, 1978), [1978] OSHD (CCH) ¶ 23,150.

153. 29 C.F.R. § 1903.4 (1978). The revised § 1903.4 provides:

> Objection to inspection.
>
> (a) Upon a refusal to permit a Compliance Safety and Health Officer, in exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employer, owner, operator, agent, or employee, in accordance with § 1903.3, or to permit a representative of employees to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace in accordance with § 1903.8, the Compliance Safety and Health Officer shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The Compliance Safety and Health Officer shall endeavor to ascertain the reason for such refusal, and shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall consult with the Regional Solicitor, who shall take appropriate action, including compulsory process, if necessary.
>
> (b) Compulsory process may be sought in advance of an inspection or investigation if, in the judgment of the Area Director and the Regional Solicitor, circumstances exist which make preinspection process desirable or necessary.
>
> (c) With the approval of the Regional Administrator and the Regional Solicitor, compulsory process may also be obtained by the Area Director or his designee.
>
> (d) For purposes of this section, the term compulsory process shall mean the institution of any appropriate action, including ex parte application for an inspection warrant or its equivalent.

154. Cerro Metal Prods. v. Marshall, No. 78-3713 (consolidated with Fleck Indus., Inc. v. Marshall, No. 79-77) (E.D. Pa. Mar. 8, 1979), [1979] OSHD (CCH) ¶ 23,373. In *Fleck Indus., Inc.,*

regulation was *not* an interpretive rule and therefore was not exempt from the notice and comment requirements of the APA. According to the court, for the revised regulation to qualify as an interpretive rule, rather than a new rule, the prior rule also would have to have authorized ex parte warrants. However, the Supreme Court in *Barlow's* held that the regulation did *not* authorize ex parte warrants.

If *Cerro II* is reversed on appeal, or if the new regulation is upheld by another court, or if the regulation is reproinulgated in accordance with the APA, the procedure should be effective. According to a 1977 regulation,[155] any refusal to permit an inspection must be reported. If these reports are maintained accurately, it will be relatively easy to determine, in advance, whether an employer is likely to require a warrant and, if so, to obtain the warrant ex parte prior to any attempted inspection.

B. *OSHA Inspections Under the* Camara *and* See *Exceptions.*

Although *Barlow's* does hold that warrantless OSHA inspections violate the fourth amendment, the decision does not affect inspections that fall within the exceptions to the warrant requirement: if an OSHA inspection comes within one of the exceptions, no warrant is required.

1. *Emergency.* The *Barlow's* decision did not deal specifically with the emergency exception, but in *Michigan v. Tyler*,[156] decided only eight days later, the Court held that a warrant is not required for an administrative search during an emergency. "[I]n the regulatory field, our cases have recognized the importance of 'prompt inspections, even without a warrant, . . . in emergency situations.' "[157] For OSHA inspections, the emergency exception appears to be limited to imminent dangers[158] or other exigent circumstances. It might also be possible to justify a warrantless investigation in the case of an accident or fatality where a prompt inspection is needed to prevent a recurrence.[159] In any event, consent should be obtained if possible.

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the employer sought to enjoin the Secretary from obtaining an ex parte warrant pursuant to the new regulation.

155. Program Directive No. 200-59 (Apr. 5, 1977), *reported at* [1977 Transfer Binder] EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 10,868.

156. 436 U.S. 499, 509-10 (1978).

157. *Id.* at 509 (citing *Camara*, 387 U.S. at 539) (omission in original).

158. Section 13(a) of the Act, 29 U.S.C. § 662(a) (1976), defines "imminent danger" as a condition "which could be reasonably expected to cause death or serious physical harm immediately or before the immmence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." *See generally* M. ROTHSTEIN, *supra* note 126, at 318-21.

159. In the context of a fire inspection, the Supreme Court in Michigan v. Tyler, 436 U.S. 499, 510 (1978), stated: "Prompt determination of the fire's origin may be necessary to prevent its

2. *Consent.* For OSHA purposes, the most important exception is consent. The Court in *Barlow's* reaffirmed that consent will validate a warrantless inspection. Moreover, the Court suggested that "the great majority of businessmen can be expected in normal course to consent to inspection without warrant."[160] Consent is usually obtained when the inspector presents his credentials.[161] At this time, the employer may make a toll-free call to OSHA to verify the inspector's identity,[162] but the employer may not impose unreasonable preconditions to the inspection.[163]

Administrative standards are applied in determining whether there is consent to an OSHA inspection. Thus, "casual" consent is sufficient[164] and any competent management official may give consent, regardless of his or her title.[165] In *Havens Steel Co.*,[166] the Occupational Safety and Health Review Commission held that a general contractor with authority over an entire worksite could consent to an inspector's presence on the site, thereby enabling the inspector to observe violations by a subcontractor. In a memorandum issued after *Barlow's*, OSHA instructed its personnel that inspectors need not inform employers of their rights, but the inspectors must not in any way mislead, coerce or threaten the employer. If the employer asks questions about the *Barlow's* ruling, the inspector is directed to answer them in a "straightforward" manner.[167]

3. *Open View.* The Supreme Court in *Barlow's* expressly states that the "open view" exception does apply to OSHA inspections.

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recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace."

160. 436 U.S. at 316. The Court, however, was constrained to observe: "We recognize that today's holding might itself have an impact on whether owners choose to resist requested searches; we can only await the development of evidence not present on this record to determine how serious an impediment to effective enforcement this might be." *Id.* at 316-17 n.11.

161. *See generally* M. ROTHSTEIN, *supra* note 126, at 228-31.

162. Marshall v. Barlow's, Inc., 436 U.S. 307, 333 (1978) (Stevens, J., dissenting).

163. *See* Usery v. Godfrey Brake & Supply Serv., Inc., 545 F.2d 52 (8th Cir. 1976) (employer may not insist that the inspector complete a detailed questionnaire).

164. See text accompanying notes 36-45 *supra.*

165. *See* Stephenson Enterprises, Inc. v. Marshall, 578 F.2d 1021, 1024 (5th Cir. 1978) (plant manager); Dorey Elec. Co. v. Occupational Safety & Health Review Comm'n, 553 F.2d 357 (4th Cir. 1977) (foreman); Western Waterproofing Co., 5 OSHC 1496, ("senior employee"); Hensel Optical Co., No. 76-1116 (ALJ Mar. 7, 1977), [1977-78] OSHD (CCH) ¶ 21,728, *aff'd*, 5 OSHC 1772 (1977) (company president).

166. 6 OSHC 1740, [1978] OSHD (CCH) ¶ 22,875; *cf.* Titanium Metals Corp. of America v. Usery, 579 F.2d 536, 545 (9th Cir. 1978); Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683 (9th Cir. 1978) (*Barlow's* decision *not* applied retroactively).

167. Memorandum from OSHA Field Coordinator Donald E. Mackenzie to regional administrators, May 25, 1978, *reported in* [1978] 8 OCCUP. SAFETY & HEALTH REP. (BNA) 3.

"What is observable by the public is observable, without a warrant, by the Government inspector as well."[168] Thus, once on the employer's property, all violations in plain view may be noted by the inspector, even if beyond the scope of a warrant.[169] The most common use of the open view exception in OSHA cases involves outdoor inspections. For example, the Fifth Circuit has upheld the validity of a warrantless inspection after a trench cave-in along a public street.[170] Similarly, the Eighth Circuit has affirmed a citation based on the warrantless inspection of a window-washing scaffold on the outside of an office building.[171]

4. *Licensing.* After *Barlow's*, the licensing-regulated industries exception of *Colonnade* and *Biswell* is inapplicable to OSHA.[172] Even OSHA inspections of the liquor and firearms industries must satisfy the fourth amendment; the exception applies only to inspectors from the particular agencies regulating the "sensitive commodities" of liquor and guns.

C. *Probable Cause.*

The most important question left unresolved by the opinion in *Barlow's* is the degree of probable cause required for the issuance of an OSHA inspection warrant. The Court's discussion of probable cause is extremely vague:

> A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amend-

168. 436 U.S. at 315 (footnote omitted).

169. Stephenson Enterprises, Inc. v. Marshall, 578 F.2d 1021, 1024 & n.2 (5th Cir. 1978); Lake Butler Apparel Co. v. Secretary of Labor, 519 F.2d 84, 88 (5th Cir. 1975).

170. Accu-Namics, Inc. v. Occupational Safety & Health Review Comm'n, 515 F.2d 828 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); *cf. In re* Surface Mining Regulation Litigation, 456 F. Supp. 1301, 1317-19 (D.D.C. 1978) (open fields search of mine).

171. Marshall v. Western Waterproofing Co., 560 F.2d 947 (8th Cir. 1977).

172. It is not clear how narrowly *Colonnade* and *Biswell* will be construed in the future. For example, in United States v. Consolidation Coal Co., 436 U.S. 942 (1978), a case involving the validity of warrantless coal mine safety inspections, the Court remanded the case for further consideration in light of *Barlow's* and *Tyler*. On remand, the Sixth Circuit reinstated its prior judgment. United States v. Consolidation Coal Co., 579 F.2d 1011 (6th Cir. 1978), *cert. denied*, 99 S. Ct. 836 (1979). *See* United States v. Munsey, 457 F. Supp. 1 (E.D. Tenn. 1978) (warrantless search and seizure of required gun records valid under *Biswell*); *In re* Surface Mining Regulation Litigation, 456 F. Supp. 1301, 1317-19 (D.D.C. 1978) (warrantless mine search regulations upheld on pervasive regulation).

ment rights.[173]

In *Michigan v. Tyler*,[174] the Court seemingly provided additional guidance, but the facts of that case do not lend themselves to the context of OSHA inspections. In *Tyler*, the Court separated fire inspections into "routine building inspections" and "investigatory fire searches." For routine fire inspections a warrant may be based upon "broad legislative or administrative guidelines specifying the purpose, frequency, scope, and manner of conducting the inspections."[175] For investigatory fire searches, "which are not programmatic but are responsive to individual events, a more particularized inquiry may be necessary."[176] This dichotomy is inapplicable to OSHA inspections, because they usually contain elements of *both* routine building inspections (or code-enforcement inspections) and investigatory searches. It would be paradoxical, moreover, to hold that a "routine" (programmed) OSHA inspection[177] may be based on broad legislative or administrative guidelines, but that an OSHA inspection conducted after a fatality or pursuant to an employee complaint (unprogrammed) requires a more particularized inquiry.[178]

To establish probable cause for the issuance of an OSHA inspection warrant, the Secretary should be required to demonstrate a reason-

173. 436 U.S. at 321 (footnote omitted). The requirement of a "general administrative plan" would not appear to be satisfied simply by the Secretary's workplace inspection priorities of: first, imminent dangers; second, catastrophe and fatality investigations; third, employee complaints; fourth, special emphasis program inspections; and finally, general inspections. OSHA Program Directive No. 400-3 (Oct. 21, 1977).

174. 436 U.S. 499 (1978).

175. *Id.* at 507.

176. *Id.* According to the Court, relevant factors are "[t]he number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner's efforts to secure it against intruders." *Id.*

177. OSHA's routine inspections, called "Regional Programmed Inspections," are based on accident experience and the number of employees exposed in particular industries. *Barlow's*, 436 U.S. at 321 n. 17. On December 6, 1978, OSHA issued its "Scheduling System for Programmed Inspections," designated as OSHA Instruction CPL 2.25. EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 11,560 (Jan. 23, 1979). This document compiled all existing programmed inspection criteria. The system is somewhat complex, but allocates 95% of programmed inspection resources to "high hazard" industries. See note 135 *supra* and accompanying text. Inspections will be determined by the employer's "standard industrial classification" (SIC) and size. See note 180 *infra*. In addition, OSHA will consider eight "adjustment factors." They are: first, the experience and qualifications of available compliance officers; second, the location of the establishment (so that establishments in the same geographic area may be inspected at the same time); third, the seasonal nature of the establishment; fourth, the time required for the inspection; fifth, the availability of needed sampling and other investigative equipment; sixth, the weather; seventh, whether the establishment had been recently inspected; and finally, special circumstances, such as a labor strike.

178. While the filing of an employee complaint should not make the issuance of a warrant automatic, see text accompanying note 128 *supra*, the Secretary should not be "penalized" and held to a higher standard of probable cause simply because further evidence exists of the need to inspect.

able, objective basis for the selection of a particular workplace for inspection. This would satisfy the Court's requirement that the specific business be chosen from an administrative plan derived from neutral sources. Establishing probable cause might appear tantamount to showing the likelihood of an OSHA violation. Employee complaints, high accident rates and other factors, however, while tending to prove that violations are likely, are actually used to establish the existence of a reasonable, objective basis for selection of the particular workplace. The need to conduct an inspection is a factual and policy decision of the Secretary. The magistrate's role is to ensure that the factual determinations underlying the decision to inspect are not clearly erroneous and that the policy considerations of the Secretary are not arbitrary, capricious and abusive of discretion.

Three types of information may establish a "reasonable, objective basis" for an inspection: first, general information about the employer's industry; second, general information about the employer and the workplace; and finally, specific information about the employer's working conditions. The first two classes of information are usually relevant to routine or "programmed" inspections. The third class is particularly applicable to special or "unprogrammed" inspections.

1. *General Information About the Employer's Industry.* It is reasonable for OSHA to inspect an employer engaged in an industry in which either the likelihood, or the consequences, of an accident are substantial. The ageney and a reviewing magistrate should therefore consider the following:

a. Statistics regarding accident rates or OSHA violations in the employer's industry. In *Reynolds Metals Co. v. Secretary of Labor*,[179] the court found that the Secretary's selection of the employer from its "Worst-First" industries list was a "rational method, the equivalent of the area inspection plan approved in *Camara*."[180] In *Marshall v. Weyerhaeuser Co.*,[181] however, the court found a lack of probable cause despite the employer's placement on the "Worst-First" list, its history

179. 442 F. Supp. 195 (W.D. Va. 1977).

180. *Id.* at 201. The "Worst-First" list is the nickname given to OSHA's Inspection Planning Guide (IPG) and is determined in the following manner: each business establishment in a geographical area is assigned a standard industrial classification (SIC) based on the nature of the business. For each SIC the Bureau of Labor Statistics has compiled an injury rate, which is the average number of employees injured per 100 employees. Then, for each business, the injury rate is multiplied by the average number of employees per establishment in a particular site SIC. The resulting figure, the "hazard rate," is used to compute the "Worst-First" list. *See* Marshall v. Weyerhaeuser Co., 456 F. Supp. 474, 478-79 (D.N.J. 1978).

181. 456 F. Supp. 474 (D.N.J. 1978). *See* Marshall v. Central Mine Equip. Co., No. 78-MISC 93 (E.D. Mo. Nov. 10, 1978), [1979] OSHD (CCH) ¶ 23,309.

of previous violations and a three-year lapse between inspections. The court held that, unlike the situation in *Reynolds*, other employers on the "Worst-First" list with a higher ranking had never been inspected and Weyerhaeuser was the subject of two prior inspections. The court was concerned that employers were being selected arbitrarily and not from a "neutral plan" as required by *Barlow's*.[182]

b. Injury records at workplaces of other employers with similar conditions or at other workplaces of the same employer.

c. The nature of the products or materials produced or handled by employees and the workplace procedures used. For example, probable cause is likely to be found where toxic chemicals are used or where injuries resulting from a safety accident would be severe.

d. Special industry facts, problems or inspection programs. For instance, in *Marshall v. Multi-Cast Corp.*,[183] probable cause was found for the inspection of a foundry as part of the Secretary's National Emphasis Program (NEP), which selected foundries for concentration because of the high accident rate in that industry. Although *Marshall v. Shellcast Corp.*[184] held that industry-wide statistics are insufficient and that injury rates for the specific employer are needed, such a requirement may place too great a burden on the Secretary.[185]

2. *General Information About the Employer and Workplace.* The nature of an employer's business and the history of his compliance with OSHA are relevant in determining probable cause to issue an inspection warrant. Specifically, the following factors should be evaluated:

a. The number of employees exposed to danger and the size of the employer's business. The Secretary gives priority to inspecting larger businesses.

182. 456 F. Supp. at 484. It would appear that the court should have required the employer's allegations of harassment and arbitrariness to be supported by greater evidence than the fact that the employer, admittedly in a high hazard industry, was not inspected in precise mathematical order. The court, in effect, presumed an illicit motive on the part of OSHA.

OSHA's new inspection criteria are designed to provide some degree of flexibility for regional administrators while ensuring that the selection of employers for inspection is not arbitrary. See note 177 *supra*.

183. No. C77-414 (N.D. Ohio Jan. 10, 1978), [1978] OSHD (CCH) ¶ 22,667; accord, Marshall v. Chromalloy Am. Corp., 433 F. Supp. 330 (E.D. Wis. 1977), *aff'd sub nom. In re* Gilbert & Bennett Mfg. Co., 589 F.2d 1335 (7th Cir. 1979); Fountain Foundry Corp. v. Marshall, No. 1877-459-C (S.D. Ind. Aug. 29, 1978), 6 OSHC 1885, [1978] OSHD (CCH) ¶ 23,101; Lockport Non Ferrous Casting, Inc. v. Marshall, 441 F. Supp. 333 (W.D.N.Y. 1977); Reynolds Metals Co. v. Secretary of Labor, 442 F. Supp. 195 (W.D. Va. 1977).

184. Civ. No. 77-P-0995-E (N.D. Ala. July 26, 1977), 5 OSHC 1689 (1977).

185. It should be noted, however, that the employer in *Shellcast* had been inspected twice before by OSHA, most recently within the last two years, and that no violations had been detected in the previous inspections.

b. The safety and health record of the employer.

c. The time elapsed since any prior inspection of the employer.[186] In *Reynolds Metals Co. v. Secretary of Labor*,[187] the issuance of the warrant was based partly on the fact that the employer had never been inspected.

d. The employer's history of OSHA violations. In *Marshall v. Northwest Orient Airlines, Inc.*,[188] the Second Circuit affirmed a district court's finding of probable cause for an OSHA inspection based on the employer's prior violations.[189]

e. Inspection of the employer's accident and illness logs.[190]

3. *Specific Information About the Employer's Working Conditions.* Probable cause can be most readily established where there is an indication that violative conditions may exist at the employer's workplace. The most reliable sources of information regarding alleged safety and health hazards are the following:

a. Employee and union complaints. Several district courts have held that the filing of a valid employee complaint[191] establishes probable cause for the issuance of a warrant.[192] It will usually be necessary, however, to introduce a copy of the complaint (with the complainant's name deleted) to the magistrate or at least to provide specific information about the contents of the complaint. The mere allegation that an

186. *See* Camara v. Municipal Court, 387 U.S. 523, 538 (1967); United States v. Blanchard, 495 F.2d 1329, 1331 (1st Cir. 1974).

187. 442 F. Supp. 195 (W.D. Va. 1977). In Camara v. Municipal Court, 387 U.S. 523, 538 (1967), the Court specifically indicated that the "passage of time" from the last inspection was a factor in determining probable cause. *See* United States v. Prendergast, 585 F.2d 69 (3d Cir. 1978) (administrative warrant authorizing search of pharmacy upheld because pharmacy had never been inspected to insure compliance with compulsory recordkeeping requirements); *cf.* United States v. Roux Labs., Inc., 456 F. Supp. 973, 976 (M.D. Fla. 1978) (issuance of administrative search warrants more than two years apart held *not* to be harassment).

188. 574 F.2d 119, 123 (2d Cir. 1978).

189. *Accord, In re* Lifeguard Indus., Inc., No. MS-1-77-39 (S.D. Ohio Dec. 22, 1977), [1978] OSHD (CCH) ¶ 22,627; *see* Accident Prevention Div. v. Hogan, 586 P.2d 1132 (Ore. Ct. App. 1978) (probable cause established by employer's history of violations and employee injuries, its reluctance to correct violations, and its unwillingness to consent to inspections).

190. For a discussion of the recordkeeping obligations of employers, *see* M. ROTHSTEIN, *supra* note 126, at 180-89.

191. Section 8(f)(1) of the Act specifically authorizes the filing of employee complaints with the Secretary and § 11(c)(1) prohibits the discharge or sanctioning of an employee for filing a complaint or exercising other rights protected under the Act. *See* M. ROTHSTEIN, *supra* note 126, at 200-03.

192. *See, e.g., In re* Blocksom & Co., No. S 76-170 (N.D. Ind. Nov. 1, 1977), 6 OSHC 1001, [1978] OSHD (CCH) ¶ 22,610, *aff'd in part, vacated & remanded in part sub nom.* Blocksom & Co. v. Marshall, 582 F.2d 1122 (7th Cir. 1978); *In re* Lifeguard Indus., Inc., No. MS-1-77-39 (S.D. Ohio Dec. 22, 1977), [1978] OSHD (CCH) ¶ 22,627; *In re* Chicago Wire Magnet Corp., No. 77C3025 (N.D. Ill. Oct. 27, 1977), 5 OSHC 2024, [1977-78] OSHD (CCH) ¶ 22,270.

employee complaint was filed will not establish probable cause. In *Marshall v. Northwest Airlines, Inc.*,[193] the Seventh Circuit held that section 8(f)(1)'s authorization of employee complaints,[194] standing alone, does not satisfy the *Barlow's* requirement of a reasonable legislative or administrative inspection program. Moreover, the warrant application in that case failed to indicate why the desired inspection fit within such a program.

Therefore, to establish probable cause based on an employee complaint the Secretary must introduce evidence that inspections based upon employee complaints are part of a reasonable administrative inspection program and that the particular complaint, together with any corroborating evidence, sets forth sufficient facts to establish a reasonable basis for inspection.[195]

A related issue is the scope of an inspection warrant issued pursuant to an employee complaint. In *Whittaker Corp. v. OSHA*,[196] the court held that an employee complaint about a specific safety hazard did not establish probable cause for an inspection of the entire workplace. Ostensibly, to justify a general inspection, it would be necessary for the complaint to describe each allegedly hazardous condition in

193. 587 F.2d 12 (7th Cir. 1978); *accord*, Weyerhaeuser Co. v. Marshall, No. 78-2013 (7th Cir. Feb. 9, 1979), 7 OSHC 1090, [1979] OSHD (CCH) ¶ 23,325.

194. Section 8(f)(1) of the Act provides:

> Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of the employees, and a copy shall be provided the employer or his agent no later than the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

29 U.S.C. § 657(f)(1) (1976).

195. According to OSHA regulations implementing § 8(f)(1), 29 C.F.R. § 1903.11 (1978), a valid complaint must: (1) be in writing; (2) allege that a violation exists at the workplace; (3) set forth with reasonable particularity the grounds upon which it is based; and (4) be signed by the employee or the authorized employee representative.

Under § 8(f)(1), complaining employees may request that their names be withheld and the disclosure of the complainant would not appear necessary to establish probable cause for the issuance of a warrant.

196. No. 77-730 (M.D. Pa. Mar. 7, 1978), 6 OSHC 1492 (1978), [1979] OSHD (CCH) ¶ 23,381. *See also* Marshall v. Central Mine Equip. Co., No. 78-MISC 93 (E.D. Mo. Nov. 10, 1978), [1979] OSHD (CCH) ¶ 23,309.

great detail.[197] The better view is represented by the district court's opinion in *In re Gilbert & Bennett Manufacturing Co.*,[198] where the court held that the filing of an employee complaint established probable cause for inspection of the entire worksite. "To hold otherwise and confine the investigation to the substance of the employee complaint would unreasonably restrict the goals outlined in the legislation without reason as the warrant requirement adequately protects the [employer's] rights."[199] According to the Secretary's regulations,[200] an inspection based on an employee complaint "normally" is not limited to the substance of the complaint but covers the entire establishment of the employer. In view of the increasing number of employee complaints, this policy may not make the most efficient use of resources and may be a needless burden on employers. An alternative would be for the Secretary to amend the regulation so that inspections based on complaints would normally be limited to the working conditions of the complaining employee or employees, and other hazardous conditions specifically alleged in the complaint. An establishment-wide inspection could be conducted if there had been no recent inspection of the entire workplace, the complaint alleges a pattern of hazardous conditions throughout the establishment, *or* during the course of the inspection the compliance officer determines that a broader inspection is necessary to protect the safety and health of affected employees.

b. Complaints or information supplied by former employees,

197. Employers undoubtedly would argue that a complaint couched in the broadest terms would not be sufficient to establish probable cause for an inspection. Moreover, such a general complaint might not be valid under the Secretary's regulations, 29 C.F.R. § 1903.11 (1978) and DEP'T OF LABOR, OSHA, FIELD OPERATIONS MANUAL, Ch. VI (1977) (both require "reasonable particularity"), and, in any event, would be of little value to the inspector in identifying hazardous conditions.

198. Civil No. 77 C 856 (N.D. Ill. Apr. 12, 1977), 5 OSHC 1375, [1977-78] OSHD (CCH) ¶ 21,798, *aff'd*, 589 F.2d 1335 (7th Cir. 1979). Although this precise issue was not raised on appeal by *Gilbert & Bennett*, the Seventh Circuit adopted a similar position in resolving a companion case. According to the court, where the exact location of violations cannot be known before an inspection "the scope of an OSHA inspection warrant must be as broad as the subject matter regulated by the statute and restricted only by the limitations imposed by Congress and the reasonableness requirement of the Fourth Amendment." 589 F.2d at 1343 (citations omitted).

199. 5 OSHC at 1375-76.

200. F.O.M. Ch. VI-D-4 (1978) provides:

> Normally, if time and resources permit, the inspection should cover not only violations and dangers alleged in the complaint, but the entire establishment of the employer. If there has been a very recent inspection, and the CSHO [compliance safety and health officer] assures himself that a complete inspection is not necessary, a partial inspection only should be made. However, if the CSHO has reason to believe that similar conditions exist in areas of an establishment other than those areas initially brought to his attention in the complaint, he shall broaden the inspection to include such areas. In each case, the CSHO shall advise the employer of an increase in scope of the inspection at the opening conference or at the earliest possible opportunity.

members of an employee's family, competitors, suppliers, neighbors or other individuals with knowledge of the employer's working conditions. Any reliable information regarding dangerous working conditions may be used to help establish probable cause. For example, in *In re Quality Products, Inc.*,[201] the court ruled that an employer's admission corroborating an anonymous tip that a known carcinogen was used in the plant established probable cause for the issuance of an OSHA inspection warrant.

c. Referrals from on-site consultants, state inspectors, inspectors from other federal agencies (such as EPA), or other similar sources. For example, in *In re Blocksom & Co.*,[202] probable cause was found, at least in part, on the basis of a prior inspection by an OSHA safety inspector which had indicated the need for an inspection by an industrial hygienist.[203]

d. Follow-up inspections to determine whether violations have abated. In *Pelton Casteel, Inc. v. Marshall*,[204] the Seventh Circuit affirmed the finding of probable cause to issue an OSHA inspection warrant where the Secretary sought to conduct a follow-up inspection of an employer who had previously been found in violation, after the employer moved some of its operations to a new facility.

e. The existence of an imminent danger.[205] Although the presence of an imminent danger would certainly establish probable cause for an inspection, presumably a warrantless inspection could be conducted pursuant to the emergency exception.[206]

f. The investigation of a fatality or an accident.[207]

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201. No. 77-0075 M-00 (D.R.I. May 30, 1978), 6 OSHC 1663, [1978] OSHD (CCH) ¶ 22,795, *remanded with directions to vacate for want of jurisdiction*, No. 78-1232 (1st Cir. Feb. 16, 1979), 7 OSHC 1093, [1979] OSHD (CCH) ¶ 23,328; *cf.* Robberson Steel Co., 6 OSHC 1430, [1978] OSHD (CCH) ¶ 22,603 (complaint filed by former employee); Aluminum Coil Annodizing Corp., 5 OSHC 1381, [1977-78] OSHD (CCH) ¶ 21,789 (complaint filed by non-employee).

202. No. 76-170 (N.D. Ind. Nov. 1, 1977), 6 OSHC 1001, [1978] OSHD (CCH) ¶ 22,610, *aff'd in part, vacated & remanded in part sub nom.* Blocksom & Co. v. Marshall, 582 F.2d 1122 (7th Cir. 1978).

203. OSHA uses both safety inspectors and industrial hygienists. Due to a shortage of industrial hygienists, the initial inspection was made by a safety inspector, who indicated that a referral inspection by an industrial hygienist was also needed. *Accord* Marshall v. Miller Tube Corp. of America, No. 78-C-1591 (E.D.N.Y. Oct. 12, 1978), 6 OSHC 2042, [1978] OSHD (CCH) ¶ 23,212.

204. 588 F.2d 1182 (7th Cir. 1978). The Secretary's regulations on follow-up inspections appear at FIELD OPERATIONS MANUAL, *supra* note 197, at Chs. IX-E-1 & V-F.

205. See note 158 *supra*.

206. See text accompanying notes 156-59 *supra*.

207. According to the Secretary's regulations, FIELD OPERATIONS MANUAL, *supra* note 197, at Chs. IV-B-3-b & XVI-C-2-c, an inspection will be conducted if an accident has caused one or more deaths, resulted in the hospitalization of five or more employees for more than 24 hours, recurred on a frequent basis, caused significant publicity, involved an industry in a special empha-

g. An inspector's observation of an apparent violation. For instance, before being refused entry or seeking a warrant, the inspector may have had a brief view of the workplace (such as from the street looking into a work yard) and believed that violations existed.[208]

The foregoing list is not all-inclusive and merely sets forth a number of *factors* to be considered by a magistrate in determining whether there is probable cause for the issuance of an OSHA inspection warrant. Based on the information presented, the overall circumstances must demonstrate a reasonable, objective basis for selecting the particular workplace for inspection.

Finally, the application to the magistrate must also indicate that the inspection will be conducted at a reasonable time and in a reasonable manner.[209] In *Empire Steel Manufacturing Co. v. Marshall*,[210] a warrant was quashed where the inspection period specified in the warrant had expired and the inspection had been authorized for a time other than normal business hours.

D. *Should an Employer Demand a Warrant?*

While *Barlow's* makes it clear that an employer has the right to demand a warrant, employers should consider the consequences of such a decision. In the first place, because a warrant may issue upon a showing of administrative probable cause, a warrant can usually be obtained easily. Thus, the inspection cannot be avoided, but merely

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sis program, or caused extensive property damage and could have resulted in a large number of deaths or injuries.

208. On open view searches under OSHA, see text accompanying notes 168-71 *supra*. *See also* Hoffman Constr. Co. v. Occupational Safety & Health Review Comm'n, 546 F.2d 281 (9th Cir. 1976); Hartwell Excavating Co. v. Dunlop, 537 F.2d 1071 (9th Cir. 1976) (observations made by inspectors before the presentation of credentials and consent to inspect held valid and admissible).

209. See § 8(a)(2) of the Act, 29 U.S.C. § 657(a) (1976), at note 71 *supra*. The Secretary need not conduct a pre-inspection evidentiary hearing to determine whether an employer is engaged in a business affecting commerce. Marshall v. Able Contractors, Inc., 573 F.2d 1055, 1056 (9th Cir.), *cert. denied*, 99 S. Ct. 98 (1978). Nevertheless, an employer should be permitted to challenge probable cause for the issuance of a warrant based on the employer's not being covered by the Act.

It should also be noted that the courts have rejected the claim that magistrates are without authority to issue warrants. *In re* Gilbert & Bennett Mfg. Co., 589 F.2d 1335, 1340-41 (7th Cir. 1979); *In re* Quality Prods., Inc., No. 78-1232 (1st Cir. Feb. 16, 1979), 7 OSHC 1093, [1979] OSHD (CCH) ¶ 23,328; Empire Steel Mfg. Co. v. Marshall, 437 F. Supp. 873, 881-82 (D. Mont. 1977).

210. 437 F. Supp. 873 (D. Mont. 1977); *see* Marshall v. Central Mine Equip. Co., No. 78-MISC 93 (E.D. Mo. Nov. 10, 1978), [1979] OSHD (CCH) ¶ 23,309 (warrant held to be improper where it authorized inspection to begin within 10 days after issuance of the warrant but did not prescribe an end date for the inspection); *cf.* Metal Bellow Corp. v. Pylypetz, No. 78-1038 (1st Cir. Sept. 1, 1978), 6 OSHC 1979 (1978) (denial of motion to quash administrative warrant affirmed on ground of mootness because OSHA had surrendered the warrant).

delayed.[211] Second, the Secretary already maintains records of employers who have demanded warrants in the past. Assuming that OSHA's regulations are revised to authorize the issuance of an ex parte warrant before entry is denied, an employer will probably be able to delay an inspection only *once*. For subsequent inspections a warrant may be secured in advance.

The most compelling reason that an employer should not be too hasty in demanding a warrant is the possible loss of good will. Even though an employer cannot be penalized for exercising his constitutional right to a warrant,[212] the OSHA inspection, citation and penalty-assessment functions involve a great degree of administrative discretion.[213] A good relationship between the inspector and the employer should be nurtured. In the context of an FDA inspection, the Ninth Circuit in *United States v. Thriftimart, Inc.*[214] pointed out: "Nothing is to be gained by demanding a warrant except that the inspectors have been put to trouble—an unlikely aim for the businessman anxious for administrative good will."[215]

Although a prudent employer would not *normally* demand a warrant, in some instances a warrant should be insisted upon. A warrant should be demanded when there is cause to question the validity or reasonableness of the search. For example, the inspection might be at an unreasonable hour,[216] the scope of the inspection may be overly broad,[217] the inspection may be one of several that have been conducted with a frequency that suggests harassment,[218] the inspector may not appear to be legitimate,[219] or there may be some other question as to the reasonableness or validity of the inspection. In short, an em-

211. Whether a delay of the inspection is of any value to the employer is questionable. First, many hazardous conditions cannot be concealed or corrected in a short period of time. Second, as the Court observes, an ex parte warrant may be obtained and the inspector may reappear without further notice. 436 U.S. at 320.

212. 29 U.S.C. § 666(j) (1976). There have been reports, however, that employers were told that if they insisted on a warrant, a more detailed inspection would be conducted. *See* Pelton Casteel, Inc. v. Marshall, 588 F.2d 1182, 1184, 1188 (7th Cir. 1978); Electrocast Steel Foundry, Inc., 6 OSHC 1562, [1978] OSHD (CCH) ¶ 22,702.

213. One of the penalty assessment factors listed in § 17(j) of the Act, good faith, contains the element of cooperativeness. *See* Havens Steel Co., 6 OSHC 1740, [1978] OSHD (CCH) ¶ 22,875. *See generally* M. ROTHSTEIN, *supra* note 126, at ch. 15, § 324.

214. 429 F.2d 1006, 1009 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970).

215. *Id.*

216. See text accompanying notes 209-10 *supra*.

217. The Court in *Barlow's* specifically expressed concern that the scope of the search be delineated where documents are involved. 436 U.S. at 324 n.22.

218. *See* Michigan v. Tyler, 436 U.S. 499, 508 (1978). See also note 129 *supra*.

219. There have been reports of "con men" posing as OSHA inspectors and exacting on-the-spot penalties (illegal even if done by a legitimate inspector), soliciting bribes to prevent issuance of a citation, and requiring employers to purchase safety equipment sold by a confederate.

ployer would be well advised to demand a warrant when the overall circumstances suggest that legal probable cause for the issuance of a warrant may be lacking.

E. *Challenging an OSHA Warrant.*

Perhaps the most unsettled of all issues relating to OSHA inspections is how an employer should proceed in challenging an already-issued inspection warrant. Because OSHA warrants may be issued ex parte, even without a prior refusal, and because there is no advanced notice of an inspection, employers and their counsel may be forced to make a quick decision whether to permit the inspection or begin some type of legal action. There have been four approaches taken to this problem, but none of these approaches has proven completely satisfactory.

1. *Enjoin the Issuance of the Warrant.* Once a warrant has been issued it may be too late for an employer to take any effective action. Therefore, if possible, the issuance of the warrant should be enjoined in the first instance. This procedure may be effective in cases where the Secretary initially sought to conduct a warrantless inspection, but entry was refused by the employer. Under the Secretary's new regulations, however, a warrant may be sought before even the initial attempt. Moreover, it may not be clear at this stage whether probable cause exists to obtain a warrant and the employer's action may be a waste of time.

In *Cerro Metal Products v. Marshall*[220] and *Fleck Industries, Inc. v. Marshall*,[221] when the employers refused warrantless inspections they were told that a warrant would be sought. The employers then brought actions in district court seeking to enjoin the issuance of an ex parte warrant. The court granted the injunctions because OSHA's inspection regulation was improperly promulgated.[222]

Although enjoining the issuance of a warrant was effective in those cases, it will probably not be successful unless there are extraordinary circumstances such as an invalid regulation or a pattern of unnecessary and harassing inspections.[223]

2. *Refuse the Inspection and Move to Quash the Warrant.* In some

220. No. 78-3713 (E.D. Pa. Mar. 8, 1979), [1979] OSHD (CCH) ¶ 23,373.

221. No. 79-77 (E.D. Pa. Mar. 8, 1979), [1979] OSHD (CCH) ¶ 23,373 (consolidated with and reported as Cerro Metal Prods. v. Marshall).

222. See note 154 *supra* and accompanying text.

223. *See* Dravo Corp. v. Marshall, No. 77-284 (W.D. Pa. Apr. 5, 1977), 5 OSHC 2057 (1977), *aff'd mem.*, 578 F.2d 1373 (3d Cir. 1978). *See generally* Continental Can Co. v. Marshall, 455 F. Supp. 1015 (S.D. Ill. 1978).

instances employers have refused to permit an OSHA inspection even after the issuance of a warrant. Thereafter the employer brought an action in district court to quash the warrant or the employer defended a contempt proceeding on the ground that there was no probable cause for the issuance of the warrant.

Even though this procedure was successful in *Barlow's*,[224] it definitely cannot be recommended. In several cases employers have miscalculated the strength of their defenses and have been held in contempt of court for refusing the inspection.[225] In *Marshall v. Reinhold Construction, Inc.*,[226] however, the court held that there was probable cause for the warrant, but dismissed contempt charges because of the employer's good faith.

3. *Permit the Inspection and Then Bring an Action to Enjoin Further Enforcement Activity by the Secretary.* In *Weyerhaeuser Co. v. Marshall*,[227] OSHA had submitted a report to a magistrate, indicating that an employee complaint had been filed, but the report neither contained a copy of the complaint nor described the allegedly violative conditions. The magistrate issued a warrant and the employer allowed the inspection "under protest." Thereafter, the employer brought an action in district court to enjoin the Secretary from enforcing the citations issued as a result of the inspection. The district court held that OSHA's report to the magistrate was insufficient to establish probable cause and enjoined the Secretary from further enforcement activity. In its affirmance, the Seventh Circuit held that the district court had jurisdiction, the employer was not required to exhaust its remedies before the Occupational Safety and Health Review Commission,[228] and there was no probable cause for issuing the warrant.

A contrary result was reached by the First Circuit in *In re Quality Products*.[229] The court held that following an inspection the magistrate who issued the warrant had no authority to "stay and recall" the war-

224. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 310 (1978).

225. *See, e.g., In re* Gilbert & Bennett Mfg. Co., 589 F.2d 1335 (7th Cir. 1979); *In re* Blocksom & Co., 582 F.2d 1122 (7th Cir. 1978); Marshall v. Multi-Cast Corp., No. C77-414 (N.D. Ohio Jan. 10, 1978), [1978] OSHD (CCH) ¶ 22,667.

226. 441 F. Supp. 685 (M.D. Fla. 1977).

227. 452 F. Supp. 1375 (E.D. Wisc. 1978), *aff'd*, No. 78-2013 (7th Cir. Feb. 9, 1979), 7 OSHC 1090, [1979] OSHD (CCH) ¶ 23,325.

228. *See* Morris v. United States Dep't of Labor, 439 F. Supp. 1014, 1017 (S.D. Ill. 1977); Hayes-Albion Corp. v. Marshall, No. C-77-205 (N.D. Ohio Oct. 14, 1977), 5 OSHC 1968, [1977-78] OSHD (CCH) ¶ 22,274.

229. No. 78-1232 (1st Cir. Feb. 16, 1979), 7 OSHC 1093, [1979] OSHD (CCH) ¶ 23,328; *see In re* Blocksom & Co., 582 F.2d 1122, 1124 (7th Cir. 1978); *cf.* Pieper v. United States, 460 F. Supp. 94 (D. Minn. 1978) (exhaustion of administrative remedies required; district court refused to suppress evidence seized by EPA).

rant. Similarly, the district court lacked jurisdiction to consider the validity of the warrant in a separate action while OSHA enforcement proceedings were pending.

According to the First Circuit, the employer was required to exhaust its administrative remedies before the Occupational Safety and Health Review Commission.

4. *Contesting the Inspection Before the Occupational Safety and Health Review Commission.* The first problem with contesting the warrant before the Commission is delay. It may take two years and involve enormous expense before the case is heard by an administrative law judge and subsequently reviewed by the Commission members.

The second problem is that the Commission has held,[230] with judicial approval,[231] that it does not have the authority to consider challenges to the validity of warrants issued by a magistrate. The Commission could hold that the inspection procedures were invalid under the Act,[232] or that the citation should be vacated on other grounds. If the Commission affirmed the citation, the employer would be required to appeal the Commission's decision to the United States Court of Appeals pursuant to section 11(a) of the Act before it could assert the invalidity of the warrant.

Finally, there is some question regarding the applicability of the exclusionary rule to OSHA cases. In *Todd Shipyards Corp. v. Secretary of Labor*,[233] the Ninth Circuit held that the exclusionary rule could not be applied retroactively to challenge the legality of a pre-*Barlow's* search. Moreover, the court expressed considerable doubt whether the exclusionary rule should *ever* be applied to OSHA proceedings.[234] The cumulative effect of these decisions, of course, is to place the employer in a seemingly inescapable quandary.

IX. CONCLUSION

In *Marshall v. Barlow's, Inc.*, the Supreme Court held that noncon-

230. Milton Morris, 6 OSHC 2019, [1978] OSHD (CCH) ¶ 23,044; Electrocast Steel Foundry, Inc., 6 OSHC 1562, [1978] OSHD (CCH) ¶ 22,702.

231. *In re* Quality Prods., Inc., No. 78-1232 (1st Cir. Feb. 16, 1979), 7 OSHC 1093, [1979] OSHD (CCH) ¶ 23,328; Weyerhaeuser Co. v. Marshall, No. 78-2013 (7th Cir. Feb. 9, 1979), 7 OSHC 1090, [1979] OSHD (CCH) ¶ 23,325; *In re* Blocksom & Co., 582 F.2d 1122, 1124 (7th Cir. 1978).

232. *See In re* Quality Prods., Inc., No. 78-1232 (1st Cir. Feb. 16, 1979), 7 OSHC 1093, [1979] OSHD (CCH) ¶ 23,328; Accu-Namics, Inc. v. Occupational Safety and Health Review Comm'n, 515 F.2d 828 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976).

233. 586 F.2d 683 (9th Cir. 1978). *See also* Buckeye Indus., Inc. v. Secretary of Labor, 587 F.2d 231 (5th Cir. 1979).

234. 586 F.2d at 686. *But see* Savina Home Indus., Inc. v. Secretary of Labor, No. 77-1139, (10th Cir. March 23, 1979), 7 OSHC 1154, [1979] OSHD (CCH) ¶ 23,413.

sensual OSHA inspections may only be conducted pursuant to a warrant. OSHA inspection warrants may be issued ex parte and merely require the existence of administrative probable cause. Although most employers are likely to continue consenting to OSHA inspections, an employer's right to insist on a warrant *does* protect vital privacy interests.

In the long run, *Barlow's* may not bring any significant substantive changes to the interpretation of the fourth amendment. In the interim, however, it has raised numerous unresolved issues such as the probable cause needed for an OSHA inspection warrant, the scope of an OSHA warrant and the procedures to use in challenging the validity of an OSHA warrant.