The Constitutionality of General Inspections Under the Occupational Safety and Health Act of 1970

I. INTRODUCTION

In 1970, Congress found that personal injuries and illnesses arising out of work situations imposed a substantial burden on interstate commerce.[1] In response, Congress passed legislation[2] which declared its resolve, through the exercise of its power to regulate interstate commerce, to assure as far as possible, a safe and healthful working environment for every working man and woman.[3] The Occupational Safety and Health Act of 1970 (OSHA) gives the Secretary of Labor or his authorized representative the right:

> (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 thereon . . . .[4]

OSHA regulates all businesses that affect interstate commerce.[5] As such, it applies to over six million work places in thousands of industries.[6] In June, 1977, for example, the Occupational Safety

1. Occupational Safety and Health Act of 1970 § 2, 29 U.S.C. § 651 (1970).
2. Occupational Safety and Health Act of 1970 § 2 *et seq.*, 29 U.S.C. § 651 *et seq.* (1970).
3. 29 U.S.C. § 651(b) (1970).
4. 29 U.S.C. § 657(a)(1)-(2) (1970).
5. 29 U.S.C. § 651(b)(3) (1970).
6. *See* Barlow's, Inc. v. Usery, 424 F. Supp. 437, 440 (D. Idaho 1976) (three-judge court).

and Health Administration (the Administration) conducted 4,746 inspections in work places employing 1,361,398 workers. The inspections resulted in 3,678 citations alleging 12,946 violations of health and safety standards. Proposed penalties for the violations totalled over $800,000.[7]

Over the last several years, the courts have decided a number of cases in which employers refused to admit Occupational Safety and Health inspectors onto their premises for the purpose of conducting inspections.[8] The employers in these cases have contended that inspectors must secure warrants prior to the inspections.[9] The courts have reached differing conclusions.

There are three basic issues to be discussed with regard to OSHA's general inspection provision. First, does OSHA's general inspection provision require a compliance officer to obtain a judicial warrant prior to an inspection?[10] Second, even if warrantless inspections are authorized by OSHA, are they unreasonable searches in derogation of the fourth amendment? Third, in the event a warrant requirement is imposed, what should be the appropriate standard of probable cause? This comment reviews the major decisions on these issues and suggests some bases for their resolution.

II. LEGISLATIVE HISTORY

There is very little legislative history regarding OSHA's general inspection provision.[11] Some discussion of the warrantless inspection issue can be found in a House report accompanying an early draft.[12] However, the views represented there are those of congressmen in the minority. The early draft authorized the Secretary or his representative to "enter upon at reasonable times any work place where work is performed to which this Act applies."[13] There

7. [1977] 7-13 OSH REP. (BNA) 398.

8. *E.g.*, Barlow's, Inc. v. Usery, 424 F. Supp. 437, 440 (D. Idaho 1976); Brennan v. Gibson's Products, Inc. of Plano, 407 F. Supp. 154, 155 (E.D. Texas 1976) (three-judge court); Brennan v. Buckeye Industries, Inc., 374 F. Supp. 1350, 1352 (S.D. Ga. 1974) (three-judge court).

9. *Id.*

10. In other words, what is meant by the phrase "without delay"?

11. *See* Dunlop v. Hertzler Enterprises, Inc., 418 F. Supp. 627, 634 n.17 (D.N.M. 1976) (three-judge court); Brennan v. Gibson's Products, Inc. of Plano, 407 F. Supp. at 162 n.18.

12. STAFF OF SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 885 (Comm. Print 1971).

13. *Id.* at 735.

was no mention of the key words "without delay" which are found in the statute as enacted. Despite the absence of these words, the minority view was that the draft authorized inspections without a warrant and the evidence thus obtained could be used in criminal prosecutions.[14] A House amendment later inserted the key words "without delay."[15] These words had not been specified in the Senate version, but the Senate acceded on this point.[16]

III. Background of Administrative Searches

General administrative inspections have been determined to be essential for effective enforcement of governmental regulations.[17] Nevertheless, they represent official intrusions. This sets up a tension between the fourth amendment's protection of an individual's right of privacy and intrusions by the government in the public interest.

In 1967, the Supreme Court of the United States decided two cases dealing with the question of warrantless administrative inspections for municipal code violations.[18]

In the first of these, *Camara v. Municipal Court of San Francisco*, the Supreme Court held that a person possessed a constitutional right to insist that a search warrant be obtained before an administrative inspection of a private residence pursuant to a municipal housing code could be conducted.[19] The Court reasoned that "except in certain carefully defined classes of cases a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."[20] However, the Court also accepted the principle that fourth amendment protection was not as strong in the administrative inspection area as it was in the realm of searches for criminal evidence.[21]

On the same day, in *See v. City of Seattle*, the Court extended its decision in *Camara* to area inspections of business premises.

14. *Id.* at 885.
15. *Id.* at 1183.
16. *Id.*
17. Camara v. Municipal Court of San Francisco, 387 U.S. 523, 535-36 (1967).
18. Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).
19. 387 U.S. at 534.
20. 387 U.S. at 528-29.
21. The Court in *Camara* adopted Justice Douglas' statement from his dissent in Frank v. Maryland, 359 U.S. 360, 383 (1959). 387 U.S. at 538.

The Court's reasoning left the way open for future exceptions.[22]

These exceptions were not long in coming. In two important decisions, the Supreme Court upheld warrantless inspections of a retail liquor dealer[23] and a gun dealer.[24] The Court based these decisions on the fact that both the liquor and gun industries had long histories of regulation and licensing. When the dealers chose to engage in such occupations, their justifiable expectations of privacy were reduced.[25] These dealers engage in their businesses with the knowledge that they will be subject to administrative inspection.

In *Almeida Sanchez v. United States*,[26] the Court invalidated a statute and regulations which authorized warrantless inspections of vehicles within a hundred miles of an international border by roving patrols of the Immigration and Naturalization Service. The Court based its decision squarely on *Camara* and *See* and distinguished the decisions permitting warrantless inspections of gun[27] and liquor[28] dealers on the basis of the history of pervasive regulation of the firearm and alcohol industries.[29]

More recently, the Court, in *Air Pollution Variance Board v. Western Alfalfa Corp.*,[30] unanimously reaffirmed *Camara* and *See* in a case involving an administrative inspection conducted for the purposes of promoting health and sanitation.[31]

With these Supreme Court decisions in mind, the focus shifts to several recent federal district court decisions which have construed OSHA's general inspection provision. The three leading cases on the subject are *Barlow's Inc. v. Usery*,[32] *Brennan v. Gibson's Products, Inc. of Plano*,[33] and *Brennan v. Buckeye Industries,*

22. The Court implied that business premises might be inspected in many more situations than private homes and that constitutional challenges to inspections under licensing or regulatory programs had to be resolved on a case by case basis. 387 U.S. at 545-46.

23. Colonade Catering Corp. v. United States, 397 U.S. 72 (1970).

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

25. 406 U.S. at 316; 397 U.S. at 77.

26. 413 U.S. 266 (1973).

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

28. Colonade Catering Corp. v. United States, 397 U.S. 72 (1970).

29. 413 U.S. at 270-71.

30. 416 U.S. 861 (1974).

31. A state health inspector entered respondent's outdoor premises in the daylight without its knowledge or consent and without a warrant to make an opacity test on smoke coming from respondent's chimney. The Court held that the fourth amendment did not extend to sights seen in "open fields" but specifically reaffirmed *Camara* and *See*. 416 U.S. at 864.

32. 424 F. Supp. 437 (D. Idaho 1976) (three-judge court).

33. 407 F. Supp. 154 (E.D. Texas 1976) (three-judge court).

Inc.[34] All three decisions concerned OSHA's general inspection provision and surrounding case law, but each applied a different analysis which resulted in varying conclusions.

IV. Warrantless Inspections Approved

In *Buckeye*, an Occupational Safety and Health compliance officer, who attempted to gain access to Buckeye's premises for the purpose of conducting an inspection, was rebuffed. The Secretary of Labor petitioned the federal district court for an order requiring Buckeye to submit to an inspection. The company argued that such an inspection would be unconstitutional in the absence either of consent or of a warrant obtained on a showing of probable cause. The district court upheld the constitutionality of a warrantless search under OSHA and granted the order.[35]

The court maintained that, if examined in light of the regulatory powers of the federal government and the compelling need for unannounced inspections, a warrantless inspection was justifiable and therefore no violation of Buckeye's fourth amendment rights had taken place.[36] The opinion reasoned that the requirement of a showing of probable cause would only serve to defeat the purposes of OSHA[37] in that such requirement would necessitate that an employee report a violation in order for an investigation to be made.[38] The court's point, in essence, was that a probable cause requirement would destroy the preventative effects of general inspections. The court, however, was making an assumption that only by employee complaints could the requisite probable cause be shown.

One basis for arguing that the court's probable cause standard is in error is that the special inspection subsection of the inspection provision specifically deals with inspections arising out of employee complaints.[39] Under general principles of statutory construction, it is unlikely that Congress intended that both sections deal with the same issue.[40]

34. 374 F. Supp. 1350 (S.D. Ga. 1974) (three-judge court).
35. 374 F. Supp. at 1354, 1356.
36. 374 F. Supp. at 1354.
37. *See* note 3 *supra*.
38. 374 F. Supp. at 1354.
39. 29 U.S.C. § 657(f) (1970).
40. Where specific and general statutory provisions are both applicable, the specific provision is controlling. *See* Schieffelin v. Craig, 183 App. Div. 515, 170 N.Y.S. 603 (1st Dept. 1918).

The *Buckeye* court's opinion rested on its belief that *Colonade* and *Biswell* represented "a sort of broad retreat from insistence on strict fourth amendment standards in administrative matters when the demands of administrative efficiency and governmental interest are great."[41] The court also pointed to a succession of lower court opinions upholding warrantless administrative searches conducted in narrowly defined contexts.[42] The decision in *Terraciano v. Montanye*[43] upheld the search of a pharmacy pursuant to a New York statute authorizing such inspections, but limited their scope to orders, prescriptions or records relating to certain drugs.[44] The court in *Youghiogheny and Ohio Coal Co. v. Morton*[45] dealt with the validity of the inspection provision of the Federal Coal Mine Health and Safety Act of 1969,[46] which authorizes warrantless inspections of coal mines. It was obvious to the *Youghiogheny* court that:

> Congress had a reason to believe that past regulatory experience compelled a more comprehensive statutory scheme which depends, for its successful implementation, upon frequent, unannounced inspections. Granting the assumptions of this approach, Congress may have had cause to conclude that resort to a judicial officer, prior to every inspection, could tend to frustrate its legislative purpose.[47]

There are problems with the *Buckeye* court's reliance on cases such as *Colonade*, *Biswell*, *Terraciano* and *Youghiogheny*. The first three cases involved inspections of enterprises engaged in the distribution of sensitive commodities, liquor, guns, and drugs. Each of the enterprises was part of an industry that had both licensing requirements and a history of pervasive regulation. By contrast, the clothing manufacturer,[48] which was the target of inspection in *Buckeye*, was not a licensed and regulated enterprise. *Buckeye*'s reliance on *Youghiogheny* was also misplaced. While the Mine Safety

41. 407 F. Supp. at 161.

42. *E.g.*, Terraciano v. Montanye, 493 F.2d 682 (2d Cir. 1974); Youghiogheny and Ohio Coal Co. v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973).

43. 493 F.2d 682 (2d Cir. 1974).

44. N.Y. PUB. HEALTH LAW §§ 3350, 3390 (repealed 1972 N.Y. Laws c. 878, § 1) (McKinney).

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

46. 30 U.S.C. §§ 801, 813(a) (1970).

47. 364 F. Supp. at 50.

48. 374 F. Supp. at 1351 n.1.

Act's inspection provision is similar to the one found in OSHA,[49] the *Youghiogheny* court's reasoning in finding warrantless inspections of mines constitutional can not be applied in construing OSHA's general inspection provision. The inspection provision in the Mine Safety Act is strictly limited to warrantless inspections of coal mines and there is no doubt that the "health, safety and the very lives of coal miners are jeopardized when mandatory health and safety laws are violated."[50] By contrast, OSHA covers millions of enterprises in thousands of industries. "It thus embraces . . . the whole spectrum of unrelated and disparate activities which compose private enterprise in the United States."[51] In addition, a comparison of the specific and detailed findings that preface the Mine Safety Act and the brief, general findings that preface OSHA points out the fact that while Congress had strong evidence of the need for warrantless inspections of coal mines, no such evidence existed with regard to the thousands of industries covered by OSHA.[52] In fact, the *Gibson's Products* court stated that, "[a] finding by Congress that such [hazardous] conditions exist in most enterprises subject to OSHA might throw a different light on the subject, but there was none, and we doubt there could have been."[53]

V. Warrant Requirement Inserted

In *Gibson's Products*,[54] the court took a different view of the issues. The court decided that the fourth amendment prohibited the warrantless general inspection.[55] However, the court also refused to enjoin operation of OSHA, construing it to be unobjectionable when it authorized inspections pursuant to a warrant.[56] Based on

49. *Compare* 30 U.S.C. § 813(a) (1970) *with* 29 U.S.C. § 657(a) (1970).
50. 364 F. Supp. at 50.
51. 407 F. Supp. at 161.
52. *Compare* 30 U.S.C. § 801 (1970) *with* 29 U.S.C. § 651(a) (1970).
53. 407 F. Supp. at 162.
54. The case arose when an Occupational Safety and Health compliance officer was refused permission to inspect the non-public areas of Gibson's discount store. The inspection was a general one and the officer had no reason to believe that Gibson was violating the statute. The Secretary sought an order compelling inspection. Gibson argued that a search warrant based on probable cause was a requisite to a non-consensual inspection and therefore sought to enjoin enforcement of the statute. 407 F. Supp. at 156.
55. *Id.*
56. *Id.*

the fact that the *Camara* and *See* decisions were clear and had been recently reaffirmed,[57] the *Gibson's Products* court was convinced that the general inspection provision, on the surface, amounted to an attempt at the partial repeal of the fourth amendment.[58] The court believed that the only way that OSHA could be saved was by reading in a warrant requirement. The tension which it saw between an individual's constitutional right of privacy and a congressional enactment which created a potential general warrant had to be decided in favor of the constitutional right.[59]

The decision examined the same opinions that had been relied on by the court in *Buckeye*. The *Gibson's Products* court, however, deduced from such opinions as *Almeida Sanchez* and *Western Alfalfa* "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*."[60]

Colonade and *Biswell* were viewed as exceptions to the general rule. The court argued that such exceptions would be looked at favorably only where the inroads were narrow and supported by clear and specific congressional findings.[61] In addition, the object or practice to be regulated had to be inherently dangerous or historically regulated or licensed as in *Biswell* and *Colonade*.[62] The decision recognized that the knowledge of being subjected to official scrutiny was a fact of life for those in the liquor and firearm industries but that this element was missing in the case of an operator of a discount store.[63]

The court found that OSHA did not expressly authorize warrantless inspections. Rather, the court stated, "[w]e 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 . . . ."[64] Thus, in order to save the statute, the court read in the warrant requirement.[65]

57. 416 U.S. at 864; 413 U.S. at 282-83.
58. 407 F. Supp. at 157.
59. *Id.* at 162.
60. *Id.* at 161.
61. *Id.*
62. *Id.*
63. *Id.* at 162.
64. *Id.* at 163.
65. *Id.*

An assumption that Congress would never exceed its constitutional powers is of doubtful validity. If the assumption were true, no federal statute would ever have been declared unconstitutional. But that has not been the case. The court certainly did not defer to the legislature as it claimed. Instead, it appears to have substituted its judgment for that of Congress. Such an approach can be criticized for promoting doubt and instability. Congress will be uncertain as to the necessary requirements of specificity in its findings and directions for future legislation.

The case is currently being reviewed by the Court of Appeals for the Fifth Circuit.[66] In its appellate brief, the government contends that if an employer can refuse to permit an inspection and require the Secretary to secure a warrant, the effectiveness of an inspection will be negated because of the resulting advance notice.[67] Additionally, the government warns that imposing a warrant requirement will place an intolerable burden on an officer's limited resources and create severe delays in implementing inspections. However, there seems to be no reason why an officer could not procure a warrant prior to an attempted inspection if he had probable cause. The government contends that a probable cause requirement will destroy the object of the statute. Such an argument, though, leads back to the constitutional necessity of protecting an individual's privacy. A strong argument by the government is that an employer's privacy interest is not being intruded upon, since the areas to be inspected are those to which his employees normally have access.[68] Respondent Gibson's brief basically follows the district court's reasoning.[69]

VI. General Inspection Provision Invalidated

A third view of the inspection issues was expressed in *Barlow*.[70] The facts of the case are similar to those of *Buckeye* and *Gibson's Products*.[71] The court held that OSHA's general inspection provi-

66. Brennan v. Gibson's Products, Inc. of Plano, 407 F. Supp. 154 (E.D. Texas 1976) (three-judge court), *appeal docketed*, No. 76-1526 (5th Cir. Feb. 27, 1976).

67. [1976] 6-22 OSH Rep. (BNA) 621.

68. *Id.*

69. [1976] 6-31 OSH Rep. (BNA) 948.

70. Secretary of Labor Marshall succeeded former Secretary Usery as appellant; the appeal is now Marshall v. Barlow's, Inc.

71. An Occupational Safety and Health compliance officer wishing to make a general inspection of the non-public areas of Barlow's premises was denied permis-

sion which attempted to authorize warrantless inspection of establishments was violative of the fourth amendment.[72]

The court's reasoning was similar to that of the court in *Gibson's Products* and the decision rested on the Supreme Court's views in *Camara* and *See*. The *Barlow* court rejected the notion espoused in *Buckeye* that decisions which authorized warrantless inspections of enterprises in industries with long histories of regulation represented a move by the Court to narrow the warrant requirement imposed by *Camara* and *See*.[73] Rather, the warrantless inspection cases were viewed as exceptions; they fit in the category of those "certain carefully defined classes of cases"[74] mentioned in *Camara*. OSHA, the court recognized, regulates thousands of different industries. The recent *Western Alfalfa* case, decided subsequent to *Buckeye*, was pointed to as demonstrating the Supreme Court's allegiance to the principles of *Camara* and *See*. The court saw a similarity among *Camara*, *See* and *Western Alfalfa*. Each decision involved statutes and regulations aimed at promoting public health and safety. Obviously, the warrantless inspections authorized by OSHA similarly sought to promote safety and health and therefore had to be controlled by Supreme Court pronouncements.[75]

While the analysis of the court was similar to that in *Gibson's Products*, its reaction to Congress' authorization of warrantless inspections was not. The court declined to judicially redraft the statute:

> [W]e cannot accept the proposition that the language of the OSHA inspection provision envisioned the requirement that a warrant be obtained before any inspection is undertaken. Certainly Congress was able, had it wished to do so, to employ language declaring that a warrant must first be obtained, 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.[76]

sion to do so by Barlow. The officer had no probable cause for his search and Barlow claimed that no inspection could take place absent a warrant. The Secretary petitioned the court and a show cause order was issued. The order was presented to Barlow who again refused to let the officer make an inspection. Barlow immediately commenced an action requesting that enforcement of the statute be enjoined and that a temporary restraining order be issued. The temporary restraining order was denied. 424 F. Supp. at 439.

72. *Id.* at 442.
73. *Id.* at 440.
74. 387 U.S. at 528-29.
75. 424 F. Supp. at 441.
76. *Id.*

An excellent feature of the opinion is that instead of trying to work around precedent, as the court did in *Buckeye*, or redrafting the statute, as the court did in *Gibson's Products*, the *Barlow* court suggested that there were less intrusive and oppressive methods of promoting the health and safety of workers than by authorizing warrantless inspections.[77] The court's constructive approach avoided the artificiality of the other opinions and pointed out a vehicle by which the courts could promote the public interest and at the same time maintain a stability with respect to the law. The court, however, failed to deal with the argument that an employer's justifiable expectation of privacy is reduced since his nonpublic areas—those to be inspected—are normally open to many if not all of his employees.

Following the district court's decision, the government's motion for a stay of the judgment pending appeal was denied.[78] Mr. Justice Rehnquist reversed the district court's decision on the government's motion and issued a partial stay of the court's judgment.[79] The stay, however, was limited merely to the State of Idaho. In the period between the issuance of this order and Justice Rehnquist's later action, which limited the effect of the injunction only to Barlow,[80] officials at the Administration reported that an expected rise in the number of employers resisting inspections never materialized.[81] On April 8, 1977, the Supreme Court agreed to review the district court's determination.[82]

The government's brief filed with the Supreme Court relies on *Biswell*.[83] It argues that the Court should permit warrantless inspections of enterprises covered by OSHA because of three reasons: the importance of the regulatory program; the fact that a warrant requirement would impede enforcement; and the limited intrusion on a reduced privacy interest that would occur.[84] Alternatively, the government contends that if the Court decides to im-

77. *See, e.g.*, employer reporting requirements with provisions for employee contribution and participation; employer-employee safety committees; encouragement of employee complaints; more input by labor unions; better enforcement by the states of their health and safety laws. *Id.* at 441 n.4.

78. [1977] 6-33 OSH REP. (BNA) 1043.

79. [1977] 6-35 OSH REP. (BNA) 1107.

80. [1977] 6-37 OSH REP. (BNA) 1179.

81. [1977] 6-36 OSH REP. (BNA) 1136.

82. 97 S. Ct. 1642 (1977).

83. [1977] 7-9 OSH REP. (BNA) 272.

84. *Id.*

pose a warrant requirement, the statute should be read as it was in *Gibson's Products*, thus permitting an inspection on a showing of probable cause. The government's position is that a showing "that the location apparently houses a covered employee work place" would be sufficient to meet this requirement.[85]

Barlow's brief claims that a search warrant based on probable cause is the "check needed to prevent government from running over peoples' rights."[86] Barlow himself, at a press conference, likened OSHA to a mad dog and said that it should be destroyed.[87] His brief is inflexible, and argues that an individual's fourth amendment privacy interests could *never* be diminished by a governmental interest to inspect.[88] The foregoing appears to be in direct conflict with the probable cause standard suggested in his brief. The standard advocated would require "a showing that the proposed intrusion into the subject privacy interests is justified by an overriding governmental interest in protecting people from serious harm and that the proposed intrusion has been tailored as narrowly as possible consistent with the particular governmental interest."[89]

Many parties have filed *amicus curiae* briefs with the Supreme Court in this case. Eleven states have asked the Court to allow warrantless inspections of working places.[90] Environmental groups argue that invalidation of OSHA's general inspection provision would have a "devastating effect" on the enforcement of other federal environmental and public health laws containing similar provisions.[91] The AFL-CIO's brief claims that a warrantless inspection would be a minimal intrusion on a limited privacy interest.[92] On the other hand, a brief filed by the American Conservative Union claims that imposition of a warrant requirement would not prevent effective enforcement of OSHA.[93] A brief filed by the Chamber of Commerce of the United States warns that reversal of the district court's ruling "would signal a repeal of the fourth amendment pro-

85. *Id.*
86. [1977] 7-19 OSH REP. (BNA) 557.
87. *Id.*
88. *Id.*
89. *Id.*
90. [1977] 7-4 OSH REP. (BNA) 110.
91. [1977] 7-7 OSH REP. (BNA) 207.
92. [1977] 7-11 OSH REP. (BNA) 345.
93. [1977] 7-19 OSH REP. (BNA) 556-57.

tections traditionally applicable to business."[94] The brief submitted by the National Federation of Independent Business contends that a warrant requirement would, in reality, affect only a small number of inspections because there is no reason to believe that employers would demand a warrant from every inspector.[95]

State and federal courts are awaiting the Supreme Court's ruling on the constitutionality of OSHA's general inspection provision. In the meantime, most lower courts have followed the analysis and conclusion of the *Gibson's Products* court.[96]

VII. Issues for Supreme Court Resolution

The courts have concluded that Congress meant for OSHA to authorize warrantless inspections of employers' premises. Even though the legislative history is sparse, the language and structure of the inspection provisions seem to justify these conclusions. Congress mandated that the Secretary had to determine whether reasonable grounds existed to make a special inspection,[97] and could have easily inserted a similar clause in the general inspection authorization. It would therefore seem to have been a deliberate omission.[98] Congress was also apparently of the opinion that the employer should not have any prior warning of an inspection, since it provided criminal penalties for anyone convicted of giving such advance notice.[99]

The question remains whether the Supreme Court should impose a warrant requirement. In order to decide, one must ask whether requiring a warrant would promote the purposes of OSHA, namely, increasing the safety and health of workers. The opponents of a warrant requirement argue that the costs, in terms of delay and inefficiency, would be staggering.

However, it seems that the best of the argument goes to those in favor of a warrant requirement. In a typical inspection situation, the compliance officer presents his credentials to the employer who

94. *Id.*

95. *Id.*

96. *E.g.*, Usery v. Centrif-Air Machine Co., 424 F. Supp. 959 (N.D. Ga. 1977); Dunlop v. Hertzler Enterprises, Inc., 418 F. Supp. 627 (D.N.M. 1976) (three-judge court); Yocom v. Burnette Tractor Co., 5 OSHC 1465 (1977).

97. 29 U.S.C. § 657(f)(1) (1970).

98. The maxim *expressio unius est exclusio alterius* is applicable. Kernochan, *Statutory Interpretation: An Outline of Method*, 3-2 DALHOUSIE L.J. 333, 362 (1976).

99. 29 U.S.C. § 666(f) (1970).

consents to the inspection. No warrant is necessary where there is consent. After discovering violations, the inspector, in his discretion, might issue some citations. The inspector would usually not look for anything in particular unless the plant had a history of specific violations. Should the employer refuse to let the officer conduct an inspection, the officer would go to a magistrate to secure a warrant. This process would inevitably delay the inspection. Meanwhile, an employer would correct his major violations, if possible. Upon the inspector's return, common sense dictates that his inspection would be more meticulous than it would have been had he been allowed to inspect originally. Not only has he been put on notice that the employer might have something to hide, but he has spent some time in securing the warrant and would probably exercise his discretion to cite violations that he otherwise might not have. Consequently, by giving the employer time to clean up major violations and by influencing the officer to conduct a more meticulous inspection, the warrant requirement conceivably might promote the safety and health of workers.

The Supreme Court has stated that its test for determining the reasonableness of searches under the fourth amendment involves balancing the need to search against the invasion of privacy which the search entails.[100] By the mere fact that Congress passed OSHA, it recognized the need for general inspections as a means of effectuating the statute's purposes.[101] In addition, it would appear that an OSHA inspection imposes a minimal intrusion on an employer's privacy interest, in light of the fact that his employees generally have access to the areas to be inspected.[102] Since the need to search is apparent and the invasion slight, an application of the Court's balancing test favors warrantless inspections.

It therefore appears that while safety would conceivably be promoted by imposing a warrant requirement, a balancing of interests by the Court should result in not imposing a warrant requirement. It must be remembered, however, that the Court has never balanced interests in these circumstances and it is difficult to predict what result will follow.

100. 387 U.S. at 536-37.

101. Additionally, the congressional investigations make a persuasive case for "need" in the field. 1970 U.S. CODE CONG. & AD. NEWS 5177 *et seq.*

102. There is a clear distinction between the intrusion resulting from an inspection authorized by OSHA and the greater intrusion that would occur should the inspector wish to search an employer's private office.

VIII. Probable Cause Requirements

If the Supreme Court imposes a warrant requirement, some requisite level of probable cause should be established. The Court has never considered the evidentiary showing required to establish probable cause for issuance of an OSHA inspection warrant, but it has discussed the probable cause showing required with regard to administrative inspections for health and safety violations.

In *Camara*, the Court stated:

> Having concluded that the area inspection is a "reasonable" search of private property within the meaning of the Fourth Amendment, it is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based on the passage of time, the nature of the building (*e.g.*, a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.[103]

Therefore, in order for a magistrate to issue a warrant authorizing an OSHA inspection, he must be provided with some basis for concluding that the inspection is reasonable.

Several tests for probable cause have been proposed. One test would merely require a showing that an employer refused to give permission to the compliance officer to inspect. Such refusal would thereby raise an inference of the presence of a violation, and therefore the existence of reasonable cause to inspect. This would lead to an absurd result, however, as a warrant would be issued when the employer exercised his constitutional right to have the inspection conducted pursuant to a warrant. The government's brief in *Barlow* claims that a showing that "the location apparently houses a covered employee workplace" would be adequate.[104] These two tests remove that independent judgment from the magistrate's determination which the framers of the Constitution saw as vital. It would also be possible to require a very strong showing of probable cause, *e.g.*, the presentation of employee complaints to the magistrate or "a showing that the proposed intrusion into the subject privacy interests is justified by an overriding governmental interest

103. 387 U.S. at 538.
104. [1977] 7-9 OSH Rep. (BNA) 272.

in protecting people from serious harm and that the proposed intrusion has been tailored as narrowly as possible consistent with the particular governmental interest."[105] Requiring such an extensive showing would virtually eliminate general inspections, thereby reducing the statute's effectiveness.

This comment proposes that the Administration develop and administer a rational and non-discriminatory plan to determine which industries and plants to inspect. Such a plan could be based on a consultation of the "Worst-First" list[106] or on any other statistical information which could aid in maximizing the resources of the Administration in an attempt to reduce the number and severity of occupational accidents and injuries. The plan should also take into account the factors discussed by the Supreme Court in *Camara*,[107] such as passage of time, and additionally whether the enterprise has ever been inspected. This fully integrated plan would provide the reasonable administrative standards necessary to obviate the requirement of specific knowledge of the existence of a violation while at the same time maintaining the employer's privacy interest.

IX. CONCLUSION

The Supreme Court's conclusion in *Barlow* will inevitably have a strong impact on many segments of society. If the Court decides to impose a warrant requirement, some unions might bargain for the right of compliance officers to inspect without probable cause. If the Court's action results in increasing the number of citations issued and consequently the amount of penalties imposed, the economic burdens that result from this increase will naturally be passed on to the consumers in the form of higher prices. The enforcement of similarly worded environmental statutes may be delayed if the Court declares OSHA unconstitutional and imposes a

105. [1977] 7-19 OSH REP. (BNA) 557.

106. The "Worst-First" list is compiled by the United States Department of Labor's Bureau of Labor Statistics from data supplied to it from each state which is derived from information obtained from Workmen's Compensation claims. Each industry is given a Standard Industrial Code and is ranked by the frequency of occupational accidents and injuries occurring in each particular type of industry with the most hazardous industries appearing at the top of the list. There are over one thousand industries ranked on the list. The "Worst-First" list has been used by some field offices of the Administration in the past. Reynolds Metals Company v. Secretary of Labor, 5 OSHC 1964, 1965 (W.D. Va. 1977).

107. 387 U.S. at 538.

warrant requirement. Such delay could have an adverse impact on the health of the whole nation. The burden is on the Court to promulgate a result that will ensure the safety and health of workers while not ignoring the interests of the employers and the public generally.

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