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Comment

THE CONSTITUTIONALITY OF WARRANTLESS OSHA INSPECTIONS

I. INTRODUCTION

In 1970, Congress enacted the Occupational Safety and Health Act (OSHA),¹ which has been characterized as the "most all encompassing piece of legislation since the income tax."² The avowed purpose of OSHA is "to assure so far as possible every working man and woman in the nation safe and healthful working conditions."³ Although this goal has been universally applauded, the administration of the Act has been criticized for unduly burdening affected businesses.⁴

The key to the enforcement provisions of OSHA is the authority given to the Secretary of Labor to make periodic inspections of business premises⁵ and to issue citations for any violation of OSHA discovered during the investigation.⁶ Although OSHA apparently authorizes inspections to take place without consent of the owner and without a search warrant,⁷ this authority has been recently challenged in the courts. At least three courts have held that the fourth amendment⁸ requires that the Act be read as

1. Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-678 (1970)).

2. *The Effects of the Administration of the Occupational Safety and Health Act on Small Business: Hearings Before the Subcomm. on Environmental Problems Affecting Small Business of the Permanent Select Comm. on Small Business*, 93rd Cong., 2d Sess. 2 (1974) (statement of Rep. William L. Hungate) [hereinafter cited as *1974 Hearings*].

3. 29 U.S.C. § 651 (1970).

4. See, e.g., *1974 Hearings*, *supra* note 2, at 2-5 (testimony of Rep. William J. Randall). Congress anticipated this problem and directed that any information obtained "under this chapter shall be obtained with a minimum burden on employers . . ." 29 U.S.C. § 657(d) (1970).

5. 29 U.S.C. § 657(a) (1970). This section provides in pertinent part:

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.

Id.

6. 29 U.S.C. § 658 (1970).

7. See note 5 *supra*; see text accompanying notes 92-97 *infra*.

8. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

mandating that a warrant be obtained in order to conduct an inspection without consent⁹ while one court has held that warrantless, consentless inspections are reasonable and not proscribed by the Constitution.¹⁰

The law on administrative searches is not settled but because of the all-encompassing nature of OSHA it is likely that warrantless, consentless inspections under the Act will not be upheld by the courts. This comment will analyze the constitutionality of such inspections and propose a change in the enforcement provisions of OSHA which might save the inspections from unconstitutionality.

II. OSHA

The Occupational Safety and Health Act is a federal law giving the Secretary of Labor authority to promulgate mandatory safety and health standards.¹¹ It is applicable to every private employer in a business affecting commerce.¹² Employers not only must comply with specific standards,¹³ they must also fulfill a broad general requirement to provide a place of employment free from recognized hazards likely to cause death or serious injury.¹⁴

The enforcement of OSHA is carried out primarily by Compliance Safety and Health Officers,¹⁵ who are authorized to make inspections of business premises covered by the Act.¹⁶ After an inspection, these officers submit a report to the Area Director, who is required to issue a citation for any non-de minimus violation of the Act or any standard promulgated thereunder.¹⁷ A penalty of up to \$1,000 *must* be assessed for any serious

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the United States Supreme Court indicated that a standard somewhat lesser than the traditional probable cause standard should be used in issuing warrants for administrative searches. The Court noted that it would not be necessary to show that there is probable cause to believe that a violation existed on the particular premises to be inspected but only that reasonable administrative standards for conducting an area inspection were satisfied with regard to a particular dwelling. *Id.* at 534-38.

9. *Barlow's Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho 1976), *prob. juris. noted sub nom. Marshall v. Barlow's Inc.*, 97 S. Ct. 1642 (1977); *Brennan v. Gibson's Products, Inc.*, 407 F. Supp. 154 (E.D. Tex. 1976). For a discussion of these cases, see text accompanying notes 84-96 *infra*.

10. *Brennan v. Buckeye Industries, Inc.*, 374 F. Supp. 1350 (S.D. Ga. 1974). For a discussion of this case, see text accompanying notes 80-83 *infra*.

11. 29 U.S.C. § 655 (1970).

12. *Id.* § 652(5).

13. *Id.* § 654. Any person adversely affected by a standard promulgated under OSHA may challenge the standard by filing a petition in a United States court of appeals. *Id.* § 655(f).

14. *Id.* § 654(a).

15. 29 C.F.R. § 1903.3 (1976).

16. *Id.* § 1903.21(d). Advance notice of inspections may not be given except in limited circumstances where "the giving of advance notice would enhance the probability of an effective and thorough inspection." *Id.* § 1903.6.

17. 29 U.S.C. § 658 (1970); 29 C.F.R. § 1903.14 (1976). De minimis violations result in the issuance of a notice. *Id.*

violation for which a citation is issued,¹⁸ and *may* be assessed for a violation not of a serious nature.¹⁹ Criminal sanctions are provided for a willful violation which causes death to an employee.²⁰

If, after notification that a penalty has been assessed against him, an employer wishes to contest the citation or penalty, he must notify the Secretary of Labor within fifteen days.²¹ The dispute is then referred to the Occupational Safety and Health Review Commission (Commission),²² which makes findings of fact and then issues an order "affirming, modifying, or vacating the . . . citation or proposed penalty."²³ Any party adversely affected by an order of the Commission may seek review in the United State courts of appeals, but findings of fact made by the Commission are conclusive if supported by substantial evidence.²⁴

Inspections under the Act are conducted on a priority basis.²⁵ First priority is given to investigations of catastrophes or fatalities.²⁶ Efforts are next directed toward investigation of valid employee complaints.²⁷ Priority is then given to inspections of "target industry and target health hazard classifications."²⁸ Final priority is given to inspections of a random cross section of businesses in the area.²⁹ If a Compliance Safety and Health Officer is refused permission to conduct an inspection, he is directed to report to the Area Director who "shall promptly take appropriate action, including compulsory process, if necessary."³⁰ It is against this background that the constitutionality of the warrantless inspections must be viewed.

III. HISTORY OF ADMINISTRATIVE SEARCHES

The Supreme Court of the United States first considered the legality of warrantless administrative searches in 1959 in *Frank v. Maryland*.³¹ The

18. 29 U.S.C. § 666(b) (1970). A serious violation is defined as one that has a substantial probability of resulting in death or serious physical harm. *Id.* § 666(j).

19. *Id.* § 666(c).

20. *Id.* § 666(e). OSHA provides for punishment by a fine of not more than \$10,000 or imprisonment for not more than six months or both for a first time conviction, and a fine of not more than \$20,000 or imprisonment for not more than one year or both for any subsequent conviction. *Id.* For a discussion of the willfulness requirement under this section, see *United States v. Dye Construction Co.*, 510 F.2d 78, 81-82 (10th Cir. 1975).

21. 29 U.S.C. § 659(a) (1970).

22. The three-member Commission is appointed by the President and has its principal office in the District of Columbia. *Id.* § 661.

23. *Id.* § 659(c).

24. *Id.* § 660; *Accu-Namics, Inc. v. Occupational Safety and Health Review Commission*, 515 F.2d 828, 835 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976).

25. Heath, *The Implementation and Philosophy of the Williams-Steiger Occupational Safety and Health Act of 1970*, 25 FLA. L. REV. 249, 254 (1973).

26. *Id.*

27. *Id.* See 29 U.S.C. § 657(f).

28. Heath, *supra* note 25, at 254.

29. *Id.*

30. 29 C.F.R. § 1903.4 (1976).

31. 359 U.S. 360 (1959). The appellant in *Frank* was arrested and fined for refusing entry to a health inspector who was acting on a neighbor's complaint. *Id.* at 361-62. It was from a conviction for resisting the inspection that the appeal was taken. *Id.* at 362.

Court held in that case that the fourth amendment's protection was applicable only in the area of criminal prosecutions.³² Thus, the Court concluded that no warrant was required for a health inspector to enter a private residence in order "to determine whether conditions exist which the [city's] Health Code proscribes."³³

The distinction between civil and criminal investigations for fourth amendment purposes was repudiated a short time later in the twin cases of *Camara v. Municipal Court*³⁴ and *See v. City of Seattle*.³⁵ The defendant in *Camara*, like his counterpart in *Frank*, was charged with refusing to allow an inspection of his residence by city inspectors.³⁶ This time the Court held that the fourth amendment barred the prosecution of an individual for refusing to permit a warrantless administrative search.³⁷ The Court found "anomalous" the suggestion that "the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."³⁸ In *See* the Court held that the warrant requirement is equally applicable to inspections of commercial enterprises.³⁹ "The business man, 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."⁴⁰ The Court did indicate in *See*, however, that business premises might "reasonably be inspected in many more situations than private homes."⁴¹

The distinction between private homes and business premises alluded to in *See* was further delineated in *Colonnade Catering Corp. v. United States*.⁴² There Justice Douglas, writing for the Court, declared that a provision of the Internal Revenue Code⁴³ which authorized warrantless inspections of liquor dealers was not unconstitutional.⁴⁴ The Court emphasized the fact that the regulation of the liquor industry predated the

32. *Id.* at 365-66. For the text of the fourth amendment, see note 8 *supra*.

33. 359 U.S. at 365-66.

34. 387 U.S. 523 (1967).

35. 387 U.S. 541 (1967).

36. 387 U.S. at 525. The case was an appeal from the denial of a writ of prohibition. The appellant had sought to block his prosecution for violation of the San Francisco Housing Code on the ground that the Code was unconstitutional on its face because it authorized warrantless inspections. *Id.*

37. *Id.* at 540.

38. *Id.* at 530 (footnote omitted). The Court noted, however, that even if the fourth amendment was limited to cases of criminal prosecution, the fact that the regulatory laws at issue were enforced by criminal processes would have been a sufficient basis for invoking the amendment's protections. *Id.* at 531.

39. 387 U.S. at 546.

40. *Id.* at 543.

41. *Id.* at 545-46. The Court made clear that its decision was not meant to foreclose licensing schemes that require inspections "prior to operating a business or marketing a product." *Id.* at 546.

42. 397 U.S. 72 (1970). Petitioner, a New York liquor licensee, brought suit in federal district court to obtain the return of liquor seized by federal authorities and to suppress it as evidence. The district court granted the relief sought but the court of appeals reversed. *Id.*

43. I.R.C. § 7606.

44. 397 U.S. at 76. "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." *Id.*

fourth amendment⁴⁵ and read the amendment in light of this practice at the time of its enactment.⁴⁶ The forcible entry and search in *Colonnade* was disapproved, however, since the statute did not directly authorize forcible entry without a warrant but rather made refusal to grant admission the offense.⁴⁷

The rationale of *Colonnade* was expanded by the Court in *United States v. Biswell*,⁴⁸ where the warrantless search of a pawn shop that was licensed to sell firearms was upheld as a reasonable incident of a legitimate licensing scheme.⁴⁹ According to the Court, warrantless searches were necessary to provide a credible deterrent to violations of the firearms legislation.⁵⁰ It was posited that by engaging in a pervasively regulated industry, dealers in firearms had impliedly consented to such inspections.⁵¹

Both *Colonnade* and *Biswell* upheld administrative inspections as reasonable under the fourth amendment, but in *Wyman v. James*,⁵² the Court indicated that under certain conditions an administrative entry may not be a search at all, and thus not subject to fourth amendment protections.⁵³ In that case the Court held that the warrantless "visit" to the home of a welfare recipient is not a search in the fourth amendment meaning of that term.⁵⁴ The majority reasoned that since the refusal to allow the "visit" did not result in a forced entry⁵⁵ and the recipient's denial of permission to enter was not a criminal act,⁵⁶ the fourth amendment was not applicable. The Court further added that even if the "visit" were assumed to be a traditional search it did "not descend to the level of

45. *Id.* at 75.

46. *Id.* The Court noted that in 1791, the year that the fourth amendment was written, Congress passed a tax act which gave federal officers the authority to inspect liquor operations without a warrant. *Id.*, citing Act of March 3, 1791, Ch. 15, § 29, 1 Stat. 206.

47. 397 U.S. at 77. See I.R.C. § 7342.

48. 406 U.S. 311 (1972).

49. *Id.* at 315. The Court stated that "[i]n the context of a regulatory inspection system of business premises that is carefully limited in time, place and scope, the legality of the search depends not on consent but on the authority of a valid statute." *Id.*

50. *Id.* at 316.

51. *Id.*

52. 400 U.S. 309 (1971).

53. *Id.* at 317.

54. *Id.*

55. *Id.* The denial of entry, however, did result in the termination of welfare benefits. *Id.* at 313-14. It has been held that a state may not condition a benefit upon the waiver of a constitutional right. *Sherbert v. Verner*, 374 U.S. 398 (1963) (refusal to work on Saturday due to religious beliefs could not be basis of denial of unemployment benefits); *Speiser v. Rondall*, 357 U.S. 513 (1958) (denial of tax exemption based upon refusal to subscribe to oath that taxpayer would not advocate overthrow of government is unconstitutional). These decisions have been held to be applicable in the welfare context. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). Thus, the fact that the refusal to allow the "visit" did not result in a forced entry should not be relevant where the refusal does result in the denial of a benefit.

56. 400 U.S. at 317. The visit is, however, partially analogous to a criminal investigation in that caseworkers are required to report any evidence of fraud that is uncovered by a home visit. *Id.* at 339-40 (Marshall, J., dissenting).

unreasonableness."⁵⁷ The Court, in listing characteristics of the procedure that were indicative of reasonableness,⁵⁸ stressed both the public interest in the correct use of welfare funds⁵⁹ and the benign purpose of the "visit."⁶⁰

In the wake of *Colonnade* and *Biswell* lower courts have tended to uphold warrantless searches by administrative agencies. The courts have emphasized that industries that are pervasively regulated do not have a justifiable expectation of privacy sufficient to override an important governmental interest in conducting a warrantless search.⁶¹ Thus, a statute that protects an important governmental interest and contains provisions for warrantless searches will be held valid if there is little danger of abuse and if having to obtain a warrant would frustrate the purpose of an act.⁶² One court has stated that "[i]n effect, the statute takes the place of a valid search warrant."⁶³

In light of this trend of the Supreme Court's to emphasize the exceptions to warrant requirements,⁶⁴ it might be assumed that the earlier holdings of *Camara* and *See* are in jeopardy.⁶⁵ Two recent decisions, however, may be interpreted as a reaffirmation of the principle that warrantless searches remain the exception and not the rule.

In *Almeida-Sanchez v. United States*,⁶⁶ the Supreme Court refused to sanction warrantless searches of automobiles within a reasonable distance⁶⁷ of national borders although the searches were conducted pursuant to

57. *Id.* at 318.

58. *Id.*, at 318-24. Among the factors the Court found to be indicative of reasonableness were included the lack of alternative methods of gaining the necessary information, the minimal burden that the visit entailed, and the stigma that a warrant requirement would provide. *Id.*

59. *Id.*, at 318-19.

60. The Court noted that the "caseworker is not a sleuth but rather, we trust, is a friend to one in need." *Id.* at 323.

61. *See, e.g.,* *Youghiogheny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 49-51 (S.D. Ohio 1973); *United States v. Business Builders, Inc.*, 354 F. Supp. 141, 143 (N.D. Okla. 1973); *United States v. Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371, 1376-78 (D. Del. 1972). For an example of an opinion which upheld a warrantless search by a state agency, *see Terraciano v. Montanye*, 493 F.2d 682 (2d Cir. 1974).

Prior to *Colonnade* and *Biswell*, courts had generally held that administrative inspections were only valid if conducted pursuant to a search warrant or with the consent of the inspected. *See, e.g.,* *United States v. Thriftmart, Inc.*, 429 F.2d 1006 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970); *United States v. J. B. Kramer Grocery Co.*, 418 F.2d 987 (8th Cir. 1969).

62. *Youghiogheny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 50 (S.D. Ohio 1973); *see also* *United States v. Litvin*, 353 F. Supp. 1333, 1336-38 (D.D.C. 1973).

63. *United States v. Business Builders, Inc.*, 354 F. Supp. 141, 143 (N.D. Okla. 1973). The court was referring to provisions of the Federal Food, Drug and Cosmetics Act that permit warrantless inspections of businesses covered by it. *Id.* *See* 21 U.S.C. § 374 (1970).

64. *See* *United States v. Biswell*, 406 U.S. 311 (1972); *Wyman v. James*, 400 U.S. 309 (1971); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

65. For a discussion of how these recent Supreme Court decisions affect the viability of *Camara* and *See*, *see* Rothstein and Rothstein, *Administrative Searches and Seizures: What Happened to Camara and See?*, 50 WASH. L. REV. 341 (1975).

66. 413 U.S. 266 (1973).

67. *Id.* at 268. Reasonable distance is defined for these purposes as "within 100 air miles from any external boundary of the United States." 8 C.F.R. § 287.1 (1976).

provisions of the Immigration and Nationality Act.⁶⁸ Relying on *Camara*, the Court concluded that at least an area search warrant would be required in order to conduct these close-to-border searches.⁶⁹ “[T]he determination of whether a warrant should be issued for an area search involves a balancing of the legitimate interests of law enforcement with protected Fourth Amendment rights.”⁷⁰ An attempt to justify the search on the basis of *Colonnade* and *Biswell* was rejected.⁷¹ The Court distinguished those decisions as being based upon the implied consent to inspection of a person engaged in a pervasively regulated enterprise.⁷² In a concurring opinion, Justice Powell — who found no such indication of implied consent in a border search — stated that “[o]ne who merely travels in regions near the borders of the country can hardly be thought to have submitted to inspections in exchange for a special perquisite.”⁷³

More recently, the Court has reiterated its continued support for *Camara* and *See* in *Air Pollution Variance Board v. Western Alfalfa Corp.*⁷⁴ This 1974 case approved the conduct of a health inspector who had entered the outside premises of a factory to measure smoke emissions.⁷⁵ The Court emphasized that the inspector did not enter any area that was not open to the public⁷⁶ and refused to extend “the Fourth Amendment to sights seen in ‘the open fields.’”⁷⁷ The important aspect of the Court’s opinion, for purposes of this comment, is its expressly stated continued adherence to *Camara* and *See*.⁷⁸

68. The Immigration and Nationality Act authorized warrantless searches of “any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance or vehicle” within a “reasonable distance from any external boundary of the United States.” 8 U.S.C. § 1357(a)(3) (1970).

69. 413 U.S. at 270. In a concurring opinion Justice Powell outlined what he perceived to be the correct factors to be considered when issuing an area search warrant in border patrol cases:

- (i) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area;
- (ii) the proximity of the area in question to the borders;
- (iii) the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use; and
- (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.

Id. at 283-84 (footnotes omitted).

70. *Id.* at 284.

71. *Id.* at 271.

72. *Id.*

73. *Id.* at 281 (Powell, J., concurring).

74. 416 U.S. 861 (1974).

75. *Id.* at 863. The inspector was acting under the authority of a Colorado state law, COLO. REV. STAT. § 66-29-5 (Supp. 1967), which required a trained inspector to stand in a position where he had an unobstructed view of the smoke plume, and to note the smoke according to the opacity scale of the Ringlemann Chart. 416 U.S. at 863.

76. 416 U.S. at 863-65.

77. *Id.* at 865 quoting *Hester v. United States*, 265 U.S. 57, 59 (1924).

78. 416 U.S. at 864. The Court noted, however, that *Camara* and *See* were not applicable because no entry of buildings or inspection of documents was involved. *Id.*

Due to the Court's recent reaffirmations of the policy behind *Camara* and *See*, it appears that not all administrative searches can escape the fourth amendment's warrant requirements. The determination of whether a warrant will be required under OSHA should instead be made by balancing the competing interests involved.⁷⁹

IV. THE CONSTITUTIONALITY OF INSPECTIONS UNDER OSHA

The validity of warrantless searches under OSHA was first upheld in *Brennan v. Buckeye Industries, Inc.*⁸⁰ There, the United States District Court for the Southern District of Georgia opined that the search was reasonable in light of "the compelling need for unannounced inspections."⁸¹ In the court's view, *Camara* and *See* had been severely restricted by the later decisions in *Colonnade* and *Biswell*.⁸² It characterized the defendant Buckeye Industries' reliance on the earlier cases as "constitutionally speaking, marching to the beat of an antique drum."⁸³

Buckeye Industries, however, was decided shortly before the Supreme Court's decision in *Western Alfalfa* and has not been followed by other federal district courts. In *Brennan v. Gibson's Products, Inc.*,⁸⁴ the district court for the Eastern District of Texas viewed recent Supreme Court pronouncements as breathing new life into the *Camara-See* doctrine.⁸⁵ The court opined that "since *Western Alfalfa*, it seems plain that the fourth amendment is not to be viewed as in a condition of general retreat before an administrative advance."⁸⁶ In examining the public interest in inspections under OSHA, the court indicated that the generalized congressional findings

79. See Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CAL. L. REV. 1011 (1973). For a list of factors that have been applied by the Supreme Court in the balancing process, see Note, *Administrative Search Warrants*, 58 MINN. L. REV. 607, 619 n.41 (1974).

80. 374 F. Supp. 1350 (S.D. Ga. 1974). In this case, an Occupational Safety and Health Compliance Officer was refused entry to the premises of Buckeye Industries. The Secretary of Labor thereupon requested a court order directing the company to submit to an inspection of the premises. *Id.* at 1351.

81. *Id.* at 1354. "The necessity of showing probable cause as a requisite would serve to destroy the object of the legislation." *Id. Accord*, *Youghioghney and Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 51 (S.D. Ohio 1973). For a discussion of the probable cause standard applied in administrative searches, see note 8 *supra*.

82. 374 F. Supp. at 1355-56. *Buckeye Industries* preceded the Supreme Court's reaffirmation of *Camara* and *See* in *Western Alfalfa*. See text accompanying notes 74-78 *supra*.

83. 374 F. Supp. at 1356.

84. 407 F. Supp. 154 (E.D. Tex. 1976). The case arose when compliance officers were refused permission to enter nonpublic portions of a store maintained by Gibson's Products, Inc. The inspection was routine and not occasioned by any complaint. The Secretary of Labor sought an order compelling Gibson's to submit to the inspection. *Id.* at 155-56.

85. *Id.* at 159-61.

86. *Id.* at 161. See text accompanying notes 74-78 *supra*. Reliance was also placed on the Supreme Court's decision in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). See text accompanying notes 66-73 *supra*.

which supported OSHA, although "entitled to the greatest deference," were insufficient to outweigh legitimate fourth amendment interests.⁸⁷

The *Gibson's Products* reasoning was followed in *Dunlop v. Hertzler Enterprises, Inc.*⁸⁸ There the court stressed that the broad scope of OSHA was fatal to the validity of warrantless searches.⁸⁹ Because the Act applies to virtually all business and is not limited to areas of pervasive regulation, the *Hertzler* court decided it would be inappropriate to follow the *Colonnade-Biswell* line of cases.⁹⁰ As to the public interest in the challenged inspection, the court wrote "it is not certain that inspection of Hertzler will advance the urgent federal interest upon which the OSHA regulatory scheme is premised."⁹¹ Both *Gibson's Products* and *Hertzler Enterprises* found that warrantless inspections were unconstitutional, but neither case declared the inspection provisions⁹² of OSHA unconstitutional. Rather, these courts construed the inspection provisions to require a warrant.⁹³ In *Barlow's, Inc. v. Usery*,⁹⁴ however, the court declared that the inspection provisions could not be fairly read to include a warrant requirement and refused to "judicially redraft an enactment of Congress."⁹⁵ Accordingly, an extremely broad injunction was issued prohibiting any inspection under OSHA.⁹⁶

87. 407 F. Supp. at 161. That the existence of more specific congressional findings would have persuaded the court to uphold the inspections is illustrated by the Court's comment that "[t]here the inroad [on fourth amendment safeguards] is narrow, supported by clear congressional findings, and the object or practice to be regulated is inherently dangerous and (perhaps or) traditionally regulated as in *Colonnade* and *Biswell*, it is more likely to be tolerated." *Id.*

88. 418 F. Supp. 627 (D.N.M. 1976). In this case, compliance officers sought and obtained a search warrant from a United States Magistrate after having been refused entry initially. The warrant contained no recital of probable cause, however, and the officers were again refused entry when they attempted to serve it. *Id.* at 629. The court noted that the warrant contained only a conclusory statement that reasonable legislative and administrative standards authorized the inspection, *id.* at 629, n.3, but failed to discuss whether a proper warrant could issue in the absence of information as to probable violations on the particular premises involved. See *Camara v. Municipal Court*, 387 U.S. 523, 535-39 (1967). According to the *Camara* Court, "reasonableness is . . . the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probably cause to issue a suitable restricted search warrant." *Id.* at 539.

89. *Id.* at 632.

90. *Id.* at 633.

91. *Id.* The fact that here there was no indication of any safety or health hazards on the premises to be searched was contrasted with the situations in *Colonnade* and *Biswell* where it was known that "the concerns searched had on the premises and dealt in the sensitive commodities — guns and liquors — which occasioned official scrutiny." *Id.* quoting *Brennan v. Gibson's Products*, 407 F. Supp. 154, 162 (E.D. Tex. 1976).

92. See 29 U.S.C. § 657 (1970). For portions of the text of this section see note 5 *supra*.

93. *Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp. 627, 634 (D.N.M. 1976); *Brennan v. Gibson's Products, Inc.*, 407 F. Supp. 154, 162 (E.D. Tex. 1976). Both courts noted that the legislative history on this point was inconclusive.

94. 424 F. Supp. 437 (D. Idaho 1976), *prob. juris. noted sub nom.* *Marshall v. Barlow's Inc.*, 97 S. Ct. 1642 (1977). *Barlow's Inc.* brought this action to enjoin enforcement of the Act on the ground of repugnance to the fourth amendment after the Secretary of Labor obtained a court order compelling *Barlow's* to allow entry, inspection and investigation of its premises. *Id.* at 439.

95. 424 F. Supp. at 441.

96. *Id.*

It is submitted that while the language Congress employed does not suggest a warrant requirement, the intention of Congress can better be served by interpreting the provisions to save them from unconstitutionality. The broad injunction issued in *Barlow's Inc.* effectively and unnecessarily cripples the administration of OSHA, and ignores the principle of statutory construction which requires a court to read an act, if possible, so as to avoid a finding of unconstitutionality.⁹⁷ The decision may prove useful, however, since it will place pressure upon Congress to specify a clearly constitutional method of enforcing OSHA.

V. A PROPOSAL FOR REFORM AND ITS EFFECT UPON THE CONSTITUTIONALITY OF WARRANTLESS INSPECTIONS

The courts which have denied the power to conduct warrantless searches under OSHA have interpreted *Colonnade* and *Biswell* as being narrow exceptions to the fourth amendment warrant requirement. They fail to discuss, however, the Supreme Court's decision in *Wyman v. James*.⁹⁸ The *Wyman* Court was not dealing with a specialized and highly regulated industry but rather with the broad field of public welfare. Its conclusion that warrantless intrusions into the home of a welfare recipient were sanctioned has an impact upon the entire system of governmental assistance.⁹⁹ Thus, to presume that warrantless inspections are valid only in the unique, historically regulated fields of the liquor and fire-arms industries, or other narrowly defined areas, is to overlook the full impact of *Wyman*. The emphasis of *Wyman* on the beneficent object of the home visit indicated at least a partial reaffirmation of the doctrine of *Frank v. Maryland*¹⁰⁰ which posited that there is a constitutional distinction between criminal and civil investigations.¹⁰¹

97. This principle of construction was described by the court in *Gibson's Products* as follows:

While we recognize that our approach is subject to criticism as remedial to the verge of redrafting, if there is a plan for unusual deference anywhere in the relations between the branches of our federal government it surely exists where a court of first instance is required to pass upon the constitutionality of a broad national enactment of the Congress.

Brennan v. Gibson's Products, Inc., 407 F. Supp. 154, 163 (E.D. Tex. 1976).

98. 400 U.S. 309 (1971). See notes 52-60 and accompanying text *supra*.

99. 400 U.S. at 326-27 (Douglas, J., dissenting). Justice Douglas commented on the importance of governmental assistance in modern times:

We are living in a society where one of the most important forms of property is government largesse which some call the "new property." The payrolls of government are but one aspect of that "new property." Defense contracts, highway contracts, and other multifarious forms of contracts are another part. So are subsidies to air, rail, and other carriers. So are disbursements for scientific research. So are TV and radio licenses to use air space which of course is part of the public domain.

Id. (footnotes omitted).

100. 359 U.S. 360 (1959). See notes 31-33 and accompanying text *supra*.

101. See *Wyman v. James*, 400 U.S. 309, 323 (1971). The *Wyman* Court did not expressly rely upon *Frank* but it did state: "The home visit is not a criminal investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding." *Id.* But see note 56 *supra*.

The omission of *Wyman v. James* in the courts' analyses, however, is not fatal to the holdings of the OSHA cases. Even under the reasoning of *Wyman*, it is probable that OSHA, as it is currently composed, cannot constitutionally authorize warrantless inspections.¹⁰² Whether the OSHA penalty provisions are "civil" or "criminal" is a matter for dispute,¹⁰³ but it is clear that the compliance officers are not looked upon as benefactors by the businessmen affected.¹⁰⁴ The inspectors are not employed as safety advisors but rather are bound to issue a citation for any violation found.¹⁰⁵ The inspections are unannounced and uninvited.¹⁰⁶ They serve only the government's enforcement interests. The Supreme Court's analysis in *Wyman* — which relies on the benign character of the welfare visit¹⁰⁷ — is, therefore, not presently applicable. It is submitted, however, that if OSHA were changed so that an inspector's function more closely resembled that of a consultant than that of a policeman, a sufficient analogy would be created.

Although numerous amendments have been proposed that would provide for on-site consultation by OSHA employees, these attempts have treated the consultants as separate from and in addition to the present compliance officers.¹⁰⁸ In order to have an effect upon the constitutionality of warrantless inspections, any change must be in the form of a modification of present inspection practices. If the purpose of the inspection was geared to advice, instead of punishment, the rationale of *Wyman* would permit inspections without warrants. More importantly, however, this change in procedure would eliminate the resentment that coercive, punitive enforcement of OSHA has generated. The resulting spirit of cooperation would better serve the policies behind OSHA and would be more conducive to the promotion of safe working conditions than the present atmosphere of mutual distrust between government and industry.¹⁰⁹

102. One confident commentator has gone so far as to state that "this conclusion seems so clearly correct that little would be served by extended discussion of this much-considered question. . . ." Currie, *OSHA*, 1976 A. B. F. Res. J. 1107, 1159.

103. See, e.g., *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990 (5th Cir. 1975), *aff'd* 97 S. Ct. 1261 (1977) (holding that OSHA is not a penal statute requiring the constitutional protections available in criminal proceeding).

104. See generally 1974 *Hearings*, *supra* note 2.

105. The Department of Labor has interpreted OSHA "to mandate that the authorized representative of the Secretary, after inspecting worksites and observing any violations, must issue appropriate citations." *On-Site Consultation Hearings, Occupational Safety and Health Act: Hearings on H.R. 8618 Before the Subcomm. on Manpower, Compensation, and Health and Safety of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 65 (1975) [hereinafter cited as 1975 *Hearings*]. See 29 U.S.C. § 658(a) (1970); notes 17-19 and accompanying text *supra*.

106. 29 C.F.R. § 1903.6 (1976). See note 16 *supra*.

107. See notes 57-60 and accompanying text *supra*.

108. See, e.g., 1975 *Hearings*, *supra* note 105, at 2-3. The purpose of the amendment discussed therein has been described as "to strengthen OSHA by providing an additional program to encourage employers to voluntarily comply with safety and health standards established under the act. [It] will not weaken the vital enforcement provisions of OSHA, including first-instance sanctions." *Id.* at 1.

109. That the present enforcement provisions are not conducive to cooperation is evidenced by the following comment:

Engineers firmly believe that voluntary compliance can best implement the intent of OSHA. Experience has demonstrated that skepticism concerning

Inspections under a revised procedure could be initiated in two ways, either by a request from an employer, or at the instigation of the government. Obviously, there is no problem with the fourth amendment when an employer requests an inspection.¹¹⁰ It may also be presumed that the fourth amendment would not bar a reasonable inspection even without consent of the employer. If the inspection does not result in the imposition of a penalty but rather confers the benefit of free safety consultation, the fourth amendment should not operate to frustrate a laudable governmental policy.

Employers, it is recognized, will not always heed the instructions of OSHA consultants even when the employer has requested the inspection.¹¹¹ Thus, some enforcement mechanism will always be required. It is envisioned, however, that the enforcement objectives could be accomplished within the traditional strictures of the fourth amendment. Employee complaints would furnish ample justification for obtaining a warrant. Furthermore, the probable cause requirement for obtaining administrative search warrants is far less burdensome than it is in the traditional criminal context and, thus, it should not be an inordinate handicap to OSHA administrators.¹¹²

VI. CONCLUSION

Effective implementation of the regulations promulgated under OSHA should go a long way toward assuring "every working man and woman in the nation safe and healthful working conditions." The universal scope of OSHA, however, requires that the constitutional protections against unreasonable governmental interference with private activities be honored. In order to achieve that end, OSHA must be structured for administration by government and industry in voluntary cooperation. Thus, the emphasis that is presently placed upon coercion and penalty should be replaced by a statutorily implemented emphasis upon advice and consultation.

Thomas Martin :

OSHA's worth has arisen out of the enforcement activities of the Act; indeed, downright rejection has appeared in many instances. And this enforcement has even developed fear and indignation by many businessmen toward OSHA. . . . On-site consultation visits will provide a giant step forward toward voluntary compliance.

1975 *Hearings*, *supra* note 105, at 29 (statement of Benjamin Rocuskie, spokesman for The National Society of Professional Engineers).

110. See *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F.2d 84, 88 (5th Cir. 1975). See also *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

111. As one involved spokesman has observed: "Organized labor remembers only too clearly that consultations without enforcement was the principal highway traveled by the state occupational safety and health programs before the 1970 act became law. The resultant failure of that approach is the principal reason we have OSHA today." 1975 *Hearings*, *supra* note 105, at 100 (statement of F. Howard McGuigan, Legislative Representative A.F.L./C.I.O.).

112. See *Camara v. Municipal Court*, 387 U.S. 523, 534-39 (1967); note 8 *supra*. See also *Currie*, *supra* note 102 at 1159.