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Constitutional Law - Search and Seizure - OSHA Warrantless Unconsented Administrative Inspections of Business Premises Held Unconstitutional

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CONSTITUTIONAL LAW—SEARCH AND SEIZURE—OSHA WARRANTLESS UNCONSENTED ADMINISTRATIVE INSPECTIONS OF BUSINESS PREMISES HELD UNCONSTITUTIONAL.

Appellee, the president and general manager of an electrical and plumbing installation business, refused to allow an Occupational Safety and Health Act (OSHA)[1] inspection, without a search warrant, of the nonpublic area of his business premises.[2] The administrative search was not prompted by a specific charge of unsafe working conditions, but was the result of an administrative selection process.[3] Appellee cited the fourth amendment of the United States Constitution[4] as justification for the requested search warrants.[5] Upon appellee's refusal of admittance, the inspector obtained a court order compelling his admission.[6] Appellee refused

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1. 29 U. S. C. § 657 (a) (1970). The statute provides as follows:

(a) Authority of Secretary to enter, inspect, and investigate places of employment; time and manner.

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.

2. Marshall v. Barlow's, Inc., ___ U. S. ___, 98 S. Ct. 1816, 1819 (1978).

3. *Id.* at ___, 98 S. Ct. at 1819. There are no specific guidelines for determining when a business may be inspected. To best utilize its manpower resources, inspections are made in the following order:

Priority	*Category*
First	Imminent danger
Second	Fatality-catastrophe
Third	Complaints
Fourth	Regional programmed inspections

(1977) GUIDEBOOK TO OCCUPATIONAL SAFETY AND HEALTH, (CCH) 404.

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

5. ___U. S. at ___,98 S. Ct. at 1819.

6. *Id.*

Upon a refusal to permit a Compliance Safety and Health Officer, in the exercise of

to admit the inspector a second time and sought injunctive relief[7] against the warrantless search. A three-judge court granted the injunction and found the statutory authorization of warrantless inspections unconstitutional.[8] On appeal, the United States Supreme Court *held* that the injunction was proper and that the Act unconstitutionally authorized warrantless, unconsented administrative inspections of businesses.[9] *Marshall v. Barlow's, Inc.*, ____U.S.____, 98 S. Ct. 1816 (1978).

The Occupational Safety and Health Act (OSHA),[10] when passed in 1970, was a controversial legislative act because of its sweeping coverage.[11] The purpose of the Act, to assure safe and healthful working conditions for every working man and woman in the United States thus preserving precious human resources,[12] was equally sweeping.[13] The Act applies to all non-governmental employers[14] engaged in interstate commerce.[15] The inspection

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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.

29 C. F. R. § 1903.4 (1977).

7. ____ U. S. at ____, 98 S. Ct. at 1819.

8. Barlow's Inc. v. Userv, 424 F. Supp. 437, 442 (D. Idaho 1976).

9. ____U.S. at____, 98 S. Ct. at 1827.

10. Occupational Safety and Health Act, Pub. L. No. 91-956, 84 Stat. 1590 (codified at 29 U. S. C. § 651 (1970)).

11. Parratt, Warrantless Inspections under OSHA: Marshall v. Barlow's, LIB. CONGRESS CONG. RESEARCH SERVICE (March 7, 1978). More than 80% of the country's non-governmental work force is subject to its jurisdiction. *Id.* at 1.

12. 29 U. S. C. § 651 (1970).

> The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. . . .

Id.

13. S. REP. No. 91-1282, 91st Cong., 2d Sess. 3, *reprinted in* [1970] U. S. CODE CONG. & AD. NEWS 5177. The Act was intended to lessen and prevent industrial accidents and deaths, as indicated by the following statistics: 14,500 persons are killed annually as a result of industrial accidents and 2.2 million persons are disabled on the job yearly, resulting in the loss of 250 million man days of work. In terms of economics, over $1.5 billion is wasted in lost wages and the annual loss to the Gross National Product is estimated to be over $8 billion. *Id.* at 5178.

14. 29 U. S. C. § 652 (5). Employer is defined as "a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State." *Id.*

15. 29 U.S.C. § 651(b)(3). "It thus embraces indiscriminately steel mills, automobile plants, fishing boats, farms and private schools, commercial art studios, accounting offices, and barber shops - - indeed, the whole spectrum of unrelated and disparate activities which compose private enterprise in the United States." Brennan v. Gibson's Prod., Inc. of Plano, 407 F. Supp. 154, 161 (E.D. Tex. 1976).

clause of the Act has been the principal means for the discovery of unsafe working conditions in these businesses.[16] Since the inspection clause was so broadly stated and far-reaching, its conflict with the fourth amendment[17] has been a matter of concern since the Act's inception.[18]

The United States Supreme Court first addressed the issue of the need for a search warrant in an administrative search in *Frank v. Maryland.*[19] The Court determined that a warrant was not necessary[20] where the inspection was part of a regulatory scheme for the general welfare of the community rather than for enforcement of the criminal law.[21] The Court further indicated that warrantless administrative searches had strong historical antecedents[22] and would cause only a slight restriction on claims of privacy.[23]

In *Camara v. Municipal Court,*[24] the Court over-ruled *Frank,*[25] stating that a search of private property without consent is unreasonable[26] unless authorized by a valid search warrant.[27] Since the warrant would authorize an administrative search rather than a criminal search, the probable cause standard would be less stringent and probable cause would exist "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[28] A companion case, *See v. City of Seattle,*[29] extended *Camara's* warrant requirement to commercial establishments. The *See* Court stated that the

16. M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 221 (1978). "As of June, 1977, OSHA conducted over 385,000 inspections, resulting in over 278,000 citations, 1.4 million alleged violations, and proposed penalties of over $44 million." *Id.*

17. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT (1966). "The [f]ourth [a]mendment. . . was drafted by the framers [of the Constitution] for the express purpose of providing enforceable safeguards against a recurrence of highhanded search measures. . . . " *Id.* at 20.

18. STAFF OF SUBCOMM. ON LABOR AND PUBLIC WELFARE, 92d CONG., 1st SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (COMM. PRINT 1971). Congressman William Steiger, co-sponsor of the Act, stated that "in carrying out inspection duties under this act, the Secretary of course, would have to act in accordance with applicable constitutional protections." *Id.* at 1077.

19. 359 U.S. 360 (1959). The warrantless health inspection of a private home, as authorized by the Baltimore City Code, was upheld in a 5-4 decision. *Id.* at 373.

20. Frank v. Maryland, 359 U.S. 360, 366 (1959).

21. *Id.* at 367.

22. *Id.*

23. *Id.*

24. 387 U.S. 523 (1967). Two San Francisco housing inspectors demanded entry into appellant's private dwelling under color of a city Housing Code section which authorized warrantless entry for inspection purposes at reasonable times. Appellant refused to admit the inspectors without a search warrant and was arrested for refusing to comply with the statute. *Id.* at 526-527.

25. Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

26. *Id.* at 529. The court excepts "certain carefully defined classes of cases" from this general rule. *Id.* at 528.

27. *Id.* at 529.

28. *Id.* at 538.

29. 387 U.S. 541 (1967). The attempted warrantless inspection of a locked warehouse pursuant to a city ordinance allowing such inspections for fire hazards was held unconstitutional. *Id.* at 546.

businessman, as well as the residential occupant, has a constitutional right to conduct his business without unreasonable official intrusions upon his private commercial premises.[30]

The constitutionality of the OSHA section in question has been considered by many courts. The federal courts which have considered the issue have declined to declare the statute unconstitutional, preferring to construe the statute as requiring a warrant where consent is not given.[31]

Under prior decisions, the rule established by the Supreme Court stated that a warrantless search of a business premise is constitutional where the business is one which is "pervasively regulated."[32] In order to determine whether an industry is pervasively regulated, and therefore, exempt from the warrant requirement, the Court has considered several factors. The historical background of the regulation is one such factor.[33] Where a regulation has been in existence for many years, as regulations governing the liquor industry have,[34] it may be deemed pervasive. A second factor concerns the type of industry which is regulated; if the industry is highly dangerous[35] it may be subject to warrantless inspections for the protection of the workers and the public. A third

30. See v. City of Seattle, 387 U.S. 541, 543 (1967).

31. *E.g.*, Usery v. Centrif-Air Machine, 424 F. Supp. 959, 962 (N.D. Ga. 1977); Dunlop v. Hertzler Enterprises, 418 F. Supp. 627, 634 (D.N.M. 1976); Brennan v. Gibson's Prods., 407 F. Supp. 154, 156 (E.D. Tex. 1976). The Eighth Circuit has not considered the question directly, refusing to consider the issue until properly presented *See* Marshall v. Western Waterproofing Co., Inc. 560 F.2d 947 (8th Cir. 1977); Usery v. Godfrey Brake & Supply Service, Inc., 545 F2d 52 (8th Cir. 1976).

32. United States v. Biswell, 406 U.S. 311 (1972); Collonnade Catering v. United States, 397 U.S. 72 (1970).

In *Biswell*, the Court upheld a warrantless search, authorized by the Gun Control Act of 1968, of a gun dealer's premises during regular business hours. *See* 18 U.S.C. § 923(g) (1970). The Court stated, "[W]hen a dealer chooses to deal in this *pervasively regulated* business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." 406 U.S. at 316 (Emphasis added). Because firearms are dangerous, their sale and distribution must be regulated. *Id.* at 315. Also, one who deals in firearms is annually furnished with a revised compilation of relevant ordinances, so that he has actual knowledge of all regulations pertinent to the business. *Id.* at 316.

In *Collonnade*, the Court upheld a federal agent's warrantless search of a liquor dealer's premises. *See* 26 U.S.C. § 5146(b) (1970). Tracing the history of liquor regulations back to the 1600's, the Court determined that the liquor industry has long been subject to "close supervision and inspection." 397 U.S. at 77.

Both cases involve industries which must be federally licensed and which are subject to federal tax duties. Agents/inspectors have a responsibility to be sure the duties are not fraudulently avoided. 397 U.S. at 76. The Court has upheld surprise warrantless inspections as one method of effectively enforcing the law. *Id.*

33. 406 U.S. at 315; 397 U.S. at 75.

34. 397 U.S. 72. The Court traced the regulation of liquor to the year 1660 in England and 1692 in Massachusetts. *Id.* at 75.

35. 406 U.S. at 315. A federal court has classified coal mining as a nearly inherently dangerous business and upheld the statutory warrantless inspection allowed under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 813(a)(b)(1970) because "the governmental interest in promoting mine safety. . . far outweighs any interest mine operators may have in privacy." Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45, 51 (S.D. Ohio 1973).

factor deals with the business owner's actual knowledge of the regulations through regular notice of ordinances concerning the business owner's obligations and the inspector's statutory authority to inspect.[36] This knowledge serves to minimize the owner's expectation of privacy in his business operations.[37] Once the court has determined that an industry is pervasively regulated, warrantless inspection would be allowed. These inspections must be carefully limited as to the time, place and scope.[38]

In *Barlow's*, the Secretary of Labor argued that because OSHA affects all businesses in interstate commerce, the businesses should have notice of all interstate commerce regulations and thus be subject to the pervasive regulation exception to the fourth amendment search warrant requirements.[39] The Supreme Court, however, did not consider mere involvement in interstate commerce sufficient to label a business pervasively regulated.[40] In addition, appellee's plumbing business was not shown to be federally licensed, historically regulated, or highly dangerous, nor was appellee the recipient of actual notice of the possibility of warrantless inspection of his business premises prior to the inspector's appearance. Thus, the Court refused to accept the argument that all businesses affected by interstate commerce are pervasively regulated.[41]

In refusing to exempt OSHA from the need for a search warrant for an administrative search, the Court repeated its policy in regard to the requirement of a search warrant in most administrative search cases.[42] The Court refused to allow an administrative officer "unbridled discretion" as to when to search and whom to search.[43] The Court stated that the warrant must provide assurances from a neutral officer that the inspection is (1) reasonable under the Constitution, (2) authorized by statute, (3)

36. 406 U.S. at 316.

37. *Id.* An unconsented search of bakery premises by FDA inspectors, authorized by the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 374(a) (Supp. 1976) was thus upheld because "[d]efendant's business of manufacturing, processing, packing and distributing food products for introduction into interstate commerce [was] 'pervasively regulated' by the Federal Food, Drug, and Cosmetic Act, and the regulations promulgated thereunder." United States v. Del Campo Baking Mfg. Co., 345 F. Supp. 1371, 1377 (D. Del. 1972).

38. 406 U.S. at 315. These limitations are satisfied where the authorized inspection takes place during regular working hours, at the place of employment and where the search is limited to conditions which are pertinent to the statutory purpose of the inspection. *See* 29 U.S.C. § 657 (a)(1970), *supra* note 1.

39. ___U.S. at ___, 98 S. Ct. at 1820-21.

40. *Id.* at ___, 98 S. Ct. at 1821. The broad scope and liberal interpretation of interstate commerce requires additional evidence of pervasive regulation of the business. *Id.*

41. *Id.*

42. *Id.* at ___, 98 S. Ct. at 1824.

43. *Id.* at ___, 98 S. Ct. at 1825-26.

pursuant to an administrative plan containing specific, neutral criteria and (4) limited in scope.[44]

Having determined that a warrant or consent is normally necessary in an administrative search, the Court considered the proper standard for obtaining a search warrant. The Secretary emphasized that the ultimate standard in considering the need for a warrant is reasonableness[45] and proposed a balancing test between the administrative necessity of OSHA inspections and the business owner's right to privacy.[46] The Secretary argued that the business owner's right to privacy was minimal and thus outweighed by the administrative burdens OSHA inspectors and the courts would have to bear if required to obtain a warrant.[47] The Secretary alleged that the administrative inconvenience of obtaining a search warrant whenever a businessman refused an inspector entrance on the premises would be a great burden on the inspection system.[48] He stressed the fact that the need to obtain a warrant in an administrative search made to ensure that work premises are safe and that safety rules are followed would hinder the "surprise" element[49] believed necessary to enforce safety provisions.[50]

The Court accepted the reasonable standard theory advanced by the Secretary, but refused to accept the Secretary's analysis of the balancing test. The Court rejected the Secretary's argument that obtaining a search warrant would be too great a burden on inspectors and courts, stating that most employers will consent to an inspection, and those who do not so consent will be subject to an *ex parte* warrant thereafter.[51] In addition, the OSHA regulations already mandate compulsory process if an inspector is refused entry.[52] In regard to the loss of the "surprise" element, the Court pointed out that once the businessman has refused to allow the

44. *Id.* at ____, 98 S. Ct. at 1826.

45. *Id.* at ____, 98 S. Ct. at 1822. The Secretary relied on the Court's statement in *Camara* that "reasonableness is still the ultimate standard" where the validity of a search is in issue. *Id.*, *citing* Camara v. Municipal Court, 387 U.S. 523, 539 (1967).

46. *Id.* at ____, 98 S. Ct. at 1822. The secretary suggested "a sensible balance between the administrative necessities of OSHA inspections and the incremental protection of privacy of business owners a warrant would afford." *Id.*

47. *Id.*

48. *Id.*

49. The unarticulated fear that wrongs may be corrected during the time lapse between notice of a search attempt and obtainment of the search warrant seems ill-grounded. If unsafe conditions can be and are remedied during this time period, the purpose of the Act is still fulfilled. *See* 29 BAYLOR L. REV. 283, 303 (1977).

50. ____U.S. at ____, 98 S. Ct. at 1831 (Stevens, J., dissenting). The dissent in *Barlow's* characterized the Court's warrant requirement as "essentially a formality" which only serves to place a greater administrative burden on overtaxed federal resources. *Id.*

51. ____U.S. at ____, 98 S. Ct. at 1822.

52. 29 C.F.R. § 1903.4 (1977). *See supra* note 6.

inspection, he will probably be subject to a search without prior warning at any time thereafter.[53]

Not losing sight of the need for reasonableness in the request for a warrant, the Court set up a less stringent standard of probable cause for issuance of a search warrant for an OSHA inspection.[54] The Court made clear that the higher standard of probable cause in the criminal sense will not be required in administrative search cases.[55] The *Camara* definition of administrative probable cause which requires the lesser showing that "reasonable legislative or administrative standards for conducting an. . . inspection are satisfied with respect to a particular [establishment],"[56] was affirmed.[57] In regard to OSHA, such reasonable standards would be based on the kinds of industries in a given area or the desired frequency of the searches required in a given area.[58] Additional grounds for probable cause sufficient to obtain an administrative search warrant[59] would include specific evidence of an existing violation[60] or a showing that the business to be searched was chosen according to a general administrative plan formulated to enforce the Act.[61]

North Dakota has no recorded court case challenging the OSHA inspection procedure. This is probably due to the fact that North Dakota's OSHA-authorized inspection staff is so small that only inspections with a top priority status[62] are made.[63] Presently, North Dakota has only three safety inspectors and two industrial hygienists to inspect the North Dakota industries, factories and

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53. ___U.S. at ___, 98 S. Ct. at 1824.

54. "Criminal" probable cause requires a decision by a neutral magistrate that there are sufficient specific facts or circumstances which would lead a reasonable person to believe that an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 162 (1925).

55. ___U.S. at ___, 98 S. Ct. at 1824.

56. *Id.*

57. 387 U.S. at 546 (Clark, J., dissenting). Justice Clark's dissent to the *Camara* and *See* decisions voiced the fear that the lower standard for probable cause would result in the misuse of warrants "issued by the rubber stamp of a willing magistrate." *Id.* at 548.

58. ___U.S. at ___, 98 S. Ct. at 1825.

59. *Id.* Although this decision is limited to the facts and law concerning OSHA, it may provide strong precedent for striking down similar statutory provisions which currently allow warrantless searches. *See, e.g.,* Animal Welfare Act of 1970, 7 U.S.C. § 2146(a) (Supp. 1977); Immigration and Nationality Act, 8 U.S.C. § 1225 (a) (1970); Hazardous Substances Act, 15 U.S.C. § 1270(b) (1970); Egg Products Inspection Act, 21 U.S.C. § 1034 (a)(b)(d) (1970); Clean Air Act, 42 U.S.C. § 7414(2)(A) (supp. 1977). *But see supra* note 35, 37.

60. U.S. at ___, 98 S. Ct. at 1824. An employee complaint of a violation would probably suffice. *Id.* n.16.

61 *Id.* at ___, 98 S. Ct. at 1825. The administrative plan could be "derived from neutral sources such as. . . 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. . . ." *Id.*

62. *See supra* note 3.

63. Interview with Don Kurvink, North Dakota OSHA representative, Bismarck, N.D. (Aug. 22, 1978). Kurvink also stated that he was aware of only one business in North Dakota which denied consent to an *OSHA* inspection since the *Barlow's* decision. *Id.*

various businesses which affect interstate commerce and are, therefore, subject to OSHA regulations.[64] The many farming operations in North Dakota are also, within limitations, subject to OSHA provisions.[65] Given the vast reach of OSHA, it is apparent that the Act has an impact on the state.[66]

The *Barlow's* decision has been heralded as a blow against bureaucracy and as a step toward limiting governmental regulation of businesses in general and small businesses in particular. But the Court's definition of administrative probable cause severely weakens the blow. The Court's refusal to require some foundation for probable cause beyond the regulations incorporated into the Act itself is cause for alarm. This relaxed administrative standard for probable cause has diluted the victory for the small businessman. The blow for freedom from OSHA's former unlimited right to search appears, in reality, as little more than a gentle slap on the wrist of the giant OSHA.

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64. *Id.*

65. M. ROTHSTEIN, *supra* note 16 at § 14. Rothstein notes that OSHA provisions temporarily exempt from the Act's coverage farming operations with ten or fewer employees at one time during the past year. This provision ran through September 30, 1978. 29 C.F.R. § 1975.4(b)(2)(1977); OSHA Program Directive 76-9 (Nov. 26, 1976); M. ROTHSTEIN, *supra* note 16 at § 14.

66. North Dakota submitted its state plan which, if approved by OSHA, would have replaced OSHA in North Dakota. North Dakota, however, withdrew its state plan on July 23, 1973, and thus must follow OSHA regulations. M. ROTHSTEIN, *supra* note 16 at § 507, app. C.