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Discord Among Federal Courts of Appeals: The Constitutionality of Warrantless Searches of Employers' OSHA Records

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The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

William Pitt, Earl of Chatham¹

I. INTRODUCTION

The twentieth century has witnessed a steady increase in governmental regulatory activity, especially in the commercial context.² As a result of the eagerness of federal and state governments to promote the safety of workers,³ businesses are constantly under the watchful

1. Speech by William Pitt, Earl of Chatham, at the House of Lords (n.d.), reprinted in THE OXFORD DICTIONARY OF QUOTATIONS 379 (2d ed. 1953).

2. *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1129 n.14 (1984) [hereinafter *Methodologies*].

3. See 3 W. LAFAVE, SEARCH AND SEIZURE § 10.2, at 629 (2d ed. 1987).

eye of governmental agencies.⁴ In carrying out their duties, agencies quite often presume the ability to enter and inspect a business' premises and operations.⁵ Such entry is designed to permit inspectors to examine the structure in which a business is housed, inspect business products, or peruse financial books and records.⁶ Indeed, this form of administrative agency inspection is "commonplace in our society."⁷ During such inspections, governmental investigative power frequently clashes with employers' fourth amendment⁸ rights against unreasonable searches and seizures.

When confronted with the issue of the constitutionality of warrantless administrative searches in the commercial context, the United States Supreme Court initially held that the fourth amendment was inapplicable.⁹ The Court overruled this line of reasoning in *See v. City of Seattle*,¹⁰ where it held that the fourth amendment's protection against warrantless searches extended to administrative searches of business premises.¹¹ In *Marshall v. Barlow's, Inc.*,¹² moreover, the Supreme Court specifically held the fourth amendment applicable to inspections conducted pursuant to the Occupational Safety and Health Act (OSHA),¹³ through which the federal government monitors safety and health concerns.¹⁴ Although the Court articulated fairly strong employers' fourth amendment rights with

4. *Id.*

5. *See v. City of Seattle*, 387 U.S. 541, 543-44 (1967); *see also* Schwartz, *Crucial Areas in Administrative Law*, 34 GEO. WASH. L. REV. 401, 425-30 (1966).

6. *See*, 387 U.S. at 544.

7. 3 W. LAFAVE, *supra* note 3, § 10.2, at 629.

8. The fourth amendment reads:

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.

9. In the companion cases of *Davis v. United States*, 328 U.S. 582, *reh'g denied*, 329 U.S. 824 (1946), and *Zap v. United States*, 328 U.S. 624 (1946), *vacated*, 330 U.S. 800 (1947), the Supreme Court upheld warrantless inspections conducted on commercial premises. One commentator has argued that the Supreme Court based each decision on a consent theory. 3 W. LAFAVE, *supra* note 3, § 10.2, at 630-31. According to his analysis, the Supreme Court did not answer the question of when a warrantless inspection was constitutionally permissible. *Id.*; *see See*, 387 U.S. at 545 n.7. For a case that upheld a warrantless administrative inspection of a home, *see Frank v. Maryland*, 359 U.S. 360, *reh'g denied*, 360 U.S. 914 (1959), *overruled*, *Camara v. Municipal Court*, 387 U.S. 523 (1967).

10. 387 U.S. 541 (1967).

11. *Id.* at 545.

12. 436 U.S. 307 (1978).

13. 29 U.S.C. § 651 (1988).

14. *See* OCCUPATIONAL SAFETY AND HEALTH LAW 59, 60 (S. Bokst & H. Thompson III eds. 1988).

respect to administrative searches in both *See* and *Barlow's*, subsequent decisions have narrowed the scope of protection for employers.¹⁵

Governmental agencies adopt several arguments in support of their power to conduct warrantless inspections. They claim that requiring a warrant is too burdensome,¹⁶ both for the particular agency that has to procure the warrant, and for the judicial system whose overworked courts must rule on "routine applications and motions to enforce or quash the warrants."¹⁷ Agencies also argue that warrantless searches are necessary for the efficient and effective enforcement of regulatory schemes,¹⁸ and for deterring violations of applicable statutes and regulations.¹⁹ The history of the fourth amendment, the purposes served by the fourth amendment warrant requirement, and the United States Supreme Court's treatment of administrative agency inspections in *See* and *Barlow's*, however, all militate against these expediency-based arguments. While the Court has recognized exceptions to the fourth amendment warrant requirement in the context of administrative inspections in the commercial setting,²⁰ the operation of the warrant requirement should not turn on the convenience of governmental agencies or the courts. The purpose of the warrant requirement is to prevent arbitrary governmental invasions through judicial intervention prior to the conduct of a search.²¹ Although this requirement necessitates a time consuming process, questions of burdensomeness, efficiency, and deterrence should play no part in determining the applicability of the fourth amendment.²²

Even when a search warrant is not required for administrative inspections, the judiciary can implement fourth amendment safe-

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

16. *McLaughlin v. Kings Island*, 849 F.2d 990, 997 (6th Cir. 1988).

17. *Id.*

18. See *Kings Island*, 849 F.2d at 997; see also *United States v. Biswell*, 406 U.S. 311, 316 (1972) (The Supreme Court concluded that warrantless inspections were necessary for proper enforcement and effective inspection.). But see *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967) (The Supreme Court rejected an effective enforcement argument.).

19. *Biswell*, 406 U.S. at 316.

20. The pervasively regulated industries exception is one such exception. The Supreme Court first discussed this exception in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). For an analysis of this exception, see *infra* notes 120-56 and accompanying text.

21. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978); *Camara*, 387 U.S. at 527.

22. *Kings Island*, 849 F.2d at 997. But see *U.S. v. Leon*, 468 U.S. 897, 909-10 (1984). In modifying the fourth amendment exclusionary rule in *Leon*, the Supreme Court accounted for the rule's deterrent effect. *Id.* However, the Court recognized that the applicability of the exclusionary rule "is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated.'" *Id.* at 906 (quoting *Illinois v. Gates*, 464 U.S. 213, 223, *reh'g denied*, 463 U.S. 1237 (1983)).

guards both through the administrative probable cause standard and the administrative subpoena.²³ These alternative solutions are less protective of employers' privacy interests than search warrants in the criminal law context.²⁴ Their utility, however, lies in their recognition of the competing stakes—protecting employers from arbitrary governmental intrusions through judicial intervention and promoting public safety by maintaining effective enforcement of agency regulations.²⁵

Three recent federal courts of appeals cases²⁶ illustrate the tensions between governmental agency investigative power and employers' fourth amendment rights. In each of these cases, United States Labor Department compliance officers²⁷ attempted to conduct war-

23. For an analysis of the administrative probable cause standard, see *infra* notes 64-68 and accompanying text; for an analogous discussion of the administrative subpoena, see *infra* notes 69-71 and accompanying text.

24. In order to obtain a search warrant in the criminal context, a governmental agency must satisfy a more rigorous probable cause standard than the administrative probable cause standard. In a criminal investigation, a search "undertaken to recover specific stolen or contraband goods . . . even with a warrant, is 'reasonable' only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling." *Camara*, 387 U.S. at 535; see Note, *Administrative Agency Searches Since Marshall v. Barlow's, Inc.: Probable Cause Requirements for Nonroutine Administrative Searches*, 70 GEO. L.J. 1183 (1982) (distinguishing between routine and nonroutine administrative searches and arguing for the implementation of the traditional criminal probable cause standard in the context of nonroutine searches).

The distinction between the administrative and criminal probable cause standards raises a definitional question: how is an administrative search distinct from a criminal search? In *New York v. Burger*, 482 U.S. 691 (1987), the Supreme Court distinguished between "traditional police searches conducted for the gathering of criminal evidence . . . [and] administrative inspections designed to enforce regulatory statutes." *Id.* at 700 (citation omitted). One commentator defines administrative, or civil, searches "to include all . . . cases outside the traditional core of criminal law enforcement." *Methodologies*, *supra* note 2, at 1131 n.22. Included in this definition are "cases containing elements of both a civil and criminal nature, such as routine traffic regulation or border searches." *Id.* (citations omitted). In particular, border patrols "enforce criminal laws against importing illegal aliens, but their efforts also result in prevented entries without criminal penalties." *Id.* (citations omitted). For purposes of distinguishing between administrative and criminal searches, this Comment adopts the commentator's perspective.

25. Cf. *McLaughlin v. A.B. Chance*, 842 F.2d 724, 727 (4th Cir. 1988).

26. The three cases are: (1) *McLaughlin v. Kings Island*, 849 F.2d 990 (6th Cir. 1988); (2) *McLaughlin v. A.B. Chance*, 842 F.2d 724 (4th Cir. 1988); and (3) *Brock v. Emerson Elec. Co.*, 834 F.2d 994 (11th Cir. 1987).

27. A compliance officer is an Occupational Safety and Health Act (OSHA) representative of the Labor Department. During inspections of business premises, a compliance officer's role "is to represent OSHA to the public and to carry out the policies and procedures of the agency [T]he compliance officer is an agent . . . of OSHA, and is, therefore, charged with the ensuring of a safe and healthful workplace." OCCUPATIONAL SAFETY AND HEALTH LAW, *supra* note 14, at 207.

OSHA administrators distinguish between different types of compliance officers based on the matters which they investigate. There "are two categories of inspectors: safety inspectors

warrantless inspections of employers' safety and health records pursuant to OSHA regulations. These regulations²⁸ required employers to keep the records on their business premises and to make them available to compliance officers.²⁹ Because the employers in these cases did not abide by the compliance officers' requests, each one was cited for violating the OSHA regulations.³⁰ Thus, each case presented the identical issue of whether the applicable OSHA regulations were constitutional under the fourth amendment insofar as they permitted warrantless searches of an employer's occupational safety and health records.³¹ The United States Courts of Appeals for the Sixth and Eleventh Circuits invalidated the regulations, to the extent that they permitted the warrantless searches.³² In particular, the Sixth Circuit found the Supreme Court's decision in *New York v. Burger*³³ controlling,³⁴ and concluded that the applicable regulations were unconstitutional because they did not require the compliance officers to procure a search warrant or an administrative subpoena.³⁵ In contrast, the Fourth Circuit rejected the employer's fourth amendment position, totally ignoring the *Burger* decision.³⁶

Section II of this Comment offers a summary of the history of the fourth amendment as it pertains to administrative inspections of homes and businesses. In addition to tracing the historical development of the fourth amendment, it focuses on the purposes served by the warrant requirement, and summarizes the judicial treatment of the applicability of the warrant requirement to administrative inspections. Section III scrutinizes the three recent federal courts of appeals cases, presenting the factual foundation of each case, and examining the analytic framework utilized by the courts. Section IV critiques the Fourth Circuit decision upholding the constitutionality of the OSHA regulations on the basis of several factors: the applicability of

and industrial hygiene inspectors." D. LOFGREN, DANGEROUS PREMISES: AN INSIDER'S VIEW OF OSHA ENFORCEMENT 5 (1989). Safety inspectors investigate hazards "that can cause death or injury by burial or fall as a result of physical contact with machinery or electricity." *Id.* at 4. Industrial hygiene inspectors investigate hazards "that may cause harm through exposure to chemicals, noise, or microwave radiation." *Id.*

28. See *infra* notes 166-74 and accompanying text.

29. 29 C.F.R. § 1904.7(a) (1989).

30. *Kings Island*, 849 F.2d at 992; *A.B. Chance*, 842 F.2d at 725; *Emerson*, 834 F.2d at 996.

31. *Kings Island*, 849 F.2d at 993; *A.B. Chance*, 842 F.2d at 726; *Emerson*, 834 F.2d at 996-97.

32. *Kings Island*, 849 F.2d at 997; *Emerson*, 834 F.2d at 997.

33. 482 U.S. 691 (1987).

34. *Kings Island*, 849 F.2d at 995 n.3.

35. *Id.* at 996-97.

36. *McLaughlin v. A.B. Chance*, 842 F.2d 724, 728-29 (4th Cir. 1988).

the *See-Barlow's* rationale, the adequacy of the balancing test employed by the court, and policy concerns in today's regulatory society. Moreover, Section IV suggests that the Sixth Circuit's interpretation of *Burger* provides a better mode of analysis than that employed by the Fourth Circuit. Section V concludes that courts should implement the *Burger* analytic framework in order to provide more effective judicial vigilance over administrative searches.

II. ADMINISTRATIVE SEARCHES: A FOURTH AMENDMENT PERSPECTIVE

The seminal principle of the fourth amendment is that, except in certain limited classes of cases, governmental officials must obtain a warrant prior to conducting a search in order for the search to be deemed reasonable and, therefore, constitutional.³⁷ The Supreme Court has extended this principle to administrative searches in the commercial setting.³⁸ Since the apparent expression of this determination,³⁹ courts have upheld warrantless administrative searches by balancing governmental and individual interests.⁴⁰ In *McLaughlin v. A.B. Chance*,⁴¹ the Fourth Circuit upheld the constitutionality of OSHA regulations permitting compliance officers to cite employers who refused to voluntarily produce safety and health records upon request. In order to thoroughly evaluate the discord among the courts, it is important to examine the history of the fourth amendment, the policies served by the search warrant, and the emergence of case law extending the fourth amendment warrant requirement to administrative searches in the commercial sphere.

A. Overview of the Fourth Amendment: The Administrative Context

The fourth amendment is rooted in both English history and the American colonial experience. In England, the judiciary recognized the limitations of the Crown's investigatory powers in the late eighteenth century.⁴² Although the English courts may have been attempting to protect the property interests of the landed classes, rather than basing their decisions on any notion of individual pri-

37. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

38. *See v. City of Seattle*, 387 U.S. 541, 546 (1967).

39. *Id.*

40. *See infra* notes 58-63 and accompanying text.

41. 842 F.2d 724 (4th Cir. 1988).

42. 1 W. LAFAVE, *supra* note 3, § 1.1, at 4.

vacy,⁴³ these cases stand for the principle that a government has limited power to arbitrarily enter and search an individual's property.⁴⁴ In the United States, the fourth amendment stems largely from the colonists' outrage against the writs of assistance⁴⁵ "utilized by customs officers to enter and search buildings for smuggled goods."⁴⁶ The ratified version of the Constitution, however, contained no declaration of individual rights.⁴⁷ Not until George Washington became president did an amendment process to add a declaration of citizens' rights begin.⁴⁸ This process culminated in the adoption of the first ten amendments to the Constitution.

The fourth amendment did not become a prominently litigated amendment until the federal government's criminal jurisdiction heightened—approximately one hundred years after the adoption of the Constitution and the Bill of Rights.⁴⁹ Since this time, the Supreme Court has faced a difficult task in delineating the rights of individuals under the amendment.⁵⁰ Nevertheless, the Court has acknowledged that "one governing principle, justified by history and current experience, has consistently been followed: 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 search warrant."⁵¹

Courts have developed a two-tiered analysis to resolve fourth amendment questions.⁵² The first inquiry is "whether the government's conduct constitutes a search or seizure by infringing upon a

43. See Schwartz, *supra* note 5, at 428-30 (Schwartz provides a property-type analysis of *Davis v. United States*, 328 U.S. 582 (1946)).

44. See *Frank v. Maryland*, 359 U.S. 360, 363, *reh'g denied*, 360 U.S. 914 (1959), *overruled on other grounds*, *Camara v. Municipal Court*, 387 U.S. 523 (1967).

45. See *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977); *Frank*, 359 U.S. at 364 (describing the fervor with which American colonists protested the use of writs of assistance).

46. 1 W. LAFAYE, *supra* note 3, § 1.1, at 4.

47. For an analysis of the reasons why the framers of the Constitution did not include such a declaration and the process by which the Bill of Rights was added to the Constitution, see N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 83-105 (1937).

48. *Id.* at 97.

49. *Id.* at 106.

50. See generally Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980) (criticizing the Warren and Burger Courts for failing to maintain fourth amendment doctrinal consistency).

51. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967) (citing *Stoner v. California*, 376 U.S. 483 (1964); *McDonald v. United States*, 335 U.S. 451 (1948); *Agnello v. United States*, 269 U.S. 20 (1925)).

52. *National Fed'n of Fed. Employees v. Carlucci*, 680 F. Supp. 416, 430 (D.D.C.), *modified on other grounds*, 3 Individual Empl. Rights Cas. (BNA) 128 (D.D.C.), *stay granted*, 3 Individual Empl. Rights Cas. (BNA) 128 (D.C. Cir. 1988).

reasonable expectation of privacy.”⁵³ The Supreme Court has recognized that “[a]n owner or operator of a business . . . has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable.”⁵⁴ Courts have employed a case-by-case approach to determine whether in a particular instance a business owner’s privacy expectation is reasonable.⁵⁵

The second inquiry is “if a search or seizure occurred, . . . was [it] reasonable.”⁵⁶ A governmental agency generally satisfies the reasonableness requirement by procuring a warrant based upon probable cause.⁵⁷ In certain limited circumstances, however, the Supreme Court has not required either a warrant or probable cause.⁵⁸ In such instances, the Court analyzes the government’s action by balancing the interests of individuals and government.⁵⁹ The Court usually adjudges a warrantless search reasonable if governmental regulatory interests outweigh individual privacy interests. This latter approach is increasingly reflected in the context of administrative searches.⁶⁰ The justifications for this approach are two-fold. First, according to the Court, privacy interests in commercial premises are “different from, and indeed less than, a similar expectation in an individual’s home,”⁶¹ and administrative inspections intrude minimally into such interests.⁶² Second, the public interest demands a balancing methodology.⁶³

In the administrative searches context, the Supreme Court has adopted two doctrines that facilitate agency inspections, but provide some judicial scrutiny of agency discretion. In *Camara v. Municipal Court*,⁶⁴ the Court adopted the administrative probable cause standard.⁶⁵ A governmental agency meets this standard when “reasonable legislative or administrative standards for conducting an area

53. *Id.*; see *Hudson v. Palmer*, 468 U.S. 517, 525 (1984); see also *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

54. *New York v. Burger*, 482 U.S. 691, 699 (1987) (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

55. *United States v. Chuang*, 897 F.2d 646, 649-50 (2d Cir. 1990) (Courts focus on whether the business owner has made a sufficient showing of a possessory or proprietary interest in the area searched and whether he has demonstrated a sufficient nexus between his work space and the area searched.).

56. *Carlucci*, 680 F. Supp. at 430.

57. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

58. *Id.*

59. *Id.* at 337.

60. *United States v. Most*, 876 F.2d 191, 193 n.2 (D.C. Cir. 1989).

61. *New York v. Burger*, 482 U.S. 691, 700 (1987).

62. See *Methodologies*, *supra* note 2, at 1135-38.

63. *Id.* at 1138-39.

64. 387 U.S. 523 (1967).

65. *Id.* at 538-39.

inspection are satisfied with respect to a particular [establishment]."⁶⁶ In contrast to the criminal probable cause standard,⁶⁷ such legislative or administrative standards do not "necessarily depend upon specific knowledge of the condition of the particular dwelling."⁶⁸ Moreover, in *See v. City of Seattle*,⁶⁹ the Court delineated the requirements that an agency must meet when it issues a subpoena in order for it to be deemed constitutional.⁷⁰ "[W]hen an administrative agency subpoenas corporate book or records, . . . the subpoena [must] be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."⁷¹

B. Purposes of the Warrant Requirement

An understanding of the purposes served by the warrant requirement is essential to the proper determination of whether courts should require a warrant, or at a minimum an administrative subpoena, in the context of administrative searches of commercial premises. In a criminal investigation,⁷² a search warrant serves several purposes. First, it limits the discretionary power of a police officer in determin-

66. *Id.* at 538; see *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978) (stating that a governmental agency may satisfy the administrative probable cause standard either on the basis of specific evidence of an existing violation or the *Camara* standard).

67. *Camara*, 387 U.S. at 535.

68. *Id.* at 538. Two recent OSHA cases discussed the administrative probable cause standard. See *Industrial Steel Prods. Co. v. Occupational Safety & Health Admin.*, 854 F.2d 1330 (5th Cir. 1988); *Donovan v. Trinity Indus.*, 824 F.2d 634 (8th Cir. 1987).

69. 387 U.S. 541 (1967).

70. *Id.* at 544-45.

71. *Id.* at 544.

72. The procedures followed by police officers in attempting to secure and execute search warrants serves as a useful model in identifying the purposes served by a warrant. Although the following model is simplified, it is useful in identifying the policies that the warrant requirement serves.

In order to obtain a warrant, a police officer must "fill out an application which particularly describes what the authorities expect to find and where they expect to find it." C. DUCAT & H. CHASE, *CONSTITUTIONAL INTERPRETATION* 1012 (4th ed. 1988). Upon completion, a magistrate evaluates the application to determine whether probable cause exists. *Id.* The magistrate must determine whether "there is a fair probability that contraband or evidence of a crime will be found at a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, *reh'g denied*, 463 U.S. 1237 (1983).

In the execution of the search warrant, "officers are limited to the specific areas indicated and are not entitled to enlarge the scope of the search into a general hunt for evidence." C. DUCAT & H. CHASE, *supra*, at 1012. However, officers are allowed to seize evidence that is in plain view. *Harris v. United States*, 390 U.S. 234, 236 (1968) (citing *Ker v. California*, 374 U.S. 23, 42-43 (1963); *United States v. Lee*, 274 U.S. 559 (1927); *Hester v. United States*, 265 U.S. 57 (1924)). "Warrant procedures also provide that, after a search has been conducted and materials seized, a copy of the warrant . . . [must] be returned to the magistrate with an account of the evidence obtained." C. DUCAT & H. CHASE, *supra*, at 1012.

ing whether a search is appropriate.⁷³ The magistrate's judgment takes the place of the policeman's judgment.⁷⁴ Second, the warrant requirement prevents illegal searches prior to their occurrence. Because individual citizens have a personal right to privacy in their homes, injury to that right should be prevented, to the extent possible, before its occurrence:

The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.⁷⁵

Third, the warrant requirement prevents hindsight from coloring the probable cause determination.⁷⁶ If the decisions of police officers were subject only to post-search judicial scrutiny, the judiciary's probable cause determinations would undoubtedly be tainted in cases when evidence of crime was found. In such situations, judges would be hard pressed not to find post-hoc probable cause, regardless of what the pre-search determination might have been.

Finally, the warrant requirement legitimizes the legal system because it limits police conduct, even when the police "act[s] for a majority with a great collective need."⁷⁷ The warrant requirement allows police conduct to be independently scrutinized. This intervention increases public confidence in law enforcement. Without judicial intervention, the public could label police action as arbitrary, thereby threatening the integrity of the criminal justice system.

C. *The United States Supreme Court's Treatment of Administrative Searches*

Initially, the United States Supreme Court held that the fourth amendment was inapplicable to administrative searches.⁷⁸ The Court reasoned that the fourth amendment's protections extended only to searches conducted pursuant to criminal prosecutions.⁷⁹ As governmental regulation increased dramatically, the Court began to change its position. The Court recognized the strain that surveillance placed

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

74. *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976) (citing *United States v. United States District Court*, 407 U.S. 297, 316-18 (1972)).

75. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

76. *Martinez-Fuerte*, 428 U.S. at 565.

77. *Methodologies*, *supra* note 2, at 1140.

78. See *supra* note 9 and accompanying text.

79. See *infra* note 90.

on individuals' privacy rights.⁸⁰ In *Camara v. Municipal Court*⁸¹ and *See v. City of Seattle*,⁸² the Court held that the fourth amendment applied to administrative searches of both homes and commercial premises, respectively.

1. HOME SEARCHES⁸³

In *Frank v. Maryland*,⁸⁴ the Supreme Court held that administrative searches of homes were not within the purview of the fourth amendment.⁸⁵ The Court upheld the conviction of a homeowner who refused to allow city health inspectors to conduct a warrantless inspection of his basement in order to locate the source of rats.⁸⁶ The health inspectors attempted the search pursuant to a city ordinance that authorized them to demand entry without a warrant.⁸⁷ The Court justified its decision on the grounds that: (1) the regulatory inspection "touch[ed] at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protections against official intrusion,"⁸⁸ (2) the inspection was "designed to make

80. "If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of . . . regulatory standards." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978); cf. *See v. City of Seattle*, 387 U.S. 541, 543-44 (1967).

81. 387 U.S. 523 (1967).

82. 387 U.S. 541 (1967).

83. Judge Frank recognized the protection that the fourth amendment affords individuals in their homes in a powerful dissent in *United States v. On Lee*, 193 F.2d 306 (2d Cir. 1951) (Frank, J., dissenting), *overruled*, *Katz v. United States*, 389 U.S. 347 (1967): "A sane, decent civilized society must provide some . . . oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." *Id.* at 315-16. This language was later adopted by the Supreme Court majority in *Silverman v. United States*, 365 U.S. 505, 511 n.4 (1961), which held a warrantless intrusion by police officers into an apartment unit through the use of an eavesdropping device unconstitutional.

84. 359 U.S. 360, *reh'g denied*, 360 U.S. 914 (1959), *overruled*, *Camara v. Municipal Court*, 387 U.S. 523 (1967).

85. *Id.* at 373.

86. *Id.* at 361-62.

87. *Id.* at 361. The city ordinance read:

Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars.

Id. (quoting BALTIMORE, MD., CITY CODE art. 12, § 120 (n.d.)). The trial court found the homeowner guilty of the offense as alleged in the warrant. *Id.* On appeal to the Criminal Court of Baltimore, the homeowner was again found guilty in a de novo proceeding. *Id.* After the Maryland Court of Appeals denied certiorari, the homeowner appealed to the United States Supreme Court. *Id.* at 362.

88. *Id.* at 367. The Supreme Court has held that the fourth amendment's protection against unreasonable searches and seizures applies to the states through the fourteenth amendment's due process clause. *Wolf v. Colorado*, 338 U.S. 25 (1949), *rev'd on other*

the least possible demand on the individual occupant,"⁸⁹ and (3) the public interest in maintaining health and safety demanded such an outcome.⁹⁰ The *Frank* holding was subsequently interpreted as carving out an exception to the fourth amendment warrant requirement.⁹¹

The Supreme Court faced a similar case in *Camara v. Municipal Court*,⁹² where city inspectors cited an apartment lessee for violating the city's housing code⁹³ because he refused to allow the inspectors to conduct a warrantless inspection of his home.⁹⁴ After he was arrested and had criminal charges filed against him, the lessee sought a writ of prohibition, which a California Superior Court denied.⁹⁵ The Supreme Court held the city ordinance unconstitutional insofar as it permitted warrantless inspections of the lessee's home.⁹⁶ In rejecting the *Frank* Court's justifications, the *Camara* Court declared that "administrative searches of the [home] . . . [were] significant intrusions upon the interests protected by the Fourth Amendment."⁹⁷ Moreover, the Court concluded that this regulatory system improv-

grounds, *Mapp v. Ohio*, 367 U.S. 643 (1961) (overruling *Wolf* insofar as *Wolf* held the exclusionary rule inapplicable to the states through the fourteenth amendment). The Supreme Court modified the application of the exclusionary rule as set forth in *Mapp* in *United States v. Leon*, 468 U.S. 897 (1984).

89. *Frank*, 359 U.S. at 367.

90. *Id.* The *Frank* majority embraced the principle that the fourth amendment's protections extended only to the right to be secure from warrantless searches in the criminal context. *See id.* at 365. In the instant case, the health inspectors sought evidence pursuant to the city regulatory code. *See id.* at 361-62. Therefore, the Court reasoned that no warrant was required. *See id.* at 372-73. In his dissent, Justice Douglas took exception to such a strict reading of the fourth amendment, arguing that "the Fourth Amendment . . . has a much wider frame of reference than mere criminal prosecutions." *Id.* at 377 (Douglas, J., dissenting). The Supreme Court later embraced Justice Douglas's position sub silentio in *Camara v. Municipal Court*, 387 U.S. 523 (1967), and in *See v. City of Seattle*, 387 U.S. 541 (1967).

91. *Camara*, 387 U.S. at 529 (citing *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, *reh'g denied*, 364 U.S. 855 (1960)).

92. 387 U.S. 523 (1967).

93. The code read:

Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.

Id. at 526 (quoting SAN FRANCISCO, CAL., HOUSING CODE § 503 (n.d.)).

94. *Id.* at 526-27.

95. *Id.* at 525. The California District Court of Appeal affirmed, *Camara v. Municipal Court*, 237 Cal. App. 2d 128, 46 Cal. Rptr. 585 (Ct. App. 1965). The Supreme Court of California denied a petition for hearing, *Camara v. Municipal Court*, 387 U.S. 523, 525 (1967), and the United States Supreme Court granted certiorari and vacated the appellate court's decision. *Id.*

96. *Camara*, 387 U.S. at 534.

97. *Id.*

erly left the lessee at the discretion of the city inspectors.⁹⁸ The Court weighed the public interest by determining whether a departure from the warrant requirement was necessary. Such a departure depended on "whether the burden of obtaining a warrant [was] likely to frustrate the governmental purpose behind the search."⁹⁹ Because no such burden had been alleged, the Court determined that the public interest did not justify a deviation from the warrant requirement.¹⁰⁰

2. COMMERCIAL PREMISES SEARCHES

a. *See* and *Barlow's*

The Supreme Court extended the fourth amendment's protection against warrantless administrative searches to business premises in *See v. City of Seattle*,¹⁰¹ the companion case to *Camara*. The Court reversed a warehouse owner's conviction of violating a city ordinance¹⁰² by refusing to permit a city fire department field worker to enter and inspect the owner's locked warehouse for violations of the municipal fire code.¹⁰³ The Court refused to leave the decision to enter and inspect a particular commercial enterprise with agency field workers,¹⁰⁴ and, therefore, held that governmental agencies must obtain a warrant in order to inspect "portions of commercial premises which are not open to the public."¹⁰⁵ In this regard, the Court observed that "the decision to enter and inspect w[ould] not be the product of the unreviewed discretion of the enforcement officer in the field."¹⁰⁶ Additionally, the Court asserted that a search of private commercial property was presumptively unreasonable if conducted without a warrant.¹⁰⁷ In reaching this conclusion, the Court applied the fourth amendment limitations on the use of the administrative

98. *Id.* at 532.

99. *Id.* at 533 (citing *Schmerber v. California*, 384 U.S. 757, 770-71 (1966)).

100. *Id.*

101. 387 U.S. 541 (1967).

102. The ordinance read:

INSPECTIONS OF BUILDING AND PREMISES. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards.

Id. (quoting SEATTLE, WASH., FIRE CODE § 8.01.050 (n.d.)).

103. *Id.* at 541-42.

104. *Id.* at 545.

105. *Id.*

106. *Id.* (stating that the Supreme Court would not decide "whether warrants to inspect business premises may be issued only after access is refused").

107. *Id.* at 543.

subpoena.¹⁰⁸ Finally, the Court concluded that it would not limit fourth amendment protections to criminal investigations only.¹⁰⁹

The Supreme Court used similar reasoning in *Marshall v. Barlow's, Inc.*,¹¹⁰ where it held Section 8 of the Occupational Safety and Health Act¹¹¹ unconstitutional. Section 8(a) empowered Labor Department field workers to conduct warrantless searches of work areas of businesses subject to the Act's provisions¹¹² in order "to inspect for safety hazards and violations of OSHA regulations."¹¹³ The *Barlow's* Court reasoned that the decision by a business to engage in interstate commerce¹¹⁴ did not constitute consent to future searches.¹¹⁵ Moreover, the Court concluded that a warrant would not unreasonably burden the Labor Department's enforcement arm.¹¹⁶ The Court pointed to an existing OSHA regulation that gave compliance officers the option of procuring an administrative subpoena

108. *Id.* at 545.

109. In reaching its decision, the Supreme Court first addressed the distinction between criminal investigations conducted on commercial premises and those conducted on residential premises. It concluded that in previous cases it had "refused to uphold otherwise unreasonable criminal investigative searches merely because commercial rather than residential premises were the object of the police intrusions." *Id.* at 543 (citing *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *Amos v. United States*, 255 U.S. 313 (1921); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)). The Court then inquired into whether it should extend such protection to commercial premises when a governmental agency conducted an administrative rather than a criminal investigation. *Id.* Finding no justification for distinguishing between these investigations, the Court held the fourth amendment applicable to administrative searches of commercial premises.

110. 436 U.S. 307 (1978).

111. 29 U.S.C. § 657(a) (1988). Section 8(a) read:

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.

112. *Barlow's*, 436 U.S. at 309-10.

113. *Id.* at 309.

114. The Secretary of Labor argued that businesses engaged in interstate commerce have always been subjected to close supervision. *Id.* at 313-14. In essence, this argument called for the per se extension of the pervasively regulated industries exception to businesses subject to OSHA.

115. *Id.* at 314.

116. *Id.* at 316-20.

where a business owner had refused entry.¹¹⁷ This regulation, the Court surmised, had not inhibited OSHA's effectiveness.¹¹⁸ The *Barlow's* decision is significant not only because it reaffirmed *See's* general rule that governmental agencies are required to obtain a warrant prior to inspecting commercial premises, but because it held that OSHA inspections would not be exempted from that rule.¹¹⁹

b. The "Pervasively Regulated Industries" Exception

Although the Supreme Court has upheld the warrant requirement for administrative searches of commercial premises, it has carved out exceptions to this rule. One such exception is the "pervasively regulated industries" exception. Under this exception, a governmental agency need not obtain a search warrant for a search of a pervasively or closely regulated industry.¹²⁰ The pervasively regulated industries exception is relevant to the conflict among the federal courts of appeals. In *McLaughlin v. A.B. Chance*,¹²¹ the Fourth Circuit held that the justifications underlying this exception applied to the OSHA regulations permitting the Labor Department to cite employers for refusing to comply with warrantless requests for their safety and health records.¹²² Of course, other exceptions are applicable in the administrative inspections context. These include: (1) emergency situations,¹²³ (2) consent,¹²⁴ and (3) "where the object of the inspection is open to public view."¹²⁵

In *Colonnade Catering Corp. v. United States*,¹²⁶ the Supreme Court concluded that the pervasively regulated industries exception was justified by a long tradition of close governmental supervision and regulation.¹²⁷ Businesses historically subject to intense regulation,

117. *Id.* at 317-18.

118. *Id.* at 318.

119. See *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 210-22 (1978).

120. *McLaughlin v. Kings Island*, 849 F.2d 990, 993 (6th Cir. 1988).

Rothstein and Rothstein argue that the *See* Court laid the foundation for this exception in its language that licensing inspections were valid. Rothstein & Rothstein, *supra* note 15, at 358-59 (quoting *See v. City of Seattle*, 387 U.S. 541, 545-46 (1967)).

When the pervasively regulated industries exception applies, business owners retain reduced privacy expectations, and governmental agencies must satisfy the fourth amendment reasonableness requirement. See *infra* notes 152-56 and accompanying notes.

121. 842 F.2d 724 (4th Cir. 1988).

122. *Id.* at 727.

123. *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967); see Rothstein & Rothstein, *supra* note 15, at 351-53.

124. See, 387 U.S. at 545; see Rothstein & Rothstein, *supra* note 15, at 353-58.

125. Rothstein & Rothstein, *supra* note 15, at 366 (discussing *See*, 387 U.S. at 545).

126. 397 U.S. 72 (1970).

127. *Id.* at 77.

such as federally licensed sellers of alcoholic beverages, could be subjected to warrantless inspections.¹²⁸ Since *Colonnade*, the Court has extended the application of the pervasively regulated industries exception to businesses that traditionally have not been subject to close governmental supervision.¹²⁹

In *United States v. Biswell*,¹³⁰ for example, the Court applied the pervasively regulated industries exception to the firearms industry.¹³¹ The Court could not base its decision on the *Colonnade* rationale because federal regulation of interstate traffic in firearms was not as historic as regulation of the liquor industry.¹³² Rather, the Court analyzed the benefits of close governmental supervision of the firearms industry, and concluded that in order for the law to be properly enforced, warrantless searches were necessary.¹³³ This law enforcement need, coupled with the minimal possibility of governmental abuse, motivated the Court to hold that the statutorily authorized warrantless inspections were reasonable under the fourth amendment.¹³⁴

In *Donovan v. Dewey*,¹³⁵ the Court upheld warrantless inspections authorized by Section 103(a) of the Federal Mine Safety and Health Act of 1977.¹³⁶ The Court expressly recognized that the length of time of governmental supervision alone would not be dispo-

128. *Id.* The Supreme Court ultimately disapproved the search conducted in the case "because the statute provided that a sanction be imposed when entry was refused, and because it did not authorize entry without a warrant as an alternative." *New York v. Burger*, 482 U.S. 691, 700 (1987).

129. See *infra* notes 130-51 and accompanying text.

130. 406 U.S. 311 (1972).

131. *Id.* at 315-17. In *Biswell*, the firearm statute authorized "official entry during business hours into 'the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises.'" *Id.* at 311 (quoting Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1223 (current version at 18 U.S.C. § 923(g) (1988))).

132. *Id.* at 315.

133. *Id.*

134. *Id.* at 317.

135. 452 U.S. 594 (1981).

136. Pub. L. No. 95-164, § 103(a), 91 Stat. 1291 (current version at 30 U.S.C. § 813 (1988)). According to the Court in *Dewey*:

[The Act] provide[d] that federal mine inspectors [were] to inspect underground mines at least four times per year and surface mines at least twice a year to insure compliance with . . . standards [promulgated by the Secretary of Labor], and to make followup inspections . . . [Section 103(a) of the Act] . . . also grant[ed] mine operators "a right of entry to, upon, or through any coal or other mine" and state[d] that "no advance notice of an inspection shall be provided to any person."

Dewey, 452 U.S. at 596 (footnote omitted).

itive of whether a particular business was subject to the pervasively regulated industries exception.¹³⁷ Rather, the pervasiveness and regularity of governmental regulation would be the deciding factor.¹³⁸ In interpreting *Colonnade* and *Biswell*, the Court stated:

[A] warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.¹³⁹

Accordingly, an individual owning a business in a pervasively regulated industry has a reduced expectation of privacy;¹⁴⁰ thus, federal mine inspectors did not have to obtain a search warrant to conduct inspections under the applicable statutory scheme.¹⁴¹ Finally, the Court concluded that the statute provided an adequate substitute for the warrant requirement,¹⁴² because it provided safeguards for mine operators,¹⁴³ and, therefore, was reasonable.

More recently, in *New York v. Burger*,¹⁴⁴ the Court held that police agency searches of junkyards that dismantled vehicles, conducted pursuant to state regulations,¹⁴⁵ fell within the pervasively regulated industries exception.¹⁴⁶ Several premises supported the Court's conclusion: (1) the junkyard industry was closely regulated by the state,¹⁴⁷ (2) automobile dismantlers were subject to extensive regula-

137. *Dewey*, 452 U.S. at 606.

138. *Id.*

139. *Id.* at 600.

140. *Id.* at 599-600.

141. *Id.* at 606.

142. The Supreme Court focused on the certainty and regularity of the Act's inspection program. *Id.* at 603-05.

143. The Supreme Court held that the statute provided an adequate substitute for a warrant because "the Act requires inspection of *all* mines and specifically defines the frequency of inspection," "the standards with which a mine operator is required to comply are all specifically set forth in the Act or . . . [in the regulations]," and "the Act provides a special mechanism for accommodating any special privacy concerns that a specific mine operator might have." *Id.* at 603-04.

144. 482 U.S. 691 (1987).

145. The state statute provided that:

Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises.

Id. at 694 n.1 (quoting N.Y. VEH. & TRAF. LAW § 415-a5(a) (McKinney 1986)).

146. *Id.* at 703.

147. *Id.* at 703-04.

tion,¹⁴⁸ and (3) automobile dismantlers were part of the general junkyard industry.¹⁴⁹ The Court concluded that "an operator of a junkyard engaging in vehicle dismantling ha[d] a reduced expectation of privacy in this 'closely regulated' business."¹⁵⁰ Therefore, the police agency did not have to obtain a search warrant in order to satisfy the fourth amendment's reasonableness requirement.¹⁵¹

These cases indicate that the basis for the pervasively regulated industries exception is not that a business owner does not have any reasonable expectation of privacy in commercial property and that, therefore, the fourth amendment is not applicable because no search has occurred.¹⁵² If this were the case, the fourth amendment reasonableness question would be irrelevant.¹⁵³ On the contrary, even in this context, the Court has inquired into whether the statutory scheme was reasonable.¹⁵⁴ Admittedly, the warrant requirement has a lessened application in this context.¹⁵⁵ The Court, however, has recognized that expectations of privacy are at stake, albeit reduced ones.¹⁵⁶

c. The *Burger* Framework

Burger is valuable for its analysis of the fourth amendment's reasonableness requirement. The *Burger* Court's framework is applicable in determining whether the Labor Department may, without a warrant or administrative subpoena, constitutionally cite employers who refuse to provide safety and health records upon demand. The Court first asked whether a search warrant was not required because the pervasively regulated industries exception applied.¹⁵⁷ Because the exception did apply, no search warrant was necessary.¹⁵⁸ With that in mind, the Court then analyzed whether the warrantless inspections

148. *Id.*

149. *Id.* at 703-04, 706.

150. *Id.* at 707.

151. The Court then concluded that the warrantless inspections were reasonable under the fourth amendment. For an extensive analysis of *Burger*, see *infra* notes 157-64 and accompanying text.

152. Whether a governmental agency's conduct constitutes a search under the fourth amendment depends on a business owner's reasonable expectation of privacy. If the business owner has no reasonable expectation of privacy, the agency's conduct does not constitute a search. See *supra* notes 52-55 and accompanying text.

153. The fourth amendment is only implicated if there is a search. If there is a search, a governmental agency's conduct must meet the fourth amendment reasonableness requirement. See *supra* notes 56-63 and accompanying text.

154. *Burger*, 482 U.S. at 702.

155. *Id.*

156. *Id.*

157. *Id.* at 703-08.

158. *Id.* at 702.

authorized by the statutory scheme were reasonable under the fourth amendment.¹⁵⁹ In the context of the pervasively regulated industries exception or "where the privacy interest of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened,"¹⁶⁰ governmental agencies must satisfy a three-tiered standard in order for the scheme at issue to be constitutional. The three criteria are: (1) "there must be a 'substantial' government interest that informs the regulatory scheme to which the inspection is made,"¹⁶¹ (2) the inspections conducted pursuant to the statute "must 'be necessary to further [the] regulatory scheme,'" ¹⁶² and (3) "the regulatory statute must perform the two basic functions of a warrant: it must advise the owner . . . that the search is being made pursuant to law and has a properly defined scope, and it must limit the discretion of the inspecting officers."¹⁶³ The Court held that because the state's regulatory statute met all three criteria, it was reasonable under the fourth amendment.¹⁶⁴

III. THE FEDERAL COURTS OF APPEALS IN CONFLICT

The United States Courts of Appeals for the Fourth, Sixth, and Eleventh Circuits have confronted the issue of the constitutionality of the OSHA regulations requiring business owners to voluntarily produce safety and health records.¹⁶⁵ An analysis of these cases illustrates the tension existing between a business owner's constitutional

159. *Id.* at 708.

160. *Id.* at 702. The United States Court of Appeals for the Sixth Circuit deemed this language as providing for an exception to the general warrant requirement rule in *McLaughlin v. Kings Island*, 849 F.2d 990, 994 (6th Cir. 1988).

161. *Burger*, 482 U.S. at 702.

162. *Id.*

163. *Id.* at 703.

164. *Id.* at 708. The Court concluded that the statute met the first criterion because "motor vehicle theft ha[d] increased in the State and because the problem of theft [was] associated with th[e automobile junkyard] industry." *Id.* As to the second criterion, the Court noted that "the State rationally may believe that it will reduce car theft by regulations that prevent automobile junkyards from becoming markets for stolen vehicles," *id.* at 709, and that warrantless inspections [were] necessary to further the statutory scheme, *id.* at 710 (citing *Donovan v. Dewey*, 452 U.S. 594, 600 (1981)). Lastly, the Court determined that the statute met the third criterion because it properly notified business owners of the regularity of the searches and sufficiently limited inspectors' discretion. *Id.* at 711.

For a recent analysis of the three *Burger* factors, see *Ruiz v. Commissioner of Dep't of Transp.*, 687 F. Supp. 888 (S.D.N.Y. 1988). The *Ruiz* court stated that it was not relying on the pervasively regulated industries exception to uphold the warrantless searches and seizures at issue. *Id.* at 894 n.8. It used the exception, however, to shed light on the controversy stemming from state regulations permitting warrantless stops of trucks. *Id.*

165. *McLaughlin v. Kings Island*, 849 F.2d 990 (6th Cir. 1988); *McLaughlin v. A.B. Chance*, 842 F.2d 724 (4th Cir. 1988); *Brock v. Emerson Elec. Co.*, 834 F.2d 994 (11th Cir. 1987).

right to be free from warrantless searches and the government's discretionary power. As the following discussion will show, the Sixth and Eleventh Circuits correctly concluded that the OSHA regulations were invalid to the extent that they permitted compliance officers to conduct warrantless searches. The Fourth Circuit, however, incorrectly upheld the OSHA regulations without even considering the Supreme Court's framework for testing the reasonableness of warrantless inspections set out in *Burger*.

A. *The OSHA Regulatory Scheme*

In its enactment of OSHA,¹⁶⁶ Congress provided for the implementation of appropriate recordkeeping procedures¹⁶⁷ by the Secretary of Labor, who was given the express authority to "prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses."¹⁶⁸ Regulations promulgated pursuant to this statutory grant of authority are at issue in the three federal courts of appeals cases to be examined.¹⁶⁹

The OSHA recordkeeping regulations require employers to maintain in their business premises both a log and supplemental record of all recordable occupational injuries and illnesses.¹⁷⁰ Addition-

166. In passing OSHA, Congress declared that OSHA's purpose was "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." 29 U.S.C. § 651(b) (1988).

167. *Id.* § 651(b)(12).

168. *Id.* § 657(c)(2).

169. The regulations forming the regulatory framework in the three cases are: Recording and Reporting Occupational Injuries and Illnesses, 29 C.F.R. §§ 1904.1-1904.7 (1989). These regulations were promulgated as "necessary or appropriate for enforcement of . . . [OSHA], for developing information regarding the causes of and prevention of occupational accidents and illnesses, and for maintaining a program of collection, compilation, and analysis of occupational safety and health statistics." *Id.* § 1904.1.

170. *Id.* §§ 1904.2(a)(1), 1904.4. Section 1904.2 provides:

(a) Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

(b) Any employer may maintain the log of occupational injuries and illnesses at a place other than the establishment or by means of data-processing equipment, or both, under the following circumstances:

(1) There is available at the place where the log is maintained sufficient information to complete the log to a date within 6 working days after receiving

ally, employers are required to post an annual compilation of all occupational injuries and illnesses for each of their establishments.¹⁷¹

information that a recordable case has occurred, as required by paragraph (a) of this section.

(2) At each of the employer's establishments, there is available a copy of the log which reflects separately the injury and illness experience of that establishment complete and current to a date within 45 calendar days.

Id. § 1904.2.

Section 1904.4 provides:

In addition to the log of occupational injuries and illnesses provided for under § 1904.2, each employer shall have available for inspection at each establishment within 6 working days after receiving information that a recordable case has occurred, a supplementary record for each occupational injury or illness for that establishment. The record shall be completed in the detail prescribed in the instructions accompanying Occupational Safety and Health Administration form OSHA No. 101. Workmen's compensation, insurance, or other reports are acceptable alternative records if they contain the information required by Form OSHA No. 101. If no acceptable alternative record is maintained for other purposes, Form OSHA No. 101 shall be used or the necessary information shall be otherwise maintained.

Id. § 1904.4.

171. *Id.* § 1904.5. Section 1904.5 provides:

(a) Each employer shall post an annual summary of occupational injuries and illnesses for each establishment. This summary shall consist of a copy of the year's totals from the form OSHA No. 200 and the following information from that form: Calendar year covered, company Name[,], establishment name, establishment address, certification signature, title, and date. A form OSHA No. 200 shall be used in presenting the summary. If no injuries or illnesses occurred in the year, zeros must be entered on the totals line, and the form must be posted.

(b) The summary shall be completed by February 1 beginning with calendar year 1979. The summary of 1977 calendar year's occupational injuries and illnesses shall be posted on form OSHA No. 102.

(c) Each employer, or the officer or employee of the employer who supervises the preparation of the log and summary of occupational injuries and illnesses, shall certify that the annual summary of occupational injuries is true and complete. The certification shall be accomplished by affixing the signature of the employer, or the officer or employer who supervises the preparation of the annual summary of occupational injuries and illnesses, at the bottom of the last page of the log and summary or by appending a separate statement to the log and summary certifying that the summary is true and complete.

(d) (1) Each employer shall post a copy of the establishment's summary in each establishment in the same manner that notices are required to be posted under § 1903.2(a)(1) of this chapter. The summary covering the previous calendar year shall be posted no later than February 1, and shall remain in place until March 1. For employees who do not primarily report or work at a single establishment, or who do not report to any fixed establishment on a regular basis, employers shall satisfy this posting requirement by presenting or mailing a copy of the summary during the month of February of the following year to each such employee who receives pay during that month. For multi-establishment employers where operations have closed down in some establishments during the calendar year, it will not be necessary to post summaries for those establishments.

(2) A failure to post a copy of the establishment's annual summary may

Employers must satisfy this requirement even if there have been no injuries or illnesses during the preceding year.¹⁷² Because such records would be of minimal or no value to the Labor Department if it did not have access to them, Section 1904.7(a) of the regulations mandates that "[e]ach employer shall provide, upon request, [the safety and health] records . . . , for inspection and copying by any representative of the Secretary of Labor for the purpose of carrying out the provisions of the act."¹⁷³ It is the constitutionality of this regulation that is in question in each of the federal cases because it does not require that compliance officers seek compulsory process. Compliance officers, however, do have the *option* to seek compulsory process.¹⁷⁴

B. *The Factual Sequence*

Each of the federal cases under review was initiated when an employee filed a complaint with the Labor Department against his or

result in the issuance of citations and assessment of penalties pursuant to sections 9 and 17 of the Act.

Id.

172. M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 200 (2d ed. 1983).

173. 29 C.F.R. § 1904.7(a) (1989). This Section provides:

(a) Each employer shall provide, upon request, records provided for in §§ 1904.2, 1904.4, and 1904.5, for inspection and copying by any representative of the Secretary of Labor for the purpose of carrying out the provisions of the act, and by representatives of the Secretary of Health, Education, and Welfare during any investigation under section 20(b) of the act, or by any representative of a State accorded jurisdiction for occupational safety and health inspections or for statistical compilation under sections 18 and 24 of the act.

(b) (1) The log and summary of all recordable occupational injuries and illnesses (OSHA No. 200) (the log) provided for in § 1904.2 shall, upon request, be made available by the employer to any employee, former employee, and to their representatives for examination and copying in a reasonable manner and at reasonable times. The employee, former employee, and their representatives shall have access to the log for any establishment in which the employee is or has been employed.

(2) Nothing in this section shall be deemed to preclude employees and employee representatives from collectively bargaining to obtain access to information relating to occupational injuries and illnesses in addition to the information made available under this section.

(3) Access to the log provided under this section shall pertain to all logs retained under the requirements of § 1904.6.

Id.

For implementation purposes, the OSHA Operations Manual provides that a compliance officer shall issue a citation to employers who fail to provide safety and health records. OSHA Field Operations Man. (BNA) ch. VI(B)(8)(e) (1989).

174. 29 C.F.R. § 1903.4(a)-(b) (1989). Section 1903.4(d) defines compulsory process as "the institution of any appropriate action, including *ex parte* application for an inspection warrant or its equivalent," *id.* § 1903.4(d), and establishes *ex parte* inspection warrants as "the preferred form of compulsory process," *id.*

her respective employer.¹⁷⁵ In *McLaughlin v. Kings Island*,¹⁷⁶ for example, the employee filed a "health complaint alleging that fog used in a theatrical performance at the theme park [operated by Kings Island] irritated employees' eyes and upper respiratory systems."¹⁷⁷ The Labor Department subsequently sent OSHA compliance officers to the respective employers' business premises to investigate the claims.¹⁷⁸

In *Brock v. Emerson Electric Co.*,¹⁷⁹ when a compliance officer visited the Emerson Electric plant in response to an employee health complaint,¹⁸⁰ he sought permission to inspect the workplace and to examine the company's safety and health records for the period covering 1982 through 1984.¹⁸¹ Emerson's personnel manager permitted the compliance officer to conduct a warrantless search of the workplace, but refused to allow him to inspect the requested records without a warrant or subpoena.¹⁸² Consequently, the Secretary of Labor issued Emerson Electric a citation for violating Section 1904.7.¹⁸³

Similarly in *Kings Island*, a compliance officer requested permission to examine the employer's safety and health records for the preceding three years,¹⁸⁴ so he could examine the documents for hygienic and environmental problems.¹⁸⁵ The compliance officer did not present either a search warrant or an administrative subpoena.¹⁸⁶ Kings Island informed the compliance officer that it would permit only an inspection of the business premises and the records relevant to the scope of the employee complaint.¹⁸⁷ It also indicated that it would produce no other records unless the compliance officer obtained a

175. *McLaughlin v. Kings Island*, 849 F.2d 990, 991-92 (6th Cir. 1988); *McLaughlin v. A.B. Chance Co.*, 842 F.2d 724, 724 (4th Cir. 1988); *Brock v. Emerson Elec. Co.*, 834 F.2d 994, 995 (11th Cir. 1987).

176. 849 F.2d 990 (6th Cir. 1988).

177. *Id.* at 991-92.

178. *Id.*; *A.B. Chance*, 842 F.2d at 724; *Emerson*, 834 F.2d at 995.

179. 834 F.2d 994 (11th Cir. 1987).

180. *Id.* at 995.

181. *Id.* at 995-96.

182. *Id.* at 996.

183. *Id.* Emerson contested the citation. *Id.* However, the Administrative Law Judge (ALJ) vacated the citation on the ground that Emerson had a fourth amendment right to insist on a search warrant or subpoena. *Secretary of Labor v. Emerson Elec. Co.*, 13 O.S.H. Cas. (BNA) 1171, 1172 (O.S.H. Rev. Comm'n Mar. 18, 1987). The Occupational Safety and Review Commission (OSHRC) affirmed, based on its earlier holding in the *Kings Island* case. *Id.* The Secretary of Labor petitioned the Eleventh Circuit for review. *Emerson*, 834 F.2d at 996.

184. *McLaughlin v. Kings Island*, 849 F.2d 900, 992 (6th Cir. 1988).

185. *Id.*

186. *Id.*

187. *Id.*

search warrant or some other form of legal process.¹⁸⁸ In response, the Secretary of Labor cited Kings Island for not providing the records upon request.¹⁸⁹

Finally, in *McLaughlin v. A.B. Chance Co.*¹⁹⁰ a compliance officer requested that A.B. Chance produce its safety and health records,¹⁹¹ as well as permission to examine the machinery that an employee had cited in his health complaint.¹⁹² An A.B. Chance representative allowed the compliance officer to examine the machinery, but on two occasions refused to produce the records.¹⁹³ Accordingly, the compliance officer gave notice to the company "of its violation of . . . [OSHA], and regulations promulgated thereunder, particularly 29 C.F.R. § 1904.7(a)."¹⁹⁴ In neither instance did the compliance officer attempt to obtain a warrant or an administrative subpoena.¹⁹⁵

C. Emerson: *The Eleventh Circuit Finds the OSHA Regulations Unconstitutional*

The core of the *Brock v. Emerson*¹⁹⁶ decision by the United States Court of Appeals for the Eleventh Circuit consisted of two inquiries addressing the constitutionality of Section 1904.7: (1) whether Emerson had a privacy interest in the OSHA safety and health records, and if so, (2) the extent of the fourth amendment protection to be given this privacy interest.¹⁹⁷ Beginning with the prem-

188. *Id.*

189. *Id.* Like Emerson, Kings Island contested the citation. *Id.* The ALJ granted the Labor Department's motion for summary judgment and found that Kings Island was in violation of the OSHA regulations for its failure to provide the requested records. *Secretary of Labor v. Taft Broadcasting Co.*, 13 O.S.H. Cas. (BNA) 1137, 1138 (O.S.H. Rev. Comm'n Mar. 18, 1987).

Kings Island subsequently petitioned the OSHRC for a review of the ALJ's holding. *Id.* The OSHRC reversed the ALJ's decision, holding that Section 1904.7(a) violated the fourth amendment "to the extent that it purports to authorize an inspection of required records without a warrant or its 'equivalent.'" *Id.* at 1146. Thereafter, the Secretary of Labor petitioned the Sixth Circuit for review. *Kings Island*, 849 F.2d at 992.

190. 834 F.2d 724 (4th Cir. 1988).

191. *Id.*

192. *Id.*

193. *Id.* at 724-25.

194. *Id.* at 725.

195. The Secretary of Labor sought to enforce the citation. *Id.* Applying established fourth amendment analysis, see *supra* notes 52-63 and accompanying text, the ALJ concluded that the fourth amendment did not require OSHA to obtain a warrant or to issue a subpoena when it desired to inspect safety and health records. *Secretary of Labor v. A.B. Chance Co.*, 12 O.S.H. Cas. (BNA) 1172, 1173 (O.S.H. Rev. Comm'n Mar. 18, 1987). On appeal, the OSHRC reversed, in light of its prior holding in *Kings Island*. *Id.* The Secretary petitioned the Fourth Circuit for review. *A.B. Chance*, 834 F.2d at 725.

196. 834 F.2d 994 (11th Cir. 1987).

197. *Id.* at 996.

ise that individuals have a protected interest in commercial property, the court observed that the pervasively regulated industries exception did not apply to Emerson.¹⁹⁸ The fact that many employers kept safety and health records prior to the passage of OSHA supported the argument that Emerson had an expectation of privacy in the records.¹⁹⁹ Moreover, this privacy interest was not lessened by Congress' enactment of OSHA and the Labor Department's subsequent promulgation of regulations mandating that all employers subject to OSHA compile such records.²⁰⁰ Consequently, the court concluded that Emerson had a privacy interest in its records.²⁰¹

The Eleventh Circuit then defined the contours of the protections afforded to Emerson's privacy interest.²⁰² Utilizing the Supreme Court's analysis in *See* pertaining to the use of administrative subpoenas,²⁰³ the *Emerson* court concluded that judicial oversight in the commercial context was indispensable to curbing the government's discretion to invade a company's privacy.²⁰⁴ Accordingly, the court held that an employer such as Emerson could demand that the Labor Department "issue a subpoena and [could] seek judicial involvement by refusing to honor the subpoena prior to its judicial enforcement."²⁰⁵ Thus, the court held Section 1904.7 unconstitutional under the fourth amendment to the extent that this regulation authorized inspections of the records without a warrant or subpoena.²⁰⁶

In essence, the Eleventh Circuit's decision is consistent with the *Burger* framework.²⁰⁷ The *Emerson* court first recognized that business owners have protected privacy interests in commercial property,²⁰⁸ and then concluded that such interests attached to Emerson's safety and health records.²⁰⁹ Therefore, the *Emerson* court surmised, some degree of judicial intervention was necessary prior to inspection. It is of no consequence that the court did not analyze the constitution-

198. *Id.* Like the conclusions reached in *Barlow's* and *Kings Island*, the Eleventh Circuit determined that Emerson was not within the exception merely because it was within the scope of OSHA. *Id.* (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313-14 (1978)); see also *Kings Island*, 849 F.2d at 994 (citing *Barlow's*, 436 U.S. at 315).

199. *Emerson*, 834 F.2d at 996.

200. *Id.*

201. *Id.*

202. *Id.*

203. See *supra* notes 69-71 and accompanying text.

204. *Emerson*, 834 F.2d at 997.

205. *Id.*

206. *Id.*

207. For a discussion of *Burger's* analysis of the reasonableness requirement, see *supra* notes 157-64 and accompanying text.

208. *Emerson*, 834 F.2d at 996.

209. *Id.* at 996-97.

ality of the OSHA regulations, assuming that the Labor Department could establish decreased privacy expectations. Because the court concluded that Emerson retained its privacy interests in the records and that some sort of judicial intervention was required, the court did not have to reach that constitutional issue.

D. Kings Island: *The Sixth Circuit Aligns with the Eleventh Circuit*

The United States Court of Appeals for the Sixth Circuit, in *McLaughlin v. Kings Island*,²¹⁰ also utilized the holding of *See* in determining whether the OSHA regulations were constitutional to the extent that they permitted warrantless searches of employers' safety and health records.²¹¹ As discussed earlier,²¹² *See* held that absent the existence of an exception, governmental agencies must obtain a warrant in order for a search of commercial premises to be deemed reasonable.²¹³ Because the Sixth Circuit found that an exception did not exist,²¹⁴ the Labor Department had to establish that Kings Island had a decreased privacy expectation overshadowed by governmental regulatory interests in order to prevail on the merits.²¹⁵

The Labor Department argued that Kings Island had a minimal expectation of privacy in the requested records because such records were required to be maintained and produced by law.²¹⁶ In addressing this argument, the Sixth Circuit employed a two-fold mode of analysis. The court first admitted that other courts had repeatedly upheld access to records based on the government's request for them.²¹⁷ It noted, however, that in those prior cases some judicial intervention was present prior to the search.²¹⁸ Whether or not a war-

210. 849 F.2d 990 (6th Cir. 1988).

211. *Id.* at 993.

212. *See supra* notes 101-09 and accompanying text.

213. *See v. City of Seattle*, 387 U.S. 541, 543 (1967) (citing *Camara v. Municipal Court*, 387 U.S. 523 (1967)). Like the *See* Court, the Sixth Circuit pointed out that an administrative subpoena may be adequate in certain circumstances. *Kings Island*, 849 F.2d at 993 (citing *See*, 387 U.S. at 544-45).

214. *Kings Island*, 849 F.2d at 994-96. The Labor Department conceded that the pervasively regulated industries exception was inapplicable. *Id.* at 994. It acknowledged that the exception was limited and that "industries affected by OSHA are not by definition pervasively regulated." *Id.*

The Labor Department could not establish consent because Kings Island had not agreed to the inspection of the records. *Id.* at 992. Additionally, an emergency situation presumably did not exist, and the records were not in plain view.

215. *Id.* at 994.

216. *Id.* at 995.

217. *Id.*

218. *Id.*

rant was ultimately required was not dispositive of the issue in those cases because the presence of the judiciary prevented arbitrary decisionmaking by agency field workers.²¹⁹ In contrast, *Kings Island* did "not involve a contested search warrant . . . ; an administrative subpoena . . . ; access by injunction or court order . . . ; a pervasively regulated industry . . . ; a regulatory reporting requirement . . . ; or access pursuant to any consent order or contract with the federal government."²²⁰ Rather, what transpired was "an unannounced inspection accompanied by an arbitrary and discretionary demand to inspect company records not only as they relate[d] to a specific [employee health] complaint, but for hygienic and environmental problems in general."²²¹ Such a governmental intrusion could not be constitutional because it was contrary both to the rule established in *See*²²² and to the policies served by a search warrant.²²³

The court then focused on whether an employer had a privacy expectation in records required by regulation to be maintained.²²⁴ In this regard, the Sixth Circuit expressly concurred with the Eleventh Circuit's decision in *Emerson*, and held that employers have recognizable privacy interests in OSHA safety and health records even though employers are required to maintain them.²²⁵ The court recognized that an employer may keep the safety and health records for any number of business reasons, including preserving the lives and health of employees, raising the labor force's morale, and obtaining lower insurance rates.²²⁶ As such, the records were not of interest solely to the Labor Department; nor were they public property.²²⁷ Therefore, the court reasoned that *Kings Island* had a privacy interest in its records that should be protected by judicial oversight through either a search warrant or an administrative subpoena.²²⁸

219. *See id.*

220. *Id.* (citations omitted).

221. *Id.*

222. For a discussion of *See v. City of Seattle*, 387 U.S. 541 (1987), see *supra* notes 101-09 and accompanying text.

223. For a discussion of the purposes served by a search warrant, see *supra* notes 72-77 and accompanying text.

224. *Kings Island*, 849 F.2d at 995.

225. *Id.* (citing *Brock v. Emerson Elec. Co.*, 834 F.2d 994, 994 (11th Cir. 1987)).

226. *Secretary of Labor v. Taft Broadcasting Co.*, 13 O.S.H. Cas. (BNA) 1137, 1140 (O.S.H. Rev. Comm'n Mar. 18, 1987), *aff'd*, *McLaughlin v. Kings Island*, 849 F.2d 990 (6th Cir. 1988).

227. *Kings Island*, 849 F.2d at 995 (quoting *United States v. Blue Diamond Coal Co.*, 667 F.2d 510, 518 (6th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982); and citing *C.A.B. v. United Airlines, Inc.*, 542 F.2d 394 (7th Cir. 1976); *United States v. Stanock Sales Co.*, 387 F.2d 849 (3rd Cir. 1968); and *Mid-Fla. Coin Exch., Inc. v. Griffin*, 529 F. Supp. 1006 (M.D. Fla. 1981)).

228. *Id.* at 996.

In discussing the need for a warrant or an administrative subpoena, the Sixth Circuit adopted a reasoning similar to that used by the Supreme Court in *Marshall v. Barlow's, Inc.*²²⁹ It noted that although the fourth amendment limited the Labor Department's ability to obtain documents, requiring at least an administrative subpoena would not impose unreasonable burdens on the Labor Department's enforcement arm.²³⁰ Under the OSHA regulations, a compliance officer had the option of choosing whether to obtain an administrative subpoena or to perform a warrantless search.²³¹ Inconsistent results could obtain under this procedure because the fourth amendment's reasonableness requirement would apply only when the compliance officer chose to obtain a subpoena.²³² These concerns, coupled with the need to define the scope of the search and to afford employers notice and an opportunity to be heard,²³³ led the Sixth Circuit to hold that judicial oversight was necessary before OSHA could demand production of the safety and health records.²³⁴

Utilizing the framework of *New York v. Burger*,²³⁵ the Sixth Circuit assumed that the Labor Department could establish that Kings Island had a reduced expectation of privacy in its safety and health records.²³⁶ Next, it considered whether the OSHA regulatory scheme satisfied *Burger*'s three-tiered reasonableness test.²³⁷ Because the regulatory scheme failed the second and third criteria of the test, the Sixth Circuit held that the regulations permitting the warrantless searches were unconstitutional.²³⁸ As to the second criterion, the Labor Department contended that requiring a warrant or a subpoena for the production of the safety and health records would be burdensome on both the agency and the federal courts.²³⁹ Following the Supreme Court's lead in *Camara*, the Sixth Circuit demanded that the Labor Department demonstrate that warrantless searches were necessary for the reasonable enforcement of OSHA.²⁴⁰ The Labor Depart-

229. 436 U.S. 307 (1978). For a discussion of *Barlow's*, see *supra* notes 110-19 and accompanying text.

230. *Kings Island*, 849 F.2d at 997.

231. *Id.*

232. *Id.* at 996.

233. *Id.*

234. *Id.* at 997.

235. 482 U.S. 691 (1987). For a discussion of *Burger*, see *supra* notes 144-64 and accompanying text.

236. *Kings Island*, 849 F.2d at 996.

237. *Id.*

238. *Id.*

239. *Id.* at 997.

240. *Id.*

ment was unable to do so.²⁴¹

Regarding the third criterion of the *Burger* test, the Labor Department alleged that the OSHA regulations adequately limited compliance officer discretion, and protected employers' privacy interests.²⁴² For instance, the regulations granted employers procedural safeguards, and the Labor Department could not imposed monetary penalties for failure to provide records until the Occupational Safety and Health Review Commission affirmed the reasonableness of the citation.²⁴³

The Sixth Circuit countered this argument, however, by invoking the language from *Marshall v. Barlow's, Inc.*²⁴⁴ that "a provision authorizing warrantless administrative inspections 'devolves almost unbridled discretion upon executive and administrative officers,' "²⁴⁵ which contravenes the purposes served by a warrant.²⁴⁶ Here, the OSHA regulations required an employer like Kings Island to refuse to produce the records and then to defend itself after receiving a citation.²⁴⁷ These "after the fact" procedures conflicted with a business owner's fourth amendment rights because the judiciary could not evaluate the reasonableness of the compliance officer's demand until the harm had been done.²⁴⁸

In sum, the Sixth Circuit held that even if the Labor Department had established King Island's reduced expectation of privacy, the OSHA regulations in question were unreasonable under the fourth amendment.²⁴⁹ The Labor Department could neither establish that the warrantless inspections were essential to furthering the regulatory scheme, or that the regulatory scheme provided an adequate substitute for a search warrant. In essence, the regulatory scheme was unreasonable because it did not safeguard the policies served by a search warrant.

E. A.B. Chance: *The Fourth Circuit Takes a Different Route*

The United States Court of Appeals for the Fourth Circuit in *McLaughlin v. A.B. Chance*²⁵⁰ confronted the constitutionality of the

241. *Id.*

242. *Id.*

243. *Id.*

244. 436 U.S. 307 (1978).

245. *Kings Island*, 849 F.2d at 997 (quoting *Barlow's*, 436 U.S. at 323).

246. For a discussion of the purposes served by a search warrant, see *supra* notes 72-77 and accompanying text.

247. *Kings Island*, 849 F.2d at 997.

248. *Id.*

249. *Id.* at 998.

250. 842 F.2d 724 (4th Cir. 1988).

OSHA regulations with an analytic framework similar to that of the Eleventh Circuit's *Emerson* decision.²⁵¹ Although it began its analytic trek with the familiar inquiry of whether A.B. Chance had a reasonable expectation of privacy in the OSHA records,²⁵² the Fourth Circuit reached a result contrary to that of the Eleventh Circuit.

After recognizing the general rule that a warrant is required for administrative searches of business premises,²⁵³ the Fourth Circuit disclosed that in certain circumstances a regulatory scheme authorizing warrantless searches may adequately protect a business owner's privacy expectations.²⁵⁴ Such a regulatory scheme must meet the fourth amendment's reasonableness standard to be constitutional.²⁵⁵ Rejecting A.B. Chance's argument that a search warrant was required in this context because A.B. Chance was not engaged in a pervasively regulated industry,²⁵⁶ the Fourth Circuit concluded that the rationale of the pervasively regulated industries exception was applicable.²⁵⁷ Because OSHA required the records to be kept, business owners were on notice that such records might be examined and, therefore, their expectation of privacy was diminished.²⁵⁸

In determining whether the OSHA regulatory scheme was reasonable under the fourth amendment, the Fourth Circuit balanced "the need to search against the invasion which the search entail[ed]."²⁵⁹ The Fourth Circuit first considered the Labor Department's need to conduct warrantless searches for safety and health records, and pointed to congressional intent to support the position that a strong enforcement scheme was necessary to fulfill OSHA's purposes.²⁶⁰ To this extent, "the keeping of records by employers to show all industrial accidents, injuries, and illnesses occurring at the work place is a reasonable and necessary requirement in order for the Act to be properly administered and enforced."²⁶¹ In sum, the Labor Department's need to search was a compelling one.

The court concluded that the invasion which the warrantless

251. See *supra* notes 196-97 and accompanying text.

252. *A.B. Chance*, 842 F.2d at 726.

253. *Id.* (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)).

254. *Id.* at 727 (quoting *Gallagher v. City of Huntington*, 759 F.2d 1155, 1159 (4th Cir. 1985) (quoting *Bionic Auto Parts & Sales, Inc. v. Fahner*, 721 F.2d 1072, 1078 (7th Cir. 1983))).

255. *Id.* (quoting *Gallagher*, 759 F.2d at 1159 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967))).

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* (citing 29 U.S.C. § 651 (1988)).

261. *Id.*

search occasioned was minimal.²⁶² The court enunciated five justifications for this conclusion. First, a compliance officer's request for the records did not place an inordinate burden on A.B. Chance.²⁶³ The company only needed to physically produce the records, which it already should have compiled.²⁶⁴ This sort of an invasion was, therefore quite minimal.²⁶⁵

Second, A.B. Chance had a minimal privacy expectation in the records requested.²⁶⁶ Pursuant to OSHA regulations, A.B. Chance was required to post "an annual summary of occupational injuries and illnesses, which . . . consist[ed] of a copy of the year's totals from form No. 200 . . . in a conspicuous place . . . where notices to employees [we]re customarily posted."²⁶⁷ Since this information was accessible to anyone viewing A.B. Chance's bulletin board, the Fourth Circuit determined that A.B. Chance had a negligible expectation of privacy in the records.²⁶⁸

Third, a compliance officer's request for the production of the records was not unreasonable.²⁶⁹ The compliance officer was on the business premises as a result of an employee health complaint. The court surmised that it was not unreasonable for the officer to request that A.B. Chance produce the records while he was on the premises because the information they contained could have related to the allegations in the health complaint,²⁷⁰ and, in any event, the regulation required the employer to keep this information.²⁷¹

Fourth, the Labor Department did not arbitrarily decide to search A.B. Chance's records.²⁷² Invoking *Barlow's*, A.B. Chance argued that allowing the warrantless search would devolve too much discretion on compliance officers.²⁷³ However, the Fourth Circuit distinguished *Barlow's* by positing that A.B. Chance had been selected for search as result of an employee health complaint—not because of "whim, caprice, or any arbitrary method."²⁷⁴

The final justification centered around the Fourth Circuit's cri-

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 727-28.

267. *Id.*

268. *Id.* at 728.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978)).

274. *Id.*

tique of the *Emerson* holding.²⁷⁵ The Fourth Circuit alleged that the Eleventh Circuit failed to address the question of whether the company's expectation of privacy was reasonable and to engage in a balancing test to determine the reasonableness of the regulatory scheme.²⁷⁶ Regarding the reasonableness of the company's expectation of privacy, the Fourth Circuit reiterated its argument concerning the posting of an annual summary of injuries and determined that there was "no reason to conclude that an employer's privacy expectation in the forms, or in the information contained thereon, [was] greater at the time OSHA requested the documents, than it [was] at the time the annual summary [was] posted."²⁷⁷ In response to the Eleventh Circuit's argument that many employers kept such records prior to OSHA's enactment, the Fourth Circuit argued that there was no indication that A.B. Chance kept such records²⁷⁸ and that, in any event, "by promulgating the record requirement, OSHA cannot be deemed to have created a privacy interest in the information contained on the forms."²⁷⁹

Concerning the failure of the Eleventh Circuit to implement a balancing test, the Fourth Circuit argued that the *Emerson* court did not address the limitations on the compliance officer's discretion.²⁸⁰ The compliance officer could only request two types of forms without a warrant.²⁸¹ Moreover, the Fourth Circuit concluded that in order to make such a request, the compliance officer "must be on the employer's premises as a result of an employee's health or safety complaint before he may require production of the forms . . . without a warrant."²⁸² Because of this judicial condition, the Fourth Circuit implied that the compliance officer's discretion was limited and ulti-

275. *Id.*

276. *Id.* This allegation may be misplaced. In fact, as previously noted, the Eleventh Circuit began its inquiry into the constitutionality of the OSHA regulations with the question of whether the employer had an expectation of privacy in the records. *Brock v. Emerson Elec. Co.*, 834 F.2d 994, 996 (11th Cir. 1987). Arguably, the court made its determination from the reasonableness perspective. Concerning the balancing test issue, the Eleventh Circuit and the Fourth Circuit employed different methodologies. The Eleventh Circuit's methodology paralleled the Supreme Court's in *See v. City of Seattle*, 387 U.S. 541 (1967). The Fourth Circuit's methodology was consistent with the methodology that courts frequently have employed in the administrative searches context. *See Methodologies, supra* note 2, at 1129-33. As will be argued, the Fourth Circuit's approach was incorrect because it was inconsistent with *See* and did not account for the three-tiered *Burger* reasonableness test. *See infra* notes 285-90 and accompanying text.

277. *A.B. Chance*, 842 F.2d at 728.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

mately held that the regulatory scheme was reasonable under the fourth amendment.²⁸³ Therefore, *A.B. Chance* could be cited for not voluntarily producing the records.²⁸⁴

IV. RESOLUTION UNDER THE FOURTH AMENDMENT

The judicial treatment of administrative searches in the commercial context indicates that business owners have privacy interests that are protected by the fourth amendment. The Supreme Court has established that a search warrant or an administrative subpoena is necessary for an administrative search to be held reasonable and, therefore, constitutional under the fourth amendment.²⁸⁵ Where the Supreme Court has recognized the pervasively regulated industries exception,²⁸⁶ it has inquired into whether the statutory scheme permitting the warrantless searches was reasonable.²⁸⁷ In essence, the issue is whether the policies served by a search warrant are safeguarded by the statutory scheme.

The preceding Section disclosed the Fourth Circuit's legal analysis in *A.B. Chance*, where it upheld the OSHA regulations permitting warrantless searches of employer safety and health records.²⁸⁸ As a result, the Labor Department could cite *A.B. Chance* for violating OSHA when it did not produce the records upon a compliance officer's request.²⁸⁹ This Comment argues that the *A.B. Chance* holding was incorrect in light of the precedent established by *See* and *Barlow's*, the Fourth Circuit's use of a balancing test, and prevailing public policy concerns. Accordingly, an alternate mode of resolving these issues is presented based on the Sixth Circuit's use of the *New York v. Burger*²⁹⁰ decision.

A. *A Critique of the Fourth Circuit's Rationale in A.B. Chance*

The Fourth Circuit employed a balancing test in holding that the OSHA regulations permitting warrantless searches of employers' safety and health records satisfied the fourth amendment reasonableness requirement.²⁹¹ The court's holding permitted OSHA compli-

283. *Id.* at 728-29.

284. *Id.*

285. *See supra* notes 101-19 and accompanying text.

286. *See supra* notes 120-51 and accompanying text.

287. *See supra* notes 152-56 and accompanying text.

288. *See supra* notes 250-84 and accompanying text.

289. *McLaughlin v. A.B. Chance*, 842 F.2d 724, 728-29 (4th Cir. 1988).

290. 482 U.S. 691 (1987). For the Sixth Circuit's application of the *Burger* test, see *supra* notes 235-49.

291. *A.B. Chance*, 842 F.2d at 727-29.

ance officers to cite employers who did not voluntarily produce the requested records. This Comment critiques the *A.B. Chance* court's analytic framework on the aforementioned grounds.

First, *See* and *Barlow's* both support the principle that a warrant is required for administrative searches of commercial premises to be deemed reasonable under the fourth amendment.²⁹² These cases recognize the need to interpose a judicial organ between businessmen and agency fieldworkers.²⁹³ The Fourth Circuit disregarded these precedents in holding that an employer cannot demand that a compliance officer present a warrant or an administrative subpoena. Even though it referred briefly to the *See* general rule,²⁹⁴ the Fourth Circuit concluded that *A.B. Chance* had a minimal expectation of privacy in its safety and health records. The court then implemented its balancing test.²⁹⁵ This approach defies the *See* principle that warrantless searches are presumptively unreasonable.²⁹⁶

Although *See* and *Barlow's* involved premises inspections rather than records inspections, *A.B. Chance* should not be distinguished on this basis. The compliance officer presumably would examine the safety and health records on the company's nonpublic premises. Courts have been sensitive to these types of on-site inspections.²⁹⁷ Like premises inspections, such on-site records inspections "invade[] corporate privacy and can disrupt the workplace . . . [,] may . . . result in significant . . . costs [, and] . . . will in some cases enable regulators to discover plain view evidence against a firm."²⁹⁸ Admittedly, the plain view evidence argument may not be applicable here because an *A.B. Chance* representative consented to an inspection of machinery.²⁹⁹ Nevertheless, his consent extended only to the premises inspection, not to the records inspection.³⁰⁰ Moreover, the applicable OSHA regulations do not limit the compliance officer's discretion. A compliance officer conceivably may limit his request to the scope of the employee's complaint, or may demand a broad production of

292. *See supra* notes 101-19 and accompanying text.

293. *See supra* notes 101-19 and accompanying text.

294. *A.B. Chance*, 842 F.2d at 726.

295. *Id.* at 726-27.

296. *See v. City of Seattle*, 387 U.S. 541, 547 (1967).

297. *E.g.*, *United States v. New Orleans Pub. Serv., Inc.*, 734 F.2d 226 (5th Cir. 1984), *cert. denied*, 469 U.S. 1180 (1985). One commentator argues that "the import of [this] . . . case[] is that any nonconsensual entry by the government onto nonpublic areas of business property to review business records is subject to the Fourth Amendment." McDonald, *IRCA and the Fourth Amendment: Constitutionality of Warrantless Access Provisions*, 13 EMPLOYEE REL. L.J. 426, 436 (1987-88).

298. *New Orleans Public Service*, 734 F.2d at 228.

299. *See supra* note 193 and accompanying text.

300. *See supra* note 193 and accompanying text.

records as occurred in *Kings Island*.³⁰¹ The *Barlow's* decision confronted this type of discretion in the OSHA premises inspection context.³⁰² Thus, the protections afforded by *Barlow's* should apply in this context.³⁰³

The Fourth Circuit's conclusion regarding A.B. Chance's expectation of privacy contravenes the conclusions of both the Sixth and Eleventh Circuits. As the Sixth Circuit explained, employers may keep these records for a variety of purposes.³⁰⁴ Further, many employers maintained safety and health records prior to the enactment of OSHA, when the Labor Department would have had to procure a warrant to obtain the records.³⁰⁵ The enactment of the recordkeeping requirements should not remove any privacy interests in the records. If the contrary were true, employers' personal rights under the fourth amendment would be derivative of agency decisions requiring the recordkeeping of particular information. Such agency discretion conflicts with both *See* and *Barlow's* and with the policies served by a search warrant.

An employer's expectation of privacy should not diminish because he is required to post an annual summary of on-site injuries and illnesses. This information is available only to those viewing an employer's bulletin board.³⁰⁶ The employer has not made the information publicly available because only those individuals with access to the premises are privy to such information. Moreover, if governmental agencies could remove a business owner's expectation of privacy in his safety and health records or any other records containing documented information by requiring the business owner to post a summary of that information, business owners would be subject to the arbitrary discretion of compliance officers specifically, and the executive branch in general—a result historically condemned.³⁰⁷

If *A.B. Chance* had involved a regulatory scheme that required the employer to present documentation to a governmental agency on a regular basis, then the Fourth Circuit's holding would be correct. The government's request for information would have been routine,³⁰⁸ and courts have recognized that "a uniform statutory or regulatory

301. See *supra* notes 184-85 and accompanying text.

302. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321-26 (1978).

303. *Id.* at 321-22.

304. See *supra* notes 226-27 and accompanying text.

305. *Brock v. Emerson Elec. Co.*, 834 F.2d 994, 996 (11th Cir. 1987).

306. See *supra* notes 267-68 and accompanying text.

307. The arbitrary discretion of executive officers was condemned in England in the late eighteenth century. See *supra* note 42 and accompanying text.

308. *Emerson*, 834 F.2d at 996 n.2 (citing *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974)).

reporting requirement satisfies the Fourth Amendment concern regarding the potential for arbitrary invasions of privacy."³⁰⁹ For example, the Second Circuit upheld the constitutionality of a warrantless Federal Deposit Insurance Corporation ("FDIC") search of a bank president's office, even though the president also used the office for his law practice.³¹⁰ The FDIC conducted the warrantless search as the receiver of the bank, pursuant to its statutory "duty to marshal the Bank's assets and to wind up its affairs."³¹¹ The Second Circuit upheld the search, inter alia, because bank records are subject to routine FDIC examination.³¹² The Supreme Court used similar reasoning in *California Bankers Association v. Schultz*,³¹³ to uphold the constitutionality of the reporting requirements of the Bank Secrecy Act of 1970.³¹⁴ In contrast, as the Eleventh Circuit recognized, the OSHA compliance officers' requests for the safety and health records involved "discretionary and potentially arbitrary requests for document inspection."³¹⁵ In such cases, courts should be wary of granting field workers unbridled discretion. Requiring a warrant permits judicial oversight and does not impose unreasonable burdens on the Labor Department because an employee's complaint ordinarily furnishes probable cause for the issuance of a warrant.³¹⁶

Second, in implementing a balancing test, the Fourth Circuit did not adequately address the fourth amendment warrant requirement. It accepted the Labor Department's decision, as exemplified by the OSHA regulations in question, that warrantless searches were necessary and then conducted a balancing test to determine the reasonableness of the regulatory scheme.³¹⁷ In effect, such an analysis "permits legislators and administrators to redefine reasonableness at will,"³¹⁸ and transforms the *See* presumption that warrantless searches are unreasonable into the exception, and the exception into the general rule. A truer approach to the general warrant requirement rule would require the Labor Department to demonstrate that the employers

309. *Id.*

310. *United States v. Chuang*, 897 F.2d 646 (2d Cir. 1990), *aff'g*, 696 F. Supp. 910 (S.D.N.Y. 1988).

311. *Chuang*, 696 F. Supp. at 914 (citing 12 U.S.C. § 1821(d) (1988); and *Federal Deposit Ins. Corp. v. Hatmaker*, 756 F.2d 34, 36 n.2 (6th Cir. 1985)).

312. *Chuang*, 897 F.2d at 650.

313. 416 U.S. 21 (1974).

314. Pub. L. No. 91-508, § 101, 84 Stat. 1114 (codified as amended in scattered sections of 12 U.S.C. and 31 U.S.C.).

315. *Brock v. Emerson Elec. Co.*, 834 F.2d 994, 996 n.2 (11th Cir. 1987).

316. D. LOFGREN, *supra* note 27, at 200.

317. *See supra* note 259 and accompanying text.

318. *Methodologies*, *supra* note 2, at 1139.

have reduced expectations of privacy in the records and that the regulatory scheme is reasonable under the fourth amendment.³¹⁹ Such an approach would not only safeguard *See's* principle that warrantless searches of commercial premises are presumptively unreasonable,³²⁰ but would also reconfirm the principle that "[l]aw enforcement . . . should work within bounds set by the Fourth Amendment, not vice versa."³²¹

The Fourth Circuit's utilization of a balancing test is also questionable as precedent. Balancing tests are vague and unpredictable.³²² Although the Fourth Circuit's test addressed such factors as congressional intent, the invasion which the search entailed, the company's expectation of privacy, and the discretion of the compliance officer, its review of these factors provides little objective guidance for other courts, especially in comparison to *Burger's* three-tiered test. The *Burger* test not only provides more objective guidance, but also allows courts to consider fully both the interests of businessmen and governmental agencies.

Moreover, the Fourth Circuit's conclusions are questionable. The Fourth Circuit declared that Congress intended a strong enforcement scheme.³²³ While this may have been the case, it does not necessarily follow that warrantless searches are required for the enforcement of OSHA. Such a conclusion conflicts with the Supreme Court's analysis in *Barlow's*. In *Barlow's*, the Court remained "unconvinced . . . that requiring warrants to inspect [would] impose serious burdens on the [OSHA] inspection scheme or the courts, [would] prevent inspections to enforce the statute, or [would] make them less effective."³²⁴ Although there may be factual differences between *Barlow's* and *A.B. Chance*, these differences were not sufficient for either the Sixth or Eleventh Circuit to distinguish *Barlow's*. The distinctions between the investigations in *Barlow's* and *A.B. Chance* reflect that OSHA will not be seriously burdened with regard

319. See *United States v. Most*, 876 F.2d 191, 193 (D.C. Cir. 1989) (stressing that in the context of criminal cases, the relevant precedent establishes that a warrantless search is presumptively unconstitutional and that the government bears the burden of proving that a particular exception applies).

320. See *supra* note 107 and accompanying text.

321. *Methodologies*, *supra* note 2, at 1139 n.61.

322. Cf. *id.* at 1137 (arguing that courts "have resorted to a more flexible and less rule-bound 'balancing' methodology in civil cases" and that courts are increasingly implementing this approach in the criminal context).

323. *McLaughlin v. A.B. Chance*, 842 F.2d 724, 727 (4th Cir. 1988).

324. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 316 (1978). Even a former OSHA compliance officer concedes that "OSHA generally has little trouble obtaining a [search] warrant[] if the inspection is conducted pursuant to a signed employee complaint." D. LOFGREN, *supra* note 27, at 200.

to inspections of safety and health records. In *Barlow's*, the compliance officer sought to investigate safety hazards.³²⁵ Requiring a search warrant in that context could inhibit OSHA's enforcement more than by requiring a warrant in the records context. Arguably, in the records context there is less chance of an employer tampering with the records while a compliance officer obtains a search warrant because employers must post an annual summary of the workplace injuries and illnesses.³²⁶ Supporting this conclusion is the Sixth Circuit's observation that the Labor Department was "not concerned that employers [would] alter or destroy the records upon being given notice and a hearing."³²⁷

The final criticism of *A.B. Chance* centers around policy concerns in today's regulatory society. If courts do not require that an administrative agency obtain a search warrant, or at least permit an employer to demand an administrative subpoena, a business enterprise could be subject to a number of searches from different agencies without having the opportunity for judicial review. For example, pursuant to the Immigration Reform and Control Act of 1986 (IRCA),³²⁸ the Labor Department conducts investigations of I-9 verification forms that employers are required to maintain.³²⁹ IRCA gives the Immigration and Naturalization Service and the Labor Department unrestricted access to the verification forms.³³⁰ Under the Fourth Circuit's approach, the Labor Department conceivably could enter upon a business owner's premises to investigate an employee health complaint and make a warrantless request for the employer's safety and health records. In addition, the compliance officer could make a warrantless request for the I-9 forms. In such a setting, where an employer could be subject to a number of investigations, judicial review is even more necessary. The Fourth Circuit's approach, however, potentially enhances warrantless searches not only by the Labor Department, but also by other governmental agencies. Such searches contradict the purposes served by a search warrant,³³¹ the principles enunciated in *See*,³³² and the decisions of the

325. *Barlow's*, 436 U.S. at 310-11.

326. 29 C.F.R. § 1904.5 (1989).

327. *McLaughlin v. Kings Island*, 849 F.2d 990, 996 (6th Cir. 1988).

328. Pub. L. No. 99-603, § 1, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

329. *See* 8 U.S.C. § 1324a(b)(3) (1988). Since the passage of IRCA, the relationship between the Labor Department and the INS has intensified, thereby subjecting employers to potentially increased scrutiny. *Cf. McDonald, supra* note 297, at 426-27.

330. *See McDonald, supra* note 297, at 428.

331. *See supra* notes 72-77 and accompanying text.

332. *See supra* notes 101-09 and accompanying text.

Eleventh Circuit in *Emerson*³³³ and the Sixth Circuit in *Kings Island*.³³⁴

B. Implementation of the Burger Framework

In contrast to the Sixth Circuit's mode of analysis in *Kings Island*, the Fourth Circuit does not invoke, or even mention, the *Burger*³³⁵ holding. The *Burger* analytic framework is useful for evaluating whether warrantless administrative searches are constitutional under the fourth amendment. It recognizes the general rule that a search warrant is required for administrative searches,³³⁶ but also acknowledges that exceptions exist.³³⁷ If a governmental agency can demonstrate reduced privacy expectations, its warrantless inspection may be constitutional if it meets the three-tiered *Burger* reasonableness test.³³⁸

No exceptions to the warrant requirement exist in *A.B. Chance*. In *Kings Island*, the Labor Department conceded that the pervasively regulated industries exception did not apply.³³⁹ The Eleventh Circuit reached the same conclusion in *Emerson*.³⁴⁰ This exception is limited,³⁴¹ and the Supreme Court has interpreted it to apply only to particular industries.³⁴² As the *Barlow's* Court recognized, OSHA potentially applies to all businesses rather than to a particular industry, such as the liquor industry or the firearms industry.³⁴³ Thus, the Court concluded that businesses subject to OSHA's reach were not per se within the pervasively regulated industries exception.³⁴⁴ Using a similar rationale, a district court concluded that the exception did not apply to federal government employees when it determined the constitutionality of a drug testing program.³⁴⁵

The alleged underlying rationale of this exception does not justify

333. See *supra* notes 196-209 and accompanying text.

334. See *supra* notes 210-49 and accompanying text.

335. 482 U.S. 691 (1987).

336. See *id.* at 699-702.

337. *Id.* at 702.

338. *Id.* at 702-03.

339. *McLaughlin v. Kings Island*, 849 F.2d 990, 995 (6th Cir. 1988).

340. *Brock v. Emerson Elec. Co.*, 834 F.2d 994, 996 (11th Cir. 1987).

341. See *Usery v. Centrif-Air Mach. Co.*, 424 F. Supp. 959 (N.D. Ga. 1977) (interpreting the pervasively regulated industries exception as a narrow exception to the *Camara-See* holdings).

342. See *supra* notes 120-51 and accompanying text.

343. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 314 (1978).

344. *Id.*

345. *National Fed'n of Fed. Employees v. Carlucci*, 680 F. Supp. 416, 430 (D.D.C.), modified on other grounds, 3 Individual Empl. Rights Cas. (BNA) 128 (D.D.C.), stay granted, 3 Individual Empl. Rights Cas. (BNA) 128 (D.C. Cir. 1988).

the determination that warrantless searches are constitutional in the context of compliance officer searches of employers' safety and health records. If it did, it would undermine the *Barlow's* Court's conclusion that businesses subject to OSHA are not by definition within the pervasively regulated industries exception.³⁴⁶ Additionally, an increase in the scope of the exception would result, as is already evident in several Supreme Court decisions.³⁴⁷ Such a process would ultimately lead to the exceptions' engulfing of the general warrant requirement rule.

Additionally, an employer's privacy interests in safety and health records is not diminished in light of the Labor Department's regulatory interests. Business owners not only have expectations of privacy in safety and health records, but also in their business premises. Such expectations should not diminish as a result of the promulgation of recordkeeping requirements.

The *Burger* framework focuses on the fourth amendment reasonableness requirement.³⁴⁸ Even if the Labor Department could establish that one of the preceding exceptions applied, the statutorily authorized searches need to satisfy the fourth amendment reasonableness requirement.³⁴⁹ Applying the three-tiered *Burger* reasonableness test,³⁵⁰ the OSHA regulatory scheme is unreasonable under the fourth amendment. While the Labor Department could establish a substantial governmental interest to support the need to regulate commercial enterprises,³⁵¹ it cannot maintain, as the Sixth Circuit noted,³⁵² either that warrantless searches are essential to furthering the OSHA regulatory scheme or that the regulatory framework provides an adequate substitute for a warrant. Regarding the former, the Supreme Court's finding in *Barlow's* that OSHA's effectiveness would not be undermined if warrants were required in order to conduct safety inspections is equally applicable here.³⁵³ As to the latter, the statute does not provide for any type of judicial oversight prior to the conduct of a search.³⁵⁴ Only "after the fact" judicial review is provided, which most certainly contravenes the precedent established by *See* and *Barlow's*—that judicial intervention is necessary to prevent unbridled

346. *Barlow's*, 436 U.S. at 314.

347. *See supra* notes 120-51 and accompanying text.

348. *See supra* notes 157-64 and accompanying text.

349. *New York v. Burger*, 482 U.S. 691, 702 (1987).

350. *Id.* at 702-03.

351. *See* 29 U.S.C. § 651(b) (1988).

352. *McLaughlin v. Kings Island*, 849 F.2d 990, 996 (6th Cir. 1988).

353. *See supra* notes 116-18 and accompanying text.

354. *Kings Island*, 849 F.2d at 997.

governmental discretion.³⁵⁵

V. CONCLUSION

In today's regulatory society, employers' fourth amendment rights often conflict with governmental agencies' authority to conduct warrantless administrative searches. The judicially recognized rule is that a search warrant is necessary for a search to be reasonable. Courts, however, have recognized exceptions to this rule.

Although governmental agencies may have valid reasons to conduct warrantless searches, courts must be wary of rubber stamping agency decisions to conduct such searches without analyzing *both* agency concerns and the personal rights of businessmen. The Fourth Circuit held that the OSHA regulations requiring voluntary production of employers' safety and health records were constitutional, even though they permitted warrantless searches.³⁵⁶ This holding conflicts with the decisions of the Eleventh³⁵⁷ and Sixth³⁵⁸ Circuits. An analysis of the Sixth Circuit's decision discloses that using the *Burger* analytic framework permits courts to respect the general warrant requirement rule. Using this framework is preferable to having a court defer to an agency decision that warrantless searches are necessary and then conduct a balancing test. The *Burger* approach provides added judicial vigilance during this era of governmental regulation—an era when our constitutional rights increasingly appear to be in jeopardy.

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355. In a hearing subsequent to the three cases under consideration, an Occupational Safety and Health Commission Administrative Law Judge vacated a citation issued to an employer who refused to provide a compliance officer with safety and health records, allegedly in violation of 29 C.F.R. § 1904.7 (1989). *Secretary of Labor v. Hern Iron Works, Inc.*, 14 O.S.H. Cas. (BNA) 1446 (O.S.H. Rev. Comm'n Dec. 2, 1989). The judge concluded "that 29 CFR 1904.7 is constitutionally invalid insofar as it purports to authorize an inspection of required records without a warrant or its equivalent, such as an employer's consent." *Id.*

356. *McLaughlin v. A.B. Chance Co.*, 842 F.2d 724, 728-29 (4th Cir. 1988).

357. *Brock v. Emerson Elec. Co.*, 834 F.2d 994, 997 (11th Cir. 1987).

358. *Kings Island*, 849 F.2d at 997.