C. 2

In the

Supreme Court of the United States

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,	)	
PETITIONERS,	)	
V.	)	No. 76-1143
BARLOW'S, INC.,	)	
RESPONDENT.	)	

Washington, D. C.
January 9, 1978

Pages 1 thru 45

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

RAY MARSHALL, SECRETARY OF LABOR, ET AL., Petitioners,	:	
v.	:	No. 76-1143
BARLOW'S, INC., Respondent.	:	

Washington, D. C.

Monday, January 9, 1978

The above-entitled matter came on for argument at 11:40 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

WADE H. McCREE, JR., ESQ., Solicitor General, Department of Justice, Washington, D.C., 20530, for the Petitioners.

JOHN L. RUNFT, ESQ., Runft & Longeteig, Chartered, 420 West Bannock Street, Post Office Box 953, Boise, Idaho, 83701, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-1143, Ray Marshall, Secretary of Labor, et al., against Barlow's.

Mr. Solicitor General, you may proceed.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.

ON BEHALF OF THE PETITIONERS

MR. McCREE: Mr. Chief Justice, and may it please the Court:

The question presented by this appeal is whether the inspection provisions of the Act and their implementing regulations that authorize representatives of the Secretary of Labor during regular working hours and at other reasonable times and within reasonable limits and in a reasonable manner to conduct warrantless inspections of the portions of commercial premises routinely occuplied by an employer's work force violate the Fourth Amendment guarantee against unreasonable searches and seizures.

A three-judge court held that provision unconstitutional,and we submit that it is an erroneous holding and respectfully request this Court to reverse it.

The chronology of events that brings this matter before the Court is brief and as follows: On September 11, 1975, an occupational safety and health inspector called for a routine inspection of appellee's premises in Pocatello, Idaho.

These premises were devoted to the heating and cooling business and he sought to make a so-called general schedule inspection, a term now superseded and called a "regional programmed inspection." That is to say the inspection was not in response to any complaint by an employee or with reference to anything other than a determination by the area officer that this kind of business enterprise would be inspected within this community.

QUESTION: Would you indicate, briefly, Mr. Solicitor General, the scope of that inspection, that is, does it go just to machinery or books, records and files?

MR. McCREE: It would be limited to the premises, the work premises occupied by Barlow's employees. It did not include the right to inspect books and records and it would be limited only to the areas routinely occupied and only during working hours or other reasonable times.

QUESTION: General McCree, did the supersession that you just referred to have any substantive consequences, or was it just a change in name?

MR. McCREE: To the best of my knowledge, it is just a change of name. I found "general schedule" somewhat difficult to comprehend, too, and "regional programmed inspection" indicates that what has happened is certain georgraphical areas are inspected on a determination that as the Labor Department indicates the worst first, to go to the premises that contain

the greatest hazards to employee safety, initially. And these are determined by reporting schedules from programs like Workmen's Compensation programs that regularly advise about the incidence of industrial accidents and other disabling occurrences.

QUESTION: Are there any specific criteria that are relied upon by the regional officers who make these decisions?

MR. McCREE: Yes. If the Court please, the regional officers receive the reports to which I made reference and determine then which industries produce the greatest number of industrial injuries and occupational disablements and then within the industries where geographically they may be located. And the schedules are determined on priorities based upon considerations such as that.

QUESTION: Are those schedules public information? What I am interested in, with 5 million businesses subject to the Act and 80,000 inspections made last year, what guidelines or objbective criteria, if any, exists that control the exercise of discretion by the individuals who decide whether this business or that business is to be inspected?

MR. McCREE: If the Court please, there is a publication to which I'd like to make reference if I may. I do not have it at fingertip. I'll have it when I return to the lectern. A publication that I suppose is discoverable by any interested person. It is a Field Performance Evaluation System that is adopted for the guidance of regional programs by

the Office of Field Performance Evaluations. It is captioned the "Worst First Program Scheduling Guide," and it indicates the industries which will first be inspected on the basis of data that is later appearing in this publication indicating the nature of the enterprise, its relative rank in producing disabling accidents and other occurrences, the number of employees, the number of establishments, and so forth.

And so it is not an arbitrary determination at all, but it has a rational basis, and as far as I can determine it is available for inspection by persons who are interested in knowing when their turn is coming about.

The inspector first called at Barlow's on September 11, 1975, properly identified himself by producing his credentials and made an offer of a toll-free call to the proprietor who was present on the premises to permit him to ascertain the authenticity of the inspector. The proprietor denied the inspector admission for the purpose of making the inspection stating that he believed the Fourth Amendment immunized him from such an inspection in the absence of a search warrant, which the inspector admitted that he did not have.

QUESTION: I suppose you would concede, Mr. Solicitor General, in this setting a search warrant could not have been had on any probable cause?

MR. McCREE: We do concede that. We concede that there was no particularized reason for inspecting Barlow's

premises. We suggest, however, that on the basis of inspections -- administrative inspections being authorized where a reasonable scheme exists for an appropriate governmental -- to serve an appropriate governmental interest, that a search would be permitted and that under the standards of Camara and See an inspection warrant would have been issued had one been sought.

QUESTION: To go on with your facts, I take it that entry was refused?

MR. McCREE: Entry was refused, if the Court please --

QUESTION: And that is not a crime or illegal, I take it?

MR. McCREE: There is no criminal sanction attached to that, nor does any civil penalty result therefrom.

QUESTION: And what does the regulation say about it?

MR. McCREE: Well, the Secretary has adopted a regulation that provides, in summary, that the Area and Assistant Regional Director and the Regional Solicitor shall promptly take appropriate action, including compulsory process, if necessary.

Now, as a matter of practice, the Regional Inspectors have then gone to the court to obtain an order requiring the proprietor to submit to the inspection. And, indeed, that was done here. On the 30th of December, the District Court to which the application was made, after issuing an order to show cause to which Barlow's responded with counsel, issued an order

requiring entry for the purpose of inspection.

QUESTION: What does the United States -- What does the inspector submit to the court to get such an order? Does he just make the presentation such as you did, that there is a reasonable inspection scheme and the statute permits it and we want to get in?

MR. McCREE: That is essentially the representation he makes to the court. And the court in this case issued an order to show cause which permitted the employer to appear and assert any objection he might have.

QUESTION: So that it is more than the equivalent of a search warrant if you could have gotten a search warrant for this reason?

MR. McCREE: Considerably more, because it is an adversary proceeding and the search warrant, of course, is ex parte.

QUESTION: Well, it is both more and less, isn't it, General McCree? In other words, as I understand it, all you did was present the district court with this statute and said under this statute we are authorized and empowered to make a search. There was no finding of probable cause, was there?

MR. McCREE: If the Court please, it was suggested that a reasonable inspection scheme is the prerequisite for the issuance of an inspection warrant under Camara and See. A particularized probable cause isn't required under the standards

of those two cases.

QUESTION: And none was found.

MR. McCREE: But it wasn't necessary under Camara and See.

QUESTION: That's the issue,really, in this case, isn't it?

MR. McCREE: Had an application been made for a search warrant, if the Court please, we suggest that that would have been the representation that would have been made to the magistrate, ex parte, and he would have issued --

QUESTION: A Camara-See type.

MR. McCREE: A Camara-See type. And we suggest that he would have issued a search warrant then for the premises. And, therefore, this procedure of requiring an order -- of issuing an order to show cause and permitting the employer to appear in opposition gave the employer even more protection than this Court said the Fourth Amendment mandates in the Camara and See situation.

QUESTION: What, under your submission, could the employer say?

MR. McCREE: Well, as a matter of fact, the employer did say that he was entitled to the protection of the Fourth Amendment and that his premises could not be entered for that reason. And I have the transcript and the court inquired of the employer whether he wanted to show any reason why he

shouldn't come in in response to it. And all he ever said was, "No, I have the Fourth Amendment," and he never contended that there was no rational scheme of inspection, which is the criterion set forth in Camara and See as a basis for the issuance of a search warrant.

QUESTION: And, under your submission, that's about all -- Well, he could say there is no such plan as this, or something like that. But, apart from that sort of thing, all he could say was this isn't a reasonable inspection program, under your submission.

MR. McCREE: Indeed, that's all he could say, and he almost said that, but he didn't quite.

QUESTION: He might have said it for us, but he was here yesterday. He's just bugging me.

MR. McCREE: Yes, indeed, he might have. He did not in fact raise that.

QUESTION: You would concede that this was a sufficient basis for entering Mr. Barlow's home, would you? To have an order to show cause why you shouldn't enter his home when --

MR. McCREE: We don't argue that at all. These were business premises and the portion sought to be entered, that portion routinely occupied by the employee. It wasn't even a private portion of the business premises.

QUESTION: Then you don't say that the court authorization would authorize entry into any other part of the premises,

or sitting at a desk, or anything else.

MR. McCREE: It was carefully restricted, and I have a copy of the order here -- It was carefully restricted to that part of the premises occupied by the employees, that it be conducted during regular working hours or at other reasonable times, within reasonable limits and in a reasonable manner and it incorporated the regulations which --

QUESTION: Did it incorporate the statutory provisions, basically?

MR. McCREE: The statutory provisions and the regulations, if the Court please.

QUESTION: Mr. Solicitor General, where did the District Court get jurisdiction to enter that order? What's the source of it? No statute authorized the District Court to enter orders to show cause, did it?

MR. McCREE: No, and that troubled me, except the Federal Rules of Civil Procedure authorize district courts to enter -- to issue process and that means --

QUESTION: Is this process, this order?

How does this order give the inspector any greater authority than the statute itself gives? That's one question. The second question is: Where did the United States District Court get the authority to enter such an unusual order?

MR. McCREE: That has disturbed me, too. I suppose the federal jurisdiction statute might confer on the court

jurisdiction to entertain the application.

QUESTION: Do you rely on the All Writs Act, as the Court did in the Telephone case the other day?

MR. McCREE: Well, I think the All Writs Act is really in support of jurisdiction that the court otherwise possesses, and I would be bootstrapping if I did that.

I think I'd have to rely on federal question jurisdiction and the authority of the Federal Rules of Civil Procedure to issue process. But, in any event --

QUESTION: It wasn't the Secretary of Labor who was claiming a right under the Constitution, was it, under 1331? He was the one who went into court.

MR. McCREE: He was claiming a right to inspect the premises under an Act, under a statute, a federal statute.

In any event, on the 30th of December, the district court entered this order and the inspector, thereupon, reappeared at the premises and requested admission pursuant to its authority. He was denied permission on the 5th of January 1976 and thereafter Appellee filed a complaint for injunctive relief in the district court. He challenged the constitutionality of the statute and a three-judge court was duly designated. And on December 30, 1976, the three-judge court held that the inspection provision was unconstitutional and permanently enjoined the Secretary from proceeding with this inspection. And that brings us to the question here: Whether the Fourth Amendment

forbids inspections as authorized by the statute.

And, of course, our initial focus is upon the Fourth Amendment. As this Court has said many times, the Courth Amendment protects a privacy interest and not places. The issue might be stated whether an inspection without a warrant is unreasonable, which is so restricted as it is in this case. And we suggest that this depends upon the determination whether the protected privacy interest at stake is of such magnitude and the authorized entry so significant an encroachment on that interest that the interposition of a neutral and detached magistrate should be required in the absence of exigent circumstances.

We suggest here that there is no significant privacy interest that calls for the issuance of a warrant because the area to be searched is routinely occupied by the employees, it's during working hours and that these limitations of area and time to a portion of the premises that the employer has opened up to his own employees indicates the absence of a privacy interest such as would require a warrant as a precondition for entry.

QUESTION: But isn't there a certain degree of privity between an employer and his employee that doesn't exist with the employer and the world at-large or government at-large?

MR. McCREE: I would certainly not deny that there

would be a relationship between the employer and the employee, but when the employer opens up to his employees certain portions of his business permises, he also surrenders his exclusive control of it, at least insofar as it affects certain of those employees' interests.

For example, under the National Labor Relations Act, these employees may speak to persons who seek to organize them for the purposes of collective bargaining, and he may not exclude them when they come into those portions of his premises, at certain times, in any event.

QUESTION: Under certain circumstances, isn't there a legal right to shut the plant down and close it and exclude everybody, including employees?

MR. McCREE: And, indeed, if he should do that, the inspector could not enter then because he must enter during regular working hours in just those areas routinely occupied. And he has not the authority, under the statute, without a particularized showing to do that.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Mr. Solicitor General.

MR. McCREE: Thank you.

(Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, you may resume.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ. (Resumed)

ON BEHALF OF THE PETITIONERS

MR. McCREE: Mr. Chief Justice, and may it please the Court:

The sum of the Government's argument in this case can be found in an expression of this Court in 1945 in a case captioned Marsh v. Alabama involving a company town, an institution that this Court has on a later date characterized fortunately as an "economic anachronism." In that case, this Court stated "the more an owner for his advantage opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

And we submit that occupational safety and health inspections intrude upon an employer's premises only to the degree that he has opened those premises to employees for his own advantage, and the purposes of the inspections are directly related to the safety of those employees. And there are safeguards in the statute and in the regulations to insure that the inspections are performed only for their intended purpose.

QUESTION: You don't suggest that a member of the public or the public at-large has any access to these premises, do you, Mr. Solicitor General?

MR. McCREE: I do not.

QUESTION: -- just walked in off the street and said, "I'd like to look at your plant."

MR. McCREE: Certainly not over the employer's refusal to accord it to him. As a practical matter, many employers do. Vendors come on at lunch hours and sell sandwiches, beverages and so forth. Many employers do this with their regular working premises, but I am not speaking of that situation.

QUESTION: In our company town situation, there was really much more access by the public, generally, wouldn't you say, then there is in an ordinary industrial plant?

MR. McCREE: I would think so. Of course, Marsh, as I recall it, was a case where religious literature was being distributed on the premises, and we are not even seeking an intrusion of that extent because we suggest that this is even more restricted. Thirty years ago the Court recognized that when a person allows someone else to use his property he gives up an expectation or privacy, at least congruent with that person's rights, or some of his rights.

And we suggest here that where the safety of the employees who are gathered on the premises for his advantage

is a legitimate concern of the Congress, as expressed in this legislation, that these inspections do not therefore intrude upon any privacy interests of the business and that no warrant should be required to permit an inspection to see that this public interest is carried out.

QUESTION: Mr. Solicitor General, do you have any other case, other than Marsh, because you know Marsh has been deluded recently? Shopping center cases, do you remember?

MR. McCREE: I am quite aware of that, if the Court please.

QUESTION: But that doesn't affect your one point.

MR. McCREE: The shopping centers are not -- to refer again to the phrase I used before -- the economic anachronism that the company town is. They are the current wave. I can refer, however, to the cases that have recognized in the labor field, that I made reference to before the recess, where for organizational purposes, under limited circumstances, access can be had on premises that are less public than shopping centers and shopping malls which have eroded some of the pronouncement of Marsh.

QUESTION: Marsh was a constitutional case and the question was whether or not the company town there was the equivalent of government.

MR. McCREE: Indeed.

QUESTION: That hasn't been questioned since. The

only question is whether a shopping center is the equivalent of a government and that's irrelevant to your argument under this case. This is a statutory case.

MR. McCREE: Thank you, Mr. Justice.

We believe that reasonableness in the light of the limited nature of the employer's interest in the portion of his premises that he opens up routinely to his employees is manifest under these circumstances, and that this legislation is constitutional and that the judgment of the three-judge court should be reversed.

QUESTION: Mr. Solicitor General, may I ask you a question about what you understand the statute means. If an employer denies access, the statute says that the agent has the right to enter without delay. Do you interpret that as meaning he can insist on going in without delay, or does he have to go to court first?

MR. McCREE: We believe that he may insist upon going in. We commend the Labor Secretary for providing in his regulations that he seek a court order in order to avoid a breach of the peace.

QUESTION: You commend him, but he really didn't have to do that, did he?

MR. McCREE: We contend that he did not have to do that.

QUESTION: Does that mean that if there is a refusal

to enter, under the statute, the agent could force his way in if he had to, if he thought there was something dangerous that might be hidden if he didn't look at it right away. You make the argument that there is need for unannounced inspection to find out what's really happening.

MR. McCREE: We believe that the Congress has authorized him to do that, but we would hope that he would not do it as a matter of policy except in the extreme circumstance that the Court posited.

QUESTION: If the agent thought it was really a very dangerous situation that might not be found out, he should go right ahead --

MR. McCREE: We believe the Congress has given him that authority.

QUESTION: For your constitutional argument, you don't rely at all on the regulation?

MR. McCREE: We do not rely on the regulation for our constitutional argument.

QUESTION: Nor on the court order?

MR. McCREE: Nor on the court order.

With the leave of the Court, I would like to reserve the balance of my time for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Solicitor General.

Mr. Runft.

ORAL ARGUMENT OF JOHN L. RUNFT, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. RUNFT: Mr. Chief Justice, and may it please the Court:

I would like to open by going directly to a question asked my friend, the Solicitor, by Chief Justice Burger, with regard to the degree of privity found here in the relationship between the employer and the employee. It seems to me, in essence here, that the Secretary of Labor is attempting to state that the Department has the right to come into the premises involved here, so to speak, on the back of the employees.

Now, the Commerce Clause in the Constitution does give Congress the power to regulate commerce. And, perhaps to the extent there are employees in a work premises there is then a commensurate right, as Congress so found, to inspect. But that is not the same thing as saying, "We have the right to inspect without a warrant." There is a distinction here. And I submit --

QUESTION: Or even enter.

MR. RUNFT: Or even enter.

The question of entry, of course, is a, I submit, separate question, one dealing with probable cause. But I believe the point here to be made initially, for opening, is

this: That throughout the presentation and throughout the brief of the United States there is a constant shifting back and forth between the question, between the issue, I should say, of the power to inspect, through the Commerce Clause, and the right to enter without a warrant.

I would like to go directly from that, with regard to this question of a warrant, to what the Court has stated in its cases is necessary to determine the question of whether or not a warrant is necessary. Of course, the leading case here is the Camara case.

QUESTION: Mr. Runft, before you get to that case -- just so I follow your argument correctly -- what is your position as to the showing that would be required in order to get a warrant?

MR. RUNFT: I believe, Mr. Justice Stevens, that there would have to be a showing of probable cause as set forth as detailed in the Camara case.

QUESTION: Probable cause as to the particular business establishment, or the probable cause to believe that some businesses like this may be dangerous?

MR. RUNFT: I believe there would have to be in any case some showing as to the particular business, even, for example, in the case posited in Camara where you have an area inspection. Now, where you have an area inspection, questions could be asked as to the particular building as to when it was

built. If it were found out that it was not built at the same time, or say more recently than all the other buildings in this blighted area --

QUESTION: Your submission is that there is no right on the part of the government inspector to enter without probable cause to believe there was some violation of the statute within the premises? That's your submission?

MR. RUNFT: It is my submission, Mr. Justice Stevens, but I do hold that there is a middle ground. I am trying to bring out --

QUESTION: It is your submission, but it's not quite that extreme you want to make it.

MR. RUNFT: Yes, not as extreme as in the criminal case, perhaps. But there must be -- It is our position, our submission to the Court that in every case in order for the Secretary of Labor to enter there must be some connection, some rational connection between the statute and that particular place of business, that particular working environment.

QUESTION: Do you think he has to have some suspicion that there is a violation? Or, I gather you say he doesn't even have to have that, does he?

MR. RUNFT: Well, I believe the sucpicion might arise from the factors, such as the nature of the industry, such as the industry-wide accident rate, for example, such as, perhaps, complaints of workmen, and so on. The suspicion, as

one would call it, does not have to be specific as to that industry, directly, as to any particular time, is what I am saying. In other words, there are cases, quite a number of cases, Mr. Justice White, recently. I have quite a list of them here that I could submit to the Court that have taken the position that government findings industry-wide, such as in NEP, National Emphasis Program in OSHA, will suffice to form probable cause for entry, say, into a steel manufacturing plant or into a casting plant.

QUESTION: I take it, then, there will be some industries at the low end of the scale that they can't enter without traditional probable cause.

MR. RUNFT: I would say that would be a question, that would be the very question that should be determined by a magistrate, as to what is the reasonable nature; What is the reasonableness here of this probable cause to be shown? In other words, is there probable cause based on a National emphasis Program or a worst-first program, and if there are facts available in a particular case, how do they relate to the general facts presented by the Secretary of Labor?

Specifically, the issue is, I believe, here, in fact, the fundamental issue in this case is whether or not we need to have a magistrate, an independent magistrate, here to make this decision. I think that really is the fundamental issue in this case.

QUESTION: Suppose the statute had expressly given a court jurisdiction to issue some sort of a piece of paper, a search warrant, or something, or an inspection warrant, and that before you even go to the premises, suppose that the statute had provided that and the piece of paper issued in this case, just on the same information that the court order issued in this case, would you think that was enough?

MR. RUNFT: I would not.

QUESTION: What was the shortcoming of the submission to the court in this case?

MR. RUNFT: The shortcoming of the submission to the court in this case, Justice White, was simply that the United States Attorney presented the fact that the Barlow establishment was an employer, that workers are employed there and that it feel into the jurisdiction of OSHA. That was the --

QUESTION: He just relied on the statute straight out.

MR. RUNFT: Purely on the statute, that's all. We claim that is insufficient. Of course, the burden is extremely great -- I mean the difference is extremely great between such a showing and a showing of probable cause. Where in this case perhaps an accident rate industry-wide might have been shown, if there are, indeed, figures for this type of small business, any other showing to lay the ground work for this inspection, to show that there is some rational connection between the purposes of the statute and the need of the government to

inspect, it is the preservation of that rationality, that link that we call for the interposition of a magistrate --

QUESTION: Mr. Runft, one is ex parte and the other is not. What you are asking for is an ex parte hearing before a magistrate.

MR. RUNFT: That is correct, Your Honor. The reason there, Justice Marshall, if I may say, is that in the ex parte hearing there is still the requirement that they must make a probable cause showing. They still must conform to these standards.

QUESTION: And you could then suppress, move to suppress.

MR. RUNFT: One could move to quash the warrant later.

That does bring up another interesting question, or another issue which is apparent throughout the brief here of the Government, and that is they say that the Government would be terribly disadvantaged if it was faced with a warrant requirement.

Now would it, really? They claim that it would give notice to the employers that there would be a search; but, indeed, doesn't the present compulsory process give notice just as much as a warrant would. In fact, a warrant would give less notice if you followed an ex parte obtaining of a warrant.

QUESTION: You use the word "search." Is this a

search or an inspection?

MR. RUNFT: Mr. Chief Justice, I take the position -- and I believe the Court has stated -- that they are synonymous. It is a search in the --

QUESTION: I wondered at your use of the term.

MR. RUNFT: Yes, I use them synonymously.

QUESTION: You don't open any doors, do you, once you get in the place?

MR. RUNFT: You mean once you get into the building?

QUESTION: Yes. Where do you get the search? Is it anything more than an eyeball search?

MR. RUNFT: Yes, there is.

QUESTION: I thought it was restricted and it said specifically that --

MR. RUNFT: If I could refer the Court to Exhibit A of the Appellee's brief. We set forth as Exhibit A the compulsory order of the court in Idaho.

QUESTION: To me, that's not involved in what I am talking about. I am talking about the right when he went there to go in without going to court. If you had let him in, aren't the regulations there to say what he can do and what he cannot do? Are not those regulations quite specific?

MR. RUNFT: That is correct, Mr. Justice Marshall.

QUESTION: That's what I thought.

MR. RUNFT: Those regulations, however, I may add,

are procedural regulations as to how the inspection should be conducted. And I wish to point out they are not safeguards of the type that would -- or a criteria that would lend itself to explaining why a search should be conducted in that particular premises. There is no way in those regulations, or in the statute itself, to determine any standards that would justify any particular search.

What we really have here, if I could submit to the Court -- What we really have here in this Act and the way it is being enforced without warrant is a form of legislative probable cause. The issue is really one of separation of powers, I submit. The brief, as you know, actually comes to the conclusion that the presence of a magistrate is unneeded in these circumstances. And in the reply brief, in fact, the phraseology is used, I believe, "the intervention of a magistrate or of a judge is not required in the administrative search." And that particular reference is to be found on page 2 of the reply brief.

QUESTION: Mr. Runft, you make the point that to require the Government to secure a warrant would be no real burden on them. I think you said that, didn't you?

MR. RUNFT: It may. It depends. As far as procedurally that is correct.

QUESTION: Well, to the extent that you are right about that, then what you contend for is no real protection for

you, is it?

MR. RUNFT: Well, I believe it would be on this, Justice Stewart, because the Secretary would have to carry the burden of making a probable cause showing.

QUESTION: In answer to questions of my brother, White, I thought I understood you to say that all the Government would have to show would be something along the lines of what was required in Camara and See, i.e., that this is a statute duly enacted by Congress and signed by the President, a valid federal law that authorizes inspections of any place of business. And he shows that and then he shows that this industry has an accident rate, and every industry has an accident rate; whatever it may be, it has one. And that that's enough.

MR. RUNFT: If I may, in answer to that, it may not be enough. It may be enough in some circumstances and it may not in other circumstances. And I think it is those circumstances --

QUESTION: What circumstances?

MR. RUNFT: Well, for example, I can give you an example of the Shellcast case. That's a case that the Alabama -- It took place in Alabama. It's Marshall v. Shellcast Corp. It's Civil Number 77-P-0995-E, and was decided on July 26th of this year. In that case, the Secretary came into a foundry to make an inspection, according to an NEP, National Emphasis

Program, under the foundry industry. The statistics of the NEP program were developed in the year 1973, and this, of course, took place in 1976, this inspection, or attempted inspection. The court asked the question of whether there was any specific information available, or easily attainable. And, apparently -- although it's not clear in the record exactly what sort of information it was -- there were specific statistics available. And, under those circumstances, where there were subsequent statistics showing that the accident rate in this particular establishment were considerably less --

QUESTION: This establishment or this industry?

MR. RUNFT: This industry -- Well, no, in this particular establishment. These were available as regards this particular establishment. And, for that reason, the court refused to grant the search warrant, or the inspection warrant.

QUESTION: Take the corollary of that. Suppose the application for the warrant recited that the accident rate were three times the rate of all other comparable people using the same kind of machinery to produce the same kind of goods in that area. Would you think that would meet whatever probable cause standards you suggest are necessary?

MR. RUNFT: What I understand, Mr. Chief Justice, that that warrant regarding this aggravated accident rate referred specifically to the entity that was to be searched.

I would say that would be a much stronger, that would be the opposite situation, much stronger, to support probable cause, yes. But I believe these cases, and these cases are varied and really very fascinating as to what the courts, in the district courts throughout the land, really are doing with the Camara test. They are adhering, on one hand, to the idea brought out in Camara of the area search or the NEP type thing, or perhaps the first-worst type of approach, but still saying, "We can still look to and if they are available demand that individual circumstances be brought to the court." For example, OSHA has several forms --

QUESTION: Camara didn't require that, did it? It required no more than a showing of a rational area inspection program, Isn't that correct?

MR. RUNFT: If I might -- That is correct, Your Honor, except that the probable cause to issue a warrant must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied. And it is that word "reasonable" in several cases that has been zeroed in on in these district court cases. And that is to be found in the Camara case, that particular reference there at 387 U.S. 538, Section Number 14 in the opinion. And they are saying that we do need the presence of an effective magistrate here to determine this reasonableness, in these questions of probable cause.

QUESTION: Here you have a statute that purports to be concerned with the health and safety of conditions in all plants all over the United States, with certain de minimis exceptions, not confined to a certain industry. If you had a statute that were concerned with the steel industry, say, and then if somebody, a government inspector, said, "I want to inspect this sausage plant," that would be unreasonable. But under this statute, why isn't any inspection that's a rational program reasonable in light of the Camara case? Why, therefore, couldn't the warrant be secured in any case in the light of the Camara standard?

MR. RUNFT: I believe the answer to that lies, if I may, in the facts which have been brought out in a number of opinions. For instance, the Brennan v. Gibson's Products opinion, Judge G., of the 5th Circuit, pointed out that the factual findings underlying OSHA are, indeed, very thin, and certainly do not themselves constitute standards, that is criterion, sufficient to explain or to give a guide as to how to translate these needs into inspections, as to say how you can express this need against -- need to inspect -- against the intrusion into privacy that might occur.

Now, there are detailed guidelines as to procedure, how they identify themselves and how the inspectors do these things, but there are very few standards here as to how these -- how the need of the Government to inspect is to be compared

or translated into the intrusion that is to occur, or against the intrusion that is to occur.

I believe, in answer to your question, also, it should be pointed out that this statute does not constitute pervasive regulation in the sense of the G.M. Leasing case. There Justice Blackmun pointed out that pervasive regulation -- I believe that's the nearest thing we have to a definition of pervasive regulation -- that pervasive regulation meant regulation where the nature of the industry or endeavor, the organization of it, every aspect of it is controlled.

Here, in OSHA, OSHA is like the IRS situation. You have a thin slice that runs through all of industry, but is not pervasive. And when you don't have pervasive regulation, of course, according to the Colonade and Biswell decisions, if it is not truly pervasive, controlling every aspect of this industry, then you don't fit into that narrow category, that narrow category of cases where warrants are not required.

QUESTION: In trying to test out this showing on getting a warrant, suppose Government had information as to the total production of a particular paint factory, from whatever source, and then it could observe from the outside that it had only X number of ventilating vents with fans to take off the noxious and dangerous fumes, then went in reciting these objective facts and reciting the standard that this was only 25% of the necessary means of protecting the

health of the people inside that plant from the noxious fumes, lead poisoning. Do you think they could issue a warrant on that?

MR. RUNFT: I believe that it would form objective evidence, perhaps, sufficient to do it, Your Honor, yes.

QUESTION: And you say that's the kind of evidence, objective evidence that the Government must furnish in order to make the inspection.

MR. RUNFT: I would like to answer the question yes or no, Mr. Chief Justice, but I hesitate to do so for this reason. There are occasions when, I am sure, that a national emphasis program type of situation would be sufficient to stand as probable cause for an inspection, to say that in one particular industry you have a very high incident of accidents and we, therefore, use that as a grounds to inspect. But there should be a magistrate present to ask these questions: When was the NEP made? When was this study made? Is this industry that you propose to inspect directly involved in exactly that type of endeavor? A number of questions like that.

Also, according to the Shellcast case, and I think this is very significant, the magistrate could ask the OSHA inspector, or the Secretary of Labor's representative: Did you attempt to make any further inquiry? Did you use the OSHA forms 102, 103 and 104, which are a form of interrogatory

asking a particular business about its own particular situation.

QUESTION: Mr. Runft, couldn't the judge have asked all of those questions in this case, and insisted on answers?

MR. RUNFT: He could have, Your Honor, but he didn't. I asked him to.

QUESTION: And couldn't you have asked him to ask them?

MR. RUNFT: The question was asked by me, and he said, "This is not a matter of warrant. This is not a probable cause hearing." He said, "My position is merely to ascertain jurisdiction here and to ascertain if we have the proper application of the statute."

QUESTION: I am not questioning, but you didn't make an offer of proof?

MR. RUNFT: Yes, I pointed out very distinctly, in fact, that we had quite a hearing later on of whether I had reserved the constitutional issue so as not to face res judicada on my collateral cause of action. And we had to make a transcript of that and take it up on that issue.

I would like to point out one other thing, if I may, that I feel is extremely important and, perhaps, fundamental here in the Secretary's position which I believe is an error throughout his brief. And that is this: Throughout his brief, the Secretary is attempting to apply a balancing test to the

question of whether or not a warrant will be issued. And I believe Justice White's opinion in Camara made it very, very plain that the balancing test is not the test -- that is the balancing test between the interests is not the test that is applied on the question of whether or not a warrant is granted. The question of whether or not a warrant is granted is a categorical definitional test. Is this the type of industry that falls into that category? Are these the facts that we exempt from a warrant requirement? Is this the kind of industry we exempt? The liquor industry has a long history of regulation. Arms, again, some history and a particular nature of that industry. Those have been specifically excepted from the warrant requirement by a decision of this Court. And at the end of the See case, See v. the City of Seattle, this Court made the further observation that as to those categorical exceptions, the Court would take it on a case by case basis.

But, I submit, that's not the balancing test. As Justice White's opinion in Camara points out, the balancing test comes later. The balancing test between interests --

VOICE: We call it the opinion of the court.

MR. RUNFT: As the opinion of the court states, the balancing test comes later and with regard to the reasonableness of the search.

Now, I am not denying that a warrantless search must

also be reasonable. Any search, under the Constitution, pursuant and in order to comply with the Fourth Amendment, must be reasonable, whether it is a search with or without a warrant. But the question of reasonableness comes after the determination, the categorical factual determination is made whether or not a warrant will be required.

QUESTION: It doesn't in the Fourth Amendment. The Fourth Amendment puts the requirement of reasonableness first and then talks about warrants.

MR. RUNFT: I will stand corrected. Perhaps, I should say they are two separate questions, that one does not involve the other. I stand corrected, Your Honor. I think that is correct. But, what I am attempting to say here is that throughout the Government's brief they use the method of determining whether or not a warrant should be issued, according to the Government's brief, is based on a balancing test. They want to balance the need to inspect against what they call the magnitude of the privacy interest. And even that balancing test, I submit, is incorrect, because the balancing test that is done, say, in the probable cause showing is between the need of the Government to inspect and the degree of intrusion on the privacy interest, not -- you don't consider the magnitude of the privacy interest. The magnitude of the privacy interest is always there; it's privacy -- or privacy interest, excuse me. The magnitude of the intrusion is what is balanced

with the need of the Government to inspect.

The last thing I want to comment on, very briefly, is the Government's position here with regard to privacy. Once again, the Court is presented with the Government's position in this case of a limited type of privacy, a peripheral privacy interest according to this Court and the Court's opinion in the Chadwick case decided last June very specifically rejected this type of concept of a privacy interest under the Fourth Amendment. In fact, Justice Brennan, in his concurring opinion, went so far as to make a remonstrance that the United States would come back to this Court with this type of presentation of privacy interest under the Fourth Amendment.

Now, once again, here they are claiming that privacy interests under the Fourth Amendment are restricted to the home and the office, and that's it. And that Mr. Barlow or people like situated in employment have a diminished privacy interest, and that their privacy interest isn't as strong as elsewhere.

And the Court summarily and very definitely rejected that in the Chadwick case, cited last January.

Thank you.

QUESTION: You don't attack the basic constitutionality of this legislation, do you?

MR. RUNFT: We do. We do ask the Court to affirm the decision below. The reason is that the argument in that

which is the last section of our brief deals with the fact that it is very clear from the legislative history that it was the expressed intent of Congress that the searches conducted pursuant to this legislation be warrantless searches. It is very definitely laid out. Secondly, the minotiry report, by Representative Shirley, specifically warned of the constitutional infirmities involved in this legislation, and specifically pointed out the Camara and See cases and one could say Congress thereby was on notice.

Secondly, in answer to that, the Act itself simply does not provide sufficient standards by which one can derive criteria by which to make these inspections.

QUESTION: You don't think the regulations help?

MR. RUNFT: Not from the standpoint of standards, Justice Marshall. Procedure, yes. Standards, no.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

Let me ask you a question before you begin. Suppose the Immigration Service asked the OSHA people to let one of the Immigration officials go along with him in let's say the Southwestern states where illegal aliens, or whatever states illegal aliens are thought to be most frequently working, and then acting on his observations checked on the blue card or green card, or whatever it is the legal alien must have for employment. Would you think that would be permitted under

this procedure?

MR. McCREE: I would think not, if the Court please. And I would amplify my answer by pointing out that the Secretary, by regulation, forbids the inspectors to search for matters other than those set forth in the regulation. I think I can furnish the Court that regulation.

MR. CHIEF JUSTICE BURGER: What if, without searching, the inspector, OSHA inspector, observed that predominantly they were Mexican-Americans, let us say, or any other alien group who could not speak English as he would observe objectively first-hand? Could he report that to the Immigration or the FBI?

MR. McCREE: I would think not. I would think the fact that they were predominantly Mexican wouldn't necessarily suggest that their alienage was other than American citizen, that their citizenship was other than American citizenship. It certainly wouldn't betray it to me.

MR. CHIEF JUSTICE BURGER: My point is not whether it is true, but whether they may report that objective fact which they observed, that 90% of the employees appeared to be Mexican-Americans or Cubans and 90% of them could not respond to questions put to them in English.

MR. McCREE: If the Court please, there is a regulation that forbids the inspector from doing just that, and I would expect them to abide by the regulation. Their inquiry

inquiry is limited to conditions affecting the safety and health of the work force.

REBUTTAL ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

MR. McCREE: We would conclude, if the Court please, by suggesting that there are two steps to our argument, first, whether the inspection is reasonable. And we think in Camara this Court has indicated that area searches and things like area searches under proper legislative pronouncements are reasonable. And then, of course, the question becomes whether a warrant, an inspection warrant is required. And in Biswell this Court told us something about the purpose of that. It suggested that a measure of protection with little, if any, threat to the effectiveness of the inspection system there at issue could be afforded by an inspection warrant.

Now, whether this measure of protection overbalances the effectiveness of the inspection system seems to be the issue. And here the unannounced inspection is a critical part of the statutory scheme. As this Court pointed out in Biswell, very little would be gained by not requiring, for the effectiveness of the system -- let me rephrase that. That the inspection system in Biswell would not -- or in See would not be impaired by requiring an inspection warrant, because structural defects in the building would be of relatively long standing and relatively difficult to change easily. And it intimated

in Biswell that if notice went to the gun dealer that the person contemplated in the inspection, he would -- he might remove the contraband from his presence.

QUESTION: Mr. Solicitor General, it seems to me that the Secretary here by his regulations has indicated that "We will just give him notice," and he has instructed his inspectors, "If refused entry, don't break in and take advantage of an unannounced entry. Go to court."

MR. McCREE: If the Court please, he first instructs his inspector to seek entry, without notice --

QUESTION: I know, but then he permits him to be turned away and tells him if he is turned away to go to court.

MR. McCREE: If the Court please, there are regulations which forbid giving advance notice of the intent to inspect, and there are even penalties on the employees for disclosing the intention of inspecting. So it's really not its purpose. The regulation, as the Court appropriately points out, does afford notice once the court is asked to issue such an order. That is the rare case. That is the case where he has been turned down and we hope this Court's ruling today will make it unnecessary to do it.

QUESTION: It is the rare case that he is turned down at all.

MR. McCREE: It is the rare case that he is denied the right, and we hope if this Court upholds the statutory

scheme, it will be even rarer.

QUESTION: What if the Court upholds it and the person, owner of the business establishment, still says don't come in. He is still not subject to any sanction.

MR. McCREE: The statute has not provided a sanction and then we suspect the Secretary, again, would direct his inspector, or he would, through his inspector, go to court to get an order so that he might use the power of the court to uphold the law. And then, of course, a contempt citation would be sought if he refused to obey it. But that happens in other situations and doesn't necessarily --

QUESTION: If we agree with you, the Secretary is left in precisely the position he is now.

MR. McCREE: Well, I think he is in the case of recalcitrant persons. I have the belief that we are a nation of law-abiding people and that if this Court issues its pronouncement that employers across the country will abide by it.

QUESTION: In your view -- or in the Government's view, I suppose, the unannounced investigation is parallel to the unannounced investigation that the bank examiners, for example, make.

MR. McCREE: There are certainly parallels. I suppose a person could perhaps adjust a questionable entry in a ledger just as easily as he could turn on a switch in a ventilating booth in a -- ventilating fan in a painting booth.

QUESTION: But the banking laws do prevent some sanctions for banks who if they dared turn away a bank examiner, do they not?

MR. McCREE: If the Court please, I think the Congress has had more experience with regulating banking enterprises than it has safety and health, which is an important matter in the nation's agenda of affairs that it has just adverted to recently.

QUESTION: Well, there are differences in degree of pervasiveness of state regulation of banks and congressional regulation of all employer establishments by OSHA, are there not?

MR. McCREE: Of course there are, Your Honor.

QUESTION: And you justify your position, primarily, because of the existence of this basic Federal statute, is that correct?

MR. McCREE: That's correct, Your Honor.

QUESTION: What if Congress should pass a housing safety and health act? There is certainly an accident rate in all houses, furnaces explode and there are fires and people trip and fall in their bathtubs, and so on, and then should say that any federal inspector could enter any home, on request, the argument would be the same, wouldn't it? Because of this basic statute, then, it follows that it is reasonable for an inspector to enter a house without a warrant.

MR. McCREE: Well, that presents a much more difficult question.

QUESTION: Your argument would be the same, wouldn't it?

MR. McCREE: My argument might not be the same, because this Court has for a long time recognized that the very core of the interest of privacy is the residence of a person. This is not the residence of a person. This is a business enterprise entered into for profit that affects commerce and that benefits only because persons not members, necessarily members of his household, despite the fact that they have a special relationship with him, are brought into his premises for his benefit. And we believe that the Congress of the United States in its interest for the well-being of the people can look to their safety and welfare by having restricted searches, inspections, if you will, limited to see that every American employee will have a safe place to work, free from hazards that might be prevented.

QUESTION: But, in the absence of this general legislation, you wouldn't claim for a moment that a federal agent could just enter any employer's premises, upon request, would you?

MR. McCREE: I would not at all.

QUESTION: So this is reasonable because of the legislation.

MR. McCREE: Because the Congress has made a legislative determination.

QUESTION: And in my hypothetical case, wouldn't it be equally reasonable because of the legislation.

MR. McCREE: Well, the Congress can legitimize certain things by its legislative acts, so long as it is consistent with the Constitution of the United States. The Fourth Amendment may forbid this kind of inspection of a private residence. The interest of the public isn't that great. And I can see when we get into residences, it might do this for large apartment buildings, where there are public areas or where there are areas not within the control of the householder. But we haven't that case here.

QUESTION: Most of those common areas of an apartment building are now open to inspection by fire inspectors, are they not? Generally, everywhere.

MR. McCREE: I would think so. But they are open generally to the public, I suspect, too, delivery persons, and so forth. And, again, I say the more a person relinquishes exclusive control of an area, the less becomes his privacy interest that is to be protected there. And that is not true of the home.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:48 o'clock, p.m., the case in the above-entitled matter was submitted.)