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Permissible Scope of OSHA Inspection Warrants

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PERMISSIBLE SCOPE OF OSHA INSPECTION WARRANTS

In 1978, the Supreme Court held in *Marshall v. Barlow's, Inc.*[1] that warrantless nonconsensual worksite inspections conducted by the Occupational Safety and Health Administration[2] violate the fourth amendment rights of the employer.[3] The *Barlow's* decision spawned much comment[4] and opened the door for extensive future litigation.[5]

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[1] 436 U.S. 307 (1978).

[2] The Occupational Safety and Health Administration (OSHA) is an executive agency, within the Department of Labor, created by the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976) [hereinafter referred to as the Act].

[3] The fourth amendment provides:

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

[4] *See, e.g.*, Rothstein, *OSHA Inspections After* Marshall v. Barlow's, Inc., 1979 DUKE L.J. 63; Note, Marshall v. Barlow's Inc.: *Are Employer's Fourth Amendment Rights Protected?*, 16 CAL. W.L. REV. 161 (1980); Note, *Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement*, 64 CORNELL L. REV. 856 (1979); Note, Marshall v. Barlow's, Inc.: *OSHA Needs a Warrant*, 57 N.C. L. REV. 320 (1979); Comment, *The Fourth Amendment and the Administrative Search—The Probable Cause Requirement After* Marshall v. Barlow's, Inc., 5 N. KY. L. REV. 219 (1978); Comment, *Administrative Roulette: Safety Inspection Probable Cause in Light of* Marshall v. Barlow's, Inc., 23 ST. LOUIS U.L.J. 768 (1979).

[5] *Barlow's* left several issues unresolved. First, the court failed to define explicitly the degree of probable cause necessary for the issuance of an OSHA inspection warrant. *See* notes 23-27 and accompanying text *infra*. Second, the ability of the Secretary of Labor to obtain an ex parte warrant after being refused entry to conduct a worksite inspection is still unclear. In *Barlow's*, the Secretary argued that "warrantless inspections are essential to the proper enforcement of OSHA because they afford the opportunity to inspect without prior notice and hence . . . preserve the advantages of surprise." 436 U.S. at 316. The Court, however, concluded that ex parte warrants issued without prior notice preserve the same element of surprise. *Id.* Subsequently, the Secretary amended 29 C.F.R. § 1903.4 (1978) in order to authorize OSHA officials to obtain ex parte warrants. But in Cerro Metal Products v. Marshall, 620 F.2d 964, 979 (3d Cir. 1980), the Third Circuit held the amendment did not empower OSHA to seek ex parte warrants. *Contra* Marshall v. W & W Steel Co., 604 F.2d 1322, 1325-26 (10th Cir. 1979). Following *Cerro*, the Secretary once again amended 29 C.F.R. § 1903.4. The regulation now provides that "compulsory process [to inspect] may be sought in advance . . . if . . . circumstances exist which make preinspection process desirable or necessary." 29 C.F.R. § 1903.4(b) (1980). Such circumstances may include past refusals by the employer to permit warrantless entry. 29 C.F.R. § 1903.4(a) (1980).

A third issue that *Barlow's* raised but left unresolved is whether evidence obtained in violation of the *Barlow's* warrant requirements can be excluded from OSHA proceedings. The applicability of the exclusionary rule to administrative as opposed to criminal adjudications is unclear. The Supreme Court has not dealt with this issue. *See* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Camara v. Municipal Court, 387 U.S. 523 (1967) (housing inspectors must obtain a search warrant in nonemergency situations); See v. City of Seattle, 387 U.S. 541

One issue, in particular, divides the lower federal courts: the permissible scope of an OSHA inspection initiated in response to an employee's complaint. Although some courts limit such inspections to the specific areas mentioned in the complaint,[6] others permit comprehensive "wall to wall" inspections.[7] Both approaches suffer substantial deficiencies.[8] Courts should recognize that the scope of a warrant ought to be reasonably related to the violations alleged in the complaint and to other significant surrounding circumstances.

I

OSHA Inspections and Search Warrants

A. *The Occupational Safety and Health Act*

Congress enacted the Occupational Safety and Health Act of 1970[9] to reduce the increasing number of job-related deaths and accidents.[10] The Act requires employers[11] to comply with safety and

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(1967) (search warrant required in commercial setting as well). In Savina Home Indus. v. Secretary of Labor, 594 F.2d 1358 (10th Cir. 1979), however, the Tenth Circuit stated in dictum that the purpose of the exclusionary rule—"preserving judicial integrity and deterring official lawlessness"—required its application to illegal searches conducted by the Department of Labor as well as the Department of Justice. *Id.* at 1363. *See* Note, *Applicability of the Exclusionary Rule to Illegal OSHA Inspections*: Savina Home Industries, Inc. v. Secretary of Labor, 64 Minn. L. Rev. 789 (1980).

A fourth unresolved issue involves the procedures an employer can use to challenge the validity of an OSHA warrant. An employer has a choice of four approaches: (1) enjoining the issuance of the warrant; (2) refusing to allow the inspection and moving to quash the warrant; (3) permitting the inspection and bringing an action to enjoin further enforcement activity by the Secretary; (4) contesting the inspection before the Occupational Safety and Health Review Commission. There are, however, problems involved in each of these approaches. For a discussion of these approaches, see Rothstein, *supra* note 4, at 100-03.

[6] *See, e.g.*, Marshall v. Trinity Indus., 7 OSHC (BNA) 1851 (W.D. Okla. 1979); Sarasota Concrete Co., [1979] OSHD (CCH) ¶ 23,839 (OSHRC), *aff'd* [1981] OSHD (CCH) ¶ 25,360 (OSHRC); Central Mine Equipment Co., 7 OSHC (BNA) 1185 (E.D. Mo. 1979), *vacated on other grounds*, 608 F.2d 719 (8th Cir. 1979).

[7] *See, e.g.*, Burkart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313, 1323-24 (7th Cir. 1980); *In re* Establishment Inspection of Gilbert & Bennett Mfg. Co., 589 F.2d 1335, 1343-44 (7th Cir. 1979), *cert. denied*, 444 U.S. 884 (1979); *In re* Establishment Inspection of Marsan Co., 7 OSHC (BNA) 1557 (N.D. Ind. 1979); Dravo Corp. v. Marshall, 5 OSHC (BNA) 2057 (W.D. Pa. 1977), *aff'd mem.*, 578 F.2d 1373 (3d Cir. 1978).

[8] *See* notes 63-67 and accompanying text *infra*.

[9] Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-678 (1976)).

[10] Work related accidents kill approximately 14,500 workers and disable more than 2.2 million workers each year. The number of disabling injuries per million worker hours in 1970 was 20% higher than in 1958. This increase prompted enactment of the Act. S. Rep. No. 1282, 91st Cong., 2d Sess. 1, 1-5, *reprinted in* [1970] U.S. Code Cong. & Ad. News 5177, 5177-81. The purpose of the Act is "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) (1976).

health standards relating to conditions and operations in the workplace.[12] The Occupational Safety and Health Administration (OSHA), under authority of the Act, conducts inspections at the employers' workplaces,[13] issues citations,[14] and recommends penalties[15] for violations of the Act and of regulations promulgated by the Secretary of Labor.[16] OSHA can undertake such inspections either in accordance with an OSHA administrative plan,[17] or in response to an employee complaint.[18]

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[11] OSHA covers an estimated 4.1 million business cstablishments and 57 million employees. Rothstein & Rothstein, *Administrative Searches & Seizures: What Happened to* Camara *and* See?, 50 WASH. L. REV. 341, 366 (1975).

[12] 29 U.S.C. § 654(a) (1976).

[13] Section 8(a) of the Act established OSHA's right to inspect workplaces:

> 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 -
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> (1) to enter without delay and at reasonable times any factory, . . . or other area, . . . where work is performed by an employee of an employer; and
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> (2) to inspect and investigate during regular working hours . . . and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines . . . equipment, and materials therein, and to question privately any such employer . . . or employee.

Id. § 657(a).

[14] *Id.* § 658(a).

[15] *Id.* § 666.

[16] *Id.* § 655.

[17] OSHA schedules periodic inspections called Regional Programmed Inspections to ensure enforcement of the Act. The OSHA officers choose specific businesses for administrative plan inspections on the basis of neutral criteria such as accident experience and the number of employees in particular industries. [1976] OSHA FIELD OPERATIONS MANUAL (CCH) ch. IV, ¶ 4327.2. In Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), the Court held that OSHA must obtain a warrant prior to conducting administrative plan inspections. The warrant would insure that the proposed inspection "is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." *Id.* at 323.

[18] The Act provides:

> Any employees . . . who believe that a violation of a safety or health standard exists . . . may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. . . . If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section . . . to determine if such violation or danger exists.

29 U.S.C. § 657(f)(1) (1976). To request an OSHA inspection, an employee must file a complaint with the Area Director or a compliance officer. 29 C.F.R. § 1903.11 (1981). The complaint must (1) be in writing, (2) allege that a violation exists at the workplace, (3) set forth with reasonable particularity the grounds on which it is based, and (4) be signed by the employee or the authorized employee representative. 29 U.S.C. § 657(f)(1) (1976).

OSHA has established a system of priorities for undertaking inspections and investigations. Of highest priority are allegations of imminently dangerous conditions which may cause death or serious physical harm. Second are investigations resulting from fatalities or catastrophes (including one or more fatalities, or five or more employees hospitalized). Investigations

B. *Warrant Required:* Marshall v. Barlow's, Inc.[19]

The Occupational Safety and Health Act does not require OSHA to obtain a warrant in order to inspect.[20] In *Marshall v. Barlow's, Inc.*, however, the Supreme Court held that if an employer objects to the inspection, OSHA must obtain a warrant.[21] The Court reasoned that the fourth amendment protects privacy in the workplace as well as the home.[22]

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initiated by valid employee complaints of alleged violations or unsafe working conditions receive third priority. Fourth are programmed inspections, scheduled by the Area Directors yearly, based on various criteria designed to insure a neutral selection process with emphasis on high-hazard industries. [1976] OSHA FIELD OPERATIONS MANUAL (CCH) ch. IV, ¶ 4327.2.

[19] 436 U.S. 307 (1978).

[20] Congress did not even consider the issue. Congressman Steiger, a cosponsor of the Act, noted, however, that "in carrying out inspection duties . . . the Secretary, of course, would have to act in accordance with applicable constitutional protections." SUBCOMM. ON LABOR OF SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 1ST SESS., THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 1077 (Comm. Print 1971).

[21] Marshall v. Barlow's, Inc., 436 U.S. 307, 323-24 (1978). The president and general manager of Barlow's, Inc., an electrical and plumbing installation business, sought to resist a regional programmed investigation covered by an administrative plan, by refusing admission to the OSHA inspector. The *Barlow's* Court did not regard such resistence as common, noting that "the great majority of businessmen can be expected in normal course to consent to inspection without a warrant." *Id.* at 316.

The Court's assertion was correct. In the three to four months immediately following the *Barlow's* decision, OSHA attempted approximately 11,000 inspections, and fewer than 500 employers demanded warrants. [1978] 8 OCCUPATIONAL SAFETY & HEALTH REP. (BNA) 564. Moreover, OSHA does not have to obtain warrants prior to all nonconsensual inspections. For example, courts do not require warrants in emergency situations. *See* Michigan v. Tyler, 436 U.S. 499, 509-10 (1978) ("[I]n the regulatory field, our cases have recognized the importance of 'prompt inspections, even without a warrant, . . . in emergency situations.'") (citations omitted). In the context of OSHA inspections, the emergency exception includes imminent dangers (see 29 U.S.C. § 662(a) (1976), defining imminent danger as a condition "which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter") and accidents or fatalities where prompt inspection is necessary to prevent a recurrence. Camara v. Municipal Court, 387 U.S. 523, 539 (1967) (dictum). *See* Michigan v. Tyler, 436 U.S. 499, 510 (1978); Rothstein, *supra* note 4, at 88-89.

Nonconsensual inspections of enterprises traditionally subject to federal regulation may not require warrants. *See* United States v. Biswell, 406 U.S. 311, 316-17 (1972) (warrantless search of licensed firearms dealer reasonable because of pervasive federal regulation of firearms); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77 (1970) (because of a historically strong federal control over liquor industry, Congress has the power to authorize warrantless searches of licensed liquor dealers and to make it an offense for liquor licensees to refuse admission to a federal inspector).

[22] "The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the American colonial experience." 436 U.S. at 311. In the past, courts had repeatedly invalidated warrantless criminal investigative searches, regardless of whether they were directed at residential or commercial premises. Go-Bart Importing Co. v. United States, 282 U.S. 344, 356-58 (1931) (warrantless search of business premises); Amos v. United States, 255 U.S. 313 (1921)

C. *Probable Cause for OSHA Inspection Warrants*

Courts require a lesser showing of probable cause for the issuance of OSHA inspection warrants than they do for criminal search warrants.[23] In criminal cases the government must establish probable cause for "believing the occurrence of a crime and the secreting of evidence in specific premises."[24] In determining whether probable cause exists for administrative searches, courts use a balancing test that weighs "the need to search against the invasion which the search entails."[25] "Probable cause in the criminal sense is not required."[26]

(warrantless search of home); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (exclusionary rule applied to illegal search of business). *See generally* Note, *supra* note 4, 16 CAL. W.L. REV. at 164. In Camara v. Municipal Court, 387 U.S. 523, 534 (1967), the Court extended fourth amendment protection to individuals subjected to administrative searches and held that warrantless, nonconsensual administrative inspections of private residences violate the Constitution. In a companion case, See v. City of Seattle, 387 U.S. 541 (1967), the Court applied the fourth amendment to an administrative inspection of nonpublic portions of a commercial enterprise:

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by [an] inspector . . . without official authority evidenced by a warrant.

Id. at 543.

[23] *See* note 26 *infra*.

[24] United States v. Harris, 403 U.S. 573, 584 (1971). *See* Berger v. New York, 388 U.S. 41, 55-56 (1967); Camara v. Municipal Court, 387 U.S. 523, 535 (1967); Ker v. California, 374 U.S. 23 (1963); Dumbra v. United States, 268 U.S. 435 (1925).

[25] 387 U.S. 523, 537. The "need to search" is, in part, justified by the public interest in maintaining healthful and safe conditions in the community. *Id.* at 537. *But see* LaFave, *Administrative Searches and the Fourth Amendment: The* Camara *and* See *Cases*, 1967 S. CT. REV. 1, 14-15. Professor LaFave argues that the public interest in 100% enforcement of safety and health ordinances is an insufficient justification for a diluted probable cause test because enforcement of the criminal law is as compelling and yet the probable cause standard that law enforcement officials must meet in criminal cases is stricter. "[W]e are committed to a philosophy tolerating a certain level of undetected crime as preferable to an oppressive police state. If there is a greater public interest in total enforcement of housing codes than of the criminal law, the *Camara* opinion does not explain why." *Id.*

[26] Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978) (search pursuant to § 8(a) of the Act). *See* Burkart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313, 1316-17 (7th Cir. 1980); Marshall v. W. & W. Steel Co., 604 F.2d 1322, 1326 (10th Cir. 1979); Weyerhaeuser Co. v. Marshall, 592 F.2d 373, 377-78 (7th Cir. 1979); *In re* Gilbert & Bennett Mfg. Co., 589 F.2d 1335, 1338-39 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979) (warrant based on an employee complaint under § 8(f) of the Act); Marshall v. North Am. Car Co., 476 F. Supp. 698, 703 (M.D. Pa. 1979), *aff'd*, 626 F.2d 320 (3d Cir. 1980). *But see* Note, *supra* note 4, 16 CAL. W.L. REV. at 186: "If the [*Barlow's*] Court wanted to negate criminal probable cause requirements for administrative searches it would have deleted . . . ['may] be based on specific evidence of a violation . . . .' Because it was included, it is evident that the court contemplated the two kinds of probable cause in the administrative searches . . . ." *Id.* n.209.

A justification for a more lenient "administrative" probable cause standard is that administrative inspections are less hostile intrusions that criminal searches; there is no probing

No court has provided a definitive list of elements that support a finding of administrative probable cause.[27] OSHA generally can meet the probable cause requirement in one of two ways, however. It can show that it chose the specific business in question based on a general administrative plan developed in reliance on neutral sources.[28] Factors such as the inherent hazardousness of the opera-

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into a person's private papers and effects, nothing is seized, and lesser penalties are imposed as a result of the search. *See* Camara v. Municipal Court, 387 U.S. 523, 530 (1967); LaFave, *supra* note 25, at 18-19; Note, 7 AM. J. CRIM. L. 79, 83 (1979). In addition, a more stringent probable cause requirement could do away with § 8(a) administrative programmed investigations based on neutral selection criteria if OSHA officers had to show evidence of a specific violation. *See generally* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED, PRETRIAL RIGHTS § 66 (1972 & Supp. 1979). One court intimated that a warrant based on an employee complaint does not establish administrative probable cause. *See In re* Northwest Airlines, 587 F.2d 12, 14-15 (7th Cir. 1978) (OSHA affidavit of employee complaint is not specific evidence and does not establish cause) (dictum).

[27] *See* Marshall v. Trinity Indus., 7 OSHC (BNA) 1851, 1853 (W.D. Okla. 1979). Since the *Barlow's* decision, courts have accepted various showings of probable cause. *See, e.g.*, Pelton Casteel, Inc. v. Marshall, 588 F.2d 1182 (7th Cir. 1978) (issuance of inspection warrant for a new plant based on showing that a silica violation had been the basis of a citation at the old plant upheld); Marshall v. Northwest Orient Airlines, Inc., 574 F.2d 119, 123 (2d. Cir. 1978) (issuance of a warrant based on employer's record of previous violations upheld). Courts have also focused on the incidence of hazard in a given industry. *See, e.g., In re* Establishment Inspection of Gilbert & Bennet Mfg. Co., 589 F.2d 1335, 1341-43 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979) (warrant based on a plan to reduce metal-working and foundry injuries and illnesses met the administrative probable cause requirements); Reynolds Metals Co. v. Secretary of Labor, 442 F. Supp. 195 (W.D. Va. 1977) (employer's inclusion on a hazardous industry list a factor in establishing probable cause).

[28] Marshall v. Barlow's, Inc., 436 U.S. 307, 321 (1978). These include statistics on accident rates or OSHA violations in the industry, injury records at similar workplaces, the nature of products or materials produced or handled, the number of employees and size of the employer's business, the safety and health record of the employer, the length of time since the last inspection, or the employer's history of OSHA violations. Rothstein, *supra* note 4, at 92-94. In *Barlow's*, the Court stated that probable cause pursuant to § 8(a) of the Act (29 U.S.C. § 657(a) (1976)) could be satisfied if " 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' " 436 U.S. at 320 (quoting Camara v. Municipal Court, 387 U.S. 523, 538 (1967)). *Camara* refers to an "area inspection." 387 U.S. at 538. The *Barlow's* Court, however, in quoting from *Camara* omitted the word "area." This may indicate the Court's desire to narrow the permissible scope of a reasonable inspection program.

Barlow's also changed the *Camara* formulation from "dwelling" to "establishment." This broadens the protections afforded. 29 C.F.R. § 1903.2(b) (1981) defines "establishment" as a single physical location where business is conducted or where services or industrial operations are performed. "Dwelling" in *Camara* is any building that is a residence. *See* Note, *supra* note 4, 16 CAL. W.L. REV. at 177.

In addition, *Barlow's* proffered different criteria for the selection of a search target from *Camara*'s. In *Camara*, the Court listed several factors for choosing a target: the passage of time between inspections; the nature of the building inspected; and the condition of the area where the building is located. 387 U.S. 523, 538. The *Barlow's* Court pointed to other factors: the "dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area." 436 U.S. at 321.

tions carried on at the plant and the length of time that has expired since the last inspection determine when the administrative plan inspection will take place.[29] OSHA also can establish administrative probable cause by using specific evidence of an employer violation.[30] Such evidence usually is drawn from an employee complaint.[31]

D. *Scope of OSHA Inspection Warrants*

Although the Act empowers OSHA to conduct nonconsensual searches by obtaining a warrant, it leaves unclear the permissible scope of such inspections authorized by warrant. Courts have interpreted the Act as specifically authorizing wall to wall searches in programmed inspections.[32] Courts differ, however, over the legitimate scope of unprogrammed inspections under the Act.

The Act provides little guidance for determining the scope of employee-triggered OSHA inspections.[33] Nevertheless, the Constitution imposes a limitation on these searches: they must be reasonable.[34] In particular, the fourth amendment protects the employer from unreasonable searches.[35] In deciding whether the scope of an

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[29] In applying for an administrative search warrant, the Secretary must show (1) that regular established criteria exist for choosing the targets of its inspections, and (2) that those criteria resulted in choosing that target. Marshall v. Barlow's, Inc., 436 U.S. 307, 320-21 (1978); W. RINGEL, SEARCH AND SEIZURE, ARRESTS AND CONFESSIONS § 14.2 (2d ed. 1979).

One commentator stated that the Secretary's workplace inspection priorities alone would not satisfy the requirement of a general administrative plan. *See* note 18 *supra*; Rothstein, *supra* note 4, at 91 n.173.

[30] 436 U.S. at 320.

[31] *See* note 18 *supra*; *see, e.g.*, Marshall v. North Am. Car Co., 626 F.2d 320 (3d Cir. 1980); Burkart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313, 1320 (1980) (warrant application including substance of employee complaints provided specific evidence of an existing violation); Marshall v. Trinity Indus., 7 OSHC (BNA) 1851 (W.D. Okla. 1979); *cf.* Weyerhaeuser Co. v. Marshall, 592 F.2d 373, 378 (7th Cir. 1979).

[32] *See* Burkart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313, 1323 (7th Cir. 1980); Marshall v. North Am. Car Co., 476 F. Supp. 698, 706 (M.D. Pa. 1979), *aff'd*, 626 F.2d 320 (3d Cir. 1980).

[33] The statutory language provides little assistance. Courts are split over its interpretation. *See, e.g.*, notes 50 & 62 *infra*.

[34] "The ultimate requirement of the Fourth Amendment is that any proposed search or inspection be reasonable." Burkart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313, 1324 (7th Cir. 1980). *See also* Camara v. Municipal Court, 387 U.S. 523, 539 (1967).

[35] In Boyd v. United States, 116 U.S. 616 (1885), the Court stated that the purpose of the fourth amendment was to protect "the sanctity of a man's home and the privacies of life" from invasion by the government. The Court considered the right of privacy the very essence of constitutional liberty and security. *Id.* at 630. In Warden v. Hayden, 387 U.S. 294 (1967), the Court pointed out that the fourth amendment was a reaction to the evils of the general warrant used in England and the writs of assitance in the colonies, and was

> intended to protect against invasions of "the sanctity of a man's home and the privacies of life," . . . from searches under indiscriminate general authority. Protection of these interests was assured by prohibiting all "unreasonable" searches

OSHA inspection is reasonable, courts must balance the employer's privacy interests against the statutory interest of providing employees with safe workplaces.[36]

II

Permissible Scope of Inspections: The Split

Lower federal courts have attempted to balance these interests but differ over the permissible scope of an OSHA inspection. Some courts permit general, wall to wall inspections in response to employee complaints. Others limit the inspection to the areas specified in the complaint.

A. *Wall to Wall Inspections*

Burkart Randall Division of Textron, Inc. v. Marshall[37] illustrates the wall to wall approach. In *Burkart*, OSHA obtained a wall to wall inspection warrant based on two employee complaints which alleged violations in several isolated areas of the workplace.[38] The employer argued that the sweeping scope of the search was unconstitutional under the fourth amendment as well as unauthorized by the statute.[39] The Seventh Circuit dismissed these contentions and upheld the warrant.[40]

In assessing the reasonableness of the inspection, the court first focused on the policies that support the inspection of worksites. The court claimed that the "broad remedial purposes" of the Act, "designed to ensure that employees are provided with safe workplaces,"

> and seizures, and by requiring the use of warrants, which particularly describe "the place to be searched, and the persons or things to be seized," thereby interposing "a magistrate between the citizen and the police." . . .

Id. at 301. The amendment prohibits arbitrary governmental intrusions in every form; "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 other statutory or regulatory standards." Marshall v. Barlow's, Inc., 436 U.S. 307, 312-13 (1978).

[36] *See* text accompanying note 25 *supra*.

[37] 625 F.2d 1313 (7th Cir. 1980).

[38] The alleged violations included: hygiene hazards in the press department; leaking rest room sewer gases coupled with poor ventilation; unsanitary eating areas; and inadequate fire escapes near the production line. *Id.* at 1315. OSHA determined that there were reasonable grounds to believe violations of the Act existed at that facility and sought a warrant to inspect the premises to uncover these and other violations. A magistrate issued the warrant but plaintiff Burkart obtained a temporary restraining order prohibiting its enforcement. *Id.* at 1315.

[39] *Id.* at 1315-16.

[40] *Id.* at 1322.

justified wall to wall inspection.[41] It was persuaded that when there is probable cause to believe that parts of the workplace are not entirely safe, the "purpose of the Act is best served . . . by inspecting the entire facility."[42] The court noted, moreover, that it would be illogical to permit general searches for programmed inspections but not for unprogrammed inspections. Said the court: "It would be anomalous to . . . hold that only a limited inspection may be conducted where there is particularized probable cause to believe that violations will be found in the specific facility to be inspected."[43]

The court then considered the employer's privacy interests in his workplace. Because those interests were, according to the court, "minimal,"[44] it saw little reason to limit the search's scope. The court added that a warrant "issued by a neutral Magistrate after a showing of probable cause, . . . adequately protected" against the possibility of vexatious disruptions of the employer's operations.[45] Thus, the court declared that "it will generally be reasonable . . . to conduct an OSHA inspection of the entire workplace."[46]

Finally, the court dismissed the argument that the statute prohibits a wall to wall inspection. The employer had argued that section 8(f)(1) of the Act—which authorizes OSHA to conduct "*special* inspection[s] in accordance with the provisions of this section . . . "[47]—"*prohibits general inspections in response to employee complaints.*"[48] But the court was convinced that under the Act "special" does not mean "limited."[49] Indeed, the court found that the section

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[41] *Id.* at 1324-25.

[42] *Id.* at 1325. The court stated:

> [R]estriction of the scope of the inspection would frustrate the purposes of OSHA. If the compliance officers are not permitted to conduct thorough inspections, then there would be a severe danger of employers being able to present a special "sanitized" area to the official, while concealing real violations.

Id. (quoting *In re* Establishment Inspection of Chicago Magnet Wire Corp., 5 OSHC (BNA) 2024, 2025 (N.D. Ill. 1977)). *See also In re* Establishment Inspection of Marsan Co., 7 OSHC (BNA) 1557, 1559 (N.D. Ind. 1979).

[43] 625 F.2d at 1324.

[44] *Id.* at 1325. *See* notes 34-36 and accompanying text *supra.*

[45] *Id.* The Court stated:

> The interposition of a neutral Magistrate between inspectors and employers guarantees that inspectors will not exercise unbridled discretion as to when and where to inspect and provides assurances to employers that the inspection is authorized by statute, is permissible under the Constitution, and will be conducted at a reasonable time and in a reasonable manner.

Id.

[46] *Id.* at 1326.

[47] 29 U.S.C. § 657(f)(1) (1976). *See* note 18 *supra.*

[48] 625 F.2d at 1326 (emphasis added).

[49] *Id.*

expressly incorporated another of the Act's provisions, which specifically authorized general inspections.[50] The court further pointed out that the implementing regulations to section 8 provide that "[i]nspections under this section shall not be limited to matters referred to in the [employee's] complaint."[51]

B. *Limited Inspections*

A number of courts agree with the Seventh Circuit's holding in *Burkart*.[52] Nevertheless, there is a substantial opposing camp that limits the scope of an OSHA inspection warrant to the subject matter of the employee complaint on which it is founded.[53] Courts in this camp limit the scope of the inspection by construing the Act narrowly and, therefore, do not need to reach the constitutional issue of reasonableness.

Marshall v. Trinity Industries, Inc.[54] exemplifies the limited approach. OSHA received two employee complaints alleging violations of the Act in several areas of the employer's workplace.[55] Based on these

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[50] *Id.* The *Burkart* court noted that § 8(f)(1) states that inspections are to be conducted in accordance with the provisions of § 8 as a whole. The court interpreted this as incorporating § 8(a)(2), 29 U.S.C. § 657(a)(2), which, according to the court, authorizes inspection of the employer's entire workplace.

[51] 625 F.2d at 1326. *See* 29 C.F.R. § 1903.11(b) (1980).

[52] *See, e.g., In re* Establishment Inspection of Marsan Co., 7 OSHC (BNA) 1557 (N.D. Ind. 1979) (complaint alleging 13 violations, including inadequate ventilation, sufficient to authorize a wall to wall hygiene inspection). In *Marsan* the court stated:

> If OSHA was prevented from conducting comprehensive inspections, employers could present special "sanitized" areas to them while concealing real violations. In this situation the scope of the OSHA warrant must be as broad as the subject matter regulated by the statute and restricted only by limitations imposed by Congress and the reasonableness requirement of the Fourth Amendment.

Id. at 1559. *See also In re* Establishment Inspection of Gilbert & Bennett Mfg. Co., 589 F.2d 1335 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979) (probable cause based on employee complaint and administrative plan); Dravo Corp. v. Marshall, 5 OSHC (BNA) 2057 (W.D. Pa. 1977), *aff'd mem.*, 578 F.2d 1373 (3d Cir. 1978).

[53] *See, e.g.*, Central Mine Equipment Co. 7 OSHC (BNA) 1185 (E.D. Mo.), *vacated on other grounds*, 608 F.2d 719 (8th Cir. 1979) (ex-employee complaint of hazards created by welding fumes and grinding dust at a drilling equipment manufacturing plant insufficient to authorize a wall to wall inspection); Sarasota Concrete Co., [1979] OSHD (CCH) ¶ 23,839 (OSHRC), *aff'd* [1981] OSHD (CCH) ¶ 25,360 (OSHRC) (employee complaint about concrete trucks not broad enough to authorize overall inspection). *See also* Blocksom & Co. v. Marshall, 582 F.2d 1122, 1125 (7th Cir. 1978) (warrant based on employee complaint and directing company to produce for inspection "all records, files, [and] papers . . . bearing on" the safety of Blocksom's working environment may not be specific enough); Marshall v. Wollaston Alloys, Inc., 479 F. Supp. 1102 (D. Mass. 1979) (OSHA inspection that included unauthorized private employee interviews exceeded scope of the warrant).

[54] 7 OSHC (BNA) 1851 (W.D. Okla. 1979).

[55] The employee complaints alleged frozen toilets, faucets, and drinking fountains in cold weather, forced climbing of pipes and conduit to repair frozen and ruptured pipes without

complaints, OSHA obtained a wall to wall inspection warrant. The employer refused entry to the compliance officers and challenged the validity of the warrant authorizing broad inspection.[56] The Secretary claimed that "[s]ince the violations described in the complaint [were] probable cause to believe certain health and safety standards [were] not being upheld, *it [was] also reasonable to believe that other violations besides those described [may have existed]*."[57] Because of the likelihood of these other violations, the Secretary argued that "the warrant must be broad enough to encompass *all possible areas of violations*."[58]

The court rejected these arguments[59] and, unlike the *Burkart* court, construed section 8(f)(1) of the Act narrowly. The court noted that OSHA inspections under 8(f)(1) are " 'special' inspection[s]"[60] triggered by an employee complaint. The statute's objective in authorizing such inspections, the court postulated, is "to determine if *such [a] violation or danger exists*."[61] The plain command of Congress, the court concluded, is that

> [t]he warrant must . . . be . . . limited to an inspection of those specific areas of which the employee complained. This is all that is necessary "to determine if such violation or danger exists." By its words, the Act denominates this as a "special" inspection and it should be so limited.[62]

III

Striking a Balance: A Proposed Middle Ground

Both approaches, the limited and the wall to wall, inadequately define the allowable scope of an OSHA inspection warrant issued in response to an employee complaint. Both are too mechanical. In deciding whether the scope of the search is reasonable, the wall to wall

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safety aids or ladders, crane loads lifted over employees, and tripping hazards caused by welding leads and cables. *Id.* at 1853.

[56] *Id.*

[57] *Id.* at 1854 (emphasis in original).

[58] *Id.* (emphasis added).

[59] *Id.*

[60] *Id.* (citing 29 U.S.C. § 657(f)(1) (1976)).

[61] 29 U.S.C. § 657(f)(1) (1976) (emphasis added).

[62] 7 OSHC (BNA) at 1854. This court did exactly what the *Burkart* court refused to do—it equated "special" with "limited." The district court held that general inspection warrants are appropriate only in § 8(a) inspections where OSHA inspects the premises pursuant to an administrative plan that relies on specific neutral criteria. *Id.*

approach overemphasizes OSHA's statutory interest; in contrast, the limited approach gives undue preference to the employer's privacy interest. Both fail to reconcile adequately these competing interests.

Although the statute can be construed to authorize general searches in section 8(f) inspections,[63] the constitutional validity of the *Bukart* wall to wall approach[64] is questionable. A blanket warrant in response to a limited and isolated complaint does not seem reasonable because it unnecessarily compromises the employer's privacy. A warrant that authorizes a broad general inspection in response to *any* employee complaint, regardless of the alleged violation's locality, undermines the function of the warrant—insuring an inspection reasonably related to the showing of probable cause.

On the other hand, the approach taken in *Marshall v. Trinity Industries, Inc.*,[65] which limits inspections to the specific area in the complaint, is too restrictive. First, an alleged violation can affect areas of the plant other than those specified in the complaint. In this situation, it may be quite reasonable for the inspection to reach areas beyond those named by the complaining employee. Second, the limited approach fails to recognize that sometimes the surrounding circumstances[66] support a finding of administrative probable cause for areas beyond those enumerated in the complaint. In such cases, the limited inspection fails to protect adequately the important employee and public interests in keeping the workplace safe.[67]

IV

Proposal for Determining the Scope of Section 8(f) Inspection Warrants

The inadequacy of both the *Burkart* and *Trinity* formulas highlights the need for a better approach. In determining the reasonableness of the inspection's scope, such an approach should protect adequately the employer's privacy interests, as well as account for OSHA's statutory interests. It should not mechanically authorize wall to wall searches or limit them absolutely to the areas alleged in the complaint. One better approach is this: Courts can require that the scope of the warrant be reasonably related to the violations for which

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[63] *See* note 50 *supra*.
[64] *See* notes 37-52 and accompanying text *supra*.
[65] 7 OSHC (BNA) 1851 (W.D. Okla. 1979).
[66] *See* notes 72-76 and accompanying text *infra*.
[67] *See* note 10 and accompanying text *supra*.

probable cause has been shown.[68] This would avoid the problems that are inherent in both the *Burkart* and *Trinity* formulations. Such an approach would guard against unreasonable and arbitrary outcomes, which result from blanket wall to wall searches in certain circumstances. This will prevent OSHA from engaging in general "fishing expeditions" as well. In addition, it will deny employees the chance to harass employers by triggering a plant-wide search for an isolated complaint.[69] This is far superior to the wall to wall approach because, in the final analysis, an impartial magistrate rather than an involved OSHA inspector will determine the scope of the search.[70]

Moreover, this proposal is less restrictive than the limited *Trinity* approach. Once the OSHA inspector makes a showing of probable cause for the alleged violation, the scope of the warrant must only be reasonably related to that violation. Therefore, the search will not necessarily be limited to the specific area named in the complaint.[71]

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[68] Although *Barlow's* indicated that probable cause in the criminal sense is not required, 436 U.S. at 320, an analogy to criminal search warrants can be drawn. In criminal cases probable cause is required for each area searched. "There is no requirement that prevents a single search warrant from issuing for more than one building or place as long as the various places and things are specifically described and there exists adequate probable cause for search of each place." State v. Ferrari, 80 N.M. 714, 718, 460 P.2d 244, 248 (1969). *See* Marron v. United States, 275 U.S. 192 (1927) (warrants must particularly describe the things to be seized, thus making general searches impossible and leaving the officer executing the warrant no discretion with regard to what is to be taken). In criminal searches, this particularity requirement guards against general exploratory searches which violate the constitutional guaranty against unreasonable searches and seizures. *See* Berger v. New York, 388 U.S. 41 (1967); Stanford v. Texas, 379 U.S. 476 (1965); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); United States v. Hinton, 219 F.2d 324, 326 (7th Cir. 1955) ("The basic requirement [of the fourth amendment] is that officers who are commanded to search be able from the 'particular' description of the search warrant to identify the specific place for which there is probable cause to believe that a crime is being committed."); United States v. Pardo-Bolland, 229 F. Supp. 473 (S.D.N.Y. 1964) (a valid search warrant does not give searching officers carte blanche to make a general exploratory search of the premises for items not specifically related to the search warrant). The particularity requirement is related to the probable cause requirement. If there is no specific description it will be apparent that there has not been a sufficient showing to the magistrate that the described items can be found at a particular place. 2 W. LAFAVE, SEARCHES AND SEIZURES § 4.5, at 72 (1978). In the same way, requiring the scope of an administrative warrant to be reasonably related to the probable cause shown assures protection of fourth amendment rights and prevents general fishing expeditions by denying the searching officer discretion.

[69] *See* note 68 *supra*.

[70] Another problem is inherent in the *Burkart* approach. *Burkart* can be read as forcing the magistrate to choose between authorizing a broad, wall to wall search and no search at all. This unreasonably restricts the issuing magistrate in his determination of the scope of the inspection. He may be reluctant to allow a wall to wall inspection, which is disruptive to an employer, when the probable cause is based on limited violations and few areas are involved. Because his only alternative is to prevent any inspection, these violations will go uncorrected and will continue to pose a danger to employees.

[71] Of course, once the magistrate defines the scope of the warrant, the OSHA inspector may not go beyond that. *Cf.* People v. Gualandi, 21 Ill. App. 3d 992, 316 N.E.2d 195 (1974) (if

Instead, the magistrate can make the scope of the search broad enough to allow the OSHA inspector to determine the extent of the violation in its entirety. If a violation exists in one part of the plant but also could affect other parts, a more extensive search is reasonable and therefore should be authorized.

In certain cases, the employee complaint will establish probable cause for particular violations at the worksite. The magistrate, in these cases, should limit the scope of the inspection to the areas reasonably related to those violations. The magistrate may, however, have other information in addition to the employee complaint. In applying for the inspection warrant, the OSHA inspector might bring certain surrounding circumstances to the attention of the magistrate. The scope of the warrant should then bear a reasonable relationship to the existing probable cause as evidenced by the complaint *and* the surrounding circumstances.[72]

There are a number of circumstances that militate in favor of a broader warrant. One relevant factor that calls for an expanded search is the number of complaints.[73] If the complaints are so numerous as

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warrant specifies only part of a building, only that part can be searched) (criminal search); Commonwealth v. Hall, 366 Mass. 790, 323 N.E.2d 319 (1975) (warrant authorizing search of second floor apartment did not legitimate search of vacant third floor apartment) (same); Riojas v. State, 530 S.W.2d 298 (Tex. Crim. 1975) (where warrant named only house and cars of defendant, search of shed on premises unlawful). *See also* People v. Rainey, 14 N.Y.2d 35, 248 N.Y.S.2d 33, 197 N.E.2d 527 (1964) (unless there is probable cause as to all the occupied units in a building, a search warrant will be invalid if directed at all of a multi-occupancy structure).

[72] Of course, even under a warrant that authorizes less than a wall to wall inspection, an OSHA inspector may note all violations in "plain view." The plain view doctrine holds that an official who has a legal right to be in the location may obtain any evidence that is in "plain view," even if beyond the scope of the warrant. *See, e.g.*, Rothstein, *supra* note 4, at 70. *Cf.* United States v. Various Gambling Devices, 478 F.2d 1194 (5th Cir. 1973); United States v. Golden, 413 F.2d 1010 (4th Cir. 1969). "What is observable by the public is observable, without a warrant, by the Government inspector as well." Marshall v. Barlow's, Inc., 436 U.S. 307, 315 (1978) (footnote omitted). *See also* State v. Brothers, 12 Or. App. 435, 507 P.2d 398 (1973).

If sufficient numbers of violations surface, or if the OSHA compliance officer has reason to believe that additional violations exist in other areas, he may return to the magistrate to request a broader warrant. The Secretary in Marshall v. North Am. Car Co., 626 F.2d 320 (3d Cir. 1980), argued that OSHA enforcement resources are better used if there is a wall to wall inspection in the first instance, rather than two separate requests for warrants and two inspections. The court responded by cautioning that "the Secretary may not exceed the statutory limits imposed by Congress." *Id.* at 324. Another court put it this way: "[B]road and indiscriminate inroads on fourth amendment safeguards, wrought in the name of administrative expedience and weighty governmental interest, are [not] to be viewed with . . . favor." Brennan v. Gibson's Prods., Inc., 407 F. Supp. 154, 161 (E.D. Tex. 1976), *vacated and remanded with instructions to dismiss sub nom.*, Marshall v. Gibson's Prods., Inc., 584 F.2d 668 (5th Cir. 1978).

[73] *See* Marshall v. North Am. Car Co., 476 F. Supp. 698, 706-07 (M.D. Pa. 1979), *aff'd*, 626 F.2d 320 (3d Cir. 1980).

to suggest pervasive violations, a wall to wall search may be reasonable. The employer's past safety record and history of OSHA violations[74] are other relevant factors that the magistrate should consider. The passage of time from the last inspection[75] might also be pertinent—if substantial time has passed since the last inspection, it may be reasonable to assume that violations have arisen and gone uncorrected. The magistrate might also consider the type of industry involved; the dangers present in a highly hazardous industry may make a broader warrant more reasonable.[76]

The magistrate, therefore, should consider the employee complaint in light of these surrounding circumstances. The scope of the warrant issued should bear a reasonable relationship to the complaint and surrounding circumstances. Although this approach is consistent with the fourth amendment, it nevertheless gives the magistrate a certain degree of flexibility.

Elements of such an approach are present in *Marshall v. North American Car Co.*[77] In the spring of 1979, an employee complained to OSHA of several violations in three areas of the North American Car Company's seventy-acre Sayre, Pennsylvania, plant. The magistrate issued a wall to wall warrant.[78] The district court quashed the warrant as overbroad[79] and the Third Circuit affirmed.[80]

In doing so, the district court and the court of appeals rejected the wall to wall approach,[81] but they also recognized that in certain

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[74] *See* Marshall v. Berwick Forge & Fabricating Co., 474 F. Supp. 104 (M.D. Pa. 1979) (permitting a general inspection in response to employee complaints but suggesting that, had there been fewer alleged violations and a less extensive record of past violations, it would have limited the scope of the inspection). *Id.* at 113. *See also* Marshall v. Northwest Orient Airlines, Inc., 574 F.2d 119, 123 (2d Cir. 1978) (probable cause found for an OSHA inspection based on employer's prior violations) (not section 8(f) search).

[75] *See* Camara v. Municipal Court, 387 U.S. 523, 538 (1967); Rothstein, *supra* note 4, at 94.

[76] Allegations of violations in a high-hazard industry usually result in inspections of the entire facility, whereas complaint inspections in low-hazard industries are usually limited to the working conditions identified in the complaint. [1980] 1 EMPL. SAFETY & HEALTH [CCH] ¶ 4014, at 1319.

[77] 476 F. Supp. 698 (M.D. Pa. 1979), *aff'd*, 626 F.2d 320 (3d Cir. 1980).

[78] The alleged violations were in the steamrack, an overhead crane that ran between some of the buildings, and one of the paint shops. The warrant application simply recited the employee complaint with no allegations of a history of past violations of the Act. The resulting inspection included examination of safety records, the wood fabrication shop, a tool storage area, the air brake shop, and the wiring and noise and air quality levels in some of these areas. Although the inspectors did examine the paint shop, no inspection was made of either the crane or the steamrack violations. 626 F.2d at 320. Obviously, the inspection exceeded the areas that the complaint covered.

[79] 476 F. Supp. at 707.

[80] 626 F.2d 320.

[81] *See* 476 F. Supp. at 706-07; 626 F.2d at 324.

circumstances the scope of the warrant should go beyond the areas specified in the complaint. The district court indicated that if the magistrate had knowledge of certain surrounding circumstances a broader warrant would be proper.[82] Further, it expressly embraced a balancing test similar to the one proffered in this Note:

> [T]he Court must consider the scope of the warrant as compared to the number and gravity of employee complaints and whether or not it would be possible to limit the warrant so as to be no more intrusive than necessary upon the employer's privacy while accomplishing the remedial purpose of the . . . Act.[83]

The court of appeals embraced the proposition that the scope of the search could go beyond the *specific* areas alleged in the complaint by pointing out that "the scope of the inspection must bear an *appropriate relationship* to the violations alleged in the complaint."[84]

CONCLUSION

Courts currently do not have an adequate test to determine the scope of employee triggered OSHA inspection warrants. Consequently, they fail to balance properly employers' privacy interests and the public's safety interests. The scope of these warrants should be reasonably related to the violations alleged in the complaint and to other relevant surrounding circumstances. Such an approach will lead to safer workplaces without infringing upon employers' constitutional protections. It will allow OSHA inspectors to carry out their duties without unduly hindering employers. In this way it will reconcile the interest in enforcing the Act with the commands of the Constitution.

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[82] [The] complaint identified with specificity the areas of the . . . plant at which the violations allegedly occurred. The application made no reference to the size of the . . . plant nor to the geographic area covered by the operations . . . . Without those crucial facts, the Magistrate could not have compared the extent of the intrusion which was authorized by a general inspection warrant with the intrusion pursuant to a warrant limited to the areas set forth in the employee complaint. Further, there is no indication in the application for a warrant that . . . in the past . . . where violations of the type alleged . . . are found to exist it is probable that other occupational safety and health violations exist in other parts of a facility . . . .

476 F. Supp. at 707.

[83] 476 F. Supp. at 706.

[84] 626 F.2d at 324 (emphasis added).