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LABOR LAW—OSHA—HOW DID OSHA GET THAT
SEARCH WARRANT?

Martin v. International Matex Tank Terminals (1991)

I. INTRODUCTION

The Occupational Safety and Health Administration (OSHA)¹ is responsible for “assur[ing] safe and healthful working conditions for working men and women”² via a comprehensive scheme of rulemaking,³ adjudication,⁴ and penalty assessment.⁵ OSHA’s most effective tool for accomplishing compliance with its safety standards is the worksite inspection.⁶ Section 8(a) of the Occupational Safety and Health Act of 1970⁷ (the Act) empowers OSHA, as a representative of the Secretary of Labor (the Secretary), to conduct reasonable inspections of the premises of any worksite covered by the Act.⁸

1. The Occupational Safety and Health Act of 1970 (the Act) created the Occupational Safety and Health Administration (OSHA) as an executive agency within the Department of Labor. 29 U.S.C. §§ 651-678 (1988).

2. S. REP. No. 1282, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 5177 [hereinafter Legislative History]. The rising number of chemical and physical hazards in the workplace, combined with the lack of economic incentives for employers to invest in safety devices, prompted Congress to enact legislation which allowed the Secretary of Labor to create and enforce national uniform standards to protect employees. Legislative History, *reprinted in* 1970 U.S.C.C.A.N. at 5177-80. The Occupational Safety and Health Act requires the Secretary of Labor to promulgate standards for improving the health and safety of employees in the workplace. 29 U.S.C. § 655(a). Violations of these standards will subject the employer to citations and possibly penalties for failure to correct the violations. *Id.* §§ 658-659, 666.

3. 29 U.S.C. § 655 (granting Secretary of Labor rulemaking authority to promulgate national occupational health and safety standards that will improve worksite conditions).

4. *Id.* § 659(c) (providing procedures to govern hearings at which employers may contest citations for violations of the Act).

5. *Id.* § 666 (granting Secretary of Labor authority to assess civil and criminal penalties for violations of the Act).

6. Legislative History, *supra* note 2, *reprinted in* 1970 U.S.C.C.A.N. at 5187-89. “In order to carry out an effective national occupational safety and health program, it is necessary for government personnel to have the right of entry in order to ascertain the safety and health conditions and status of compliance of any covered employing establishment.” *Id.*, *reprinted in* 1970 U.S.C.C.A.N. at 5187.

7. 29 U.S.C. §§ 651-678.

8. *Id.* § 657(a). Section 8(a) authorizes the Secretary of Labor to enter any place of employment covered by the Act for the purpose of conducting reasonable inspections and investigations of workplace conditions. *Id.* Section 8(a) does not require the Secretary to obtain a warrant prior to initiating an inspection. *Id.* Section 8(a), entitled “Authority of Secretary to enter, inspect, and investigate places of employment; time and manner,” provides:

In *Marshall v. Barlow's, Inc.*,⁹ the Supreme Court held that in order to satisfy the Fourth Amendment requirement for probable cause, OSHA must obtain a search warrant before conducting a nonconsensual inspection pursuant to its authority under section 8(a).¹⁰ To obtain a warrant under section 8(a), OSHA does not have to establish the same level of probable cause as required in criminal proceedings.¹¹ Instead, OSHA may show either "specific evidence of an existing violation [or show] . . . that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'"¹²

In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

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

Id.

9. 436 U.S. 307 (1978).

10. *Id.* at 315-16. The *Barlow's* case arose when an OSHA inspector attempted to conduct a warrantless inspection of Barlow's electrical and plumbing business. *Id.* at 309-10. Barlow refused to permit the OSHA inspector into the non-public areas of his business unless the inspector obtained a search warrant. *Id.* at 310. For further discussion of the constitutional restrictions on OSHA's authority to conduct inspections, see *infra* notes 44-53 and accompanying text.

11. *Barlow's*, 436 U.S. at 320.

12. *Id.* (quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967)). After *Barlow's*, lower federal courts have consistently found that Fourth Amendment safeguards were satisfied as long as OSHA demonstrated that the facility was selected via a neutral administrative plan for enforcement of the goals of the Act. See, e.g., *In re Trinity Indus.*, 898 F.2d 1049, 1051 (5th Cir. 1990) ("*Barlow's* is satisfied if: 1) the warrant is sought pursuant to a plan based on sufficient specific neutral criteria; and 2) the warrant application adequately explains why an inspection of the particular establishment is within the program." (citing *Brock v. Gretna Mach. & Ironworks*, 769 F.2d 1110, 1112 (5th Cir. 1985))); *Pennsylvania Steel Foundry & Mach. Co. v. Secretary of Labor*, 831 F.2d 1211, 1215 (3d Cir. 1987) (holding that warrant application must describe enforcement program and aver that targeted facility fits within program); *In re Northwest Airlines*, 587 F.2d 12, 14-15 (7th Cir. 1978) (holding that *Barlow's* standard of administrative probable cause satisfied if (1) reasonable legislative or administrative program for enforcement is shown to exist and (2) desired inspection fits within program), *cert. denied*, 439 U.S. 1132 (1979).

The courts, however, have not reached a consensus on the appropriate standard of probable cause when OSHA seeks a warrant under § 8(a) based upon specific evidence of violations. Some courts have held that OSHA must initially demonstrate that the site was not selected in an arbitrary manner pursuant to an administrative plan. See, e.g., *In re Trinity Indus.*, 898 F.2d 1049, 1051 (5th Cir. 1990) (section 8(a) authorizes inspections pursuant to a general administrative plan); *Donovan v. A.A. Beiro Constr. Co.*, 746 F.2d 894, 898 (D.C. Cir. 1984)

In *Barlow's*, the Supreme Court failed to describe the scope of the Secretary's authority to obtain a warrant for an administrative inspection under section 8(a).¹³ The United States Court of Appeals for the Third Circuit recently addressed this issue in *Martin v. International Matex Tank Terminals*.¹⁴ The *Matex* court held that under section 8(a) the Secretary may establish probable cause in two ways. First, the Secretary may show that the facility was chosen for inspection via an administrative plan for enforcement containing neutral selection criteria.¹⁵ Second, the Secretary may present specific evidence establishing a reasonable belief that a violation has been or is being committed.¹⁶ This decision significantly broadened the scope of OSHA's authority under section 8(a) to obtain a warrant beyond the use of a neutral administrative plan for enforcement.¹⁷

(same); *Marshall v. Weyerhaeuser Co.*, 456 F. Supp. 474, 481-82 (D.N.J. 1978) (same). Other courts have sustained a warrant based solely upon evidence that violations may exist. See, e.g., *In re Cerro Copper Prods. Co.*, 752 F.2d 280, 282 (7th Cir. 1985) (holding that Secretary of Labor may use specific evidence of existing violation of law to establish administrative probable cause); *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 957 (11th Cir. 1982) (stating that administrative probable cause justifying issuance of OSHA inspection warrant may be based upon specific evidence of existing violation); *Chicago Zoological Soc'y v. Donovan*, 558 F. Supp. 1147, 1152 (N.D. Ill. 1983) (indicating that administrative probable cause can be demonstrated if specific evidence of existing violation is presented in warrant application).

13. The *Barlow's* Court limited its inquiry to whether the restrictions of the Fourth Amendment Warrant Clause applied to inspections made pursuant to § 8(a) of the Act. *Barlow's*, 436 U.S. at 325. *Barlow* sought a declaratory judgment on ground that the Act unconstitutionally authorizes inspections without a warrant. *Id.* at 310. Several commentators have noted that this decision has created a great deal of litigation over the appropriate scope of the Secretary's authority to inspect under § 8(a). See, e.g., Barbara M. Maczynski, Note, *Permissible Scope of OSHA Inspection Warrants*, 66 CORNELL L. REV. 1254 n.5 (1981); Fern P. O'Brian, Note, *Administrative Agency Searches Since Marshall v. Barlow's, Inc.: Probable Cause Requirements for Nonroutine Administrative Searches*, 70 GEO. L.J. 1183 n.5 (1982).

14. 928 F.2d 614 (3d Cir. 1991). At issue in the appeal to the Third Circuit was whether OSHA has authority under § 8(a) to obtain a warrant for inspection based only upon evidence of specific violations or whether its authority is limited to programmed inspections. *Id.* at 619.

15. *Id.* at 621. In order to insure compliance with the Act, OSHA schedules periodic inspections (Regional Programmed Inspections). Maczynski, Note, *supra* note 13, at 1256 n.17 (citing OSHA FIELD OPERATIONS MANUAL (CCH) ch. IV, ¶ 4327.2 (1976)). Facilities are targeted for inspection on the basis of neutral criteria such as: (1) the inherent hazardousness of the operations conducted at the facility; (2) statistics on accident rates; (3) the facility's health and safety record; (4) duration of time since the last inspection; (5) the employer's history of OSHA violations; and (6) the number of employees at the facility. *Id.* at 1259 n.28 (1981) (citing Mark A. Rothstein, *OSHA Inspections After Marshall v. Barlow's, Inc.*, 1979 DUKE L.J. 63, 92-94).

16. *International Matex*, 928 F.2d at 627. For further discussion on how the Third Circuit has defined administrative probable cause in this context, see *infra* notes 69-82 and accompanying text.

17. For a discussion of the impact of the Third Circuit's decision in *Interna-*

II. FACTS AND PROCEDURAL HISTORY OF THE CASE

On September 25, 1989, OSHA received a written complaint from the Mayor of Bayonne, New Jersey.¹⁸ The Mayor alleged that several gas tank leaks had occurred at International Matex's Bayonne facility between August 1986 and August 1989.¹⁹ The complaint also included several allegations of OSHA regulatory violation, that the Mayor had received from anonymous sources about the facility.²⁰

In response, OSHA assigned Compliance Officers Jane Secor and Steve Sawyer to visit the facility.²¹ After reviewing the complaint and

tional Matex on the scope of the Secretary's authority under § 8(a), see *infra* notes 54-60.

18. *International Matex*, 928 F.2d at 616. International Matex owns and operates a facility in Bayonne, New Jersey. *Id.* At that facility, International Matex receives, stores, blends and ships bulk liquid petroleum products. *Id.*

19. *Id.* On July 9, 1986, a 350,000 gallon mixing tank exploded on the International Matex Tank Terminals waterfront facility in Bayonne, New Jersey. George Andreassi, *Waterfront Fire Extinguished Today*, UPI, July 10, 1986, available in LEXIS, Nexis Library, UPI File. The fire spread to three other tanks and a nearby polluted canal, forcing the Coast Guard to close two waterways separating New Jersey from Staten Island. *Id.* International Matex pled guilty to charges of recklessly causing the risk of widespread injury or damage in connection with the incident. *Concern Pleads Guilty in Jersey Gasoline Fire*, N.Y. TIMES, Nov. 7, 1986, at B2. In the plea agreement, International Matex agreed to reimburse the Bayonne Fire Department \$17,624 in costs that the fire department incurred to extinguish the blaze. *Id.* The company also agreed to pay the maximum fine of \$7,500 for recklessly causing the risk of widespread injury or damage. *Id.*

20. *International Matex*, 928 F.2d at 616. Specifically, the complaint alleged:

- (1) Poor housekeeping exists in the Maintenance Shop Building.
- (2) Employees are forced to work overtime.
- (3) There are no toilet facilities or water in the dock area.
- (4) There is no shower in the dock or pier area for purposes of assisting employees in the event of a product spill.
- (5) Apparently some management personnel are living on the third floor of the main office.
- (6) The west side of pier #1 and the east side of pier #4, it is represented are in a total state of disrepair and therefore are not safe.
- (7) A further representation is that on pier #7 hoses are strewn all over the place.
- (8) It is further alleged that respirators and goggles to be used for product use are not always in evidence.
- (9) Additionally, it is represented that the area in back of tanks #'s 1701, 1702, and 1704, in the center of the plant area, there possibly exists contamination.
- (10) Further representation concerns a spill of #6 oil at approximately 6:30 a.m. on September 4th, 1989 that was not reported by the company but called in to Police Headquarters by an employee at 1:00 a.m. on Tuesday, September 5th.
- (11) A final allegation represents that behind tank #6206, phenol and other products have been buried underground and covered over.

Id. (quoting Appendix at 25-26, *International Matex*, (No. 90-5776)). These allegations, if true, "would represent serious violations of the Occupational Health and Safety Act of 1970." *Id.*

21. *Id.*

the facility's safety programs with Dennis M. Barbarise, International Matex's Administrative Manager, the officers asked to inspect the entire facility.²² International Matex consented to their requests.²³

The Officers Secor & Sawyer subsequently inspected the Maintenance Department and two of International Matex's piers.²⁴ During these inspections, which covered approximately thirty percent of the facility, the officers uncovered a multitude of serious violations.²⁵ On February 9, 1990, when its Officers Secor and Sawyer returned to continue their inspection, Barbarise informed them that they would need a search warrant if they wanted to continue.²⁶

On March 12, 1990, Charles Horvath, President of Local 8-406 of the Oil, Chemical & Atomic Workers International, sent a written complaint to OSHA repeating the earlier allegations of safety hazards at the Bayonne facility.²⁷ OSHA subsequently applied to a federal magistrate

22. *Id.* at 617.

23. *Id.*

24. *Id.* Upon inspecting Pier No. 1, the two compliance officers found several minor violations. *Id.* These violations led the officers to believe that the pier was in "imminent danger." *Id.* The officers threatened to close the pier unless International Matex immediately remedied the violations. *Id.* International Matex responded with a short term remedial plan to correct the violations. *Id.*

25. *Id.* The affidavit of Robert Kulick, OSHA's Area Director, stated that the compliance officers had uncovered the following violations during the consensual inspection:

[N]o Hazard Communications (29 CFR 1910.1200) Program appears to exist at these premises; no confined space procedures appear to have been developed or implemented, although [the compliance officers] have observed and learned that employees are required to enter tanks and other vessels, confined spaces, that contain or contained hazardous substances; employees are required to wear respirators routinely throughout the facility, but no respirator program, required by OSHA standards, appears to have been established or implemented; house-keeping—(29 CFR 1910.106(b))—storage tanks for hazardous materials lack diking, while weeds and combustile [sic] are adjacent to the tanks; fire fighting—two fire fighting trucks with signs, "fire rescue" were observed, but evaluation with OSHA standards (29 CFR 1910.156) must still be investigated; after the limited view my [compliance officers] have observed of the electrical hazards, there appear to be electrical hazards present to a large extent everywhere, which could result in electrocution hazards, or fire/explosion hazards.

Id. (citing Appendix at 22-23, *International Matex* (No. 90-5776)).

26. *Id.*

27. *Id.* The contents of Horvath's letter reiterated complaints similar to those in the Mayor's earlier letter to OSHA. *Id.* Specifically, Horvath complained of:

electrical hazards on the piers, at tank locations, and at pump areas; the absence of safety showers; ground contamination from leaky pipes and tanks; poor house cleaning throughout the plant; the condition and availability of safety equipment; and the inadequacy of safety programs for fire safety, vessel entry, and respirator training.

Id. International Matex contended that Horvath's complaint was merely a retali-

for a warrant to inspect the entire facility.²⁸ The warrant application was supported by affidavits from Compliance Officer Secor, who had initially inspected the facility, and from the OSHA Area Director.²⁹ The written complaints of Mayor Collins and Union President Horvath were also attached to the application.³⁰ OSHA based its authority for the application upon both sections 8(f)(1) and 8(a) of the Occupational Health and Safety Act of 1970.³¹ The magistrate issued a warrant allowing OSHA to inspect International Matex's facility with "as many as four OSHA inspectors and for up to 60 days."³²

Despite the warrant, International Matex refused to allow OSHA officials to conduct the inspection.³³ The Secretary of Labor then filed a complaint in the United States District Court for the District of New Jersey seeking an order holding International Matex in contempt for re-

atory action because International Matex had won a protracted strike dispute six months earlier. *Id.*

28. *Id.* OSHA failed to attach the necessary supporting affidavits to its first warrant application. *Id.* The magistrate nonetheless issued the warrant. *Id.* OSHA, however, was unsuccessful in executing the warrant and had to file a second application. *Id.*

29. *Id.* at 618. The court commented:

Secor's affidavit stated that, during the consensual inspection, "[u]sing accident/illness records, I calculated the firm's LWDI (lost workday incident rate) to be 15.4, which is more than three and one-half times above the national rate of 4.2." She also stated that she found "numerous instances of conditions which may constitute violations of the general OSHA standards."

Id. Secor's affidavit also noted that a limited inspection after a fire in January 1987 had exposed a serious violation. *Id.*

30. *Id.*

31. *International Matex*, 928 F.2d at 617-18. The application stated:

[T]he desired inspection and investigation is mandated . . . as a special inspection in accordance with section 8(f)(1) of the Act. . . .

. . . In addition, the desired inspection and investigation is part of an inspection and investigation program (described in more detail in the accompanying affidavit) designed to assure compliance with the Act and is authorized by Section 8(a) of the Act.

Id. (citing appellant's brief at 7).

32. *Id.* at 618. The warrant specifically authorized OSHA

to enter *without delay* the [premises] during regular working hours or at other reasonable times, and to inspect and investigate in a reasonable manner and to a reasonable extent (including but not limited to the taking of photographs and samples, which may be done by attaching monitoring devices to employees, and to question privately any employer, owner, operator, agent or employees of the establishment on the premises during working hours), the workplace or environment where work is performed by employees of the employer, and all pertinent conditions including structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records required by the Act and regulations and standards, but excluding all employee medical records)

Id. (citing appellant's brief at 37) (emphasis in original).

33. *Id.*

fusing to comply with the warrant.³⁴ International Matex subsequently moved to quash the warrant and to dismiss the complaint.³⁵ The company contended that the Secretary failed to support the warrant with sufficient probable cause.³⁶ The district court granted both of International Matex's motions.³⁷ In quashing the warrant, the court interpreted section 8(a) as granting the Secretary limited authority to conduct inspections pursuant to a neutral administrative plan.³⁸ The court held that OSHA's warrant application had failed to demonstrate that International Matex had been selected for inspection pursuant to such a plan.³⁹

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 618-19.

38. *Id.* The district court relied upon several other district court opinions in arriving at its conclusion. *Id.* The court interpreted these opinions as requiring the Secretary to demonstrate that the site was selected for inspection nonarbitrarily via a detailed program for enforcement, *regardless of whether the Secretary could independently establish probable cause.* *Id.* at 619.

Specifically, the district court relied upon *Marshall v. Weyerhaeuser*, 456 F. Supp. 474 (D.N.J. 1978), and *Reynolds Metals Co. v. Secretary of Labor*, 442 F. Supp. 195 (W.D. Va. 1977). In *Reynolds Metals*, a Virginia district court interpreted § 8(a) as requiring OSHA to demonstrate in the warrant application that the site was selected for inspection pursuant to a rational and non-discriminatory plan. *Reynolds Metals*, 442 F. Supp. at 200-01. OSHA met its burden by demonstrating that Reynolds Metals ranked twentieth on OSHA's "Worst-First" List, granting it status as one of the most hazardous industries in the nation. *Id.* at 197. In a supporting affidavit, OSHA also presented information on how it compiles the "Worst-First" list. *Id.* For further discussion on the criteria used by OSHA to rank industries on its "Worst-First" list, see *supra* note 15.

In *Weyerhaeuser*, a New Jersey district court held that OSHA must demonstrate in the warrant application that selection of a particular facility is based upon neutral criteria. *Weyerhaeuser*, 456 F. Supp. at 483. The court found OSHA's warrant application deficient because it did not reveal what criteria OSHA had used to select the Weyerhaeuser Company for inspection. *Id.* at 482.

39. *International Matex*, 928 F.2d at 619. The Secretary had offered evidence of International Matex's unusually high lost workday incident rate, the mayor's and the union president's complaints, and affidavits containing the observations of the two OSHA compliance officers to support its warrant application. *Id.* at 617-18. The district court rejected this supporting evidence because it failed to show that the inspection was requested pursuant to a neutral administrative plan. *Id.* at 619.

The district court also rejected the Secretary's argument that the warrant was authorized under § 8(f)(1), holding that "a section 8(f)(1) inspection also requires [that] a detailed 'program' of inspection . . . must be identified in the warrant application." *Id.* (citation omitted). The district court interpreted a Wisconsin district court opinion as requiring the Secretary to demonstrate that the site had been targeted for inspection via an administrative enforcement plan as a *prerequisite* to obtaining a warrant under § 8(f)(1). *Id.* at 623 (citing *In re Northwest Airlines*, 437 F. Supp. 533 (E.D. Wis. 1977), *aff'd*, 587 F.2d 12 (7th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979)).

III. THE THIRD CIRCUIT'S ANALYSIS

A. Statutory Interpretation of OSHA's Authority to Conduct Site Inspections

1. General Authority Under Section 8(a)

On appeal, the Third Circuit focused on whether OSHA has authority under section 8(a) to obtain a warrant for inspection based only on "conventional probable cause,"⁴⁰ or whether its authority is limited to inspections made pursuant to an administrative enforcement program containing specific neutral criteria dictating selection of a site for inspection.⁴¹ The Secretary of Labor contended that section 8(a) broadly authorizes OSHA to conduct inspections based upon "conventional probable cause"—i.e., when there is sufficient evidence to believe that violations are present at the site.⁴² By contrast, International Matex claimed that section 8(a) restricts OSHA to "programmed" inspections

40. The author intends the phrase "conventional probable cause" to represent one kind of administrative probable cause. To establish conventional probable cause, the warrant applicant must present either evidence of specific violations or evidence supporting a reasonable belief that violations have been or are being committed. *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967) (holding that standard for administrative probable cause is not as stringent as criminal probable cause); see also *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 958 (11th Cir. 1982) (holding that administrative probable cause must at least show that proposed inspection "is based upon a reasonable belief that a violation has been or is being committed"); *Marshall v. Horn Seed Co.*, 647 F.2d 96, 102 (10th Cir. 1981) (holding that warrant application grounded on administrative probable cause must show some "plausible basis for believing that a violation is likely to be found"). For further discussion of administrative probable cause, see Steven T. Wax, *The Fourth Amendment, Administrative Searches and the Loss of Liberty*, 18 ENVTL. L. 911, 917-18 (1988); O'Brian, Note, *supra* note 13, at 1195-98.

41. *International Matex*, 928 F.2d at 619. For example, OSHA schedules periodic inspections (Regional Programmed Inspections) to ensure enforcement of the Act. Maczynski, Note, *supra* note 13, at 1256 n.17. For a discussion of Regional Programmed Inspections, see *supra* note 15.

OSHA has established a priority list for conducting inspections and investigations. Maczynski, Note, *supra* note 13, at 1256 n.18. Highest on the list are investigations into allegations of "imminently dangerous conditions" that present a risk of death or serious physical harm. *Id.* Second on the list are investigations following a fatality or catastrophe. *Id.* OSHA has defined a catastrophe to be an incident with one or more fatalities or when five or more employees are hospitalized. *Id.* Third on the list are investigations based upon an employee complaint alleging unsafe working conditions. *Id.* Fourth on the list are the Regional Programmed Inspections. *Id.* at 1256 n.18.

42. *International Matex*, 928 F.2d at 619. The court noted that "[t]he Secretary has interpreted section 8(a) as . . . subject only to the limitation that inspections be 'within reasonable limits' and made 'during regular working hours and at other reasonable times' . . ." *Id.* at 622 (quoting *Secretary of Labor v. Aluminum Coil Anodizing Corp.*, 1 O.S.H. Cas. (BNA) 1508, 1509 (Rev. Comm'n 1974)). The Secretary asserted that probable cause may be established either "by specific evidence of violations" or under § 8(f)(1), which confers authority upon the Secretary to initiate an inspection upon receiving a complaint from an employee alleging unsafe working conditions. *Id.* at 619 (citing 29 U.S.C. § 657(f)(1) (1982)). For the full text of § 8(f)(1), see *infra* note 62.

made pursuant to an administrative plan.⁴³

The Third Circuit began its analysis with a discussion of constitutional restrictions on administrative searches.⁴⁴ The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers and effects."⁴⁵ Moreover, the Warrant Clause restricts an agency's authority to conduct searches or inspections by allowing an administrative search only after a warrant supported by probable cause has been issued.⁴⁶ The court noted, however, that the standard of prob-

43. *International Matex*, 928 F.2d at 619. *International Matex* argued that OSHA must show that *International Matex* "had been selected for inspection by a neutral administrative plan." *Id.* In support of its argument, *International Matex* pointed to the Secretary's Field Operations Manual which lists the order of priority for OSHA inspections. *Id.* First are "Imminent Danger Investigations;" second are "Fatality/Catastrophe Investigations;" third are "Investigation of Complaints/Referrals;" and fourth are "Programmed Inspections." *Id.* For a discussion of the OSHA priority list, see *supra* note 41.

In the warrant application, the Secretary had failed to detail how *International Matex* had been selected for inspection. *International Matex*, 928 F.2d at 619. The Secretary had only offered the compliance officers' observations during the consensual inspection. *Id.* at 617-18. Therefore, *International Matex* contended, the district court had properly determined that the Secretary had failed to demonstrate that *International Matex* had been selected for inspection in a non-arbitrary or non-discriminatory manner. *Id.* at 619.

44. *International Matex*, 928 F.2d at 620-21. For an in depth discussion of the constitutional restrictions on an agency's authority to conduct administrative searches, see generally, Wax, *supra* note 40 (assessing the recent significant expansion of governmental regulatory power and resultant erosion of personal liberty); Jonathan F. Bloom, Note, *Entries and Searches in the Administrative Setting*, 53 GEO. WASH. L. REV. 230 (1985) (examining trends in law governing administrative searches and its effect on federal agency action); Michael J. Lacey, Note, *Camara, See, and Their Progeny: Another Look At Administrative Inspections Under The Fourth Amendment*, 15 COLUM. J.L. & SOC. PROBS. 61 (1979) (examining issues arising from application of Fourth Amendment safeguards to administrative inspections); O'Brian, Note, *supra* note 13, at 1183 (tracing development of administrative search warrant requirements).

45. U.S. CONST. amend. IV. The amendment states:

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.

Id.

46. *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967). In *Camara*, the Supreme Court held that administrative searches "are significant intrusions upon the interests protected by the Fourth Amendment, [and] that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual . . ." *Id.* For a detailed discussion on how the Fourth Amendment Warrant Clause restricts administrative activity, see generally, Bloom, Note, *supra* note 44, at 231-37; Lacey, Note, *supra* note 44.

The Supreme Court has utilized a "general reasonableness" or "balancing test" in interpreting the extent of Fourth Amendment protection against unreasonable searches. Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV.

able cause necessary to sustain a warrant in the administrative search context is not as stringent as that in the criminal search context.⁴⁷

The Third Circuit then examined the application of the Fourth Amendment Warrant Clause to OSHA inspections conducted pursuant to section 8(a).⁴⁸ In *Marshall v. Barlow's, Inc.*,⁴⁹ the Supreme Court addressed the constitutionality of warrantless searches under section 8(a).⁵⁰ In *Barlow's*, the Secretary of Labor argued that section 8(a), on

1173, 1178-84 (1988). Under the Fourth Amendment, any search or seizure is per se unconstitutional unless the searching authority obtains a warrant based upon probable cause. *Id.* at 1178-79. The Supreme Court, however, has carved out exceptions to the warrant requirement in both the criminal and administrative arenas. *Id.* at 1179. In determining whether such an exception should exist, the Court balances the cost to the individual resulting from the intrusion against the government's interest justifying the intrusion upon the individual's Fourth Amendment rights. *Id.* at 1182-84.

In the administrative search context, the Supreme Court has recognized an exception to the warrant requirement when the business to be inspected is part of an industry subject to pervasive and regular federal regulation. *See, e.g.*, *United States v. Biswell*, 406 U.S. 311, 316-17 (1972) (stating that warrantless searches specifically authorized under Gun Control Act are reasonable because effective enforcement of the Act requires frequent unannounced inspections); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970) (holding that warrantless inspections of federally licensed alcoholic beverage dealerships are constitutionally permissible). In these situations, the owner of the business has a diminished expectation to Fourth Amendment protection. Therefore, the regulating body may conduct reasonable inspections without first procuring a warrant. *Donovan v. Dewey*, 452 U.S. 594, 599-600 (1981) (determination of whether warrant is necessary hinges on pervasiveness and regularity of federal regulation). For further discussion on the closely regulated businesses exception, see Martha H. Ayres, Note, *Constitutional Law—Warrantless Administrative Searches and the Two-Step Test of Donovan v. Dewey*, 56 TUL. L. REV. 1467 (1982); Bloom, Note, *supra* note 44, at 235-37; O'Brian, Note, *supra* note 13, at 1193-95.

47. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978). In administrative search cases, "probable cause in the criminal law sense is not required." *Id.* An administrative search warrant "may be based not only on specific evidence of an existing violation, but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Id.* at 320 (quoting *Camara*, 387 U.S. at 538). The Supreme Court has embraced a reduced standard of probable cause in the administrative search context for several reasons. *Camara*, 387 U.S. 537. First, administrative enforcement programs are relatively limited invasions of privacy and are therefore fundamentally different from searches of personal effects to discover evidence of a crime. *Id.* Second, administrative searches are performed to further a strong public interest in the prevention and abatement of dangerous conditions. *Id.* Third, administrative enforcement programs have long enjoyed acceptance by both the judiciary and the public. *Id.* For further discussion on probable cause in the administrative search context, see generally, O'Brian, Note, *supra* note 13.

48. *International Matex*, 928 F.2d at 620-21.

49. 436 U.S. 307 (1978).

50. *Id.* The controversy arose when an OSHA inspector informed Barlow, the owner of an electrical and plumbing business, that he wanted to conduct a search of the working areas of the business. *Id.* at 309-10. The inspector did not have a warrant. *Id.* at 310. Barlow refused to permit the OSHA inspector into the non-public areas of his business without a search warrant. *Id.* The Secretary

its face, authorizes warrantless inspections of commercial workplaces.⁵¹ The Court, however, rejected the Secretary's argument and held that routine warrantless searches of commercial workplaces pursuant to section 8(a) violated the Fourth Amendment's prohibition against unreasonable searches.⁵² Therefore, OSHA must obtain a warrant to perform routine administrative inspections.⁵³

of Labor then petitioned the United States District Court for the District of Idaho for an order to compel Barlow to admit the inspector. *Id.*

51. *Id.* at 311. The Secretary of Labor advanced four major arguments in support of his position. Relying upon § 8(a) of the Act, which authorizes warrantless inspections of business premises, the Secretary first argued that Congress intended the Secretary to have the authority to conduct warrantless inspections to enforce the provisions of the Act. *Id.* The Secretary urged the Court to defer to Congress' judgment that such warrantless inspections are reasonable within the meaning of the Fourth Amendment. *Id.* Second, the Secretary urged the Court to recognize an exception to the Fourth Amendment search warrant requirement because employers are subject to pervasive OSHA oversight of workplace safety and health conditions. *Id.* at 313-14. Third, the Secretary argued that warrantless inspections are essential to enforcement of the Act, and that the enforcement scheme requires the opportunity to inspect without prior notice in order to preserve the advantage of surprise. *Id.* at 315-16. Fourth, the Secretary attempted to convince the Court that if it declared the Act unconstitutional, then all other warrantless search provisions in other regulatory schemes also would be rendered impermissible. *Id.* at 321. The Court rejected all of the Secretary's arguments. *Id.* at 314-323.

52. *Id.* at 325. The Court began its analysis by stressing that the Warrant Clause of the Fourth Amendment applies not only to private homes, but also to commercial buildings. *Id.* at 312. Therefore, warrantless searches of commercial premises are presumed to be unreasonable, unless some recognized exception to the warrant requirement applies. *Id.* at 312-13. The Court, however, found that the federal government's involvement in the workplace has never risen to the level necessary to justify an exception. *Id.* at 314-16. For a discussion of factors justifying an exception to the Fourth Amendment warrant requirement, see *supra* note 46. In addition, the Court also stressed that warrantless searches were not necessary to enforce the Act because the Secretary can quickly obtain a warrant upon a showing of probable cause. *Barlow's*, 436 U.S. at 320-21.

53. *Barlow's*, 436 U.S. at 325. To obtain a warrant authorizing an administrative inspections, OSHA may establish probable cause with either "specific evidence of an existing violation [or upon a] . . . showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Id.* at 320 (quoting *Camara v. Municipal Court*, 387 U.S. 527, 538 (1967)). The Court noted that "a warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for enforcement of the Act derived from neutral sources . . . would protect an employer's Fourth Amendment rights." *Id.* at 321. In a footnote, the Court gave an example illustrating when specific evidence of an existing violation would support the issuance of a warrant:

Section 8(f)(1), 29 U.S.C. § 657(f)(1), provides that employees . . . may give written notice to the Secretary of what they believe to be violations of safety or health standards and may request an inspection. If the Secretary then determines that "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 as soon as practicable."

After reviewing the Fourth Amendment restrictions on OSHA's ability to conduct an inspection, the Third Circuit addressed the scope of the Secretary's authority to obtain a search warrant under section 8(a).⁵⁴ The court examined the specific language of the statute⁵⁵ and found nothing in the language of the statute or in any Supreme Court decision requiring section 8(a) inspections to be conducted pursuant to a neutral administrative plan.⁵⁶ Moreover, the court found nothing in the statute's legislative history to support such an interpretation of section 8(a).⁵⁷ After reviewing the district court's analysis, the Third Cir-

Id. at 320 n.16 (quoting 29 U.S.C. § 657(f)(1)).

This footnote has resulted in the current controversy in the lower federal courts surrounding the scope of OSHA's authority to obtain a search warrant. Some courts have held that OSHA's authority under § 8(a) is restricted to routine inspections pursuant to a neutral administrative plan for enforcement. *See In re Trinity Indus.*, 898 F.2d 1049, 1051 (5th Cir. 1990) ("Barlow's is satisfied if: (1) the warrant is sought pursuant to a plan based on sufficient neutral criteria; and (2) the warrant application adequately explains why an inspection of the particular establishment is within the program."); *Donovan v. A.A. Beiro Constr. Co.*, 746 F.2d 894, 898 (D.C. Cir. 1984) (holding that § 8(a) authorizes inspections pursuant to a general administrative plan); *Marshall v. Weyerhaeuser Co.*, 456 F. Supp. 474, 484 (D.N.J. 1978) ("[E]vidence must be presented in each warrant application to show that the administrative standards are being applied to a particular establishment in a neutral manner."). These courts will accept evidence indicative of existing violations as sufficient probable cause to sustain a warrant only if that evidence takes the form of an employee complaint pursuant to § 8(f)(1). *See, e.g., Beiro*, 746 F.2d at 898 (stating that OSHA may obtain warrants for two types of inspections: (1) inspection pursuant to general administrative plan under § 8(a), and (2) inspection pursuant to employee complaint under § 8(f)(1)). Other courts have adopted a less restrictive interpretation of § 8(a) and will uphold a warrant if there is sufficient evidence to support a reasonable belief that a violation exists. *United States v. Jeep Corp.*, 836 F.2d 1026, 1027 (6th Cir. 1988) (holding that "administrative search warrant may be issued when it is shown that there is specific evidence of a violation of OSHA regulations"); *In re Cerro Copper Prods. Co.*, 752 F.2d 280, 282 (7th Cir. 1985) (allowing use of specific evidence of existing violation of law to establish administrative probable cause); *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 957 (11th Cir. 1982) (holding that administrative probable cause justifying issuance of OSHA inspection warrant may be based upon specific evidence of existing violation).

The Third Circuit adopted the less restrictive interpretation of § 8(a) in *International Matex*. *Martin v. International Matex Tank Terminals*, 928 F.2d 614, 622, 627 (3d Cir. 1991).

54. *International Matex*, 928 F.2d at 621.

55. *Id.* OSHA's authority to conduct an administrative search is limited by the Fourth Amendment and its enabling statute. Bloom, Note, *supra* note 44, at 231. For the full text of § 8(a), see *supra* note 8.

56. *International Matex*, 928 F.2d at 621. The court found that "nothing in *Barlow's* or *Camara* supports the district court's conclusion that the *only* means for the Secretary to establish probable cause for an administrative warrant to search under § 8(a) is by an administrative plan containing specific neutral criteria." *Id.* at 622.

57. *Id.* at 621. The legislative history suggests that the Secretary should develop a "Worst-First" list to conserve manpower. Legislative History, *supra* note 2, reprinted in 1970 U.S.C.C.A.N. at 5188-89. "In recognition of the possi-

cuit concluded that the district court had “misinterpreted the relevant precedents . . . [and] erroneously relied on cases which could not be persuasive here”⁵⁸ The Third Circuit adopted the Secretary’s interpretation of section 8(a) as a “broad grant of authority to conduct reasonable inspections.”⁵⁹ Under this interpretation, the Secretary may establish probable cause for section 8(a) inspections in two ways. First, the Secretary may show that the facility was selected for inspection via an administrative plan containing neutral criteria. Second, the Secretary may use “conventional” means of establishing probable cause by producing evidence of specific violations.⁶⁰

bility of limited inspection manpower in the earlier phases of the program, the committee expects that the Secretary will initially place emphasis on inspections in those industries or occupations where the need to assure safe and healthful conditions is determined to be the most compelling.” *Id.* This language, however, was not intended to restrict the Secretary’s authority to conduct inspections based upon conventional probable cause. For an explanation on how OSHA ranks high-hazard industries for periodic inspections, see *supra* note 15.

58. *International Matex*, 928 F.2d at 622. The district court had relied heavily upon three district court opinions in its disposition of the issue: *Marshall v. Weyerhaeuser*, 456 F. Supp. 474 (D.N.J. 1978); *In re Northwest Airlines*, 437 F. Supp. 533 (E.D. Wis. 1977), *aff’d* 587 F.2d 12 (7th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Reynolds Metals Co. v. Secretary of Labor*, 442 F. Supp. 195 (W.D. Va. 1977). For a discussion of the district court’s opinion, see *supra* notes 38-39.

The Third Circuit did not find these three opinions to “be helpful on the resolution of the proper inquiry of whether there was probable cause for the warrant in this specific evidence case.” *International Matex*, 928 F.2d at 622. The cases are factually distinguishable from *International Matex* because in these cases OSHA was attempting to establish in its warrant application that the facilities were selected for inspection via an enforcement plan rather than presenting specific evidence of violations. *Id.* Neither *Reynolds Metals* nor *Weyerhaeuser* can be relied upon as precedent limiting OSHA’s authority under § 8(a) to just routine programmed inspections. *Id.* For a discussion of the third opinion, *Northwest Airlines*, see *infra* note 61.

59. *International Matex*, 928 F.2d at 621. The court noted that the “[Secretary’s] interpretation is entitled deference, if reasonable.” *Id.* at 622; *see also*, *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (holding that agency’s interpretation of statute is entitled to deference if interpretation is reasonable construction of statute). For a discussion of the Secretary’s interpretation of § 8(a), see *supra* note 42 and accompanying text.

The legislative history of the Act supports this interpretation. *See* Legislative History, *supra* note 2, *reprinted in* 1970 U.S.C.C.A.N. at 5187-89, 5207-09. The Senate Report states:

In order to carry out an effective national occupational safety and health program, it is necessary for government personnel to have the right of entry in order to ascertain the safety and health conditions and status of compliance of any covered employing establishment. Section 8(a) therefore authorizes the Secretary or his representative, upon presenting appropriate credentials, to enter at reasonable times the premises of any place of employment covered by this act, to inspect and investigate within reasonable limits all pertinent conditions, and also to privately question owners, operators, agents or employees.

Id., *reprinted in* 1970 U.S.C.C.A.N. at 5187.

60. *International Matex*, 928 F.2d at 621. This interpretation has been

2. Authority Under Section 8(f)(1)

The Third Circuit also addressed the scope of the Secretary of Labor's authority to inspect places of employment under section 8(f)(1) of the Act.⁶¹ This section authorizes the Secretary to initiate an inspection upon the receipt of an employee complaint.⁶² In *Barlow's*, the Supreme

adopted in at least three other circuits. For example, the United States Court of Appeals for the Eleventh Circuit, in *West Point-Pepperell, Inc. v. Donovan*, interpreted § 8(a) as "cloth[ing] the Secretary with the general power to enter and inspect workplaces in order to carry out the purposes of the Act." *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 956 (11th Cir. 1982). The Eleventh Circuit held that the only restrictions on the Secretary's authority were those outlined in *Barlow's*. *Id.* at 957. Therefore, in order to obtain a warrant under § 8(a), the Secretary "must at least show that the proposed inspection is based upon a reasonable belief that a violation has been or is being committed." *Id.* at 958; see also *In re Inspection of Jeep Corp.*, 836 F.2d 1026, 1027 (6th Cir. 1988) (OSHA may establish probable cause with specific evidence supporting reasonable suspicion of violation); *In re Cerro Copper Prods. Co.*, 752 F.2d 280, 282 (7th Cir. 1985) ("To establish probable cause . . . the Secretary of Labor must show: (1) specific evidence of an existing violation of the law or (2) that neutral and reasonable legislative or administrative standards for conducting an inspection have been satisfied." (emphasis added) (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978))); *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1068 (11th Cir. 1982) ("Probable cause for an administrative warrant . . . may consist of either a showing that the inspection is pursuant to reasonable administrative standards or specific evidence of an existing violation." (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978))).

61. *International Matex*, 928 F.2d at 622-23. The Third Circuit addressed this issue because the district court had incorrectly interpreted *Barlow's* as requiring the Secretary to demonstrate that the targeted facility had been selected for inspection via an administrative enforcement plan as a *prerequisite* to obtaining a warrant under § 8(f)(1). *Id.* at 623. In arriving at this conclusion, the district court relied heavily upon *Northwest Airlines*. *Id.* In *Northwest Airlines*, the United States Court of Appeals for the Seventh Circuit interpreted *Barlow's* as requiring the existence of a neutral administrative plan as a prerequisite to finding probable cause based upon an employee complaint under § 8(f)(1). *In re Northwest Airlines*, 587 F.2d 12, 14-15 (7th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979). Under the Seventh Circuit's interpretation of § 8(f)(1), the Secretary must demonstrate in the warrant application that (1) a neutral administrative plan for enforcement exists, and (2) the facility for which the inspection is desired was chosen for inspection via that enforcement plan. *Id.* In a more recent decision, however, the Seventh Circuit adopted a different interpretation of the Secretary's authority under § 8(f)(1). See *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1319-22 (7th Cir. 1980) (holding that employee complaint alleging specific violations is sufficient to establish administrative probable cause under § 8(f)(1)).

62. Section 8(f)(1), entitled "Request for inspection by employees or representative of employees . . ." provides:

Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided to the employer or his agent no later than at the time

Court used section 8(f)(1) to illustrate when evidence of a specific violation would be sufficient to obtain an administrative search warrant.⁶³ The Court, however, did not address the scope of the Secretary's authority under section 8(f)(1).⁶⁴ After examining the language of the statute, the Third Circuit held that section 8(f)(1) does not grant discretionary inspection authority to the Secretary but rather mandates that, upon receiving an employee request for inspection, the Secretary must undertake the inspection as soon as practicable.⁶⁵

In summary, under the Third Circuit's interpretation of section 8, the Secretary of Labor may establish probable cause to obtain an administrative search warrant in three ways. First, under section 8(f)(1), the warrant application may be based upon an employee complaint of specific violations.⁶⁶ Second, under section 8(a), the warrant application may contain a detailed description of the neutral criteria used to select a

of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. *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 as soon as practicable, to determine if such violation or danger exists.* If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

Occupational Safety and Health Act § 8(f)(1), 29 U.S.C. § 657(f)(1) (1988) (emphasis added).

63. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 n.16 (1978). For further discussion on the Supreme Court's treatment of administrative probable cause in the employee complaint context, see *supra* note 53.

64. *International Matex*, 928 F.2d at 623 ("*Barlow's*, however, addresses only inspections under section 8(a) and does not consider constitutional requirements for section 8(f)(1) inspections based on employee complaints."); see also George S. Leone, Note, *The Permissible Scope of OSHA Complaint Inspections*, 49 U. CHI. L. REV. 203 (1982); Maczynski, Note, *supra* note 13, at 1254-55, 1264.

65. *International Matex*, 938 F.2d at 623. For the full text of § 8(f)(1), see *supra* note 62.

66. The Secretary's authority to conduct administrative searches under § 8(f)(1) is rarely challenged. The targeted facility usually contests the scope of the search authorized in the warrant that is issued pursuant to an employee complaint. See, e.g., *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1068 (11th Cir. 1982) (finding warrant issued validly pursuant to § 8(f)(1) as long as scope of inspection bears an appropriate relationship to violation alleged in complaint); *Hern Iron Works v. Donovan*, 670 F.2d 838, 841 (9th Cir. 1982) (holding issue of warrant in response to employee health and safety complaint pursuant to § 8(f)(1) reasonable even though complaint was over one year old), *cert. denied*, 459 U.S. 830; *Marshall v. Horn Seed Co.*, 647 F.2d 96, 102 (10th Cir. 1981) (holding that warrant application issued pursuant to employee complaint must contain "plausible basis for believing that a violation is likely to be found"); *Marshall v. North Am. Car Co.*, 626 F.2d 320, 322-24 (3d Cir. 1980) (indicating that § 8(f) authorizes inspections pursuant to an employee complaint; however, scope of inspection "must bear an appropriate relationship to the violations alleged in the complaint"); *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625

particular company for inspection.⁶⁷ Third, under the Third Circuit's broad interpretation of section 8(a) in *Matex*, the Secretary may use conventional means of establishing probable cause by producing specific evidence of violations.⁶⁸

B. *What Constitutes Sufficient Probable Cause to Obtain an Administrative Search Warrant?*

After determining that the Secretary could obtain a search warrant based upon specific evidence of violations, the Third Circuit attempted to formulate a standard for establishing probable cause in an administrative search context.⁶⁹ The court noted that no clear precedent identifies the "quantum and quality of specific evidence [necessary] to establish [administrative] probable cause."⁷⁰ Although the Supreme

F.2d 1313, 1319 (7th Cir. 1980) (finding employee complaint sufficient to establish administrative probable cause).

67. *Barlow's*, 436 U.S. at 321 ("[A] warrant showing that a specific business ha[d] been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the [OSH] Act derived from neutral sources . . . would protect an employer's Fourth Amendment rights."); *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967) (holding that "'probable cause' to issue a warrant to inspect must exist if reasonable . . . standards for conducting an area inspection are satisfied"); see also *In re Trinity Indus.*, 898 F.2d 1049, 1051 (5th Cir. 1990) (warrant application valid if "1) the warrant is sought pursuant to a plan based on sufficient specific neutral criteria; and 2) the warrant application adequately explains why an inspection of the particular establishment is within the program"); *Pennsylvania Steel Foundry & Mach. Co. v. Secretary of Labor*, 831 F.2d 1211, 1215 (3d Cir. 1987) (requiring that "warrant application describe the program and aver that the worksite fits within the program").

68. *International Matex*, 928 F.2d at 622; see also *Barlow's*, 436 U.S. at 320 (administrative probable cause to justify issuance of search warrant may be based on "specific evidence of an existing violation"); *In re Cerro Copper Prods. Co.*, 752 F.2d 280, 282 (7th Cir. 1985) (specific evidence of an existing violation is sufficient to establish probable cause); *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 957 (11th Cir. 1982) (warrant may be based upon specific evidence supporting belief that there are existing violations).

69. *International Matex*, 928 F.2d at 623. The Fourth Amendment requires that a warrant be supported by probable cause. U.S. CONST. amend. IV. This requirement ensures that the basic purpose of the Fourth Amendment is met: "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara*, 387 U.S. at 528.

70. *International Matex*, 928 F.2d at 623. The Supreme Court has defined administrative probable cause only in the context of a programmed inspection. See *Barlow's*, 436 U.S. at 321 (stating that employer's Fourth Amendment rights protected if warrant indicates employer chosen for OSHA search on the basis of a general administrative enforcement plan); *Camara*, 387 U.S. at 528 (inspecting on the basis of neutral administrative criteria "safeguards the privacy and security of individuals against arbitrary invasions by government officials"); see also O'Brian, Note, *supra* note 13, at 1195-98 (commenting on the appropriateness of the reduced standard of probable cause utilized in the administrative search context).

The lack of guidance from the Supreme Court on how to evaluate the evidence offered to support an administrative search warrant has resulted in the lower federal courts applying widely divergent standards when reviewing the ev-

Court in *Barlow's* held that an administrative search warrant may be based upon specific evidence of violations, the Court did not address the appropriate degree of probable cause necessary to sustain such a warrant.⁷¹

The Third Circuit relied upon decisions from the United States Courts of Appeals for the Tenth and Eleventh Circuits to design its own standard for establishing administrative probable cause. In *Marshall v. Horn Seed Co.*,⁷² the Tenth Circuit formulated a standard to assess probable cause in an employee complaint context. The *Horn Seed* court held that OSHA must present evidence establishing a plausible basis for believing that a violation is *likely* to be found.⁷³ The Eleventh Circuit, in *West Point-Pepperell, Inc. v. Donovan*,⁷⁴ adopted a similar standard for reviewing a warrant application submitted by OSHA.⁷⁵ The Eleventh Cir-

idence offered to support such a warrant. For a discussion on the different standards used by the lower federal courts to evaluate probable cause, see *supra* note 53.

71. *Barlow's*, 436 U.S. at 320-21. In a footnote, the Court provided an illustration of when specific evidence could be used to establish probable cause. *Id.* at 320 n.16. For further discussion of this footnote, see *supra* note 53. See also Maczynski, Note, *supra* note 13, at 1254 n.5 (noting that *Barlow's* Court failed to define degree of probable cause necessary to sustain warrant application); O'Brian, Note, *supra* note 13, at 1184 (indicating that *Barlow's* did not address appropriate standard of probable cause in nonroutine search context).

72. 647 F.2d 96 (10th Cir. 1981). Under the authority of § 8(f)(1), OSHA applied for a warrant to inspect Horn Seed's premises. *Id.* at 98-99. In support of its application, OSHA attached an affidavit from one of its own compliance officers. *Id.* at 98. The affidavit stated that the Oklahoma City Area Office had received several complaints from Horn Seed's employees alleging OSHA violations; the affidavit also contained the substance of the complaints. *Id.* The complaints themselves, however, were not attached to the warrant application, and OSHA failed to offer its basis for believing the substance of the complaints. *Id.* at 103-04. The Tenth Circuit, therefore, concluded that the warrant was deficient because it failed to provide a basis for the reviewing court to evaluate the veracity of the complaints. *Id.* at 104.

73. *Id.* at 102-03. The court stated:

When the warrant application is grounded . . . upon "specific evidence" of violations such as an employee complaint, there must be some plausible basis for believing that a violation is *likely* to be found. The facts offered must be sufficient to warrant further investigation [T]here must be some basis for believing that a complaint was actually made, that the complainant was sincere in his assertion that a violation exists, and he had some plausible basis for entering a complaint.

Id. In order to successfully obtain a warrant pursuant to an employee complaint, the accompanying affidavits should contain the name of the person at OSHA who received the complaint, the source of the complaint, the facts underlying the complaint, any steps taken by OSHA to verify the complaint, and any personal observations of OSHA personnel about the circumstances surrounding the complaint, including evidence of past violations. *Id.* at 103.

74. 689 F.2d 950 (11th Cir. 1982).

75. *Id.* at 958. OSHA had offered evidence supporting its belief that "seven specific violations of OSHA cotton dust and respirator regulations" existed at West Point-Pepperell. *Id.* at 954. OSHA had conducted 57 off-site and 13 on-site interviews with West Point-Pepperell employees after receiving a number of

cuit required OSHA to present enough evidence to support a reasonable suspicion that a violation exists at the targeted site.⁷⁶

The Third Circuit evaluated the evidence OSHA presented in the warrant application using the standards for administrative probable cause adopted by the Tenth and Eleventh Circuits.⁷⁷ The court first addressed the sufficiency of the two complaints.⁷⁸ Adopting the standard of probable cause set forth in *Horn Seed*, the *International Matex* court concluded that the magistrate had a basis for believing that the complaints were actually made.⁷⁹ The court, however, did not consider whether the magistrate's determination of probable cause was correct with respect to the complaints.⁸⁰ The Third Circuit instead based its holding upon the overwhelming evidence of specific violations contained in the accompa-

complaints about OSHA's cotton dust and respirator regulations. *Id.* at 953-54. These interviews led OSHA to believe that at least seven violations of these regulations existed at the Lindale cotton mill. *Id.* at 954. In the warrant application, OSHA summarized the information gained from the interviews that supported its belief that the violations existed. *Id.* at 958. OSHA also included copies of the complaints and relevant OSHA regulations. *Id.*

76. *Id.* at 958 (citing *Horn Seed*, 647 F.2d at 102). The Eleventh Circuit noted:

[T]he evidence of a specific violation required to establish administrative probable cause . . . must at least show that the proposed inspection is based upon a reasonable belief that a violation has been or is being committed and not upon a desire to harass the target of the inspection.

Id. Applying this standard, the Eleventh Circuit found that "the warrant application unquestionably contained sufficient specific evidence of a violation to support a finding of probable cause." *Id.* For the specific evidence contained in the warrant application, see *supra* note 75.

77. *Martin v. International Matex Tank Terminals*, 928 F.2d 614, 624 (3d Cir. 1991). When reviewing the evidence OSHA offered to support its warrant application, the court may only consider evidence contained within the four corners of the application given to the magistrate. *Id.* at 620. The reviewing court must also "give great deference to the magistrate's determination that probable cause existed" to support the warrant. *Id.* OSHA had offered as supporting evidence the affidavits from Compliance Officer Secor, who conducted the initial consensual inspection, and from OSHA Area Director Kulick. *Id.* at 618. These affidavits contained the personal observations of the Compliance Officers, Secor and Sawyer, as well as a calculation of International Matex's lost workday incident rate that was three and a half times above the national rate. *Id.* The application also contained copies of the written complaints of Mayor Collins and Union President Horvath. *Id.* For further discussion of the contents of Secor's and Kulick's affidavits, see *supra* notes 25 & 29. Sections of Mayor Collins' and Union President Horvath's complaints are reproduced, *supra* notes 20 & 27.

78. *Matex*, 928 F.2d at 624.

79. *Id.* The Third Circuit had not previously addressed how to evaluate administrative probable cause when a warrant is requested under § 8(f)(1) pursuant to an employee complaint. In *North American Car*, the Third Circuit addressed only the appropriate scope of an inspection conducted pursuant to an employee complaint. *Marshall v. North Am. Car Co.*, 626 F.2d 320, 324 (3d Cir. 1980) (holding that "scope of the inspection must bear an appropriate relationship to the violations alleged in the complaint").

80. *Matex*, 928 F.2d at 624. The court only noted that the magistrate had a reasonable basis for believing that the complaints were actually made because

nying affidavits of the OSHA inspectors who conducted the initial consensual inspection.⁸¹ Applying the standard for probable cause developed in *West Point-Pepperell*, the Third Circuit concluded that the warrant was issued "based upon a reasonable belief that a violation has been or is being committed."⁸²

C. *What Is the Appropriate Scope of Inspection?*

After concluding that sufficient probable cause existed to sustain the warrant, the Third Circuit turned its attention to the scope of the warrant issued to OSHA.⁸³ Under the Fourth Amendment, the scope of the search must be reasonable.⁸⁴ The Third Circuit had previously addressed the scope of an administrative search warrant in two situations. In *Marshall v. North American Car Co.*,⁸⁵ the Third Circuit held that if a warrant is issued pursuant to an employee complaint, "the scope of the [authorized] inspection must bear an *appropriate relationship* to the violations alleged in the complaint."⁸⁶ Therefore, a wall-to-wall search may not always be justified.⁸⁷ In contrast, when the warrant is sought as part

the complaints were attached to the warrant application. *Id.* The court did not determine if the complaints alone could support the issuance of the warrant. *Id.*

81. *Id.* at 625. The court found the first hand observations of the OSHA compliance officers to be a particularly reliable source of information. *Id.* ("[E]mployee complaints of unsafe conditions, . . . observations of [a] compliance officer . . . and accident records are ample evidence to support a finding of probable cause for an administrative search." (citing *Plum Creek Lumber Co. v. Hutton*, 608 F.2d 1283, 1287 (9th Cir. 1979))). Additionally, OSHA had offered its determination of International Matex's lost workday incident rate. *Id.* This rate was three and a half times the national rate. *Id.*

82. *Id.* (quoting *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 958 (11th Cir. 1982)).

83. *Id.* The magistrate had issued a very broad warrant authorizing up to four OSHA inspectors to investigate International Matex's entire Bayonne facility. *Id.* For the full text of the warrant, see *supra* note 32.

84. U.S. CONST. amend. IV. The purpose of the Fourth Amendment is to protect against "unreasonable searches and seizures." *Id.*; see also *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1324 (11th Cir. 1980) ("The ultimate requirement of the Fourth Amendment is that any proposed search or inspection be reasonable.").

85. 626 F.2d 320 (3d Cir. 1980).

86. *Id.* at 324 (emphasis added). In *North American Car*, the scope of the inspection exceeded the areas covered by the employee complaint. *Id.* at 322. The employee complained of violations in only three areas of the plant: the steamrack, an overhead crane, and one of the paint shops. *Id.* at 321. The warrant, however, authorized an inspection of the entire plant. *Id.* at 322.

87. *Id.* at 323 ("[T]he scope of an inspection must bear some relationship to the alleged violations in the employee complaint."); see also *Dole v. Trinity Indus.*, 904 F.2d 867, 868-69 (3d Cir. 1990) (limiting inspection of plant under § 8(f)(1) to conditions described in employee complaint); *In re Cerro Copper Prods.*, 752 F.2d 280, 282-83 (7th Cir. 1985) (holding wall-to-wall search instituted upon filing of employee complaint not unreasonable given that company is high hazard workplace); *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 962-63 (11th Cir. 1982) (scope of warrant must bear reasonable relationship to

of a comprehensive enforcement program, a wall-to-wall inspection has been considered necessary to implement "the broad remedial purpose of the OSH Act to ensure that employees are provided a safe workplace."⁸⁸ In *Pennsylvania Steel Foundry & Machine Co. v. Secretary of Labor*,⁸⁹ the Third Circuit upheld the validity of a warrant authorizing a wall-to-wall inspection because the warrant was validly based upon OSHA's national enforcement plan for foundries.⁹⁰

The *Matex* court found neither of these cases controlling because the warrant at issue in *Matex* was not based solely upon an employee complaint, nor was it based upon a programmed plan for enforcement.⁹¹ The court contemplated extending *North American Car's* "appropriate relationship" test to section 8(a) inspections based upon evidence of discrete and isolated violations.⁹² The court, however, concluded that it was "unnecessary" to determine if such a test should apply to section 8(a) inspections, because in this case "specific evidence provides that violations permeated the entire facility; thus, a wall-to-wall inspection was reasonable."⁹³

employee complaint); *Donovan v. Blue Ridge Pressure Castings*, 543 F. Supp. 53, 60 (M.D. Pa. 1981) (scope of warrant must be limited to conditions identified in employee complaint). *But see* *Hern Iron Works v. Donovan*, 670 F.2d 838, 840-41 (9th Cir. 1982) (reasonable to permit general inspection given OSHA's purpose in promoting employee safety); *Burkart Randall*, 625 F.2d at 1325 ("[W]here probable cause to conduct as [sic] OSHA inspection is established on the basis of employee complaints, the inspection need not be limited in scope to the substance of those complaints.").

88. *Martin v. International Matex Tank Terminals*, 928 F.2d 614, 626 (3d Cir. 1991) (citing *Burkart Randall*, 625 F.2d at 1324-25).

89. 831 F.2d 1211 (3d Cir. 1987).

90. *Id.* at 1216. The warrant was ordered pursuant to § 8(a). *Id.* at 1212.

The application set forth that the foundry had been cited in 1973 for three violations The warrant application also described the National Emphasis Program (NEP) which had been established in 1976 "to reduce hazards in industries reporting a higher than average rate of injuries and illnesses." The application further stated that iron and steel foundries were among the first target industries selected for inspections, citing foundry illness and injury rates of 26.6 per 100 workers as compared to the national average of 8.8.

Id. (citation omitted) (quoting Appendix at 72, *Pennsylvania Steel Foundry* (No. 86-3546)). The Third Circuit upheld the validity of the wall-to-wall search warrant because the NEP and the evidence of past violations provided a rational basis for the selection of Penn Steel. *Id.* at 1216.

91. *International Matex*, 928 F.2d at 626. The evidence OSHA offered to support the warrant application included International Matex's high lost workday incident rate (LWDI) rate, employee complaints, and the personal observations of two OSHA compliance officers. *Id.*

92. *Id.*

93. *Id.* The court stressed the reliability of the affidavit of Compliance Officer Secor who examined the facility during the initial consensual inspection. *Id.* The affidavits of Secor and Area Director Kulick indicated serious electrical hazards throughout the facility which presented serious electrocution, fire and explosion hazards. *Id.* at 625. The mayor's and the union president's complaints alone would not have supported such a broad search, but "[t]he cumula-

IV. CONCLUSION

The Third Circuit has interpreted OSHA's authority to obtain a search warrant under section 8(a) very broadly.⁹⁴ Under its interpretation, OSHA has two available methods for obtaining a warrant under section 8(a). First, under the widely accepted interpretation of section 8(a), OSHA may establish that the facility slated for inspection was chosen via a neutral administrative plan for enforcement of OSHA standards.⁹⁵ Second, under the interpretation of section 8(a) adopted in *International Matex*, OSHA may obtain a warrant by presenting evidence supporting a "reasonable belief that a violation has been or is being committed."⁹⁶ This decision, however, leaves two issues unresolved. First, the decision does very little to clarify the "quantum and quality" of evidence necessary to establish administrative probable cause. Second, the decision does not define the appropriate scope of a warrant issued pursuant to evidence of specific violations.

In *Matex*, the Third Circuit attempted to define the "quantum and quality" of evidence that OSHA must present to obtain a warrant application under section 8(a). The Third Circuit's interpretation of section 8(a) allows OSHA to obtain a search warrant upon a showing of "conventional" administrative probable cause.⁹⁷ To make this showing, OSHA must submit evidence establishing a "reasonable belief that a violation has been or is being committed."⁹⁸ However, this standard for determining administrative probable cause does not clarify what kind or how much evidence OSHA must present to support a warrant application under this interpretation of section 8(a). *International Matex* represents an easy case because of the overwhelming evidence gathered by OSHA compliance officers supporting the inference that specific violations of OSHA regulations permeated the entire facility.⁹⁹ This type of first hand knowledge, acquired by OSHA's own representatives, provides ample evidence to meet this standard of probable cause. The Third Circuit also hinted that evidence of an abnormally high lost work-day incident rate may also be sufficient to establish administrative prob-

tive evidence of International Matex's high LWDI rate, the employee complaints, and the personal observations of the compliance officer[s] during the consensual inspection provided a plausible basis for believing that [violations were] likely to be found throughout International Matex's facility." *Id.* at 626.

94. *Id.* at 625-26.

95. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321 (1978). For further discussion on how OSHA may establish probable cause using this method, see *supra* note 67 and accompanying text.

96. *Matex*, 928 F.2d at 625 (quoting *West Point-Pepperell Inc. v. Donovan*, 689 F.2d 950, 958 (11th Cir. 1982)).

97. *Id.* at 623-25. For a discussion of this author's definition of conventional probable cause, see *supra* note 40.

98. *Matex*, 928 F.2d at 625.

99. *Id.* at 623-24.

able cause.¹⁰⁰ The court, however, gave little guidance beyond these two situations as to what OSHA must demonstrate to establish a "reasonable belief that a violation has been or is being committed."¹⁰¹

The Third Circuit recognized that an employee complaint may also establish probable cause under section 8(f)(1), but the court again failed to explain how to evaluate the sufficiency of a warrant application submitted pursuant to the complaint. The Third Circuit did not interpret section 8(f)(1) as granting the Secretary of Labor discretionary authority to initiate an investigation into the circumstances of the complaint. Rather, the court interpreted this section as mandating the Secretary to inspect as soon as practicable when an employee requests an inspection.¹⁰² The court, however, upheld the warrant issued against International Matex because of the overwhelming evidence of specific violations, not because of the complaints.¹⁰³ Therefore, the Third Circuit, in dicta, adopted the standards formulated in *Horn Seed* to evaluate the sufficiency of an employee complaint under section 8(f)(1), but it did not address how this standard would be applied if OSHA rested its authority solely upon an employee complaint.¹⁰⁴

The second issue left unresolved was the appropriate scope of a warrant issued under section 8(a) for a nonroutine search. The Third Circuit alluded to the "appropriate relationship" test of *North American Car*, but then found it unnecessary to determine whether this was the appropriate test to apply in this particular case.¹⁰⁵ *International Matex* presented an easy case because overwhelming evidence existed to show that violations were present throughout the entire facility. The reluctance of the Third Circuit to address the appropriate scope of a search warrant issued pursuant to evidence of specific violations will likely spawn future litigation over the proper scope of such warrants.

Nonroutine searches entail a high degree of OSHA discretion in evaluating evidence and selecting a site for inspection.¹⁰⁶ The search

100. The Third Circuit noted that OSHA presented the magistrate with evidence that International Matex's LWDI rate was three and a half times the national rate. *Id.* at 625. According to the court, such a wide deviation alone may provide a "plausible basis for believing that a violation is *likely* to be found." *Id.* (quoting *Marshall v. Horn Seed Co.*, 647 F.2d 96, 102 (10th Cir. 1980)).

101. *Id.* at 625.

102. *Id.* at 620.

103. *Id.* at 624-25.

104. *Id.* at 624. In order to obtain a warrant based upon an employee complaint, OSHA must present evidence providing a "basis for believing that a complaint was actually made, that the complainant was sincere in his assertion that a violation exists, and he had some plausible basis for entering a complaint" *Marshall v. Horn Seed Co.*, 647 F.2d 96, 102-03 (10th Cir. 1980).

105. *Matex*, 928 F.2d at 626. None of the other circuits have addressed this issue.

106. *Horn Seed*, 647 F.2d at 101-04 (noting that despite *Barlow's* warrant requirement, choice of site for inspection is still highly discretionary); *see also*, O'Brian, Note, *supra* note 13, at 1199 ("Because officials authorized to conduct

itself can be highly intrusive.¹⁰⁷ OSHA officials search for violations in much the same way that police search for evidence linking a suspect to a crime.¹⁰⁸ Depending on the severity of the violations, the targeted establishment could be subject to expensive penalties.¹⁰⁹ Commentators have urged that only the heightened standard of probable cause used in the criminal context is sufficient to protect the target industries' Fourth Amendment rights.¹¹⁰ Because our society highly values the right to be free from arbitrary government invasion, the *International Matex* decision will certainly engender future litigation to determine what level and type of evidence are necessary to establish probable cause and to define the appropriate scope of an inspection based upon the available evidence.

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nonroutine searches possess more discretion to select target establishments and because nonroutine searches are more intrusive than routine searches, nonroutine searches should require warrants based on traditional probable cause.'").

107. For example, in the Seventh Circuit, a single employee complaint can trigger a full scope, wall-to-wall inspection. *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1325 (7th Cir. 1980) ("[W]here probable cause to conduct as [sic] OSHA inspection is established on the basis of employee complaints, the inspection need not be limited in scope to the substance of those complaints.").

108. O'Brian, Note, *supra* note 13, at 1199.

109. See 29 U.S.C. § 666 (1988). This section authorizes OSHA to assess civil and criminal penalties against an employer for violations of regulations promulgated pursuant to the Act. For example, an employer, who willfully or repeatedly violates such regulations, may be fined up to \$10,000 for each violation. *Id.* § 666(a). If the employer fails to correct the violation after a citation has been issued, he may be fined \$1,000 for each day the violation persists. *Id.* § 666(d).

110. See, e.g., Strossen, *supra* note 46, at 1254-66. "[S]tate[s] should be required to use an alternative measure which is *substantially* less intrusive than the challenged measure, even if the less intrusive measure is *somewhat* less effective . . . in promoting the states' [enforcement] goals." *Id.* at 1254; see also Wax, *supra* note 40, at 928-30 (noting that regulation of health, safety and environmental areas has increasingly resulted in weakening of Constitutional protection afforded against government intrusion); O'Brian, Note, *supra* note 13, at 1198-1207 (stating that high levels of discretion and intrusiveness associated with nonroutine administrative searches require heightened standard of criminal probable cause to sustain warrants for such searches).