ADMINISTRATIVE PROCEDURE—REMEDIES—EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIRED WHEN COMPANY CHALLENGES CONSTITUTIONALITY OF OSHA INSPECTION WARRANT—*Babcock & Wilcox Co. v. Marshall*, 610 F.2d 1128 (3d Cir. 1979).

Under the terms of the Occupational Safety and Health Act of 1970 (the Act),[1] the Occupational Safety and Health Review Commission (Review Commission) was created and charged with "carrying out adjudicatory functions under [the Act]."[2] Because of the adjudicatory authority vested in the Review Commission, companies which desire to contest citations issued by compliance officers[3] are required to exhaust their administrative remedies before seeking redress in the courts.[4] When there is a challenge to an Occupational Safety and Health Administration (OSHA) inspection on constitutional

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[1] 29 U.S.C. §§ 651-678 (1976). The Act was promulgated "to reduce the number and severity of work-related injuries and illnesses which, despite current efforts of employers and government, are resulting in ever-increasing human misery and economic loss." [1970] U.S. CODE CONG. & AD. NEWS 5177, 5177.

[2] 29 U.S.C. § 651(b)(3) (1976). The Review Commission is independent and separate from the Department of Labor and has its own adjudicatory powers. Babcock & Wilcox Co. v. Marshall, 7 OSHC (BNA) 1315, 1316 (W.D. Pa. May 16, 1979), *aff'd*, 610 F.2d 1128 (3d Cir. 1979).

[3] Babcock & Wilcox Co. v. Marshall, 7 OSHC (BNA) 1315, 1316 (W.D. Pa. May 16, 1979), *aff'd*, 610 F.2d 1128 (3d Cir. 1979). Compliance officers act as authorized representatives for the Secretary of Labor and are empowered to inspect workplaces and issue citations for violations of the Act. *See* 29 U.S.C. §§ 657(a), 658(a), 659(a) (1976).

[4] Babcock & Wilcox Co. v. Marshall, 7 OSHC (BNA) 1315, 1316 (W.D. Pa. May 16, 1979), *aff'd*, 610 F.2d 1128 (3d Cir. 1979). As stated in 1938 by the United States Supreme Court, the requirement of exhaustion of administrative remedies is based upon the well established principle that when an administrative remedy has been promulgated by the legislature, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) (footnote omitted).

The Act specifies the procedure by which an employer must exhaust its administrative remedies when contesting a citation. 29 U.S.C. §§ 659-661 (1976 & Supp. II 1978). *See* Babcock & Wilcox, 7 OSHC (BNA) at 1316. If an employer wishes to exercise its right to contest a citation, it must notify the Secretary of Labor within fifteen days. 29 U.S.C. § 659(c) (1976). Such notice initiates proceedings before the Review Commission. *Id.*

Thereafter, the parties are afforded an opportunity to be heard before an administrative law judge of the Review Commission. 29 U.S.C. §§ 659(c), 661(i) (1976 & Supp. II 1978). Administrative law judges are appointed by the Chairman of the Review Commission to assist in administrative operations. 29 U.S.C. § 661(d) (Supp. II 1978). After a hearing, the administrative law judge is required to issue a report with recommendations to the Commission. *Id.* § 661(i). Within thirty days the decision of the administrative law judge becomes a final order, unless a Commission member requests that the decision be reviewed. *Id.* Within sixty days after the order becomes final, either the Secretary of Labor or any other aggrieved party may appeal to the United States Court of Appeals. 29 U.S.C. § 660(a)-(b) (1976).

grounds,[5] however, the question arises whether a company must similarly exhaust its remedies prior to demanding relief in the federal courts. In *Babcock & Wilcox Co. v. Marshall*,[6] an employer attacked the propriety of three OSHA inspection warrants on fourth amendment grounds. The Court of Appeals for the Third Circuit resolved the issue in favor of requiring exhaustion of administrative remedies.[7]

The employer, Babcock and Wilcox Co. (Babcock), was subject to three separate inspections as a result of three employee complaints received by OSHA.[8] In order to enter Babcock's premises to conduct each inspection, the compliance officers obtained *ex parte* warrants from a United States magistrate.[9] The last two warrants were limited in scope by the magistrate to prevent "wall to wall" inspections of the entire plant.[10] Each inspection resulted in the issuance of citations for violations of the Act.[11] Although Babcock timely exercised its right to contest the citations by initiating an action before the administrative law judge, the administrative proceedings were never completed.[12]

Rather than exhausting administrative remedies, Babcock filed

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[5] Under the recent Supreme Court decision in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), compliance officers must obtain either the employer's consent or a search warrant in order to inspect workplaces. *See* notes 32-41 *infra* and accompanying text.

[6] 610 F.2d 1128 (3d Cir. 1979).

[7] *Id.* at 1131.

[8] *Id.* Under the Act, "[a]ny 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. . . ." 29 U.S.C. § 657(f)(1) (1976). This notice must be in writing, must be signed by the employee, and must set forth the grounds for the notice with reasonable particularity. *Id.* If "the Secretary determines [that] there are reasonable grounds to believe that such violation or danger exists," an inspection will be ordered. *Id. See* Marshall v. North American Car Co., No. 79-2374 (3d Cir. July 24, 1980); 29 C.F.R. § 1903.11(a)-(b) (1979).

[9] 610 F.2d at 1131. On the occasions of the first and second inspections, the compliance officers first attempted to obtain consent to search Babcock's premises. *Id.* at 1132. However, Babcock denied entry, and *ex parte* inspection warrants had to be obtained. *Id.* Since the compliance officers were unable to gain entry without warrants to conduct the first two inspections, the OSHA officials secured a warrant at the outset for the third inspection. *Id.*

[10] 610 F.2d at 1132. There was some disagreement whether the compliance officers acted within the scope of the three *ex parte* warrants. *Id.* Babcock contended that OSHA never advised it "that the scope of any warrant was at all limited. Rather, the OSHA Compliance Officers who executed the warrants represented that each warrant authorized a wall-to-wall inspection of the Company's total plant, without regard to the underlying employee complaint." Brief of Appellant at 5, Babcock & Wilcox Co. v. Marshall, 610 F.2d 1128 (3d Cir. 1979). OSHA contended that the inspection officers followed the limitations imposed by the magistrate. 610 F.2d at 1132.

[11] 610 F.2d at 1132.

[12] *Id.*

suit in the district court to quash the three inspection warrants[13] and to enjoin OSHA from any further litigation relating to these inspections.[14] The complaint also sought declaratory relief, demanding that the district court declare section 8(a) of the Act[15] unconstitutional to the extent that it permitted *ex parte* warrants and allowed warrants to issue without specific limitations in scope.[16]

The district court granted defendants' motion to dismiss, holding that, since there were no extraordinary circumstances to require district court review, Babcock had to exhaust its administrative remedies by following the guidelines of the Act.[17] On appeal, the Court of Appeals for the Third Circuit affirmed and deferred review of Babcock's complaint to the Review Commission.[18]

The issue whether exhaustion of administrative remedies is required when an OSHA inspection is challenged on constitutional grounds has been addressed by other courts of appeals. In *Weyerhaeuser Co. v. Marshall*,[19] the Court of Appeals for the

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[13] *Id.* Babcock's motion to quash was considered moot by the district court because the searches had been completed before the motions were filed. Babcock & Wilcox Co. v. Marshall, 7 OSHC (BNA) 1315, 1318 (W.D. Pa. May 16, 1979), *aff'd*, 610 F.2d 1128 (3d Cir. 1979). The court of appeals, however, concluded that it would treat Babcock's motion to quash the warrants as one to suppress evidence, since the warrants had already been executed. 610 F.2d at 1133-34. *See* Marshall v. Whittaker Corp., 610 F.2d 1141, 1144-46 (3d Cir. 1979).

[14] 610 F.2d at 1132. Babcock insisted that the Secretary of Labor should be permanently enjoined from taking any further action concerning the warrants, searches, or citations. Babcock & Wilcox Co. v. Marshall, 7 OSHC (BNA) 1315, 1317 (W.D. Pa. May 16, 1979), *aff'd*, 610 F.2d 1128 (3d Cir. 1979).

[15] 29 U.S.C. § 657(a) (1976). This section provides as follows:

> (a) 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] plant . . . where work is performed by an employee of an employer; and
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> (2) to inspect and investigate during regular working hours . . . within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures . . . .

Id.

[16] 610 F.2d at 1132. Babcock asserted that the investigations violated its fourth amendment rights because the employee complaints were too ambiguous and nonspecific to provide probable cause, because the warrants failed to specify the basis for the probable cause determination, and because the warrants were issued *ex parte* and without specific limitations in scope. Babcock & Wilcox Co. v. Marshall, 7 OSHC (BNA) 1315, 1317 (W.D. Pa. May 16, 1979), *aff'd*, 610 F.2d 1128 (3d Cir. 1979). *See* Cerro Metal Prods. v. Marshall, 620 F.2d 964 (3d Cir. 1980).

[17] Babcock & Wilcox Co. v. Marshall, 7 OSHC (BNA) 1315, 1318 (W.D. Pa. May 16, 1979), *aff'd*, 610 F.2d 1128 (3d Cir. 1979). Exhaustion should proceed according to the statutory guidelines of 29 U.S.C. §§ 659-661. *See* note 4 *supra*.

[18] 610 F.2d at 1131.

[19] 592 F.2d 373 (7th Cir. 1979). The facts in *Weyerhaeuser* were similar to those in *Babcock & Wilcox*. The compliance officers conducted a safety and health inspection of Weyerhaeuser's

Seventh Circuit took a position contrary to the *Babcock & Wilcox* decision, holding that the employer "should be permitted to challenge the warrant's validity in district court."[20] The court reasoned that exhaustion "should not be required with respect to an issue over which the agency has no expertise," such as "the constitutionality of its own enabling act" or the validity of a warrant.[21] Furthermore, the court concluded that a decision in the pending administrative proceedings would not moot the probable cause issue, since the employer would remain injured by the illegal inspection even if OSHA dismissed the citations.[22]

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manufacturing plant after receiving an employee complaint. *Id.* at 375. The inspections were conducted pursuant to 29 U.S.C. § 657(f)(1). 592 F.2d at 375. *See* note 8 *supra*. The employer filed suit in the federal district court seeking an injunction restraining the administrative proceeding and a declaratory judgment that its fourth amendment rights had been violated by searches pursuant to an improper warrant. 592 F.2d at 375. *See* note 34 *infra* and accompanying text. The lower court found for the employer. 592 F.2d at 375.

[20] 592 F.2d at 377.

[21] *Id.* at 376. The *Weyerhaeuser* court found support for its decision in several district court opinions which had previously addressed the same issue. In Hayes-Albion Corp. v. Marshall, 5 OSHC (BNA) 1968 (N.D. Ohio Oct. 4, 1977), the district court had concluded:

> No significant interest would be served by requiring plaintiff to exhaust its administrative remedies. The expertise of the Occupational Safety and Health Review Commission with regard to assuring this nation's workers with safe and healthful working conditions under the authority granted in the Occupational Safety and Health Act would not aid in the judicial determination of the constitutionality of the administrative search and seizure in this case.

Id. at 1969. *See also* Downen v. Warner, 481 F.2d 642, 643 (9th Cir. 1973).

In Morris v. United States Dep't of Labor, 439 F. Supp. 1014 (S.D. Ill. 1977), the district court stated that exhaustion of administrative remedies was not required in order to adjudicate the validity of an OSHA warrant. The reasoning behind the court's decision was threefold. First, probable cause was "not within the competency and expertise of the OSHA Review Commission." *Id.* at 1018. Second, the employer would be unfairly burdened by incurring the costs of exhausting its administrative remedies before receiving a court ruling on the validity of the warrant. Finally, the court concluded that it "must retain the power to determine the legality of its process" since the attack was upon a warrant issued by this same court through its magistrate. *Id.*

In Barlow's, Inc. v. Usery, 424 F. Supp. 437 (D. Idaho 1977), *aff'd sub nom.*, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), the company had challenged the constitutionality of the inspection provisions of the Act itself, rather than the validity of the OSHA inspection warrant. The Secretary of Labor, in attempting to prevent the district court from deciding the merits, argued that judicial review was improper because Congress had designated the Review Commission as the exclusive forum and because the employer had to exhaust its remedies. *Id.* at 439. The district court rejected the Secretary's arguments, holding that OSHA lacked the expertise to consider constitutional challenges to its own enabling act. *Id.*

[22] 592 F.2d at 376. In the opinion of the court, "[t]he injury resulting from an illegal inspection is clearly separate from injury relating to the citations, as the former would exist even if OSHA had found no violations of the Act." *Id.* at 376 n.2. Commercial structures are protected by the fourth amendment so that businesses may operate free from unreasonable administrative inspections. Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); Michigan v. Tyler, 436 U.S. 499, 504-05 (1978); See v. City of Seattle, 387 U.S. 541, 543 (1967). *See* note 35 *infra*.

The *Weyerhaeuser* court further stated that "sound judicial administration" required this exception to the general rule that administrative remedies be exhausted.[23] Since a United States magistrate had issued the inspection warrant, and since magistrates are appointed and generally supervised by the district courts, the court of appeals believed that it was appropriate for district courts to review the probable cause determinations of magistrates.[24] If exhaustion of remedies were required, appeals from decisions of the Review Commission would be heard by the court of appeals, completely bypassing the district court.[25]

The position taken by the Court of Appeals for the Seventh Circuit in *Weyerhaeuser* was rejected by two subsequent court of appeals decisions. The Court of Appeals for the First Circuit in *In re Worksite Inspection of Quality Products, Inc.*[26] and the Eighth Circuit in *Marshall v. Central Mine Equipment Co.*[27] concluded that the employer must exhaust the administrative remedies available through the Review Commission before seeking relief in the courts. Both courts held that the employer should not be permitted to seek redress in the district court unless it could demonstrate that its constitutional rights would not be adequately protected through proceedings in the Review Commission or subsequent appeal to the court of appeals.[28] In both cases, the employer had failed to demonstrate that such an exceptional situation was present.[29]

This conflict among the circuits was well defined by the time the Court of Appeals for the Third Circuit addressed the issue in the case of *Babcock & Wilcox*. Judge Adams, writing for the court, took the position articulated in *Quality Products* and *Central Mine Equipment*, and held that exhaustion of administrative remedies was required when an employer wished to raise a constitutional challenge to an OSHA inspection.[30]

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[23] 592 F.2d at 377.

[24] *Id.* The Magistrates Act of 1976 states in part: "The judges of each United States district court . . . shall appoint United States magistrates," 28 U.S.C. § 631(a) (1976) and "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." *Id.* § 636(b)(3). *See* Bruno v. Hamilton, 521 F.2d 114, 116 (8th Cir. 1975) ("district court has inherent power to review the final decision of its magistrates" unless otherwise provided by statute or rule).

[25] 592 F.2d at 377. *See* note 4 *supra; cf.* Blocksom & Co. v. Marshall, 582 F.2d 1122 (7th Cir. 1978) (court of appeals remanded for district court ruling on probable cause issue rather than deciding issue itself).

[26] 592 F.2d 611 (1st Cir. 1979).

[27] 608 F.2d 719 (8th Cir. 1979).

[28] Central Mine Equip. Co., 608 F.2d at 721; Quality Prods., Inc., 592 F.2d at 615.

[29] Central Mine Equip. Co., 608 F.2d at 722; Quality Prods., Inc., 592 F.2d at 616.

[30] Babcock & Wilcox, 610 F.2d at 1131.

These cases[31] arose in the wake of the Supreme Court decision in *Marshall v. Barlow's, Inc.*,[32] in which the Court held that section 8(a) of the Act[33] was "unconstitutional insofar as it purport[ed] to authorize inspections without warrant" as required by the fourth amendment.[34] The Court reiterated its prior holdings that warrantless searches are generally unreasonable in regard to commercial premises as well as personal residences.[35] While recognizing that searches as to liquor[36] and firearms[37] are exempted from the search warrant requirement, the Court held that OSHA inspections should not be afforded such exceptional status.[38] The *Barlow's* Court con-

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[31] Babcock & Wilcox, 610 F.2d 1128 (3d Cir. 1979); Central Mine Equip. Co., 608 F.2d 719 (8th Cir. 1979); Quality Prods., Inc., 592 F.2d 611 (1st Cir. 1979); Weyerhaeuser, 592 F.2d 373 (7th Cir. 1979).

[32] 436 U.S. 307 (1978).

[33] 29 U.S.C. § 657(a) (1976), *quoted in* note 15 *supra*.

[34] 436 U.S. at 325. The fourth amendment of the United States Constitution 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 . . . describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

In concluding that the warrant requirement should be applied to OSHA inspections, the Court stated: "A warrant . . . would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." 436 U.S. at 323 (footnote omitted).

[35] 436 U.S. at 312-13. In this respect, the *Barlow's* decision was an extension of two prior Supreme Court holdings. In discussing fourth amendment protection with regard to private residences, the Court in Camara v. Municipal Court, 387 U.S. 523 (1967), stated:

> [W]e hold that administrative searches . . . are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual . . . .

Id. at 534.

On the same day, in See v. City of Seattle, 387 U.S. 541 (1967), the Court applied the *Camara* holding to inspections of commercial structures:

> 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 the inspector in the field without official authority evidenced by warrant.

Id. at 543.

[36] *See* Colonnade Corp. v. United States, 397 U.S. 72 (1970). The Court provided an exception from the search warrant requirement for "closely regulated" industries "long subject to close supervision and inspection." *Id.* at 74, 77.

[37] *See* United States v. Biswell, 406 U.S. 311 (1972). The Court recognized warrantless searches for "pervasively regulated business[es]." *Id.* at 316.

[38] 436 U.S. at 312-15. In the opinion of the Court, businesses in regulated industries impliedly consent to be restricted. *Id.* at 313 (citing Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973)). Since the plaintiff before the Court was not such a closely regulated industry, an exemption from the fourth amendment warrant requirement could not be justified on similar grounds. 436 U.S. at 313-14.

cluded, however, that the same level of probable cause required for a search warrant in a criminal investigation was not required in administrative enforcement.[39] For purposes of an administrative search, probable cause may be based either "on specific evidence of an existing violation"[40] or "on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' "[41]

Although the issue in *Babcock & Wilcox* arose from the *Barlow's* decision, the Court of Appeals for the Third Circuit was not concerned with the standards for administrative probable cause. Rather, the *Babcock & Wilcox* court focused on the jurisdictional and institutional competence of the Review Commission to decide challenges to OSHA inspection warrants.[42]

Babcock did not attack the validity of the general rule that administrative remedies must be exhausted. Instead, Babcock argued that the exhaustion doctrine was not applicable to the specific circumstances because a magistrate's decision should be reviewed by district court judges instead of administrative agencies.[43] In response, the court noted that Babcock could have obtained direct district court review of the issuance of the warrant by resisting entry and moving to quash the warrant before it was executed.[44] Since Babcock did not take swift action, it not only failed to prevent what was allegedly an illegal search, but also denied itself the opportunity of district court review.[45] The court further explained that, in adjudicating a challenge to an inspection warrant, the Review Commission would not be directly reviewing the magistrate's ruling because the "decision to issue the inspection warrant is complete and cannot be negated."[46] When the Review Commission analyzes the propriety of the warrant in deciding whether to use the evidence, it is not

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[39] 436 U.S. at 320.

[40] *Id.* The Act permits employees or their representatives to request an inspection by giving written notice to the Secretary of the specific violations. 29 U.S.C. § 657(f)(1) (1976). *See* note 8 *supra*.

[41] 436 U.S. at 320 (quoting Camara v. Municipal Court, 387 U.S. 523, 538 (1967)). If the warrant is issued pursuant to a general administrative plan for enforcement of the Act, the plan must be "derived from neutral sources." 436 U.S. at 321. *See* Rothstein, *OSHA Inspections After Marshall v. Barlow's, Inc.*, 1979 DUKE L. J. 63, 86-98 (1979).

[42] 610 F.2d at 1131.

[43] *Id.* at 1135. *See* note 24 *supra* and accompanying text.

[44] *Id.* at 1135-36. The court realized that these steps would subject Babcock to civil contempt, but rationalized that the alternative would be to presume that magistrates improperly issue inspection warrants based upon incorrect determinations of probable cause. *Id.* at 1136. *See* note 77 *infra*.

[45] *Id.* at 1135-36.

[46] *Id.* at 1136 (footnote omitted).

reversing or upholding the magistrate's action, nor is it contravening a judicial order.[47] Thus, the *Babcock & Wilcox* court believed that the principle of exhaustion applied because "the ongoing procedure here is that initiated by OSHA in the Review Commission, not that of the district court in supervising one of its magistrates."[48]

Babcock also argued that the exhaustion doctrine should not apply because federal courts should determine constitutional issues.[49] The court noted, however, that Babcock had a right to appeal to a court of appeals any adverse determination by the Review Commission;[50] therefore, Babcock would receive judicial review of its constitutional claims. The court further rejected Babcock's contention that a factual record for constitutional claims must be developed in the district court, rather than in the congressionally created Review Commission.[51]

In concluding that the principle of exhaustion was applicable to this situation, the *Babcock & Wilcox* court also noted that a contrary holding would result in hindering the effectiveness of administrative agencies as they operate within statutory schemes.[52] The court

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[47] *Id.* The court emphasized that an OSHA official could decide not to execute a magistrate's warrant and not be in contempt. Likewise, an administrative tribunal could properly refuse to consider evidence which was obtained pursuant to a warrant. *Id. Cf.* Metal Bellow Corp. v. Pylypetz, 6 OSHC (BNA) 1979 (1st Cir. Sept. 1, 1978) (dismissing as moot the appeal from district court denial of motion to quash warrant that OSHA had surrendered without executing).

[48] 610 F.2d at 1137.

[49] *Id.* at 1136.

[50] *Id.* 29 U.S.C. § 660(a) (1976). *See* note 4 *supra.* In so holding, the *Babcock & Wilcox* court viewed the question as "not *whether* the [constitutional] issues may be heard by [a federal] court, but *when*." 610 F.2d at 1136 (emphasis in original) (footnote omitted).

[51] 610 F.2d at 1136. *See* Blocksom & Co. v. Marshall, 582 F.2d 1122, 1124 (7th Cir. 1978) (review of constitutional defenses to enforcement of Act required factfinding by Review Commission); Marshall v. Able Contractors, Inc., 573 F.2d 1055, 1057 (9th Cir.), *cert. denied*, 439 U.S. 826 (1978) (fourth amendment claim not raised before Review Commission waived for purposes of review by court of appeals); Marshall v. Northwest Orient Airlines, Inc., 574 F.2d 119, 122 (2d Cir. 1978) (exhaustion of administrative remedies required despite existence of constitutional claims); A Quaker Action Group v. Morton, 460 F.2d 854, 861 (D.C. Cir. 1971) (no right to *de novo* factual record in federal court when administrative procedure is fair and adequate for developing material facts).

[52] 610 F.2d at 1136. Prior to the *Babcock & Wilcox* decision, the Court of Appeals for the Third Circuit had decided that:

> Under the enforcement and review scheme of the [Act], the Commission is the only tribunal available for the development of a factual record. If we were to hold that these constitutional arguments need not be presented to the Commission, the alternative would be either separate litigation in a district court, which has facilities for making a record, or factfinding in this court, which lacks such facilities. Assuming we could find a statutory justification for either course, neither is attractive.

Bethlehem Steel Corp. v. OSHRC, 607 F.2d 871, 876 (3d Cir. 1979).

stated that any conflict between the federal district court and the Review Commission over the propriety of the warrant was inconsequential, "while the conflict with the statutory scheme and administrative exigencies if exhaustion is not required will be quite real."[53]

Although the *Babcock & Wilcox* court recognized that the exhaustion doctrine is not so rigid that exceptions cannot be made in appropriate circumstances,[54] based upon policy considerations it believed that no exception should be made in this case.[55] The court articulated that one of the underlying reasons for administrative review is to allow the Review Commission to develop a factual record, since it has expertise in areas within the purview of the Act.[56] Unlike the *Weyerhaeuser* court,[57] the *Babcock & Wilcox* court believed that a factual record was necessary because there were many disputed facts concerning the validity of the OSHA search warrants.[58] For example, it would have to be determined whether the inspections exceeded the scope authorized in the warrants, whether the second and third warrants authorized general inspections or limited ones, whether general inspection warrants can be issued pursuant to specific employee complaints, and whether the issuing magistrate was fully aware of the agency's inspection plans.[59] The *Babcock & Wilcox* court noted that if the court of appeals had to eventually decide the various constitutional issues presented by Babcock, such a factual record developed by the Review Commission would be essential.[60]

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[53] 610 F.2d at 1137.

[54] *Id.* at 1137-38. The Court of Appeals for the Third Circuit has not required exhaustion when resort to administrative remedies would be futile, United States ex rel. Marrero v. Warden, Lewisburg Penitentiary, 483 F.2d 656, 659 (3d Cir. 1973), *rev'd on other grounds*, 417 U.S. 653 (1974), when "the prescribed administrative procedure is clearly shown to be inadequate to prevent irreparable injury," American Fed'n of Gov't Employees, Local 1904 v. Resor, 442 F.2d 993, 994-95 (3d Cir. 1971), or when agency involvement "clearly and unambiguously violates statutory or constitutional rights," Barnes v. Chatterton, 515 F.2d 916, 920 (3d Cir. 1975). *See* Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231, 245 (3d Cir. 1980); notes 67-91 *infra* and accompanying text.

[55] 610 F.2d at 1140.

[56] *Id.* at 1137, 1139-40.

[57] Weyerhaeuser, 592 F.2d at 376. The *Weyerhaeuser* court thought that no benefit would result from a prior agency development of the factual record since the court could decide the constitutionality of the warrant based upon the face of the warrant itself. *Id.* It should be noted that when *Weyerhaeuser* was decided the Review Commission had consistently declined to hear arguments based upon a warrant's validity. However, before *Babcock & Wilcox* was decided, the Review Commission changed its policy and began considering challenges to inspection warrants. 610 F.2d at 1138-39 & n.37. *See* notes 92-97 *infra* and accompanying text.

[58] 610 F.2d at 1139.

[59] *Id.* at 1139-40.

[60] *Id.* at 1140.

Recognizing that the Review Commission was in the formative stages of interpreting the constitutional concept of "reasonableness" for OSHA inspections, the *Babcock & Wilcox* court believed that only by requiring exhaustion could the Review Commission develop expertise in this area.[61] If courts decided not to require exhaustion when an agency's expertise was not fully developed, "the doctrine might well be frustrated whenever a new agency or independent tribunal were created."[62]

Another policy reason articulated by the court in support of requiring exhaustion was based upon the congressional intent behind the Act. This intent was to design an administrative procedure for swift issuance of abatement orders to provide safe working conditions for employees.[63] The court recognized the potential harm that could result if the employer could always invoke the district court's jurisdiction when presenting a constitutional challenge. Such a procedure would provide the employer with a device for delay and, as a result, hinder effective enforcement of the Act.[64] On the other hand, if exhaustion were required, an employer would have to make its motions to suppress in the same forum in which the evidence was to be used, thereby preventing any delay tactics.[65] Because of these policy considerations, the *Babcock & Wilcox* court concluded that Babcock's situation did not excuse it from the general rule of exhaustion of administrative remedies.[66]

In *Babcock & Wilcox*, the court of appeals adopted a position which properly reflects the necessity and effectiveness of applying the exhaustion doctrine. Although the court emphasized policy reasons in holding that Babcock was subject to the exhaustion requirement, an analysis of the specific "judicially created exceptions"[67] to the exhaustion doctrine leads to the same result.

One situation in which exhaustion has not been required is when resort to administrative remedies would be futile[68] and, therefore,

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[61] *Id.* The court recognized that the issue of administrative probable cause developed as a result of the recent *Barlow's* decision. *Id.*

[62] *Id.*

[63] *Id.*; *In re* Restland Memorial Park, 540 F.2d 626, 628 n.14 (3d Cir. 1976).

[64] 610 F.2d at 1140; Quality Prods., Inc., 592 F.2d at 616.

[65] 610 F.2d at 1140-41.

[66] *Id.* at 1140.

[67] Barnes v. Chatterton, 515 F.2d 916, 920 (3d Cir. 1975). The rule that administrative remedies must be exhausted before resort is made to the courts is not absolute or without exceptions; it is flexible, and the courts have discretionary power not to require exhaustion. United States ex rel. Sanders v. Arnold, 535 F.2d 848, 852 (3d Cir. 1976) (Adams, J., dissenting).

[68] United States ex rel. Marrero v. Warden, Lewisburg Penitentiary, 483 F.2d 656, 659 (3d Cir. 1973), *rev'd on other grounds*, 417 U.S. 653 (1974). *See* United States ex rel. Sanders v. Arnold, 535 F.2d 848, 850-51 (3d Cir. 1976).

the claimant has no adequate remedy at law.[69] The Court of Appeals for the Third Circuit applied this exception to the case of *United States ex rel. Marrero v. Warden, Lewisburg Penitentiary*.[70] In *Marrero*, the prisoner initiated a habeas corpus proceeding, raising the issue of the availability of parole under a general parole statute.[71] The court did not require the prisoner to exhaust his administrative remedies before the parole board because the issue was one of statutory construction and no administrative record was required.[72] Additionally, the parole board was firmly opposed to appellant's claims.[73] Since both parties agreed that administrative proceedings would be futile, the court declined to apply the exhaustion doctrine.[74]

An employer is not within the scope of this exception unless it can demonstrate that its fourth amendment rights will not be adequately adjudicated by the Review Commission or by the court of appeals.[75] Since Babcock had an adequate opportunity under the Act to challenge the OSHA warrants,[76] the *Babcock & Wilcox* court correctly required exhaustion.

A second exception to the exhaustion doctrine is applicable when the administrative procedure is inadequate to prevent irreparable harm to the party.[77] For example, in the Court of Appeals for the

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[69] Central Mine Equip. Co., 608 F.2d at 721-22; Quality Prods., Inc., 592 F.2d at 616; Hunsucker v. Phinney, 497 F.2d 29, 34 (5th Cir. 1974).

[70] 483 F.2d 656 (3d Cir. 1973), *rev'd on other grounds*, 417 U.S. 653 (1974).

[71] *Id.* at 658.

[72] *Id.* at 659.

[73] *Id.*

[74] *Id.*

[75] Central Mine Equip. Co., 608 F.2d at 721; Quality Prods., Inc., 592 F.2d at 615.

[76] Quality Prods., Inc., 592 F.2d at 615. The court concluded that the statutory enforcement proceeding, which requires review by the Review Commission and then by the court of appeals, is an adequate remedy at law in most cases concerning constitutional challenges to OSHA inspection warrants. *Id.*; Central Mine Equip. Co., 608 F.2d at 721-22; Hayes-Albion Corp. v. Marshall, 8 OSHC (BNA) 1581, 1583 (N.D. Ohio May 1, 1980).

[77] American Fed'n of Gov't Employees, Local 1904 v. Resor, 442 F.2d 993, 994-95 (3d Cir. 1971). Although the court articulated this exception, it concluded that it should not be applied in the plaintiffs' situation. The suit was brought by government employees to enjoin discharges and demotions before they exhausted their remedies in the Civil Service Commission. *Id.* at 994. Since the plaintiffs' allegations did not sufficiently prove any irreparable harm, the court did not allow a departure from the administrative procedure which was mandated by Congress. *Id.* at 994-95. *See* Barnes v. Chatterton, 515 F.2d 916, 920 (3d Cir. 1975); Hunsucker v. Phinney, 497 F.2d 29, 34 (5th Cir. 1974).

In Cerro Metal Prods. v. Marshall, 620 F.2d 964 (3d Cir. 1980), the court of appeals concluded that since there was "an imminent threat of irreparable harm" to the employers, they were not required to exhaust their administrative remedies. *Id.* at 975. The Third Circuit was confronted with a fact pattern which was similar to *Babcock & Wilcox*, except that the employers initiated a proceeding in the district court to enjoin OSHA before, rather than after,

Third Circuit decision of *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*,[78] the court concluded that exhaustion was not required because of the irreparable harm to the complaining parties. Alleging that they were being deprived of their constitutional right to "life and liberty," plaintiffs filed suit against the Nuclear Regulatory Commission (NRC) for allowing effluents from a nuclear plant to endanger their health.[79] The court held for the plaintiffs because "[p]reliminary injunctive relief to prevent irreparable unconstitutional injury" was not a remedy within the guidelines of the NRC.[80]

Unlike *Susquehanna Valley Alliance*, the requirement of exhaustion in *Babcock & Wilcox* would not result in any irreparable harm to Babcock.[81] The only detrimental effect to Babcock would be increased costs of litigation because it would have to adjudicate its complaint before the administrative law judge and Review Commis-

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the inspections occurred. *Id.* at 967. The court believed that if exhaustion were required, the employers would have to permit the inspections pursuant to *ex parte* warrants and, subsequently, contest any citations if violations were found. *Id.* at 970. Such a procedure would "create inconvenience to the employer and a certain amount of lost time for employees who escort the inspector or are otherwise disrupted in their work." *Id.* at 974. Furthermore, the court noted the possibility that an illegal inspection would never be remedied by the Review Commission, since the law is unsettled concerning the application of the exclusionary rule to such proceedings. *Id. See* notes 98-104 *infra* and accompanying text. In concluding that exhaustion was not required, the court distinguished its case from *Babcock & Wilcox* by stating that the employers in *Cerro Metal* were "not seeking to disrupt an ongoing Review Commission matter, but [were seeking] to prevent OSHA from initiating the process in an allegedly illegal manner." *Id.* at 971.

Subsequent to *Cerro Metal*, the Court of Appeals for the Third Circuit was confronted with an interesting situation in Marshall v. North American Car Co., No. 79-2374 (3d Cir. July 24, 1980). In *North American Car* the employer had refused entry to OSHA inspection officers after the third day of inspection. *Id.*, slip op. at 4. This denial of entry was factually different from *Babcock & Wilcox*, where the inspections were fully completed, and from *Cerro Metal*, where the inspections were never begun. In response to the employer's refusal to permit the inspection to continue, the Secretary of Labor filed a contempt motion. *Id.* The Third Circuit affirmed the district court's decision to dismiss the contempt motion and to quash the warrant. *Id.*, slip op. at 4, 8. Since citations were issued as a result of the three day inspection, the employer requested that the court enjoin the OSHA proceedings. *Id.*, slip op. at 8. The court of appeals, however, required exhaustion:

> We have held that once OSHA begins citation proceedings, the proper course is for an employer to exhaust OSHA procedures and then raise contentions in an appeal from the finding of a violation. . . . It makes no difference that we have affirmed the district court's order holding the warrant overbroad. The citation proceedings relate to the portion of the inspection completed prior to the employer's challenge, and they very well may raise different issues than we have considered here. Thus the policies underlying exhaustion . . . are fully applicable here.

Id., slip op. at 9.

[78] 619 F.2d 231 (3d Cir. 1980).

[79] *Id.* at 244-45.

[80] *Id.*

[81] *See* Central Mine Equip. Co., 608 F.2d at 722; Quality Prods., Inc., 592 F.2d at 616.

sion prior to judicial review.[82] The costs associated with this delay do not constitute irreparable harm.[83] Since Babcock was not threatened with irreparable harm, this second "judicially created exception" to the exhaustion doctrine was inapplicable.

Finally, the courts have declined to require exhaustion when there has been a blatant disregard for statutory or constitutional rights.[84] For example, in *Finnerty v. Cowen*[85] the administrative procedure itself was alleged to have violated the plaintiff's constitutional rights. Specifically, the plaintiff attacked the administrative procedures of the Railroad Retirement Board on due process grounds, alleging that she was deprived of prior notice and an opportunity for a hearing as to her right to apply for certain benefits.[86] The Court of Appeals for the Second Circuit concluded that the plaintiff was not required to pursue or exhaust administrative remedies under these circumstances.[87]

The courts have consistently held, however, that mere allegations of constitutional deprivations are not sufficient to bring a case within the scope of this exception to the exhaustion requirement.[88] Although there were constitutional challenges presented in *Babcock & Wilcox*, Babcock could not have demonstrated a blatant disregard of its constitutional rights.[89] To the contrary, under *Barlow's*, the administrative procedure protected the fourth amendment rights of Babcock by requiring OSHA to obtain a warrant before conducting a search.[90] The Act further afforded due process to Babcock by providing notice and an opportunity to be heard.[91]

A review of the "judicially created exceptions" to the exhaustion doctrine supports the *Babcock & Wilcox* holding. The correctness of

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[82] *See* note 4 *supra*.

[83] Barnes v. Chatterton, 575 F.2d 916, 921 (3d Cir. 1975). The Supreme Court has said that injuries in terms of money, time, and energy are not enough to constitute irreparable harm. Sampson v. Murray, 415 U.S. 61, 84-92 (1974).

[84] Barnes v. Chatterton, 515 F.2d 916, 920 (3d Cir. 1975) (no exhaustion if preliminary agency decision "clearly and unambiguously violates statutory or constitutional rights"); First Jersey Securities, Inc. v. Bergen, 605 F.2d 690, 697 (3d Cir. 1979).

[85] 508 F.2d 979 (2d Cir. 1974).

[86] *Id.* at 981.

[87] *Id.* at 982.

[88] *E.g.*, Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 771-72 (1947); First Jersey Securities, Inc. v. Bergen, 605 F.2d 690, 697 (3d Cir. 1979); Montana Chapter of Ass'n of Civilian Technicians, Inc. v. Young, 514 F.2d 1165, 1167 (9th Cir. 1975).

[89] *See* Quality Prods., Inc., 592 F.2d at 616. The *Quality Products* court was presented with a similar constitutional challenge to OSHA search warrants and concluded that the employer had "not made a sufficiently clear showing of a fourth amendment violation to justify extraordinary relief." *Id. See* Hunsucker v. Phinney, 497 F.2d 29, 34 & n.10 (5th Cir. 1974).

[90] *See* notes 32-41 *supra* and accompanying text.

[91] *See* 29 U.S.C. § 659 (1976).

this decision is further underscored by a recognition of the change in policy of the Review Commission regarding fourth amendment issues. The earlier policy of the Review Commission had been to decline to hear fourth amendment challenges to the validity of OSHA inspection warrants.[92] At that time, the Review Commission believed that if it ruled upon the validity of a warrant, it would in effect be deciding the constitutionality of the Act, since the Act permitted warrantless searches.[93] The Review Commission did not want to pass upon the constitutionality of its own enabling statute and, therefore, refused to address such issues.[94]

This abstention policy, which was a consideration in *Weyerhaeuser*,[95] had been changed prior to *Babcock & Wilcox*.[96] Since *Barlow's* established a constitutional requirement of search warrants for administrative inspections, the Review Commission became "clearly competent to address the inspection warrant issues."[97] This change in the Review Commission's policy partially explains the divergence of the *Babcock & Wilcox* court from the *Weyerhaeuser* opinion.

The *Babcock & Wilcox* court adequately and reasonably answered the specific question of whether an employer must exhaust administrative remedies in attacking an OSHA warrant. However, some related unanswered questions remain. One highly debated issue which has arisen as a result of the *Barlow's* case is whether the fourth amendment exclusionary rule is applicable to OSHA enforcement proceedings.[98] The *Barlow's* decision involved an action for a de-

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[92] Electrocast Steel Foundry, Inc., 6 OSHC (BNA) 1562, 1563 (Review Comm'n Apr. 21, 1978) (Review Commission held that it lacked jurisdiction to rule on validity of OSHA warrant issued by United States magistrate).

[93] Chromalloy Am. Corp., 7 OSHC (BNA) 1547, 1547-48 (Review Comm'n July 17, 1979).

[94] *Id.* at 1548. *See* Electrocast Steel Foundry, Inc., 6 OSHC (BNA) 1562, 1563 (Review Comm'n Apr. 21, 1978).

[95] Weyerhaeuser, 592 F.2d at 377. The *Weyerhaeuser* court took cognizance of the Review Commission's policy by noting in its opinion that the Secretary of Labor had informed the court at oral argument that the Review Commission had always declined a ruling on the validity of an OSHA inspection warrant. *Id.*

[96] Chromalloy Am. Corp., 7 OSHC (BNA) 1547, 1548 (Review Comm'n July 17, 1979) (Review Commission held that constitutional challenges to the validity of OSHA warrants can be considered by Review Commission as a result of the *Barlow's* decision). The Review Commission's July 17, 1979 *Chromalloy* decision preceded *Babcock & Wilcox*, which was decided on November 16, 1979.

[97] *Id.* Since *Chromalloy*, motions to suppress evidence because of unconstitutional inspections have been considered by the Review Commission. Meadows Indus., Inc., 7 OSHC (BNA) 1709, 1711-12 (Review Comm'n Sept. 7, 1979).

[98] *Compare* Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683, 689 (9th Cir. 1978) (suggesting that exclusionary rule should not apply to OSHA proceedings) *with* Savina Home Indus., Inc. v. Secretary of Labor, 594 F.2d 1358, 1363 (10th Cir. 1979) (suggesting that the

claratory judgment and an injunction, and it did not address the exclusionary rule issue.[99] Similarly, the *Babcock & Wilcox* court refrained from expressing any opinion concerning the application of the exclusionary rule.[100] Since the Supreme Court has never applied the exclusionary rule in a civil proceeding,[101] the law is unsettled as to its applicability to proceedings under the civil penalty provisions of the Act.[102] If the exclusionary rule is not applied, however, a fourth amendment violation would not be grounds to bar the introduction of evidence gathered during an illegal inspection.[103] Since compliance officers are now required to obtain warrants to conduct an inspection,[104] the resolution of this question is vital in determining the consequences of an illegal search.

Another unresolved issue is whether a federal district court has jurisdiction to decide a motion to suppress in an action separate from the administrative proceedings in which the evidence would be used.[105] There is no statute or rule which provides the district court with jurisdiction to order the suppression of evidence in a separate

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exclusionary rule should be applied to OSHA proceedings). Both *Todd Shipyards* and *Savina* agreed that the exclusionary rule should not be applied retroactively to pre-*Barlow's* inspections, and the Review Commission has concurred. Meadows Indus., Inc., 7 OSHC (BNA) 1709, 1712 (Review Comm'n Sept. 7, 1979). *See* Daniel Int'l Corp., 8 OSHC (BNA) 1142, 1147-48 (Review Comm'n March 26, 1980).

[99] Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683, 689 (9th Cir. 1978).

[100] Babcock & Wilcox, 610 F.2d at 1139. The court specifically abstained from any discussion of the exclusionary rule by stating that "[w]e do not, of course, express any opinion at this time on the sharply contested question whether the exclusionary rule applies to OSHA enforcement." *Id.*

[101] United States v. Janis, 428 U.S. 433, 447 (1976); Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683, 689 (9th Cir. 1978).

[102] *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.03, at 262-64 (1958). Since administrative proceedings do not involve a jury, rules of evidence, such as the exclusionary rule, arguably should not be enforced. *Id.* Davis concluded his discussion by stating that, "to whatever extent the exclusionary rules are based upon the unique needs of the jury system[,] those rules are a misfit for the administrative process." *Id.* at 264.

[103] Savina Home Indus., Inc. v. Secretary of Labor, 594 F.2d 1358, 1361 (10th Cir. 1979); Meadows Indus., Inc., 7 OSHC (BNA) 1709, 1711-12 (Review Comm'n Sept. 7, 1979).

[104] Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). *See* notes 32-41 *supra* and accompanying text.

[105] Quality Prods., Inc., 592 F.2d at 614-15. After analyzing the possibilities of jurisdiction, the First Circuit concluded that "we prefer to avoid a definitive ruling on jurisdiction here." *Id.* at 615. Instead, the court followed the approach enunciated in Hunsucker v. Phinney, 497 F.2d 29, 33 (5th Cir. 1974), and assumed jurisdiction, but refused to adjudicate the plaintiff's suppression claim because of the exhaustion doctrine. In *Central Mine Equipment*, the Eighth Circuit was also unclear in explaining the basis of the district court's jurisdiction. The court simply said that "[t]he grant of a motion to suppress evidence, brought in an action separate from that in which the evidence might be introduced against the movant, requires the exercise of a court's equitable jurisdiction." 608 F.2d at 721.

administrative proceeding.[106] Courts have avoided this jurisdictional issue by simply assuming jurisdiction and refusing, because of the exhaustion doctrine, to adjudicate the motion to suppress.[107] Since subject matter jurisdiction is a threshhold question in any proceeding, courts in the future should take a more definitive position in addressing this issue.

Regardless of these unanswered questions, the *Babcock & Wilcox* decision represents a step in the right direction. The holding follows both from the policy considerations underlying the exhaustion doctrine[108] and the change in policy of the Review Commission.[109] Requiring exhaustion enhances the effectiveness of the administrative tribunal and supports the congressional intent behind the Act. Moreover, only in this way can the Review Commission be utilized to its full potential as an independent body for carrying out adjudicatory functions under the Act.[110]

Because of the split among the circuits, a decision from the Supreme Court is necessary to settle this issue. It is to be hoped that the Supreme Court will rule in favor of developing, rather than restricting, the authority of the Review Commission by requiring exhaustion. The Review Commission was congressionally vested with adjudicatory power to balance the employer's right to due process against the need for prompt action where dangerous conditions exist;[111] this power should remain with the Review Commission.

James E. Trabilsy

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[106] Quality Prods., Inc., 592 F.2d at 614. Since this situation does not involve a motion made ancillary to a proceeding in the district court, FED. R. CRIM. P. 41(f) is inapplicable. 592 F.2d at 614. Under rule 41(f) "[a] motion to suppress evidence may be made in the court of the district of *trial* . . . ." FED. R. CRIM. P. 41(f) (emphasis added).

[107] *See* Central Mine Equip. Co., 608 F.2d at 721; Quality Prods., Inc., 592 F.2d at 615; Hunsucker v. Phinney, 497 F.2d 29, 33 (5th Cir. 1974).

[108] *See* McKart v. United States, 395 U.S. 185, 194-95 (1969). In *McKart*, the Supreme Court indicated that the basic premises underlying the exhaustion requirement are: first, judicial review may be facilitated by allowing the appropriate agency to use its expertise in developing a factual record; second, the claimant may be successful through the administrative process and the courts may never have to intervene; and third, the agency should have an opportunity to correct its own errors, since it is supposedly autonomous. *Id.*

[109] *See* notes 92-97 *supra* and accompanying text.

[110] *See* 29 U.S.C. § 651(b)(3) (1976).

[111] Babcock & Wilcox, 610 F.2d at 1140.