EMPLOYER OPTIONS UNDER THE OSHA INSPECTION WARRANT PROCEDURE: A ROCK AND A HARD PLACE

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I. INTRODUCTION

In 1978, the United States Supreme Court issued its decision in *Marshall v. Barlow's, Inc.*[1] which resolved the then long standing issue of whether the Occupational Safety and Health Administration (OSHA) had the right to conduct nonconsensual work site inspections without the benefit of a warrant. The Supreme Court's response was a definitive "no."[2] In the years following the *Barlow's* decision, commentary and analysis abounded on topics involving OSHA inspection rights and the implications of the warrant requirement.[3] Significant issues remain unresolved,

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[1] 436 U.S. 307 (1978). Writing for the majority, Justice White rejected the government's contention that warrantless searches to enforce OSHA were reasonable. The Court held that "[t]he history of the United States Constitution demonstrates that the Warrant Clause of the Fourth Amendment" was specifically intended to "protect[] commercial [establishments] as well as private homes." *Id.* at 311. The Court also rejected the government's attempt to expand the search warrant exception sanctioned for "pervasively regulated business[es]," to OSHA inspections. *Id.* at 313 (quoting United States v. Biswell, 406 U.S. 311, 316 (1972)). Justice White distinguished such cases noting that in those instances, the particular industry was subject to such extensive government oversight, by virtue of licensing and other regulations, "that no reasonable expectation of privacy . . . could exist . . . ." *Id.*

[2] "We are unconvinced . . . that requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspection necessary to enforce the statute, or will make them less effective." *Id.* at 316.

[3] *See, e.g.*, Trant, *OSHA and the Exclusionary Rule: Should the Employer Go Free Because the Compliance Officer Has Blundered?*, 1981 DUKE L.J. 667 ("Utilizing the exclusionary [rule] . . . would not result in the forfeiture of the government's legitimate interest in enforcing OSHA."); Rothstein, *OSHA Inspections After* Marshall v. Barlow's, Inc., 1979 DUKE L.J. 63 (noting that *Barlow's* raises, but leaves unresolved many issues such as "the procedures to use in challenging the validity of an OSHA warrant"); Note, *Permissible Scope of OSHA Inspection Warrants*, 66 CORNELL L. REV. 1254 (1981) (arguing that by failing to recognize the need to balance employers'

however, concerning many aspects of the warrant and inspection process. Questions relating to the availability of an exclusionary rule, exhaustion of administrative remedies, and procedures available to employers to challenge the validity of warrants, continue to generate disagreement among the courts.

One recognized practice of an employer faced with responding to an inspection warrant is refusal of entry, followed by an action to defeat the validity of the warrant.[4] Recent case law, however, raises significant concerns over the wisdom in relying upon such a strategy. The prospect that an employer may be faced with criminal, versus civil, contempt has become a reality. This result raises concerns over application of the "collateral bar" rule, which leaves the employer exposed to contempt penalties even where he can establish the invalidity of the underlying warrant.

Furthermore, without the availability of an exclusionary rule, even when an employer has a reasonable basis to challenge a warrant, he may have no satisfactory remedy. An employer correctly concluding that a warrant has been improperly issued is faced with the dilemma of either permitting the inspection to proceed without the assurance that illegally obtained evidence of OSHA violations will be suppressed, or refusing the inspection and facing the possibility of a criminal contempt conviction and the associated penalties.

This article will discuss the current state of the law concerning the above issues and assess the very real concerns that employers must face when considering challenges to a warrant-based inspection. Particular focus will be given to the recent development regarding the possibility of criminal contempt proceedings arising in the OSHA setting. Finally, a discussion of the procedural distinctions (or lack thereof) between prosecuting

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privacy rights against the public's safety interest, courts have not reconciled interests advanced by OSHA with fourth amendment commands of the Constitution); Note, *Procedures for Attacking OSHA Inspection Warrants*, 66 VA. L. REV. 983 (1980) (favoring direct district court review over issues pertaining to the validity of OSHA warrants, perceiving that such review does not threaten OSHA's enforcement program).

[4] *See, e.g.*, Babcock & Wilcox Co. v. Marshall, 610 F.2d 1128 (3d Cir. 1979). The Third Circuit noted the "Hobson's choice" facing employers, stating "illegal OSHA searches will not inevitably evade review; they may be preserved for determination by the district courts if the plant operator is willing to risk civil contempt and moves expeditiously to obtain full judicial review before the warrant is executed." *Id.* at 1136.

civil and criminal contempt will show why employers currently find themselves between the proverbial "rock and a hard place."

II. STATUTORY AND PROCEDURAL FRAMEWORK OF THE OSHA INSPECTION AND WARRANT ENFORCEMENT PROCESS

A. Overview of Procedure

The Occupational Safety and Health Act[5] (the Act) created OSHA and charged it with the legal obligation to administer a comprehensive plan of rule making,[6] adjudication,[7] and assessment of penalties[8] to provide "every working man and woman in the Nation safe and healthful working conditions."[9] An obvious requisite to fulfilling these legislated obligations is the need to view, firsthand, a work site to evaluate whether compliance is being achieved. The Act provides for such a procedure by establishing inspection authority: "[T]he Secretary . . . is authorized . . . to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, work place or environment."[10]

The Supreme Court held, in *Barlow's*, that fourth amendment protections are applicable to OSHA procedures. A work site inspection without an employer's consent, therefore, can only proceed upon procuring and presenting a warrant in connection with the specific inspection that is to be performed.[11] Probable cause necessary to obtain a warrant can be established by showing either "specific evidence of an existing violation" or

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5 29 U.S.C. §§ 651-678 (1970).

6 *Id.* at § 655.

7 *Id.* at § 659(c).

8 *Id.* at § 666.

9 *Id.* at § 651(b).

10 *Id.* at § 657(a)(1).

11 *See* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). There is disagreement, however, among the circuits regarding application of similar protections to the production of records required by the Act to be maintained by the employer. The United States Court of Appeals for the Fourth Circuit recently held that demands for production of OSHA forms Nos. 101 (supplemental record of injuries and illnesses) and 200 (log and summary of all recordable occupational injuries or illnesses) must be complied with, even absent a warrant or subpoena, based upon 29 C.F.R. § 1904.7(a), which requires production of the documents upon request of a representative of the Secretary of Labor. McLaughlin v. A.B. Chance Co., 842 F.2d 724 (4th Cir. 1988). *Contra* McLaughlin v. Kings Island, 849 F.2d 990 (6th Cir. 1988), which, discussing the same regulations, held that an expectation of privacy existed even to mandatory business records, and that "insofar as the [regulations] allow . . . nonconsensual search[es] [they] are in violation of the Fourth Amendment of the United States Constitution." *Id.* at 993.

by demonstrating a "general administrative plan of enforcement . . . derived from neutral sources" which include "reasonable legislative or administrative standards for conducting an . . . inspection . . . ."[12] Once obtained, a copy of the warrant is served upon the employer by the OSHA compliance officer.

If an employer refuses to comply with a warrant, OSHA regulations state that the compliance officer is not to use force to gain entry.[13] Rather, the officer is specifically required to inquire whether the employer is refusing to comply.[14] If the employer refuses, or even if "consent is not clearly given," the compliance officer is instructed to refrain from conducting the inspection, leave the premises, and contact his supervisor regarding further action.[15] The Area Director, upon notification of the situation by the supervisor must contact the Regional Administrator and the Regional Solicitor, either orally or in writing, with the details of the refusal.[16] Thereafter, "[t]he Regional Administrator, jointly with the Regional Solicitor, shall decide what further action should be taken."[17]

The decision on how to proceed with enforcement of the warrant is thus left to the discretion of the regional personnel most closely linked to the case. The standard mechanism utilized by the Solicitor's Office is an action for civil contempt against the employer. Because the main objective of the Solicitor in enforcing the warrant is to see that the inspection is performed, the coercive element of civil contempt seems most suitable to achieving that result. In addition, this mechanism is presumably uti-

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[12] *Barlow's*, 436 U.S. at 320-21 (quoting Camara v. Municipal Court, 387 U.S. 523, 538 (1967)). The power to issue a search warrant arises directly from the fourth amendment of the United States Constitution. However, when issuing a warrant, the judge or magistrate must meet two tests. First, he must be neutral and detached; that is, he must be acting in a judicial, rather than prosecutorial manner. Shadwick v. City of Tampa, 407 U.S. 345 (1972); United States v. McNally, 473 F.2d 934, *aff'd*, 491 F.2d 751 (3d Cir. 1973), *cert. denied*, 417 U.S. 948 (1973). Second, the magistrate must find that probable cause exists for the search. *Shadwick*, 407 U.S. 345 (1972).

[13] *See* OSHA FIELD OPERATIONS MANUAL, ch. III, pt. D, § 1(d)(1), at III-11, Empl. Safety & Health Guide (CCH) ¶ 7964.180 (1988). When confronted with a refusal to permit entry, OSHA agents are forbidden to even engage the employer in an argument.

[14] *Id.* at ch. III, pt. D, § 1(d)(8), Empl. Safety & Health Guide (CCH) ¶ 7964.220.

[15] *Id.* at ch. III, pt. D, § 1(d)(8)(a), Empl. Safety & Health Guide (CCH) ¶ 7964.220.

[16] *Id.* at ch. III, pt. D, § 1(d)(8)(b), Empl. Safety & Health Guide (CCH) ¶ 7964.220.

[17] *Id.* at ch. III, pt. D, § 1(d)(8)(c), Empl. Safety & Health Guide (CCH) ¶ 7964.220.

lized because of the distinctions between requirements for imposing civil, as opposed to criminal, contempt and the nature of the penalties. Nevertheless, as will be the focus of the subsequent discussion, employers must now fear criminal contempt as a possible result of their noncompliance with a warrant.

B. Distinctions Between Civil and Criminal Contempt

The distinction between criminal contempt and civil contempt depends on whether the court is attempting to punish the contemnor (criminal) or coerce compliance with an order of the court (civil).[18] Nevertheless, courts and litigants alike have long struggled to ascertain whether a contempt sentence which has been imposed is criminal or civil in nature.[19] Such a determination is critical since the consequences stemming from the type of contempt differ significantly. Different proofs, procedures, and defenses are warranted depending on the nature of the proceedings.

1. Civil Contempt

The ability of federal courts to impose civil contempt is governed by 28 U.S.C. § 1826.[20] The imprisonment and/or monetary fine imposed by a court in a civil contempt action is intended to induce the contemnor to comply with the court's order and cure the contempt.[21] The imposed sentence of incarceration and/or daily monetary fine, therefore, cannot extend beyond the termination of the matter for which the evidence is sought.[22]

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[18] Shillitani v. United States, 384 U.S. 364, 368-70 (1966); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911).

[19] *See, e.g.*, United States v. North, 621 F.2d 1255 (3d Cir.), *cert. denied*, 449 U.S. 866 (1980). The *North* case required the Third Circuit to ascertain the nature of the contempt order imposed upon the contemnor. In order to illustrate that the lower court intended its contempt order to be criminal rather than civil, the circuit court was compelled to include pages of testimony from the lower court trial. *Id.* at 1258-61. Indeed, the appellate court specifically directed its district court judges to "specify the particular nature of the contempt . . . in order that situations such as the one presented on this appeal can be avoided." *Id.* at 1265.

[20] This section limits the period of incarceration or confinement to a maximum of 18 months for refusal to comply with the court order.

[21] *See* United States v. Rylander, 714 F.2d 996, 1001 (9th Cir. 1983), *rev'd on other grounds*, 460 U.S. 752 (1984).

[22] *Shillitani*, 384 U.S. at 371-72. The Court determined:

> [T]he justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order . . . . Where the grand jury has been finally discharged, a contumaciuos witness can no longer be confined since he has no further opportunity to purge himself of contempt.

Further, the penalty imposed will automatically be removed upon compliance with the court order.[23] Thus, once a litigant has complied, it is not necessary to impose the civil contempt sentence.

Because of the coercive nature of a civil contempt order, the safeguards and defenses which are afforded the alleged contemnor differ from those allowed defendants in cases involving criminal contempt. The evidence which is sought in a civil contempt case is also furnished more protection than the evidence provided in criminal contempt cases.

A person accused of civil contempt has access to a variety of protective measures depending upon whether the alleged contemptuous behavior is direct or indirect. Direct contempt results from misconduct which occurs in the presence of the court. In such cases, the presiding judge is empowered to make a summary disposition of the misconduct in compliance with the court's order without affording the contemnor the right to a trial.[24] When the alleged contemptuous conduct is committed outside the presence of the court, as would be the case where an employer refuses to permit an OSHA inspection under warrant, a hearing is required wherein the court must rely upon indirect evidence to determine whether the alleged contemnor has committed the misconduct for which he is charged.[25]

The standard of proof in both direct and indirect civil contempt proceedings is that of "clear and convincing" evidence. Moreover, demonstrating the inability to comply with the court order is a valid defense to a charge of civil contempt unless such inability is the result of the defendant's own conduct.[26] More im-

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Id. at 317.

[23] McDonald's Corp. v. Victory Invs., 727 F.2d 82, 85 (3d Cir. 1984). "Once the contemnor has complied with all aspects of the order, it has purged itself of contempt." *Id.* at 85 (citing *In re* Establishment Inspection of the Metal Bank of Am., 700 F.2d 910, 913 (3d Cir. 1983)).

[24] FED. R. CRIM. P. 42(a). *See also In re* Chaplain, 621 F.2d 1272, 1275 (4th Cir.) ("The power rests on the proposition that a hearing to determine guilt . . . is not necessary when contumacious conduct occurs in the actual presence of a judge who observed it, and then immediate action is required to preserve order in the proceedings and appropriate respect for the tribunal."), *cert. denied sub nom.* Chaplain v. United States, 449 U.S. 834 (1980).

[25] FED. R. CRIM. P. 42(b). *See In re* Heathcock, 696 F.2d 1362, 1365 (11th Cir. 1983).

[26] United States v. Rylander, 460 U.S. 752 (1983); Newman v. Graddick, 740 F.2d 1513, 1528 (11th Cir. 1984); SEC v. Ormont Drug & Chem. Co., 739 F.2d 654 (D.C. Cir. 1984).

portantly for purposes of this discussion, the invalidity of the underling warrant is an absolute defense in cases of civil contempt.

2. Criminal Contempt

In cases of criminal contempt the focal point is punishment. Unlike civil contempt, criminal contempt does not seek to coerce future conduct, but rather, punishes a wrongdoer for a past violation of a court order.[27] Criminal contempt attempts to vindicate offenses against the court and society, not the contemnor's adversary. Thus, subsequent compliance with a court order will not remove a sanction imposed for criminal contempt. For this reason alone the utility of a criminal contempt order in attempting to secure an OSHA inspection of a reluctant employer's work site would seem minimal.

Like civil contempt, criminal contempt may be either direct or indirect. In cases of direct criminal contempt, the notice and hearing requirements are normally satisfied by a warning from the judge. Although punitive in nature, a person held in direct criminal contempt does not usually have the opportunity to a full hearing.[28]

When criminal contempt is indirect a hearing is required. However, there is some disagreement amongst the circuits as to whether notice will be required to satisfy the requirements of due process.[29] Nevertheless, in all cases of indirect criminal contempt, the accused is entitled to the sixth amendment right to counsel and the fifth amendment right against self-incrimination.[30] Questions of proper notice and associated rights of the

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[27] A federal court's authority to impose criminal contempt is contained in 18 U.S.C. § 401 (1982), which states:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Id.

[28] Similarly, contemnors do not have the right to trial by jury when the contempt proceeding is summary in nature. Bloom v. Illinois, 391 U.S. 194 (1968).

[29] *Compare* United States v. Petito, 671 F.2d 68 (2d Cir.), *cert. denied*, 459 U.S. 824 (1982) (witness already held in civil contempt for refusing to testify not entitled to notice that noncompliance could result in criminal sanctions) *with* Yates v. United States, 227 F.2d 848 (9th Cir. 1955) (due process does not permit punitive sanctions without prior notice being given to defendant).

[30] United States v. Rylander, 714 F.2d 996, 1004, *rev'd on other grounds*, 460 U.S. 752 (1983). *See also In re* Kave, 760 F.2d 343, 351 (1st Cir. 1985). The fifth amend-

accused in an OSHA contempt proceeding suggest that criminal contempt should not be available to a court without an appropriate procedural foundation.[31]

Moreover, because the proceeding is criminal, all accepted proofs must be shown "beyond a reasonable doubt." Since intent must also be shown, the contemnor's inability to comply is irrelevant. Finally, if the penalty imposed upon the contemnor could result in confinement, a jury trial is mandatory if requested. Unlike civil contempt, however, a judge cannot impose both a monetary fine and imprisonment.

III. EMPLOYER CHALLENGES TO WARRANT-BASED INSPECTIONS

Once employers are presented with a warrant, issued either by a judge or magistrate, a decision must be reached regarding an appropriate course of action. Where the employer has no basis to question the validity of the warrant, the only reasonable decision must be to permit the inspection to proceed. Thereafter, the course of action would be to rely on the administrative process to contest any citations issued for violations.[32] Of course, if the warrant is valid, and the inspection is conducted with no violations discovered or citations issued, presumably there is no injury to be addressed through legal challenge.[33]

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ment privilege against self-incrimination depends on the "purportedly *incriminatory nature of the interrogation*" and not the "nature of the proceedings in which the testimony is sought . . . ." *Id.* at 343 (emphasis in original).

[31] This concern has particular applicability to the discussion of *Hern Iron Works*, wherein it appears a civil contempt action was transformed to a criminal contempt penalty upon unilateral action by the appellate court, and without notice to the adjudged contemnor. For a complete discussion of the *Hern Iron Works* case see *infra* notes 71-95 and accompanying text.

[32] Employers who have been cited and/or fined for an OSHA violation have the right to contest the citation before the OSHA Review Commission by notifying the Secretary of Labor of their intention to do so. 29 U.S.C. § 659 (1970). Such notice must be given within 15 days of the issuance of the citation or fine. *Id.* The rules and procedures pertaining to review of an OSHA citation are codified at 29 CFR § 2200, § 2204 (1989). Once a contest has been timely filed, the case will be heard before an Administrative Law Judge (ALJ). Appeals of ALJ decisions are reviewed by the Review Commission as a matter of discretion. 29 CFR § 2200.91 (1989). Parties who are aggrieved by a final order of the Review Commission must file a motion to stay the order, 29 CFR § 2200.94 (1989), pending review by the United States court of appeals in the circuit where the violation is alleged to have occurred. 29 U.S.C. § 660 (1989).

[33] Nevertheless, employers incur very real expenses as a result of OSHA inspections. "Wall to wall" inspections may continue for days or weeks. These inspections often result in "down time" of operations and prevent or interfere with the performance of necessary operational tasks, tying up management and supervisors for extended periods of time.

The dilemma arises when an employer has some reason to believe that the warrant is defective or that it can be challenged on some legitimate basis.[34] A decision must be made either to permit the inspection and pursue challenges to the validity of the warrant in the course of contesting any resultant citations, or to refuse the inspection and respond to the resulting legal process. Either course of action presents significant drawbacks to achieving employer objectives.

A. Administrative Challenge — Post Inspection

Allowing the inspection to proceed in the face of a warrant, and then utilizing the available procedure to challenge either the warrant itself or the "product" of the warrant, has several serious deficiencies. These drawbacks encompass issues relating to exhaustion of administrative remedies, exclusion of evidence obtained in the course of an inspection conducted pursuant to an invalid warrant, and lastly, questions over the authority of the Occupational Safety and Health Review Commission (Review Commission) to consider and rule upon warrant validity. Each of these problem areas will be discussed separately.

1. Exhaustion of Administrative Remedies

Once the inspection has occurred, initial recourse to the judicial process may be foreclosed. The majority view is that exhaustion of administrative remedies before the Review Commission is required before judicial challenge to the warrant can be pursued.

The United States Court of Appeals for the Third Circuit's decision in *Babcock and Wilcox Co. v. Marshall*[35] and the United States Court of Appeals for the Fifth Circuit's decision in *Baldwin*

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[34] It is not within the scope of this article to review and analyze the standards that will result in a successful challenge to a warrant, or to comment upon the likelihood of success under particular fact patterns. However, it is instructive to set forth certain general comments. There continues to be differences among the circuits in regard to evaluating those factors sufficient to support issuance of a warrant on OSHA inspections. The Fifth Circuit, for example, requires that OSHA have a plan based on sufficient specific neutral criteria and selection of a particular site based upon adequate reasons. A warrant application will be fatally defective if it fails to include an adequate description of the manner of selection for a particular employer. Brock v. Gretna Mach. & Ironworks, 769 F.2d 1110, 1113 (5th Cir. 1985). *But see* Pennsylvania Steel Foundry & Mach. Co. v. Secretary of Labor, 831 F.2d 1211, 1215 (3d Cir. 1987) (particularized cause is not required, a "warrant application [need only] describe the program and aver that the worksite fits within the program").

[35] 610 F.2d 1128 (3d Cir. 1979).

Metals Company v. Donovan,[36] are representative of this majority line of reasoning. In *Baldwin Metals*, the court of appeals held that a combination of factors, including the protection of administrative autonomy, deferral to administrative expertise, development of a factual record facilitating subsequent judicial review, and easing the burden on the courts by weeding out cases that become moot, necessitated application of the exhaustion doctrine to OSHA warrant challenges.[37] The court first observed that even if constitutional issues under the fourth amendment were involved, administrative pursuit could nevertheless result in mootness. The court stated:

> If the OSHA citations against the administrative defendants are dismissed for any reason, the injunctive and declaratory relief sought in federal court would be of no value. Hence, while the alleged injury resulting from the search is indeed different than the alleged injury resulting from the citations, the relief sought in cases like the ones at bar concerns the latter. Since the issue might therefore be mooted by dismissal of the citations in the administrative proceeding, the rationale behind the exhaustion of remedies doctrine applies.[38]

Addressing the issue of administrative autonomy, the court reasoned that the absence of an exhaustion requirement "invites dilatory tactics by companies faced with an enforcement proceeding."[39] The court further embraced the rationale of the Third Circuit in *Babcock and Wilcox*, wherein the Third Circuit Court of Appeals concluded that an employer's ability to go into district court on the "eve of a scheduled hearing before the Review Commission . . . [would disrupt] the statutory balance between swift abatement of dangerous [work] conditions and due process protections."[40]

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36 642 F.2d 768 (5th Cir.), *cert. denied sub nom.* Mosher Steel Co. v. Donovan, 454 U.S. 893 (1981).

37 *Baldwin Metals*, 642 F.2d at 771. The line of reasoning continues to be followed. *See, e.g., In re* Trinity Indus., Civ. No. 88-4035 (6th Cir. August 31, 1989), Empl. Safety and Health Guide (CCH) No. 957, at 7. Contrawise, the court also held that constitutional challenges which did not require a factual record for judicial review do not require exhaustion. *Baldwin Metals*, 642 F.2d at 772.

38 *Baldwin Metals*, 642 F.2d at 772. The court further noted that mootness of constitutional issues before an agency could, standing alone, require application of the exhaustive doctrine. *Id.* at 772 n.7. *See* Pub. Util. Comm'n of Cal. v. United States, 355 U.S. 534 (1958).

39 *Baldwin Metals*, 642 F.2d at 773.

40 *Id.* at 773 n.9 (quoting Babcock and Wilcox Co. v. Marshall, 610 F.2d 1128, 1140 (3d Cir. 1979)). The court in *Baldwin Metals* thus concluded that exhaustion of remedies was necessary to prevent defendants "from throwing a wrench into the enforcement machinery." *Id.* at 773.

Thus, the majority view appears to place a heavy emphasis on the efficient pursuit of administrative procedures and the potential positive impact on the district court's case load. This position, however, is not universally accepted. Although the minority position, the United States Court of Appeals for the Seventh Circuit continues to allow post-execution of warrant challenges.[41] In contrast to the other jurisdictions, the Seventh Circuit has emphasized that when constitutional injuries are alleged, there is a distinction between injury resulting from the issuance of citations and from the mere conduct of an improper inspection. Even if the citations are subsequently dismissed, reasons the Seventh Circuit, the injury resulting from the inspections are not mooted by an administrative decision in favor of the injured employer.[42] The Seventh Circuit's analysis is better suited to address the needs and rights of all the parties. It is a fiction to suggest that administrative dismissal of citations addresses all injuries to which an employer is subjected when inspection follows an invalid warrant. Therefore, access to the courts should not be subject to an exhaustion requirement, even after the inspection has taken place.

2. Questions Over the Availability of an Exclusionary Rule

Perhaps the more significant concern regarding allowing inspections to proceed under a potentially invalid warrant is the prospect of the inability to contain evidence of violations that are disclosed in the course of such an inspection. Disagreement over whether an exclusionary rule should be recognized in this type of administrative context has continued for over a decade.[43] The

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[41] *See, e.g.*, Chromalloy Am. Corp. v. Donovan, 684 F.2d 504 (7th Cir. 1982) (fourth amendment challenge to inspection based upon warrant executed two years after its issuance). The Seventh Circuit's reasoning in this regard was first announced in its decision of Weyerhaeuser Co. v. Marshall, 592 F.2d 373 (7th Cir. 1979). In *Weyerhaeuser*, the court held that an employer could seek judicial review of an administrative warrant where a factual record was not required and the probable cause necessary to determine the validity of a warrant could be determined on "the face of the warrant application." *Id.* at 376. The court's decision further rested upon its reasoning that since warrants originate from magistrates, officers of the district courts, the district courts should be afforded the opportunity to review a magistrate's probable cause determination. *Id.* at 377.

[42] *Id.* at 376.

[43] *See Babcock and Wilcox*, 610 F.2d at 1139 ("We do not, of course, express any opinion at this time on the sharply contested question whether the exclusionary rule applies to OSHA enforcement."). *Compare* Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683, 689 (9th Cir. 1978) (dictum) (proposing that exclusionary rule should not be brought to bear on OSHA proceedings) *with* Savina Home In-

Review Commission has previously found that evidence may be excluded if it was obtained pursuant to a warrant not meeting probable cause standards.[44] This position is supported by certain courts.[45] However, a recent court ruling rejecting the availability of the rule has clouded the issue.

In *In re Establishment Inspection of Hern Iron Works*,[46] the employer argued that the applicability of the exclusionary rule to civil OSHA proceedings would "provide the subject of the search with a forum in which to raise the constitutional issue and permit the court to correct the erroneous warrant."[47] In rebuffing the employer's argument, however, the United States Court of Appeals for the Ninth Circuit observed that application of the exclusionary rule had been rejected by the United States Supreme Court in both Internal Revenue Service proceedings[48] and in immigration proceedings.[49] The court noted that the Supreme Court, in each instance, determined that the social cost of allowing the rule to be applied outweighed any possible deterrent effect on improper or overzealous government conduct. Based upon the Supreme Court's previous holdings, the Ninth Circuit Court of Appeals rejected use of the exclusionary rule: "We think it unlikely that the exclusionary rule would in the future be applied to OSHA violation proceedings."[50]

Notwithstanding the Ninth Circuit ruling in *Hern Iron Works*, any continuing argument that an exclusionary rule has viability and should be available in an OSHA inspection context would have to rely on the reasoning advanced by the court in *Savina Home Industries v. Secretary of Labor*.[51] In *Savina*, the United States Court of Appeals for the Tenth Circuit ruled: "[A] conclusion that [an] inspection . . . violated the Fourth Amendment would be of no practical significance in the absence of an exclusionary sanction. If the exclusionary rule were inapplicable, even if a constitutional violation were to be found no remedy would be

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dus. v. Secretary of Labor, 594 F.2d 1358, 1363 (10th Cir. 1979) (exclusionary rule applicable to OSHA proceedings).

44 Sarasota Concrete Co., 9 O.S.H. Cas. (BNA) 1608 (Rev. Comm. 1981).

45 Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982); Savina Home Indus. v. Secretary of Labor, 594 F.2d 1358 (10th Cir. 1979).

46 881 F.2d 722 (9th Cir. 1989).

47 *Id.* at 729.

48 *Id.* (citing United States v. Janis, 428 U.S. 433 (1976)).

49 *Id.* (citing INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (exclusionary rule inapplicable to deportation hearing)).

50 *Id.* at 729 n.18.

51 594 F.2d 1358 (10th Cir. 1979).

available . . . ."[52]

Although referring to other supportive decisions, the *Savina* court's apparent basis for applying the exclusionary rule was the concern that "preserving judicial integrity and deterring official lawlessness do not become inconsequential simply because an illegal search is conducted by the Department of Labor instead of by the Department of Justice."[53] However, the cases relied upon by the *Savina* court from other jurisdictions, including the United States Supreme Court, are no longer controlling. The *Savina* court had bolstered its conclusions based upon analysis that application of the rule was held appropriate in other civil contexts. The Supreme Court's subsequent decision in *INS v. Lopez-Mendoza*,[54] holding that the exclusionary rule does not apply to a civil deportation hearing, clearly demonstrates that this no longer is a viable assertion.

The argument against extending the exclusionary rule to evidence obtained pursuant to an invalid warrant generally focuses upon the contention that adequate alternative remedies exist. For example, the court in *Hern Iron Works* stated, in dicta, that such remedies are available under the Administrative Procedure Act or by instituting a separate *Bivens* action alleging harassment by government officials.[55]

The principles set forth in *Bivens v. Six Unknown Named*

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[52] *Id.* at 1361.

[53] *Id.* at 1363. The court's analysis rested upon the principles set forth by the Supreme Court in Mapp v. Ohio, 367 U.S. 643 (1961). The *Mapp* decision represents a culmination of Supreme Court cases, all of which stand for the proposition that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible . . . ." *Id.* at 655.

[54] 468 U.S. 1032 (1984). Writing for the majority, Justice O'Connor declared that where there is no determination of guilt or administration of punishment being made, the civil nature of such a proceeding does not afford various protections that apply in criminal proceedings. *Id.* at 1038. Thus, the decision in *Lopez-Mendoza* held that the exclusionary rule did not apply to a civil deportation hearing. *Id.* at 1034.

[55] *In re* Establishment Inspection of Hern Iron Works, 881 F.2d 722, 729 n.19 (9th Cir. 1989). The court in *Hern Iron Works* noted:

> Even absent an exclusionary rule in OSHA proceedings, we are not convinced that Hern Iron would be entirely without remedies if its complaints were justified. For instance, the company might seek declaratory or injunctive relief against enforcement of the plan in a suit under the Administrative Procedure Act. Similarly, if, as *Hern Iron Works* suggests, the inspection was part of a plan of harassment against the company and the views of its president, a *Bivens* action might be brought against OSHA and its inspection officials.

Id.

Agents[56] may provide a suitable alternative to extending the exclusionary rule in an administrative context. This position has been advocated by commentators for a number of years.[57] However, it has been recognized that such a remedy has potential drawbacks. Such issues include both the potential for great expense of pursuing separate litigation and whether the vague prospect of such a suit could have any meaningful impact on deterring improper conduct by compliance officers and OSHA officials.[58]

The bottom line appears to be that there is no guarantee that an employer will be able to exclude evidence of OSHA violations obtained in the course of an invalid warrant inspection. Although certain alternative actions may be available for an employer, none appear to provide any meaningful or efficient protection to the employer engaged in an ongoing prosecution. Rather, pursuit of such remedies would at best provide only the most indirect deterrence. Furthermore, if the inspection is allowed to proceed, the likelihood of eventually challenging the validity of the warrant is greatly limited. As discussed previously, even if application of the exhaustion doctrine were avoided, a court may conclude that challenges to the warrant, such as seeking injunctive relief, are moot because the inspection would have already taken place. There is also additional concern that attempting to challenge a warrant's validity in the administrative process will have unsatisfactory results. This contention will be discussed in the following section.

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56 403 U.S. 388 (1971). *Bivens* concerned a claim for damages suffered by a suspected drug dealer as a result of the conduct of federal narcotics agents in arresting and searching the plaintiff. In *Bivens*, the agents, acting in their official capacity, entered the plaintiff's apartment where they arrested him and "manacled [him] in front of his wife and children." *Id.* at 389. After being taken to the courthouse, the plaintiff was interrogated and strip-searched. The plaintiff claimed that the arrest and search were made without a warrant or probable cause. *Id.* The plaintiff sought damages based upon the violation of his constitutional rights. The Supreme Court recognized the plaintiff's claim, holding that the fourth amendment not only serves as a limitation on federal powers, but entitles a party to money damages for injuries suffered as a result of such violations. *Id.* at 394-97. In reaching its decision, the Court noted that there is no specific prohibition that "persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages . . . ." *Id.* at 396.

57 *See, e.g.*, Trant, *supra* note 3, at 711-13.

58 *Id.* at 712.

3. Deficiencies in Pursuing Warrant Challenges Administratively

Assuming that an exhaustion doctrine is applied and questions concerning the warrant are raised administratively, an understanding of the possible outcomes of such pursuit is necessary. The primary inquiry is whether the Review Commission has authority to take any action with respect to evaluating a warrant that has been issued by a United States Magistrate, presumably after the magistrate has undertaken the required review and applied the proper standards for administrative probable cause. A consideration of this question is typically intertwined with determining application of an exhaustion doctrine and reviewing exclusionary rule availability. In *Babcock and Wilcox Co. v. Marshall*,[59] the United States Court of Appeals for the Third Circuit rejected the Seventh Circuit's position in *Weyerhaeuser Co. v. Marshall*,[60] and approved what it concluded was the Review Commission's then new stance of considering challenges to inspection warrants.[61] Referencing the United States Supreme Court's legal clarification in *Marshall v. Barlow's, Inc.*, the Third Circuit stated:

> Before the Supreme Court's opinion in *Barlow's*, the Review Commission had declined to rule on challenges to warrants, because it believed that to do so would require it to pass, at least implicitly, on the constitutionality of its underlying statute, which had authorized searches.

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[59] 610 F.2d 1128 (3d Cir. 1979).

[60] 592 F.2d 373 (7th Cir. 1979).

[61] *Babcock and Wilcox*, 610 F.2d at 1138-40. The Review Commission had initially rejected its ability to consider such warrant challenges. Electrocast Steel Foundry, 6 O.S.H. Cas. (BNA) 1562, 1563 (Rev. Comm. 1978). However, in 1979, the First Circuit in *In re* Worksite Inspection of Quality Prods., 592 F.2d 611 (1st Cir. 1979), concluded that "in the vast majority of OSHA enforcement cases, the challenges to the warrant can be adequately considered in the statutory enforcement proceedings." *Id.* at 615. The Review Commission utilized this foothold in its subsequent decision in Chromalloy American Corp., 70 O.S.H. Cas. (BNA) 1547 (Rev. Comm. 1979) to reject *Electrocast Steel* and conclude that "challenges to the validity of OSHA inspection warrants should be considered in the statutorily created review procedure," including review by the Commission itself. *Id.* at 1549. It did not accept this new role without certain misgivings, however, noting:

> The Commission recognizes that finding itself in the position of reviewing a magistrate's determination with respect to the issuance of an inspection warrant is unusual and we accept this role reluctantly. To do otherwise, however, is to create a separate and collateral review mechanism through the federal courts that will operate either concurrently with or to the exclusion of the review procedure created by Congress in the Act.

Id. at 1548.

> Now . . . the Review Commission may consider motions to suppress evidence without acting beyond its jurisdiction. It may do this, consonant with its limited role under the Constitution, not by reviewing the constitutionality of its statute but by interpreting the statute and by applying constitutional principles to specific facts.[62]

Thus, the question of the Review Commission's authority to review the validity of a warrant will arise when an employer requests the exclusion of evidence obtained in a search pursuant to the challenged warrant. Also supporting this result is the United States Court of Appeals for the Eleventh Circuit's decision in *Donovan v. Sarasota Concrete Co.*,[63] which held that the [Review Commission] "may determine if sufficient probable cause supported an administrative warrant when the evidence obtained pursuant to the warrant form the basis of the agency's proceedings."[64]

The above decisions upholding the Review Commission's power to review a magistrate's determination are to be contrasted with less definitive rulings. Other courts have viewed the Review Commission's role as merely a preliminary step to the judicial appeal process. These courts conclude that there is no irreparable injury inflicted by first requiring an exhaustion of administrative remedies, which will necessitate review of any raised warrant challenges by the Review Commission. In *Baldwin Metals Co. v. Donovan*[65] the United States Court of Appeals for the Fifth Circuit noted that "since judicial review of the warrant's constitutionality is guaranteed by the right to appeal adverse [Review Commission] rulings to a federal court of appeals . . . no irreparable injury . . . [will result from] being required to exhaust administrative remedies before bringing their claims to federal court."[66] Although distinguishing its analysis from the Third Circuit's decision in *Babcock and Wilcox*, the court utilized that decision to demonstrate that Review Commission consideration of a warrant's validity does not inflict any damage upon the authority of the magistrate: "Our brethren of the Third Circuit choose to characterize this function in a different way, and suggest that the Review Commission must inevitably decide whether to consider seized evidence, and that this involves a judgment as to the warrant's propriety."[67]

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62 *Babcock and Wilcox*, 610 F.2d at 1139 (citations omitted).

63 693 F.2d 1061 (11th Cir. 1982).

64 *Id.* at 1067.

65 642 F.2d 768 (5th Cir. 1981).

66 *Id.* at 773.

67 *Id.* at 773 n.11. The *Babcock and Wilcox* court held:

Thus, the question of whether the Review Commission has the power and authority to review the issuance of a warrant for probable cause is piggy-backed on the issue of whether evidence obtained pursuant to an invalid warrant is excludable. The rationale expressed by courts analyzing the question is that in the context of determining whether evidence should be excluded, the Review Commission must by necessity independently review the actual validity of the warrant. If, as appears to be the case based upon such recent cases as *Hern Iron Works* and *Lopez-Mendoza*, the trend is moving away from recognition of the exclusionary rule, this end result would also seem to remove the ability of the Review Commission to consider the basis of warrant issuance in the first instance. If not for reaching a decision as to whether improperly obtained evidence should be allowed as a part of the case, there simply is no reason for the Review Commission to even consider the warrant or whether administrative probable cause existed when the warrant was issued.

Thus, there continues to be authority "on the books" that an employer's pursuit of administrative remedies could allow Review Commission analysis of the validity of the warrant, and if defective, the possibility of excluding such evidence from the case. This prospect, however, appears to be rapidly diminishing. The greater likelihood is that the Review Commission will no longer entertain questions on the warrant process, and will merely defer to the initial determination of the magistrate. Simply, an employer wishing to challenge the legality of a warrant merely by permitting the inspection to proceed, and then exhausting administrative remedies through the Review Commission by seeking exclusion of evidence through a suppression motion, ventures into treacherous and unchartered territory. He could find that his case was already lost long before the opportunity to argue arises.

> [T]he decision to issue the inspection warrant is complete and cannot be negated. If the challenge [to the warrant's validity] is raised by [the administrative defendant], the problem for the Review Commission will be whether to use the evidence obtained from the inspection. In deciding whether to use this evidence the Review Commission must of course, make its own judgment as to the propriety of the warrant, but such a determination does not reverse the magistrate's action, nor does it contravene a judicial order. The OSHA official would not be in contempt if he were to decide not to execute a warrant signed by the magistrate, and an administrative tribunal does not flout the authority of the judiciary by refusing to consider evidence that has been obtained pursuant to a warrant issued by a judge or magistrate.

Babcock and Wilcox Co. v. Marshall, 610 F.2d 1128, 1136 (3d Cir. 1979).

B. Refusal to Permit Inspection

The remaining option for the employer, therefore, is to not comply with the warrant by refusing to allow the compliance officer to inspect the work site. The government will then start its legal process in motion by commencing contempt proceedings against the employer. Defenses to the validity of the warrant can then be raised by the employer, either by moving to quash in a separate action or in responding to the contempt action. An employer who can establish the invalidity of the warrant will thus avoid inspection and secure the dismissal of the contempt, assuming the procedure is continued as a civil contempt throughout.

Even where the employer is confident that the process in which he is involved is one for civil contempt, however, the risk of failure is great. It is an all or nothing proposition; failure to defeat the warrant will result in enforcement of the contempt and the associated necessity to submit to inspection. Recent case law demonstrates that the stakes in civil contempt proceedings are approaching extreme levels. In *In re Trinity Industries*,[68] the United States Court of Appeals for the Eleventh Circuit rejected the employer's contentions of lack of probable cause in connection with an OSHA inspection warrant, and held that the district court did not abuse its discretion in imposing sanctions for refusing to honor the warrant. Furthermore, the appellate court found the sanction, set at $10,000 per day, to be "entirely reasonable,"[69] and not punitive even though the company had requested that a penalty of $500 per day be imposed, and assured the court that it would comply after incurring one day's penalty. The court of appeals reasoned that its function was not to accommodate contemnors in preparing for appeal, but rather "to determine what amount is necessary to ensure compliance."[70]

This argument, however, appears to be a simple exercise in circular reasoning. If the court's main objective in enforcing a civil contempt is to ensure compliance, and it has been assured that a one day fine of $500 would be sufficient to guarantee submission to inspection, a $10,000 daily fine must be construed as punitive. If punitive, the contempt must be construed as criminal. Nevertheless, the underlying concern is evident; an employer risks a potentially extreme penalty whenever he refuses to

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68 876 F.2d 1485 (11th Cir. 1989).
69 *Id.* at 1494.
70 *Id.*

comply with a warrant. Therefore, in deciding whether to pursue this strategy the employer must weigh the risk of incurring a significant penalty against the advantages of obtaining immediate access to the judicial forum and avoiding issues relating to exhaustion of administrative remedies and the exclusionary rule.

If, notwithstanding the inherent risk, access for inspection is refused, an employer must be prepared to go the full route in the challenge process. The entire strategy is counterproductive if the warrant is found to be valid. Thus, while in the past employers were faced with a gamble, it was a gamble based upon a studied judgment of the likelihood of success in defeating the warrant. Now, with criminal liability looming as a potential threat, there is an entirely different end result. This new gamble is based not upon a reasoned judgment of the ability to succeed in establishing the warrant's validity, but also upon a "crapshoot" guess of whether the court will impose criminal, rather than civil, contempt sanctions to enforce the warrant.

IV. THE *HERN IRON WORKS* SAGA

The best example of the treacherous ground upon which employers now venture when refusing to comply with a warrant is evidenced in the *Hern Iron Works*[71] case decided by the United States Court of Appeals for the Ninth Circuit. Although *Hern Iron Works* may be an extreme example based upon the apparent long and hostile relationship between that company and OSHA, the case demonstrates emphatically the possible outcome of a warrant challenge. It also serves to highlight the absence of any reasonably safe alternative to permitting an inspection to go forward, even when there is a good faith belief that a warrant was issued with insufficient legal foundation.

A. Background

Hern Iron Works' difficulties with OSHA can be traced to 1975 and include a series of attempted inspections, access refusals, refused warrants, legal prosecutions, and contempt proceedings.[72] This history was apparently not an insignificant factor in

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[71] *In re* Establishment Inspection of Hern Iron Works, 881 F.2d 722 (9th Cir. 1989).

[72] *Id.* at 724-25. OSHA first came into conflict with Hern in 1975 when OSHA attempted to conduct a warrantless search of the company. After Hern refused entry, OSHA terminated its investigation. *Id.* In 1978, OSHA again attempted a warrantless search of Hern with the same unsuccessful result. *Id.* In 1979, OSHA appeared with a warrant. *Id.* Three years of litigation followed Hern's refusal to

the most recent round of Hern fireworks which concluded in a finding of criminal contempt against the employer. The United States Court of Appeals for the Ninth Circuit specifically reviewed this history in its decision affirming the contempt finding and denying Hern's motion to quash an inspection warrant.[73] The court noted that the hostilities between Hern and OSHA were so long standing and intricately evolved that "[t]he complete history of the conflict between OSHA and Hern cannot be fully distilled . . . ."[74]

B. The Recent Dispute

The most recent battle was initiated on June 11, 1987, when Chief Judge Marion J. Callister of the United States District Court for the District of Idaho issued a warrant authorizing OSHA to inspect Hern Iron Works of Coeur d'Alene, Idaho. OSHA officers attempted to inspect the factory on June 23rd and 24th, but were denied access by its sole owner John Hern. Hern subsequently defended his actions, asserting that they were not intended as a refusal, but rather as a request for time to enable his attorneys to review the warrant.[75] On June 26, 1987, Hern filed a motion to quash the warrant. The initial bases for the motion were: 1) that the actions of the Secretary of Labor in seeking the warrant constituted harassment and intimidation contrary to the United States Supreme Court's directives in *Marshall v. Barlow's, Inc.*, and; 2) that the criteria OSHA used to select Hern Iron Works for inspection provided an insufficient basis for justifying the inspection.[76]

The Secretary of Labor countered Hern's motion to quash by seeking an order to show cause why Hern "should not be held in civil contempt of th[e] Court for failure to honor and comply

allow entry, ultimately resulting in the completion of OSHA's inspection. *Id.* No inspections were attempted again until June 11, 1987. *Id.* at 725. This most recent controversy between OSHA and Hern began when OSHA obtained an administrative search warrant to inspect the Hern premises. *Id.*

73 *Id.* at 724-25.

74 *Id.* at 724 n.4. The court further noted: "However, the record before us details other battles that have been carried out in the press and in correspondence with elected representatives." *Id.*

75 *Id.* at 723-24.

76 *In re* Establishment Inspection of Hern Iron Works, Civil No. MS-3305, slip op. at 1 (October 30, 1987) (Report and Recommendation of Magistrate Stephen M. Ayers). Relying upon its contention that it was merely seeking additional time for its attorneys to review the warrant, Hern Iron also argued that its failure to honor the warrant was not contemptuous "because it was pursuing its legal right to counsel." *Id.*

with the Warrant for Inspection previously issued . . . ."[77] On July 20, 1987, United States District Court Judge Harold L. Ryan signed the order and referred both it and the motion to quash to the magistrate for review and recommendations.[78]

In October of 1987, the magistrate issued his "Report and Recommendation" on this matter and recommended denial of Hern's motion to quash. The magistrate rejected Hern's allegations of intimidation and harassment and cited to a sworn affidavit filed by the Area Director which stated that "Hern was selected for inspection pursuant to the provisions of the plan for inspection attached to his affidavit and no other factor entered into the decision."[79] The magistrate considered the testimony of the OSHA investigator regarding whether harassment and intimidation influenced the decisions, but did not consider testimony regarding the secondary contention that the criteria for selection did not provide a sufficient factual basis for warrant issuance. The magistrate noted that "[o]nly the information within the 'four corners' of the warrant application can be considered in determining whether the warrant should be issued."[80] Recognizing that the circuits did not agree upon the standards for criteria selection, the magistrate ruled that the Ninth Circuit did not require an extensive factual showing of the process utilized by OSHA for selection. The magistrate cited *Stoddard*[81] for the proposition that the government, to obtain a warrant, is not required to provide the individual statistics of an employer.[82] The

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77 *In re* Establishment Inspection of Hern Iron Works, Civil No. MS-3305, slip op. at 1 (July 20, 1987) (Order to Show Cause re: Contempt).

78 *In re* Establishment Inspection of Hern Iron Works, Civil No. MS-3305, slip op. at 1 (July 20, 1987) (Order of Reference).

79 *In re* Establishment Inspection of Hern Iron Works, Civil No. MS-3305, slip op. at 7 (October 30, 1987) (Report and Recommendation of Magistrate Stephen M. Ayers).

80 *Id.*, slip op. at 8.

81 *Id.*, slip op. at 9 (citing Stoddard Lumber Co. v. Marshall, 627 F.2d 984, 985 (9th Cir. 1980)). *Stoddard* concerned the appeal of a contempt order against a lumber company for failure to honor an OSHA warrant. *Stoddard*, 627 F.2d at 985. In its defense, the employer claimed that the *ex parte* application for a search warrant by the OSHA area director was unauthorized, and further argued that the lumber company did not fall within the Secretary of Labor's standards for inspection selection. *Id.* The court rejected these contentions, holding that individual statistics pertaining to the specific employer were not necessary due to the high rate of injury to the lumber industry. *Id.* at 988.

82 *Hern Iron Works*, slip op. at 12-13 (Report and Recommendations of Magistrate Stephen M. Ayers). Ayers concluded that, similar to the *Stoddard* case, the detailed selection criteria employed by OSHA in the *Hern Iron Works* matter made it unnecessary for the area director to provide the court with a specific analysis of the reasons that Hern Iron was selected for inspection. *Id.*

magistrate disposed of the issue regarding sufficiency of criteria by noting that "[b]y providing a copy of the plan and a sworn affidavit stating that Hern was selected pursuant to the criteria set forth in the plan, OSHA made a sufficient probable cause showing for the issuance of the inspection warrant."[83]

C. Contempt Issue

Having disposed of the arguments raised to quash, the magistrate turned to the contempt issue. Surprisingly, the magistrate presented analyses consistent with a treatment of civil contempt. The magistrate reasoned that "where a valid inspection warrant has been issued by a magistrate or judge, one who refuses to allow inspection is in contempt of court. Mr. Hern was well aware of this jeopardy from his prior experience."[84] Hern's denial of entry to the inspection officer, the magistrate concluded, constituted a disobeyance of the warrant. The magistrate therefore recommended enforcement of the contempt order. This recommendation was apparently linked directly to the conclusion that the warrant itself was valid and that grounds for quashing it had been rejected.[85]

As a result of the magistrate's recommendations, an order was issued on November 19, 1987, signed by District Judge Harold L. Ryan, accepting the report and adopting it as the court's decision. The motion to quash was denied, and the following contempt order issued:

> It is FURTHER ORDERED that Hern Iron Works, Inc., should be, and is hereby, adjudged to be in CONTEMPT of this court; shall be fined the sum of $2,000, and it shall pay the Secretary of Labor all costs and attorney's fees incurred in litigating this matter.[86]

Framing the contempt order in the above fashion raised questions as to the nature of the order. The order itself imposed a fixed fine, assessed attorneys fees, and was not linked in any manner to performance of the act for which the contempt was prosecuted,

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[83] *Id.*, slip op. at 13.

[84] *Id.*, slip op. at 14.

[85] *Id.* It is revealing to note Magistrate Ayers' comments relating to Hern's apparent good faith in denying entry. In his opinion, Ayers concluded that Hern's intent was irrelevant to the imposition of a contempt citation. *Id.* Such an analysis clearly reflects that the contempt which the magistrate recommended was civil in nature. For a discussion of the distinction between criminal and civil contempt, see *supra* notes 18-31 and accompanying text.

[86] *In re* Establishment Prospection of Hern Iron Works, Civil No. MS-3305 (Order of Hon. Harold L. Ryan, U.S.D.J.).

namely, submission to the inspection. Thus, the contempt order was strictly punitive in nature, not issued to secure the end result. As mentioned earlier, this result is more closely associated with a finding of criminal contempt rather than civil contempt.

This area of confusion was not lost to the Secretary, who subsequently filed motions seeking clarification of the contempt sanction and for a further finding of contempt based upon Hern's continued noncompliance in refusing to allow the inspection. These motions, however, were not filed until June of 1988, approximately eleven months after Judge Ryan's contempt order. In the interim, Hern had filed a notice of appeal on January 18, 1988, challenging the court's findings regarding the warrant's validity and its denial of the motion to quash. Because of the pending appeal, the district court issued an order dated September 1, 1988, indicating that it lacked jurisdiction to "enter any orders regarding sanctions which have already been imposed or further findings of contempt."[87] As a result, the initial ruling of the court, and its inherent confusion regarding the nature and basis for the contempt finding, was the matter presented to the Ninth Circuit for review on appeal.

D. The Ninth Circuit's Decision

Given the focus of Hern Iron Works' appeal and the arguments pursued in its challenge, the foundation of the United States Court of Appeals for the Ninth Circuit's decision is surprising. It would appear by the court's discussion, that the dispute centered around the criminal nature of the contempt finding. In fact, a review of the appellant's opening brief discloses that no argument was presented on appeal challenging the apparent criminal nature of the district court's contempt finding.[88]

Thus, a contempt order that was specifically sought via a civil proceeding by the Secretary in keeping with the government's long-standing policy of prosecuting through civil contempt proceedings, and which had not at any point been previously described as a criminal contempt order, was accepted as such without discussion or basis by the court of appeals. The presupposition that the contempt order was criminal supported the appellate court's entire decision. The court concluded that the

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[87] *In re* Establishment Inspection of Hern Iron Works, Civil No. MS-3305 (Order denying further contempt of court) (September 1, 1988).

[88] Brief for Appellant, *In re* Establishment Inspection of Hern Iron Works, 881 F.2d 722 (9th Cir. 1989).

warrant was valid and that the motion to quash was properly denied, but not before it had determined through a lengthy and convoluted analysis, that the contempt order against Hern would be enforced regardless of its decision on the other issues. Thus, in one sweeping decision, the court had turned on its ear the "status quo" of established procedure and response in OSHA warrant enforcement. Obviously, if an employer is uncertain as to whether he is involved in a civil or criminal contempt proceeding throughout the entire process, and this is clarified and ultimately enforced at the court of appeals level, options are significantly limited in the initial response stage.

The basis for the Ninth Circuit's holding on the contempt issue is evident from the court's declaration that "[i]n brief, the collateral bar rule permits a judicial order to be enforced through criminal contempt even though the underlying decision may be incorrect and even unconstitutional."[89] In that statement, the court finally clarified without argument, that Hern was facing a criminal, not civil, contempt order.

The court then discussed at length the principle of collateral bar. Citing to *Maness v. Meyers*[90] and *Walker v. City of Birmingham*,[91] the court of appeals quoted a summary of the rule from the seminal case of *United States v. United Mine Workers*:[92] "The orderly and expeditious administration of justice by the courts requires that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."[93]

The court, in its discussion of collateral bar, observed that exceptions are recognized by the courts.[94] The court also noted the distinction between civil and criminal contempt: "The collateral bar rule applies only to criminal contempt charges. The invalidity of the underlying order is always a defense to a civil

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89 *In re* Establishment of Hern Iron Works, 881 F.2d 722 (9th Cir. 1989).

90 419 U.S. 449 (1975).

91 388 U.S. 307 (1967).

92 330 U.S. 258 (1947). The Supreme Court's decision rested upon the need for a court to be able to maintain the status quo while determining its own authority. Thus, any actions interfering with a court order seeking to preserve existing conditions subjects the actor to criminal contempt.

93 *Hern Iron Works*, 881 F.2d at 726 (quoting United States v. United Mine Workers, 330 U.S. 258, 293 (1947)).

94 *See id.* at 726-29. The exceptions specified by the Ninth Circuit included: "1) Orders which are defective due to the issuing court's lack of personal or subject matter jurisdiction; 2) 'Transparently invalid' orders; and 3) Orders which compel production which would violate the fifth amendment right against self-incrimination." *Id.*

contempt charge."[95] This statement, however, begs, and slickly avoids, the real question. Why, and at what stage, had this matter been converted from a petition for civil contempt, as initially pursued by the Secretary, to one in criminal contempt? At no point in its discussion did the court of appeals review the criteria for a criminal contempt ruling, analyze any aspects of the case that were crucial in a criminal contempt determination, or set forth a conclusion that criminal contempt was appropriate. Rather, the discussion assumed, without deciding, that a criminal contempt had been perpetrated.

It is ironic that this type of unilateral conversion from civil to criminal contempt had been raised by a concerned employer in a case decided by the United States Court of Appeals for the Third Circuit almost a decade earlier where the appellate court dismissed the concern as a highly "unlikely event."[96] In *In re Establishment Inspection of Consolidated Rail Corporation*,[97] Conrail had requested that a decision of the district court, denying its motion to quash an OSHA warrant, be held to be a final and appealable order "because it might be unable to have its challenge to the underlying order reviewed . . . were it cited for criminal contempt, [and] it might not be able to defend an appeal on the grounds that the underlying order is invalid . . . [based on the ruling of *United States v. United Mine Workers*]."[98] The Third Circuit dismissed the employer's request based upon representations from the Secretary's counsel "that instances in which criminal, rather than civil, contempt have been used to enforce OSHA have been exceedingly rare."[99] The court held:

> We decline to make an exception to the general rule against non-appealability of orders denying motions to quash warrants on the mere hypothetical possibility that the district

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95 881 F.2d at 726 n.11 (citing *United Mine Workers*, 330 U.S. at 295).

96 *In re* Establishment Inspection of Consol. Rail Corp., 631 F.2d 1122 (3d Cir. 1980). An even earlier case from the United States Court of Appeals for the Seventh Circuit, *In re* Establishment Inspection of Blockson and Co., 582 F.2d 1122 (7th Cir. 1978), stated that refusal to comply with a facially valid warrant was a poor strategy, as such conduct exposed the employer to criminal contempt, and "it is no defense to a charge of *criminal* contempt that the order disobeyed was invalid." *Id.* at 1124 (emphasis in original). That court recognized, however, that if the employer was "fortunate" enough to merely be charged with civil contempt, that since the purpose of civil contempt is merely to coerce compliance, a defense can be made on the ground that the underlying order was erroneously issued. *Id.*

97 631 F.2d 1122 (3d Cir. 1980).

98 *Id.* at 1124-25 (citing United States v. United Mine Workers, 330 U.S. 258 (1947)).

99 *Id.* at 1125.

> court, on its own motion, will convert the civil contempt proceeding into a criminal contempt proceeding, thereby depriving the appellate court of its ability to consider the merits of the underlying order. We will deal with that situation when and in the unlikely event that it materializes.[100]

The result of this development, therefore, is that employers and legal practitioners are left with no guidance as to when to expect, or even be wary of, potential criminal contempt. Does it take as long and as adversarial a history as the *Hern Iron Works* cases? Will any challenge to a warrant by refusal of entry subject an employer to that result? Will criminal contempt be invoked only after a second, or third, refusal of entry? The standards are unclear, and no guidance can be obtained from existing law in other areas where contempt proceedings are commonplace. It appears that the distinctions between civil and criminal contempt are so cloudy that any guidance is unlikely to be found by a review of precedent. Indeed, in *In re Trinity Industries*,[101] the United States Court of Appeals for the Eleventh Circuit appeared to have sufficient grounds, by *Hern Iron Works* standards, to issue a criminal contempt order. The *Trinity* court stated that: "Trinity's repeated refusals to permit an inspection evidenced Trinity's willful, deliberate, and brazen contumacy and made obvious the need for the district court to resort to coercive tactics to secure compliance with its contempt orders."[102] It is unclear why Trinity escaped criminal contempt, based on such "willful, deliberate, and brazen contumacy." If anything, the cases demonstrate a lack of standards by which an employer can reasonably evaluate its proper course of action.

V. CONCLUSION

There appears to be no solution to the dilemma in which employers find themselves. There is no simple answer or advice that can be offered to employers who seek to challenge inspections by taking issue with the validity of a warrant. The first major obstacle is deciding whether to refuse inspection and proceed directly to court, or whether to allow inspection and administratively challenge the proceedings. The latter course would be with recognition that the end result may be unsatisfactory because of closed avenues resulting from mootness or inability to exclude evidence.

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100 *Id.*
101 876 F.2d 1485 (11th Cir. 1989).
102 *Id.* at 1494.

The second obstacle is attempting to defeat a warrant where the probable cause standards are low and appear to be becoming even lower. Unless challenge efforts are successful, a civil contempt proceeding may result in supposedly "nonpunitive" assessments, intended for mere "coercive" purposes, that reach stratospheric and arguably punitive levels.

The third obstacle, and the ultimate insult, of course, is the renewed specter of criminal contempt. Whether initiated by OSHA in the first instance or "sprung" on the parties without prior warning, as in the Ninth Circuit's *Hern Iron Works* decision, the concern of doing "wrong" even when "right" has become a reality.