FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket Nos.	KENT 2011-1259-R KENT 2011-1260-R KENT 2012-705
v.		
WARRIOR COAL, LLC		

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Jordan, Chairman; Cohen, and Nakamura, Commissioners

These proceedings, which arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), involve a citation and an order issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") to Warrior Coal, LLC ("Warrior") following its failure to comply with a request for information made by MSHA investigators. The investigation was initiated after an inspector observed miners working in close contact to multiple hazardous roof and rib conditions. MSHA's request for information about the position, shifts worked, and contact information for each mine employee was made pursuant to section 103(h) of the Mine Act.[1]

Warrior contested the citation and the order before the Commission. After considering motions for summary decision, a Commission Administrative Law Judge affirmed both the citation and the order, assessed a penalty, and ordered that Warrior provide the requested information. 35 FMSHRC 2968, 2976 (Sept. 2013) (ALJ).

Warrior petitioned the Commission for review of the Judge's order. We granted review, and for the reasons that follow, we affirm the order of the Judge.

[1] Section 103(h) of the Mine Act requires mine operators to "provide such information, as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under this Act." 30 U.S.C. § 813(h).

I.

Factual and Procedural Background

On May 10, 2011, an MSHA inspector visited the underground Cardinal Mine in Kentucky owned by Warrior. During an inspection of the mine's No. 2 unit, he observed multiple hazardous roof and rib conditions in a place where miners were actively working. The inspector immediately issued an order to withdraw the miners pursuant to section 107(a) of the Mine Act.[2] In addition, the inspector issued Warrior a citation and an order pursuant to section 104(d), 30 U.S.C. § 814(d). The citation alleged a violation of 30 C.F.R. § 75.202(a)[3] for a failure to protect miners from the hazards related to roof and rib falls. The order alleged that the hazardous conditions were not listed in the pre-shift examination book, in violation of the safety standard at 30 C.F.R. § 75.360(a)(1).[4]

Thereafter, MSHA began a special investigation into the hazardous roof and rib conditions pursuant to section 110(c) of the Act, which addresses liability for corporate directors, officers, or agents.[5] The investigators suspected that the hazards may have existed for multiple shifts and sought to interview Warrior's employees. On June 21, 2011, the MSHA District Manager sent Warrior a letter stating:

> MSHA is conducting a preliminary investigation of a possible willful/knowing violation. The Federal Mine Safety and Health Administration (MSHA) is requesting the names, addresses, positions, shift worked and telephone numbers of the employees at the Cardinal Mine.

S. Ex. G; W. Ex. 1.

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[2] Section 107(a) states that "[i]f, upon any inspection . . . an authorized representative of the Secretary finds that an imminent danger exists, such representative shall . . . issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from . . . such area." 30 U.S.C. § 817(a).

[3] Section 75.202(a) states that "[t]he roof, face and rib's of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

[4] Section 75.360(a)(1) provides that "a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is schedule to work or travel underground."

[5] Section 110(c) states that "[w]henever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to . . . civil penalties, fines, and imprisonment . . . ." 30 U.S.C. § 820(c).

In response, Warrior sent the District Manager a letter which raised concerns that the demand for information was "overly broad, unduly burdensome, an unwarranted invasion of confidential and proprietary information of Warrior, and an unwarranted invasion of the privacy of Warrior's employees . . . ." S. Ex. H; W. Ex. 2. Warrior also represented that it would cooperate with MSHA provided that MSHA first obtained the permission of the employees involved. *Id.*

An exchange of several letters followed; in each of the letters, Warrior stated that it disagreed with the scope of the request, and, in turn, the District Manager demanded that Warrior provide his investigators with the list. Warrior continuously represented that it would not provide employee contact information without first receiving prior approval from the individual employees involved.

On July 14, 2011, MSHA issued Citation No. 8503376 to Warrior, alleging that Warrior failed to provide requested information during an investigation in violation of section 103 of the Act.[6] After receipt of the citation, Warrior continued to refuse to supply the contact information. Accordingly, MSHA issued an order to Warrior pursuant to section 104(b) of the Mine Act for its failure to abate the violation.[7]

Warrior filed notices of contest with the Commission, and the proceedings were assigned to an Administrative Law Judge. The Judge scheduled the case for a hearing. Thereafter, the parties filed cross motions for summary decision and responses pursuant to Commission Procedural Rule 67, 29 C.F.R § 2700.67.

The Judge granted the Secretary's motion for summary decision, denied Warrior's motion, and ordered that Warrior provide the requested information to the Secretary. 35 FMSHRC at 2973-76. The Judge concluded that MSHA's specific request to Warrior was "reasonable and for a legitimate government purpose." *Id.* at 2974. Accordingly, he affirmed the citation and the order and assessed a civil penalty of $555. *Id.* at 2976.

On review before the Commission, Warrior asserts that section 103 of the Act does not grant the Secretary the authority to compel an operator to produce the contact information of its employees to MSHA investigators. Warrior also maintains that the Judge's ruling conflicts with an MSHA policy document that states that miner participation in interviews is "voluntary."

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[6] Section 103(a) provides that "[a]uthorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year . . . ." 30 U.S.C. § 813(a). Section 103(h) states that "[i]n addition to such records as are specifically required by this Act, every operator of a coal or other mine shall . . . . provide such information, as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under this Act." 30 U.S.C. § 813(h).

[7] Section 104(b) authorizes an inspector to issue an order to an operator if, upon any follow-up inspection of the mine, he determines that a violation was not abated in the time specified. 30 U.S.C. § 814(b).

Finally, Warrior contends that the Judge erred in affirming the section 104(b) order because the violation of section 103(h) did not affect a physical location at the mine.

II.

Disposition

A. Section 103(h) of the Mine Act authorizes the Secretary to make reasonable requests for information from a mine operator as part of an investigation.

As noted above, section 103(h) of the Mine Act states that "[i]n addition to such records as are specifically required by this Act, every operator of a coal or other mine shall . . . provide such information, as the Secretary . . . may *reasonably require* from time to time to enable him to perform his functions under this Act." 30 U.S.C. § 813(h) (emphasis added).

The Commission had occasion to consider the reasonableness of the Secretary's request for records under section 103(h) in *Big Ridge, Inc.*, 34 FMSHRC 1003 (May 2012), *aff'd*, 715 F.3d 631 (7th Cir. 2013), a case which involved citations issued during an audit of accident, injury, and illness reports. In *Big Ridge* we made clear that the Secretary has broad authority to request information from mine operators. As part of the audit, the Secretary requested access to medical reports and payroll information, and issued citations alleging violations of 30 C.F.R. § 50.41 to the mine operators who refused to provide the requested information.[8] On review, the Commission concluded that the Secretary's requests were within the broad scope of authority provided by section 103(h) of the Mine Act. It stated that section 103(h) provides "clear instructions that 'information' that is not specifically required to be maintained by the Act shall, nonetheless, be provided to the Secretary to enable her to perform her functions, as long as the request is *reasonable*." *Id.* at 1012-13 (emphasis added and omitted).

In affirming the Commission's decision, the Seventh Circuit emphasized that section 103 "unambiguously requires mines to provide MSHA with records, reports and information beyond what mines are otherwise required to maintain." 715 F.3d at 641. It further stated that the text of section 103(h) "permits MSHA to make information demands for a wide range of purposes – any reasonable requirement that would help MSHA fulfill the purposes of the Mine Safety Act." *Id.*

Warrior incorrectly asserts that the court's ruling in *Big Ridge* was premised on its finding that the records at issue there were "relevant and necessary" for MSHA to verify whether operators complied with Part 50 reporting requirements. W. Br. at 5. Although the posture of the case in *Big Ridge* concerned MSHA's records request pursuant to Part 50, the court did not restrict its holding to the "relevant and necessary" language of that standard. It emphasized that:

[8] 30 C.F.R. § 50.41 states that "[u]pon request by MSHA, an operator shall allow MSHA to inspect and copy information related to an accident, injury or illnesses which MSHA considers relevant and necessary to verify a report of investigation required by § 50.11 of this part or relevant and necessary to a determination of compliance with the reporting requirements of this part."

> [The text of section 103(h)] permits MSHA to make information demands for a wide range of purposes – any reasonable requirement that would help MSHA fulfill the purposes of the Mine Safety Act.

715 F.3d at 641. The court then stated that "[s]ection 50.41 and the document demands here are well within those bounds." *Id.* at 642. It held that MSHA may reasonably require operators to turn over records, even records they are not required to maintain, when that information would enable MSHA to perform any of its functions under the Act. *Id.* at 641. In other words, MSHA's statutory authority is not limited to "relevant and necessary" information.[9]

B. The Secretary's request was reasonable.

In determining the reasonableness of the Secretary's document request, we will consider, as the *Big Ridge* court did, whether the request is "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." 715 F.3d at 646 (quotation omitted); *see also id.* at 642, 646-48.

Applying that framework here, we conclude that the request was clearly reasonable. First, the request was relevant to MSHA's purpose, which was to investigate if any agent of the operator "knowingly authorized, ordered, or carried out" a violation of a mandatory safety standard. 30 U.S.C. § 820(c). The investigation concerned serious failings with regard to roof and rib control requirements. MSHA suspected that the roof and rib hazards had existed for multiple shifts. Failures in these areas have a potential for the most serious safety consequences, and the employees of the operator are the only potential witnesses who may have relevant information.

While the scope of the request was broad, we conclude that the broad scope was justified by the circumstances of the investigation. In connection with an investigation into a potential systemic compliance failure, MSHA obviously must have access to a broad number of potential employee witnesses, and must have the ability to follow the investigation where it leads without unnecessary encumbrance. By having the names of all employees, MSHA can pursue the investigation without the need to have further conversations with the operator, thereby maintaining the important aspect of confidentiality during the progress of the investigation. MSHA could have attempted to frame the request more narrowly by specifying types of job duties at the mine. However, such an effort might have inadvertently omitted the identities of persons not directly working on the section who nonetheless would have relevant information. The Secretary correctly observes that employees might have information by dint of their duties in office administration or relationships with other employees rather than by virtue of their particular duties at the operation.

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[9] Even if it could be said that MSHA must establish that the information it seeks from Warrior is "necessary" for its investigation, MSHA has met this burden in this case. As noted, *infra*, miners other than those who worked in the immediate area of the violations may have relevant information, and MSHA must be able to follow the investigation where it leads.

We also conclude that the request was sufficiently limited in both time and manner. MSHA requested only the names of the employees who were employed at the mine at the time of the request. Furthermore, the manner is limited to obtaining a list of employees, with their shifts and contact information. It does not include searching through Warrior's offices for additional documents.

In the *Big Ridge* decision, the Seventh Circuit recognized that while the Mine Act does not empower MSHA to serve administrative subpoenas during an investigation, the power to request information pursuant to section 103(h) "amounts to an administrative subpoena in substance." 715 F.3d at 646.[10] Our determination here that the Secretary's request is reasonable is fully consistent with the broad authority the federal courts have accorded agencies' enforcement of administrative subpoenas.

For example, the Supreme Court has held that an administrative subpoena issued by the Secretary of Labor pursuant to the Walsh-Healey Act should be enforced if the "evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act." *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943); s*ee also United States v. Whispering Oaks Residential Care Facility, LLC*, 673 F.3d 813, 818 (8th Cir. 2012) ("a subpoena 'should be enforced when the evidence sought by the subpoena is not plainly incompetent or irrelevant to any lawful purpose of the agency in the discharge of its duties.'") (citation omitted).

We also find the opinion of the Fourth Circuit in *EEOC* v. *Randstad,* 685 F.3d 433 (4th Cir. 2012) instructive. In that case, the EEOC filed an application to enforce an administrative subpoena against an employment agency. The subpoena requested employment information from 13 offices in Maryland over a five-year period. The EEOC was investigating allegations of disability discrimination based on an alleged literacy policy of the employer. The Fourth Circuit rejected the employer's claim that the geographic and temporal scope of the subpoena went too far. Although the employer argued that the subpoena should have been limited to the position assignments made only by the complainant's office during the years he was temporarily employed there, the court disagreed, stating

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[10] Our dissenting colleague is deeply critical of the Seventh Circuit's analogizing of MSHA's authority to request information pursuant to section 103(h) to the issuance of administrative subpoenas, and suggests that the court may have been unaware of MSHSA's lack of general subpoena power. Slip op. at 15-16 n.1. It is certainly true that the Mine Act does not provide MSHA with the express power to issue subpoenas except in connection with summoning witnesses to appear and documents to be produced for investigatory public hearings. 30 U.S.C § 813(b). However, as discussed *supra*, the Mine Act, in section 103(h), clearly requires "every operator of a coal or other mine [to] establish and maintain such records, make such reports, *and provide such information*, as the Secretary . . . may reasonably require from time to time . . . ." 30 U.S.C. § 813(h) (emphasis added). Hence, although Congress did not give MSHA the power to subpoena individuals to testify except in connection with investigatory public hearings, it did give MSHA the power to reasonably require the production of records and other information from operators. This power is properly analogized to the power to issue administrative subpoenas for such records and information.

that it and the district court "must defer to the EEOC's appraisal of what is relevant so long as it is not obviously wrong. We conclude the thirteen-office, five year scope of the subpoena was not an unreasonable exercise of the EEOC's discretion in deciding how to investigate whether [the employer's] literacy policy was discriminatory." *Id.* at 451 (citation omitted).[11]

The Supreme Court has also held that the burden of showing that the request pursuant to a subpoena is unreasonable, and therefore should not be enforced, is on the subpoenaed party. *See Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 218 (1946) (holding that "[n]o sufficient reason was set forth in the returns or the accompanying affidavits for not enforcing the subpoenas, a burden petitioners were required to assume in order to make 'appropriate defense.'"); *see also FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) ("The burden of showing that the request is unreasonable is on the subpoenaed party."). If an operator has an objection to the scope of a request made by the Secretary pursuant to section 103(h), it appropriately bears the burden of identifying the basis for its objection that the request is not reasonable.

Warrior did not carry that burden. Warrior's submissions included a letter to the District Manager stating that the scope of the Secretary's request was too broad because it included employees who were not underground miners. W. Ex. 6. Warrior failed, however, to provide the Judge with specific objections stating why a certain category of employee would lack relevant knowledge. Instead, Warrior requested that the Judge decide the case on the arguments it presented in its motion for summary judgment. *See* 35 FMSHRC at 2973. In that motion, Warrior argued that, as a general matter, section 103(h) does not provide the Secretary the right to the disclosure of private contact information of miners, that the Secretary's position was in conflict with an MSHA handbook, that *Big Ridge* was distinguishable, and that the Secretary was disregarding a miner's right not to provide his contact information to MSHA. W. Mot. for Sum. Dec. at 6-11. As to MSHA's request being overly broad, Warrior's argument for summary decision was limited to the following general assertion: "The request was unreasonably broad

[11] Commissioner Young's reliance on *United States v. Johnson,* 628 F.2d 187, 193 (D.C. Cir. 1980), slip op. at 17, is misplaced. Johnson involved a discharged employee's request that a government agency issue subpoenas for witnesses on his behalf. Our opinion rests not on MSHA's power to issue subpoenas, but on Congress's explicit grant of authority to MSHA pursuant to section 103(h) of the Act.

Commissioner Young relies on *Donovan v. Dewey*, 452 U.S. 594 (1981) for the Fourth Amendment proposition that MSHA's reasonable search must be both authorized by law and necessary. Slip op. at 19. However, as the Seventh Circuit made clear in *Big Ridge*, the protections available to mine operators under the Fourth Amendment when faced with a documents request are best analogized to the protections available to a regulated entity which has received a request for documents in the form of an administrative subpoena. Accordingly, it distinguished the document request in *Big Ridge* from MSHA's ability to conduct warrantless physical searches of mine property considered in *Donovan.* Because *Big Ridge*, like this case, did not involve a physical search of a mine, the Seventh Circuit concluded that "the Fourth Amendment issues are better understood in terms of the law applicable to administrative subpoenas." 715 F.3d at 645.

because it clearly sought information from people who MSHA knew would have no information to provide." *Id.* at 11.

Therefore, Warrior did not provide to the Judge any significant context or factual support for its cursory contention that the Secretary's request was "overly broad and not relevant." PDR at 6. The mere statement of the breadth of the request does nothing to explain why such breadth makes the request unreasonable. Warrior needed to assert with particularity why inclusion of non-underground miners resulted in overbreadth, created a burden, or otherwise was unreasonable. It failed to do so.

MSHA's information request placed virtually no "burden" upon the operator. Obviously the operator could easily produce a list of its employees, and Warrior made no effort to demonstrate any burden in doing so. As the Judge found, "[s]imply supplying the contact information for its employees placed almost no burden on Warrior." 35 FMSHRC at 2974.

Further, such disclosure did not impose any obligation upon any employee. Each employee could choose whether to cooperate with any MSHA investigator who might contact the employee. The information sought by the Secretary only enabled his representatives to contact relevant witnesses away from the mine site, a measure that ensures that the identity of potential witnesses remains confidential during the course of an investigation. *See* Commission Procedural Rule 61, 29 C.F.R. § 2700.61 ("A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.").

MSHA had an understandable preference to speak with potential witnesses in true privacy rather than in a closed room at the workplace of the entity under investigation. MSHA must be able to conduct an effective investigation. Therefore, an objection that MSHA could satisfy its need to speak with potential witnesses by interviewing employees at the mine carries no weight whatsoever.[12]

The Commission is mindful and protective of individuals' right to privacy. However, every individual working at a mine understands the dangers faced by miners. Therefore, in undertaking such employment, individuals also understand that the Secretary has the important task of assuring compliance with laws and regulations protecting the health and safety of miners. Although employees may refuse to participate in an investigation by MSHA, it does not overreach by obtaining their names and addresses in the course of conducting an ongoing investigation into a serious safety situation at a mine.

Accordingly, we hold that Warrior failed to demonstrate that any portion of the Secretary's information request was unreasonable.

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[12] Warrior suggests that the investigators could have visited the mine and asked miners to join them at an off-site location for interviews. We reject this argument. The Mine Act does not require such an ungainly process and, as stated above, MSHA is authorized to make reasonable requests for information during an investigation.

C. The Secretary's special investigation handbook does not authorize Warrior's refusal to comply with the information request, and MSHA's request did not deprive Warrior of fair notice of its obligations under the Mine Act.

Warrior argues that the Secretary's request for miner contact information impermissibly forces it and its miners to participate in the Secretary's investigation, which conflicts with MSHA's policy that states that participation in an investigation is voluntary. W. Br. at 6-9. Warrior's assertion is based on the statement "all information is voluntary and may be refused" found in MSHA's *Special Investigations Procedures Handbook* at page 5-9. W. Ex. 12.

We disagree. As to Warrior itself, the argument would give any operator carte blanche to refuse to participate in an MSHA special investigation, which would eviscerate MSHA's ability to conduct a meaningful inquiry.

As to individual miners, there is no conflict between the MSHA Special Investigations policy and the Secretary's request to Warrior. Any miner contacted by the Secretary during the course of the investigation can voluntarily choose whether to participate in a subsequent interview and to what extent. Under the Secretary's proposed investigation method, miners retain their individual ability to make a decision for themselves, and inform the investigators of their decision. The *Handbook* in no way sanctions Warrior's refusal to comply with the Secretary's request.

Further, because there is no conflict between an employee's right to choose whether to participate in an investigation and the right of the Secretary to obtain material reasonably related to its investigation, Warrior was not deprived of fair notice.

Finally, we note that it is well established that policy manuals are not officially promulgated and do not prescribe rules of law that are binding on the Commission or its Judges. *King Knob Coal Co., Inc.*, 3 FMSHRC 1417, 1420 (June 1981) (citing *Old Ben Coal Co.*, 2 FMSHRC 2806, 2809 (Oct. 1980)).

D. The Secretary's interpretation of section 104(b) of the Mine Act is reasonable.

The Judge concluded that an inspector can issue an order alleging a failure to abate a violation pursuant to section 104(b), even if the inspector determines that no discrete physical location in the mine is affected by the violation. 35 FMSHRC at 2975.

Warrior argues that the Judge erred, in that the language of the standard makes the inspector's ability to issue a section 104(b) order conditional on his determination that a specific area has been affected. We disagree.

Section 104(b) of the Mine Act states:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein . . . and (2) that the period of time for abatement should not be further extended, *he shall determine the extent of the area affected by the violation* and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, *such area* until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b) (emphases added).

Section 104(b) provides two conditions for the issuance of an abatement order: (1) a violation has not been totally abated within the time period fixed and (2) the inspector determines that the period for abatement should not be further extended. If those two conditions are satisfied, the inspector must then "determine the extent of the area affected by the violation" and issue the order which requires the withdrawal of miners from that area. It is this second set of requirements that arguably injects ambiguity into the standard. The Mine Act provides no specific direction for how an inspector is to proceed if he determines that a violation has not been abated within the time fixed, the period should not be extended, but "the extent of the area affected" language is not applicable.

When the Mine Act is silent on an issue, the Secretary's interpretation which reasonably effectuates the health and safety goals of the Act is controlling. *Sec'y of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 115 (4th Cir. 1996). Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC,* 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984)).

We conclude that the Secretary's interpretation of the statute, permitting the issuance of a section 104(b) order which states that the inspector determined that no area of the mine in particular was affected by the violation, is a reasonable interpretation.

It is significant that nothing in the language of section 104(b) prohibits the Secretary from issuing a "no area affected" order. The language indicates that, if the two conditions above are met, the MSHA inspector "shall determine the extent of the area affected by the violation" and order the appropriate withdrawal of miners from "such area" until it is determined that the violation has been abated. Thus, if no specific area of the mine is affected by the violation, it is reasonable to read the statute as providing that the inspector is to state that determination and issue a corresponding section 104(b) order.

The Secretary's interpretation is also consistent with the remedial nature of the Act. *See Pattison Sand Co., v. FMSHRC*, 688 F.3d 507, 513 (8th Cir. 2012) ("The Act is remedial in nature and its terms should therefore be construed broadly."). Furthermore, it is consistent with the Mine Act's structure and progressive enforcement scheme of increasingly severe sanctions being applied when an operator incurs repeated violations. *See* 30 U.S.C. § 814(d) and (e).

A "no area affected" order provides an important deterrent to operators who fail to abate violations in a timely fashion. Moreover, issuing such orders has been an ongoing and accepted practice for many years. *See Thunder Basin Coal Co.*, 16 FMSHRC 671 (Apr. 1994) (acknowledging the Secretary's practice of issuing "no area affected" section 104(b) orders). The issuance of an order for a failure to abate promotes compliance by imposing a consequence on an operator that refuses to comply with the Mine Act.

While the immediate result of miner withdrawal is not applicable if no physical space in the mine is affected by the violation, the withdrawal of miners is not the only consequence associated with the issuance of a section 104(b) order. Pursuant to section 105(b)(1)(A) of the Act, 30 U.S.C. § 815(b)(1)(a), the Secretary is authorized to seek a separate civil penalty if an operator has not corrected a violation in a timely manner, i.e., if the issuance of a section 104(b) order for failure to abate the violation was warranted. Moreover, section 110(b)(1) of the Act, 30 U.S.C. § 820(b)(1), authorizes the assessment of a civil penalty on a daily basis if an operator fails to abate a violation. Finally, a Judge can assess an elevated civil penalty as a result of an operator's failure to abate a violation. *See* 30 U.S.C. § 820(i) ("In assessing civil monetary penalties, the Commission shall consider . . . [factors that include] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation."). In these instances, the issuance of a "no area affected" section 104(b) order documents the operator's failure to comply, and the prospect of a higher penalty acts as a deterrent.

Our dissenting colleague suggests that the operator was not afforded due process protection because "[r]ather than an opportunity to seek judicial review concerning the scope and nature of the agency's request . . . the operator was exposed to the threat of immediate and coercive penalties simply for defending its fundamental rights." Slip op. at 20. The Seventh Circuit in *Big Ridge* categorically rejected a similar claim (that the mine operators' due process rights were violated because MSHA was allowed to impose daily penalties on mines not complying with record demands before any opportunity for judicial review). After analyzing the legislative history of the Mine Act, the Court found that the procedures for imposing penalties were constitutional. 715 F.3d at 652-53. It also noted that the Secretary had granted the operators' request not to assess any failure-to-abate penalties until after the disposition of the hearing before the Judge, and that the Commission granted the mine operators' request to expedite its review. *Id.* at 654. The Court concluded that "the penalties do not violate the mine operators' right to due process because the statutory scheme offered opportunities both for review and to mitigate the penalties." *Id.*

Moreover, although our colleague implies that Warrior was forced to pay penalties for its failure to turn over the records without recourse to Commission review of MSHA's request, this was not the case. Pursuant to the scheme set forth by Congress in the Mine Act, the Secretary proposed a penalty for Warrior's failure to turn over the records, the operator contested the

citation and the penalty, and was only ordered to pay a $550 penalty *after* the opportunity for a hearing before a judge. In addition, there is no record of any proposed penalty for the failure to abate order.[13]

For the aforementioned reasons, we conclude that the Secretary's interpretation of section 104(b) of the Mine Act as authorizing MSHA inspectors to issue "no area affected" orders is reasonable and should be given deference.

III.

Conclusion

We affirm the Judge's decision to grant the Secretary's motion for summary decision. Accordingly, the citation and the order are both affirmed. Warrior is ordered to pay the assessed civil penalty and to provide the requested information to MSHA within 30 days of the date of this decision if it has not already done so.

Mary Lu Jordan, Chairman

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

[13] We also note that Warrior could have requested an expedited hearing before the Judge. *See* Commission Procedural Rule 52, 29 C.F.R. § 2700.52.

Commissioner Althen, concurring:

I concur with the majority decision. Commission precedent establishes that, although MSHA does not have authority to issue administrative subpoenas except in very limited circumstances, sections 103(a) and (h) of the Mine Act authorize MSHA to demand documents beyond those required by the Act. Here, MSHA was pursuing an important investigation; the document demand imposed virtually no burden on the operator, and implicated minimal, if any, privacy rights. I think the request was "reasonable."

However, I share many of the important concerns expressed in Commissioner Young's dissent. In particular, a document demand under section 103(h) is not an administrative subpoena. There are important differences. A fundamental difference is the absence of a hearing before assessment of a proposed civil penalty arising from the failure to comply with a document demand.[1] The right to a fair hearing at a meaningful time and in a meaningful manner is a fundamental requirement of the due process clause of the Fifth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

In *Big Ridge, Inc. v. FMSHRC*, 715 F.3d 631 (7th Cir. 2013), the Seventh Circuit offered three reasons that a penalty assessment before a hearing in a document demand case did not create constitutional difficulties: (1) mine operators could ask MSHA to delay imposing the penalty; (2) penalties are not automatic; and (3) mine operators can contest a penalty assessment before it becomes final. *Id.* at 653-54. The first two points rest upon a speculative, secular faith in the goodwill of government.[142] Only, the third point is substantive.

In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the Supreme Court did not find a constitutional defect in a pre-hearing assessment of a civil penalty. However, the Court was careful to state that it was the record in that case that did not support finding a constitutional defect. *Id.* at 216-18. That case focused upon the jurisdiction of federal district courts and upon the circumstances associated with inspections – that is, the type of MSHA actions that formed

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[1] There are other differences. For example, it appears that the operator never provided the demanded information at issue in this case. Unless MSHA has kept a section 110(c) investigation open for more than four years awaiting the names and addresses of all employees, it completed its investigation without the operator's compliance with the demand. Assuming that is the case, if this proceeding was analogous to an administrative subpoena proceeding, then, when the agency closed the investigation, a motion to compel compliance with a subpoena would be moot. Here, apparently, the Secretary collects a monetary penalty even though MSHA has foregone receipt of the documents in completing its investigation.

[2] This unusual case provides only a modicum of justification for the *Big Ridge* court's initial propositions. Here, MSHA did not seek a daily fine for the failure to abate order, and followed normal processes in assessing a fine for the section 104(a) citation. Indeed, the records obviously were not of real interest to MSHA as it allowed the contest to continue for over four years and, apparently, closed the investigation without obtaining the information. This provides no comfort that in other cases, when MSHA actually wants the information, it will not propose daily fines to coerce compliance before a hearing.

the gravamen of the Court's acceptance of warrantless inspections in *Donovan v. Dewey*, 452 U.S. 594 (1981). Such urgency does not attach to document demands and, thus, does not offer the set of facts or intellectual underpinning upon which the Court rested its *Thunder Basis* decision.

I do not find due process concerns sufficiently raised and articulated in this case to warrant definitive analysis. However, I am uncomfortable with the notion that MSHA may impose significant daily fines upon respondents to coerce compliance with a demand for records before a fair hearing. A future case in which MSHA does not meet either of the first two hypotheses of *Big Ridge* would present an opportunity to review the constitutionality of MSHA's imposition of severe, pre-hearing fines to coerce disclosure in the context of a specific investigation or discrimination case.

In this regard, MSHA recently alleviated constitutional concerns over the right to immediate review of a notice of safeguard by instituting a procedure for a technical citation followed by a hearing. *See* Program Policy Letter ("PPL") No. P14-V-02 (issued Sept. 24, 2014); *Contest of Mine Approval Actions*, MSHA's Program Policy Manual, V.G-4. Such a procedure for document demands, if coupled with an expedited hearing, would go far toward vindicating the Seventh Circuit's otherwise naïve assumptions about MSHA and toward assuring the constitutionality of enforcement procedures for document demands under section 103(h).

William I. Althen, Commissioner

Commissioner Young, dissenting:

I joined our opinion approving the Secretary's information request in *Big Ridge, Inc.*, 34 FMSHRC 1003 (May 2012), despite some misgivings, because the Mine Safety and Health Administration's (MSHA) request was narrowly crafted and the information sought was necessary to proper, specific and publicly-noticed auditing functions. Further, the rulemaking in *Big Ridge* gave notice that the Secretary intended to seek precisely the types of information at issue. Finally, and most critically, the information request at issue in *Big Ridge* was authorized and directed by the Secretary's own designated Administrator, whom Congress intended to exercise the discretionary powers under the Act.

The current information request is not similarly graced, and the majority seeks to follow an appeals court's invitation[1] – on an issue we pointedly did not address in our decision in *Big Ridge* – to engage in an alarming and unconstitutional expansion of the law, and to permit the sort of low-level policy freelancing the Supreme Court has expressly disapproved on Fourth Amendment grounds. I dissent.

At the heart of the majority's opinion lies the mistaken assumption that MSHA has the authority to issue administrative subpoenas in connection with routine mine inspections.[2] The

[1] The Seventh Circuit's reference to administrative subpoenas provides no support for its recognition of a general subpoena power in the Mine Act. Like the majority (*see* n.2, *infra*), the Court of Appeals simply assumes that the subpoena power exists, stating that it is "not persuaded" otherwise. *Big Ridge, Inc. v. FMSHRC*, 715 F.3d 631, 642 (7th Cir. 2013). This is a bare conclusion that cites no law governing the issuance of subpoenas under the Act or as a general matter of administrative law. Somewhat ironically, the court states, "we conclude that the record demands are best understood, in constitutional terms, as administrative subpoenas." *Id.* at 644. Of course, "in constitutional terms," MSHA has no power whatsoever, except that which has been bestowed by Congress. It may be understandable that the Court of Appeals would assume that the Mine Act authorizes the issuance of administrative subpoenas – a prerequisite to their use and enforcement under the Administrative Procedure Act. *See* 5 U.S.C. § 555(d) (requirement that agency subpoenas be "authorized by law"). It is relatively rare for an agency *not* to have Congressional authorization to issue administrative subpoenas, which suggests strongly that such power must be express, and not implied. *See* Edward A. Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89, 93 n.19 (1971) ("Those few remaining agencies which do not possess the subpoena power must obtain it from Congress.")

[2] In seeking to rationalize the Seventh Circuit's position on administrative subpoenas, the majority falls into the same trap as the appeals court but lacks the legally-valid fallback position afforded by the distinguishable facts in *Big Ridge*. The appellate court could properly have noted that Congress did, in fact, confer significant powers on the Secretary, along with the appropriate rulemaking he had undertaken in direct support of the records request, and affirmed our holding on that basis. Instead, it sought to overcome the significant impediments the Supreme Court has imposed on agency searches and seizures by assuming, as the majority now has in turn, that MSHA has a power Congress withheld from it. Thus, the majority's fundamental error is its endorsement of the Seventh Circuit's assumption that the authority exists and then analogizing the case at bar to cases where the issue was the scope of an authorized administrative subpoena.

problem with this rationale is that Congress not only failed to confer general administrative subpoena power on MSHA, it designed the Mine Act to preclude any inferences in favor of that power.

As we very recently held in *Pocahontas Coal Company*:

> The precise list of jurisdictional triggers in section 105(d) strongly indicates a Congressional intent to exclude other types of actions. *See Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1014 (5th Cir. 1968) (holding that "a power which has been withheld or denied by Congress cannot be found to exist as an 'incidental' and 'necessary' power" when Congress has specifically delineated other powers).

38 FMSHRC 157, 160-61 (Feb. 2012).

Despite our fresh recognition of this fundamental principle of statutory construction, the majority finds a general subpoena power where none was given. Indeed, the Mine Act authorizes subpoenas in only two circumstances: 1) to compel the attendance of witnesses when the agency holds public hearings to assist its investigation following an accident or other occurrence (section 103(b)); and 2) to authorize the *Commission* to compel the appearance of witnesses and production of evidence for hearings (section 113(e)). 30 U.S.C. §§ 813(b), 823(e).

Not only is the express authority for subpoenas severely limited under the Act, the power is extended to the Commission, and not the Secretary, except when summoning witnesses to public hearings. This is important.[3] "The Supreme Court has characterized as 'treacherous

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These cases have no relevance because MSHA does not possess subpoena power, and the alternative justifications offered have been expressly refuted by the Supreme Court. *See* pp. 18-19, *infra.*

[3] In addition to the case law cited in this opinion, it's worth noting that, in a Report to Congress directed by Public Law 106-544, Section 7, the Department of Justice *expressly* noted the limited scope of the Secretary's subpoena power under the Act. Citing section 103(b) of the Act, the report states that this conferral is the Act's sole administrative subpoena authority:

> For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal or other mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpoenas for the attendance and testimony of witnesses and the production or [sic] relevant papers, books, and documents, and administer oaths." *Federal courts have long recognized that the subpoena power of the Secretary under this and the predecessor Federal Coal Mine Health and Safety Act of 1969 (P. L. 91-173) is limited to public hearing settings, United States v. Blue Diamond Coal Co.*, 667 F2d 510, 519 (6th Cir. 1981); *UMWA v. Martin*, 785 F. Supp. 1025, 1027 [n].1 (D.D.C. 1992). Thus, it is clear both from the wording of the statute and the court interpretations that the subpoena power of the Mine Act is limited to investigatory public hearings being conducted by the Secretary.

business' such imputations of power from one agency to an entirely different agency." *Peters v. United States*, 853 F.2d 692, 699 (9th Cir. 1988) (citing *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 353 (1941)).

Peters is directly on point, and confronts the extension of subpoena power where none was conferred by Congress. The Immigration and Naturalization Service (INS) assumed it had the power to issue subpoenas because the Internal Revenue Service had been granted similar power to issue summonses in an analogous situation. *Id.* at 698. In reversing the District Court's "expansive" reading of the authorizing statute, the Court of Appeals contrasted the inferred power with the "specific legislative direction [given to the IRS] in an area heavily explored by both Congress and the courts." *Id.* at 698-99.

Here, the structure of that Act clearly evinces Congressional intent to limit the Secretary's subpoena power, by specifying this power may be wielded by the Secretary in only one situation not at all like or related to the circumstances presented by this case. Further, the legislative history and the structure and operation of the Act make clear that Congress intended independent adjudication by the Commission, and placed significant restraints on the Secretary's ability to enforce the Act and to adjudicate issues unilaterally. Thus, except when MSHA convenes a public hearing authorized by the Act, only the Commission has the authority to issue subpoenas, as a necessary extension of its power to conduct hearings.

This necessity, too, has been examined in a Court of Appeals, which similarly found unavailing the government's arguments in favor of an inferred power to issue subpoenas. *See Johnson v. United States*, 628 F.2d 187, 193 (D.C. Cir. 1980) ("Subpoena power is not an intrinsic feature of the administrative process, and courts cannot engraft subpoena authority onto an agency's charter from Congress.") (citation omitted). In *Johnson*, a discharged federal employee claimed that his due process rights were violated by the Civil Service Commission's failure to issue subpoenas for witnesses on his behalf. *Id.* The Court of Appeals held that there was no authority for the subpoenas sought by the employee. *Id.* Citing precedent, the Court reiterated that "'(t)he Commission cannot confer upon itself the power of subpoena in the absence of a statute requiring it to hold hearings of the type involving subpoenas.'" *Id.* (citing *Deviny v. Campbell*, 194 F.2d 876, 880 (D.C. Cir.), *cert. denied*, 344 U.S. 826 (1952)).[4]

One cannot overlook, in this context, the significance of Congress' choice to establish an independent Commission. Not only does the Labor Department lack the authority to conduct

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U.S. Department of Justice, Office of Legal Policy, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities*, Appendix A-1 (emphasis added). Of course, pursuant to Section 112 of the Mine Act, all litigation by the Solicitor before the Commission is subject to the direction and control of the Attorney General, and the Justice Department's frank appraisal in a statutorily-mandated report should thus be accepted as authoritative.

[4] The majority attempts to distinguish *Johnson* on its facts, but the fundamental legal principles upon which the decision rests are express, forceful and controlling here and do not depend on the peculiar circumstances of that case for their vitality.

hearings, but Congress assigned that function to another, distinct entity: the Commission. Indeed, the Commission has express subpoena power as an extension of its authority to conduct hearings under the Act. Where Congress has clearly delineated, and limited, the subpoena power under the Mine Act, it is improper for the Commission – or the courts – to infer additional power clearly withheld.[5]

Noting the Secretary's own awareness that it lacks subpoena authority beyond that expressed in the Act seems almost beside the point, in light of the overwhelming authority weighing against a more expansive view. But the Secretary's representatives did in fact seek greater subpoena powers, and the sponsors of the bill acknowledged the Secretary's absence of authority to issue such subpoenas. *See Big Ridge*, 715 F.3d at 642 (citing Committee on Education and the Workforce Democrats, H.R. 1373: The Robert C. Byrd Mine Safety Protection Act of 2013, 113th Cong., 1st Sess. (Mar. 21, 2013) (citation omitted)). While the Seventh Circuit dismissed this, *id.,* the Secretary's clear understanding of its administrative boundaries is nothing less than an acknowledgment of the governing law here.

Even if one were to somehow find the request permissible under another theory, in this context the request must be recognized on principle as facially overbroad and unreasonable under *Donovan v. Dewey,* 452 U.S. 594 (1981). From conditions in one section of a mine, MSHA has concocted theories justifying an unbounded inquisition into the operator's affairs and the authority, not only to question anyone whom it wishes on any subject, but to compel the operator's cooperation in what appears to be the classic – and forbidden – "fishing expedition."

The agency presents no evidence of a mine-wide problem, but appears confident that it would find one, but for the operator's intransigence. *See* S. Br. at 20 ("At the beginning of its section 110 investigation, *MSHA could not have known* how long the [subject] violations had existed, *which agents knew or had reason to know* of their existence, and *whether the violations occurred because of broader practices occurring elsewhere in the mine* . . . .") (emphasis added). This is essentially an acknowledgment that MSHA, despite the broad – and *Donovan*-approved – authority to enter the mine as part of the regular inspection process and to examine all documentation in the mine, must nonetheless also be given general authority to demand documentation that a low-level field agent (contra the Supreme Court's proscription in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)) believes he may need to build a case *without any reason to believe, at the outset, that the case exists.*

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[5] Where some courts have inferred a subpoena power from a statute, the inference arose from a statutory grant that implied the power by necessity. *See U.S. v. Florida Azalea Specialists*, 19 F.3d 620, 622-23 (11th Cir. 1994) (court, citing *Peters*, affirmed issuance of subpoena as within the scope of the subpoena authority conferred by Congress, even though the specific circumstance was not expressed in the statute authorizing investigations by the Office of Special Counsel); *U.S. ex rel Richards v. De Leon Guerrero*, 4 F.3d 749, 753 (9th Cir. 1993) (subpoena power is inferred from the grant of audit power to the Department of Interior under Insular Areas Act, which was expressly made "in addition to the authority conferred upon the Inspector General by the Inspector General Act of 1978.") (citation omitted). Both cases followed *Peters* and specifically quoted its holding that "[t]he authority of an administrative agency to issue subpoenas for investigatory purposes is created solely by statute." *Florida Azalea,* 19 F.3d at 623; *De Leon Guerrero*, 4 F.3d at 753.

The agency's argument is seductive. The logistical difficulty and inconvenience of complying with the Secretary's request in this case is, indeed, trivial. In light of the protracted litigation that has ensued, it may in fact have been easier and less costly for the operator to provide access to all of the contact information for everyone who works at the mine, just as it may be more convenient to simply consent to an officer's request to rifle through one's possessions on the street rather than insisting on a warrant. However, the Seventh Circuit's opinion in *Big Ridge* rests squarely on *Donovan*, which draws its force in turn from the Fourth Amendment.

We might do well to remember, then, that *Donovan* explains conformance to constitutional protections – it does not do away with them. Contrary to the majority's assumption, *Donovan* requires that a reasonable search be *both* authorized by law *and* necessary. *See Donovan,* 452 U.S. at 599 ("Inspections of commercial property may be unreasonable if they are not authorized by law or are unnecessary for the furtherance of federal interests."). Thus, the majority's confidence in the breadth of the Seventh Circuit's opinion – which dismisses with hardly a concern the operator's argument against the supposed "subpoena" power – is sorely misplaced. Asserting that Congress "authorized" agency personnel below the Secretary to seek any "relevant" information from operators, with the bounds of that inquiry left solely to those subordinate agents, disregards *Donovan* and its constitutional underpinnings, as well as the Act's provision of a forum for ensuring the agency does not have the very sort of unfettered discretion it claims before us in this case.

Donovan, in fact, speaks directly to just that problem:

> "Where Congress has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Colonnade Corp. v. United States, supra*, 397 U.S., at 77, 90 S.Ct., at 777. In such cases, a warrant may be necessary to protect the owner from the "unbridled discretion [of] executive and administrative officers," *Marshall v. Barlow's, Inc., supra,* 436 U.S. at 323, 98 S.Ct., at 1826, by assuring him that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara v. Municipal Court,* 387 U.S. 523, 538, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967).

Id. Furthermore, the very concerns which led the same Supreme Court to disapprove of warrantless searches under the Occupational Safety and Health Act in *Marshall v. Barlow's, Inc.* are present in this case. As the *Donovan* Court explained, in contrasting the regularity of inspection spelled out in the Mine Act with the asserted authority to inspect the panoply of businesses regulated under the OSHA:

> In assessing this regulatory scheme [under the Occupational Safety and Health Act], this Court found that the provision authorizing administrative searches "devolves almost

> unbridled discretion upon executive and administrative officers, *particularly those in the field*, as to when to search and whom to search."

452 U.S. at 601 (emphasis added). This, then, represents the proper perspective for analyzing the request at issue in this case: is there any limit or regularity inherent in the exercise of the Secretary's discretion under section 103(h), when employed by an inspector?

There is precious little. The request in *Big Ridge* involved an initiative developed by or at the direction of the Assistant Secretary, published in advance, and subject to public review and comment. The nexus between the information sought and the audit function for which it was needed was, as we held and the Seventh Circuit affirmed, tightly focused.

Contrast those facts with the current request, initiated by the type of low-level field agent whose discretion the Supreme Court found so troubling in *Donovan* and *Barlow's, Inc.* Not only does the agency assert *de facto* subpoena power has somehow been conferred (silently) all the way from Congress to a mine inspector, it does so without even the modest due process protections an actual subpoena might provide to its recipient. Rather than an opportunity to seek judicial review concerning the scope and nature of the agency's request here, as it would have with a proper subpoena, the operator was exposed to the threat of immediate and coercive penalties simply for defending its fundamental rights.[6]

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[6] This really is a matter of fundamental rights. As the Court of Appeals for the Sixth Circuit has noted, and as the Secretary once conceded, the diminished expectation of privacy the Supreme Court has applied to businesses, even those that are "pervasively regulated," has not abrogated the protections of the Fourth Amendment. *McLaughlin v. Kings Island, Div. of Taft Broadcasting Co.*, 849 F.2d 990, 993-94 (6th Cir. 1988), (*citing New York v. Burger*, 482 U.S. 691, 699 (1987)). Indeed, the Supreme Court established clear standards in *Burger* for balancing the government's interests against the Fourth Amendment rights of pervasively regulated businesses:

> [B]efore any such warrantless inspection or search is constitutionally acceptable:
>
> First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made.
>
> Second, the warrantless inspections must be "necessary to further [the] regulatory scheme."
>
> . . .
>
> Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." In other words, the regulatory statute must perform the two basic functions of a warrant: it must

Those rights are the elephant in a relatively small room. Having been granted the power to conduct unnoticed inspections, and access without a warrant to various documents and information, the agency nonetheless asserts it must *also* have the power to require the operator to produce documents beyond those needed to investigate a known violation, in order to determine whether there might be other violations elsewhere in the mine, without providing any foundational facts to gird its suspicions.

Speaking of facts, we should also recall that this case came to us on summary decision. Thus, the majority today affirms the judge's finding that the government was entitled to the information it sought *as a matter of law* and that no plausible factual scenario – a rogue inspector, government overreach on the particulars – might give pause on the way to affirmance. This is a loose and dangerous game, with principles that protect the rights of a free people arguably at stake. In the end, the fact that Ernest Miranda was probably guilty[7] didn't prevent the Supreme Court from honoring the promises made by the Constitution, *see Miranda v. Arizona*, 384 U.S. 436 (1966), and the fact that this petitioner operates a mine which failed to fulfill its duties under the Mine Act – as almost all do, from time to time – should not preclude a proper constitutional analysis in this case.

The Mine Act represents a negotiated settlement of contentious safety and health issues among labor, industry and government interests. It was produced through compromise, and has inured to the benefit of both the nation's miners and the mining industry. As with all federal laws, it must be read in harmony with the Constitution's protection of fundamental rights. The Commission must respect the Constitution's limits on the exercise of federal power, and is also bound to respect the terms of the Act as they were negotiated, including the significant procedural limits imposed on the Labor Department and the requirement for independent adjudication by the Commission. Extending to the agency powers that Congress withheld in drafting the Act represents legal error and a breach of trust. Accordingly, I dissent.

Michael G. Young, Commissioner

> advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.

Id. at 994 (*citing Burger,* 482 US at 702-03) (ellipsis in original). The majority fails to even consider that the Supreme Court has established benchmarks which control our evaluation of such matters, let alone attempt to analyze the case before us against those benchmarks. There is no administrative subpoena or any other "constitutionally adequate substitute for a warrant" here, and as this opinion has noted, there are no real limits on the discretion exercised by the Secretary's delegates at the district level. The request is therefore invalid even if the Secretary could establish that the first two *Burger* requirements have been met.

[7] After his confession was suppressed, Miranda was retried without it and convicted of the kidnapping and rape of which he had been accused. *See Arizona v. Miranda*, 450 P.2d 364 (Ariz. 1969).

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