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Constitutional Considerations

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ADMINISTRATIVE AND PRIVATE SEARCHES FOR SMOKING ARTICLES CONDUCTED PURSUANT TO THE FEDERAL MINE SAFETY AND HEALTH ACT: CONSTITUTIONAL CONSIDERATIONS

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I. INTRODUCTION

One cannot appreciate fully the courts' interpretation and application of the Federal Mine Safety and Health Act of 1977 (FMSHA), including provisions prohibiting smoking in the nation's mines, without understanding the history of mine tragedies that compelled Congress to enact that landmark legislation. In the forty years before enactment of FMSHA, from 1936 to 1976, 843 miners perished in twenty-five separate explosions. Each of these tragedies led to louder and more persistent cries that Congress establish a regulatory system strong enough to ensure the safety of working miners. Each outcry led to the passage of legislation that increased the federal government's role as regulator.

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2. The dangers of mining were known before this time. Indeed, Congress passed the first law regarding safety in mines on federal lands in 1891. See An Act for the Protection of the Lives of Miners in the Territories, ch. 564, 26 Stat. 1104 (1891). However, perhaps because improvements in print and other media had made the dissemination of information to the public easier by the 1940's, Congress had not previously focused serious attention upon increasing safety in the nation's mines.


The ultimate result was, pursuant to FMSHA, the creation of the federal Mine Safety and Health Administration (MSHA) in 1977.

Although FMSHA contained enforcement teeth that its 1969 predecessor lacked, both pieces of legislation recognized that mine explosions would not be eliminated until their underlying cause—the ignition of methane gas—was controlled.\(^5\) To this end, Congress enacted mandatory safety standards designed to eliminate both accumulations of methane gas and ignition sources that can spark a deadly blast.\(^6\) These standards, and regulations subsequently promulgated by MSHA,\(^7\) require mine operators to provide ventilation through a mine sufficient to dilute and remove methane released by the mining process.\(^8\) Furthermore, operators are required to monitor the mine atmosphere at frequent intervals\(^9\) and take appropriate action if methane levels approach explosive levels.\(^10\) Finally, the regulations spell out specific restrictions governing the use of equipment or material that can ignite a methane blast.\(^11\)

Congress included in both the 1969 and 1977 Acts an absolute prohibition against smoking in any underground coal mine, or at any place on the surface where an ignition hazard is present.\(^12\) Congress'
conclusion that smoking in a mine presents an extraordinary hazard is highlighted by three unprecedented features of the smoking prohibition. First, Congress authorized the imposition of a $250 fine upon any miner who willfully violates the smoking prohibition.\textsuperscript{13} This is the only provision in FMSHA where Congress specifically authorized monetary penalties directed at individual miners;\textsuperscript{14} all other penalties are directed either at operators, or at agents, directors, or officers of operators.\textsuperscript{15}

Second, Congress went out of its way to emphasize the seriousness of the smoking ban by “impos[ing] upon the operator the highest possible duty: that of insurer.”\textsuperscript{16} FMSHA and related regulations set forth a mine operator’s duty to “insure” that the anti-smoking ban is enforced:

No person shall smoke, carry smoking materials, matches, or lighters underground, or smoke in or around oil houses, explosives magazines, or

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Program Policy Manual, Vol. V, § 75.1702, Release No. V-1 at 132 (July 1, 1988) ("This Section is an absolute prohibition against having smoking articles underground and is directed to all persons.")

\textsuperscript{13} FMSHA, 30 U.S.C. § 820(g) (1988): Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than $250 for each occurrence of such violation.

\textit{Id.}

\textsuperscript{14} Penalties can be imposed against individual miners under FMSHA, 30 U.S.C. § 810(e) (1988) (authorizing criminal penalty for giving advance notice of an inspection) or FMSHA, 30 U.S.C. § 810(f) (1988) (authorizing criminal penalty for making a false statement, representation, or certification). However, these statutory provisions apply to any violators and are not specifically directed at individual “miners.”


other surface areas where such practice may cause a fire or explosion. The operator shall institute a program, approved by the Secretary, to **insure** that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters.  

Finally, this language hints at the third unusual feature of the smoking prohibition—the operator’s ability to search miners and their personal possessions to “**insure**” that no smoking articles are taken into the mine.

II. **Recent Developments Involving Smoking Article Searches**

A. **Operator Anti-Smoking Programs for the Detection of Smoking Articles**

Neither FMSHA nor the MSHA regulations specifically authorize operators to search miners or miners’ personal possessions. However, cases discussing the failure of operators to maintain effective anti-smoking programs contain implicit assumptions that the methods used by operators to prevent miners from taking smoking articles underground should at least include pat-down searches and searches of lunch pails. For example, the administrative law judge in *Secretary of Labor v. Bough*, 18 assumed without question that such searches were necessary for compliance:

The manager of the mine in question testified that he had seen miners go back to their lockers when they became aware of the fact that a search would be conducted. . . . It is reasonable to infer from this fact that Peabody had notice that miners would carry smoking materials underground but for the fact that they had advance warning of a search. The evidence of record fails to show that Peabody took any action to change the methods or places of its searches in the light of this information. 19

To similar effect, the administrative law judge in *Secretary of Labor v. Consolidation Coal Co.* 20 stated:

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18. 2 F.M.S.H.R.C. 1331 (1980).
19. *Id.* at 1344.
20. 3 M.S.H.C. 1047 (1983).
The operator argues that the violation is not significant and substantial because the search is a mere pat-down and an inquiry to the miner regarding his lunch pail, whereas a daily strip search would be necessary to eliminate the possibility of miners taking smoking materials into the mine. However, searches such as those which should have been performed here have a deterrent effect. Without the inspections, miners may either inadvertently or purposefully carry smoking materials underground.\textsuperscript{21}

The permissible limits of operator searches for smoking articles have not been addressed in these cases. Pat-down and lunch box searches are readily accepted as evidence of operator compliance with the duty to insure that smoking articles are not taken underground. But what of the operator’s contention in Consolidation Coal that strip searches would be required to “insure” compliance? How far may an operator—or enforcement official—go to insure compliance with the smoking prohibition? These questions have assumed new importance, in light of recent developments concerning the smoking ban.

B. State Enforcement Actions Resulting from the Southmountain Explosion: Virginia Statutory Amendments

In December 1992, an explosion at the Southmountain Coal Co., No. 3 Mine near Norton, Virginia, killed eight miners.\textsuperscript{22} MSHA contends not only that smoking articles ignited the Southmountain explosion,\textsuperscript{23} but that at least thirty mine deaths in the last twenty years are directly attributable to miners smoking in underground mines.\textsuperscript{24}

Prior to the Southmountain explosion, the provisions of the Virginia state mine safety law prohibited smoking in underground mines and imposed misdemeanor penalties upon miners for violations.\textsuperscript{25}

\textsuperscript{21} Id. at 1048.

\textsuperscript{22} Allen G. Breed, Authorities Trying to Stop Miners Who Are Dying for a Smoke, SUNDAY GAZETTE-MAIL (Charleston, W. Va.), Sept. 4, 1994, at 6C.

\textsuperscript{23} Id.

\textsuperscript{24} Id.

\textsuperscript{25} Before amendment, the state law provided:
four months of the explosion, however, the Virginia law was amended to address the specific hazards alleged to have contributed to the blast. Among the amendments were four provisions that: (1) made violation of the smoking-articles prohibition by miners a Class 6 felony;26 (2) required operators to post notices at designated locations on the mine site warning all persons of the smoking prohibition and related penalties;27 (3) made violation of the smoking-articles prohibition by operators a Class 6 felony;28 and (4) authorized the revocation of licenses

Smoking, the carrying of matches, other flame-making devices, and smokers' articles and the intentional creation of any arc, spark or open flame, except as provided in the following subsection, shall be prohibited in all mines. . .

VA. CODE ANN. § 45.1-98(a) (Michie 1989) (repealed 1994). The penalty provision applicable prior to amendment was as follows:

The Chief, or any inspector, or any operator . . . or other employees of any mining company, or any other person, who shall willfully violate any of the provisions of Chapters 1 to 14 of this title, shall, upon conviction, be guilty of a Class 1 misdemeanor.

VA. CODE ANN. § 45.1-105(b) (Michie 1989) (repealed 1994).

Smoking materials prohibited; penalty.
A. No miner, workman, or other person in an underground coal mine shall smoke or carry or possess any smoker's articles or matches, lighters, or similar materials generally used for igniting smoker's articles.
B. A violation of subsection A of this section is Class 6 felony.
C. This section shall not prohibit the possession of equipment used solely for the operation of flame safety lamps or for welding or cutting as provided in § 45.1-98.

Id. This provision was amended in 1994 to require that operators institute so-called "smoker search programs." See VA. CODE ANN. § 45.1-161.177 (Michie 1994).

Posting of notice.
The operator of every underground coal mine, or his agent, shall display, in ten-point bold-faced type, on a sign placed at the mine office, bath house, and on a bulletin board at the mine site, the following notice:
NOTICE IT IS UNLAWFUL FOR A MINER, WORKMAN, OR OTHER PERSON IN AN UNDERGROUND COAL MINE TO SMOKE OR CARRY OR POSSESS ANY SMOKER’S ARTICLES OR MATCHES, LIGHTERS, OR SIMILAR MATERIALS GENERALLY USED FOR IGNITING SMOKER’S ARTICLES. A VIOLATION IS PUNISHABLE AS A CLASS 6 FELONY.

Id. This provision was amended and renumbered in 1994, but remains essentially the same. See VA. CODE ANN. § 45.1-161.179 (Michie 1994).

Allowing persons to work in a mine with smoker's articles.
and certifications for anyone convicted of violating the smoking prohibition.29

C. Fourth Amendment Issues Presented by Warrantless Enforcement Efforts Against Individual Miners

The anti-smoking enforcement activities have seeded a Constitutional storm in the form of a Fourth Amendment challenge brought by Derrell Burgan and Harold Davis, the first miners charged with violating Virginia’s revised mine safety law.

Burgan and Davis were employed at the Big Fist Mine in Lee County, Virginia.30 In response to rumors that miners on the second shift were smoking underground, a surprise “spot inspection” was conducted at the mine on October 4, 1993, by three employees of the Virginia Department of Mines, Minerals and Energy (DMME), one DMME mine inspector supervisor, an assistant attorney general for the

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A. The Department shall revoke every license issued for the operation of an underground coal mine, and shall not issue a license for the operation of an underground coal mine to smoke, carry or possess any of the materials prohibited pursuant to subsection A of § 45.1-98.1 shall be guilty of a Class 6 felony.  
Id. This provision was amended and renumbered in 1994, but remains essentially the same.  
See VA. CODE ANN. § 45.1-161.178 (Michie 1994).

A. The Department shall revoke every license issued for the operation of an underground coal mine, and shall not issue a license for the operation of an underground coal mine to smoke, carry or possess any of the materials prohibited pursuant to subsection A of § 45.1-98.1 or § 45.1-98.3.
B. The Board of Examiners shall revoke any certificate of competency as provided in § 45.1-12 which has been issued to any person convicted of violating § 45.1-98.1 or § 45.98.3. No new certificate shall be issued to such person for not less than one year nor more than three years after such conviction, to be set at the time the certificate is revoked, in the discretion of the Board of Examiners.  
Id. This provision was repealed in the 1994 amendments. Another provision was added, which prohibits smoking in surface and other areas. See VA. CODE ANN. § 45.1-161.180 (Michie 1994).

Commonwealth of Virginia, and two MSHA inspectors. A foreman for the mine accompanied the inspection party and, at the request of the inspectors, conducted pat-down searches of the miners and also searched their lunch buckets.

As a result of the searches, cigarettes and a lighter were found in Burgan’s lunch bucket and in Davis’ shirt pocket. The attorney for the miners successfully argued, in a motion to suppress evidence, that the foreman acted as an agent for the government in conducting the searches and, therefore, the searches violated the Fourth Amendment prohibition against unreasonable search and seizure, Article 1, § 10 of the Constitution of the Commonwealth of Virginia, and were illegal in the absence of a search warrant or probable cause. On appeal by the prosecution, the Virginia Court of Appeals upheld the trial court’s finding that the searches violated the miners’ Fourth Amendment privacy rights.

This Article will address the Fourth Amendment issues presented by the enforcement efforts directed at preventing smoking in the nation’s mines. Analysis of existing cases addressing the constitutionality of warrantless searches conducted in pervasively regulated industries, such as mining, indicates that the United States Supreme Court would most likely uphold searches by operators as “private” searches

31.  Id. at 178.
32.  Id.
33.  Id.
34.  Id.
36.  Commonwealth v. Burgan, 450 S.E.2d 177 (Va. Ct. App. 1994). According to the court, the Virginia regulatory scheme addressed a substantial governmental interest. However, the court found that neither the state nor federal mine safety laws expressly authorize searches of miners for smokers articles, or otherwise indicate such searches are necessary to further the regulatory scheme. The court accepted the defendant’s dubious conclusion that “the regulatory scheme in place at the time of the inspection addressed the safety of the premises and equipment of the mine, not the miners.” Id. at 179. Finally, the court found that the Virginia scheme did not provide a constitutionally adequate substitute for a warrant to search miners, because it did not put miners on notice that they would be subject to searches. Therefore, according to the court, the miners’ privacy expectations were undiminished and entitled to Fourth Amendment protection. Id. at 180.
that are not subject to Fourth Amendment protections. Further, in deciding whether to uphold searches of miners for smoking articles conducted by enforcement officials, the Court will base its decision upon: (1) the existence of a miner's reasonable expectation of privacy with regard to such searches; (2) the existence of an urgent governmental need requiring the use of warrantless searches; and (3) a determination of whether the regulatory scheme authorizing such searches provides procedural substitutes to a warrant that adequately limit an enforcement officer's discretion. 37

III. FOURTH AMENDMENT PROTECTIONS AND THE FMSHA

A. General Background: The Fourth Amendment

The Fourth Amendment prohibition against unreasonable searches and seizures had its genesis in the Colonial experience with the general warrant. 38 By use of such warrants, customs officials in the Colonies were permitted to conduct blanket searches of entire neighborhoods—homes and businesses alike—in search of goods smuggled into the Colonies in violation of Britain's tax laws. 39 These general searches by government officials were so abhorred that they were outlawed by the Fourth Amendment to the United States Constitution as follows:

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized. 40

39. 68 AM. JUR. 2D Searches and Seizures § 1 (1993).
40. U.S. CONST. amend. IV.
The United States Supreme Court has concluded, given the history of abuses of the general warrant authority, that Fourth Amendment protections extend to both private homes\textsuperscript{41} and commercial businesses;\textsuperscript{42} to any investigation conducted by government officials,\textsuperscript{43} either federal or state;\textsuperscript{44} and to civil as well as criminal investigations.\textsuperscript{45}

Any non-lawyer knows this much about the Fourth Amendment, plus one more thing: Searches and seizures made by government officials must be preceded by the issuance of a warrant based upon probable cause. This grade school, "Civics Class" view of the Fourth Amendment perhaps explains why, even in 1994, mine operator John Cullen could appear before an administrative law judge and state, with absolute sincerity, that MSHA inspectors had violated his Fourth Amendment right to be protected against unreasonable searches. Cullen told the judge that:

[T]here's no denying I told these people they should leave, and I damn well meant it. But I wasn't doing it to violate any law. I truly believed that my Constitutional rights were violated and that these people should not have that kind of power [to inspect mines without a warrant].

* * * *

And I just can't understand why these people (MSHA inspectors) have more power than the FBI or the police or anyone. They need no reasonable cause. They can make any amount of regulations that they want, whenever they want, to enforce those regulations.\textsuperscript{46}

\textsuperscript{41} Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967) (administrative searches of residences to enforce municipal fire, health, or housing codes are subject to the Fourth Amendment's prohibition against unreasonable searches and seizures).

\textsuperscript{42} See v. Seattle, 387 U.S. 541 (1967) (Fourth Amendment prohibition against unreasonable searches and seizures is applicable to portions of commercial premises not open to the public).


\textsuperscript{44} The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

\textsuperscript{45} Marshall v. Barlow's, Inc., 436 U.S. 307, 312-13 (1978) (business owner's expectation of privacy exists with regard to traditional police searches conducted for the gathering of criminal evidence, as well as in connection with administrative inspections designed to enforce regulatory statutes).

\textsuperscript{46} Secretary of Labor v. John Cullen Rock Crushing & Gravel, 16 F.M.S.H.R.C. 909,
What Cullen failed to realize is that the Supreme Court has fine-tuned the Fourth Amendment warrant requirement over the last three decades. As a result of that fine-tuning, the Court has indeed held that, in certain respects, an MSHA inspector's right of warrantless entry onto mine property is broader than that of the FBI or police. In a series of decisions, the Court has established that a warrant based upon probable cause, while required for most types of criminal investigation, is not required for searches of business premises conducted pursuant to an administrative scheme. Rather, a warrant may issue based upon the lower standard of administrative probable cause. Moreover, when the necessary prerequisites are met, certain administrative investigations of business premises may take place in the total absence of a warrant.

B. Fourth Amendment Applied to Administrative Searches of Commercial Premises

The Supreme Court's reshaping of Fourth Amendment protections as applied to commercial premises began in 1967 with the decisions of

911 (1994). Cullen was cited for violating FMSHA § 103(a), 30 U.S.C. § 813(a) (1988), which provides:

Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines. . . . In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided. . . . [And the authorized representatives] shall have a right of entry to, upon, or through any . . . mine.

Id.


Katz v. United States,51 Camara v. Municipal Court of San Francisco,52 and See v. City of Seattle.53 In Katz, the Supreme Court stated a threshold test, the purpose of which:

[It]s to determine whether a given intrusion is subject to the Fourth Amendment. If the complaining individual did not have a reasonable expectation of privacy with regard to the intrusion, the Fourth Amendment is inapplicable; if he did have a reasonable expectation of privacy, however, the government must demonstrate that the intrusion was justified under Fourth Amendment standards.54

The Court found that the business owner in Katz had an expectation of privacy in his commercial property that society was prepared to consider as reasonable; therefore, the Fourth Amendment protected that expectation.

In Camara, the Court held that administrative searches of residences to enforce municipal fire, health, or housing codes are subject to the Fourth Amendment prohibition against unreasonable searches and seizures.55 Thus, in Camara the Court found that the Fourth Amendment warrant requirement, designed to protect against unreasonable searches, applies not only to criminal investigations, but also to government searches conducted for other purposes, including public safety and health.56 The Fourth Amendment protection afforded to administrative searches differs from that for criminal searches, however, in that warrants may issue for administrative searches upon a finding of “administrative” probable cause; that is, in the absence of the type of particu-

52. 387 U.S. 523 (1967). The administrative scheme at issue in Camara was the City of San Francisco’s housing code, and its requirement that an inspector from the Department of Public Health conduct routine, annual inspections of private residences, like the private apartment at issue. Of note is the fact that the resident who refused entry to the inspector was convicted under the code.
53. 387 U.S. 541 (1967). In this case, an inspector from the Seattle Fire Department attempted to inspect a portion of a locked commercial warehouse for fire code violations. The owner had been convicted of violating the code by refusing entry.
54. United States v. Davis, 482 F.2d 893, 904-05 (9th Cir. 1973) (citing Katz, 389 U.S. at 361 (Harlan, J., concurring)).
56. Id. See also KRESS & IANNELLI, supra note 37, at 714-17.
larized probable cause findings that must form the basis for criminal search warrants. The Court reasoned that a less stringent probable cause standard is appropriate for administrative searches, both because such searches are necessary to protect public health, safety, and welfare, and because they are usually less intrusive than criminal searches. Essentially, the Court concluded that a legislative determination that certain types of administrative searches are essential for the public welfare obviates the need for a magistrate’s particular and individualized findings of suspicion that are a prerequisite for issuance of criminal search warrants. In determining whether a particular administrative search is reasonable, the Court directed magistrates to apply a balancing test that weighs the public interest sought to be protected by a particular administrative scheme against the right to be free from unreasonable searches.

The less stringent administrative probable cause standard was first applied in See, a case in which an inspector for the City of Seattle Fire Department sought warrantless entry into a locked commercial warehouse, for purposes of conducting a routine inspection for the detection of fire code violations. The Supreme Court found that the business owner had a reasonable expectation of privacy in those portions of the commercial premises not open to the public.

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57. 387 U.S. at 538. Search warrants in the criminal context may only issue upon a showing of probable cause, based upon an affidavit or oral testimony setting forth facts and circumstances within the knowledge of a police officer or other government official that demonstrate the officer or official has reasonable grounds to believe that a search will reveal evidence of a crime at a particular place. See Andresen v. Maryland, 427 U.S. 463 (1976); Brinegar v. United States, 338 U.S. 160 (1949); Johnson v. United States, 333 U.S. 10 (1948). See generally, Mussio, supra note 47.


59. 387 U.S. at 538.

60. Id. at 536-37.


62. Id. at 543.
quently, a warrant was required for inspection. The Court relied upon its decision in Camara, however, to conclude that the warrant could be issued based upon the lesser, administrative probable cause standard.

C. Administrative Searches in Pervasively Regulated Industries

Subsequent to the Katz, Camara, and See trilogy of cases, the Supreme Court further differentiated the Fourth Amendment warrant requirement by distinguishing between administrative searches of ordinary businesses (which must be conducted pursuant to administrative warrant because owners retain a reasonable expectation of privacy) and administrative searches of businesses which either have a long history of "close supervision and inspection" or are subject to pervasive government regulation (which may be conducted without an administrative warrant because of the owners' greatly diminished expectation of privacy).

The prerequisites for warrantless administrative searches were enunciated by the Supreme Court in Colonnade Catering Corp. v. United States, and United States v. Biswell.

1. The business to be subjected to the warrantless search must be in a pervasively regulated industry.
2. The ability to conduct warrantless administrative searches must form a crucial part of the regulatory scheme. That is, the particular governmental interest at issue can only be furthered if inspectors maintain the "element of surprise."
3. The statute at issue must specifically authorize warrantless searches and ensure their reasonableness by imposing specific restraints regarding their time, place, and scope.

63. Id. at 545-46.
64. Id. at 546.
Under the Colonnade/Biswell rationale, one who decides to engage in a business that is subject to pervasive regulation has such a greatly diminished expectation of privacy that no Fourth Amendment sensibilities are offended by permitting warrantless searches.69 Indeed, those engaged in pervasively regulated businesses are said to have impliedly consented to warrantless searches.70

The next significant developments in Fourth Amendment law as applied to administrative searches occurred in the cases of Marshall v. Barlow's, Inc.,71 United States v. Consolidation Coal Co.,72 and Donovan v. Dewey.73 The latter two cases are also significant in this analysis, because they established that coal and other mining are the types of pervasively regulated businesses for which, because of the extreme hazards inherent to the industry, Congress may authorize the use of warrantless administrative inspections.74

In Marshall v. Barlow's, Inc., the Supreme Court held that the Occupational Safety and Health Act of 1970 was unconstitutional insofar as it authorized warrantless administrative searches.75 According to the Court, the Act gave unbridled discretion to inspectors and their supervisors regarding what businesses would be inspected and at what

735.
70. See KRESS & IANNELLI, supra note 37, at 725-26.
74. Id. at 603 (quoting United States v. Biswell, 406 U.S. 311, 316 (1972)): [T]he Mine Safety and Health Act applies to industrial activity with a notorious history of serious accidents and unhealthful working conditions. The Act is specifically tailored to address those concerns, and the regulation of mines it imposes is sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he "will be subject to effective inspection."
Donovan, 452 U.S. at 603. See also Consolidation Coal, 560 F.2d at 220.
75. Barlow's, 436 U.S. at 325.

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times. The Court, in discussing the necessity of obtaining administrative warrants for the conduct of OSHA inspections, also refined the concept of administrative probable cause, by holding that administrative warrants may be issued based upon either a specific allegation of wrongdoing, or upon a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." The latter showing is made by demonstrating that a specific business was selected for inspection based upon an administrative inspection plan, developed for enforcement purposes and derived from neutral sources. Neutral sources include accident rate statistics, injury records, number of employees and size of business, length of time since the last inspection, and employer's history of violations.

Further limitations on the use of warrantless administrative searches were imposed when the Sixth Circuit, relying upon the Supreme Court's decisions in Barlow's and Michigan v. Tyler, made clear that the scope of warrantless searches is limited by the statute authorizing such intrusions. Thus, the Sixth Circuit, in Consolidation Coal, held

76. Id. at 322-23.
77. Id. at 320 (quoting Camara v. Municipal Court of San Francisco, 387 U.S. 523, 538 (1967)).
78. An agency requesting an administrative warrant must show that:
   (1) The inspection was requested pursuant to an administrative or regulatory scheme;
   (2) The magistrate could reasonably assume that neutral criteria were used in developing the administrative inspection plan;
   (3) Denying the inspection warrant would frustrate legislative intent as manifested in the statute at issue; and
   (4) The inspection scheme is reasonable, as applied to the business in question.
80. See Barlow's 436 U.S. at 321; Kress & Ianneli, supra note 37, at 752.
81. 436 U.S. 499 (1978) (arson investigation: warrantless entry constitutional where exigent circumstances presented by fire require quick action, but once emergency subsides, warrant needed to reenter premises in which homeowner retains privacy interest). See Michigan v. Clifford, 464 U.S. 287 (1984) (arson investigation: search for evidence of arson, made six hours after emergency crews left the scene, can only be made pursuant to warrant. Firefighters permitted warrantless entry only in exigent circumstances presented by ongoing fire or threat of flare-up).
that because FMSHA only authorizes warrantless searches of underground portions or active workings of coal mines, inspections of mine offices in which the operator retains an expectation of privacy, and seizures of records, are not authorized in the absence of a warrant.82

Finally, in Donovan v. Dewey,83 the Supreme Court fine-tuned its prior holdings and held that regulatory schemes such as FMSHA that authorize warrantless administrative searches of pervasively regulated businesses do not necessarily violate the Fourth Amendment, if the scheme provides a constitutionally adequate substitute for the Fourth Amendment warrant requirement.84 According to the Court, a "constitutionally adequate substitute" for a warrant is provided by a legislative scheme that protects property owners from the unbridled exercise of discretion by enforcement officers.85 Such protection is afforded when the scheme: (1) specifically requires inspection of the type of business premises at issue and specifically defines the frequency of such inspections;86 (2) specifically sets forth in the statute or regulations the standards with which the property owner is required to comply,87 and (3)

82. United States v. Consolidation Coal Co., 560 F.2d 214, 217 (6th Cir. 1977) (quoting Youghiogheny and Ohio Coal Co. v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973) (distinguishing between the right to enter mine offices, which the government could do in the absence of a warrant, and the right to conduct the type of search and seizures at issue)), vacated and remanded, 436 U.S. 942 (1978), judgment reinstated, 579 F.2d 1011 (6th Cir. 1978), cert. denied, 439 U.S. 1069 (1979). In addition, the Consolidation Coal court stated that "[e]ven where a statute requires records to be maintained and authorizes on-premises inspection of them in the normal course no precedent sanctions direct access to the records without demand in the absence of a search warrant." Consolidation Coal Co., 560 F.2d at 518.
84. Id. at 603. The Court also held that (1) legislative schemes authorizing warrantless administrative searches of commercial property of pervasively regulated industries do not necessarily violate the Fourth Amendment because the business owner in such industries has a reduced expectation of privacy; (2) Congress reasonably determined a warrant requirement could significantly frustrate effective enforcement of the legislative scheme; and (3) the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware the property will be subject to periodic inspections undertaken for specific purposes. Id. at 599-600.
85. Id. at 603-04.
86. See id. at 604.
87. See id.
provides a specific mechanism for accommodating special privacy concerns (i.e., prohibiting forcible entries by requiring the enforcing officers to seek compulsory process in the event a business owner refuses entry).  

The Court made clear that warrantless administrative inspections of private commercial property may violate the Fourth Amendment if inspecting officials have excessive discretion in deciding when and where an administrative inspection will be conducted—where the inspections occur so randomly, infrequently, or unpredictably that the owner can have no real expectation that the property will be inspected, from time to time, by government officials. According to the Court, the scope and frequency of inspections must be tailored to meet the particular concerns posed by the types of businesses regulated by the law at issue.

Because Congress had so tailored the inspection requirement set forth in FMSHA, and had otherwise included all the elements necessary for a constitutionally adequate substitute for a warrant, the Court upheld MSHA’s authority to conduct warrantless inspections of a quarry.

More specifically, the Court found that Congress had made factual findings regarding the hazardous nature of the mining industry and specifically tailored the requirements of FMSHA to address and reduce the hazards in all of the nation’s mines. By including the broadest possible definition of “mine” in FMSHA, Congress effectively put all mine operators on notice that their businesses would be subject to reg-

88. See id.
90. See Dewey, 452 U.S. at 600-01.
91. Id. at 603. According to the Court, the FMSHA was specifically tailored to deal with the concerns inherent in a notoriously hazardous industrial activity.
92. Id. at 606.
93. Id. at 603.
94. Id. at 596.
ulation, including periodic inspection. In addition, Congress specified the timing of required inspections, and, importantly, defined the scope of permissible, warrantless agency intrusions by cataloguing the purposes for which inspections and investigations could be conducted under the Act. That section provides:

Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under the Act and other health and safety laws. For the purpose of making any inspection or investigation under the Act, the Secretary, or the Secretary of Health, Education, and Welfare, shall have a right of entry to upon, or through any coal or other mine.

The Court found that the regulatory scheme authorized by FMSHA also notified mine operators as to how they could achieve compliance with the Act. Finally, the Court also noted that FMSHA protected special privacy concerns, by requiring the agency to obtain injunctive

98. Dewey, 452 U.S. at 604. FMSHA set forth specific interim mandatory health and safety standards at Titles II and III, which standards were adopted and expanded upon by MSHA in promulgating the regulations set forth at Title 30, Code of Federal Regulations.
or other appropriate relief, in the event a mine operator refuses to permit warrantless entry.  

IV. EFFECT OF SMOKING ARTICLES SEARCHES UPON MINERS' FOURTH AMENDMENT RIGHTS

In one respect, individual miners and the companies they work for are on equal footing regarding their Fourth Amendment rights against unreasonable search and seizure. As the Supreme Court explained in *Katz*, the Fourth Amendment protects people, not places. In a more important respect, however, the Fourth Amendment protections afforded miners with regard to searches for smoking articles vary greatly from those of mine operators. First, because the Fourth Amendment applies only to searches conducted by government officials, the constitutional rights of miners are not implicated when a search for smoking articles is conducted by private operators pursuant to a mine's required smoking-articles program. Second, as to those searches for smok-

(1) The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the operator of such mine has his principal office, whenever such operator or his agent—

* * *

(C) refuses to admit such representatives to the coal or other mine,
(D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine. . . .

Id.


102. United States v. Mehr, 824 F.2d 297, 299 (4th Cir. 1987), *cert. denied*, 484 U.S. 915 (1987) ("The fourth amendment does not proscribe private action undertaken without participation or knowledge of a government official.") In a number of cases, the courts have held that a search conducted by a private employer can become governmental action for purposes of determining Fourth Amendment rights when the government interjects itself extensively into the search process. However, the regulatory schemes at issue in those cases...
ing-articles conducted by federal or state mine safety inspectors, the Fourth Amendment protections afforded miners are greatly diminished, because individuals who work in the mining industry have no reasonable expectation that they will be free from searches for smoking articles. As the Fourth Circuit Court of Appeals stated in *United States v. Mehra*:

The fourth amendment protects people rather than places... but the capacity of a person to claim the protection of the fourth amendment depends upon a legitimate expectation of privacy in the invaded place or thing. This requires both that a person have exhibited an actual expectation of privacy and that the expectation be one that society recognizes as reasonable.

Society, acting through the United States Congress, made an explicit determination that miners must be prevented from taking smoking articles underground, and required mine operators to institute programs to "insure" that miners do not carry smoking articles underground with them. This requirement, that smoking articles not be taken underground, is embodied in FMSHA and a comprehensive set of regulations. Importantly, miners are made aware of this prohibition before beginning work, during training sessions that include a review of FMSHA. Supplemental refresher training is also provided at period-

...are much more elaborate and detailed than the simple directive in FMSHA that miner operators "institute a program" to insure that smoking articles are not taken underground. *See United States v. Walther, 652 F.2d 788, 792 (9th Cir. 1981) ("Mere governmental authorization of a particular type of private search in the absence of more active participation or encouragement is similarly insufficient to require the application of fourth amendment standards."); United States v. Davis, 482 F.2d 893 (9th Cir. 1973) (airport security); International Bhd. of Teamsters v. Department of Transp., 3 Admin.L.3d (P & F) 1307 (9th Cir. 1991) (drug testing for truckers). As the discussion below makes clear, however, the distinction between private and government action does not affect the Fourth Amendment protections afforded to miners, at least to the extent the searches are conducted to achieve administrative, rather than criminal, goals.

104. Id. at 298 (citing Katz v. United States, 389 U.S. 347 (1967)).
106. See generally Ralph V. Seep, Annotation, "Warrantless Search by Government Employer of Employee's Workplace Locker, Desk, or the Like as Violation of Fourth Amendment Privacy Rights—Federal Cases," 91 A.L.R. FED. 226 (1989) (discussing the effect that
ic intervals. Miners with any experience in the industry have both observed and been the targets of searches conducted by operators for the detection of smoking articles; they realize that they have chosen to participate in an industry with a long history of intense governmental regulation.

Courts, in considering factors similar to these, have concluded that employees in other pervasively regulated industries have no reasonable expectation that they will be free from warrantless administrative searches conducted by either private or governmental parties, when such searches are necessary to further an important governmental or public interest. Thus, the Supreme Court in *Skinner v. Railway La-

the presence or absence of notices or regulations authorizing searches of employee workplaces has in determining the reasonableness of an employee’s expectation of privacy in the workplace.

107. See 30 C.F.R. pt. 48 (1994) (setting forth the training requirements for underground and surface miners). Under the 1992 amendments to the Virginia mine safety law, mine operators in that state are required to post a sign at the mine entrance, thus providing an explicit warning to miners regarding both the smoking articles prohibition and the criminal penalties imposed for violations. See also VA. CODE ANN. § 45.1-98.2 (Michie 1989 & Supp. 1993) (repealed 1994). See generally United States v. Sihler, 562 F.2d 349 (5th Cir. 1977) (upholding, in part, the search of a prison guard because a 2' x 2' sign at the main entrance to the prison warned that all persons, property, and packages entering the facility would be subject to search).

108. The courts typically employ a balancing test and phrase their conclusions in terms of an employee’s expectation of privacy as “minimal” or “greatly diminished” and the government’s administrative purpose as being “compelling.” See, e.g., International Bhd. of Teamsters v. Department of Transp., 3 Admin.L.3d (P & F) 1307 (9th Cir. 1991):

[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.


Having concluded that the incremental intrusion on drivers’ privacy worked by random drug testing is minimal and that the [Federal Highway Administration’s] purpose for instituting the tests is compelling, we conclude that the random drug testing of commercial drivers does not offend the Fourth Amendment despite the lack of a warrant or individualized suspicion.

Id. at 1321 (citing cases).
bor Executives' Association\textsuperscript{109} upheld against Fourth Amendment challenge the administration of blood, urine, and breathalyzer tests to rail employees involved in train accidents or violations of certain safety rules.\textsuperscript{110} In Shoemaker v. Handel,\textsuperscript{111} the Third Circuit found that the Fourth Amendment rights of jockeys participating in horse races in New Jersey were not violated by a requirement of the state Racing Commission that jockeys submit to urine testing, because such individuals "have always participated in the industry with full awareness that it is the subject of intense state regulation."\textsuperscript{112} Further, in two cases involving workers at nuclear power plants, Alverado v. Washington Public Power Supply System\textsuperscript{113} and Rushton v. Nebraska Public Power District,\textsuperscript{114} the courts held that plant operators could require employees to submit to urinalysis testing to detect the presence of prohibited substances, if they choose to work at such plants.\textsuperscript{115}

Consequently, individuals who choose to work in mining are on notice that they are subject to warrantless search at any time by the operator to detect smoking articles. Thus, miners have no reasonable expectation of privacy when it comes to taking smoking articles into underground mines or into certain designated surface areas.

The contrary conclusion reached by the Virginia Court of Appeals in the Burgan case is based upon a lack of understanding regarding the strong legislative intent underlying mine safety legislation, and a mis-

\textsuperscript{109} 489 U.S. 602 (1989).
\textsuperscript{110} Id. at 603. The tests were conducted by the employer-companies, but were required to be conducted by detailed regulations promulgated by the Federal Railway Administration.
\textsuperscript{111} 795 F.2d 1136 (3rd Cir. 1986), cert. denied, 479 U.S. 986 (1986).
\textsuperscript{112} Id. at 1141.
\textsuperscript{113} 759 F.2d 427 (Wash. 1988), cert. denied, 490 U.S. 1004 (1989).
\textsuperscript{114} 653 F. Supp. 1510, 1524-25 (D. Neb. 1987), aff'd, 844 F.2d 562 (8th Cir. 1988).
\textsuperscript{115} In these cases, the Nuclear Regulatory Commission required employers, as a condition for continued licensure of their facilities, to institute "Fit For Duty" programs that were to include urinalysis testing for controlled substances. See generally Andrea Lewis, Drug Testing: Can Privacy Interests Be Protected Under the "Special Needs" Doctrine?, 56 Brook. L. Rev. 1013 (1990); Craig H. Thaler, Note, The National Collegiate Athletic Association, Random Drug-Testing, and the Applicability of the Administrative Search Exception, 17 Hofstra L. Rev. 641 (1989).
apprehension as to the decisive role played by legitimate expectations of privacy in Fourth Amendment analyses.\textsuperscript{116}

First and foremost, mine safety legislation is intended to protect the lives and health of miners.\textsuperscript{117} Hence, the contention of defendants that "the regulatory scheme in place at the time of the inspection addressed the safety of the premises and equipment of the mine, not the miners,"\textsuperscript{118} demonstrates a manifest lack of understanding of the goals to be promoted by legislative schemes regulating mine safety. The court's implicit agreement with defendants' contention, and its conclusion that the federal and state regulatory schemes authorize warrantless searches of mines, not miners, is contrary to both the intent and specific wording of FMSHA.\textsuperscript{119}

Equally flawed is the court's conclusion that miners retain a reasonable expectation of privacy because neither the federal nor state mine safety laws specifically authorize warrantless searches of individual miners for smoking articles.\textsuperscript{120} Unfortunately, state procedural rules bar review of the Virginia Court of Appeals' interlocutory decision.\textsuperscript{121}

\textsuperscript{116} The court's decision may also have been influenced by the fact that, prior to the 1994 amendments to the Virginia mine safety law, the state legislature had not required operators to institute smoking-articles programs. As the discussion below demonstrates, however, the lack of a specific requirement that \textit{operators} institute a program does not affect the analysis as to whether miners had a legitimate expectation of privacy. The fact remains, however, that the state mine safety law at the time of the searches prohibited the taking of smoking articles underground, imposed penalties upon miners for violations of that prohibition, and authorized state enforcement officials to conduct inspections for the detection of violations of Virginia's mine safety act.

\textsuperscript{117} See FMSHA § 2(a): "[T]he first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner. . . ." 30 U.S.C. § 801(a) (1988).


\textsuperscript{119} Both parties and the court referred frequently to FMSHA in their analyses, attempting to either compare or distinguish features of the state and federal regulatory schemes.

\textsuperscript{120} Burgan, 450 S.E.2d at 180.

\textsuperscript{121} 1 Mine Health and Safety News (Leg. Pub. Serv.) 579 (Nov. 18, 1994). According to Virginia's Assistant Attorney General, H. Elizabeth Shaffer, review is prohibited both because the decision is interlocutory, and because the Commonwealth is prohibited from appealing the decision of the Virginia Court of Appeals in such cases.
The lack of review is unfortunate, for neither the prosecution, the defendants, nor the court apparently recognized that a resolution of defendants' Fourth Amendment claims did not depend upon whether the Colonnade/Biswell "closely regulated industry" exception applied to diminish the miners' expectation of privacy and permit warrantless searches pursuant to an administrative scheme. Rather, the authors contend that Fourth Amendment protections are not even implicated by searches of miners for smoking articles, because miners have absolutely no expectation of privacy with regard to smoking articles taken underground.\textsuperscript{122}

Miners have had no reasonable expectation of privacy with regard to smoking articles since at least 1969, when Congress absolutely prohibited the taking of smoking articles into underground coal mines and certain areas on the surface.\textsuperscript{123} Along with this absolute prohibition, Congress imposed the requirement that operators institute programs to "insure" that smoking articles are not taken underground; such programs are well-known in the industry as "smoker's search programs." Finally, Congress required that MSHA "make frequent inspections . . .

\textsuperscript{122} See McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (discussing strip searches of prison guards):

In analyzing the intrusion on the individual's fourth amendment interests, there must be a legitimate expectation of privacy. To determine if an individual's expectation of privacy is legitimate, there must be both an actual subjective expectation and, even more importantly, . . . that expectation must be one which society will accept as reasonable.


\textsuperscript{123} Pat-down and lunch box searches of miners for smoking articles are in no way akin to the invasive searches at issue in cases discussed by the Virginia court, which analyze the constitutionality of regulatory schemes requiring the submission and analysis of blood, urine, and breath samples. See, e.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986),\textit{cert. denied}, 479 U.S. 986 (1986). While society readily accepts the existence of a reasonable expectation of privacy in one's body, and the right to be free from bodily invasions required for blood tests, urinalyses, breathalyzer tests, and strip searches, society—acting through the Congress—has concluded that no such expectation exists with regard to minimally intrusive pat-down and lunch box searches for smoking articles.
for the purpose of . . . determining whether there is compliance with the mandatory health or safety standards. . . ."  

Thus, since 1969 miners have been on notice that they are absolutely prohibited from taking smoking articles underground. Also, since that time miners have been on notice that to enforce the absolute prohibition against taking smoking articles underground, they are subject to searches by operators both prior to and after entering a mine. Further, since 1969 miners have been subject to searches for smoking articles conducted by operators at the request of MSHA inspectors, during regular and other enforcement inspections.  

The existence of an absolute smoking ban since 1969, the history of mine fatalities caused by smoking both before and after 1969, and the post-1969 history of searches for smoking articles, all militate against any argument that a miner could reasonably expect to be free from searches for smoking articles before or after entering an underground mine. This is true whether the search is conducted by an operator to prevent the taking of smoking articles underground, or by an operator at the request of a mine safety enforcement official to determine whether the miner is in compliance with the regulatory prohibition.  

125. MSHA personnel do not search miners for smoking articles. See MINE SAFETY AND HEALTH ADMIN., U.S. DEPT. OF LABOR, COAL GENERAL INSPECTION PROCEDURES 27 (1992):  
   MSHA personnel will not search anyone for matches, lighters, or smoking materials. However, the inspector should:  
   (1) determine whether an adequate search program exists by reviewing the records; and  
   (2) interview a number of miners concerning the program.  
   Id.  
126. Under another theory, miners who decide to proceed underground could be said to have "consented" to a pat-down search and search of their personal possessions for smoking articles. See, e.g., United States v. Sihler, 562 F.2d 349 (5th Cir. 1977), holding that a prison guard who voluntarily accepted and continued an employment that subjected him to search on a routine basis held to have consented to search that uncovered contraband. Consent was also found because every day he came to work the guard walked past a 2' x 2' sign posted at the entrance to the prison, advising that "all persons" entering were subject to search. Id.  
127. The Constitutional effect of the use made by government officials of the results of
V. Effect of Criminal Penalty Provisions on Fourth Amendment Rights

The discussion above demonstrates that the Supreme Court is willing to uphold the constitutionality of administrative searches made without a warrant, or with a warrant based upon administrative probable cause, when necessary to further important governmental or public safety concerns. In other cases, the Court has upheld such searches even though, as a result, criminal penalties authorized by the administrative scheme at issue are imposed. These decisions have significance in the smoking prohibition context, because under FMSHA, violations of the smoking prohibition can lead to civil penalties of $250 for miners,\textsuperscript{128} and civil and criminal penalties for operators or their agents, directors, and officers.\textsuperscript{129} Under the 1992 amendments to the Virginia mine safety law, such violations resulted in civil\textsuperscript{130} and criminal penalties for both miners\textsuperscript{131} and operators or their agents, superintendents, and mine foremen.\textsuperscript{132}

Decisions of the Supreme Court and lower courts demonstrate that when the prerequisites are met for conducting an administrative search without a warrant or with a warrant based upon administrative probable cause, evidence uncovered during the search may be used to impose criminal penalties authorized by an administrative scheme,\textsuperscript{133} if the

\begin{itemize}
  \item a smoking articles search is discussed below.
  \item FMSHA, 30 U.S.C. § 820(g) (1988).
  \item VA. CODE ANN. § 45.1-98.1(B) (Michie 1989 & Supp. 1993) (repealed 1994). This provision was essentially amended and renumbered in 1994 to require that operators institute smoker search programs. See VA. CODE ANN. § 45.1-161.177 (Michie 1994).
  \item VA. CODE ANN. § 45.1-98.3 (Michie 1989 & Supp. 1993) (repealed 1994). This provision was amended and renumbered in 1994, but remains essentially the same. See VA. CODE ANN. § 45.1-161.178 (Michie 1994).
  \item In New York v. Burger, 482 U.S. 691 (1987), the Court went one step further
\end{itemize}
officials conducting the search were acting in good faith to further the legitimate, administrative objectives of that regulatory scheme at issue.

For example, in *Abel v. United States*\textsuperscript{134} and *United States v. Prendergast*,\textsuperscript{135} the courts upheld the use of administrative, rather than criminal warrants, based upon the legitimate, administrative objectives served by the searches at issue\textsuperscript{136} and a showing that the searches did not exceed the scope permitted by the regulatory scheme.\textsuperscript{137} Both the Supreme Court and lower courts have invalidated warrantless searches in the absence of a legitimate, administrative objective for conducting the searches,\textsuperscript{138} or when a regulatory inspection is used as

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and upheld the defendant’s criminal conviction under a separate, non-administrative penal code, which conviction was based upon criminal evidence uncovered during an “administrative” search. The *Burger* majority has been criticized by some, including the dissent, as ignoring or deviating from prior decisions that attempted to draw a line between administrative and criminal searches. According to critics, once the defendant stated he did not have the administrative records that formed the basis for the inspections, every administrative requirement of the regulatory scheme had been violated, and all further searches by the officers were for criminal evidence. Because the conduct of the officers could further no administrative ends, a warrant based upon criminal probable cause was required. *See Administrative Search; Perry S. Reich, Administrative Searches For Evidence of Crime: The Impact of New York v. Burger*, 5 Touro L. Rev. 31 (1988).

\textsuperscript{134} 362 U.S. 217 (1960).

\textsuperscript{135} 585 F.2d 69 (3rd Cir. 1978) (per curiam).

\textsuperscript{136} See *Abel*, 362 U.S. at 230:

We emphasize again that our view of the matter would be totally different had the evidence established ... that the administrative warrant was here employed as an instrument of criminal law enforcement to circumvent the latter’s legal restrictions, rather than as a bona fide preliminary step in a deportation proceeding. The test is whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime.

*Id.*

\textsuperscript{137} *Prendergast*, 585 F.2d at 71 (quoting *United States v. Goldfine*, 538 F.2d 815, 819 (9th Cir. 1976)):

If evidence of a crime is sought that would not be disclosed by an inspection under § 880(b)(1), limited to the purposes there specified, a search warrant specifying such evidence would be required and would have to be supported by a showing of probable cause to suppose the presence of that which was sought. However, if the extent of the intrusion is to be limited to an inspection under § 880(b)(1) an administrative inspection warrant upon probable cause as defined in § 880(d)(1) is all that is required.

*Id.*

a pretext for a criminal investigation\textsuperscript{139} or furthering the goals of criminal law enforcement.\textsuperscript{140} Finally, in a number of other cases, including \textit{United States v. Consolidation Coal Co.},\textsuperscript{141} the courts have concluded that the validity of an administrative search is not affected by the possibility that civil or criminal penalties, or both, may be imposed under the regulatory scheme at issue.\textsuperscript{142}

In \textit{Consolidation Coal Co.}, the Sixth Circuit emphasized that the objective in conducting a search is the deciding factor in determining whether a warrant based upon criminal probable cause is a prerequisite

\textsuperscript{139} See United States v. Johnson, 994 F.2d 740 (10th Cir. 1993), where three state agents and one federal agent conducted a search of defendant's taxidermy shop, under the ostensible authority of a state statute authorizing inspections of taxidermy shops. The defendant was subsequently indicted and convicted for felony violations of various federal game laws, sentenced to 15 months in prison, and fined $7,500. \textit{Id.} at 742 The court found that the federal agent, acting on a tip of alleged criminal activity, encouraged the state officials to conduct the inspection. The court further found that, although the government may address a problem in a regulated industry through administrative and penal sanctions, an administrative inspection may not be used as a pretext solely to gather evidence of criminal activity. \textit{Id.} at 743. No federal administrative scheme existed that would have been furthered by the search at issue; only federal criminal law governed the violations discovered. Thus, the court concluded that the federal agent had used the state regulatory inspection as a pretext for an investigatory search, and the warrantless search was unreasonable. \textit{Id.} at 744.

\textsuperscript{140} See Alexander v. City and County of San Francisco, 29 F.3d 1355, 1361 (9th Cir. 1994) ("[A]n administrative search may not be converted into an instrument which serves the very different needs of law enforcement officials. . . . It is because the missions of those agencies are less patently hostile to a citizen's interests than are the missions of the police that the barriers may be as weak as they are and still not jeopardize Fourth Amendment guarantees."); United States v. $124,570 U.S. Currency, 873 F.2d 1240, 1244 (9th Cir. 1989) ("The Supreme Court has repeatedly emphasized the importance of keeping criminal investigatory motives from coloring administrative searches.").


\textsuperscript{142} See, e.g., United States v. Davis, 482 F.2d 893, 908 (9th Cir. 1973) ("Of course, routine airport screening searches will lead to discovery of contraband and apprehension of law violators. This practical consequence does not alter the essentially administrative nature of the screening process, however, or render the searches unconstitutional. . . . ").
to conducting the search. According to the court, a warrant based upon criminal probable cause is unnecessary in the administrative context, as long as the search remains within the bounds set by the statutory or regulatory scheme sought to be furthered by the search. That the objective and scope of an administrative search, rather than the potential for imposition of criminal administrative penalties, determines the validity of an administrative search was re-emphasized by the court in United States v. Acklen, when the court stated:

We find the reasoning of Consolidation Coal applicable to the present case. We note that in both cases inspection searches were made pursuant to a regulatory statute that imposes both civil and criminal penalties for its violation. In such a situation, to make the validity of the administrative inspection wholly dependent upon the motivation of the inspector would be to create a rule extremely difficult to administer, since the same violations may lead to either criminal prosecution or the imposition of civil sanctions. The validity of the administrative warrant should depend not upon the motivation of the inspector but upon the scope of the search and the manner in which it is conducted.

Consolidation Coal, Acklen, and similar cases demonstrate that if the scope of an administrative search becomes no broader merely because evidence of criminal wrongdoing may be uncovered, searches that fulfill legitimate, administrative objectives may be conducted either without a warrant, or pursuant to warrants based upon administrative

143. See generally Mussio, supra note 47.
144. Consolidation Coal Co., 560 F.2d at 220:
The basic rationale for demanding a more compelling showing of probable cause where the purpose of the intrusion is to uncover the fruits or instrumentalities of crime is inapposite in this context. . . . The scope of the searches became no broader because they were predicated on criminal suspicions than they would have been if justified by administrative exigencies.
Id.
145. 690 F.2d 70 (6th Cir. 1982).
146. Id. at 74.
147. See United States v. Neczy, 827 F.2d 1161, 1167 (7th Cir. 1987); United States v. Gel Spice, 773 F.2d 427, 433 (2nd Cir. 1985), cert. denied, 474 U.S. 1060 (1986) (analogizing United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978), which upheld, in non-Fourth Amendment context, authority of the Internal Revenue Service to issue summonses despite the dual civil and criminal nature of the Internal Revenue Code; relevant inquiry is whether the IRS is pursuing its authorized powers in good faith).
probable cause. However, if the sole purpose of the search is to uncover evidence of criminal wrongdoing, and no objective of a legislative scheme is furthered by such search, the search may only be conducted pursuant to a search warrant based upon criminal probable cause.148

Consequently, in the smoking articles context, when a miner, like Derrell Burgan, is searched by an operator at the request of a mine enforcement official, the search is conducted to further a legitimate, administrative objective—to assure compliance with the smoking articles prohibition. Thus, any evidence of non-compliance may be used in civil and criminal penalty proceedings against both the operator and the miner.

148. See Alexander v. City and County of San Francisco, 29 F.3d 1355, 1361 (9th Cir. 1994) ("[A]n administrative search may not be converted into an instrument which serves the very different needs of law enforcement officials."); United States v. Johnson, 994 F.2d 740, 742 (10th Cir. 1993) ("[A]lthough the government may address a problem in a regulated industry through administrative and penal sanctions, . . . an administrative inspection may not be used as a pretext solely to gather evidence of criminal activity."); United States v. Villarreal, 963 F.2d 770, 775 (5th Cir. 1992) ("The government has pointed to no regulatory scheme at all here, much less one that requires warrantless searches to function effectively. We cannot sua sponte transform a search for contraband into a safety inspection."); United States v. $124,570 U.S. Currency, 873 F.2d 1240, 1244 (9th Cir. 1989) ("The Supreme Court has repeatedly emphasized the importance of keeping criminal investigatory motives from coloring administrative searches."); United States v. Davis, 482 F.2d 893, 908 (9th Cir. 1973) ("[W]arrantless search will not offend the Fourth Amendment if "conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as apart of a criminal investigation to secure evidence of crime. . . . ") See also United States v. Nechy, 827 F.2d 1161 (7th Cir. 1987); United States v. Acklen, 690 F.2d 70 (6th Cir. 1982); United States v. Prendergast, 585 F.2d 69 (3rd Cir. 1978); United States v. Goldfine, 538 F.2d 815 (9th Cir. 1976); United States v. Zaki, Criminal No. 92-243, 1992 U.S. Dist. LEXIS 12979 (E.D. Pa. Aug. 24, 1992). See MUSSIO, supra note 47, at 207-208: Instead, because the civil and criminal penalties of most environmental statutes are "inherently intertwined," courts and magistrates should require a criminal search warrant based on traditional criminal probable cause only when an environmental agency has no valid administrative purpose in conducting the investigation. In other words, when an agency conducts the inspections solely to gather evidence of crime, then the "object of the search" is criminal, and the agency must obtain a criminal search warrant.

Id.
VI. CONCLUSION

Searches conducted to detect the presence of smoking articles are required to fulfill the legitimate, administrative objectives that underlie the Federal Mine Safety and Health Act of 1977. Consequently, such searches may be conducted by government mine safety enforcement officials without benefit of either a warrant based upon probable cause or an administrative warrant. The authority to conduct warrantless administrative searches on mine property is limited by FMSHA, however, and MSHA must either comply with the administrative substitutes for a warrant set forth in that Act or obtain an administrative warrant before entering onto a mine-operator's property for purposes of conducting a search for smoking articles.

Once mine safety enforcement officials properly gain entry onto mine property, no further warrants are required to conduct searches of individual miners. Miners who choose to work in underground mines are put on notice, by the FMSHA, MSHA regulations, and the training they receive, that they will be subject to searches for smoking articles. Thus, miners have no reasonable expectation that they will be free from the type of pat-down and personal effects searches used to detect the presence of smoking articles. The Fourth Amendment is simply not implicated by such searches.149 This is true even though the legislative scheme designed to enhance mine safety imposes criminal as well as civil penalties on miners found with smoking articles.

149. Fourth Amendment concerns could be presented by more invasive searches. See Klarfeld v. United States, 944 F.2d 583, 587 (9th Cir. 1991) ("A method of search which exposes the person searched to substantial embarrassment . . . may rise to the level of a fourth amendment violation."); McDonell v. Hunter, 809 F.2d 1302, 1306-07 (8th Cir. 1987): [A] reasonable suspicion standard should be adopted for strip searches of correction officers while working in correctional facilities. . . . The reasonable suspicion standard requires . . . individualized suspicion specifically directed to the person who is targeted for the strip search.

Id.