

**STUCK BETWEEN A LUMP OF COAL AND A HARD PLACE: THE
MINE SAFETY AND HEALTH ADMINISTRATION'S STRUGGLE
WITH DUE PROCESS AND AMERICA'S COAL INDUSTRY**

*Patrick R. Baker**

| | | |
|------|--|-----|
| I. | INTRODUCTION: SETTING THE STAGE FOR THE MINE SAFETY AND HEALTH ADMINISTRATION'S LEGISLATIVE ACTIONS | 626 |
| II. | THE HISTORY OF MINING LEGISLATION AND ADMINISTRATIVE ACTION..... | 628 |
| | <i>A. Disasters</i> | 628 |
| | <i>B. Historical Legislation</i> | 632 |
| | <i>C. The Federal Mine Safety and Health Review Commission: Attempts at Reducing the Backlog</i> | 634 |
| | 1. How Cases Proceed Before the Commission..... | 635 |
| | 2. Implemented Procedural Improvements and Initiatives Aimed at Ending the Case Backlog | 636 |
| | <i>i. The Supplemental Appropriations Act</i> | 636 |
| | <i>ii. Final Rules and Simplified Proceedings</i> | 638 |
| | <i>iii. Review Systems</i> | 640 |
| | <i>iv. Safety and Health Conferences</i> | 641 |
| | 3. Results of the Commission's Efforts | 644 |
| III. | PATTERN OF VIOLATIONS | 647 |
| | <i>A. Prior Pattern Criteria</i> | 648 |
| | <i>B. Current Pattern Criteria</i> | 650 |
| | 1. Elimination of PPOV Notice Procedures..... | 651 |
| | 2. Final Orders as Criteria for POV Designation..... | 654 |
| IV. | DUE PROCESS CONCERNS | 657 |
| | <i>A. Mathews v. Eldridge</i> | 659 |
| | 1. Private Interest | 660 |
| | 2. Erroneous Deprivation..... | 663 |
| | 3. Government's Interest..... | 666 |

* Patrick R. Baker is an Associate Professor of Law and Director of the Natural Resources Law Center at the Appalachian School of Law. Professor Baker teaches Administrative Law, Water Law, Oil & Gas Law, and Coal & Hard Mineral Law. He also serves as chair of the Institutional Development and Strategic Planning Committee. Special thanks to my Research Assistant Monique Braun; you will have a wonderful and fulfilling career in the law. Also, thanks to my colleague Professor Maryann Herman for her patience and insight throughout the process. Finally, and most importantly, a special thanks to my bride Karen Banta Baker.

| | | |
|-----|---------------------------------------|-----|
| V. | ANALYSIS | 668 |
| | A. <i>Private Interest</i> | 669 |
| | B. <i>Erroneous Deprivation</i> | 670 |
| | C. <i>Government's Interest</i> | 678 |
| VI. | CONCLUSION | 680 |

I. INTRODUCTION: SETTING THE STAGE FOR THE MINE SAFETY AND HEALTH ADMINISTRATION'S LEGISLATIVE ACTIONS

The history of coal mining legislation in the United States is said to be “written with the blood” of coal miners.¹ Dating back to 1891, when the federal government passed its first coal mining legislation, regulation of the mining industry has consistently increased by implementation of new laws and policies in an attempt to protect the health and safety of miners.² The Federal Mine Safety and Health Act of 1977 (“Mine Act”) is the signature piece of mining legislation, which sets forth the rights and obligations of both the federal government and mining operators in attaining mandatory compliance with health and safety standards.³ The Mine Safety and Health Administration (“MSHA”) is the administrative agency responsible for enforcing the Mine Act’s regulatory procedures.⁴ MSHA’s steady implementation of new policies along with mine operator challenges has severely backlogged cases before the Federal Mine Safety and Health Review Commission (“the Commission”).⁵ The Commission is the independent federal adjudicative body responsible for adjudicating operators’ challenges to the Mine Act.⁶ The vast majority of the case backlog is due to litigation of safety and health violations.⁷

MSHA’s most recent and aggressive response to stem the tide of litigation is its complete overhaul of rules stemming from the Pattern of Violations provision (“POV provision”) in the Mine Act.⁸ The POV provision gives MSHA the power to specifically address mine operators who repeatedly

¹ Brian Naylor, *Mine Deaths Stir New Debate on Federal Oversight*, NAT’L PUB. RADIO (Apr. 27, 2010, 12:01 AM), <http://www.npr.org/templates/story/story.php?storyId=126289636>.

² *History of Mine Safety and Health Legislation*, MSHA, <http://www.msha.gov/mshainfo/mshainf2.htm> (last visited Oct. 16, 2014).

³ See Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (codified as amended at 30 U.S.C. §§ 801–961 (2012)).

⁴ *History of Mine Safety and Health Legislation*, *supra* note 2.

⁵ Pattern of Violations, 78 Fed. Reg. 5056, 5059 (Jan. 23, 2013) (to be codified at 30 C.F.R. pt. 104).

⁶ See 30 U.S.C. § 823 (2012).

⁷ See Pattern of Violations, 78 Fed. Reg. at 5059.

⁸ *Id.* at 5056–59.

violate the same safety and health standards of the Mine Act.⁹ If an operator exhibits a pattern of violating standards that significantly and substantially contributes to safety and health hazards (“S&S” violations), MSHA issues a Pattern of Violation (“POV” or “pattern”), which notifies the mine operator that it has violated the Mine Act.¹⁰ A pattern terminates only when a subsequent inspection of the mine reveals no additional S&S violations or if MSHA does not issue a withdrawal order within 90 days after the POV notice.¹¹

Until recently, MSHA enforced the POV provision with a notice and hearing procedure that fostered communication between operators and MSHA by providing an opportunity for operators to improve their health and safety management prior to MSHA sanctioning it and halting its operations.¹² However, on January 23, 2013, MSHA overhauled the POV enforcement mechanism when it issued its “Pattern of Violations Final Rule” (“new Final Rule”).¹³ MSHA claimed the existing POV regulation did not fulfill the intent of the Mine Act—to put perpetual bad actors out of business.¹⁴ MSHA’s new enforcement procedure is extremely controversial, most notably because it utilizes non-adjudicated citations and orders in its POV assessment. This implicates operators’ constitutional due process rights to notice and a hearing prior to the halting of their operations.¹⁵ The stakes could not be higher, as public interest strongly favors safety. However, this interest should not be upheld at the expense of operators’ constitutional rights.

This Article discusses due process concerns in relation to MSHA’s new Final Rule. In Part II, the Article provides a brief overview of the disasters that created the current legislation, as well as a synopsis of legislative history and how cases proceed before the Commission. Part III provides an in-depth discussion of the old POV procedures and the new Final Rule provisions. Part IV addresses due process concerns surrounding MSHA’s new Final Rule. Finally, Part V provides an in-depth analysis of the due process implications resulting from MSHA’s new POV rule, stakeholder arguments concerning this important safety regulation, and MSHA’s options and path forward.

⁹ 30 U.S.C. § 814(e) (2012).

¹⁰ *Id.* § 814(e)(1).

¹¹ *Id.* § 814(e)(1)–(2).

¹² Mark E. Heath & Joseph D. Garcia, *Pattern of Violation: The Changing Dynamic of Enforcement and Regulation Under the Mine Act*, 32 ENERGY & MIN. L. INST. 587, 592–93 (2011), available at http://www.emlf.org/clientuploads/directory/whitepaper/Heath_Garcia_11.pdf.

¹³ Pattern of Violations, 78 Fed. Reg. at 5056.

¹⁴ *See id.*

¹⁵ *See* Bruce Watzman, Senior Vice President, Nat’l Mining Ass’n, to Roslyn Fontaine, Acting Director, Office of Standards, Regulations, and Variances, MSHA (Apr. 18, 2011), available at <http://www.msha.gov/REGS/Comments/2011-2255/AB73-COMM-73.pdf>.

II. THE HISTORY OF MINING LEGISLATION AND ADMINISTRATIVE ACTION

Congress enacted the first federal statute governing the coal mining industry in 1891.¹⁶ Since then, federal regulation has consistently expanded to improve mining conditions so as to protect miners from safety and health hazards inherent in the industry. Often sparked by tragic accidents and disasters, Congress enacts laws that heavily regulate the industry and greatly affect the rights and obligations of operators to maintain a safe and healthy workplace.

A. *Disasters*

The mining community in Upshur County, West Virginia, mourned the loss of 12 coal miners in the Sago Mine explosion on January 2, 2006.¹⁷ The Sago disaster was considered the worst explosion in the United States since September 23, 2001, when 13 coal miners were killed in the Jim Walter Resources #5 Mine in Brookwood, Alabama.¹⁸ On May 9, 2007, MSHA announced that the Sago explosion was likely ignited by lightning that struck an abandoned area of the mine.¹⁹

The Sago Mine disaster brought mine safety regulation to the forefront of Congress's agenda.²⁰ Only five months after Sago, on June 15, 2006, President George W. Bush signed into law the "Mine Improvement and New Emergency Response Act of 2006" (the "New Miner Act").²¹ This bill was the legislature's first major reform to mine safety in over 30 years.²² President Bush pledged that, "[w]e make this promise to American miners and their families: We'll do everything possible to prevent mine accidents and make sure

¹⁶ *History of Mine Safety and Health Legislation*, *supra* note 2.

¹⁷ *Sago Mine Explosion, January 2006*, W. VA. COAL HIST., <http://web.archive.org/web/20120509070742/http://www.wvcoalhistory.com/id31.html> (last visited Oct. 16, 2014).

¹⁸ *Id.* See generally UNITED MINE WORKERS OF AM., JIM WALTER RESOURCES # 5 COAL MINE DISASTER SEPTEMBER 23, 2001: A UNITED MINE WORKERS OF AMERICA REPORT (2003), available at http://www.umwa.org/files/documents/UMWA_JWR_Report.pdf.

¹⁹ Press Release, MSHA, U.S. Mine Safety and Health Administration Pursues New Regulations on Sealed Areas Based on Findings of Its Sago Mine Accident Investigation (May 9, 2007), available at <http://www.msha.gov/media/press/2007/nr070509.asp>.

²⁰ Patrick R. Baker, *The American Coal Miner, the Forgotten Natural Resource: Why Legislative Reforms Are a Viable Solution To Solving the Case Backlog Before the Federal Mine Safety and Health Review Commission Sparked by Tougher Enforcement of New Coal Mining Health and Safety Laws and Regulations*, 13 VT. J. ENVTL. L. 141, 142 (2011).

²¹ See Mine Improvement and New Emergency Response (MINER) Act of 2006, Pub. L. No. 109-236, 120 Stat. 493 (codified as amended in scattered sections of 30 U.S.C.).

²² See *History of Mine Safety and Health Legislation*, *supra* note 2.

you're able to return safely to your loved ones."²³ The most significant reforms to miner safety focused on oversight and enforcement and increased violations and penalties for safety violations.²⁴ However, the New Miner Act did little to address accident prevention and failed to consider the harmful impact on administrative efficiency that would result from an increase in litigation and challenges to the new law.²⁵

On April 5, 2010, 29 miners tragically died in an underground explosion at the Upper Big Branch Mine²⁶ ("UBB") in Montcoal, West Virginia, the worst explosion in over 40 years.²⁷ The mine had received 124 safety violations in 2010, dozens of which were citations for problems with ventilation and accumulation of combustibles.²⁸ Massey Energy Company ("Massey"),²⁹ operator of UBB, had allegedly "contested 97 percent of the serious violations against it in 2007."³⁰ After the explosion, Massey sent a letter to the governors of Kentucky, West Virginia, Virginia, and Illinois, which stopped short of blaming the ventilation plan approved and developed by MSHA as the cause of the explosion.³¹ In this letter, Massey's CEO, Don

²³ Naylor, *supra* note 1.

²⁴ Baker, *supra* note 20, at 142–43.

²⁵ *Id.* at 143 (citing MINER Act § 8).

²⁶ Press Release, Alpha Natural Res., Alpha Natural Resources to Permanently Close Upper Big Branch Mine (Apr. 4, 2012), *available at* http://files.shareholder.com/downloads/ALNR/3617505749x0x557769/a269aab4-0ccb-47d9-9c58-6470d5756402/ANR_News_2012_4_4_Financial.pdf. Alpha will seal off the entrances with concrete barriers during the summer of 2012 after two years of idle activity since the April 5, 2010, explosion. *Id.*

²⁷ Press Release, MSHA, US Labor Department's MSHA Cites Corporate Culture as Root Cause of Upper Big Branch Mine Disaster (Dec. 6, 2011), *available at* <http://www.msha.gov/media/press/2011/nr111206.asp>.

²⁸ Tom Hamburger & Andrew Zajac, *Massey Energy's Safety Record Questioned After Mine Explosion*, L.A. TIMES, Apr. 7, 2010, <http://articles.latimes.com/2010/apr/07/nation/la-na-coal-mining7-2010apr07>.

²⁹ For an article discussing the 2011 sale of Massey to Alpha Natural Resources, see Tim Huber, *Alpha's Purchase of Troubled Massey Coal Company Gets OK*, USA TODAY, June 1, 2011, http://usatoday30.usatoday.com/money/industries/energy/2011-06-01-massey-alpha-coal-deal_n.htm.

³⁰ Naylor, *supra* note 1.

³¹ Dori Hjalmarson, *Massey Goes on Offensive, Criticizes MSHA in Letter to Governors*, LEXINGTON HERALD-LEADER, June 9, 2010, <http://www.kentucky.com/2010/06/09/1298150/massey-goes-on-the-offensive-criticizes.html>; Letter from Don L. Blankenship, Chairman & CEO, Massey Energy, to Stephen L. Beshear, Governor of Ky., Joseph Manchin, Governor of W. Va., Robert F. McDonnell, Governor of Va., Patrick J. Quinn, III, Governor of Ill. (June 7, 2010) [hereinafter Letter from Don L. Blankenship], *available at* http://media.kentucky.com/smedia/2010/06/08/16/masseylettertoky.source.prod_affiliate.79.pdf.

Blankenship,³² stated, “[o]ur investigation into the UBB accident is continuing. While we do not yet know the cause of the explosion, we have developed grave and serious concerns about the MSHA imposed ventilation system employed at UBB.”³³

On December 11, 2011, MSHA released its official report on its UBB investigation.³⁴ Contrary to Massey’s concerns, the report listed several safety violations in the mine as contributing factors to the explosion; however, it concluded the “root cause” of the tragedy was the unlawful policies and practices Massey exercised prior to the explosion.³⁵ The report concluded that in the “longwall” area of the mine, a faulty water spray system created the ignition source.³⁶ Additionally, Massey’s failure to monitor and repair the underground ventilation system in certain parts of the mine restricted airflow and trapped dangerous amounts of methane in the explosion site.³⁷ In fact, large amounts of loose coal and coal dust accumulated and became the fuel for the explosion.³⁸ MSHA explained that the safety precautions Massey failed to take were routine safety standards within the industry.³⁹

MSHA’s report also revealed that Massey’s poor managerial practices contributed to the explosion.⁴⁰ First, Massey failed to perform required examinations of certain areas, and when it did perform examinations, Massey failed to remedy the hazards.⁴¹ Most notably, Massey did not examine the levels of methane contained in the longwall area of the mine where the faulty water sprayers ignited the explosion.⁴² Second, MSHA found that Massey regularly failed to inform MSHA investigators of hazardous conditions in the mine.⁴³ Specifically, Massey would record the existing hazards in a “production

³² The embattled, and often controversial, CEO stepped down on December 3, 2010, due to board and public pressure. Clifford Krauss, *Under Fire Since Explosion, Mining C.E.O. Quits*, N.Y. TIMES, Dec. 3, 2010, B6, available at <http://www.nytimes.com/2010/12/04/business/energy-environment/04massey.html>.

³³ Hjalmarson, *supra* note 31.

³⁴ MSHA, REPORT OF INVESTIGATION: FATAL UNDERGROUND MINE EXPLOSION (Dec. 11, 2011) [hereinafter REPORT OF UBB INVESTIGATION], available at <http://www.msha.gov/Fatals/2010/UBB/FTL10c0331noappx.pdf>; see also *Performance Coal Company: Upper Big Branch Mine-South*, MSHA, <http://www.msha.gov/PerformanceCoal/PerformanceCoal.asp> (last updated Jan. 13, 2014).

³⁵ REPORT OF UBB INVESTIGATION, *supra* note 34, at 2.

³⁶ *Id.* at 3.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 4.

⁴¹ *Id.*

⁴² *See id.*

⁴³ *Id.*

and maintenance book” for internal use only; however, those hazards were omitted from the books MSHA examined.⁴⁴ MSHA discovered that in 2009, Massey had twice as many violations as it reported.⁴⁵ Finally, the investigation revealed that Massey regularly intimidated its employees by threatening termination and other consequences if they reported hazards or violations to MSHA.⁴⁶ Massey also required certain employees to give advance notice to underground miners when an MSHA inspector arrived on-site.⁴⁷ Employees testified they were repeatedly threatened and intimidated, and if they did not conceal existing hazards when they were given this notice, consequences would ensue.⁴⁸

On June 1, 2011, Alpha Natural Resources (“Alpha”), the third largest coal producer in the United States, purchased Massey Corporation for \$7.1 billion.⁴⁹ On April 4, 2012, Alpha announced its plan to permanently close UBB.⁵⁰ However, the mine continues to act as a “lesson learned” example within the industry, and both MSHA and the industry have been proactive in preventing another UBB disaster.⁵¹ For example, MSHA continues to

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 5.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Press Release, Alpha Natural Resources, Alpha Natural Resources Acquires Massey Energy Company, Creating a Global Leader in Metallurgical Coal Supply (June 1, 2011), available at <http://ir.alphanr.com/file.aspx?IID=4100842&FID=11287162>; see also Mario Parker & Zachary R. Mider, *Alpha Natural Agrees To Buy Massey Energy for \$7.1 Billion in Cash, Stock*, BLOOMBERG (Jan. 29, 2011), <http://www.bloomberg.com/news/2011-01-29/alpha-natural-agrees-to-buy-massey-energy-for-8-5-billion-in-cash-stock.html>.

⁵⁰ Press Release, Alpha Natural Resources, Alpha Natural Resources to Permanently Close Upper Big Branch Mine (Apr. 4, 2012), available at http://files.shareholder.com/downloads/ALNR/3617505749x0x557769/a269aab4-0ccb-47d9-9c58-6470d5756402/ANR_News_2012_4_4_Financial.pdf.

⁵¹ The Alpha Foundation, formed under a settlement between Alpha Natural Resources and the U.S. Department of Justice, is committed to filling the gaps in current research on coal miners' safety. Vicki Smith, *Alpha Foundation Culls 160 Mine Research Pitches*, DENVER POST, June 21, 2013, http://www.denverpost.com/breakingnews/ci_23509279/alpha-foundation-culls-160-mine-research-pitches. The Foundation was endowed with \$48 million to spend on research regarding the health and safety of coal miners. *Id.* Part of this endowment included \$9.5 million in research grant awards, which the Foundation distributed to 16 recipients on September 30, 2013. Press Release, The Alpha Foundation, Alpha Foundation for the Improvement of Mine Safety and Health Announces \$9.5 Million in Research Grant Awards (Sept. 30, 2013), available at http://www.alpha-foundation.org/uploads/Alpha_Foundation_Press_Release_20130930.pdf. The winning research proposals include focus areas in safety and health management and training within the industry. *Id.*

implement corrective action plans in response to its Internal Review Report⁵² conducted after the explosion.⁵³ The most recent corrective action was completed on December 31, 2013.⁵⁴ The persistence of MSHA, the Department of Justice, labor unions, and the industry indicates a more proactive future for improving the health and safety of miners. Notably, 2012 had the lowest mining death and injury rates in the history of mining in the United States.⁵⁵

Despite the lessons learned, on August 6, 2013, an underground explosion at Huff Creek Mine in Harlan County, Kentucky, resulted in one fatality and two injuries.⁵⁶ The accident resulted from a coal pillar that burst while the mining machinery continued to operate, trapping the miners.⁵⁷ The Harlan County mine had over 200 violations since January 2011.⁵⁸ It is obvious that despite the incremental improvement, MSHA and the industry's efforts can only go so far if habitual offenders are allowed to stay in business.

B. Historical Legislation

The first mining statute, enacted in 1891, was incomprehensive, applying only to U.S. territories, and implemented minimum ventilation requirements at underground mines.⁵⁹ After a decade of coal fatalities totaling over 2,000, in 1910, Congress created the Bureau of Mines within the Department of the Interior.⁶⁰ However, the Bureau's responsibilities were limited and largely included conducting research and reducing accident rates.⁶¹ It was not until the Federal Coal Act of 1952 that the Bureau had significant enforcement power, permitting investigators to issue imminent withdrawal

⁵² MSHA, INTERNAL REVIEW OF MSHA'S ACTIONS AT THE UPPER BIG BRANCH MINE-SOUTH (Mar. 6, 2012), available at <http://www.msha.gov/PerformanceCoal/UBBInternalReview/UBBInternalReviewReport.pdf>.

⁵³ *Review of MSHA's Actions at the Upper Big Branch Mine-South*, MSHA, <http://www.msha.gov/performancecoal/UBBInternalReview/UBBCorrectiveActions.asp> (last visited Nov. 8, 2014).

⁵⁴ *Id.*

⁵⁵ Press Release, MSHA, MSHA Releases Final Data for 2012: Numbers Indicate Lowest Death and Injury Rates (July 10, 2013), available at <http://www.msha.gov/media/press/2013/NR130710.asp>.

⁵⁶ Erica Peterson, *Harlan County Coal Miner Dies in Underground Accident*, LOUISVILLE PUB. MEDIA (Aug. 6, 2013, 4:26 PM), <http://wfpl.org/post/harlan-county-coal-miner-dies-underground-accident>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *History of Mine Safety and Health Legislation*, *supra* note 2.

⁶⁰ *Id.*

⁶¹ *Id.*

orders and citations for safety violations.⁶² However, a series of mining disasters from 1967 through 1968, resulting in 533 deaths, prompted Congress to take significant action to increase regulatory oversight.⁶³

In 1969, Congress enacted the Federal Coal Mine Health and Safety Act (“the Coal Act”), which represented the most stringent and comprehensive legislation to ever govern the mining industry.⁶⁴ Under this new legislation, the Secretary of the Interior created the Mining and Safety Enforcement Administration (“MESA”) as the federal agency responsible for implementing the expanded investigatory powers of the Coal Act.⁶⁵ The Coal Act significantly expanded federal enforcement powers by permitting random and mandatory inspections and increasing inspections for hazardous operations.⁶⁶ Notably, federal investigators were permitted to issue withdrawal orders that closed hazardous areas of a mine until conditions were abated.⁶⁷

However, the Coal Act was not significant enough, and in 1977, Congress enacted the Mine Act.⁶⁸ The Mine Act replaced MESA with MSHA⁶⁹ and established the Commission as the adjudicative body for mine safety and health challenges.⁷⁰ The Mine Act also created a split-enforcement regulatory model that required the Secretary of Labor (“Secretary”) to promulgate and enforce, through MSHA, the health and safety standards articulated in the Mine Act.⁷¹ The Commission would then determine industry challenges to violations.⁷² Together, the enforcement scheme and Commission review procedures were designed to prevent regulatory capture.⁷³

For the next 30 years, the Mine Act did not change substantively despite technological, engineering, and safety advancements. Notably, coal-related fatalities nationwide dropped to 23 in 2005, an all-time low.⁷⁴ Many

⁶² *Id.*

⁶³ H.R. REP. NO. 91-563, at 3 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2503, 2505.

⁶⁴ *History of Mine Safety and Health Legislation*, *supra* note 2. For an original copy of the Coal Act, see Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91-173, 83 Stat. 742, available at <http://www.msha.gov/solicitor/coalact/69act.htm>.

⁶⁵ *History of Mine Safety and Health Legislation*, *supra* note 2.

⁶⁶ S. REP. NO. 95-181, at 5–6 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3405–06.

⁶⁷ *Id.* at 6.

⁶⁸ Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (codified as amended at 30 U.S.C. §§ 801–961 (2012)).

⁶⁹ *See History of Mine Safety and Health Legislation*, *supra* note 2.

⁷⁰ *See* 30 U.S.C. § 823(a) (2012).

⁷¹ *See Id.* § 811(a).

⁷² *See Id.* § 823(a).

⁷³ *See generally* S. REP. NO. 95-181, *reprinted in* 1977 U.S.C.C.A.N. 3401.

⁷⁴ *See Coal Fatalities for 1900 Through 2013*, MSHA, <http://www.msha.gov/stats/centurystats/coalstats.asp> (last visited Oct. 5, 2014).

within the industry and MSHA attributed the record to advancements in mine safety technology and a renewed corporate culture centered on safety instead of profits.⁷⁵ However, in 2006, the Sago Mine Disaster and two similar explosions undermined this theory.⁷⁶

These tragedies sparked Congress to evaluate the effectiveness of current regulations and safety laws.⁷⁷ A former MSHA official emphasized the “unfortunate” fact that “it took a disaster to bring renewed [legislative] attention to the issue,” stating, “[t]hat’s the history of coal mining legislation in the U.S.—it’s always born[e] out of disaster and as it’s said the safety laws are always written with the blood of miners. That’s what it takes.”⁷⁸ In response to the series of mining tragedies, Congress passed the New Miner Act on June 15, 2006,⁷⁹ which significantly increased civil and criminal penalties for Mine Act violations.⁸⁰ However, the New Miner Act did not establish any procedures by which MSHA could deter bad actors from persistently violating safety regulations under the Mine Act.

C. *The Federal Mine Safety and Health Review Commission: Attempts at Reducing the Backlog*

Once MSHA issues a citation or order for a safety or health violation, a mine operator has a right under the Mine Act to contest it before the Commission.⁸¹ In response to the mining industry’s due process concerns with MSHA’s new Final Rule, MSHA insists the operator’s right to appeal to the

⁷⁵ See Mark E. Heath & Timothy D. Houston, *Increased Enforcement and Higher Penalties Under the Miner Act: Do They Improve Worker Safety?*, 30 ENERGY & MIN. L. INST. 301, 302 (2009).

⁷⁶ Seventeen days after Sago, on January 19, 2006, the Aracoma Alma Mine Number 1 in Logan County, West Virginia exploded due to a misaligned conveyor belt that ignited combustible materials accumulated in the mine. MSHA, REPORT OF INVESTIGATION: FATAL UNDERGROUND COAL MINE FIRE 1–2 (2007), available at <http://www.msha.gov/Fatals/2006/Aracoma/FTL06c1415total.pdf>. The explosion resulted in the tragic deaths of two miners. *Id.* at 1. Four months later, on May 20, 2006, five miners at the Darby Mine Number 1 in Harlan County, Kentucky lost their lives in a methane gas explosion. MINE SAFETY & HEALTH ADMIN., INTERNAL REVIEW OF MSHA’S ACTIONS AT THE DARBY MINE NO. 1, at 3 (June 28, 2007), available at <http://www.msha.gov/readroom/FOIA/2007InternalReviews/Darby%20Internal%20Review%20Report.pdf>.

⁷⁷ See Heath & Houston, *supra* note 75, at 305.

⁷⁸ Naylor, *supra* note 1.

⁷⁹ See generally MINER Act, Pub. L. No. 109-236, 120 Stat. 493 (codified as amended in scattered sections of 30 U.S.C.).

⁸⁰ *Id.* § 8; Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13592, 13592 (Mar. 22, 2007) (to be codified at 30 C.F.R. pt. 100).

⁸¹ See Notice of Contest of a Citation or Order Issued Under Section 104 of the Act, 29 C.F.R. § 2700.20 (2014).

Commission is one factor that protects it against deprivation of a hearing.⁸² However, a closer look at the Commission's case backlog, along with MSHA's past and proposed attempts at decreasing it, reveal that appealing to the Commission does not provide an adequate opportunity to be heard.

1. How Cases Proceed Before the Commission

When a case is appealed to the Commission, it is assigned a docket number and referred to the Chief Administrative Law Judge ("Chief ALJ") for review.⁸³ The Chief ALJ has the power to expedite the decisional process by reviewing certain motions and issuing settlement, dismissal, and default orders.⁸⁴ Otherwise, the case is delegated to an individual Administrative Law Judge ("ALJ").⁸⁵ Once assigned, the ALJ is responsible for handling the case, ruling on certain motions and settlement proposals, and adjudicating the final hearing.⁸⁶ The ALJ's ruling becomes a final, non-precedential order of the Commission.⁸⁷ By the Commission's own initiative or at the request of a litigant, a five-member Commission may provide administrative appellate review of the ALJ's decision.⁸⁸ However, a litigant does not have a right to this review; the decision rests in the affirmative votes of at least two Commissioners.⁸⁹ The appellate decision is precedential, and a party may appeal the decision to the U.S. Courts of Appeals.⁹⁰

Contests to citations and orders are directed to the Commission for adjudicative proceedings.⁹¹ Once an operator receives a safety and health citation or order,⁹² it has 30 days to file a notice of contest with the Secretary.⁹³

⁸² See Pattern of Violations, 78 Fed. Reg. 5056, 5061 (Jan. 23, 2013) (to be codified at 30 C.F.R. pt. 104).

⁸³ FED. MINE SAFETY & HEALTH REVIEW COMM'N, PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2013, at 3 (Dec. 16, 2013) [hereinafter 2013 FMSHRC PERFORMANCE REPORT], available at <http://www.fmsshr.gov/reports/FMSHRC%202013%20Performance%20and%20Accountability%20Report.pdf>.

⁸⁴ *Id.* at 4.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Guide to Commission Proceedings*, FED. MINE SAFETY & HEALTH REVIEW COMM'N, <http://www.fmsshr.gov/guides/guide-commission-proceedings> (last visited Oct. 4, 2014).

⁸⁹ *Id.*

⁹⁰ 2013 FMSHRC PERFORMANCE REPORT, *supra* note 83, at 4.

⁹¹ See FED. MINE SAFETY & HEALTH REV. COMM'N, CASE BACKLOG REDUCTION PROJECT JOINT OPERATING PLAN 2 (Sept. 7, 2010), available at http://www.fmsshr.gov/reports/joint_operatingplan.pdf.

⁹² See generally 30 U.S.C. § 814 (2012).

⁹³ Review of a Subsequent Citation or Order, 29 C.F.R. § 2700.23 (2014).

Additionally, the operator must comply with the following requirements when filing the notice: (1) attach a copy of the order or citation; (2) state the reason(s) for contesting the citation; (3) include all pertinent issues of law and fact; and (4) state the relief sought.⁹⁴ The operator must send a copy directly to the Commission and to the Secretary,⁹⁵ who must answer the notice within 20 days.⁹⁶ After the answer is filed and notice sent to the operator, the case is referred to the Chief ALJ and docketed before an ALJ.⁹⁷

2. Implemented Procedural Improvements and Initiatives Aimed at Ending the Case Backlog

The Commission has taken numerous steps with Congressional support to reduce the case backlog. While some of their efforts show promise, overall, the Commission and MSHA have failed to implement procedures that will reduce the backlog permanently.

i. The Supplemental Appropriations Act

Congress's first legitimate step occurred on July 29, 2010, with the passage of the Supplemental Appropriations Act ("SAA").⁹⁸ At the time the SAA was implemented, the Commission had a total of 17,591 trial-level cases; the majority of which were an accumulation of backlogged cases from October 2007 through February 2010.⁹⁹ To address the stalemate, the SAA allocated \$3.8 million to the Commission.¹⁰⁰

The Commission implemented several different programs to effectuate the goals of the SAA.¹⁰¹ First, the Commission hired additional staff to manage the caseload¹⁰² and established six new ALJ positions.¹⁰³ The Commission reported its allocation of resources resulted in significant strides.¹⁰⁴ However,

⁹⁴ Notice of Contest of a Citation or Order Issued Under Section 104 of the Act, 29 C.F.R. § 2700.20 (2014).

⁹⁵ *Id.* § 2700.20(c)–(d).

⁹⁶ *Id.* § 2700.20(f).

⁹⁷ *See Guide to Commission Proceedings, supra* note 88.

⁹⁸ Supplemental Appropriations Act, Pub. L. 111-212, 124 Stat. 2302 (2010); *see also* 2013 FMSHRC PERFORMANCE REPORT, *supra* note 83, at 5.

⁹⁹ FED. MINE SAFETY & HEALTH REV. COMM'N & U.S. DEP'T OF LABOR, FINAL REPORT ON THE TARGETED CASELOAD BACKLOG REDUCTION PROJECT 3 (2011), *available at* http://www.fmshr.gov/reports/4DOL_FMSHRC_report.pdf

¹⁰⁰ *Id.* at 2.

¹⁰¹ *Id.* at 3–4.

¹⁰² *Id.* at 3.

¹⁰³ 2013 FMSHRC PERFORMANCE REPORT, *supra* note 83, at 5.

¹⁰⁴ FED. MINE SAFETY AND HEALTH REV. COMM'N & U.S. DEP'T OF LABOR, *supra* note 99, at 3.

in January 2011, the trial-level number of cases increased to 19,135 due to an influx of 11,412 new cases that had been filed over the SAA period.¹⁰⁵ By the time funding had expired, the Commission had disposed of 11,643 cases.¹⁰⁶ Notably, two-thirds of those cases had been stalled in the backlog from 2007-2010.¹⁰⁷ While the number of disposed cases is commendable, the case inventory at the end of the SAA period totaled 17,101, a difference of only 490 cases from its implementation.¹⁰⁸

Next, the Commission's Office of Administrative Law Judges ("OALJ"), implemented a prioritizing system for case disposal, where unwarrantable failure citations and orders had highest priority, followed by S&S citation cases.¹⁰⁹ At the outset of the SAA project, priority cases totaled 547 of the total backlog.¹¹⁰ By the end of the project, OALJ had disposed of all but three of the priority cases.¹¹¹

Additionally, the Commission instituted Global Settlement Conferences ("Global Conferences"), which enabled the Commission to group multiple violations assigned to one mine, to resolve disputes immediately via teleconference.¹¹² Cases not settled were then referred to the Commission's hearing docket.¹¹³ Throughout the SAA project, the Commission scheduled 17 Global Conferences comprising 99 cases and 854 citations.¹¹⁴ By the end of the SAA project, the Commission successfully settled 77 cases and 706 citations.¹¹⁵

On March 23, 2011, the Commission took yet another stride in reducing the backlog and proposed to Congress the possibility of implementing an electronic filing system.¹¹⁶ In addition to filing, the program would facilitate online access to files, manage all documents, and track cases electronically.¹¹⁷ Consequently, in November 2011, the Commission "initiated pilot projects to increase the use of technology in handling cases and to ameliorate potential problems with e-filing."¹¹⁸ In 2012, the Commission implemented the

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 4.

¹⁰⁷ *See id.* at 3.

¹⁰⁸ *Id.* at 4.

¹⁰⁹ *Id.* at 6.

¹¹⁰ *Id.*

¹¹¹ *Id.* The remaining three cases were not adjudicated due to the operators' failure to file a timely answer.

¹¹² *See id.* at 7.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ 2013 FMSHRC PERFORMANCE REPORT, *supra* note 83, at 5.

electronic “case management system,” which was scheduled for full implementation in 2014.¹¹⁹ The system permits fully electronic filing, management, and assignment and distribution of cases, in addition to automatic notifications to parties and case tracking capabilities.¹²⁰ The Commission describes this system as its most comprehensive effort for expedited case disposal.¹²¹

ii. Final Rules and Simplified Proceedings

Additionally, the Commission promulgated several rules aimed at reducing the backlog and facilitating the adjudicative process.¹²² The Commission published Final Rule 73955 on November 30, 2010.¹²³ Final Rule 73955 aimed to increase efficiency and time-management by requiring parties who file a “Motion to Approve Settlement” to also submit a proposed decision approving settlement.¹²⁴ Between December 30, 2010, and July 28, 2011, an estimated 6,130 settlement motions were filed with the Commission pursuant to Final Rule 73955.¹²⁵

Also, on December 28, 2010, the Commission published a final “Simplified Proceedings Rule,” which attempted to streamline procedures for processing certain civil penalty cases.¹²⁶ Under the simplified proceedings, the Chief ALJ designates the cases eligible for simplified proceedings, most of which include at least one of the following characteristics: (1) contains only section 104(a) citations;¹²⁷ (2) proposed penalties are not specially assessed; (3) does not involve complex issues of law or fact; (4) involves a limited number of citations; (5) involves a limited penalty amount; (6) prospective hearing will be only for a limited duration, defined by the Chief ALJ; (7) does not involve

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See id.* at 2.

¹²² *See* 2013 FMSHRC PERFORMANCE REPORT, *supra* note 83, at 2.

¹²³ Penalty Settlement Procedure, 75 Fed. Reg. 73955-01 (Nov. 30, 2010) (to be codified at 29 C.F.R. pt. 2700).

¹²⁴ FED. MINE SAFETY & HEALTH REV. COMM’N & U.S. DEP’T OF LABOR, *supra* note 99, at 5.

¹²⁵ *Id.* at 7.

¹²⁶ Final Rule, 75 Fed. Reg. 81459-01 (Dec. 28, 2010) (to be codified at 29 C.F.R. pt. 2700).

¹²⁷ *Id.*; *see also* 30 U.S.C. § 814 (2012). Section 104(a) citations are issued for violations of a mandatory health or safety standard. The citation must set a reasonable time for abatement of the violations. If a mine operator does not comply with an order promulgated within the citation, the inspector issues a withdrawal order requiring all persons, with limited exceptions, to vacate the area of the mine until the hazards have been abated. 30 U.S.C. § 814.

solely legal issues; and (8) the case does not require expert witnesses.¹²⁸ Furthermore, if a party disagrees with the Chief ALJ's designation of eligibility, either party can opt-out.¹²⁹ Likewise, if it becomes apparent the case is no longer eligible for simplified proceedings, the case may be discontinued at either the ALJ's discretion or the party's motion.¹³⁰

Once the Chief ALJ designates a case for simplified proceedings, the Commission notifies the parties.¹³¹ Fifteen days after receiving notice, the parties must file a "Notice of Appearance," although no answer is required.¹³² The parties then have 45 days to submit all non-privileged documents that may support the other party's claims or defenses.¹³³ After the parties receive the information, the ALJ is required to conduct a pre-hearing conference to discuss settlement efforts, narrow the issues, make factual stipulations, and declare witnesses, defenses, motions, and other pertinent matters.¹³⁴ However, prior to this conference the parties must "explore" the possibility for settlement.¹³⁵ Once the pre-hearing conference is complete, the ALJ conducts a hearing to resolve any issues not otherwise decided in the pre-hearing conference.¹³⁶ Within 60 days of concluding the hearing, the ALJ issues its final disposition.¹³⁷

The Simplified Proceedings Rule became effective on March 1, 2011; however, full implementation of the rule was delayed until May 2012.¹³⁸ The Commission insisted it would track the case disposal rate to measure the program's success.¹³⁹ To effectuate this plan, the Commission established two additional performance metrics to track the case-disposal time and the number of cases processed through the program.¹⁴⁰ The 2014 performance targets were established using the 2013 data.¹⁴¹

¹²⁸ 29 C.F.R. § 2700.101 (2014).

¹²⁹ *See id.* § 2700.104.

¹³⁰ *Id.* § 2700.104(a).

¹³¹ *See id.* § 2700.103(b)–(c).

¹³² *Id.* § 2700.103(c)–(d).

¹³³ *Id.* § 2700.105(a).

¹³⁴ *Id.* § 2700.106(b).

¹³⁵ *Id.* § 2700.106(a).

¹³⁶ *Id.* § 2700.108(a).

¹³⁷ *Id.* § 2700.108(f).

¹³⁸ 2013 FMSHRC PERFORMANCE REPORT, *supra* note 83, at 5.

¹³⁹ *Id.* at 5–6.

¹⁴⁰ *Id.* at 6.

¹⁴¹ *Id.* As of February 25, 2014, MSHA has not posted any data regarding 2014 performance targets.

iii. Review Systems

In addition to new regulations, MSHA has implemented a review system that inserts conferencing opportunities at the beginning of the formal review procedure.¹⁴² Due to the volume of cases before the Commission, MSHA assigns its own employees to facilitate the conferences, serving as Conference and Litigation Representatives (“CLRs”), instead of licensed attorneys from the Department of Labor Solicitor’s Office.¹⁴³ CLRs are primarily experienced mine inspectors who directly represent the Secretary in relatively simple cases.¹⁴⁴ For example, CLRs do not usually handle S&S citation cases.¹⁴⁵ Operators attempt to negotiate settlements with CLRs to avoid the cost and time of formal Commission procedures.¹⁴⁶ To do so effectively, CLRs generally request a 90-day extension from the Commission to allow more time to settle before filing a formal “Petition for Assessment of Civil Penalty,” which triggers Commission formalities.¹⁴⁷

However, a recent ruling by Administrative Law Judge Margaret Miller indicates CLRs may not be properly trained or particularly competent to handle certain cases.¹⁴⁸ Judge Miller denied a joint request from MSHA and Alpha Natural Resources to drastically modify citations against Brushy Eagle mine.¹⁴⁹ The ALJ’s ruling revealed that a CLR had been assigned to a case that contained S&S violations.¹⁵⁰ After the conferencing procedure with the operators, the CLR’s recommendations convinced Judge Miller that the CLR was “not qualified, because she did [not] seem to understand mine safety law.”¹⁵¹ Former MSHA investigator and mine safety advocate Tony Opegard stated he was surprised MSHA would assign a CLR to this case, because Brushy Eagle is a mine with a significant history of violations, some of which the ALJ characterized as very serious.¹⁵² Opegard opined that because the

¹⁴² *Reducing the Growing Backlog of Contested Mine Safety Cases: Hearing Before the Comm. on Educ. & Labor*, 111th Cong. 2 (2010) (statement of Michael T. Heenan) [hereinafter Heenan].

¹⁴³ *Id.*

¹⁴⁴ *Alternative Case Resolution Initiative (ACRI)*, MSHA, <http://www.msha.gov/mshainfo/factsheets/mshafct9.htm> (last visited Oct. 16, 2014).

¹⁴⁵ Jessica Y. Lilly, *Judge Denies Alpha, MSHA Request to Reduce Citation Seriousness*, W. VA. PUB. BROAD. (Apr. 25, 2013), <http://archive.wvpubcast.org/newsarticle.aspx?id=29699>.

¹⁴⁶ Heenan, *supra* note 142, at 6.

¹⁴⁷ *Id.*

¹⁴⁸ Lilly, *supra* note 145.

¹⁴⁹ *Id.* Marfork Coal coal group oversaw Upper Big Branch operations at the time of the UBB explosion.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

CLR did not understand the Mine Act, she also “[didn’t] understand . . . negligence . . . , [didn’t] understand . . . [S&S], and if [she didn’t] understand those, [she didn’t] understand the agency.”¹⁵³

iv. Safety and Health Conferences

The changing structure of MSHA’s Safety and Health Conference (“Pre-Assessment S&H Conference”) is one of the primary causes fueling the backlog.¹⁵⁴ Pursuant to 30 C.F.R. § 100.6, an operator has the right to request a Pre-Assessment S&H Conference after MSHA notifies the operator of a safety or health violation.¹⁵⁵ The purpose of the Pre-Assessment S&H Conference is to discuss the merits of any citation or order issued to an operator during an inspection prior to formal litigation.¹⁵⁶ Importantly, despite the evolving nature of the S&H Conference over the past several years, MSHA has maintained the operator’s right to request a conference as guaranteed by section 100.6 of the Mine Act.

Pursuant to section 100.6, an operator’s request for a Pre-Assessment S&H Conference with an MSHA District Manager must be submitted in writing within ten days of notification of a violation.¹⁵⁷ However, the District Manager does not have a specified period of time in which to grant or deny the request.¹⁵⁸ If the District Manager grants the operator’s request, MSHA considers additional information relevant to the issued citations and orders to determine whether they should be vacated.¹⁵⁹ Notably, civil penalties are assigned only after the conclusion of the Pre-Assessment S&H Conference.¹⁶⁰

On February 4, 2008, MSHA issued Procedure Instruction Letter No. 108-111-01 (“2008 PIL”), which permitted inspectors and CLRs to only address “high negligence” or “unwarrantable failure”¹⁶¹ citations and orders during Pre-Assessment S&H Conferences.¹⁶² The 2008 PIL represented a

¹⁵³ *Id.*

¹⁵⁴ *See* 30 C.F.R. § 100.6 (2014).

¹⁵⁵ *Id.* § 100.6(a).

¹⁵⁶ *See id.* § 100.6.

¹⁵⁷ *Id.* § 100.6(b).

¹⁵⁸ *See id.* § 100.6.

¹⁵⁹ *Id.* § 100.6(c).

¹⁶⁰ *See id.* § 100.6(d).

¹⁶¹ *See* 30 U.S.C. § 814(d)(1) (2006).

¹⁶² *See MSHA Issues New Procedure Concerning Safety and Health Conferences*, JACKSON KELLY PLLC (Feb. 8, 2008), <http://safety-health.jacksonkelly.com/2008/02/msha-issues-new-procedure-concerning-safety-and-health-conferences.html>.

drastic departure from MSHA's regular practice of granting conferencing requests for any citations issued.¹⁶³

In March 2009, MSHA replaced the Pre-Assessment S&H Conference with a Post-Assessment Enhanced Conference ("Enhanced Conference").¹⁶⁴ This new procedure required operators to submit a written request to the Commission for an Enhanced Conference only *after* MSHA had assigned civil penalties for the citations issued during an inspection.¹⁶⁵ MSHA also restricted the scope of the Enhanced Conference by warning operators to "carefully consider the violations to be discussed in order to narrow the scope of the conference and facilitate a more meaningful and efficient" review.¹⁶⁶ MSHA claimed the Enhanced Conference would save operators and MSHA the time and expense of litigation.¹⁶⁷

Although aimed at reducing operator abuse, the Enhanced Conference propelled both parties into litigation and severely undermined communication.¹⁶⁸ Requests for Enhanced Conferences were often met with "conference will be scheduled after . . . penalties . . . have been assessed . . . [f]ailure to timely contest penalties will result in your conference request being cancelled."¹⁶⁹ The lack of communication was a real impediment to mine operators' opportunity for a fair review.¹⁷⁰ Without operator input, MSHA relied solely on an inspector's report.¹⁷¹ Due to the trust MSHA puts in its inspectors, the likelihood of questioning the legitimacy of an inspector's actions was unlikely.¹⁷² As a result of the procedural inadequacies, the Enhanced Conference forced both parties to enter into costly and time-consuming litigation; thus, formal contests were "the only reliable avenue for dialogue."¹⁷³

In fact, on December 20, 2011, MSHA announced its plan to return to the Pre-Assessment S&H Conference, where penalty amounts would once

¹⁶³ *Id.*

¹⁶⁴ See U.S. DEP'T OF LABOR, PROGRAM INFORMATION BULLETIN NO. P09-05: PART 100 SAFETY AND HEALTH CONFERENCE PROCEDURE (2009), available at <http://web.archive.org/web/20131003102310/http://www.msha.gov/regs/complian/PIB/2009/pib09-05.asp>.

¹⁶⁵ *Id.* (emphasis added).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See Heenan, *supra* note 142.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

again be assigned after the conference took place.¹⁷⁴ MSHA decided to reinstate the conferences based on the results of its Pre-Assessment Safety and Health Conference Pilot Program (the “Pilot”) conducted from August 31, 2010, through November 30, 2010.¹⁷⁵ In the Pilot, MSHA reinstated Pre-Assessment S&H Conferences in three of 17 MSHA districts.¹⁷⁶ During the pilot time period, operators could contact MSHA to request a Pre-Assessment Conference to discuss violations and citations issued prior to a civil penalty assessment.¹⁷⁷ The feedback from the participating districts was generally positive; the majority of operators believed the conferences were a good idea and should continue into the future.¹⁷⁸ They felt the conferences improved communication with MSHA.¹⁷⁹ However, the Pilot also revealed that a significant lack of resources could be a real impediment to effective implementation.¹⁸⁰ For example, in one of the participating districts, 73% of contested cases took greater than two months to schedule a conference due to a lack of staffing.¹⁸¹ Comparatively, the other two districts were generally able to schedule conferences in less than 60 days.¹⁸² In addition, MSHA contacted the 14 non-participating districts to specifically inquire as to what resources they would need if MSHA reinstated the Pre-Assessment S&H Conferences.¹⁸³ Overall, MSHA found the number of conferencing and clerical staff required to conduct the interviews was directly dependent on the number of conferences requested and granted.¹⁸⁴ MSHA stated that as the number of contested violations continued to rise, additional staff in most districts would be necessary to meet the conferencing demand.¹⁸⁵ MSHA concluded the resources for conferencing in the districts should be seriously considered, in conjunction with the resources available to reduce the backlog.¹⁸⁶

¹⁷⁴ U.S. DEP’T OF LABOR, PROCEDURE INSTRUCTION LETTER NO. I11-V-11: PART 100 SAFETY AND HEALTH CONFERENCE PROCEDURES (2011) [hereinafter PROCEDURE INSTRUCTION LETTER NO. I11-V-11], available at <http://www.msha.gov/regs/complian/PILS/2011/PIL11-V-11.asp>.

¹⁷⁵ See MSHA, EVALUATION OF MSHA’S PRE-ASSESSMENT SAFETY AND HEALTH CONFERENCING PILOT 1 (2011) [hereinafter PILOT EVALUATION], available at <http://www.msha.gov/PreAssess/PreAssessConfEval2011.pdf>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 11.

¹⁷⁹ *Id.*

¹⁸⁰ See *id.* at 12–13.

¹⁸¹ See *id.* at 20.

¹⁸² *Id.*

¹⁸³ *Id.* at 13.

¹⁸⁴ See *id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

Despite MSHA's projected and anticipated lack of significant resources, MSHA planned to institute the Pre-Assessment S&H Conferences in every district by March 2013.¹⁸⁷ MSHA stated that "District Managers [were] authorized and encouraged to implement the [P]re-[A]ssessment [C]onference process immediately."¹⁸⁸ However, MSHA asserted that because of the increasing backlog before the Commission, District Managers had the *discretion* to grant conferences based on available resources, but not the *responsibility* to do so.¹⁸⁹ Moreover, MSHA admitted the District Manager's wide discretion will make implementation occur slowly "or not at all in some districts, until other backlog reduction strategies take hold and make caseloads more manageable."¹⁹⁰

3. Results of the Commission's Efforts

MSHA's initiatives to reduce the backlog have shown promise. In 2012, the Commission received 9,060 new cases,¹⁹¹ compared to approximately 10,600 in 2011.¹⁹² The Commission normally anticipates a total of 11,000 case dispositions annually.¹⁹³ In 2012, the Commission exceeded that goal with a total of 11,883 dispositions.¹⁹⁴ Notably, that included the Performance Coal Company settlements (Massey's Upper Big Branch), which totaled 1,241 cases.¹⁹⁵ By the end of 2012, the Commission had 12,976 pending cases, marking the second year the number of pending cases had dropped.¹⁹⁶ In 2013, the Commission received 6,898 new cases, which is a 24% decrease from 2012.¹⁹⁷ The Commission also experienced a 72% increase in case dispositions, totaling 12,262.¹⁹⁸ The Commission credits this increase to the special "backlog

¹⁸⁷ See Press Release, MSHA, MSHA to Start Using Pre-Assessment Conferencing Procedures, (Dec. 1, 2011), available at <http://www.dol.gov/opa/media/press/msha/MSHA20111703.htm>.

¹⁸⁸ PROCEDURE INSTRUCTION LETTER NO. I11-V-11, *supra* note 174.

¹⁸⁹ *Id.*

¹⁹⁰ See Press Release, MSHA, *supra* note 187. As of February 21, 2014, MSHA had not disclosed the number of districts in which the Pre-Assessment S&H Conferences have been implemented.

¹⁹¹ See 2013 FMSHRC PERFORMANCE REPORT, *supra* note 83, at 10.

¹⁹² *Id.*

¹⁹³ See *id.* at 9.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* In 2010, the Commission faced over 18,000 pending cases at the end of the year. In 2011, this number dropped to less than 16,000.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

teams” within the OALJ that focused on resolving settlement cases.¹⁹⁹ In January 2014, the Commission faced 7,612 undecided cases, marking the third consecutive year that the total number of pending cases has decreased.²⁰⁰

Despite these improvements, the pressure of quickly disposing of cases to reduce the backlog continues to result in significant increases in the number of appeals to the Commission.²⁰¹ The Commission hears primarily two types of appeals: substantive cases and default cases.²⁰² A substantive case results from “an appeal of an ALJ’s decision on the merits,” whereas default cases result from “an operator’s failure to timely contest a proposed penalty where it has filed a motion to reopen the ALJ’s final order.”²⁰³ Recently, the Commission has faced a dramatic increase in both substantive and default contests.²⁰⁴ For example, in 2008, eight petitions for review were filed and only four were granted, compared to 66 filed petitions and 43 accepted in 2011.²⁰⁵ The Commission had a brief reprieve in 2012, with only 52 petitions filed and 27 granted.²⁰⁶ Most recently, in 2013, 54 petitions were filed and 38 were granted.²⁰⁷ The general increase of petitions filed in turn places a greater burden on the Office of General Counsel (“OGC”), which prepares draft opinions for the Commissioners based on its research into the petitioned substantive cases.²⁰⁸ However, compared to most administrative appellate courts, the number of cases heard by the Commission is very small.²⁰⁹

Due to the backlog, in 2012 the Commission failed to meet its default cases target.²¹⁰ In response to two Commissioners’ terms ending in 2012, the Commission deemphasized ruling on default cases in order to spend additional time on substantive cases.²¹¹ This resulted in an increase of older default cases pending for decision, and at the end of 2012, 41 default cases remained on the docket.²¹² The Commission had set a target of only 15 cases.²¹³ However, in

¹⁹⁹ *Id.*

²⁰⁰ *See id.*

²⁰¹ *Id.* at 12.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *See id.*

²¹⁰ *Id.*

²¹¹ *See id.*

²¹² 2013 FMSHRC PERFORMANCE REPORT, *supra* note 83, at 14.

²¹³ *Id.*

2013, the Commission met its target goal for default cases and ended the year with only nine pending cases.²¹⁴

Despite increased attention, the Commission also failed to meet its 2012 goals for reducing substantive cases.²¹⁵ Of the cases that had been pending for 12–18 months, the Commission aimed to have only 6 cases remaining by the end of 2012; however, it ended the year with 13, or 23% of the total docket.²¹⁶ Conversely, in 2013, the Commission met its goal of nine cases pending at the end of the year.²¹⁷ The target for cases 18 months and older was also not met in 2012, ending the year with 15 cases instead of two, as the Commission had anticipated.²¹⁸ In 2013, the Commission once again failed to meet its goal of having only two cases pending by the end of the year; instead, the Commission faced 31 cases at the beginning of 2014.²¹⁹

The increased number of penalty cases at the trial level has also increased the number of substantive cases on appeal.²²⁰ In 2009, operators appealed only nine substantive cases to the Commission, compared to 55 in 2012.²²¹ In 2012, the Commission anticipated that the increase in petitions would continue to rise for the “foreseeable future and perhaps accelerate as the Commission’s judges issue a greater number of decisions in the course of addressing the backlog.”²²² In 2013, the Commission received 54 appeals and met its prediction that the petitions would increase in the future.²²³

The Commission’s proposed and implemented backlog strategies have shown that MSHA’s policies consistently fail to address the underlying problem—inconsistency and inefficiency within the administrative structure. MSHA further complicated the problem by passing the new Final Rule for Pattern of Violations, which altered the prior procedures at the expense of mine operators’ due process rights. A closer look at the evolution of the POV procedures illuminates how the problem persists.

²¹⁴ *Id.*

²¹⁵ *See id.* In addition, the increased number of penalty cases at the trial-level has increased the number of substantive cases. *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 13.

²¹⁸ *Id.* at 14.

²¹⁹ *Id.*

²²⁰ *Id.* at 12 (showing increased number of cases).

²²¹ *See id.* at 13.

²²² FED. MINE SAFETY & HEALTH REV. COMM’N, JUSTIFICATION OF APPROPRIATION ESTIMATES FOR COMMITTEE ON APPROPRIATIONS: FISCAL YEAR 2012, at 12, available at http://www.fmshrc.gov/plans/FY12budget_request.pdf.

²²³ 2013 FMSHRC PERFORMANCE REPORT, *supra* note 83, at 12.

III. PATTERN OF VIOLATIONS

Congress created the initial Pattern of Violation enforcement scheme in response to an investigation of the 1976 Scotia Mine Disaster in Letcher County, Kentucky,²²⁴ where 26 coal miners tragically lost their lives in two explosions.²²⁵ The investigation revealed that Scotia and other mines had inspection histories of recurrent violations, which significantly contributed to the disasters.²²⁶ Congress concluded the existing enforcement schemes in the Coal Act were unable to address the problem of persistent bad actors.²²⁷ Congress intended the provision to be “[a]n effective tool to protect miners when the operator demonstrates his disregard for the health and safety of miners through an established pattern of violations.”²²⁸

Ironically, until recently the POV provision had rarely been used as an enforcement tool.²²⁹ It was only on April 12, 2011, that MSHA issued its “first” official POV notices to two operators, 30 years after promulgation of the regulations.²³⁰ However, from mid-2007 to today, MSHA has heavily exercised its enforcement power under the pattern provision.²³¹ MSHA’s new Final Rule became effective on March 25, 2013.²³² The new Final Rule eliminates key provisions from prior regulations that required hearing opportunities and formal notice prior to issuance of a POV.²³³ Most importantly, the new Final Rule relies on *non-final orders* to be included in the POV analysis.²³⁴

The POV provision is economically devastating. After MSHA issues a pattern, any subsequent safety or health violations require the inspector to issue a withdrawal order, which restricts access to the affected area until the hazard has been abated.²³⁵ This powerful tool halts operations and effectively closes

²²⁴ Heath & Garcia, *supra* note 12, at 589.

²²⁵ See *Mine Accidents and Disasters: Scotia Mine Explosions*, U.S. MINE RESCUE ASS’N, <http://www.usmra.com/saxsewell/scotia.htm> (last visited Sept. 24, 2014).

²²⁶ Heath & Garcia, *supra* note 12, at 589.

²²⁷ *Id.*

²²⁸ S. REP. NO. 95-181, at 32 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3432.

²²⁹ Heath & Garcia, *supra* note 12, at 588.

²³⁰ *Id.* In 2008, MSHA issued a POV notice to National Coal in Knoxville, Tennessee; however, it was quickly removed after a clean inspection. *Id.* at 588 n.1.

²³¹ *Id.* at 588.

²³² Pattern of Violations, 78 Fed. Reg. 5056, 5056 (Jan. 23, 2013) (to be codified at 30 C.F.R. pt. 104).

²³³ Heath & Garcia, *supra* note 12, at 591–92.

²³⁴ Pattern of Violations, 78 Fed. Reg. at 5056.

²³⁵ See *Pattern of Violations (POV) Procedures Summary*, MSHA, available at <http://www.msha.gov/POV/POVProcedures.pdf> (last visited Oct. 16, 2014).

the mine.²³⁶ MSHA has admitted that it is difficult for a mine to avoid further violations during subsequent inspections after it already has been placed on POV status.²³⁷ Only two mines have been placed on a pattern in the history of the Mine Act and neither has reopened.²³⁸

The prior pattern criteria sufficiently protected operators' rights by providing multiple review and hearing opportunities prior to placing the mine on a pattern. The prior regulations also permitted inspectors to only consider *final* orders in its POV assessment. Now, however, an operator's opportunity to contest notices and citations prior to being placed on a pattern are restricted, and inspectors have the power to consider *non-final citations and orders*. The implementation of MSHA's new Final Rule harms the economic vitality of the mine and inhibits due process of law.

A. Prior Pattern Criteria

The prior POV regulations required two investigatory screenings prior to issuing a POV, during which an MSHA investigator examined the mine for S&S violations.²³⁹ The screening process was divided into an initial screening and, if necessary, a pattern of violations screening.²⁴⁰ The regulations required MSHA to review a mine's compliance history and conduct an inspection at least once per year.²⁴¹ Specifically, the inspector could consider S&S violations, withdrawal orders, imminent danger orders, other enforcement measures applied to the mine, evidence of a lack of good faith in correcting S&S violations, accident or injury history indicating serious safety or health management problems, and mitigating factors.²⁴² Most controversial, and what the new Final Rule omits, is that only orders and citations *adjudicated and*

²³⁶ *See id.*

²³⁷ Pattern of Violations, 55 Fed. Reg. 31128, 31129 (July 31, 1990) (to be codified at 30 C.F.R. pt. 104). MSHA stated in the POV Final Rule for the old Mine Act:

The Agency realizes that the statutory requirements for terminating a pattern of violations sequence place a great burden on the operator of the mine. An inspection of the entire mine, particularly a large underground mine, that reveals no violations of a significant and substantial nature may be difficult to achieve.

Id.

²³⁸ Press Release, MSHA, U.S. Labor Department's MSHA Places 2 Mining Operations on Pattern of Violations Status: Unprecedented Enforcement Action Is First in Mine Act History (Apr. 12, 2011), available at <http://www.dol.gov/opa/media/press/msha/MSHA20110532.htm>.

²³⁹ Heath & Garcia, *supra* note 12, at 591 (citing prior regulations at 30 C.F.R. §§ 104.2-104.3).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

confirmed by the Commission (“final orders”) could be considered during the screening.²⁴³

If the initial screening revealed a recurring pattern of S&S violations, MSHA conducted a second screening to determine if the mine had a potential POV (“PPOV”).²⁴⁴ During the PPOV screening, MSHA evaluated the operator’s history of S&S violations and any S&S violations specifically related to the identified hazard(s).²⁴⁵ It also determined whether the operator’s unwarrantable failure to comply caused the S&S violations.²⁴⁶ Notably, MSHA also was limited to review of final orders during the PPOV screening.²⁴⁷

Previously, if an inspector identified a PPOV the MSHA District Manager provided written notice to the operator describing the specific basis for its finding.²⁴⁸ Within 20 days, the operator could review the inspection documents and provide additional information to explain discrepancies or mistakes.²⁴⁹ The operator could request a conference with a District Manager to discuss the PPOV notice and propose solutions.²⁵⁰ Also, the operator could choose to implement a safety plan to prevent future S&S violations.²⁵¹ If the operator elected, the District Manager could take up to 90 days to review the program’s effectiveness at reducing S&S violations.²⁵² If the District Manager continued to believe the mine was at risk of a pattern, she reported her evaluation to the MSHA Administrator (“Administrator”) within four months of the mine’s PPOV notice or within two months if the mine did not implement a safety program.²⁵³ Ten days prior to submitting the report, MSHA provided the operator with a copy of the report and the operator could submit written comments to the Administrator.²⁵⁴ Within 30 days of receiving the district manager’s report, the Administrator issued his decision of whether or not the mine should be placed on a pattern.²⁵⁵ MSHA could then terminate the pattern notice if the inspector did not find any S&S violations in a subsequent

²⁴³ *Id.* at 600–01.

²⁴⁴ *Id.* at 592.

²⁴⁵ *Id.* at 597.

²⁴⁶ *Id.* at 592.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

inspection or if MSHA had not issued a withdrawal order within 90 days of the pattern notice.²⁵⁶

As set forth in the Mine Act, once a mine is placed on POV status it is subject to a closure order if any S&S violation is discovered during a subsequent inspection.²⁵⁷ While on a pattern, an operator could request an inspection to terminate the pattern designation; however, MSHA did not have to provide notice and solely determined the parameters of the investigation.²⁵⁸

B. Current Pattern Criteria

MSHA created its new Final Rule in response to findings from the Office of the Inspector General's report ("OIG report") on MSHA's faulty implementation of its pattern authority.²⁵⁹ The OIG audited MSHA in response to heightened concern regarding MSHA's process for identifying mines with POVs.²⁶⁰ The report found the POV regulations limited MSHA's ability to exercise its POV authority as the Mine Act intended and made it difficult to place mines on POV status.²⁶¹ As a result, MSHA created its new Final Rule to comply with statutory and legislative intent to restore safe and healthy working conditions to noncompliant mines.²⁶²

The most controversial aspect of the law is the fact that the new Final Rule severely restricts notice and hearing procedures.²⁶³ Specifically, it eliminates the two-step PPOV notice and review process, and it permits MSHA inspectors to consider *non-final* citations and orders in its POV assessment.²⁶⁴ The industry vehemently asserts these revisions eliminate an operator's due process rights to notice and hearing prior to issuance of a pattern notice.²⁶⁵

²⁵⁶ *Id.* at 594.

²⁵⁷ 30 U.S.C. § 814(e)(1) (2013).

²⁵⁸ *See id.*

²⁵⁹ OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF LABOR, IN 32 YEARS MSHA HAS NEVER SUCCESSFULLY EXERCISED ITS PATTERN OF VIOLATIONS AUTHORITY 1-3 (2010), available at <http://www.oig.dol.gov/public/reports/oa/2010/05-10-005-06-001.pdf>.

²⁶⁰ *See id.*

²⁶¹ *Id.*

²⁶² *See* Pattern of Violations, 78 Fed. Reg. 5056, 5056 (Jan. 23, 2013) (to be codified at 30 C.F.R. pt. 104).

²⁶³ *See id.*

²⁶⁴ *See id.*

²⁶⁵ Heath & Garcia, *supra* note 12, at 599.

1. Elimination of PPOV Notice Procedures

MSHA strongly disputes the industry's due process concerns.²⁶⁶ It argues its current review procedures, as well as the Mine Act, confer adequate procedural due process.²⁶⁷ MSHA's reasoning is largely based on its position that operators have a continuing obligation to remain current with their compliance history.²⁶⁸ Specifically, MSHA argues that mine operators should know the details of their compliance history; therefore, advance notice to an operator who may be approaching a pattern is unnecessary.²⁶⁹ MSHA also believes the new Final Rule will incentivize mine operators to continually evaluate their performance on a long-term basis.²⁷⁰

To fulfill the operator's responsibility, MSHA encourages use of its computerized notification program, the "Online Monthly Monitoring Tool" ("Monitoring Tool"), as a replacement for the PPOV screening.²⁷¹ The Monitoring Tool is available 24 hours a day, and it displays the amount and type of an operator's violations compared to MSHA's pattern criteria posted on its website.²⁷² Additionally, the online program indicates whether the operator's S&S violations trigger POV criteria.²⁷³ MSHA insists the Monitoring Tool eliminates "uncertainty surrounding POV status" and allows operators to perform "the same review of their compliance and accident data as MSHA."²⁷⁴ MSHA also asserts the Monitoring Tool allows operators to verify the accuracy of the information.²⁷⁵ MSHA concludes that, collectively, citations and orders issued to a mine, the constant availability of POV criteria posted on its website, and greater use of the Monitoring Tool provides sufficient notice to "alert operators of the possibility they may be subject to a POV."²⁷⁶

Furthermore, MSHA maintains that its regulatory procedures and certain Mine Act provisions provide sufficient review opportunities to satisfy due process.²⁷⁷ In support, MSHA provides five pre- and post-deprivation procedures that exist in its regulatory scheme: (1) operators may discuss citations and orders with an inspector during the inspection and at the informal

²⁶⁶ Pattern of Violations, 78 Fed. Reg. at 5061.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 5058.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 5059.

²⁷¹ *Id.* at 5058.

²⁷² *Id.* at 5059.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 5061.

²⁷⁷ *Id.*

closeout conference; (2) operators may request a Pre-Assessment S&H Conference to review citations and orders, and present additional evidence; (3) an operator approaching POV status may implement a corrective action plan (“CAP”) to reduce future S&S violations; (4) the operator can meet with a District Manager to discuss discrepancies in MSHA’s data when it is issued a POV; and (5) an operator’s right under the Mine Act to request expedited temporary relief from a POV is an adequate post-deprivation procedure.²⁷⁸ In its new Final Rule, MSHA argues these provisions are satisfactory in providing notice and hearing to operators prior to issuing a pattern.²⁷⁹

First, MSHA asserts that mine operators can discuss citations and orders with an inspector both during the inspection and at the informal closeout conference.²⁸⁰ Following an inspection, the inspector must schedule an informal closeout conference with the operator.²⁸¹ During the conference, the inspector provides “a summary of all enforcement actions taken,”²⁸² which includes issued citations and orders.²⁸³ Additionally, the operator must develop a plan to prevent recurrence of “violations, hazards, and accidents.”²⁸⁴ The inspector is responsible for informing the District Manager of any concerns discussed in the meeting.²⁸⁵

Second, MSHA states that an operator can request a Pre-Assessment S&H Conference with a District Manager or a field office supervisor to review citations and orders, in addition to presenting other relevant evidence.²⁸⁶ During this conference, MSHA provides an interpretation of regulations and discusses potential disputes in MSHA’s data prior to issuing a civil penalty or commencing formal litigation.²⁸⁷ Under the Mine Act, a mine operator has the right to contest each citation or order issued after an inspection.²⁸⁸

However, MSHA has sole discretion to grant the request for a conference and to determine its nature.²⁸⁹ Within ten days of receiving a citation, the operator may submit additional information or request a Pre-

²⁷⁸ *Id.*

²⁷⁹ *See id.*

²⁸⁰ *Id.*

²⁸¹ MSHA, COAL MINE SAFETY AND HEALTH GENERAL INSPECTION PROCEDURES HANDBOOK 2-6 to -7 (2013) [hereinafter GENERAL INSPECTION PROCEDURES HANDBOOK], available at <http://www.msha.gov/READROOM/HANDBOOK/PH13-V-1.pdf>.

²⁸² *Id.* at 2-7.

²⁸³ Pattern of Violations, 78 Fed. Reg. at 5061.

²⁸⁴ GENERAL INSPECTION PROCEDURES HANDBOOK, *supra* note 281, at 2-7.

²⁸⁵ *Id.*

²⁸⁶ Pattern of Violations, 78 Fed. Reg. at 5061.

²⁸⁷ *Id.*

²⁸⁸ 30 C.F.R. § 100.6(a) (2013).

²⁸⁹ *Id.* § 100.6(b).

Assessment S&H Conference, which must be in writing and include a brief statement of the reason(s) why each citation or order should be reviewed.²⁹⁰ During the conference, all parties may submit additional information relevant to the citation,²⁹¹ including any mitigating circumstances implemented by the operator.²⁹² MSHA reviews the relevant information and “the facts warrant a finding that no violation occurred,” the citation or order is vacated.²⁹³ At the conclusion of the conference, MSHA’s Office of Assessments evaluates the citations and orders for proper penalty amounts.²⁹⁴

Third, MSHA points out that an operator approaching POV status may implement a CAP to reduce future S&S violations.²⁹⁵ CAPs are comprehensive implementation plans for future safety improvements that are tailored to the mine’s specific compliance problems.²⁹⁶ CAPs contain benchmarks for implementation and specific guidelines are posted on MSHA’s website.²⁹⁷ Before a CAP may be implemented, MSHA must evaluate the CAP to determine whether it is structured to result in “meaningful, measurable, and significant reductions in S&S violations.”²⁹⁸ If MSHA approves the CAP and the operator successfully implements it, MSHA considers the program a mitigating circumstance in its POV assessment.²⁹⁹

Fourth, MSHA argues that after a mine is issued a POV, an operator can request to meet with its District Manager for the “limited purpose” of discussing discrepancies in MSHA’s data.³⁰⁰ Possible discrepancies include incorrectly entered citations on MSHA’s Monitoring Tool, citations that have been adjudicated but not yet recorded in MSHA’s system, and erroneous citations.³⁰¹ During the meeting, the operator may question the underlying data on which the inspector issued the pattern and offer documentation to support his position.³⁰² After MSHA verifies the alleged discrepancies, MSHA may terminate the pattern.³⁰³

²⁹⁰ *Id.*

²⁹¹ 30 U.S.C. § 815(c)(2) (2012).

²⁹² PROCEDURE INSTRUCTION LETTER NO. I11-V-11, *supra* note 174.

²⁹³ 30 C.F.R. § 100.6(d).

²⁹⁴ *Id.*

²⁹⁵ Pattern of Violations, 78 Fed. Reg. 5056, 5061 (Jan. 23, 2013) (to be codified at 30 C.F.R. pt. 104).

²⁹⁶ *Id.* at 5063.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 5061.

³⁰⁰ *Id.* at 5065.

³⁰¹ *Id.*

³⁰² *Id.* at 5066.

³⁰³ *Id.*

Finally, MSHA asserts that the opportunity to request expedited temporary relief from a pattern designation under section 105(b)(2) of the Mine Act is an adequate post-deprivation procedure.³⁰⁴ Under this section, an operator may request expedited temporary relief from a pattern designation or withdrawal order³⁰⁵ within 30 days of issuance.³⁰⁶ MSHA reviews the request within 72 hours of receipt, and if granted, the case is assigned to an ALJ.³⁰⁷ An ALJ will accept the request if it raises “issues that require expedited review.”³⁰⁸ The Commission has not defined these “issues”,³⁰⁹ however, ALJ’s have consistently held that “for the contestant to prevail, it must bear the burden of showing extraordinary or unique circumstances resulting in continuing harm or hardship.”³¹⁰ For example, the Commission has found a withdrawal order that is still in effect when it reviews the request is sufficient grounds for the contestant to prevail.³¹¹ In addition, the Commission may grant relief only if: (1) a hearing was held in which all parties had an opportunity to be heard; (2) the applicant proves that a substantial likelihood exists for the Commission’s findings to be favorable to the applicant; and (3) temporary relief will not put the health and safety of miners at risk.³¹²

2. Final Orders as Criteria for POV Designation

Prior to the new Final Rule, MSHA considered “[o]nly citations and orders issued after October 1, 1990, *and that have become final* shall be used to identify mines with a potential pattern of violations under this section” in its initial compliance review.³¹³ The new Final Rule revised these criteria to

³⁰⁴ *Id.* at 5061.

³⁰⁵ 30 U.S.C. § 815(b)(2) (2013). Orders or citations issued under Pattern of Violations, 30 C.F.R. § 104(a) of the Mine Act—non-S&S citations—or § 104(f)—citations for sample violations—do not qualify for expedited relief.

³⁰⁶ 29 C.F.R. § 2700.23(a) (2013).

³⁰⁷ Pattern of Violations, 78 Fed. Reg. at 5061.

³⁰⁸ *Id.*

³⁰⁹ *See* Consol. Coal Co., Docket Nos. WEVA 94-157-R, 94-158-R, 94-159-R, at 496 (FMSHRC Feb. 14, 1994), <http://www.fmshrc.gov/decisions/alj/94020495.pdf> (contest proceedings).

³¹⁰ *Id.*; *see also* Energy West Mine Co., 15 FMSHRC 2223, 2223 (1993); Pittsburg & Midway Coal Mining Co., 14 FMSHRC 2136, 2136 (1992); Medicine Bow Coal Co., 12 FMSHRC 904, 906 (1990).

³¹¹ *See* Consol. Coal Co., Docket Nos. WEVA 94-157-R, 94-158-R, 94-159-R, at 496–97 (FMSHRC Feb. 14, 1994), <http://www.fmshrc.gov/decisions/alj/94020495.pdf> (contest proceedings).

³¹² 30 U.S.C. § 815(b)(2)(A)–(C) (2013).

³¹³ Pattern of Violations, 78 Fed. Reg. 5056, 5059 (Jan. 23, 2013) (to be codified at 30 C.F.R. pt. 104) (emphasis in original).

include non-final citations and orders.³¹⁴ Specifically, MSHA now considers the following factors in its POV review: (1) citations for S&S violations; (2) orders for not abating S&S violations under section 104(b) of the Mine Act; (3) citations and withdrawal orders issued under section 104(d) of the Mine Act resulting from the mine operator's unwarrantable failure to comply; (4) imminent danger orders under section 107(a) of the Mine Act; (5) orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others; (6) enforcement measures, other than section 104(e) of the Mine Act, that have been applied at the mine; (7) other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and (8) mitigating circumstances.³¹⁵

MSHA uses these eight factors listed above to evaluate a mine's accident record.³¹⁶ Also, MSHA will continue to post the specific criteria on its website that mine operators should access to evaluate their performance.³¹⁷ Specific criteria for identifying a pattern designation include the number and rate of S&S violations.³¹⁸

If, after an inspection, MSHA determines the mine meets POV criteria, the District Manager will issue a POV notice to the operator that specifies the basis for MSHA's decision.³¹⁹ The procedures following a POV notice—request for an inspection, closure orders for subsequent S&S violations found within 90 days of POV notice, and termination procedure—mirror those that existed prior to the new Final Rule.³²⁰

However, MSHA's procedures preceding the POV notice are much different, as is the inclusion of non-final orders into the POV calculation. MSHA argues it is not bound to only consider final orders for the following reasons: (1) considering all orders and citations reveals a mine's most recent compliance history; (2) the Mine Act does not prevent MSHA from revising the criteria; and (3) the final order requirement is inconsistent with the Mine Act's legislative history.³²¹

First, MSHA argues the final order requirement impedes its ability to consider a mine's most recent compliance history, because finalization of

³¹⁴ See *id.* at 5056.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* For more specific POV criteria, see *Pattern of Violations Screening Criteria – 2013*, MSHA, available at <http://www.msha.gov/pov/POVScreeningCriteria2013.pdf> (last visited Oct. 16, 2014).

³¹⁸ *Pattern of Violations*, 78 Fed. Reg. at 5056.

³¹⁹ 30 U.S.C. § 814(a) (2013).

³²⁰ *Id.* § 814(e).

³²¹ See *Pattern of Violations*, 78 Fed. Reg. at 5059–60.

citations and orders is increasingly prolonged.³²² MSHA also asserts the Commission's case backlog may postpone or aid in a mine's avoidance of POV status.³²³ In support, MSHA points to the recent surge of cases and citations before the Commission.³²⁴ For example, in 2005, approximately 1,000 cases were pending the Commission's review, including approximately 4,000 citations and orders.³²⁵ In January 2013, the Commission faced an overwhelming total of 10,730 contested cases, comprised of nearly 59,000 citations and orders.³²⁶ Because of the backlog, MSHA points out that the time required to litigate cases has skyrocketed between 2005 and 2011; in 2005, the average litigation time from filing to final adjudication totaled seven months, compared to 20 months in 2011.³²⁷ MSHA contends that by eliminating the final order requirement, the impediment to exercising its POV power is extinguished.³²⁸

Second, MSHA argues the plain language of the Mine Act does not prohibit the revision of criteria, and thus permits the elimination of the final order requirement.³²⁹ MSHA relies on a provision in the Mine Act that requires a mine be issued a POV notice "if [it] has a pattern of [S&S] violations of mandatory health or safety standards"³³⁰ Furthermore, MSHA argues that because Congress explicitly empowered the Secretary to "make such rules as he deems necessary to establish [pattern] criteria,"³³¹ the non-final order revision must be given "controlling weight."³³²

Finally, MSHA argues the elimination of the final order requirement is consistent with the Mine Act's legislative history.³³³ Several years of congressional comments, hearings, and committee meetings precede the Act.³³⁴ MSHA argues that Congress created the POV provision in response to the Scotia Mine Disaster, "an accident that 'forcefully demonstrated' the need for

³²² *Id.* at 5059.

³²³ *Id.* at 5060.

³²⁴ *Id.* at 5059.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.* As of February 25, 2014, neither MSHA nor the Commission has reported the current time required to litigate cases.

³²⁸ *Id.*

³²⁹ *See id.* at 5060.

³³⁰ 30 U.S.C. § 814(e)(1) (2013).

³³¹ *Id.* § 814(e)(4).

³³² Pattern of Violations, 78 Fed. Reg. at 5060 (citing *Eagle Broad. Grp. Ltd. v. FCC*, 563 F.3d 543, 551–52 (D.C. Cir. 2009)).

³³³ *Id.*

³³⁴ *See generally* S. REP. NO. 95-181 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401.

such a” powerful enforcement tool.³³⁵ Specifically, MSHA quotes Congress’s reference to the Scotia mine as having an “*inspection* history of recurrent violations”³³⁶ rather than a “*violation* history.”³³⁷ According to MSHA, this distinction indicates Congress’s intent that pattern determinations be based on all violations and not solely on finalized citations and orders.³³⁸

IV. DUE PROCESS CONCERNS

The lack of procedural safeguards against MSHA action puts the regulated entity at a substantial risk of due process deprivation. Most controversially, MSHA’s newly created power to consider *non-final* citations and orders subjects a mine to closure orders based on non-adjudicated information without adversarial input from the operator prior to the POV notice.³³⁹

The Due Process Clause of the Fifth Amendment guarantees no person shall “be deprived of life, liberty, or property, without due process of law”³⁴⁰ At minimum, due process requires that an individual subjected to potential deprivation be given “notice of the case against him” and a fair opportunity to be heard.³⁴¹

Although articulated by the Constitution, the Due Process Clause is a fundamental principle of justice, rather than a clearly defined rule of law.³⁴² The courts are left to determine the acute principles to apply when considering a due process claim.³⁴³ The Supreme Court has determined that “[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in ‘property’ or ‘liberty.’”³⁴⁴ Any deprivation of a protected interest shall be preceded by notice and hearing “appropriate to the nature of the case.”³⁴⁵ In addition, when analyzing the constitutionality of agency procedures, the Supreme Court has stated,

³³⁵ Pattern of Violations, 78 Fed. Reg. at 5060 (quoting S. REP. NO. 95-181, at 32, *reprinted in* 1977 U.S.C.C.A.N. 3401, 3425).

³³⁶ *Id.* (emphasis added) (citing S. REP. NO. 95-181, at 32, *reprinted in* 1977 U.S.C.C.A.N. 3401, 3425).

³³⁷ *Id.* (emphasis added).

³³⁸ *Id.*

³³⁹ Pattern of Violations, 78 Fed. Reg. 5056, 5059 (Jan. 23, 2013) (to be codified at 30 C.F.R. pt. 104).

³⁴⁰ U.S. CONST. amend. V.

³⁴¹ *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976).

³⁴² *Territory of Alaska v. Craig Enters., Inc.*, 355 P.2d 397, 401 (Alaska 1960).

³⁴³ *See Gilbert v. Homar*, 520 U.S. 924, 930 (1997).

³⁴⁴ *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999).

³⁴⁵ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

“Due process” is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or *make binding determinations which directly affect the legal rights of individuals*, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.³⁴⁶

Although courts may scrutinize agency procedure, it is important to recognize the high level of deference courts afford to an agency’s own procedures.³⁴⁷ However, the constitutional guarantee of due process prevents agencies from eradicating all forms of notice and hearing.³⁴⁸

The Constitution protects two types of due process: substantive and procedural.³⁴⁹ Substantive due process protects against arbitrary and capricious government action³⁵⁰ and safeguards the Bill of Rights.³⁵¹ However, even government action that passes the substantive due process test must be fairly implemented.³⁵² Determining whether the government enforces the law fairly requires a procedural due process analysis.³⁵³

When faced with a procedural due process claim, a court must first determine if a person was deprived of a protected interest, and if so, what process was due.³⁵⁴ In the landmark case of *Mathews v. Eldridge*,³⁵⁵ the Supreme Court established a balancing test to determine what process was due prior to deprivation: (1) the nature of the private interest; (2) “the risk of . . . erroneous deprivation . . . through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”³⁵⁶

MSHA impedes upon the private interest of a mine’s economic viability when it issues closure orders and citations without any sufficient

³⁴⁶ *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (emphasis added).

³⁴⁷ *See* *Process Gas Consumers Grp. v. FERC*, 930 F.2d 926, 929 (D.C. Cir. 1991); *see also* *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986).

³⁴⁸ *Gates*, 790 F.2d at 156; *Marshall v. Conway*, 491 F. Supp. 1123, 1126 (E.D. Pa. 1980).

³⁴⁹ *Zinerman v. Burch*, 494 U.S. 113, 125 (1990), *construed in* *DeKalb Stone, Inc. v. Cnty. of DeKalb*, 106 F.3d 956, 959 (11th Cir. 1997); *see also* *Marshall*, 491 F. Supp. 1123.

³⁵⁰ *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *DeKalb*, 106 F.3d at 959.

³⁵¹ *DeKalb*, 106 F.3d at 959.

³⁵² *United States v. Salerno*, 481 U.S. 739, 746 (1987).

³⁵³ *Id.*

³⁵⁴ *See, e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

³⁵⁵ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

³⁵⁶ *Id.* at 335.

adversarial input, and by utilizing non-final orders in its POV calculation. The new Final Rule regulations lack any probative value when weighed against the erroneous deprivation of a mine operator's constitutional right to be heard. Although the government's interest in public safety is imperative, this interest must be weighed against the unconstitutional infringement of due process rights. The *Eldridge* factors are foundational in analyzing the due process violations imposed by MSHA's new Final Rule.

A. *Mathews v. Eldridge*

In *Eldridge*, the Supreme Court held that a disability benefit termination procedure did not violate due process.³⁵⁷ Pursuant to a federal administrative procedure that determined continued eligibility for disability benefits, respondent completed a questionnaire regarding his medical condition.³⁵⁸ After conducting a standard investigation, the state agency charged with monitoring his condition notified respondent, in writing, that his benefits might be terminated based on his responses.³⁵⁹ The agency provided evidence supporting its preliminary decision and informed respondent of his right to provide additional information prior to final determination.³⁶⁰ In response to the agency's notice, respondent disputed only one of the agency's characterizations and claimed the agency had enough medical information to continue his benefits.³⁶¹

The Social Security Administration ("SSA") approved the state agency's determination to terminate respondent's benefits.³⁶² The agency notified respondent that his benefits had been terminated and informed him of his right to seek reconsideration.³⁶³ The respondent declined to elect the reconsideration process.³⁶⁴ Instead, he filed suit alleging a due process violation based on the lack of an evidentiary hearing prior to the termination of his benefits.³⁶⁵

Applying the three-factor test, the Court recognized the uninterrupted, continued receipt of disability benefits was a protected private interest, but that it was not a strong enough interest to require a full evidentiary hearing, prior to

³⁵⁷ *Id.* at 349.

³⁵⁸ *Id.* at 323–24.

³⁵⁹ *Id.* at 324.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *See id.* at 324–25.

³⁶⁵ *See id.*

final termination, in order to prevent erroneous deprivation.³⁶⁶ The Court held the agency's termination procedure did not create a substantial risk of erroneous deprivation, and that it provided adequate means by which respondent received notice and an opportunity to contest termination prior to final adjudication.³⁶⁷ Finally, the Court ruled a full evidentiary hearing would create significant administrative and fiscal burdens on the government.³⁶⁸ Ultimately, the Court found respondent's due process rights were not violated.³⁶⁹

1. Private Interest

The first *Eldridge* prong requires a court to determine the nature of the private interest at stake.³⁷⁰ A private interest is not arbitrarily defined by an individual's expectation to that right.³⁷¹ Rather, a protected property interest is a right to which a person has a legitimate claim of entitlement.³⁷² Moreover, the Supreme Court has ruled that purely financial deprivations recoverable *after* a final adjudication are less significant than irreparable deprivations.³⁷³

The *Eldridge* Court determined that the respondent's private interest—the uninterrupted and continued receipt of disability benefits prior to final administrative decision—was a statutorily created property interest duly protected under the Due Process Clause.³⁷⁴ In determining the nature of that private interest, the Court contrasted respondent's case with that of an erroneously terminated welfare benefits recipient, whose benefits may not be terminated prior to an evidentiary hearing.³⁷⁵ The Court recognized the risk of deprivation to an erroneously terminated disability recipient might be significant.³⁷⁶

The Court reasoned the delay between the termination of benefits and the final adjudication exceeded one year, and the modest resources of a disabled worker increased this risk of hardship.³⁷⁷ However, the Court concluded the needs of a disability recipient are less than that of a welfare

³⁶⁶ *Id.* at 342–43.

³⁶⁷ *See id.* at 345–46.

³⁶⁸ *Id.* at 347–49.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 335.

³⁷¹ *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

³⁷² *Id.*

³⁷³ *City of L.A. v. David*, 538 U.S. 715, 717 (2003).

³⁷⁴ *Eldridge*, 424 U.S. at 332.

³⁷⁵ *Id.* at 340–43.

³⁷⁶ *Id.* at 331–32.

³⁷⁷ *Id.* at 342–43.

recipient who is without private resources and receives assistance only when living on the “margin of subsistence.”³⁷⁸ Thus, the Court concluded that although continued receipt of disability benefits is a constitutionally protected interest, it is not so great as to demand a full evidentiary hearing prior to final termination.³⁷⁹

In *General Electric Co. v. Jackson*,³⁸⁰ the United States District Court for the District of Columbia ruled that a certain pre-deprivation procedure enforced by the Environmental Protection Agency (“EPA”) did not offend due process.³⁸¹ General Electric (“GE”) challenged the EPA’s “pattern and practice” of administering certain enforcement regulations pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) as unconstitutional.³⁸² Congress enacted CERCLA to ensure that hazardous waste sites were cleaned up efficiently.³⁸³

According to the procedure, once the EPA identified a hazardous site it decided who was the potentially responsible party (“PRP”) and entered into negotiations with the PRP to clean up the site.³⁸⁴ If negotiations failed, the EPA could issue a “unilateral administrative order” (“UAO”) and mandate the PRP clean up the site.³⁸⁵ However, a UAO could only be issued when the hazardous waste created an imminent and substantial danger to public health or the environment.³⁸⁶ If a PRP believed it was not responsible and refused to comply, the EPA would then file a civil enforcement action in district court to enforce the UAO.³⁸⁷ If the reviewing court found the PRP had sufficient cause for not complying, the PRP was not subject to penalties.³⁸⁸

GE argued the regulations EPA used to administer UAOs deprived GE, and all identified PRPs, of their “protected liberty and property interests without a [prior] hearing.”³⁸⁹ GE first alleged that its property interests in stock price and brand value were protected interests of which they were deprived when the EPA issued a UAO.³⁹⁰ In support, GE argued the negative market

³⁷⁸ *Id.* at 340–41.

³⁷⁹ *See id.* at 343.

³⁸⁰ *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8 (D.D.C. 2009).

³⁸¹ *Id.* at 11.

³⁸² *Id.* at 10.

³⁸³ *Id.* at 11.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 12.

³⁸⁹ *Id.* at 14.

³⁹⁰ *Id.* at 22.

reactions to an issuance of a UAO significantly decreased these interests.³⁹¹ The court disagreed, and held the interests were not protected upon *issuance* because damage to stock price and brand value “could occur anytime any agency takes any action that the market interprets as adverse against a company.”³⁹² The district court opined that if the SEC announced a securities fraud investigation or the FDA announced a recall of a company’s drug, the brand value and stock price would likely decrease.³⁹³ The court explained the FDA and SEC’s actions would not trigger due process concerns because the decrease would have resulted only from the market’s reaction, not the EPA’s issuing of the order.³⁹⁴ Because the source of the property deprivation was too speculative, the court ruled the EPA did not substantially deprive GE of its property interests.³⁹⁵

However, GE also argued that the EPA deprived PRPs of their property interests when they elected not to comply with a UAO.³⁹⁶ The court made the distinction that stock price and brand value would be protected property interests at the noncompliance stage.³⁹⁷ In support, it reasoned that PRPs were normally labeled a “recalcitrant actor” when they chose not to comply with a UAO, which in turn harmed its stock price.³⁹⁸ The court recognized that GE’s interests were primarily financial, which were “less troubling because money [could] be recouped in a post-deprivation hearing.”³⁹⁹ However, the court ruled “[a] substantial financial deprivation bearing collateral consequences—for example, an effect on a company’s operations”—amounted to a “more significant private interest.”⁴⁰⁰

Finally, the court found a PRP who chose to comply with a UAO could be deprived of \$4 million, on average, for about three years.⁴⁰¹ The court recognized that for some companies, this amount and timeframe could materially affect a PRP’s economic viability, but for larger companies such as GE, this amount may not materially impact financial stability to the same degree.⁴⁰² Thus, for a PRP who did not comply with the UAO, the average size

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *See id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *See id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 30; *see City of L.A. v. David*, 538 U.S. 715, 717 (2003) (holding that purely financial deprivations are less significant than irreparable deprivations).

⁴⁰⁰ *Jackson*, 595 F. Supp. 2d at 29; *see Mathews v. Eldridge*, 424 U.S. 319, 341–42 (1976).

⁴⁰¹ *Jackson*, 595 F. Supp. 2d at 30–31.

⁴⁰² *See id.* at 30.

and length of financial deprivation could be substantial.⁴⁰³ The court added that “although the private interests are [admittedly] less constitutionally significant . . . they are sufficiently large” and could carry enough potential collateral consequences to amount to a substantial private interest.⁴⁰⁴ Ultimately, the court concluded that the deprivation of GE’s privacy interest was too speculative and the amount and length of time of the deprivation was unsubstantial for a company of GE’s size and wealth.⁴⁰⁵

2. Erroneous Deprivation

The second *Eldridge* factor assesses a procedure’s risk of erroneous deprivation.⁴⁰⁶ In correcting an administrative error where post-deprivation review is prompt and available, generally the only requirement for pre-deprivation procedures is to provide a reasonably reliable basis to conclude that the underlying facts support an agency’s decision and are “as a responsible governmental official warrants them to be.”⁴⁰⁷

The *Eldridge* Court weighed the risk of erroneous deprivation against the probable value of an evidentiary hearing prior to final termination and found that the agency’s procedures satisfied due process.⁴⁰⁸ First, the Court reasoned the procedures were fair and reliable because the agency’s medical assessment requirement provided “routine, standard, and unbiased” medical information from specialized physicians.⁴⁰⁹ The Court noted the respondent completed a questionnaire prior to termination that “identifie[d] with particularity” the information the agency used to determine eligibility.⁴¹⁰ The Court explained the respondent had full access to the agency’s information upon which it relied, and the agency provided detailed notice of its tentative termination assessment, which included the right to directly challenge the agency’s decision and submit additional evidence.⁴¹¹ The Court ultimately concluded the agency’s procedures enabled respondent to sufficiently “‘mold’ his argument” to address the precise issues in his case.⁴¹²

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 30–31.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁴⁰⁷ *See, e.g., Mackey v. Montrym*, 443 U.S. 1, 13 (1979).

⁴⁰⁸ *Eldridge*, 424 U.S. at 343.

⁴⁰⁹ *Id.* at 343–44.

⁴¹⁰ *Id.* at 345.

⁴¹¹ *Id.* at 345–46.

⁴¹² *Id.* at 346.

In *Southern Ohio Coal Co. v. Donovan*,⁴¹³ the Sixth Circuit Court of Appeals declared an employee reinstatement procedure under the Mine Act erroneously deprived mine operators of their property interests.⁴¹⁴ In that case, two employees filed complaints with MSHA, claiming they were wrongfully discharged for voicing complaints about unsafe working conditions.⁴¹⁵ After reviewing MSHA's recommendation, the Commission reinstated both employees pursuant to section 815(c)(1) of the Mine Act ("Rule 44").⁴¹⁶ Subsequently, the operators sued MSHA and claimed the procedure violated due process by forcing them to reinstate terminated employees without first providing a pre-deprivation hearing.⁴¹⁷

Rule 44 prohibited operators from discharging employees who notified them of potential safety hazards in the mine.⁴¹⁸ Pursuant to the Mine Act, once an employee submitted an unlawful discharge complaint, MSHA conducted an interview within 15 days to determine the complaint's legitimacy.⁴¹⁹ Rule 44 required only that the Secretary's application for reinstatement to the Commission show the complaint was not "frivolously brought," that it included the Secretary's reasoning for suggesting reinstatement, and that the application was accompanied by proof of service of process.⁴²⁰ Then, an ALJ reviewed MSHA's recommendation, and if it appeared it was supported by the application, "an order of temporary reinstatement [would] be immediately issued."⁴²¹ The court noted after the reinstatement order had been issued, Rule 44 permitted the operator to request a hearing before the ALJ and to seek temporary relief from the Commission.⁴²² However, the Commission could review the ALJ's decision only if a "substantial question of law, policy or discretion [was] involved."⁴²³

In ruling on the employees' due process concerns, the Sixth Circuit recognized the hearing available to the operator within five days of the reinstatement order was too narrow because it focused solely on whether the complaint was frivolous and did not address the merits.⁴²⁴ Additionally, the court characterized the initial procedures leading to the temporary

⁴¹³ S. Ohio Coal Co. v. Donovan, 774 F.2d 693 (6th Cir. 1985).

⁴¹⁴ *Id.* at 703–04.

⁴¹⁵ *Id.* at 697–98.

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 698.

⁴¹⁸ *Id.* at 696.

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.* at 697.

⁴²⁴ *See id.* at 704.

reinstatement order as significantly weak, because MSHA only needed “‘minimal supporting evidence’ in favor of the complainant.”⁴²⁵ Also, the court found the application insufficient because it excluded input from the mine operator, which was particularly important because reinstatement proceedings are “inherently subject to factual determination and adversarial input.”⁴²⁶ Thus, the court stated that Rule 44 failed to “[e]nsure any reasonable opportunity for at least some minimal pre-deprivation hearing.”⁴²⁷ Consequently, the court found a violation of due process because the hearing procedure created an increased risk of error by failing to address the merits of the controversy.⁴²⁸

Conversely, in *Marshall v. Conway*⁴²⁹ the United States District Court for the Eastern District of Pennsylvania concluded that “due process [was] not offended by not granting defendants a hearing prior to the issuance of citations and orders.”⁴³⁰ Defendant-mine operators continued operations after having been issued citations, fines, and withdrawal orders pursuant to the Mine Act.⁴³¹ When the Secretary of Labor sought to enjoin the operators, the defendants argued that issuing citations and orders without a prior hearing violated due process.⁴³² The court’s analysis correctly noted that the Mine Act did not provide operators with pre-deprivation hearings prior to issuing the citations and withdrawal orders.⁴³³ However, the court also acknowledged the “elaborate” post-order review procedures provided sufficient opportunities for hearing.⁴³⁴ These procedures included the right of an operator to immediately contest a citation or order before the Commission, the right to request an expedited hearing, the right to request expedited temporary relief from an order or citation, and the opportunity to seek review before the United States Court of Appeals.⁴³⁵ The court characterized these procedures as Congress’s safeguards against “arbitrary action or abuse of discretion by administrators in carrying out their responsibilities under federal statutes.”⁴³⁶ Ultimately, the court found the process constitutional because the elaborate post-deprivation procedures—

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.* at 705.

⁴²⁸ *Id.* at 704.

⁴²⁹ 491 F. Supp. 1123 (E.D. Pa. 1980).

⁴³⁰ *Id.* at 1127.

⁴³¹ *Id.* at 1125.

⁴³² *Id.* at 1126.

⁴³³ *Id.* at 1126–27.

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.* at 1127 (quoting *Bernitsky v. United States*, 620 F.2d 948, 956 (3d Cir. 1980)).

coupled with the significance of withdrawal orders—created a constitutionally accepted level of error.⁴³⁷

3. Government's Interest

The final *Eldridge* factor balances government interest with the nature of the private interest at stake and the potential for erroneous deprivation.⁴³⁸ A reviewing court must consider the government function involved along with the fiscal and administrative burdens that an additional or substitute procedure would entail.⁴³⁹ However, financial cost alone is not controlling as to whether a procedural safeguard is required “prior to some administrative decision.”⁴⁴⁰ Rather, the balance between administrative burdens and protecting private interests requires a determination as to when judicial-type procedures are essential to assure constitutional fairness.⁴⁴¹

In *Eldridge*, the Court found the government's interest outweighed the administrative burdens of a pre-termination evidentiary hearing.⁴⁴² Although financial cost alone was not dispositive in determining whether additional procedural safeguards were appropriate, the Court reasoned that the government had a strong interest in preserving fiscal and administrative resources.⁴⁴³ Specifically, the Court pointed to the “incremental” costs associated with increased hearings and providing full benefits while final termination is pending.⁴⁴⁴ In addition, the Court asserted an evidentiary hearing was not always the most efficient or effective means of decision making, and that only minimal notice and hearing was required to satisfy due process.⁴⁴⁵ The Court concluded by asserting that the public's trust—in the “good-faith judgments of the individuals charged by Congress” to administer social programs—must be given great weight.⁴⁴⁶ The Court opined that this was particularly true when pre-termination procedures provided an effective process for the recipient to assert and argue its claim prior to final termination.⁴⁴⁷

⁴³⁷ *Id.* at 1126–27.

⁴³⁸ *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976).

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* at 348; *see Kelly v. Wyman*, 294 F. Supp. 893, 901 (S.D.N.Y. 1968) (holding that additional expense is a factor, but not a justification to deny a hearing that meets the “ordinary standards of due process”).

⁴⁴¹ *Eldridge*, 424 U.S. at 348.

⁴⁴² *Id.* at 349.

⁴⁴³ *Id.* at 348.

⁴⁴⁴ *Id.* at 347.

⁴⁴⁵ *Id.* at 348–49.

⁴⁴⁶ *Id.* at 349.

⁴⁴⁷ *Id.*

Similarly, the district court in *Conway* found the government's interest in safeguarding public safety overcame any potential risk of erroneous deprivation.⁴⁴⁸ The court recognized the flexible nature of due process and the government's wide discretion to create policies that protect the public.⁴⁴⁹ Although flexible in nature, the court urged that when public safety is at risk, "the private interest infringed is reasonably deemed to be of less importance, [and] an official body can take summary action pending a later hearing."⁴⁵⁰ The court admitted that the cessation order for mining activities "clearly implicate[d] important private interests" and that the withdrawal order resulted in serious economic consequences.⁴⁵¹ However, the overriding public concern for the safety of miners ultimately guided the court's decision.⁴⁵²

In *Jackson*, the court considered the government's interest in issuing UAOs to PRPs.⁴⁵³ Under section 106, the EPA could issue a UAO to an identified PRP who denied liability for the hazardous conditions.⁴⁵⁴ The UAO then forced the PRP to clean up the site, so long as the conditions posed an "imminent and substantial endangerment" to the public or environment due to an "actual or threatened release of a hazardous substance" from the PRP's facility.⁴⁵⁵ Although subject to a court's discretion, a PRP who chooses not to comply with the UAO can face up to \$32,500 for each day of noncompliance.⁴⁵⁶ Similarly, the EPA could seek significant punitive damages from a PRP who failed to take proper action.⁴⁵⁷

The court concluded that although a UAO may only be issued under imminent and substantial conditions for public health and safety, the government did not have a need for taking "very prompt action."⁴⁵⁸ The court explained the EPA did not always issue UAOs in true emergency situations; but rather, the EPA regularly cleaned up a site itself and subsequently filed cost recovery actions in true emergency situations.⁴⁵⁹ In addition, the court assessed the additional process GE proposed—a full judicial hearing before a judge—to determine the potential burden on the government; the court concluded that

⁴⁴⁸ *Marshall v. Conway*, 491 F. Supp. 1123, 1127 (E.D. Pa. 1980).

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* (quoting *R.A. Holman & Co. v. SEC*, 299 F.2d 127, 131 (D.C. Cir. 1962)).

⁴⁵¹ *Conway*, 491 F. Supp. at 1127.

⁴⁵² *Id.*

⁴⁵³ *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 32 (D.D.C. 2009).

⁴⁵⁴ *Id.* at 11.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* at 32; see *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972) (establishing a factor to determine government interest as assessing whether it has "a special need for very prompt action").

⁴⁵⁹ *Jackson*, 595 F. Supp. 2d at 32.

other potential methods of providing an additional process in front of a neutral decision-maker were more timely and financially feasible, such as an informal hearing before an ALJ or an agency officer.⁴⁶⁰ Furthermore, the court reasoned that because UAOs issued after negotiations with PRPs usually fail, most PRPs should utilize the pre-issuance hearing that GE proposed.⁴⁶¹ Due to the “complex technical judgments” and high stakes UAOs involved, the court concluded “any” hearing before a neutral decision-maker would invoke significant administrative and fiscal burdens.⁴⁶²

The court ultimately held that GE’s proposed pre-assessment procedure was unnecessary to satisfy due process.⁴⁶³ The court reasoned that to allow every PRP to contest a UAO before a presiding agency officer would, in the aggregate, constitute substantial financial and administrative costs to the government.⁴⁶⁴ Additionally, because the EPA’s current procedure boasted such a small risk of error, the court concluded that the costs of GE’s proposal were too great to justify an additional process.⁴⁶⁵ Finally, the court concluded that GE failed to demonstrate its financial interests at stake routinely had collateral consequences to warrant a greater pre-deprivation process.⁴⁶⁶ Thus, the court concluded that the UAO regulations under CERCLA were a more effective means to address the EPA’s potential errors than to invoke any additional pre-deprivation procedures.⁴⁶⁷

V. ANALYSIS

The critical legal and policy issue raised by MSHA’s new Final Rule is whether the weight of public interest and safety is greater than that of the private interest infringed. MSHA could have simply avoided this constitutional entanglement by creating a minimal pre-deprivation hearing or expanding some processes already in place; however, it did not. A closer look at each element of the *Eldridge* test sheds light on how MSHA’s new POV procedures implicate due process protections, and more critically, how they violate this essential right. While the public interest of safety outweighs private infringement, the future of this policy hinges on the likelihood of erroneous deprivation and how that could be reasonably prevented with little administrative cost or burden to MSHA.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* at 33.

⁴⁶² *Id.*

⁴⁶³ *Id.* at 39.

⁴⁶⁴ *Id.* at 38.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at 38–39.

⁴⁶⁷ *Id.* at 39.

A. Private Interest

Placing a mine on POV is a “severe” penalty resulting in dire financial consequences.⁴⁶⁸ Specifically, courts have recognized that cessation of mining is a “serious economic consequence” that may result in deprivation.⁴⁶⁹ However, the Supreme Court has found that purely financial deprivations recoverable after final adjudication are “less significant than irreparable deprivations.”⁴⁷⁰ As history has shown, placing a mine on POV notice most likely precludes full recovery of the financial deprivation because of the two mines placed on a pattern, both remain closed.⁴⁷¹

There is little doubt that a substantial private interest is infringed when a mine is placed on a pattern; however, the National Mining Association’s (“NMA”) argument that placing a mine on a pattern “pulls down an operator’s stock value, taking an economic toll,”⁴⁷² does not by itself constitute a deprivation.⁴⁷³ Notably, in *Jackson*, the court held the PRPs’ private interests were not protected upon adverse administrative action because damage to stock price and brand value “could occur anytime any agency takes any action that the market interprets as adverse against a company.”⁴⁷⁴ The court specifically found that damage to stock value was too speculative and explained the agency did not substantially deprive GE’s property interests.⁴⁷⁵ However, the court recognized that a substantial financial deprivation bearing collateral consequences, such as the “effect on a company’s operations,” amounted to a more significant private interest.⁴⁷⁶ While damage to stock value may be too speculative, POV status clearly impacts company operations.

This critical legal and policy issue hinges on a balance of public interest versus private infringement. MSHA and the nation clearly recognize the high stakes involved when unsafe mines continue to operate. Indeed, one only has to recall the Upper Big Branch Mine disaster and the tragic result of

⁴⁶⁸ Brief for Petitioners, at *39, *Nat’l Mining Ass’n v. Sec’y of Labor*, 13-3324, 2014 WL 4067861 (6th Cir. Aug. 19, 2014) (Nos. 13-3324, 13-3325), 2013 WL 5674206.

⁴⁶⁹ *Marshall v. Conway*, 491 F. Supp. 1123, 1127 (E.D. Pa. 1980).

⁴⁷⁰ *Jackson*, 595 F. Supp. 2d at 29; *see City of L.A. v. David*, 538 U.S. 715, 717 (2003).

⁴⁷¹ Press Release, MSHA, *supra* note 238.

⁴⁷² Brief for Petitioners, *supra* note 468, at *41. (NMA argued that the reputational harm caused by a POV sanction, as well as the mandatory SEC reporting requirements, “predictably” lead to devalued stock prices because of an investor’s unwillingness to invest in a POV-sanctioned mine. NMA argued this impact to a mine’s reputation is a violation of due process protection.); *see Paul v. Davis*, 424 U.S. 693, 709 (1976) (establishing that reputation alone is a right entitled to due process).

⁴⁷³ *Jackson*, 595 F. Supp. 2d at 22.

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* at 29; *see Mathews v. Eldridge*, 424 U.S. 319, 341–42 (1976).

habitually unsafe working conditions.⁴⁷⁷ Moreover, courts have consistently sided with the strong public interest of safe working conditions over the sometimes less important economic deprivations.⁴⁷⁸ While the economic deprivation in POV cases is clearly substantial, the loss of life and permanent impairment is even more substantial. However, this constitutional question will likely be decided by other *Eldridge* factors.

B. Erroneous Deprivation

MSHA has gone to great lengths to provide a regulatory framework that prevents erroneous deprivations. Most notably, MSHA points out that mine operators should know the details of their compliance history and that there is no need to provide advance notice of POV designation.⁴⁷⁹ In fact, MSHA has created a Monitoring Tool that allows operators to verify the accuracy of the information MSHA posts.⁴⁸⁰ MSHA argues the Monitoring Tool will enable operators to perform “the same review of their compliance and accident data” as MSHA.⁴⁸¹ While the industry may balk at this requirement, the fact that MSHA encourages operators to use the online program as a compliance fact-checking tool should be embraced by an industry that publically touts its commitment to safety.

MSHA argues the online program has been successful due to the nearly 2,200 hits per month on its website.⁴⁸² While this number indicates the program’s use and operator compliance, the constitutional significance of the program dramatically changed when MSHA implemented its new Final Rule. Prior to March 25, 2013, when the new Final Rule took effect, operators relied on the Monitoring Tool *in addition to* the PPOV procedure to review their compliance history.⁴⁸³ This overlapping approach ensured accuracy; however, the government still had the ultimate duty of notifying the operator approaching POV status via the PPOV review procedures.

⁴⁷⁷ Press Release, MSHA, *supra* note 27.

⁴⁷⁸ *Marshall v. Conway*, 491 F. Supp. 1123, 1127 (E.D. Pa. 1980); *see R.A. Holman & Co. v. SEC*, 299 F.2d 127, 131 (D.C. Cir. 1962) (“In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing.”).

⁴⁷⁹ Pattern of Violations, 78 Fed. Reg. 5056, 5058 (Jan. 23, 2013) (codified at 30 C.F.R. pt. 104).

⁴⁸⁰ *Id.* at 5059.

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ *See Heath & Garcia, supra* note 12, at 592.

Conversely, MSHA now requires operators to use the Monitoring Tool as their primary form of notice.⁴⁸⁴ This raises an interesting query: If the operator does not detect the administrative error that is included in the POV calculation, is the operator really at fault for failing to provide itself notice about a possible POV sanction? It can be argued that this protocol illustrates MSHA's inability to account for its own reporting errors and ineffective quality control measures. At the same time, it may also be argued that by employing multiple approaches and processes the risk of error is greatly diminished. Additionally, MSHA can legitimately argue that the Monitoring Tool is but one avenue for providing notice and improving safety; however, without additional procedural safeguards to ensure effective notice, the process may be inadequate to provide due process. More importantly, from a policy perspective, a democratic society should ensure the government retains the burden to provide notice before adverse action is taken, instead of shifting that burden to the citizens.

While notice is a major issue that could result in erroneous deprivation, it pales in comparison to *non-final orders* being considered in the POV calculation. In fact, MSHA's assertion that citations and orders previously issued to a mine provide adequate notice is simply incorrect. Although citations and violations provide notice, assessing POV status on non-final orders that may not have been accurately assessed or that are waiting for adjudication will surely result in erroneous deprivations.

For example, a January 31, 2011, report issued by MSHA revealed that nearly 20% of issued S&S violations that were litigated in 2009 and 2010 were either vacated or modified to "non-S&S" status.⁴⁸⁵ Furthermore, 33% of the "unwarrantable failure to comply" citations litigated during the same time period were either vacated or modified to a lesser, non-S&S violation.⁴⁸⁶ Both are subject to, and involve, serious factual determinations. Therefore, MSHA's argument—that an operator receives notice from issued citations and violations—falters when compared to its own data.

However, MSHA can legitimately argue that a substantial majority of issued citations and violations are found to be accurate, and therefore, the risk of error is low.⁴⁸⁷ This precise data shines a light on an interesting due process dilemma. Clearly, courts have been willing to risk erroneous deprivations when human life is at stake. In fact, "due process is flexible and calls for such

⁴⁸⁴ See Pattern of Violations, 78 Fed. Reg. 5056, 5056 (Jan. 23, 2013) (to be codified at 30 C.F.R. pt. 104).

⁴⁸⁵ Nat'l Mining Assoc., *supra* note 15.

⁴⁸⁶ *Id.*

⁴⁸⁷ See *id.* If 20% of S&S violations that were litigated were vacated or modified and 33% of unwarrantable failure to comply violations that were litigated were vacated or modified, then a clear majority of those citations and violations were found to be accurate. See *id.*

procedural protections as the particular situation demands.”⁴⁸⁸ With that general principle in mind, “in a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing.”⁴⁸⁹

Courts have already examined an analogous situation.⁴⁹⁰ In *Marshall v. Conway*, the court clearly recognized that cessation of mining activities, caused by the issuance of a withdrawal order, implicated an important private interest.⁴⁹¹ However, the public interest of safety was given greater weight than the private infringement.⁴⁹² The court found that conducting a hearing before MSHA could issue a withdrawal order would thwart an important function of the Mine Act.⁴⁹³ The court noted, “[i]n the case of [the Mine] Act, the balancing of competing private and public interests compels a different result.”⁴⁹⁴

Clearly, when imminent danger⁴⁹⁵ exists in a mine, or when an S&S violation is caused by an operator’s unwarrantable failure to comply⁴⁹⁶ with

⁴⁸⁸ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

⁴⁸⁹ *R.A. Holman & Co. v. SEC*, 299 F.2d 127, 131 (D.C. Cir. 1962).

⁴⁹⁰ *See Marshall v. Conway*, 491 F. Supp. 1123 (E.D. Pa. 1980).

⁴⁹¹ *Id.* at 1128.

⁴⁹² *Id.*

⁴⁹³ *Id.*

⁴⁹⁴ *Id.*

⁴⁹⁵ 30 U.S.C. § 802(j) (2013). The Mine Act defines imminent danger as “the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.” *Id.* If during an inspection, an inspector finds an imminent danger exists, he must issue a withdrawal order evacuating the affected area of the mine until the violation has been abated. *Id.* at § 817(a). The purpose of an imminent danger order is “to *immediately* remove miners from exposure to *serious* hazards and to prevent miners from entering such hazardous areas.” *Office of Assessment Citation and Order Explanations*, MSHA, <http://www.msha.gov/PROGRAMS/assess/citationsandorders.asp> (last visited Oct. 16, 2014) (emphasis added). Also, “[c]ourts have noted that an imminent danger exists only when the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.” *Id.*

⁴⁹⁶ *See, e.g., Office of Assessment Citation and Order Explanations*, MSHA, <http://www.msha.gov/PROGRAMS/assess/citationsandorders.asp> (last visited Oct. 16, 2014) (emphasis added) (“A violation is caused by an unwarrantable failure if it is determined that the mine operator . . . has engaged in aggravated conduct constituting more than ordinary negligence.”). Under § 104(d)(1) of the Mine Act, if upon inspection of a mine an inspector finds an S&S violation was caused by an operator’s unwarrantable failure to comply with a mandatory safety and health standard, the inspector shall issue a citation to the operator. If during the same inspection or any subsequent inspection within ninety days of issuing the citation, another S&S violation exists that is also caused by an unwarrantable failure to comply, the inspector must issue a withdrawal order for the affected area of the mine until the violation has been abated. 30 U.S.C. § 104(d)(1) (2013).

mandatory health and safety standards, an inspector should immediately order the closure and evacuation of the area. In these specific situations, a pre-deprivation hearing is impractical and would completely undermine this important safety mechanism.

However, when considering a POV assessment, MSHA is not dealing with one isolated situation or incident. Rather, the critical piece in assigning a pattern designation is the number of S&S citations issued to the operator over a period of time. "Significant and substantial" is not defined in the Mine Act or its regulations; however, MSHA does require four specific criteria be fulfilled before an inspector may designate a violation as S&S: (1) the underlying violation must be of a mandatory safety and health standard; (2) the violation must contribute to the identified health hazard; (3) there must be a reasonable likelihood the hazard will result in illness or injury; and (4) there must be a reasonable likelihood the injury or illness will be reasonably serious.⁴⁹⁷

There is no doubt that an S&S citation is serious. However, when compared to the criteria for issuing an imminent danger order or an unwarrantable failure order, an S&S citation does not rise to the same level of danger to reasonably justify issuing a withdrawal order. By contrast, one can justifiably argue that a "pattern" of S&S violations is much more serious than an isolated incident leading to a withdrawal order, and therefore, the penalty, result, and ramifications should be more drastic and impactful.

Logically, a pre-deprivation hearing before an imminent danger or unwarrantable failure to comply with a withdrawal order can take effect makes zero policy sense; we want regulators and employees faced with tough on-the-spot decisions to err on the side of safety. Clearly, in those cases, public interest trumps private infringement. However, pattern assessments are much different as evidenced by the 20%–33% error rate for S&S violations and unwarrantable failure orders contested in 2009 and 2010.⁴⁹⁸ Here, "reliability (or unreliability) of the initial procedures leading to [the adverse administrative action] is perhaps a significant weakness in the administrative scheme under scrutiny."⁴⁹⁹

Furthermore, MSHA's claim that the temporary expedited review procedure pursuant to section 105(b) of the Mine Act is a constitutionally adequate post-deprivation procedure lacks merit. In *Marshall v. Conway*, MSHA issued non-S&S violation withdrawal orders to the defendants, and therefore, the defendants met the qualifications to request an expedited review.⁵⁰⁰ Although the defendants did not take advantage of this

⁴⁹⁷ *Citation and Order Explanations*, *supra* note 495.

⁴⁹⁸ Nat'l Mining Assoc., *supra* note 15.

⁴⁹⁹ *S. Ohio Coal Co. v. Donovan*, 774 F.2d 693, 704 (6th Cir. 1985) (comparing the situation to *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978)).

⁵⁰⁰ *Marshall v. Conway*, 491 F. Supp. 1123, 1125 (E.D. Pa. 1980).

administrative remedy, the court deemed the review procedure constitutional.⁵⁰¹ Here, when challenging a pattern designation, a mine must have been issued a withdrawal order prior to requesting expedited review. It is true that a withdrawal order frequently follows a pattern designation; however, this is not the case for all situations. The mines that have been placed on a pattern, but have not received a withdrawal order, are devoid of due process. Thus, the mine remains subject to a potential withdrawal order without the option to request relief. Importantly, in this case, the S&S violations that comprise the crux of the POV assessment remain on the Commission docket awaiting adjudication. Instead of narrowly focusing on the expedited review procedures for a select few, a better option is to simply enlarge the process and make it available to any operator placed on a pattern, regardless of a withdrawal order.

MSHA correctly argues that considering all violations and citations reveals a mine's most recent compliance history.⁵⁰² Examining a mine's most recent compliance history, or lack thereof, makes the most sense from a policy and safety perspective. While the NMA may argue that MSHA oversteps its authority by revising POV criteria without submitting the changes to notice and comments,⁵⁰³ the law is not a stagnant force incapable of change. The law is a malleable concept that must be amended and altered to address changing circumstances and account for new realities. Here, MSHA has undertaken the task to eliminate dangerous mines and unsafe working conditions; in fact, this is the sole purpose of why MSHA was created.

Likewise, agencies are given great deference to use their expertise to craft much needed rules and regulations. Our society and Congress place great confidence and trust in administrative agencies. However, this agency autonomy is not without limits nor should it be. Regulations arising from the administrative process are limited by the Constitution. Here, MSHA has challenged these constitutional guarantees. While MSHA should be applauded for taking unsafe mines to task, accomplishing that goal by constitutional deprivation is not a means with which society should be comfortable. Rather, this is an argument premised upon constitutional protections, no matter how unpopular.

MSHA argues that the Mine Act does not preclude it from considering non-final orders.⁵⁰⁴ While that may be true, this argument carried to its logical conclusion produces dangerous results: it forces one to accept that every legislative act has to preclude every possible and conceivable scenario to prevent agency overreach. That argument is simply implausible and rests perilously upon a very slippery slope.

⁵⁰¹ *Id.* at 1127.

⁵⁰² *See* Pattern of Violations, 78 Fed. Reg. 5056, 5059–60 (Jan. 23, 2013) (to be codified at 30 C.F.R. pt. 104).

⁵⁰³ Brief for Petitioners, *supra* note 468, at *14–15.

⁵⁰⁴ Pattern of Violations, 78 Fed. Reg. at 5059.

MSHA reasons that Congress created the POV provision in response to the Scotia Mine Disaster in 1976, an accident that “forcefully demonstrated” the need for such a powerful enforcement tool.⁵⁰⁵ Specifically, MSHA quotes Congress’s reference to the Scotia mine as having an “*inspection* history of recurrent violations”⁵⁰⁶ rather than a *violation* history.⁵⁰⁷ From a safety and policy perspective, permitting MSHA to consider non-final orders as part of the POV process undermines one of the most essential functions of MSHA, especially when violations awaiting adjudication linger on the docket for years. Despite this administrative nightmare, administrative inefficiency or efficiency should not be the problem of the regulated—it should be the problem of the government.

But all is not lost; MSHA is not without recourse and it could easily modify its own processes to ensure constitutional safeguards while exercising its POV power. MSHA could simply issue more withdrawal orders, expand the subject matter discussed in Closeout Conferences and the post-POV assessment meetings with District Managers, or mandate each district to implement Pre-Assessment S&H Conferences.⁵⁰⁸ Currently, MSHA has the tools and processes in place that would likely render this constitutional issue moot. The real quandary faced by MSHA is whether or not any of its post-inspection processes provide the operator an ability to provide meaningful input that produces an administrative decision based on the merits. MSHA argues that its current regulatory procedures and certain Mine Act provisions provide sufficient review opportunities to satisfy due process.⁵⁰⁹ However, a closer examination calls this assertion into question and puts this extremely important enforcement tool into constitutional jeopardy.

Generally speaking, an expanded conferencing system would not only improve communication and administrative efficiency, it would reduce the risk of erroneous deprivations. In fact, it would solve MSHA’s real problem, which is the fact that cases spend 20 months on average awaiting adjudication, *ergo* final orders that can be calculated into the POV assessment.⁵¹⁰ As stated in *Eldridge*, “something less than a full evidentiary hearing is sufficient prior to adverse administrative action.”⁵¹¹ MSHA only needs to provide “something less” than a full hearing before taking adverse action; however, that

⁵⁰⁵ *Id.* at 5060 (quoting S. REP. NO. 95-181, at 32 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3432).

⁵⁰⁶ S. REP. NO. 95-181, at 32 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3432.

⁵⁰⁷ Pattern of Violations, 78 Fed. Reg. at 5060.

⁵⁰⁸ See 2013 FMSHRC PERFORMANCE REPORT, *supra* note 83; see also Press Release, MSHA, *supra* note 187.

⁵⁰⁹ Pattern of Violations, 78 Fed. Reg. at 5061.

⁵¹⁰ *Id.*

⁵¹¹ *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976).

“something” has to be available and must include adversarial input and some consideration of evidentiary issues.

Providing a legitimate and substantive conferencing opportunity after the inspection process would reduce the case backlog and solve this due process quagmire. When factual determinations are involved, adversarial input and an opportunity to be heard are constitutional rights.⁵¹² By considering violations, and *not final orders*, MSHA fails to provide this essential right. In fact, the process must provide at least some minimal determination on the merits of the controversy.⁵¹³ When non-final orders are calculated into the POV assessment, a minimal determination on the merits is clearly missing.

Similar to the procedure in *Donovan*, where the hearing was too narrow and focused solely on whether the complaint was frivolously brought, rather than the merits,⁵¹⁴ here, the Closeout Conference conducted post-mine inspection precludes any decision of evidentiary issues or factual determinations. MSHA argues that the Closeout Conference affords the operator a minimal opportunity to present its side prior to the deprivation.⁵¹⁵ However, the sole purpose of the Closeout Conference is limited to a discussion of the inspector’s actions during the inspection, including the citations and orders issued.⁵¹⁶ It is not a forum for the operator to contest citations or present evidence.⁵¹⁷ The operator is precluded from discussing the evidentiary issues that surround the non-final orders and citations. Thus, the Closeout Conference serves as a debriefing of the inspector’s decisions, rather than an opportunity for a meaningful discussion regarding the merits of the citations or possible violations.

Likewise, the meeting with the District Manager post-POV assessment is narrowly focused on errors and discrepancies and lacks consideration on the merits. The sole purpose of meeting with the District Manager is for the operator to present discrepancies in MSHA’s data upon which the pattern designation was based. However, this meeting is conducted *after* the mine has been placed on a pattern. While the operator’s opportunity to question MSHA’s data may reduce the chances of erroneous deprivation in the future, it is a far cry from an evidentiary or factual determination sufficient to confer due process prior to depriving a mine of its economic vitality.

⁵¹² *S. Ohio Coal Co. v. Donovan*, 774 F.2d 693, 704 (6th Cir. 1985) (finding the application for temporary reinstatement insufficient because it excluded input from the operator, and also the reinstatement procedure unconstitutional because “questions involved in reinstatement proceedings [were] ‘inherently subject to factual determination and adversarial input’” (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 617 (1974))).

⁵¹³ *Id.* at 704.

⁵¹⁴ *Id.*

⁵¹⁵ Pattern of Violations, 78 Fed. Reg. at 5061.

⁵¹⁶ GENERAL INSPECTION PROCEDURES HANDBOOK, *supra* note 281, at 2–7.

⁵¹⁷ *Id.*

MSHA could have simply avoided this constitutional struggle if the Pre-Assessment S&H Conference was made available to all claimants. However, a closer examination of MSHA's implementation of the S&H process raises serious constitutional concerns. For example, in December 2011, MSHA announced that it was reintroducing the Pre-Assessment S&H Conference procedure as a new program to stem the tide of litigation and reduce the case backlog.⁵¹⁸ However, MSHA did not mandate the implementation of the program in every district; rather, implementation is subject to the discretion of each District Manager.⁵¹⁹

In addition, MSHA admits "[i]mplementation [of Pre-Assessment S&H Conferences] may occur slowly or not at all in some districts, until other backlog reduction strategies take hold and make caseloads more manageable."⁵²⁰ Thus, in districts where the case backlog is the most significant, and likely possessing the highest number of S&S violations pending a hearing, the Pre-Assessment S&H Conference is not an available avenue for justice. This strategy hardly belies due process and fairness. Thus, the lack of the Pre-Assessment S&H Conference process in each district only bolsters operator concerns and skepticism surrounding non-final orders being included in the POV assessment.

Finally, MSHA argues that an approved CAP is an effective factor in MSHA's POV review procedures. In its new Final Rule, MSHA reiterates that it has the discretion to consider mitigating circumstances prior to issuing a POV notice. However, MSHA's discussion of mitigating circumstances reveals that its consideration of such circumstances, which include a CAP, is not an effective measure. For example, MSHA asserts there may be "extraordinary occasions when a mine meets the POV criteria, but mitigating circumstances make a POV notice inappropriate."⁵²¹ MSHA explains that mitigating circumstances will be more likely to reduce or alter citations when presented to it prior to a POV notice.⁵²² When the operator approaches POV status, it must then notify MSHA of its desire to design a CAP, develop the plan according to MSHA's guidelines, await MSHA approval, and successfully implement the plan before MSHA will consider any mitigating circumstances. Simultaneously, the mine is still subject to POV procedures and if it meets pattern criteria prior to successful implementation of the CAP, MSHA will

⁵¹⁸ 2013 FMSHRC PERFORMANCE REPORT, *supra* note 83.

⁵¹⁹ *Id.* Although equal protection is beyond the scope of this Article, MSHA's approach raises serious equal protection concerns that a "similarly situated" respondent will be treated differently. Regardless of equal protection or due process, constitutional compliance is not voluntary—it is mandatory. *See Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602 (2008).

⁵²⁰ 2013 FMSHRC PERFORMANCE REPORT, *supra* note 83.

⁵²¹ Pattern of Violations, 78 Fed. Reg. 5056, 5063 (Jan. 23, 2013) (to be codified at 30 C.F.R. pt. 104).

⁵²² *Id.*

issue a POV notice prior to any meaningful consideration of the operator's implemented, but unfinished, CAP. While all of these procedures are designed to provide some opportunity to be heard, none of the procedures by themselves satisfy due process.

C. Government's Interest

The public interest of safe working conditions clearly outweighs the infringed private interest. However, MSHA's own data illustrates that there is a legitimate chance of erroneous deprivations without a more substantial hearing process. For the court faced with these competing interests, its analysis and outcome will likely be dictated by the administrative burden placed upon MSHA.

As announced in *Eldridge*, courts must consider the government function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail when examining what process is due.⁵²³ However, financial cost alone is not controlling as to whether a procedural safeguard is required "prior to an administrative decision."⁵²⁴ Rather, the balance between administrative burdens and protecting private interests requires a determination as to when judicial-type procedures are essential to assure constitutional fairness.⁵²⁵ An evidentiary hearing is not always the most efficient or effective means of decision making, and only minimal notice and hearing procedures are required to satisfy due process.⁵²⁶

MSHA eliminated the two-prong notice process by which it alerted operators to possible POV status. Simply put, reinstating the PPOV process would not be an additional burden on MSHA; instead, it would only require reinstating an administrative process that already existed.

More importantly, MSHA's new hearing procedures violate due process because they lack adversarial input and an opportunity to be heard, which are essential when factual determinations are critical to MSHA's determination. As discussed above, the Closeout Conference, post-POV assessment meeting with a District Manager, and the Pre-Assessment S&H Conference all have clear procedural defects or are not available. In fact, MSHA either controls whether or not the operator can elect the process, or severely limits or outright precludes operator input and evidentiary considerations. Also, even if these conferencing opportunities were expanded, all three have an internal conflict that undermines due process. None of the

⁵²³ *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976).

⁵²⁴ *Id.* at 348; *see Kelly v. Wyman*, 294 F. Supp. 893, 901 (S.D.N.Y. 1968) (stating that additional expense is a factor, but not a justification to deny a hearing that meets the "ordinary standards of due process").

⁵²⁵ *Eldridge*, 424 U.S. at 348.

⁵²⁶ *Id.* at 348-49.

processes allow an administrative decision by a third-party neutral; instead, each process and its outcome is controlled by an MSHA representative.⁵²⁷ This internal conflict and lack of process is even more glaring when one considers the essential fact that *non-final orders* are considered in the POV process.

MSHA can successfully argue that to require an independent adjudicator in each case would constitute a significant administrative burden. Applying the reasoning from *Jackson*—where the court found that allowing every claimant an opportunity to contest an adverse administrative action before a hearing officer aggregately constituted a substantial financial and administrative burden—here, MSHA would face a substantial burden to conduct a full evidentiary hearing before an ALJ. However, a full adversarial hearing is not what this Article argues. Rather, at a minimum, operators approaching POV status should have an opportunity to present evidence and be heard prior to severe adverse administrative action. MSHA could easily open up the expedited review process to all mines facing POV assessment or simply provide a substantive hearing process for S&S violations—neither would constitute a significant burden.

Although GE's proposed process was found to be too burdensome, the facts in *Jackson* are clearly distinguishable from this case. Most notably, the court found the EPA's procedure presented a small risk of error compared to the claimant's proposed procedure and impending costs.⁵²⁸ However, here, S&S violations and unwarrantable failure to comply violations are vacated or reduced 20%–33% of the time.⁵²⁹ This constitutes a significant risk of error rather than a small one.

Even though the *Jackson* court rejected the process suggested by GE, dicta stated that other potential methods of providing additional process in front of a neutral decision-maker were more financially and timely feasible, such as an informal hearing before an ALJ or an agency officer.⁵³⁰ Clearly, the court acknowledged that while some processes are too burdensome or elaborate, an “informal hearing before an ALJ or agency officer” is guaranteed by due process. MSHA could argue its processes permit an informal hearing before an agency officer. However, those processes are either not available to all claimants based on geographic region, or the process forbids consideration of evidentiary issues by the hearing officer. Either way, fairness demands a clear

⁵²⁷ Baker, *supra* note 20, at 174. CLRs play an important role in the informal adjudicative process by handling relatively simple cases regarding the legitimacy of certain citations and orders. However, the absence of a neutral third-party calls into question the fairness of an operator's hearing. Without additional representation outside of MSHA control, an operator's opportunity to be heard is severely jeopardized. *Id.*

⁵²⁸ Gen. Elec. Co. v. Jackson, 595 F. Supp. 2d 8, 38 (D.D.C. 2009).

⁵²⁹ Nat'l Mining Assoc., *supra* note 15.

⁵³⁰ *Jackson*, 595 F. Supp. 2d at 32.

and predictable process available to all claimants. Due process dictates safeguards and protection from agency overreach.

VI. CONCLUSION

Unequivocally, everyone can agree that unsafe mines and working conditions should be corrected and if needed, shut down. MSHA's new Final Rule that streamlines the POV process and puts more pressure on America's unsafe coal mines should be applauded as a victory for oversight. However, these gains and improvements should not come at the expense of violating due process and the Constitution. While unpopular, these constitutional arguments are not in support of unscrupulous mine operators who abuse the system or evade oversight; instead, we should zealously guard our constitutional guarantees and rights even in the face of what may be expedient or appear just. As this Article points out, MSHA could easily amend its procedures or reissue the rule and avoid this constitutional entanglement and unnecessary delay.