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Comment


On November 20, 1968, 78 miners working the midnight shift at Consolidation Coal Co.’s No. 9 mine near Farmington, W. Va., were killed by an explosion. In all, 309 miners throughout the country were killed on the job that year. Since the odds in 1968 were approximately 500 to 1 that a miner would lose his life while working, coal mining was easily the nation’s most hazardous occupation. The Farmington disaster had a catalytic effect on proposed coal mine safety and health reform legislation and greatly influenced the passage of the Federal Coal Mine Health and Safety Act of 1969.

The Secretary of Interior (Secretary) is charged with administration and enforcement of the Act. He is authorized to promulgate and revise mandatory safety standards, and his representatives (inspectors) are required to conduct frequent inspections in the coal mines to insure compliance with those standards. The inspectors

2. Id.
3. 30 U.S.C. §§ 801-960 (1970) [hereafter referred to as the Act]. The Act applies to all coal mines the products of which enter or affect interstate commerce, the operators of such mines and the miners working therein. Id. § 803.
4. The Secretary was to exercise his enforcement function through the Bureau of Mines. Legislative History, supra note 1, at 635. That function was delegated to the Mining Enforcement and Safety Administration [hereinafter cited as MESA], 38 Fed. Reg. 18,695-96 (1973).
6. Inspectors are required to completely inspect all mines at least four times a year. The inspections are to be conducted for the purposes, inter alia, of determining whether there is compliance with the mandatory standards and enforcement actions taken pursuant to the Act, and to determine whether an imminent danger exists. Inspections are to be conducted without advance notice. Id. § 813(a). Inspectors are authorized to enter into all coal mines without a warrant. Id. § 813(b) (held constitutional in Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973). Inspectors are also required to conduct at least one weekly spot inspection of all or part of any mine which liberates excessive quantities of methane, one in which an ignition or explosion which caused death or serious injury has
are provided with a comprehensive scheme of enforcement powers to insure strict compliance with the mandatory standards and are empowered, where necessary, to take immediate summary action to protect the miners' lives. Each of the enforcement provisions gives an inspector the discretion and ultimate authority to order the withdrawal of all persons from a mine or designated part thereof. The Act does not require or provide for notice or a prior hearing before such an order is issued, but a mine operator (operator) may apply for administrative review by the Secretary after an order has been issued. The issuance of a withdrawal order has several significant effects. First, it requires the immediate cessation of all production activities until the inspector or the Secretary determines that the cause for its issuance has been abated, i.e., it constitutes an immediate and direct temporary interference with the operator's property. If a violation of a mandatory standard is found and described in the order, the Secretary will then assess a civil penalty against the mine operator. If the violation is the result of the operator's willful or knowing neglect, the operator may be criminally prosecuted. Furthermore, if miners are idled because of the issuance of the order, the operator is required to compensate such miners for at least part, if not all, of the time lost due to the order.

This comment considers whether the enforcement and hearing provisions of the Act, as interpreted and applied by the Secretary, meet the requirements of due process. That is, does the issuance of a withdrawal order without notice and a prior hearing deny a coal mine operator his property without due process of law. In undertaking this inquiry, the withdrawal order and hearing provisions are first described, followed by a review of the administrative and court decisions interpreting these provisions. A brief survey of the present

occurred during the preceding five years, or a mine where an especially hazardous condition exists. 30 U.S.C. § 813(i) (1970).
7. 30 U.S.C. §§ 814(a)-(c) (1970). The details of these enforcement provisions will be considered infra.
8. Id. § 815(a).
9. Id. §§ 814(g), 815(b).
10. Id. § 819(a). The civil penalty is assessed only after the operator has been given notice and an opportunity for a hearing pursuant to the Administrative Procedure Act, 5 U.S.C. § 554 (1970); 30 U.S.C. § 819(a)(3) (1970).
12. Id. § 820(a). Miners idled by an order issued pursuant to §§ 814(a) or (b) are entitled to compensation for the balance of that shift and for four hours of the next shift or until the termination of the order whichever occurs first. Miners idled by an order under § 814(c) are entitled to compensation for idle time up to one week.
status of due process is considered in light of recent Supreme Court decisions such as *Fuentes v. Shevin*\(^\text{13}\) and *Mitchell v. W. T. Grant Co.*,\(^\text{14}\) which generally condemned pre-notice, pre-hearing government seizures as deprivations of private property, at least where strict control over such power is lacking.

**THE ACT'S PROVISIONS FOR ENFORCEMENT, NOTICE AND HEARING**

Section 104 of the Act\(^\text{15}\) provides the inspector with three separate enforcement tools. Under subsection (a),\(^\text{16}\) the inspector is required to immediately issue an order withdrawing all non-abatement personnel from an endangered area whenever he finds that an imminent danger exists. “Imminent danger” is defined as “the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.”\(^\text{17}\) Subsection (b)\(^\text{18}\) provides that, if the inspector finds a violation of the mandatory safety standards that does not constitute an imminent danger, he must issue a notice of violation and set a reasonable time for abatement.\(^\text{19}\) If the violation is not abated in the time set and there is no reason to extend such time, the inspector must thereafter issue an order withdrawing all non-abatement personnel until the violation is abated. Subsection (c)\(^\text{20}\) applies if the inspector finds a violation of any of the mandatory standards which does not constitute an imminent danger but does constitute a significant safety hazard caused by the


\(^{16}\) Id. § 814(a), provides in pertinent part:

If, upon any inspection of a coal mine, an... [inspector] finds that an imminent danger exists, ... [he] shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator ... to cause immediately all persons ... to be withdrawn from, and to be prohibited from entering, such area until an ... [inspector] determines that such imminent danger no longer exists.

Excepted from the withdrawal order provisions of §§ 104(a)-(c) are: (1) persons deemed necessary to abate the condition; (2) any public official whose duties require his presence; (3) a representative of the miners qualified to be in such an area; and (4) any consultant to the above. Id. § 814(d).

\(^{17}\) Id. § 802(j).

\(^{18}\) Id. § 814(b).

\(^{19}\) No criteria for determining a reasonable time for abatement are provided in the Act.

operator's "unwarrantable failure." Such findings are included in the notice of violation. If a second unwarrantable failure violation is found during the same inspection, or during a subsequent inspection within ninety days, the inspector must immediately issue an order withdrawing all non-abatement personnel until the violation is abated. Once a withdrawal order has been issued under subsection (c), the inspector must continue to issue a withdrawal order when he finds any similar violation until an inspection discloses the lack of such violations. In addition, several of the mandatory safety standards require the operator to withdraw all non-abatement personnel on his own initiative. The operator is required to conduct a number of pre-shift, on-shift, and weekly inspections of all active working areas. If he finds a violation of the safety standards, a hazardous condition, or an imminent danger, he is required to post a "DANGER" sign at all access ways to the area and to withdraw all non-abatement personnel until the condition is eliminated. The operator is also required to make frequent examinations for methane gas and to withdraw all miners when 1.5 volume per centum of methane is detected.

Where any violation of the mandatory standards is found, the Act requires the Secretary to assess a civil penalty on the operator of the

21. "Unwarrantable failure" is not defined in the Act, but it is defined in LEGISLATIVE HISTORY, supra note 1, at 1030 as:

[T]he failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of a lack of due diligence, or because of indifference or lack of reasonable care, on the operator's part.

22. The word "similar" is not defined in the Act or the legislative history. In Eastern Associated Coal Corp., 3 CCH EMPLOYMENT SAFETY & HEALTH GUIDE ¶ 18,706, at 22,598, 22,603 (1974), it was defined as requiring the common characteristics of § 104(c)(1), i.e., that the violation (1) does not constitute an imminent danger; (2) does cause a significant health or safety hazard; and (3) is caused by the operator's unwarrantable failure.

23. For the purposes of § 104(c)(2), the term "inspection" was held to mean a complete inspection of the entire mine, even though that inspection may take as long as three months to complete. Id. at 22,604 n.10.


27. "Active workings" is defined as "any place in a coal mine where miners are normally required to work or travel." 30 U.S.C. § 878(g)(4) (1970).


29. Methane gas is a highly explosive gas commonly liberated from the coal seam during the mining process. Its explosive range is 5-15 volume per centum. LEGISLATIVE HISTORY, supra note 1, at 58-59.

mine in an amount up to $10,000 for each violation. In determining
the amount of the penalty, the Secretary must consider the oper-
ator's history of previous violations, the size of the operator's busi-
ness, the operator's negligence, the effect of the penalty on the oper-
ator's continued operations, and the operator's good faith in rapidly
abating the violation after it is found. The Act also imposes crimi-
nal sanctions against an operator who wilfully violates any standard
or knowingly violates any order issued under section 104.

The Act requires that all notices and orders issued pursuant to
section 104 contain a detailed description of the condition or prac-
tice constituting an imminent danger or a violation of the manda-
tory standards, the mandatory standard violated, and the area of
the mine affected. All notices and orders must be in writing and
must be immediately served on the operator or his agent.

The operator or a representative of the miners is entitled to obtain
an administrative review of any order issued pursuant to section 104
or a notice issued pursuant to section 104(b) by filing an application
for review within thirty days after the issuance of such notice or
order. The filing of an application does not, however, stay the
effect of the notice or order, but pending review, the applicant may
obtain temporary relief from an order issued pursuant to sections
104(b) or (c). After the Secretary has issued his final order on
review, an aggrieved party may seek review by an appropriate
United States circuit court of appeals.

THE ENFORCEMENT, NOTICE AND HEARING PROVISIONS APPLIED

More than forty-five hundred imminent danger orders and sixty-

32. Id.
33. Id. §§ 819(b), (c).
34. Id. § 814(e).
35. Id. § 814(f).
36. Id. § 815(a)(1). The hearings are governed by the Administrative Procedure Act; id.
§ 815(a)(2). The Secretary has delegated his review authority to the Office of Hearings and
Appeals; 43 C.F.R. § 4.1 (1973). The evidence is heard by an administrative law judge
pursuant to special departmental regulations; id. §§ 4.580-.595. The Board of Mine Opera-
tions Appeals has general review authority of proceedings under the Act, and it is empowered
to issue the final order of the Secretary; id. §§ 4.1(4), 4.500, 4.605.
38. Id. § 815(d).
39. Id. § 816. Exhaustion of administrative remedies is a prerequisite to judicial review.
See, e.g., Eastern Associated Coal Corp. v. Interior Bd. of Mine Operations Appeals, 491 F.2d
one hundred non-imminent danger and unwarrantable failure orders were issued during the first three years of the Act's existence. The reason for the seemingly large number of withdrawal orders is not at all clear, but there are two factors which are probably significant in contributing to their overabundance: the inherently dangerous nature of coal mining coupled with the difficulty in maintaining the status quo in a coal mine; and the fact that specific guidelines given to inspectors in their training call for the issuance of withdrawal orders whenever certain conditions or practices are found.  

277 (4th Cir. 1974) (noting judicial review as appropriate); Pittston Co. v. Board of Mine Operations Appeals, 460 F.2d 1189 (4th Cir. 1972) (denying interlocutory judicial review).


41. The inspectors are given two manuals during their training: The United States Department of Interior, Bureau of Mines Coal Mine Safety Inspection Manual for Underground Mines (Sept. 1972) [hereinafter cited as Inspection Manual], and The United States Department of Interior, Bureau of Mines Health and Safety Manual for Orders, Notices and Report Writing [hereinafter cited as Report Manual]. The Report Manual, supra at 1, specifies that imminent danger orders may be issued for violations of the mandatory standards or naturally caused conditions. The Inspection Manual calls for issuance of imminent danger orders in several specific instances. The finding of an accumulation of "inadequately inerted" coal dust, which cannot be cleaned up in less than thirty minutes, is cause for issuance of an imminent danger order, Inspection Manual, supra at § 75.400. This rule has been declared invalid in a number of administrative decisions. See, e.g., Kings Station Coal Corp. cases at Docket Nos. VINC 73-239 (1973), appeal filed, IBMA 74-46 (1973); VINC 73-194 (1973), appeal filed, IBMA 74-45 (1973); VINC 73-112 (1973), appeal filed, IBMA 74-44 (1973); VINC 73-107 (1973), appeal filed, IBMA 74-43 (1973); and VINC 73-19 (1973), appeal filed, IBMA 74-42 (1973).

Cause for issuance of an imminent danger order is mandated by the Inspection Manual, supra at § 75.606, where electrical cables are run over by any type of mobile equipment. This rule was held invalid in Kings Station Coal Corp., 3 CCH EMPLOYMENT SAFETY & HEALTH GUIDE ¶ 18,664, at 22,567 (1974); Quarto Mining Co., 3 CCH EMPLOYMENT SAFETY & HEALTH GUIDE ¶ 18,075, at 22,295 (1974).

The Report Manual, supra at 7, had previously called for issuance of imminent danger orders where it was necessary for MESA to maintain control of a mine or affected area until an investigation or until recovery operations were completed after an accident or disaster. This provision was changed on August 7, 1974, apparently in response to two decisions holding enforcement action in accordance with this instruction improper. The manual now provides for such action to be taken under 30 U.S.C. §§ 813(e)-(f) (1970). See Eastern Associated Coal Corp., Docket No. HOPE 73-663 (1974), appeal filed, IBMA, 74-64; and U.S. Steel Corp., Docket No. BARB 73-372-P (1974).

In Eastern Associated Coal Corp., Docket No. MORG 74-50, at 5 (1974), an inspector testified that, as a matter of policy, inspectors are instructed to issue a § 104(b) order if
The due process issue concerning the Act has never been raised or decided by the Board of Mine Operations Appeals (Board) or the courts.\textsuperscript{43} When an order or a 104(b) notice is issued, an operator may apply for review and request an expedited hearing which, if granted, should take place no more than eight days after the application and request are filed.\textsuperscript{43} If a 104(b) or (c) order is issued, the operator may apply for a stay, but, of course, the order remains effective until the obtainment of the stay, which could take several days and could require a hearing itself. If a 104(a) order is issued, the operator's only recourse is to request an expedited hearing.

At least in theory, an operator can obtain a prior hearing in the case of a 104(b) or (c) order by seeking a review of the underlying notice.\textsuperscript{44} As a practical matter, however, in the case of a 104(b)
notice, the operator may not initially dispute the existence of the violation or the time set for abatement (which may be as short as a half-hour), but he may subsequently take issue with the inspector's refusal to extend the time for abatement because of subsequent occurrences. In such a situation, the only available opportunity to be heard is in a post-order hearing.

Similarly, in the application of section 104(c), where an order can be issued during the same inspection in which the underlying notice was issued, it may be a practical impossibility to obtain a review of the notice before the issuance of the order.

In most instances, the issuance of an order puts the operator in a dilemma if he feels the order is unjustified. He can stand on his rights, demand an expedited hearing, and leave his mine closed until a decision is finally rendered after the hearing, if the order is for an alleged imminent danger; or until a stay is obtained, if the order is issued pursuant to section 104(b) or (c). Of course in doing so, he is required to compensate the miners idled by the order for at least part of their lost time, and even if the order is vacated on review, he has no recourse against the inspector or the government for the economic losses which he has suffered. On the other hand, he can seek to minimize his economic losses by complying with the inspector's wishes and subsequently filing for review as a matter of principle. If an operator does not request an expedited hearing, the case usually will not be heard until six months to a year after the order is terminated.

45. Notices and orders, however, are generally issued orally at the scene and then written and served on the operator on the surface after the shift. See Eastern Associated Coal Corp., 1971-1973 OSHD ¶ 16,187, at 21,160-61 (1973).

46. The Board has held that subsequent vacation of an order does not divest the miners of their right to compensation. Rushton Mining Co., 1971-1973 OSHD ¶ 18,077, at 22,297 (1974); CF&I Steel Corp., 3 CCH EMPLOYMENT SAFETY & HEALTH GUIDE ¶ 17,962, at 22,241 (1974). This reasoning may also apply to time lost due to an order issued and then stayed pending decision, even though the order is subsequently vacated.

47. The Act provides no recourse for the operator who has been issued an improper order. The Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1970), exempts the government from liability for discretionary acts of its employees pursuant to a statute or regulation. Government employees are also protected from such liability. Scherer v. Morrow, 401 F.2d 204 (7th Cir. 1968), cert. denied, 393 U.S. 1084 (1969).

48. The operator has 30 days in which to file his application, and the statutory parties, the Secretary and a representative of the miners, 30 U.S.C. § 815(a)(1) (1970), have 30 days in which to file an answer. A general survey of the review decisions indicates that the cases are not heard for at least six months and often the decisions are not issued for an additional three to six months due to the fact that the Administrative Procedure Act requires that the parties be given an opportunity to file written proposed findings of fact, conclusions of law and briefs after the hearing. See 5 U.S.C. § 557(c) (1970); 43 C.F.R. § 4.592 (1973).
The Board has held that even terminated orders are reviewable because of the need "to establish guidelines as to the proper basis for the issuance of an order of withdrawal and [because such guidelines] would help to protect all operators from the adverse effects of improperly issued orders."\(^9\) The establishment of strict guidelines seems particularly important where due process questions are raised.\(^5\) The substantive meaning of imminent danger has been dealt with by the Board in two cases reviewing such terminated orders. In the first, *Eastern Associated Coal Corp.*,\(^5^1\) the Board held that an imminent danger exists whenever the condition or practice is such that it could reasonably be expected to cause death or serious harm "if normal mining operations were permitted to proceed in the area before the dangerous condition [was] eliminated."\(^5^2\) Commenting on the particular facts of this case, the Board added that: (1) the condition could not be divorced from the "normal work activity"; (2) prior voluntary action by the operator was praiseworthy, but that such action did not eliminate the "imminence" of the hazard; (3) the fact that the abatement period was short did not invalidate a finding of imminent danger; (4) time for abatement alone was not a proper consideration; and (5) no review of whether the inspector used the appropriate enforcement tool would be considered.\(^5^3\)

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50. One of the key criteria in determining the constitutionality of statutes such as the Act is the existence of strict controls over the exercise of the powers granted. See discussion of Fuentes v. Shevin, 407 U.S. 67 (1972) and Mitchell v. W.T. Grant Co., 94 S. Ct. 1895 (1974) in text accompanying notes 91-95 infra.

51. 1971-1973 OSHD ¶ 16,187, at 21,159 (1973), aff'd sub nom. Eastern Associated Coal Corp. v. Interior Bd. of Mine Operations Appeals, 491 F.2d 277 (4th Cir. 1974). The condition cited in the inspector's order was as follows:

There is an excessive accumulation of loose coal and rock on the floor of the No. 4 Entry, 8 feet inby, 16 left section loading point extending for a distance of 25 feet. The vertical clearance is restricted to 54 inches. The shuttle cars have rubbed the roof and dislodged two roof-bolt[s] which are hanging down 6 inches at the brow of the boom hole. This is a hazard to the shuttle car operators.


At the time the condition was observed, the section crew had just arrived on the section and no mining activity was taking place. The shuttle car sitting on the pile of rock and coal was unmanned. Eastern's section foreman had also observed the condition and had ordered the shuttle car removed and the condition corrected. The inspector orally issued the order and later reduced it to writing on the surface of the mine and thereupon served it on the operator. The condition was abated in about an hour. *Id.* at 21,160-61.

52. *Id.* at 21,161.

53. *Id.* at 21,161-62. The dissent, however, vigorously maintained that: (1) the majority's
The Board dealt with this issue a second time in *Freeman Coal Mining Corp.* In its analysis, the Board stated that the term "reasonably," as applied in the definition of imminent danger, rendered the test of imminence objective, and thus the inspector’s subjective opinion was not necessarily binding. The proper standard, it announced, is whether the condition is of a nature that would induce a reasonable man to estimate that if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

The Board also added that the existence of an imminent danger must be determined on a case by case basis. Since *Eastern* and *Freeman*, the Board has abstained from any further consideration of the meaning of “imminent danger,” and it

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547 3 CCH Employment Safety & Health Guide ¶ 16,567, at 21,391, aff’d sub nom. *Freeman Coal Mining Corp. v. Interior Bd. of Mine Operations Appeals*, ___ F.2d ___ (7th Cir. 1974). The condition described in the order was as follows:

The main belt from the dump on the bottom of the tailpiece at 1,004 ft. tag north and the main east belt from No.1 drive to the 7 north a distance of 4,569 ft. tag, and the 7 north belt was very black with float coal dust.

*Id.* at ¶ 16,567, at 21,391. The section was covered for 24 hours.

55. *Id.* at 21,395.

56. *Id.* The Board also said that in each case the question was:

Would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately?

*Id.*

Compare the requirement of a finding of a “presently existing threat to the employees’ safety” supported by “ascertainable, objective evidence” of an abnormally dangerous work condition to uphold a finding of imminent danger in *Gateway Coal Co. v. UMW*, 414 U.S. 368, 386-87 (1974).

57. 3 CCH Employment Safety & Health Guide ¶ 16,567, at 21,395.
has based all its subsequent decisions on whether an applicant has met his burden of proof. A close examination of the subsequent decisions indicates the lack of any apparent consistency in the determination of imminent danger on review by the administrative law judges. In one line of cases, imminent danger orders based on the finding of accumulations of loose coal and coal dust were vacated, yet in a second series of cases imminent danger orders based on seemingly identical facts were affirmed. Similarly, an imminent danger order based on shuttle cars running over energized electrical cables was vacated in one case, while such an order was affirmed in another instance with similar facts.

In determining a reasonable time for abatement, the Board has stated that an inspector should consider the availability of necessary equipment, the degree of danger caused by the violation, and the difficulty of such abatement. Where a significant hazard exists because of a violation, abatement should be required as soon as possible; however, enforcement action under section 104(a) is the responsibility of the inspector, and his failure to take such action is not an appropriate issue on review. The Board has also declared that to some extent the distinction between a 104(a) order and a 104(b) notice requiring prompt abatement is largely formal, since both require prompt abatement when a significant hazard is found. In the line of cases dealing with section 104(c), the Board adopted a


59. See note 41 supra.

60. See cases cited note 58 supra.


64. Id.

65. The requisite elements for a § 104(c) notice or order are a lack of imminent danger, a violation which causes a significant hazard, and a condition which is caused by the operator's unwarrantable failure.
reasonable man standard in determining unwarrantable failure, and it defined a significant hazard as one which poses a serious risk of death or serious injury short of imminent danger.

The Act also provides for an administrative proceeding for the assessment of a civil penalty for each violation cited in a notice or order. Where possible, the penalty and review proceedings may be consolidated. The validity of a withdrawal order may not be challenged in a penalty proceeding, but where an order has been vacated in a review proceeding, the administrative law judge may, in his discretion, consider the economic loss caused by the invalid order in determining the amount of the penalty. Where a penalty proceeding involves an order, the fact that the violation was cited in an order is a necessary consideration in determining the amount of the penalty.

**Some Initial Comments**

At this point it is appropriate to summarize and comment on the guidelines established by the Board's interpretations of sections

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67. Id. at 22,602.
70. The consideration of economic loss is limited to an assessment arising out of the vacated order; a claim of such loss must be affirmatively pleaded; there is no statutory right to a dollar-for-dollar offset; and the administrative law judge can give whatever weight he deems appropriate to such losses. North Am. Coal Corp., 3 CCH Employment Safety & Health Guide ¶ 17,658, at 22,058, 22,064-65 (1974).
71. By definition a violation which causes an imminent danger should be deemed very serious. See Spring Branch Coal Co., 1971-1973 OSHD ¶ 16,240, at 21,194 (1973); Eastern Associated Coal Corp., 1971-1973 OSHD ¶ 15,388, at 20,564 (1972). The issuance of a § 104(b) order should indicate a lack of good faith. The finding of unwarrantable failure and a significant hazard under § 104(c) should indicate more than ordinary negligence and seriousness, as well as a significant history of previous violations. See Eastern Associated Coal Corp., 3 CCH Employment Safety & Health Guide ¶ 18,706, at 22,602-04 nn.4 & 6 (1974). These findings, as assessment criteria, can of course be challenged in a penalty proceeding where the burden of proof is on the Secretary. But if the operator seeks review, he has the burden of disproving the existence of an imminent danger, Lucas Coal Co., 1971-1973 OSHD ¶ 15,378, at 20,542, 20,544 (1972); that the inspector set an unreasonable time for abatement, Freeman Coal Mining Corp., 1971-1973 OSHD ¶ 15,367, at 20,501, 20,509 (1970); and the lack of unwarrantable failure or significant hazard, Eastern Associated Coal Corp., 3 CCH Employment Safety & Health Guide ¶ 18,706, at 22,599-600 (1974). The burden of proof in administrative proceedings is set out in 43 C.F.R. § 4.587 (1973).
104(a), (b) and (c). As a practical matter it is difficult to say that any guidance has been provided. The Board has suggested that there is no functional distinction between the use of a 104(a) order or a 104(b) notice requiring prompt abatement where a significant hazard is caused by a violation; and yet it has characterized a significant hazard under section 104(c) and an imminent danger under section 104(a) as being mutually exclusive, stating that a significant hazard is something less than an imminent danger. Furthermore, the Board has refused to consider whether an inspector has used the most appropriate enforcement vehicle.

At least arguably it is possible to extract some guidelines from the Board’s decisions. The Board has stated that an imminent danger exists where a reasonable man would conclude that an accident or disaster was probable if normal mining operations continued prior to or during abatement, where “normal mining operations” is defined as work designed to extract coal from the earth. Simply stated, it seems that an imminent danger exists if a violation is serious enough to require immediate abatement, and abatement can be immediately achieved only by taking some miners from their normal production activities. No consideration is to be given to the likelihood of death or injury in the time required to abate or the operator’s willingness to abate. This determination by the Board raises several challenges to its validity. First, it is questionable whether such an interpretation is consistent with the statutory definition of imminent danger. In addition, the adoption of a normal mining operations concept would seem to be unnecessary in view of the other compliance-forcing tools provided in the Act.

Imminent danger is expressly defined in the Act as a condition which is reasonably expected to cause death or serious injury before it can be abated. This definition was broadened from that in the Federal Coal Mine Safety Act of 1952 to include “any condition”
which could immediately cause death or injury.\textsuperscript{77} The emphasis in the legislative history of the Act, however, remains on time, since the history notes that delays in withdrawing the miners could be fatal.\textsuperscript{78} Thus the Board's refusal to consider time for abatement vis-à-vis the likelihood of death or injury in that time is contrary to the Act's definition and its legislative history.

The concept of normal mining operations has no statutory or evidentiary origin.\textsuperscript{79} In view of the totally pervasive nature of the mandatory standards,\textsuperscript{80} and the duty on the operator to maintain compliance with them\textsuperscript{81} and to abate substandard conditions,\textsuperscript{82} it is unrealistic to define normal mining operations as only production-oriented activities. To the contrary, normal operations must inherently include maintenance of the mandatory standards and abatement of substandard conditions. The adoption of the normal mining operations concept appears to be contrary to the general purpose of the Act,\textsuperscript{83} and its application in effect sanctions use of an imminent danger withdrawal order when the same objective could be achieved by a less intrusive notice under section 104(b).\textsuperscript{84} Thus, the concept subverts the 104(b) notice to use only in situations where the danger is remote or slight. This interpretation by the Board is unnecessary in view of the provision in section 104(b) which allows for requiring prompt abatement where a significant hazard exists. The Board's inability to distinguish between an imminent danger and 104(b)

\textsuperscript{77} Legislative History, supra note 1, at 244. The intent was to broaden the scope of imminent danger orders to encompass any possible conditions which could cause death, rather than those conditions specifically enumerated in the 1952 Act.

\textsuperscript{78} Legislative History, supra note 1, at 89.

\textsuperscript{79} There is no reference to "normal mining operations" in the Act or its legislative history, and no evidence was taken in Eastern or Freeman with regard to normal mining practices.

\textsuperscript{80} The mandatory safety standards apply to everything from roof support systems and methane monitoring to required porta-toilets. See 30 C.F.R. §§ 75.100-.1730 (1973).

\textsuperscript{81} The Act placed primary responsibility on the operators to insure compliance with the mandatory standards. 30 U.S.C. §§ 801(e), (g)(2) (1970).

\textsuperscript{82} Id. See also id. §§ 863 (d)-(f) (1970).

\textsuperscript{83} The obvious objective of the Act is to make working conditions in the coal mines safe. To achieve this purpose, Congress placed the prime responsibility for safety on the operators and miners, i.e., obtaining and maintaining safe working conditions must become part of the normal mining operations. Id. §§ 801, 863(d)-(h) (1970).

\textsuperscript{84} For example, the safety objective of abating the condition resulting in the imminent danger order in Eastern Associated Coal Corp., 1971-1973 OSHD ¶ 16,187, at 21,159 (1973), discussed in note 51 supra, could readily have been obtained by issuing a § 104(b) notice (or notices) and requiring immediate abatement.
notice situation, therefore, can be traced to its overly broad interpretation of imminent danger.\textsuperscript{85}

The Board has further impeded the extraction of any meaningful guidelines for the issuance of imminent danger orders by insisting that each case must be determined on its own merits, and by adopting a subjective-objective reasonable man review standard, which necessarily depends on an inspector's individual training and previous experience.\textsuperscript{86} Also, the Board's refusal to decide whether the appropriate enforcement vehicle has been used, leaves the choice entirely to the inspector's discretion.\textsuperscript{87} Although the Board has provided guidelines for determining a reasonable time for abatement under section 104(b), that determination remains completely within the inspector's discretion. In addition, the Board adopted a reasonable man test for determining unwarrantable failure under section 104(c) and, as already noted, thereby further confused the definition of imminent danger with its definition of significant hazard.

In summary, when an inspector finds a violation which creates a serious hazard, he may choose his weapon—an imminent danger order or a 104(b) notice (or a 104(c) notice or order if unwarrantable failure is also found). In a pragmatic, though not administrative sense, an order is final at the moment it is issued. The operator has little choice but to take the action required by the inspector or suffer substantial economic losses while waiting for a hearing and final order by the Secretary; even if an expedited hearing is obtained, there is no real remedy provided for an operator who has been mistakenly subjected to a closure. Thus, the enforcement tools of the

\textsuperscript{85} Shortly after the decisions in \textit{Eastern} and \textit{Freeman}, Senator Baker of Tennessee proposed a bill to amend the Act, S. 2541, 93d Cong., 1st Sess. (1973). This proposed amendment would change the language of § 104(a) by inserting after the words “finds an imminent danger,” the phrase “as defined in § 3(j) of this Act.” No action was taken on the proposal.

\textsuperscript{86} In fact this standard has not been applied without confusion. In Pocahontas Fuel Co., Docket No. HOPE 74-314, 7-8, 10 (1974), the Administrative Law Judge stated that \textit{Freeman} required both an objective and subjective standard of review. He found that applying the subjective standard, the imminent danger order should be affirmed; but applying the objective standard, the order should be vacated. In Cowin & Co., Docket No. BARB 74-350, 7 (1974), the Administrative Law Judge held that \textit{Freeman} required

The Judge . . . to look at the facts as they existed at the time of the issuance of the order and to determine whether it was reasonable for the inspector involved to have believed that death or serious injury could have resulted from the condition cited. \textit{Id.}, citing U.S. Steel Corp., 3 CCH \textit{EMPLOYMENT SAFETY \\& HEALTH GUIDE} ¶ 17,551, at 21,999 (1974).

\textsuperscript{87} The instructions in the inspector's training manual, cited note 41 \textit{supra}, probably tend to render the inspector's judgment somewhat less than objective.
Act, as construed by the Board, raise serious due process questions which must be answered in light of the present status of due process and governmental actions affecting private property rights.

DUE PROCESS AND GOVERNMENTAL ACTIONS AFFECTING PRIVATE PROPERTY

While the Supreme Court has consistently refused to question the substantive wisdom or reasonableness of economic regulations since the New Deal era, it has, with few exceptions, steadfastly upheld the due process requirements of notice and a prior hearing with respect to governmental action which deprives an individual of his property rights. The leading recent Supreme Court decisions on this issue have dealt with government seizures of private property as a means of adjusting debtor-creditor relations. In Fuentes v. Shevin, the Court held that the Florida and Pennsylvania replevin statutes violated due process by failing to provide for notice or a hearing prior to seizure of the encumbered property. Fuentes generally requires notice and a hearing at a meaningful time and in a meaningful manner. To be meaningful, a hearing must be held at a time

88. Several commentators have considered substantive due process a dead letter since the New Deal era. See E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY, § 328-30 (1973); McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 SUP. CT. REV. 34-62.

Deference to the validity of the state's exercise of its police powers in the interest of public safety is typified by the Court's approach in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), where it said that a state is justified in the exercise of its police powers so long as the interests used are reasonably necessary to accomplish the public purpose without being unduly oppressive. The Court had upheld an ordinance which deprived the owner of his property's most beneficial use. Id. at 592-95.


90. The Florida statute authorized repossession of the sold goods without court order, approval, or participation, since the writ of replevin was issued by the court clerk. The Court found no requirement that the applicant even make a convincing showing before the seizure; the applicant's bare assertion that he was entitled to a writ was sufficient. The buyer was eventually afforded an opportunity for a hearing in a court action for repossession filed by the seller. Id. at 73-75.

The Pennsylvania statute was essentially the same except that it never required an opportunity for a hearing on the merits, since the party seeking the writ was not required to institute a court action for repossession. Id. at 77-78. See also Justice White's discussion of these statutes in Mitchell v. W.T. Grant Co., 94 S. Ct. 1895, 1904 (1974).

The Court held that these statutes worked a deprivation of property without due process because they denied the right to a hearing before the chattels were repossessed from the buyers. 407 U.S. at 96.

91. The lower courts and appellees had read Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (garnishment of wages without prior hearing held to violate due process), and Goldberg
when the deprivation can still be prevented. The Court commented that the length and severity of any deprivation is a factor to weigh in determining the proper form of hearing, but it is not determinative of the right to a prior hearing of some kind. There are, however, "extraordinary situations" which justify seizure or deprivation without notice or a prior hearing, if (1) the deprivation is necessary to secure an important public or governmental interest, (2) there is a need for prompt action, and (3) the government exercises strict control over the use of such power, i.e., the person initiating the deprivation is a responsible government official acting under the guidelines of a narrowly drawn statute, and the action is necessary and justifiable under the circumstances.

Applying a similar approach, the Court upheld the validity of the Louisiana sequestration statute in *Mitchell v. W. T. Grant Co.* The court distinguished *Fuentes* since strict controls were provided in the Louisiana statute: the statute required a verified statement of specific facts and a bond and authorization by a judge rather than a court clerk, and it avoided issuance of the writ on the basis of an ex parte determination of fault. Under the Act, however, the con-

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v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits without prior hearing held to violate due process), as requiring a prior hearing only with respect to deprivation of such basic necessities as wages or welfare benefits. The *Fuentes* Court, however, stated:

Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute "necessities" of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect [citations omitted]. In none of those cases did the Court hold that this most basic due process requirement is limited to the protection of only a few types of property interests. While *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine. 407 U.S. at 88-89 (footnote omitted).

93. 407 U.S. at 86. See also *Morrissey v. Brewer*, 408 U.S. 471 (1972), where the Court emphasized that due process is flexible and that the procedural protectives required depend on what the particular situation warrants. This determination depends on the nature of the governmental function involved and the private interest affected thereby. The Court stated "that not all situations calling for procedural safeguards call for the same kind of procedure." *Id.* at 481.
94. 407 U.S. at 90-91. The Court noted that it had allowed summary seizures of property to collect taxes, to meet national needs during war, to prevent the economic disaster of a bank failure, and to protect the public from contaminated foods and mislabeled drugs. *Id.* at 92 nn.24-28.
95. 94 S. Ct. 1895 (1974).
96. The statute allows a mortgage or lien holder to obtain a writ on his ex parte application without giving notice or an opportunity for a hearing to the debtor. A writ will issue only when the creditor files a verified affidavit specifying the particular facts upon which he relies,
cern is not specifically with due process and the government’s interest in adjusting the debtor-creditor relationship, but with constitutional consequences of pre-notice, pre-hearing deprivations by government officials acting in accordance with statutes aimed at protecting the public health, safety, and welfare. The Supreme Court has considered and rejected due process challenges to such actions under public health statutes in *Ewing v. Mytinger & Casselberry, Inc.*, and *North American Cold Storage Co. v. Chicago.* Presumption furnishes a bond, and obtains the authorization of a judge for the issuance based on the affidavit. The debtor may immediately apply to have the writ dissolved, and it will be dissolved unless the creditor proves the existence of the debt or lien and its delinquency. If the creditor fails in his proof, the court may order the return of the property and award damages, including attorney’s fees. *Id.* at 1899-1900.

It was noted that Mitchell was not subjected to the unsupervised mercy of the court clerk or the creditor. *Id.* at 1904. The Court also noted that the Pennsylvania and Florida statutes had allowed for replevin only when the property was “wrongfully detained,” and characterized this as a “broad ‘fault’ standard” which was considered to be unsatisfactory for preliminary ex parte determinations. *Id.* at 1905. The Court summarized the Louisiana statute as protecting the “debtor’s interest in every conceivable way, except allowing him to have the property to start with . . . .” The “hardship to the debtor is limited . . . . the process proceeds under judicial supervision and management and the prevailing party is protected against all loss.” *Id.* at 1905-06. The Court added that its holding was limited to the constitutionality of the Louisiana statute. *Id.* at 1905 n.13.

Justice Powell, concurring, read the majority opinion as withdrawing significantly from the broad sweep of *Fuentes,* which he read as requiring notice and a prior hearing in all cases, and as, in effect, overruling *Fuentes.* At the same time, however, he emphasized that he found the statutes in *Fuentes* violative of due process “because of their arbitrary and unreasonable provisions.” In his opinion, a determination of due process in any situation requires a consideration of the nature of the governmental function and the private interests affected. Here he said that the government’s function was to protect the interests of both debtors and creditors, and that these interests had to be balanced. In accommodating both interests here involved, Justice Powell stated that due process required: (1) that the creditor furnish adequate security and make a specific factual showing of probable cause to a neutral officer or magistrate before sequestration; and (2) that an adversary proceeding must be provided promptly after sequestration. *Id.* at 1908-09.

Justice Stewart, in his dissent, noted that the three bases on which the majority distinguished the present case from *Fuentes* had been expressly rejected as distinguishing factors by the *Fuentes* Court, *id.* at 1912, but he concurred with the majority’s return to a flexible approach in determining procedural due process. *Id.* at 1910.

In summary, the Court found that the sequestration procedure: (1) fulfilled an important public interest in protecting sellers, *id.* at 1900; (2) was appropriate because under Louisiana law a seller’s lien was extinguished if the buyer transferred possession, *id.* at 1900-01; and (3) followed very narrowly drawn procedures, including a judicial authorization of the writ, *id.* at 1904-05.

97. 339 U.S. 594, 595-98 (1950). Ewing, as administrator of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 334(a)(1) (1970), had seized Mytinger’s vitamin pills and instituted libel actions as provided by the statute. Mytinger, instead of waiting for the libel proceedings, filed suit in federal district court to have the seizure provision of the statute declared uncon-
bly the *Fuentes* Court’s reference to these two cases was intended to reaffirm their continued viability.⁹⁹

In addition, a recent lower court decision has dealt with a summary seizure of private property under a statute designed to protect the public safety. In *Aircrane, Inc. v. Butterfield*,¹⁰⁰ when plaintiff’s helicopter was seized to insure payment of a fine for a violation of the helicopter’s use certificate, Aircrane argued that summary seizure could be sustained only if all the elements of the *Fuentes* exception were present.¹⁰¹ The court rejected this assertion and, instead, took a flexible approach similar to that used by the *Mitchell* Court. It said, “ultimately what is involved is a balancing of the government’s interest in summary action against the owner’s interest in adjudicating his rights prior to government action.”¹⁰² In upholding the summary seizure, the *Aircrane* court weighed the governmental interest in public safety against the resulting minimal deprivation of Aircrane’s property rights, even though the summary seizure could not be classified as “necessary and justified.”¹⁰³

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⁹⁸. 211 U.S. 306, 307-09 (1908). Public health officers of the city of Chicago, pursuant to the municipal code, summarily seized and destroyed, as unfit for human consumption, food stored by North American. North American sought to have the ordinance declared invalid under the fourteenth amendment and to require that a judicial determination of the condition of the food be made before seizure.


¹⁰¹. 369 F. Supp. at 604.

¹⁰². *Id.*

¹⁰³. In deciding that the summary seizure squared with procedural due process, the court said that it had to determine whether the procedure at issue furthered a governmental interest of sufficient magnitude to justify dispensing with the usual procedural protections. It found that the regulation violated was closely related to public safety and that the owner’s interest against summary seizure was minimal because (1) the deprivation would not significantly impair Aircrane’s adjudication of its rights (the court found this situation clearly distinguishable, as to its effect on the owner, from *Goldberg* and *Sniadach*), (2) the seizure was effective only until Aircrane posted a minimal bond which insured payment of the penalty (Aircrane...
While *Aircrane* was decided merely by a district court, it nonetheless indicates a willingness by the courts to take a more liberal approach to due process where the governmental interest is the public health or safety rather than the adjustment of creditor-debtor relations. The court in *Aircrane*, however, emphasized the specific protections against mistaken seizure and the minimal effect of the seizure on the property owner in that particular case. The question, therefore, remains whether the summary procedures of the Act can be justified under either the *Fuentes-Mitchell* or *Aircrane* approaches.

**DO THE ORDER AND HEARING PROVISIONS OF THE ACT MEET THE REQUIREMENTS OF PROCEDURAL DUE PROCESS?**

There can be no question that a coal mine operator's interest in his coal mine is entitled to the protections of the due process clause of the fifth amendment. The question remains what process is due, *i.e.*, what is the minimum procedure necessary to meet the requirements of due process? At the outset, the order provisions of the Act are distinguishable from the seizure provisions approved of in *Ewing*, where seizure was necessary for the institution of a libel action;*** from those in *Aircrane*, where seizure of the mobile aircraft could recover use of the helicopter by posting a bond of $2000 while the craft was worth over $250,000; compare *Fuentes*, where the bond required was twice the value of the goods replevied), and (3) *Aircrane* had already fully informed the agency of the details of its operation, thus significantly reducing the possibility of factual error which would be avoided by a public hearing (*Aircrane* had filed all the details of its operation with the agency prior to the seizure). Although the court noted that the situation did not present an emergency like that in *North American* and that there was some question as to whether the statute was narrowly enough drawn to prevent summary seizure except when "necessary and justified," it concluded that the seizure could be upheld because the deprivation was minimal, there was adequate opportunity to present complete information to the agency before seizure, and there was an opportunity to contest the penalty claim in a subsequent court proceeding, *Id.* at 607-08 & n.9.


Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which may not . . . be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or any time thereafter, on libel of information and condemned in any district court of the United States . . . within the jurisdiction of which the article is found . . . (B) when the Secretary has probable cause to believe from facts found, without hearing, by him or any officer or employee . . . that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer . . . .
was permitted to insure payment of the fine; and from the provisions in *North American*, where the Court said that the owner could bring an action for damages arising out of a wrongful seizure and destruction. With the exception of *North American*, the seizures occurred under statutes which established a blanket prohibition against the use or distribution of the seized property until it had been registered with or licensed by the appropriate agency; and thus they resulted from an unlicensed use or a failure to comply with the registration standards. Since the purposes and/or procedures for seizure in these cases are conceptually different from those in the Act, they cannot be taken to establish blanket exceptions to the requirements of due process in every instance where the public health or safety is to be protected. Their value as guideposts for a due process analysis of the order-hearing provisions of the Act must, therefore, be considered in view of the purposes and procedures provided in the governing statute.

Since the Act does not provide for a pre-order hearing, it must be determined whether the three-pronged exception to *Fuentes* applies to validate summary deprivations of property as provided therein. The first element of the test would seem to be satisfied since protecting the lives of coal miners is clearly an appropriate subject for an exercise of police power. In addition, the need for prompt action is similarly met, even absent the finding of imminent danger. In

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21 U.S.C. § 334(b) (1970) states that the seizure pursuant to the libel shall conform, as nearly as possible, to the procedure in admiralty. Libel in admiralty means to seize under process at the commencement of a suit. Its purpose is to secure payment of the fine or penalty. 28 U.S.C. §§ 2461(a), (b) (1970). The deprivation of property allowed under the Act is not for the purpose of instituting suit or to secure payment of the penalty. *Ewing* was distinguished in a similar fashion by the court in *Nor-Am Agricultural Prod. Inc. v. Hardin*, 435 F.2d 1133, 1139-40 (7th Cir.), *rev'd en banc* 435 F.2d 1151 (7th Cir. 1970), cert. denied, 402 U.S. 935 (1971).

105. In *North American*, the Court said that the health officer's ex parte finding was not binding on the owner and that the owner had a right to a hearing after destruction of the food. Such an action, it said, would be at common law for damages against the official. 211 U.S. at 316, citing, e.g., *Lawton v. Steele*, 152 U.S. 133 (1894). Under the Act, the government and the inspectors would be protected from such actions by the doctrine of sovereign immunity. See note 47 supra.

106. In *Ewing*, the court said that "a requirement for a hearing . . . does not arise merely because the danger of injury may be more apparent or immediate in the one case than in the other." Such a determination is for Congress to make. 339 U.S. at 600. At the same time the Court emphasized that a hearing was required before the final administrative order becomes effective. Id. at 599. The problems with the orders provided by the Act is that they are effective and, in a pragmatic sense, final when issued. In *Nor-Am Agricultural Prod. Inc. v. Hardin*, 435 F.2d 1133, 1140-41, (7th Cir. 1970), the court viewed an imminent danger order
fact, it is doubtful that any statute protecting the public health, safety or welfare would fail to meet these first two elements, even where individual property rights are affected. The real issue becomes whether the third element of the test is satisfied applying the flexible or balancing approach used in Mitchell and Air crane, i.e., how should the balance be struck between the governmental interest in summary closure and the operator's interest in determining his rights prior to closure.

The governmental interest in summary seizure under the Act is the protection of the coal miners. At the same time, the government has a strong interest in increasing coal production as the need for this vital energy resource increases. The operator has a twofold interest in a pre-order determination of his rights. First, he wants to avoid mistaken or unwarranted interferences with the use of his property, since he has no real remedy when an order is mistakenly issued. In addition, he wishes to avoid payment of compensation to miners for idle time caused by an order, since he is liable for these payments even if the order is subsequently vacated.

Simply stated, the issue is whether the Act is drawn narrowly enough, and the administrative guidelines are sufficiently strict, to insure that an order is issued only when "necessary and justified." The language of sections 104(a)-(c) and the definition of imminent danger are very broad and general. The Act leaves the determination of "imminent danger," a "reasonable time for abatement," "unwarrantable failures" and "significant hazard" completely within the inspector's discretion. The administrative interpretations have similarly provided broad and general guidelines, and at least arguably, have broadened even further the definition of imminent danger. In fact, these interpretations have made the practical distinction between an imminent danger, significant hazard and non-imminent danger, impossible. In addition, section 104(b) and (c) orders require an ex parte determination of fault by the inspector, and no real remedy has been provided for an operator who has been wrongfully subjected to such an order. Clearly, the strict controls required under Fuentes and Mitchell are lacking.

Where the government's interest in the safety of the miners is strong, the question under the less strict balancing approach of

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as final in a pragmatic sense even though administrative review leading to a final administrative order was still available. Cf., id. at 1156-57.
Aircrane becomes whether an order causes only a "minimal interference" with the operator's property which is outweighed by achievement of the strong public interest in safety. In Aircrane, the seizure did not affect the adjudication of the penalty, the payment of which the seizure was designed to secure. Similarly, where an order is issued under the Act, its issuance does not directly affect the adjudication of the penalty to be assessed for a violation. However, the issue in a review proceeding is the validity of the order itself, and an operator cannot effectively and meaningfully litigate that issue in a post-order hearing. The operator cannot post a bond and resume operations; instead, he must comply with the inspector's demands or suffer substantial economic losses while waiting for a hearing and decision.\textsuperscript{107} The operator is also denied a pre-order opportunity to submit his version of the facts to the agency. Applying the less strict balancing approach of Aircrane, then, it is apparent that the balance should not always tip in favor of the government's interests if we also consider the procedural methods involved. If the choice is couched in terms of pure interests, the government's concern with the safety of miners' lives will concededly win out over any property interests of the operators; but the choice should also balance the means used to effectuate such interests. When we look realistically at the loosely drawn procedures of the Act, it becomes clear that the operators' property interests are often substantially impaired by the achievement of a governmental end which could readily be obtained in a less offensive manner. In effect, the economic losses caused by mistakenly issued orders have been forced on the operators as a cost of providing safe working conditions for their miners.\textsuperscript{108}

In order to achieve the desired level of safety enforcement and meet the procedural requirements of due process, some changes in the present procedures are required. Since the issuance of an order causes more than a "minimal interference" with the operator's property, controls should be developed to insure that an order is

\textsuperscript{107} The effect of an order on an operator will obviously vary with the extent of the mine closing, the duration of the order, and the size of the operator's business. The Act, however, applies to all mines from which products enter or affect interstate commerce (essentially all mines), 30 U.S.C. § 803 (1970), including mines employing anywhere from three or four to over a thousand miners. While the effect of an order on a large operator may be minimal in an economic sense, an order closing a small mine is greatly akin to the summary garnishment of wages which was prohibited in Sniadach.

\textsuperscript{108} The court in Lucas v. Morton, 358 F. Supp. 900, 903 (W.D. Pa. 1973), said that such a situation would constitute a "deprivation of due process."
issued only where necessary and justified. A narrowly defined interpretation of imminent danger, where time to abate is a vital consideration, would justify a pre-hearing order, provided an immediate post-order hearing of some kind were made available.\textsuperscript{109}

Section 104(b) and (c) orders, however, stand on a different footing. They primarily serve a punitive function while at the same time advancing the safety purposes of the Act. The Act requires the finding of an alleged violation which will eventually lead to a civil penalty assessment proceeding. An order will issue if an inspector makes an ex parte determination of bad faith in abating the violation (104(b)) or wilful neglect of a significant hazard (104(c)). In the penalty proceeding, however, the burden is on the prosecution to prove bad faith or wilful neglect even though a 104(b) or (c) order has been issued for the alleged violation.\textsuperscript{110} There is no practical way to obtain control over the inspector's ex parte determination of fault as the basis of 104(b) or (c) orders. If such order provisions are an indispensible part of an effective enforcement scheme, some form of prior hearing must be provided.\textsuperscript{111}

**Summary**

At the outset the question was asked: Does due process apply in

\textsuperscript{109} Compare, for example, the Occupational Safety and Health Act, 29 U.S.C. § 662(a) (1970) [hereinafter cited as OSHA], which requires the Secretary of Labor to obtain an imminent danger order from a federal district court, with the similar provision in the Consumer Product Safety Act, 15 U.S.C. § 2061 (1973 Supp.). The legislative history of OSHA emphasized that time in taking necessary action was essential. In considering the imminent danger provision, Congress rejected a proposal which would have allowed an OSHA inspector to take discretionary action when an immediate danger was found. It rejected discretionary action even where the danger was too imminent to obtain a court order and even though the inspector would have had to obtain the concurrence of a regional Labor Department official over the telephone and an informal review of the order would have been required. 3 U.S. Code Cong. & Ad. News, 91st Cong. 2d Sess. 5189-90, 5221 (1970).

\textsuperscript{110} See, e.g., Jewell Ridge Coal Corp., 3 CCH Employment Safety & Health Guide ¶ 18,901, at 22,707 (1974) where MESA failed to sustain its burden of proving unwarrantable failure in a penalty proceeding even though a § 104(c) order had been issued. The Board, however, reversed the administrative law judge's refusal to assess a penalty, stating that the evidence supported the finding of a violation. Presumably since the order had not been contested and vacated in a penalty proceeding, the operator would not have been allowed an offset for the economic loss caused by the order. The Board also said that the order could not be vacated in the penalty proceeding.

\textsuperscript{111} Under OSHA a time is set for abatement of a violation of the mandatory standards, and failure to abate in the time set subjects the employer to an additional civil penalty for each day that the violation remains unabated. 29 U.S.C. §§ 659(a)-(c), 666(d) (1970).
the coal fields? The question is not easily resolved. The Act was adopted with the aim of reducing the overwhelming number of job-related deaths and disabling injuries in the nation's most hazardous occupation. The enforcement provisions that were adopted are strong, swift and efficient; but they also, when exercised, summarily deprive the coal mine operator of the only known beneficial use of his property. One might readily dismiss such temporary interferences with the operator's property as merely an added cost in the production of coal. However, the issue is really not whether Congress could take away the right to mine when, for example, an imminent danger exists, because clearly in the interest of public safety, it can. A problem arises because the procedures adopted in exercising that legitimate authority are so loosely drawn. Under the Act, the determination that a mine should be temporarily closed is left completely to an inspector's unguided or misguided discretion. The operator is eventually afforded an opportunity for a hearing, but the quickest way an operator can get an order terminated is to do whatever the inspector deems appropriate. If the order is subsequently vacated because of a mistake of fact or judgment by the inspector, the operator obtains no real relief and is afforded no real remedy for the economic losses he has suffered. The question, therefore, is whether Congress can consider the public interest in protecting the lives of the miners to be so important, and the operator's interest in avoiding summary closure of his mine, so minimal, that the requirements of procedural due process can be met by providing the operator with an eventual and basically meaningless post-order opportunity for a hearing. Indeed, one might ask whether, in the area of economic safety regulation, procedural due process is a viable concept at all. If the answer is "yes", one could hardly say that due process does exist in the coal fields. Admittedly, the hazardous nature of the coal industry requires strong enforcement authority, but if we are to retain any semblance of procedural due process in the coal industry, that authority must be more controlled and operators must be afforded an opportunity for a hearing at a meaningful time and in a meaningful manner. In view of the Court's approach in Mitchell and Fuentes, even when less strictly applied as in Aircrane, the procedures provided in the Act fail to strike an acceptable balance between the government's interest in summary action and the operator's interest in a pre-order determination of his rights. Unless the Court is prepared to give total deference to the legislative
determination of acceptable procedures in the area of safety regulations as it has given almost total deference to the legislative determination on substantive due process questions in the area of economic regulation, the order and hearing provisions of the Act cannot pass muster under the due process clause.

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