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Jurisdiction to Review Agency Nonenforcement under the Federal Mine Safety and Health Act: The Miner as Litigant

John S. Yun

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## JURISDICTION TO REVIEW AGENCY NONENFORCEMENT UNDER THE FEDERAL MINE SAFETY AND HEALTH ACT: THE MINER AS LITIGANT*

### JOHN S. YUN**

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INTRODUCTION

This Article discusses the legal issues presented by an attempt to obtain judicial review of the Mine Safety and Health Administration's (MSHA) failure to enforce the Federal Mine Safety and Health Amendments Act of 1977 (the Mine Safety Act). Compelling an agency to enforce a remedial statutory scheme is an important, yet often overlooked, legal question. The typical litigant attempts to block allegedly illegal enforcement action, rather than to force the agency to take action. But an agency's failure to enforce a statutory scheme may serve as a de facto executive branch veto of that statutory scheme. Agency inaction may serve as a form of statutory repeal without resort to the legislative repeal process.

The primary focus here is upon a sub-issue of compelling agency enforcement: what jurisdictional barriers confront the beneficiary or protected party of a remedial statute when he or she attempts to compel unlawfully withheld agency enforcement action? Distinct problems confront the protected party—such as a mine worker—when he, rather than a regulated party—such as a mine owner—seeks judicial review of agency action or inaction.

The protected party may find himself without a right to judicial review of any type. When agency enforcement action deprives the mine owner of the use of his mine or leads to civil or criminal penalties, the Due Process Clause guarantees judicial review for the mine owner. But when agency inaction exposes the mine worker to health or safety hazards in violation of the statutory scheme, the Due Process Clause does not guarantee judicial review because no currently recognized constitutional interest is involved.

Even if the protected party may obtain judicial review, he or she may not receive judicial review at a sufficiently early stage to be practically meaningful. The courts have presumed that the protected party, like the regulated party, must exhaust administrative remedies prior to seeking review of the agency's action or inaction. In so presuming, the courts may have ignored a significant distinction between the protected party and the regulated party. When the mine owner bears the cost of exhausting administrative remedies, the mine owner, as the regulated party, presumably bears a cost that Congress intended for him to bear and deemed him capable of bearing. But because the mine worker, as a protected party, typically possesses limited economic resources, one should not presume that he or she should always bear the cost or delay of exhausting administrative remedies.

Judge Harold Greene's decision in Council of the Southern Mountains, Inc. v. Donovan, together with the Federal Mine Safety and Health Review Commission's (the Commission) decision in United Mine Workers of America

v. Secretary of Labor (Garland Coal), now place in doubt the mine worker’s ability to obtain jurisdiction in any forum to challenge the Mine Safety and Health Administration’s alleged failure to enforce the Mine Safety Act. In Southern Mountains, the court broadly applied the exhaustion of administrative remedies requirement and ruled that it lacked jurisdiction to entertain a miners’ representative’s claim that the Secretary of Labor had failed to issue sufficiently stringent citations. In Garland Coal the Commission adhered to a literal reading of the Mine Safety Act’s language and ruled that the Commission lacked subject matter jurisdiction to entertain a miners’ representative’s contention that a mine safety inspector failed to issue a sufficiently stringent citation. Thus Southern Mountains makes federal district court jurisdiction unavailable until the administrative review procedures have been exhausted, while Garland Coal makes administrative review unavailable. A sweeping application of the exhaustion requirement coupled with a technical reading of the Mine Safety Act’s language may have foreclosed jurisdiction to review miner challenges to agency underenforcement or nonenforcement.

A review is therefore necessary of the manner in which jurisdiction to review agency nonenforcement is granted or withheld. The first part of this article lays the groundwork for exploring the manner in which the current jurisdictional doctrines are applied. The various enforcement mechanisms of the Mine Safety Act are separated in Category I, Category II and Category III enforcement actions. The second part of this Article analyzes both the availability of administrative review of the agency’s failure to undertake each Category of enforcement action and the availability of judicial review for each Category. The third part undertakes a reconsideration of the exhaustion requirement. Finally, the fourth part of the Article sets forth a proposed model for granting or withholding judicial review when a protected party seeks to challenge agency nonenforcement.

I. General Principles of Judicial Review

This section outlines general principles of judicial review of the Secretary’s enforcement action or inaction.

A. Nonstatutory Subject Matter Jurisdiction

The provisions of 28 U.S.C. § 1331 provide federal district courts with subject matter jurisdiction over Mine Safety Act enforcement actions as “arising under the Constitution, laws, or treaties of the United States.” Additionally, 28 U.S.C. § 1337(a) also gives district courts jurisdiction over Mine Safety Act enforcement provisions as “regulating interstate commerce.”

5 Association of Bituminous Contractors, 581 F.2d at 857.
This jurisdictional provision authorizes a district court to compel an officer to perform an enforcement duty owed under the Mine Safety Act. Finally, 28 U.S.C. § 1361 grants subject matter jurisdiction to command federal officers to perform certain Mine Safety Act enforcement duties. Once an independent basis for subject matter jurisdiction is established, declaratory relief under 28 U.S.C. §§ 2202, 2204 is available.

B. Statutory Subject Matter Jurisdiction

Section 108(a) of the Mine Safety Act grants district courts subject matter jurisdiction to entertain civil suits brought by the Secretary for a permanent or temporary injunction or a temporary restraining order. However, section 108 does not authorize civil suits in district courts by persons other than the Secretary.

Section 110(j) grants district courts jurisdiction to entertain a suit by the United States to collect civil penalties owed under section 110 of the Act. However, this provision does not authorize suits by private persons.

The Mine Safety Act grants subject matter jurisdiction over enforcement-related cases brought by mine operators, miners, or miners' representatives only in section 106(a), which establishes jurisdiction in federal courts of appeal. Upon filing, section 106(a) gives the appeals court exclusive jurisdiction to review: (1) the Commission's section 105(d) decision order "affirming, modifying, or vacating the Secretary's section 104 citation, order or proposed penalty or directing other appropriate relief;" or (2) the Commission's section 107(e) decision order "vacating, affirming, modifying or terminating the Secretary's section 107 order." Notably, section 106(a) might not create appeals court jurisdiction greater than the Commission's section 105(d) and section 107(e) jurisdiction. Some enforcement actions, for example failure to issue any citations, are therefore potentially unreviewable under section 106(a) because they are potentially unreviewable under sections 105(d) and 107(e).

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13 See Association of Bituminous Contractors, 581 F.2d at 857.
C. Exclusivity of Statutory Review Procedures

Although district courts would normally have "nonstatutory" subject matter jurisdiction under 28 U.S.C. §§ 1331, 1337, and 1361 over Mine Safety Act enforcement actions, case law has established that an enabling statute's review procedures are exclusive. Thus, an enabling statute's review procedures divest district courts of Title 28 jurisdiction over any case arising under the enabling statute. Litigants must instead exhaust the statutory review procedures.

D. Exceptions to the Exclusivity Principle

The rigorous and widely followed exhaustion requirement and exclusivity principles have a few narrow exceptions. Under these exceptions a federal district court regains nonstatutory subject matter jurisdiction under the applicable section 1331, 1337, or 1361 provisions.

_Fay v. Douds_ restores district court jurisdiction when agency action causes a continuing violation of the complaining party's constitutional rights. A district court applied this exception in _Southern Ohio Coal Company v. Marshall_ at a mine operator's request. While operators may invoke the _Fay v. Douds_ exception, current case law suggests that miners are generally unable to raise constitutional issues in the case of agency nonenforcement. To raise a constitutional issue, a miner must establish either a fundamental right or constitutionally protected interest in a safe and healthy mine environment. The miner must then establish that agency inaction to insure a safe environment either infringes upon the fundamental right or works a deprivation of the miner's interest without due process. In _Pinkney v. Ohio E.P.A._ the court ruled first that the Constitution neither expressly nor implicitly recognizes a healthful environment as a fundamental right. Second, the legislature must be the body to undertake the difficult task of defining the "deprivation" of plaintiff's interest in a healthful environment, assuming that the interest is constitutionally protected.

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17 172 F.2d 720 (2d Cir. 1949).
19 172 F.2d 720 (2d Cir. 1949).
20 However, in UMWA v. Secretary of Labor, 3 FMSHRC 2016 (Garland Coal) (1981), the Intervenor Council of the Southern Mountains raised an equal protection and due process issue as requiring the Commission to assume subject matter jurisdiction over a contest filed by a miners' representative to a citation. Intervenor Council of the Southern Mountains, Inc. reply brief at 26-28, UMWA v. Secretary of Labor, 5 FMSHRC 807 (1983) reprinted in 2 MINE SAFETY & HEALTH Rep. (BNA) 2097 (1983) (argued before the Commission on Oct. 6, 1982).
22 Id. at 309-11.
The Supreme Court's decision in *Leedom v. Kyne*\(^3\) allows a district court to resume jurisdiction if clearly illegal agency action will destroy a plaintiff's statutory "right" unless the district court intervenes. *Leedom* requires that the statutory review procedure be unavailable to justify resumed district court jurisdiction. Another Supreme Court decision, *Oestereich v. Selective Service System Local Board No. 11*,\(^4\) however, only requires the statutory review procedure to be "unnecessarily harsh" to justify resumed jurisdiction. The *Leedom* exception, as will be shown, might be available to miners for reviewing certain enforcement action.

Finally, cases such as *Environmental Defense Fund, Inc. v. Hardin*\(^5\) and *Environmental Defense Fund, Inc. v. Ruckelshaus*\(^6\) suggest that the district court or the appeals court may assume jurisdiction under the Administrative Procedures Act (APA)\(^7\) to compel agency action unlawfully withheld. However, the basis of APA review must be either the Mine Safety Act's statutory review procedures or the presence of "final agency action for which there is no remedy in a court."\(^8\)

II. JUDICIAL REVIEW OF PARTICULAR ENFORCEMENT DUTIES

A miner probably must rely upon the *Leedom* or *Environmental Defense Fund* exceptions to review the Secretary's enforcement action or inaction when the miner considers the Act's statutory review procedures to be unavailable or inadequate. Because the availability of these exceptions depends upon the nature of the Secretary's enforcement duties and the persons to whom the duty is owed, the Act's enforcement duties will be classified as Category I, Category II, and Category III. A Category I enforcement action involves an agency enforcement duty which the statutory language indicates to be mandatory in nature and owed to the miner, as well as to the government. A Category II enforcement action involves an agency enforcement duty which the statutory language indicates to be mandatory in nature, but might be owed only to the government and not to the miner. The Category III enforcement action involves an agency enforcement duty which the statutory language indicates to be discretionary in nature and owed to the government, but not necessarily to the miner.\(^9\)

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\(^1\) 358 U.S. 184, 190 (1958).

\(^2\) 393 U.S. 233, 238 (1968).

\(^3\) 428 F.2d 1093 (D.C. Cir. 1970).

\(^4\) 439 F.2d 584 (D.C. Cir. 1971).


\(^7\) As this paper discusses fully later, the absence of an agency duty to the miner in particular does not necessarily mean that the miner is not an especial beneficiary of the Act or is not a protected party under the Act. The absence of an agency duty towards the miner simply means that the agency's enforcement duties are owed to the government and the people as a whole, but not specifically to the miner. The miner continues, however, to be an especial beneficiary or protected...
In essence, the Leedom and Environmental Defense Fund exceptions restore district court review of Category I, II, and III enforcement actions only if the Act's statutory review procedures—sections 105(d), 107(e), and 106(a)—are inadequate as to each Category. Under each Category we will, therefore, consider the availability of the Act's review procedures and then consider the availability of the Leedom or Environmental Defense Fund exceptions.

A. Review of Category I Enforcement Actions

Category I actions provide miners with the greatest opportunity for district court review because these actions involve mandatory nondiscretionary duties owed to the miner as a statutory "right." The most important Category I action is the section 103(f)30 guarantee that a miner or miners' representative will accompany an inspector during his "walk around" inspection of the mine. Another Category I action is the miner's or miners' representative's section 103(g)(1)31 "right" to an immediate spot inspection after making a written request. The Mine Safety Act also guarantees that miners' representatives, and in many cases miners, will receive written notification from the Secretary: (1) under section 105(a)32 of the issuance of a section 104 citation or order; (2) under section 105(b)33 of the Secretary's belief that a cited violation party in the sense that when the agency does perform its duty to the government, the miners especially benefit from the agency's enforcement activities.


*Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.*


has not been timely abated; (3) under section 103(g)(1)\(^{24}\) if the inspector did not find an imminent danger or mandatory standard violation during the requested inspection; and (4) under section 103(g)(2)\(^ {25}\) of the Secretary’s reasons for not issuing a citation or order after the miner alleges that a violation or danger exists. The catch-all provision assuring the miners’ right to written notification is section 109(b).\(^ {26}\) Finally, the Mine Safety Act apparently directs the Secretary to allow miners, as members of the public, to inspect any of the records, information and reports which the Act requires mine operators to make.\(^ {27}\)

The Secretary’s or inspector’s violation of Category I enforcement duties appears to be unreviewable under sections 105(d) or 106(a). Section 105(d)\(^ {28}\) provides administrative review of section 104 citations, orders, proposed penalties, or abatement periods. Violations of Category I duties involve, however, the Secretary’s or inspector’s breach of a section 103, section 105, or section 109 duty. The section 106(a)\(^ {29}\) judicial review provision covers section 105(d) Commission decision orders and these section 105(d) orders involve a modification, affirmation, or vacating of a section 104 citation, order, pro-


\(^{25}\) Section 103(g)(2), 30 U.S.C. § 813(g)(2) provides:

Prior to or during any inspection of a coal or other mine, any representative of miners or a miner in the case of a coal or other mine where there is no such representative, may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this chapter or of any imminent danger which he has reason to believe exists in such mine. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation or order with respect to such danger and shall furnish the representative of miners or miner requesting such review a written statement of the reasons for the Secretary’s final disposition of the case.


\(^{27}\) Section 103(h), 30 U.S.C. § 813(h), provides in pertinent part:

In addition to such records as are specifically required by this chapter, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary or the Secretary of Health and Human Services may reasonably require from time to time to enable him to perform his functions under this chapter. The Secretary or the Secretary of Health and Human Services is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. Except to the extent otherwise specifically provided by this chapter, all records, information, reports, findings, citations, notices, orders, or decisions required or issued pursuant to or under this chapter may be published from time to time, may be released to any interested person, and shall be made available for public inspection.

The use of the word “shall” in the last clause, as distinct from the word “may” in the preceding clause, indicates that the Secretary is under a mandatory duty to make these records available for public inspection.


posed penalty, or abatement period. Thus, there would be no applicable section 105(d) order to review under section 106(a). Furthermore, section 105(d) review might be inadequate. Although the Commission can modify or vacate the Secretary's section 104 citation or order, section 105(d) does not expressly grant the Commission any authority to command the Secretary or his inspectors to perform or not perform a particular act or duty.40

The Category I duties insure that the miner or miners' representative is a full participant in the Mine Safety Act's enforcement mechanism. Entitling the miners' representative to accompany the inspector assures miners that an effective inspection occurs, rather than a "whitewash."41 Also, the miner's

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41 In proposing on the Senate floor the amendment which includes the current § 103(f) language, Senator Metcalf said:

MR. METCALF. Mr. President, the whole purpose of the amendment is to provide that when the representative of the Secretary, the mine inspector, goes into a mine and makes an inspection, some member of the union or, if there is not a union, some worker be authorized to accompany the inspector to see what he has inspected and to report back to the miners.

This is a very important amendment because many of the miners would say, "Well, that inspection was a whitewash. The inspector just walked through the mine and did not observe any violations." This might be said if a representative of the union or a representative of the employees in whom the employees have confidence does not accompany him.

The only purpose of the amendment is to require the mineowner to let one of the representatives of the employees accompany the inspector as he goes through the mine.

In 90 percent of the cases, the mineowner will welcome such a representative of the union and be glad to have him accompany the inspector. However, there might arise a case where the mineowner would say, "Look, I own this mine. The only reason I am letting you come in is because of the passage of this legislation. But I am not going to let one of my miners follow along with you and make a report on the safety requirements."

If that were to occur, my amendment would come into play. That is the only purpose of my amendment. It is so that there will be confidence in the inspection that the Secretary is going to institute.

MR. METCALF. Mr. President, it might well happen that the miner who has been working in that mine would help the inspector by calling attention to certain safety violations. He is familiar with the operation of the mine, and he would be able to represent his fellow union members or his fellow mine workers to reveal safety violations.

day-to-day experience with the mine provides inspectors with information about the mine's unique conditions so that unusual problems are identified. Requiring the Secretary to make an immediate inspection upon the miner's request allows miners to maintain the Act's enforcement efficacy between quarterly inspections. This encourages miner awareness of violations or hazards by assuring prompt action. Also, mining conditions can change significantly between quarterly inspections and the miner must be able to invoke remedial action when a new problem arises. The notification provisions insure miners timely information regarding the Secretary's enforcement actions so that they can participate in the administrative and judicial reviews of those actions. Finally, the availability of operator reports allows miners to compare identified problems in the mine with the Secretary's remedial actions or inactions. The reports also allow miners to knowledgeably invoke the Act's enforcement procedures or to challenge the Secretary's particular enforcement actions.

The Leedom exception probably makes the Secretary's or inspector's breach of a Category I duty reviewable in district court. In Leedom, a professional employee association sued in district court to enjoin National Labor Relations Board (NLRB) certification of a bargaining unit under the National Labor Relations Act (NLRA). The NLRB created a "mixed" bargaining unit containing 233 professional and 9 nonprofessional employees. However, section 9(b) of the NLRA provides: "[T]he Board shall not (1) decide that any unit is appropriate for such [bargaining] purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit . . . ." Notwithstanding this statutory provision, the NLRB certified the mixed unit without a professional employees' vote on the issue.

After the district court issued the injunction, the NLRB appealed on the grounds that the district court lacked subject matter jurisdiction because section 10(c) of the NLRA vests jurisdiction in the federal court of appeals. The NLRB conceded that section 10(c) did not insure judicial review for the professional employee association because section 10(c) review is triggered by an unfair labor practice which the association might not be able to insti-
gate. However, the NLRB argued that the NLRA therefore foreclosed judicial review of the NLRB's concededly illegal unit certification.49

Justice Whittaker, writing for the Leedom court, characterized the NLRB's action as "an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a 'right' assured to them by Congress."50 He then responded to the NLRB's contention that such action was unreviewable:

This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers . . . .

Where, as here, Congress has given a "right" to the professional employees it must be held that it intended that right to be enforced and "the courts . . . encounter no difficulty in fulfilling its purpose."51

Justice Whittaker stated the controlling principle: "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control."52 Since the Secretary's or inspector's Category I duties are mandatory and create a statutory "right" in the miners, the Leedom exception should be available.

Although Leedom provides district court jurisdiction when agencies exercise powers "specifically withheld" by a "definite statutory prohibition of conduct which would thwart the declared purpose of the legislation,"53 cases in the District of Columbia and Fifth Circuits indicate that Leedom may be extended to compel specifically mandated exercises of agency powers.54

The Leedom exception requires a threat of irreparable harm to the owner's statutory "right."55 Part of this irreparable harm is established if the Mine Safety Act's review procedures are unavailable or inadequate.56 Additionally, the Secretary's or inspector's breach of a Category I enforcement duty threatens irreparable harm to the miner's statutory "right" by denying the miner his congressionally intended role in the Act's enforcement mech-

49 Leedom, 358 U.S. at 187.
50 Id. at 189.
51 Id. at 190-91 (quoting Texas & New Orleans R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 568-69 (1930)).
52 Id. at 190 (quoting Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 300 (1943)).
53 Id. at 189 (quoting Texas & New Orleans R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 568 (1930)).
54 Miami Newspaper Printing Pressman's Union Local 46 v. McCulloch, 322 F.2d 993, 997 (D.C. Cir. 1963); Templeton v. Dixie Color Printing, 444 F.2d 1064, 1068 (5th Cir. 1971).
55 358 U.S. at 190.
anism. If the inspector refuses to allow the miner's representative to accompany him, the miner's "right" to participate in and ensure the effectiveness of all section 103(a) inspections is destroyed. The Secretary's refusal to conduct a section 103(g)(1) inspection when requested or to make operator reports and records available denies miners the ability to engage in self-help activities as contemplated by the Act. This can lead to increased safety risks for the affected miners. Finally, when the Secretary does not provide miners with notification under section 105(a) or section 109(b) of his enforcement decisions or actions, the miners can be foreclosed from timely participation in the section 105(d) or section 107(e) administrative review proceedings.

B. Review of Category II Enforcement Actions

1. Category II duties defined

Category II enforcement duties involve statutory provisions making the duty mandatory in nature, but owed only to the federal government, rather than in any explicit terms to the miners or miners' representative. Category II duties are of two basic types. The first involves the Secretary's duty to inspect each underground mine in its entirety four times annually and each surface mine twice annually. Additionally, the Secretary has a mandatory duty to inspect more mines liberating methane or explosive gases.

The second Category II duty involves the inspector's or Secretary's obligation to issue citations, withdrawal orders, or notices when he believes or finds that certain violations or hazards exist. Section 104(d)(1) provides for the issuance of an unwarrantable failure citation. The word "shall" is similarly used regarding issuance of section 104(d)(1) withdrawal orders, section 104(d)(2) closure orders, section 104(e)(2) pattern of violations notices or withdrawal orders, section 104(b)(2) closure orders, section 107(a) imminent danger withdrawal orders and section 107(b) unabateable hazard notices.

2. Review under the Mine Safety Act

The Secretary's refusal to conduct the minimum number of inspections might be unreviewable under section 105(d), section 107(e), and section 106(a).

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59 See supra note 41.
60 Galloway, McAteer & Webb, supra note 41, at 411.
Section 105(d) reviews the inspector's or Secretary's issuance of a section 104 citation or order, just as section 107(e) reviews the issuance of a section 107 order. However, the inspector or Secretary may issue a section 104 or section 107 citation or order only during, or subsequent to, a mine inspection. Thus the Secretary's decision not to conduct an inspection in the first place precludes initiation of the Mine Safety Act's sanction provisions—sections 104, 107, 110—and therefore of the enforcement review provisions—sections 105(d), 107(e), 106(a). Because section 505 describes inspectors as employees "subject to the civil service laws," miners and miners' representatives probably cannot conduct their own inspections as federal "inspectors" for the purpose of initiating the section 104 or section 107 enforcement provisions. Also, section 105(d) and section 107(e) may not authorize the Commission to compel the Secretary to conduct an inspection, because section 105(d) and section 107(e) only authorize the Commission to modify an order of the Secretary, rather than commanding an act of the Secretary per se. Because an appellate court's section 106(a) jurisdiction extends only to modifying a Commission's section 105(d) or section 107(e) order, the court, under section 106(a), may also lack authority to compel the Secretary to conduct an inspection.

Similarly, the inspector's or Secretary's refusal to issue a section 104 or section 107 citation, order, or notice after making the requisite findings may be unreviewable under section 105(d) or section 107(e). Both review provisions authorize the Commission to modify a previously issued citation or order. But if the inspector never issues a citation or order, the Commission's section 105(d) or section 107(e) jurisdiction may never attach. Also, an administrative law judge's decision affirmed by the Commission holds that section 105(d) does not provide subject matter jurisdiction to entertain a miner's representative's suit to modify an already-issued citation. Instead, miners may challenge only already-issued orders or already-specified abatement periods. Additionally, neither section 105(d) nor section 107(e) provides for miner challenges to the Secretary's failure to issue a section 104(e) pattern of violations notice or a section 107(b) unabatable hazard notice. Finally, the Commission may not be able to provide adequate relief. Because section 105(d) and section 107(e) only allow the Commission to modify an order or citation, those sections do not authorize the Commission to compel

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67 Section 105(a) provides: "If, after an inspection or investigation, the Secretary issues a citation or order under section [104] of this title...." 30 U.S.C. § 815(a) (Supp. IV 1980). This suggests that a § 104 citation or order may be issued only after an inspection. Similar language is used in § 107(a) and § 107(b). 30 U.S.C. §§ 817(a), 817(b) (Supp. V 1981).
68 See supra note 40.
69 See supra text accompanying notes 10-13.
71 See supra text accompanying notes 10-13.
action by the Secretary or the inspector. Furthermore, one mining case under the 1969 Act, Baker v. United States,\(^4\) holds that an administrative law judge does not have the power to issue a citation. Only an inspector possesses that power.

3. Review as a statutory “right”

Although the Mine Safety Act’s statutory review procedures appear unavailable or inadequate to review the Secretary’s or inspector’s breach of Category II enforcement duties, the Leedom v. Kyne\(^5\) exception is probably unavailable to restore federal district court jurisdiction. The Leedom line of cases involved a statutory “right” in the plaintiff and some courts expressly require a statutory “right” to invoke the Leedom exception.\(^6\)

Although Leedom did not provide any guidelines for identifying a statutory “right,” the cases suggest that only when the statutory language specifically directs the agency’s duty toward particular persons or groups do those persons have a statutory “right” to the performance of that duty.\(^7\) Although Congress might enact regulatory or remedial legislation such as the Mine Safety Act to especially benefit miners as a social group,\(^8\) this does not necessarily create a duty to\(^9\) or a statutory “right” in the miners regarding the agency’s performance of its mandatory duties.

An agency’s mandatory duties are always owed to the government. However, to have a mandatory duty which also creates a statutory “right,” there must be a particularization of the duty. That is, a mandatory duty creating a statutory “right” is apparently a special subset of the general collection of the agency’s mandatory duties. Not only must the duty be directed to the government, as it always is, but the duty must also be directed to a particular person or group.\(^{10}\) Thus a phrase like “miners . . . shall be given the oppor-

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\(^4\) 595 F.2d 746, 750 (D.C. Cir. 1978).
\(^7\) See Oestereich v. Selective Serv. Bd. No. 11, 393 U.S. 233 (1968); Templeton v. Dixie Color Printing Co., 444 F.2d 1064 (5th Cir. 1971).
\(^8\) Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals, 523 F.2d 25, 31 (7th Cir. 1975); Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974).
\(^9\) See Holland, 464 F. Supp. at 124 n.9 (citing Zabala Clemente v. United States, 557 F.2d 1140, 1144-45 (1st Cir.), cert. denied, 435 U.S. 1006 (1978)). Cases under the Federal Tort Claims Act have held that the statute’s creation of a mandatory duty in a federal officer does not create a duty in tort law to a statutory beneficiary or “protected party.” These cases have analogized the federal officer’s mandatory duty to the employer/employee relationship. The statute creates a mandatory duty in the federal employee towards the federal government, his employer. This, however, does not create a duty, in and of itself, in the federal employee to a particular citizen.
\(^10\) See Stark v. Wickard, 321 U.S. 288, 309 (1944) (“When, as we have previously concluded in this opinion, definite personal rights are created by a federal statute, similar in kind to those customarily treated in courts of law” the presumption is for judicial reviewability) (emphasis added).
tunity to accompany” from section 103(h)\(^1\) or “unless a majority of such professional employees vote” from section 9(b) of the NLRA seem necessary to turn a mandatory duty into a statutory “right.” Such phrasing is present in Category I statutory provisions and absent in Category II statutory provisions.

But the tendency of courts to rely upon particular phrasings to find a statutory “right,” or to require a statutory “right” as a prerequisite of the Leedom exception, reflects a technical, rather than substantive, analysis. That is, the substance of the enabling statute and its legislative purpose become secondary to considerations of the particular language used.\(^2\)

In essence, Leedom provides an exception to the exhaustion requirement and exclusivity of statutory procedures principle by expanding the availability of judicial review beyond that provided in the enabling statute. But consider the discussion of the circumscription of judicial review in Templeton v. Dixie Color Printing Co.:

> The reason for circumscribing judicial review in representation matters is to avoid dilatory tactics which would postpone the commencement of bargaining when the employer really had no legitimate objections to the conduct of the election and merely wished to delay bargaining . . . . These considerations are not present here. The application before the Board is not an employer decertification petition; it is plainly not made for the purpose of delay or to thwart the exercise of rights protected under the Act.\(^3\)

Here the court looks beyond a technical analysis of the NLRA’s statutory language to consider the practical interests of management and labor in avoiding the statutory review procedure by litigating in district court. The issue is not whether management or labor possesses a statutory “right” which they wish to protect in district court. Rather, the real issue is whether the statute’s impact upon a litigant’s practical interests will encourage the litigant to use district court jurisdiction to advance, rather than frustrate, the statute’s purpose.

4. Problems with the statutory “right” analysis

Determining whether a statutory “right” is present is an inadequate analytical tool for judicially effectuating the statute’s purpose. This is particu-
larly true for remedial statutes such as the NLRA, the Mine Safety Act, or the Occupational Safety and Health Act (OSH Act) in the industrial relations area where all rights derive from the law's relative protection of conflicting labor and management interests. The employer has a "right" and interest in the free use of his private property and in freedom of contract. The worker also has a "right" and interest in the free use of his individual labor and in freedom of contract. But for a variety of economic, social, political, and historical reasons the employer was able to exercise his "rights" so as to greatly undermine the individual worker's "right" to negotiate wage rates, hours, and working conditions. A balance of power existed such that employers could dictate the terms upon which an individual worker used and contracted his labor. But under the NLRA, OSH Act, and Mine Safety Act, the employer's exercise of his rights are restricted to permit the employee more effective exercise of his rights.

Under the NLRA, for example, the employer's right to the free use of his private property is infringed by allowing employees to conduct organizing activities on his property. Similarly, under the Mine Safety Act the employer's right to free use of his property is infringed by warrantless government inspections and by allowing miners to accompany inspectors. As another example, both the employer's and the individual employee's right of freedom of contract is infringed under the NLRA by requiring the employer to bargain exclusively with the employees' bargaining representative and

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84 The courts hold that the NLRA is a remedial statute, see, e.g., Department & Specialty Store Employees' Union Local 1285 v. Brown, 284 F.2d 619, 626 (9th Cir. 1960), cert. denied, 366 U.S. 934 (1961), which Congress enacted "to redress the perceived imbalance of economic power between labor and management ...." American Ship Building Co. v. NLRB, 380 U.S. 300, 316 (1965). The NLRA created rights in the employees against employers which rights did not exist before. However, these newly created rights are public rights which Congress may change by legislative action. NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571, 577 (6th Cir. 1948), cert. denied, 335 U.S. 908 (1949).

Similarly, the courts hold that the OSH Act is a remedial statute. See, e.g., Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980); Bristol Steel & Iron Works, Inc. v. Occupational Safety and Health Review Comm'n, 601 F.2d 717, 721 (4th Cir. 1979).

85 The point is that a so-called legal "right" of any type is only the courts' willingness to give judicial sanction to a legal action brought upon the right. This willingness is based upon a balancing of the importance of the individual right asserted—guaranteed in the Bill of Rights—against the social interest in limiting the free exercise of that right.

86 For a discussion of the relative nature of freedom in the industrial relations context, see Nelles, The First American Labor Case, 41 Yale L.J. 165, 183-89 (1931); see generally Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1195, 1273 (1982) (the concept of private entitlements and individual benefit does not apply to a regulatory scheme such as the OSH Act because a safe working environment is a collective benefit).

87 See, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).


89 See, e.g., J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).
under the Mine Safety Act by specifying the health and safety aspects of working conditions. 99

None of these remedial statutes creates or abolishes employer and employee rights or interests. These rights or interests are pre-existent. Rather, these statutes change the relative balance of power between these employer and employee rights and interests as the legislature deems appropriate given public policy considerations. This change in the relative balance of rights and interests is effectuated by the mandatory duties the legislature imposes upon the enforcing agency. When an agency, under the Mine Safety Act, for example, orders an employer to allow a miner to accompany an inspector over the employer's private property, the power of the federal government is being exercised upon the employer's property rights to benefit the miner's safety interests. The statute's mandatory commands to the agency direct it to change the previous status quo of employer and employee rights and interests into a legislatively redefined arrangement of legally enforceable rights and interests. 91

5. Alternatives to the statutory "right" analysis

Under the Mine Safety Act, courts occasionally look beyond the Act's language to consider the conflicting practical interests involved and the Act's remedial purpose. Section 110(b)(1) of the 1969 Act protected from employer discrimination miners who made a safety complaint to the Secretary or "filed, instituted, or caused to be filed ... any proceeding under the Act." 9 The Interior Board of Mine Operations Appeals interpreted this language as protecting only miners who complain to an inspector, the Secretary, or the miners' representative because the 1969 Act authorizes only those persons to initiate a proceeding. The court in Phillips v. Interior Board of Mine Operations Appeals 93 rejected the Interior Board's technical construction. Instead, said the Phillips court, section 110(b)(1) of the 1969 interpreted as follows:

[W]e look to: the overall remedial purpose of the statute . . .; the practicalities of the situation in which government, management and miner operate; and particularly to the procedure implementing the statute actually in effect at the Kencar mine. The existence of this procedure itself was a practical recognition that the bare words of the Safety Act, unless implemented by some procedure at the mine . . . would be completely ineffective in achieving mine safety.

. . . .

91 In essence, the statute's mandatory commands are legislative directions to an agency for the exercise of public power to affect the private rights and interests of private individuals or groups. See generally JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 18-20 (1965).
93 500 F.2d 772 (D.C. Cir. 1974).
We believe that the Mine Safety Act, to be effective, must be construed as we have here. If it is not, it will be easy for management to avoid the prohibitions of the Act.44

Thus where, as in Phillips, the miner complains to the coal company's supervisor, rather than to a government official or the miners' representative as specified in the 1969 Act, the miner receives section 110(b)'s protection.

The Phillips decision focuses upon the practicalities of the mining environment:

Safety costs money. The temptation to minimize compliance with safety regulations and thus shave costs is always present. The miners are both the most interested in health and safety protection, and in the best position to observe the compliance or noncompliance with safety laws. Sporadic federal inspections can never be frequent or thorough enough to insure compliance. Miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine foremen or top mine management. Only if the miners are given a realistically effective channel of communication re health and safety, and protection from reprisal after making complaints, can the Mine Safety Act be effectively enforced.45

Phillips is also based upon a miner's practical perception of the procedures at his mine, rather than the 1969 Act's "formal procedure for review, of which they [the miners] may be unaware."46 For the miner, a safety concern must be dealt with now and the superintendent is the person to see because he is the person in charge. The inspector or the Secretary does not have a similar daily presence in the mine or the miner's thoughts.47

Although the Leedom exception might not provide district court review of Category II enforcement actions, a line of cases suggests that either a district or appellate court may review Category II actions as agency actions unlawfully withheld. The Administrative Procedures Act (APA)48 provides the principles for such review.49 But a potential barrier to APA review is section 507 of the Mine Safety Act: "Except as otherwise provided in this chapter, the provisions of sections 551 to 559 and sections 701 to 706 of Title 5 shall not apply to the making of any order, notice, or decision made pursuant

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44 Id. at 779-81.
45 Id. at 783 (footnote omitted).
46 Id. at 783.
47 Id. at 781.
49 5 U.S.C. § 702 (1982) grants a right to review. Section 703 requires judicial review to take place in the form and court specified by statute. Where the statutory mechanism is absent or inadequate, the APA has been held to be an independent grant of subject matter jurisdiction in the context of the Mine Safety Act, thus allowing judicial review where the Act's review mechanism is unavailable. See supra note 4. Section 704 creates a presumption of reviewability, and section 706(1) authorizes the court to compel agency enforcement actions.
to this chapter, or to any proceeding for the review thereof."103 By its own language, however, section 507 applies only when an order, notice or decision has actually been made. When the Secretary precludes the issuance of an order or decision by breaching a Category II enforcement duty, then section 507 suggests that it is not applicable. Also, the Secretary's or inspector's breach of a Category II enforcement duty is not reviewable under the Act's statutory review procedures and courts hold that when the Mine Safety Act's procedures are unavailable, APA review becomes available.104 However, even if the APA itself is unavailable, cases hold that the courts have the inherent equitable power to compel agency action unlawfully withheld.105

Actions to compel agency action are rare, since most challenge agency action as overreaching.106 However, environmental law cases brought in the early 1970's provide an important discussion of jurisdictional issues related to compelling agency action.

In Environmental Defense Fund, Inc. v. Hardin,107 five environmental groups sued the Department of Agriculture (DOA) in the United States Court of Appeals, District of Columbia Circuit. Plaintiff environmentalists sought to compel the DOA to exercise its Federal Insecticide Fungicide and Rodenticide Act (FIFRA)108 authority to suspend the agricultural use registration of DDT products as "necessary to prevent an imminent danger to the public."109 Under the FIFRA, the DOA may issue notices of cancellation of DDT product registrations. These notices initiate public hearings reviewing DDT dangers, but leave the registrations in effect until the hearings' outcome. Additionally, the FIFRA authorizes the DOA to immediately suspend the DDT product registrations pending the cancellation hearings' outcome if the use of DDT threatens imminent danger. Unless a product has an effective registration, it cannot be shipped in interstate commerce. The environmentalists formally requested the DOA to issue both notices of cancellation and the immediate suspension of DDT registration. The DOA issued notices of cancellation as to four DDT product registrations and declined to render a decision on the suspension request. The environmental groups then sued to compel the issuance of the other cancellation notices and all of the suspension notices.

104 See supra note 4.
105 See Dixie Color Printing Co., 444 F.2d at 1070 n.3; Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 861-63 (4th Cir. 1961).
106 A look at the annotations to 5 U.S.C.A. § 706 (West 1977 & Supp. 1982) is instructive. Under note 108, the West annotation lists ten cases dealing with agency action unlawfully withheld. These mere ten cases are surrounded by over two hundred pages of annotations under section 706.
The DOA moved to dismiss for lack of jurisdiction and in the alternative for a stay of the suit while DOA further considered its position on the DDT products. Chief Judge Bazelon, writing for the Hardin court, denied the motion to dismiss but granted a thirty-day stay. The DOA first argued that its failure to render a decision on the suspension or other cancellation notices was not final agency action and therefore not reviewable. Bazelon rejected that argument because no further agency action was contemplated and because the failure to decide to suspend DDT product registrations had the same effect as deciding not to suspend. In both instances, manufacturers continue to ship DDT products in interstate commerce.

The DOA also argued that the suit properly belonged in federal district court because the suit involved relief in the nature of mandamus and because appeals court review without a formal record is inappropriate. Bazelon rejected the argument that only a district court can compel agency action:

Respondents suggest that the district court is the proper forum for any review that may be available, characterizing the petition as one for relief in the nature of mandamus. We find it unnecessary to decide whether petitioners could have obtained relief from the district court, since the availability of that extraordinary remedy for the failure of an officer to perform his statutory duty need not bar statutory appellate review of the failure to act, when exigent circumstances render it equivalent to a final denial of petitioners' request.

Bazelon also found the absence of a formal record not to be controlling:

There is some authority to the effect that only a trial court is capable of reviewing orders issued without benefit of formal factfinding based on a record ... Whatever its continuing vitality, that line of authority is especially inappropriate here, where the facts in issue lie peculiarly within the special competence of the Secretary. The district court could do no more than remand to the Secretary, as we do here; there seems to be no reason to inject another tribunal into the process.

Thus the court denied the motion to dismiss, but granted a stay while the DOA produced a record explaining its future decision.

After Hardin, Congress transferred the DOA's FIFRA enforcement duties to the Environmental Protection Agency (EPA). The EPA decided not to suspend the registration of the DDT products and made no decision regarding cancellation of the remaining DDT product registrations. The envir-

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107 428 F.2d at 1096 n.8, 1100.
108 Id. at 1099.
109 Id. at 1098.
110 Id. at 1098-99.
onmental groups therefore returned to the court of appeals in *Environmental Defense Fund, Inc. v. Ruckelshaus*. Ruckelshaus allowed Bazelon to further elaborate on those "exigent circumstances" that allow an appeals court to assume jurisdiction to compel agency action.

*Hardin* and *Ruckelshaus* involved the agency's failure to issue a decision that would commence the FIFRA's administrative review proceedings including public hearings and judicial review in an appeals court. Bazelon ruled that the court had jurisdiction to compel agency action because agency action commences a process of public hearings and judicial review, while agency inaction precludes such a process.

Bazelon wrote:

The FIFRA gives this court jurisdiction to review any order granting or denying the cancellation of a pesticide registration. The Secretary could defeat that jurisdiction, however, by delaying his determination indefinitely . . . . In order to protect our appellate jurisdiction, this court has jurisdiction to entertain a request for relief in the form of an order directing the Secretary to act in accordance with the FIFRA.

But by protecting its jurisdiction, the court also protects the enabling statute's administrative review procedures. By compelling agency action unlawfully withheld, the court protects the legislative values inherent in the review procedures. Bazelon reasoned:

Not only the legislative history, but also the statutory scheme itself points to the conclusion that the FIFRA requires the Secretary to issue notices and thereby initiate the administrative process whenever there is a substantial question about the safety of a registered pesticide. For when Congress creates a procedure that gives the public a role in deciding important questions of public policy, that procedure may not lightly be sidestepped by administrators . . . . The statutory scheme contemplates that these questions will be explored in the full light of a public hearing and not resolved behind the closed doors of the Secretary.

*Ruckelshaus* is an important advance over the *Leedom* case line which focuses upon whether the litigant possessed a statutory "right." Instead, *Ruckelshaus* focuses upon the nature of the statutory review process and the role Congress intended for the litigant in that process. When an agency attempts by inaction or otherwise to foreclose the litigant from participating in the review process as Congress intended, the exhaustion requirement and the exclusivity principle are inapplicable. Also, because the agency foreclosed ac-

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112 439 F.2d 584 (D.C. Cir. 1971).

113 Chief Judge Bazelon referred to exigent circumstances in *Hardin*, 428 F.2d at 1098.

114 439 F.2d at 593 (citing 28 U.S.C. § 1651 (1976)).

115 Id. at 594.

cess to the statutory review procedure, there is nothing to exhaust and no procedure to make exclusive. Thus, on the one hand, federal district courts retain their nonstatutory jurisdiction and, on the other hand, federal appeals courts can protect their statutory review jurisdiction through 28 U.S.C. § 1651.

Ruckelshaus is especially appropriate when the Secretary, under the Mine Safety Act, refuses to conduct mandated inspections or to issue a citation, order or notice after making the requisite findings. The refusal in both instances precludes initiation of the section 105(d), 107(e), and 106(a) review procedures in which the miner participates as a full party. The congressional findings and purposes statement indicate that miners have an important participatory role: “[T]he operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines.” Indeed, the Mine Safety Act as a whole is designed to insure the miner’s constant participation in the Act’s enforcement mechanism, especially given the miner’s special familiarity with the mine’s unique problems.

6. Court focus in determining jurisdiction

In deciding whether to assume jurisdiction, courts should preferably focus—as Ruckelshaus does—upon the litigant’s intended role in the statutory enforcement and review mechanism, rather than focus—as Leedom does—upon the litigant’s possession of a statutory “right.” The Leedom cases, to a large extent, focus upon the agency action’s threatened injury to the litigant. Thus, if a statutory “right” will be irreparably injured, district courts may resume jurisdiction in the face of the exhaustion requirement and the exclusivity of remedies principle.

Ruckelshaus could have engaged the same sort of analysis—that is, focusing upon statutory “rights.” However, whether assuming jurisdiction will

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117 See Coca-Cola Co. v. FTC, 342 F. Supp. 670, 677 (N.D. Ga. 1972) (“Delay on the part of the agency was considered implicitly to constitute exhaustion of administrative remedies.”), aff’d, 475, F.2d 299 (5th Cir. 1973), cert. denied, 414 U.S. 977 (1973).
118 See supra note 4.
119 See S. Rep. No. 181, supra note 43, at 48. (“Affected miners or their representatives are to be afforded an opportunity to participate in proceedings before the Commission and its Administrative Law Judges.”). But see Garland Coal, 3 FMSHRC 2016 (1981) (decision of ALJ Broderick) (Section 105(d) does not give the Commission or the administrative law judges subject matter jurisdiction to hear miner-initiated contests).
121 See S. Rep. No. 181, supra note 43, at 35. (“If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act.”).
122 See supra note 41.
aid agency decision-making should be a primary consideration because effective agency decision-making is what the exhaustion requirement and the exclusivity principle are intended to protect. But finding a statutory "right" which has been injured by agency action is a poor analytical tool for deciding whether the assumption of jurisdiction will effectuate the statute's purpose and provide better agency decision-making. The fact of injury to the litigant's statutory "right" goes to the standing or cause of action issues, rather than to the nature of the administrative review process.

The Ruckelshaus court's focus upon whether assuming jurisdiction will preserve the agency's review process by shaping the issues under consideration is a more effective analytical tool. In Ruckelshaus, for example, the court ruled that the EPA under the FIFRA must balance the risks and advantages of DDT in deciding whether to cancel the DDT product registrations. Such an assessment of risks and advantages can best be made with full public input.24 In a related case, Environmental Defense Fund, Inc. v. United States,25 Judge Skelly Wright raises the same concerns. He wrote:

Instead of publishing petitioners' proposal, which would begin an administrative process designed to bring forth constructive alternatives for dealing with an admittedly difficult but vitally important problem, the Commissioner chose to stop petitioners at the door.

... None of these alternatives [considered by the environmentalists and by the Secretary's Commission on Pesticide concerning their relationship to environmental health] has been considered in specific detail, with opportunity for comment and study by all interested parties. The administrative process, the process which Congress intended to focus on and illuminate these problems, has not been permitted to begin.26

These Environmental Defense Fund cases provide a more flexible analysis than the Leedom cases by focusing upon the role of the review procedures in the legislative scheme instead of focusing upon the technical language of the statute and whether it creates a statutory "right."

If a miner sues to challenge the Secretary's failure to perform a Category II enforcement duty, the Environmental Defense Fund cases suggest that a federal district court or a federal appeals court is equally capable of assuring effective statutory decision-making. According to Hardin, both the district and the appeals court would require the Secretary to issue a written finding which explains his failure to conduct mandated inspections or to issue an appropriate citation, order, or notice after making the requisite findings. Either the district or appeals court could review the written findings, decide if the

24 439 F.2d at 594.
26 Id. at 1089, 1090.
Secretary abused his discretion, and direct the performance of the Category II duty if the Secretary abused his discretion.\textsuperscript{127}

The crucial point is that once the Secretary commences a Category II enforcement action—performing inspections, issuing citations—the section 105(d), section 107(e), and section 106(a) statutory review procedures may now come into play.\textsuperscript{128} These review procedures remain inoperative so long as the Secretary fails to conduct the requisite inspection or issue the requisite citation or order. Also, in the course of these statutory review proceedings agency decision-making over the propriety of issuing a particular citation or order can come into play. Thus, although the district or appeals court activities involve a remand for written findings, review of these findings, and then a possible remand to the Secretary, the federal courts would still leave intact the most essential components of the Act's review procedures. Those procedures are section 105(d) and section 107(e) provisions for agency review of actually initiated enforcement action.

7. The statutory "right" as a guide

If \textit{Environmental Defense Fund} rejects Leedom's statutory "right" requirement, is there any justification for continuing to require a statutory "right" before restoring nonstatutory jurisdiction? One possible justification is the use of the statutory "right" as a guideline for conserving agency and

\textsuperscript{127} In suggesting that either a district court or the appeals court could remand to the agency for written findings, Chief Judge Bazelon was rejecting the prior rule that an appeals court could only review a district court's hearing transcript. \textit{Hardin}, 428 F.2d at 1099. Instead, an appeals court could make it determination of an abuse of discretion by using already-made agency findings or agency findings produced on remand. Chief Judge Bazelon's rather tentative view was explicitly adopted in \textit{Investment Co. Inst. v. Board of Governors of the Fed. Reserve Sys.}, 551 F.2d 1270, 1276-77 (D.C. Cir. 1977), in which the court ruled that district court review is unnecessary when the agency has already applied its factual expertise by producing an administrative record.

In a dispute arising under the Mine Safety Act, either a district or appeals court should be able to review the Secretary's written findings to determine from the findings alone whether the Secretary abused his discretion in not performing a Category II enforcement duty. The more difficult situation is when the miners wish to submit further evidence or to challenge the credibility of the Secretary's written assertions. In this case, however, \textit{Hardin} and \textit{Investment Co.} give an identical response: the district or appeals court must remand to the Secretary for further consideration. In this case the Secretary would have to decide whether to hold a formal hearing and produce a formal record or to submit written responses to the miner's allegations. As this paper discusses later, the Court's decision in \textit{Dunlop v. Bachowski}, 421 U.S. 560 (1975), could preclude either a district or appeals court from demanding a greater response from the Secretary than his initial written explanation.

\textsuperscript{128} According to the language used in § 104(a), § 104(d), § 104(e)(2), § 107(a), and § 170(b), the performance of an inspection is a condition precedent to the issuance of the appropriate citation, order or notice. Similarly, according to the language of § 105(a) and § 107(e), the inspector's issuance of some sort of citation or order is necessary before the § 105(d) and § 107(e) administrative review provisions can be activated.
judicial resources for the most "important" statutory activities. A common objection to judicial review of agency enforcement decisions is that judicially compelling agency action will inefficiently allocate already inadequate agency resources. Even if the Secretary is under a mandatory duty to conduct four section 103(a) inspections annually, this is but one of the Secretary's mandatory duties.

As a related point, Congress may not exercise its budgetary appropriation and legislative powers in a consistent fashion. As such, although Congress legislates new or numerous mandatory duties for the Secretary, Congress may fail to appropriate sufficient funds or personnel to carry out all of the mandatory duties which Congress creates. Where the Secretary decides that he lacks sufficient resources to carry out all mandatory duties, he might set priorities for carrying out as many mandatory duties as possible. Given such a situation, a court might refuse to entertain a lawsuit to compel agency enforcement action because the court fears that inadequate resources would be reallocated according to the willingness of a group to sue, rather than upon the agency's assessment of how best to use its resources. In

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123 Judicial reluctance to force a reallocation of agency resources because a plaintiff has sued to compel the performance of a mandatory duty has been demonstrated under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982). After any person has made a request for reasonably identifiable agency records, the agency is under strict time limits to respond to that request. 5 U.S.C. § 552(a)(6)(A). However, in the case of "exceptional circumstances" a federal court has discretion to retain jurisdiction and allow the agency additional time to respond to the request. 5 U.S.C. § 552(a)(6)(C). In Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976), plaintiff-requestor Open America, a public interest group, sued to enforce the statutory deadline when its request was not completed within the mandatory thirty days. One defendant, the Federal Bureau of Investigation (FBI), alleged that "exceptional circumstances" were present given the large number of FOIA requests which it was already processing. The Open America court refused to order the FBI to speed up or give priority to processing plaintiff's request because the court would be giving plaintiff relief "by taking personnel away from other prior requests which the FBI is now engaged in processing." Id. at 614. The Open America court concluded that allowing plaintiff to prevail because it had sued to compel an admittedly mandatory agency duty would undermine the regulatory scheme. The Open America court wrote:

If this were enough [the filing of a lawsuit to compel an agency duty], even those with the dimmest of eyesight could look ahead a few months and see that the regulation of priorities in all agencies, not just the FBI, would very shortly become the function of the courts. If everyone could go to court when his request had not been processed within thirty days, and by filing a court action automatically go to the head of the line at the agency, we would soon have a listing based on priority in filing lawsuits, i.e., first into court first out of the agency. This would be nothing but an inflation of a simple administrative request to a United States district court action, and like inflation in the monetary world would ultimately profit no one, since no one would be assigned a priority position any different than he would achieve if all applicants were left to the priorities fixed by the agency.

Id. at 615.
short, the court treats the manner in which the agency allocates inadequate resources as within the agency's discretion. Similarly, federal courts might lack sufficient resources to review every agency failure to perform a mandatory duty or compel the performance of every mandatory duty.

One limitation which a court can place upon an agency's failure to perform a mandatory duty or upon the court's reluctance to compel agency action is the finding of a statutory "right" in the plaintiff. When Congress determines that a mandatory duty is so important as to use language creating a statutory "right", a court can subsequently decide that if the agency has any resources to perform the duty, then the reallocation of resources is appropriate. Similarly, a court can decide that it is not forcing the agency to reallocate resources according to the party's willingness to sue but rather according to Congress' assessment of the importance of the duty and of this party within the statutory scheme. Also, a court can decide that this party's interest and this duty is sufficiently important to deserve the judicial resources necessary to hear the case and grant appropriate relief. Thus Leedom's statutory "right" prerequisite is a shorthand analysis of the court's determination that inadequate agency or judicial resources should not preclude hearing the case and rendering judgment.

Although judicial solicitude for inadequate agency resources might be appropriate, the inadequacy of resources goes to plaintiff's ability to state a cause of action or to the justiciability of the case. It does not determine whether subject matter jurisdiction itself exists. More importantly, judicial recognition of agency discretion in prioritizing the use of inadequate resources does not tell us how much agency discretion is acceptable or that such discretion is unreviewable. Although a statutory "right" serves as a convenient limitation upon allocative discretion, should it be the only limitation? Are personal biases an acceptable criterion for allocative discretion? Imagine an agency which decides not to perform mandatory duty not constituting a statutory "right"—such as overseeing a free lunch program for disadvantaged students—because the agency anticipates that the primary beneficiaries will be poor black children. Imagine also that this agency decides to perform another mandatory duty under the same statute—such as conducting research into the effects of malnutrition—because the primary beneficiaries will be white, middle class faculty members. The agency's decision might possibly reflect a congressional preference for more research over more program enforcement. But one suspects that an independent judicial analysis of Congress' purpose is preferable to unchecked agency assessment of its statutory priorities. Furthermore, judicial review usually serves as a primary check on the agency's use of an impermissible factor—the beneficiary's race—in exercising allocative discretion.
C. **Review of Category III Enforcement Actions**

1. **Category III duties**

   Category III involves duties which the statutory language makes discretionary in nature and are owed to the government, rather than in express terms to the miners. These discretionary duties involve the inspector’s making of requisite findings for issuing a section 104 or section 107 citation or order. Section 104(a)\(^{131}\) requires issuance of a citation when the inspector “believes” that a violation of a mandatory standard, rule, order or regulation has occurred. By contrast, section 104(d)(1), section 104(d)(2), section 104(e)(2), section 104(g)(1), section 107(a) and section 107(b) require the inspector to “find” that the requisite violation or hazard exists.\(^{132}\) Section 104(e)(1) leaves it to the Secretary to promulgate regulations defining a “pattern of violations” that requires issuance of a section 104(e)(1)\(^{133}\) pattern of violations notice. Section 104(f)\(^{134}\) requires issuance of a citation for excessive respirable coal dust concentration level after the Secretary’s analysis under section 202(a) of the dust concentration samples.\(^{135}\) This analysis might involve discretionary as well as technical evaluations.

2. **The problem of prosecutorial discretion**

   These sections require an assessment of diverse factual situations. Prior to issuing a citation, order or notice, the Secretary assesses the applicability of particular mandatory standards or regulations to the particular fact situation. The exercise of discretion is a necessary part of this process.\(^{136}\) Addition-

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\(^{133}\) 30 U.S.C. § 814(e)(1) (Supp. IV 1980). However, the Secretary has never promulgated such regulation. In fiscal year 1982, the Secretary did not issue a section 814(e) notice, withdrawal order, or closure order. Department of Labor, Mine Safety and Health Administration, Draft Report of Monthly Issuances of Notices, Citations and Orders.


\(^{136}\) See Secretary of Labor v. Cement Div., Nat’l Gypsum Co., 3 FMSHRC 822, 825 (1981), reprinted in 2 MINE SAFETY & HEALTH REP. (BNA) 1201. In National Gypsum, the Commission ruled that a "significant and substantial" violation for section 104(d) purposes must be found according to the particular facts of each situation, rather than according to mechanical rules. The Commission ruled:

   Rather, for the reasons that follow, we hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

   An important part of this test is to increase the role and discretion of federal mine inspectors:

   The Secretary’s mechanical approach would leave little, if any room for the inspector to exercise his own judgment in evaluating the hazard presented by the violation in
ally, the making of requisite findings leads to the issuance of citations or orders, the imposition of civil penalties, and possible criminal penalties. Therefore, these findings are an exercise of prosecutorial discretion.

Category III enforcement actions therefore present the clear issue of whether prosecutorial discretion is judicially reviewable. Under the Mine Safety Act the issue is whether the inspector's findings of no violations or hazards are judicially reviewable and, if so, where. Even if the relevant statute commands the prosecution of violators, most courts consider the decision to prosecute to be discretionary and not judicially reviewable.137

Some courts, however, hold that although executive branch officers make prosecutorial decisions, courts should still provide review.138 Vesting prosecutorial duties in an executive officer only precludes judicial assumption of those duties.139 Thus, a basic distinction is drawn between the assumptions of and the review of prosecutorial discretion.140

The presence of discretion in prosecutorial decisions does not resolve the reviewability issue. The existence of prosecutorial discretion begs the question of the extent of that discretion. An agency's official exercise of prosecutorial discretion is after all the exercise of agency discretion. Insulating such agency discretion from reviewability for abuse of discretion conflicts with the Supreme Court's Abbott Laboratories v. Gardner141 principle that agency actions are reviewable absent a "clear and convincing" legislative intent to the contrary. Relying upon Abbott Laboratories, the Supreme Court in Dunlop v. Bachowski142 held that the Secretary of Labor's decision not to prosecute a complaint under the Labor-Management Relations and Disclosure Act143 was reviewable. The real issue becomes not the reviewability of prosecutorial discretion, but the extent of such review.

... light of the surrounding circumstances. We believe that the inspector's independent judgment is an important element in making significant and substantial findings, which should not be circumvented.

Id. at 826, 2 MINE SAFETY & HEALTH REP. at 1203. See also Holland v. United States, 464 F. Supp. 117, 121 (W.D. Ky. 1978) (Federal Tort Claims Act case).


140 Nader, 497 F.2d at 679 n.19; Medical Comm., 432 F.2d at 673 n.14.


142 421 U.S. at 567 (citing Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967)).

3. Review of discretion under the Act

The Mine Safety Act's structure indicates that inspector's findings are reviewable. One justification for nonreviewability of prosecutorial discretion is to allow the prosecutor to reach a rapid settlement with the offender—that is, "plea bargaining." In the enforcement agency context, this allows the agency to negotiate a rapid correction of the violation in exchange for halting further enforcement action. Making this negotiated agreement nonreviewable facilitates negotiations by giving the enforcement agency something to offer in exchange for compliance. If third parties can strike down an agreement as too lenient, the offender has little incentive to reach an agreement.

Section 104(h) of the Mine Safety Act gives the Secretary the power to modify citations and orders: "Any citation or order issued under this section shall remain in effect until modified, terminated, or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to section 815 or 816 of this title." But section 105(d) certainly allows the miner to challenge the modification or vacating of any order or period of abatement by the Secretary and possibly allows miners to also challenge the modification or vacating of a citation by the Secretary. Furthermore, the legislative scheme indicates a Congressional intent to limit the Secretary's ability to negotiate "back-room" agreements with the mine operators.

146 Congress was very concerned with protecting the actual and apparent integrity of the enforcement process, particularly those relating to inspections. In proposing the amendment to allow miners to accompany inspectors, Senator Metcalf said:

MR. METCALF. Mr. President, the whole purpose of the amendment is to provide that when the representative of the Secretary, the mine inspector, goes into a mine and makes an inspection, some member of the union or, if there is not a union, some worker be authorized to accompany the inspector to see what he has inspected and to report back to the miners.

This is a very important amendment because many of the miners would say, "Well, that inspection was a whitewash. The Inspector just walked through the mine and did not observe any violations." This might be said if a representative of the union or a representative of the employees in whom the employees have confidence does not accompany him.


Similarly, the miners are to participate at the post-inspection conferences during which the citation or withdrawal order decisions are usually made. The Senate Report states:

The opportunity to participate in pre- or post-inspection conferences has also been provided. Presence of a representative of miners at opening conference helps miners to know what the concerns and focus of the inspector will be, and attendance at closing conference will enable miners to be fully apprised of the results of the inspection. It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness.

Making the inspector's findings nonreviewable while subjecting the Secretary's modification or vacating of a citation or order to review would undercut Congress' intent and deny miners the participation in enforcement actions that Congress intended. See S. Rep. No. 181, supra note 43, at 35. However, the brief of the intervenor coal operator in Council of the Southern Mountains argues that the miner's role is participatory, not plenary. That is, the miner is confined to those participating roles as are expressly provided for in the Mine Safety Act. Because Congress did not expressly give miners the right to challenge nonissuance of a citation or order, the miners do not possess such a role under the Act. Brief of Intervenor Peabody Coal Company's on motion to dismiss, Council of the Southern Mountains, Inc. v. Donovan, 516 F. Supp. 955 (D.C. 1981).

The Mine Safety Act provides in section 103(g)(2) for informal review of the inspector's decision not to issue a citation or order and for a written statement explaining the decision. This indicates Congress' intent not to allow the inspector to enshrud his decision in secrecy. Such a written statement should be subject to review for abuse of discretion under the Abbott Laboratories presumption that agency action is reviewable.

Cases declining review of prosecutorial discretion raise the concern that prosecutorial discretion is nonreviewable given the "myriad" of factors involved in the prosecutorial decision. Under the Mine Safety Act this raises the issue of whether inspector findings are nonreviewable because the inspector's decision is beyond the court's expertise and competence. The Mine Safety Act clearly contemplates inspectors' possessing a special expertise.

147 See S. Rep. No. 181, supra note 43, at 35. However, the brief of the intervenor coal operator in Council of the Southern Mountains argues that the miner's role is participatory, not plenary. That is, the miner is confined to those participating roles as are expressly provided for in the Mine Safety Act. Because Congress did not expressly give miners the right to challenge nonissuance of a citation or order, the miners do not possess such a role under the Act. Brief of Intervenor Peabody Coal Company's on motion to dismiss, Council of the Southern Mountains, Inc. v. Donovan, 516 F. Supp. 955 (D.C. 1981).

148 The ability of any party to challenge the Secretary's directives to federal inspectors prior to the initiation of an enforcement proceeding is in doubt. Compare Bituminous Coal Operators' Ass'n v. Marshall, 82 F.R.D. 350 (D.D.C. 1979) (denying pre-enforcement review) with Bituminous Coal Operators Ass'n v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977) (permitting pre-enforcement review).


151 387 U.S. 136, 141 (1967). However, the use of the phrase "the Secretary's final disposition of the case" in § 103(g)(2) is ambiguous. On the one hand, this language could suggest that the Secretary's written explanation constitutes final agency action for review purposes. On the other hand, this language could suggest that a finality standard of review was placed upon this written explanation. That is, the explanation is unreviewable. The legislative history does not clarify this ambiguity. S. Rep. No. 181, supra note 43, at 65.

152 E.g., Newman, 382 F.2d at 481.
Section 505 specifies an inspector's qualification requirements, including "at least five years practical mining experience." Given the inspector's special experience, some judicial deference to his findings is appropriate. However, section 103(f)'s requirement that a miner be allowed to accompany the inspector suggests that Congress wishes to use the miner's expertise also. A particular inspector might see a mine only every ninety days. The miner, however, faces this mine's unique conditions daily. Although the inspector might have a particular expertise in assessing violations and hazards in general, the miner is in a better position to assess the violation's or hazard's implications given conditions at this particular mine. The finding of a section 107(a) imminent danger demonstrates that the inspector's and miner's expertise necessarily complement one another. Courts developed the imminent danger test to require an assessment of the probability that the hazard will cause injury if normal mining operations continued. Although the inspector's expertise is important in finding a hazard or violation, the miner's expertise is essential for assessing the impact of continued normal mining operations.

4. Challenging findings in lieu of prosecutorial discretion

Because of his practical experience and knowledge, a miner wishing to challenge an inspector's findings might bring forward sufficient factual information to present a sharp, yet enlightening, controversy. Providing a mechanism for resolving this controversy can insure a more effective enforcement of the Mine Safety Act. In Medical Committee for Human Rights v. SEC, the court ruled that the Securities and Exchange Commission's (SEC) refusal to require Dow Chemical Company to include the plaintiff's Medical Committee for Human Rights (MCHR) proxy resolution in the company's proxy statement was judicially reviewable. The Medical Committee court treated its consideration of MCHR's suit to compel SEC action against Dow Chemical as analogous to a court's decision to allow intervention by public interest groups in a regulatory licensing proceeding. The Medical Committee court adopted the "Public Intervenor" concept, which developed in licensing cases, as applicable to regulatory enforcement cases also. A group's efforts to compel regulatory enforcement, like a public interest group's efforts to intervene in licensing proceedings, gave it the status of a "Public Intervenor":

"Public Intervenor"... is, in this context, more nearly like a complaining witness who presents evidence to the police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts and to pur-
sue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred.

It was not the correct role of the Examiner or the Commission to sit back and provide a forum for the intervenors; the Commission's duties did not end by allowing Appellants to intervene; its duties began at this stage. The "Public Intervenor" concept is therefore designed to force a prosecutorial body to consider issues and arguments which it would not otherwise consider. Allowing groups to become "Public Intervenors" prevents secretive agency decision-making by forcing agencies to clarify their procedural rules and to develop more articulated justification for their decisions. This clarity in turn assists judicial supervision in assuring "vigorous, efficient and evenhanded implementation" of the legislature's statutory goals. Similarly, allowing miners to challenge an inspector's findings using the miner's peculiar expertise will strengthen the enforcement process. Knowing that a miner can challenge his findings will encourage inspectors to more rigorously assess their decisions and provide courts with a more developed record which facilitates administrative and judicial review.

In making the Secretary of Labor's decision not to prosecute a violation under the Labor-Management Relations and Disclosure Act reviewable, the Supreme Court in Dunlop v. Bachowski sharply limited the scope of review under Labor-Management Relations and Disclosure Act's (LMRDA) scheme. Because Congress intended the LMRDA to provide for rapid validation of union election results in order to prevent the union leadership's composition from remaining in limbo, the Bachowski Court rejected a full adversarial hearing into the Secretary of Labor's decision. Such a hearing, found the Court, would so protract election outcome decisions as to undermine the LMRDA. Instead, the reviewing court must limit review to the Secretary of Labor's justification statement in determining whether the Secretary of Labor abused his discretion by not prosecuting.

The most substantial obstacle to allowing miners to challenge inspector findings is the drain on resources that frivolous challenges could produce. If inspectors must constantly defend their findings in an administrative or judicial proceeding or must constantly forego planned inspections, mine safety could decline. The problem can be met by carefully shaping the form and extent of review, rather than barring it altogether. Review challenges could be

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154 432 F.2d 659, 673-74 (emphasis added) (quoting Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 546-47 (D.C. Cir. 1969)).
155 Id. at 674.
156 Id.
158 Id. at 568-73. Another issue raised in Bachowski is the court's power to compel an executive officer to initiate enforcement proceedings. This issue is distinct from the issue of whether judicial review for possible abuse of discretion is available in the first place.
limited to those brought by miners' representatives. This would tend to limit challenges to those instances where a number of miners decide that it is necessary to challenge the inspector's findings. Also, the court could initially review the inspector's section 103(g)(2) written justification for not finding a violation to determine if there are any credible or reasonable grounds to merit further review.

III. JUSTICIABILITY ISSUES

Even if a court finds that it has jurisdiction over a suit, the court may decline to exercise its jurisdiction. If the court declines on the basis that review is inappropriate or counterproductive, it rules that the case is not justiciable. Two issues of justiciability, "ripeness" and "finality" are difficult to discuss in the abstract. However, a third issue of justiciability involves the exhaustion of administrative and statutory remedies.

A. The Exhaustion Requirement

The requirement in Whitney National Bank that statutory review procedures be exclusive is to protect the Bethlehem Shipbuilding exhaustion of remedies requirement. Whitney seeks to protect the agency's ability to bring its expertise to bear on factual issues within its peculiar competence. Whitney also seeks to promote administrative and judicial efficiency by requiring all potential litigants to initially appear in one forum—the administrative hearing—and by allowing the agency to proceed with its review and decision-making process without judicial interference. But Whitney found the statutory review provisions to be exclusive, even where the statutory review provision did not explicitly make its procedures exclusive. The Court implied exclusivity into the statutory review procedure for the reasons just described. However, if exclusivity of the statutory review procedures is to be implied, don't the justifications for implied exclusivity also require a very broad reading of the legal disputes covered by the statutory review procedures? That is, shouldn't we read the review provisions broadly beyond their plain language so that the potential litigant will actually have a statutory review procedure to exhaust? Otherwise, more litigants will be able to go into district court because the statutory review procedures do not cover their dispute or, even worse, the litigant will be denied both administrative and judicial review. The concerns suggested by Whitney indicate that the statutory review procedure should be read broadly to encompass all legal disputes arising under the enabling statute.

162 379 U.S. at 420-21.
163 Id. at 422.
164 Id. at 419-20.
B. Judicial Decisions on Exhaustion Under the Act

The circuits are divided in their readiness to broadly or narrowly construe the Mine Safety Act's review provisions. The Fourth Circuit in *Bituminous Coal Operator's Association v. Secretary of the Interior* \(^{165}\) narrowly construed the section 106 review procedures under the 1969 Act. In *Bituminous Coal*, the plaintiff coal operator companies challenged a Secretary of the Interior directive making coal operator companies responsible under section 104 for any violations committed by coal construction companies while working on the operator's property. In essence, the coal operator companies were challenging the Secretary of the Interior's determination that they were vicariously liable under the 1969 Act for violations committed by the coal construction companies with which they had contracts. Coal operators will often contract with coal construction firms to build or repair surface support and processing facilities for the underground mine. Because the 1969 Act, like the Mine Safety Act, imposes citations upon an "operator," the dispute was whether construction companies are "operators" and whether the construction companies being "operators" relieved the owner-operator companies from responsibility for violations committed by the construction companies.

Judge Butzner, writing for the *Bituminous Coal* court, ruled that both coal operator companies and coal construction companies could be cited under the 1969 Act for section 104 violations committed by the construction company. \(^{165}\) Butzner made this ruling after first upholding the district court's jurisdiction over the suit: "But in this case, which deals with pre-enforcement review, the procedure set forth in § 816(a) is not appropriate because no administrative record has been developed .... Because the Act neither states nor implies that § 816(a) furnishes the exclusive procedure judicial review, other procedures are not precluded." \(^{167}\)

*Bituminous Coal* represents a liberalization of the Fourth Circuit's holding in *Sink v. Morton*. \(^{168}\) Although never directly confronting the issue of whether exhaustion is required if "irreparable harm" concededly exists, the *Sink* court did construe the meaning of "irreparable harm" very narrowly. The court ruled that "[i]rreparable harm, presupposes the absence of an available remedy for relief, whether administrative or judicial." \(^{169}\) Because the aggrieved operator could apply for a temporary stay of the withdrawal order which he was contesting in *Sink*, the operator did not face irreparable harm pending the outcome of the administrative review proceedings. A stay of the withdrawal order would allow the operator continued use of his mine property while he exhausted his administrative remedies.

\(^{165}\) 547 F.2d 240 (4th Cir. 1977).
\(^{166}\) Id. at 245-47.
\(^{167}\) Id. at 243.
\(^{168}\) 529 F.2d 601 (4th Cir. 1975).
\(^{169}\) Id. at 604.
Cases in the Tenth, Third and District of Columbia Circuits give a broader interpretation of the statutory review procedures in order to require exhaustion of remedies. The Tenth Circuit case of American Coal Co. v. United States employs a particularly broad construction. In American Coal, a 25-foot long section of the roof collapsed in plaintiff's mine, but without injuring or entrapping any miners. Under section 103(k) the inspector “may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine” after such an incident. Pursuant to this power, the inspector in American Coal ordered a large section of the mine closed. Because section 105 provides for review of section 104, but not section 103 withdrawal orders, the Mine Safety Act did not explicitly provide for administrative or judicial review of this order. Plaintiff therefore sued in federal district court to enjoin the inspector's order. The American Coal court responded:

It is true that within the four corners of 30 U.S.C. § 813(k) there is no mention of review, be it administrative review or otherwise, of orders entered under the authority of that statute. . . . We do not believe, however, that merely because 30 U.S.C. § 813(k) makes no specific reference to administrative review, such omission means that there is no administrative review. A reading of the entire Act, coupled with its legislative history, leads us to conclude that the action taken by Inspector Jones under 30 U.S.C. § 813(k) was subject, first, to administrative review, with final action by the Review Commission to then be subject to judicial review in the appropriate Court of Appeals under 30 U.S.C. § 816. It is on this basis that we conclude the district court did not have subject matter jurisdiction.

The court relied upon the following statement in the legislative history to conclude that the review procedures must be read broadly: “The Commission serves as the ultimate administrative review body for disputed cases arising under the new mine safety act. An operator or affected party or employee representative may appeal to the Commission the issuance of a closure order or of any proposed penalty.”

The Third Circuit case of Lucas v. Morton imposes a rigorous exhaustion requirement. In Lucas, the plaintiff alleged in district court that his inability to obtain administrative review of the citation's validity prior to expiration of the abatement period was a due process violation and justified nonexhaustion of administrative remedies. Plaintiff also alleged that without a prior administrative hearing he was forced to choose between making expensive abatement repairs that he did not believe to be legally required in the

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110 639 F.2d 659 (10th Cir. 1981).
112 639 F.2d at 660-61.
113 Id. at 661 (emphasis added) (citing S. REP. No. 181, supra note 43, at 13).
first place or facing the imposition of sanctions for noncompliance without having a prior opportunity to challenge the citation's validity.

The *Lucas* court agreed that such a choice without a prior hearing did present due process concerns. However, the court found that section 104(h) permits the Secretary to modify the citation so as to extend the abatement period until an administrative hearing was held. Also, the agency in *Lucas* stated that it was reviewing and modifying some of the mandatory standards to which plaintiff objected and which led to the citation. The court found on the basis of this agency policy: “This development and the vacation of the *Lucas* 104(a) withdrawal order through administrative action indicate that there is a possibility, if indeed not a probability, that the specific grievance of the plaintiffs in this case may be satisfactorily resolved by the departmental hearing method.” *Lucas*, therefore, indicates that the possibility of administrative relief justifies requiring exhaustion of remedies, even if relief during administrative review is not probable.

Cases in the District of Columbia Circuit have issued decisions contrary to the Fourth Circuit's *Bituminous Coal* decision. Judge Gesell held in *Bituminous Coal Operators' Association v. Marshall* that a preenforcement “interpretative bulletin” issued by the Secretary is not reviewable in federal district court. In *Coal Operators*, plaintiffs challenged the Secretary's bulletin which allows miners or miners' representatives to accompany inspectors on all inspections, even those more frequent than the four mandated by section 103. Additionally, the bulletin provided that under section 103(f) opera-

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175 *Id.* at 903-04. *Lucas* arose over the Secretary of the Interior's regulations, 36 Fed. Reg. 9,364 (1971) (revised by 36 Fed. Reg. 13,142 (1971)), requiring roll bar protection and back-up warning devices for surface strip mining vehicles. The mine operator challenged the need for the safety devices and the validity of the new regulations. Because of the cost of these devices and the mine operator opposition to their installation, the agency decided to reconsider its position.

176 *Id.* at 905 (emphasis added).

177 In his motion to dismiss brief in *Council of the S. Mountains, Inc. v. Donovan*, the Secretary of Labor argued that if a “colorable” claim could be made that the Act's review provisions covered this dispute, plaintiff must attempt to exhaust the statutory procedures. Defendant Secretary of Labor's motion to dismiss brief at 16-21. *Council of the S. Mountains, Inc. v. Donovan*, 516 F. Supp. 955 (D.D.C. 1981). However, when the United Mine Workers of America attempted to exhaust the statutory procedures by attempting to challenge before the Commission the inspector's failure to issue a § 104(d) unwarrantable failure citation, the Secretary changed his position. Whereas the Secretary in *Council of the S. Mountains* attempted to demonstrate the Commission's potential subject matter jurisdiction over miner challenges to underenforcement, in the later *Garland Coal* case the Secretary argued that the Commission lacked subject matter jurisdiction over such challenges. Defendant Secretary of Labor's reply brief at 12-15. *UMWA v. Secretary of Labor*, 5 FMSHRC 807, reprinted in 2 MINE SAFETY & HEALTH REP. (BNA) 2097 (1983) (*Garland Coal*).

178 547 F.2d 240.


tors must compensate accompanying miners for inspections in excess of the mandated four inspections.

Judge Gesell ruled that the district court lacked jurisdiction over the challenge, notwithstanding the absence in section 105 or section 106 of any provision for administrative or judicial review of interpretative bulletins. He found that coal operators could receive adequate review through the Mine Safety Act’s enforcement procedures. Under section 104(a) the Secretary may issue citations both for violations of mandatory standards and for violations of his regulations. By either refusing to allow miners to accompany inspectors on the more frequent inspections or by refusing to pay the miners for such accompaniment, the mine operators could instigate a section 104(a) citation. This citation would be reviewable under section 105 and section 106 and during those review proceedings the mine operators could challenge the bulletin’s validity.

Judge Gesell found the Mine Safety Act’s review procedures to be boundless in their coverage of disputes:

The structure of the Act in this instance makes it quite clear that Congress intended that all legal challenges to the Act, to its enforcement and to any regulations promulgated thereunder be heard by the Federal Courts of Appeals, not by Federal District Courts . . . . The Act, moreover, does not limit the nature of the issues—be they factual or legal—which the Commission or the Courts of Appeals may entertain. Consequently, all of the plaintiff’s claims may be raised in those forums. This fact further supports the conclusion that the avenues of review provided by the Act are exclusive.

However, in Association of Bituminous Contractors, Inc. v. Andrus, Judge MacKinnon held that a federal district court had jurisdiction under the 1969 Act to issue a declaratory judgment on whether a coal construction company fell within the 1969 Act’s definition of an “operator.” Bituminous Contractors arose from the Interior Board of Mine Operation Appeal’s decision in Affinity Mining Company Keystone No. 5 Mine, which dismissed the imposition of a civil penalty upon the coal operator company that was the only party defendant in Affinity Mining. The Interior Board held that it was the coal construction company that was the offending party and that should be fined. The plaintiff coal construction companies in Bituminous Contractors sought to overturn Affinity Mining in federal district court in order to prevent future impositions of civil penalties upon coal construction companies.

Judge MacKinnon sustained district court jurisdiction by relying upon

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181 Id. at 353-54.
182 Id. at 352-54 (emphasis added).
the 1969 Act's section 106 provision that: "Any order or decision issued by the Secretary or the Panel under this chapter, except an order or decision under section 819(a) of this title, shall be subject to judicial review..." 106 30 U.S.C. § 819(a) provided that all civil penalties were subject to de novo district court review when the Secretary of the Interior brings an enforcement action to collect unpaid civil penalties. Judge MacKinnon reasoned that Affinity Mining's dismissal of the civil penalty assessment against the coal operator company precluded a subsequent section 109(a) enforcement action in district court. Because section 106 expressly precludes review of section 109(a) orders or decisions, review of civil penalties was not available under that section either. The unavailability to the construction companies of either section 109(a) district court review or section 106 appeals court review, left the construction companies without an avenue for judicially reviewing the Affinity Mining decision under the 1969 Act's statutory review procedures. Therefore, there were no statutory review procedures for the construction companies to exhaust. As such, nonstatutory review in federal district court was available to the construction companies.

Judge Leventhal's concurring opinion in Bituminous Contractors argued for a narrower holding. Leventhal concluded that section 106's review provisions are exclusive unless section 106 expressly provides otherwise. 118 Thus, section 106's express preclusion of appeals court review of section 109(a) civil penalty assessments was sufficient to resolve the case and sustain the district court's jurisdiction. 117

Finally, Council of the Southern Mountains, Inc. v. Donovan 118 is the most recent case considering district court jurisdiction under the Mine Safety Act. In Southern Mountains, plaintiff miners' representative sought injunctive and declaratory relief requiring the Secretary to issue a section 104(d) unwarrantable failure citation whenever the inspector made the requisite findings. 119 Defendant Secretary argued that the section 105 and section 106 review procedures were exclusive even if section 105(d) does not expressly grant miners or their representatives the right to challenge the Secretary's failure to issue a citation. The Secretary argued that a "colorable" claim of

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107 Id. at 865 n.8.
108 Id. at 867.
110 Id. at 958. Plaintiff miners representative, the Council of the Southern Mountains, argued that inspectors made the requisite findings for issuance of the § 104(d) citation. In proposing a civil penalty assessment, the inspector must consider the factors listed in § 110(i), 30 U.S.C. § 820(i) (Supp. V 1981), including the operator's possible negligence in permitting the violation and the gravity of the violation. Plaintiff argued that because the inspector made the requisite findings of negligence and gravity for civil penalty purposes, the inspector has also made the requisite findings for the purpose of issuing a § 104(d) unwarrantable failure citation.
available section 105 administrative review required exhaustion of the statutory remedies.\textsuperscript{190}

Judge Harold Greene's decision in \textit{Southern Mountains} followed Judge Gesell's lead in \textit{Coal Operators}\textsuperscript{94} by requiring exhaustion of the Act's review procedures. Judge Greene wrote, "a mine operator or miner representative wishing to contest the issuance by the Secretary of a citation or an order shall be heard before the Commission."\textsuperscript{192} Because section 105(d) does not expressly provide for miner challenges to the nonissuance of a citation or to the type of citation issued, Greene read section 105(d) beyond its plain words to expand section 105 reviewability of miner challenges. By reading the Act's review procedures broadly to cover the legal dispute in \textit{Southern Mountains}, Judge Greene then ruled that \textit{Whitney National Bank}'s implied exclusivity of statutory remedies principle applied and that the district court lacked jurisdiction over the suit.\textsuperscript{193}

C. \textbf{Underpinnings of the Exhaustion Requirement}

We may critically assess the correctness of the above-described cases when the miner is the litigant by carefully reviewing the exhaustion requirement and implied exclusivity of remedies principle. \textit{Myers v. Bethlehem Shipbuilding Corporation}\textsuperscript{94} is the Supreme Court's leading case on the exhaustion requirement.\textsuperscript{195} In \textit{Bethlehem Shipbuilding}, plaintiff Bethlehem Shipbuilding Corporation argued that it was not a business engaged in interstate commerce. Therefore, the NLRB's enforcement action against it was beyond the NLRB's subject matter jurisdiction. Bethlehem Shipbuilding Corporation alleged irreparable harm from the allegedly illegal NLRB proceeding because of the litigation costs it was incurring and the damage to its employer-employee relations. Notwithstanding the possibility that the NLRB was conducting an illegal proceeding to Bethlehem Shipbuilding Corporation's irreparable harm, Justice Brandeis ruled for the Court that Bethlehem Shipbuilding Corporation must exhaust its remedies by defending itself in the NLRB's proceedings. Brandeis wrote:

Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative

\\textsuperscript{190} See supra note 177.
\textsuperscript{191} 82 F.R.D. 350.
\textsuperscript{192} 516 F. Supp. at 958 (emphasis added).
\textsuperscript{193} \textit{Id.} at 959.
\textsuperscript{194} 303 U.S. 41 (1938).
\textsuperscript{195} E.g. Sterling Drug, Inc. v. Weinberger, 509 F.2d 1236, 1239 (2nd Cir. 1975) (rejected plaintiff's argument that \textit{Leedom}, 358 U.S. 184, had made \textit{Bethlehem Shipbuilding}, 303 U.S. 41, "old hat". Instead, the \textit{Sterling Drug} court ruled that \textit{Bethlehem Shipbuilding} provides the general rule on the exhaustion issue and that \textit{Leedom} is a narrow exception to that rule.).
hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact. 196

Whitney National Bank extended Bethlehem Shipbuilding's exhaustion requirement by making the statutory review procedures impliedly exclusive. 197 In Whitney, plaintiff Bank of New Orleans sued in a federal district court to enjoin the Comptroller of the Currency from approving a bank holding company's (Whitney Holding Company) purchase of a newly formed bank (Whitney-Jefferson Bank) under the Bank Holding Company Act of 1956 (Holding Company Act). 198 Whitney Holding Company was itself formed by Whitney National Bank which resided in a different parish from the Whitney-Jefferson Bank. Plaintiff Bank of New Orleans argued that section 7 of the Holding Company Act prohibited the Comptroller's approval of the Whitney Holding Company purchase if the purchase violates state law. Plaintiffs alleged that Whitney National Bank's formation of the Whitney Holding Company in order to purchase the Whitney-Jefferson Bank was intended solely to circumvent Louisiana law which prohibited banks from operating in more than one parish.

The Supreme Court reversed the district court's grant of an injunction because the Federal Reserve Board, not the Comptroller, was the ultimate decision-maker. When plaintiffs proceeded against the Comptroller in district court, they necessarily failed to employ the available statutory review procedures before the Federal Reserve Board. Because the statute provided review procedures before the Federal Reserve Board, the Whitney court held that the district court lacked jurisdiction to issue an injunction in this case. The Whitney court reasoned that where the available review procedures afford the agency an opportunity to use its expertise, those procedures are exclusive as a matter of judicial construction. Thus, even if the statutory review procedures do not expressly provide that they are exclusive, the Court will infer such exclusivity to protect the Bethlehem Shipbuilding exhaustion requirement.

Bethlehem Shipbuilding's exhaustion requirement, as applied and extended in the Whitney case, was too much for dissenting Justices Douglas and Black to accept. Bethlehem Shipbuilding and Whitney rely upon the statutory review procedure's grant of federal appeals court review to insure that illegal agency action is ultimately overturned. Agency action beyond its subject matter jurisdiction or erroneous as a matter of law will be struck down at the appeals court level. But this guarantee of ultimate judicial review does not satisfy Douglas or Black. Until such appellate review, the agen-

196 303 U.S. at 51-52.
cy is without judicial proscription as to the types of illegal conduct in which it may engage and as to the practical impact which its illegal conduct will have. As the Douglas dissent in Whitney puts it:

This threat [by the Comptroller to approve the Whitney Holding Company acquisition once the injunction is dissolved] makes a mockery of the Solicitor General's assurance that the parties have a full and adequate remedy in the Court of Appeals review of the Board's order . . . . For without the injunction issued by the District Court the Comptroller candidly states that the new branch bank would be in business, flouting the new Louisiana law, whose prototype we have already sustained.

The ruling of the Court that the District Court had no jurisdiction in this case promises serious consequences. It means there may be an hiatus during which the Comptroller can take the law into his own hands without restraint from anyone.193

D. Review under the Exhaustion Requirement

As a practical matter, appeals court review might never occur and the agency's illegal action will permanently affect the status quo. Litigants exhausted by prolonged or expensive administrative review proceedings might lack sufficient resources to undertake an appeals court suit. Just as importantly, illegal agency action or inaction might so affect or maintain the status quo prior to appeals court review, that vindicating the litigant's position in the appeals court provides little practical relief.

In fairness to the Bethlehem Shipbuilding and Whitney Courts, the exhaustion requirement serves the enabling statute's purpose in many cases, even with its attendant delays and expenses.202 But the judicial decision imposing this requirement should not be, as Black argues in his dissent, “an entirely technical one.”201 Both Bethlehem Shipbuilding and Whitney can be used in that fashion. Bethlehem Shipbuilding imposes the exhaustion requirement after finding that Congress intended the NLRA's statutory review procedure to be exclusive:

The District Court is without jurisdiction to enjoin hearings because the power “to prevent any person from engaging in any unfair practice affecting commerce,” has been vested by Congress in the Board and the Circuit Court of Appeals . . . . The grant of that exclusive power is constitutional, because the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board.202

193 379 U.S. at 429-30 (emphasis added).
201 See generally L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 433-437 (1965) (Bethlehem Shipbuilding Corporation brought the Myers v. Bethlehem Shipbuilding Co. case as part of a concerted action to destroy the NLRA).
202 379 U.S. at 432.
203 303 U.S. at 48.
Justice Brandeis here treats the exclusivity of remedies issue—and necessarily also the exhaustion requirement which this exclusivity protects—in terms of due process concerns. Because the NLRB's action receives full judicial review during enforcement proceedings, the exclusivity requirement, and therefore the exhaustion requirement, does not deny due process.

In many cases the Bethlehem Shipbuilding reasoning serves the statute's overall purpose. When, as in Bethlehem Shipbuilding, a large corporation allegedly commits an unfair labor practice by dominating an employee organization, restricting the employer to the statutory review procedures probably complies with the Congress' intent. But this conclusion is based upon the NLRA's overall purpose, rather than just upon the presence of a particular type of statutory review procedure. After all, in passing the NLRA, Congress chose to make employers the regulated party. Congress presumably weighed the equities of the legislative scheme created in the NLRA and chose to impose upon employers restrictions in their conduct toward employees and the burden of defending unfair labor practice charges before the NLRB.

But Congress' power to impose such restrictions and burdens upon employers is not unlimited. The limitation is the protection of life, liberty and property under the Due Process Clause. In this sense, Brandeis' treatment of the exclusivity and exhaustion issues as being coextensive with due process issues is correct. Due process concerns provide the outer limit of the exclusivity and exhaustion principles. The exclusivity principle cannot be a basis for denying any judicial review when life, liberty or property is being deprived by government action. Similarly, the exhaustion requirement cannot be so burdensome as to itself work a deprivation of life, liberty or property.

However, due process concerns are not necessarily coextensive with a statute's overall purpose if the statute is remedial in nature. Bethlehem Ship-

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203 Id. at 45.
204 Cf. National Labor Relations Board v. Carlisle Lumber Co., 94 F.2d 138, 145-46 (9th Cir. 1937) (employer's right of discharge "is subject to the limitations that the Congress may prescribe, if it regulates, burdens, or obstructs interstate commerce."), cert. denied, 304 U.S. 575 (1938). See generally H.R. REP. NO. 1147, 74th Cong., 1st Sess., reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3046, 3049-54 (1949) (Congress enacted the NLRA and created the NLRB to overcome the resistance of "reactionary employers").
205 Because due process concerns provide an outer limit to the exhaustion and exclusivity principles, an agency must be more flexible in its enforcement activities. In cases such as Lucas, 358 F. Supp. 900 (W.D. Pa. 1973), and Sink, 529 F.2d 601 (4th Cir. 1975), the crucial factor seems to be the ability to preserve the regulated party's status quo during statutory review proceedings. Either the mine operator is not required to undertake abatement costs, as in Lucas, or as in Sink, the mine operator may obtain a stay of the withdrawal order while the statutory proceedings are pending. Hence other than the mine operator's litigation expenses, the mine operator is free to use his property as before while exhausting statutory remedies. As an outer limit, the due process clause sharply limits the exhaustion requirement's impact upon the regulated party's prior business activities. Thus the role for the due process clause as an outer limit should not be underestimated.
building's analysis of the exclusivity and exhaustion principles in terms of due process concerns breaks down when applied to the protected, rather than regulated, party. By requiring the protected party to exhaust the statutory remedies, the court might be imposing a burden that Congress did not intend to impose. By passing remedial legislation for a party's especial benefit, Congress probably intends to confer a benefit upon or relieve a hardship for the protected party, rather than imposing a restriction or burden as with a regulated party. While Congress chooses to impose the burden of administrative proceedings upon a regulated party because Congress believes the party to have sufficient resources to undertake those proceedings, we cannot transfer this assumption to protected parties such as individual workers under the OSH Act or the Mine Safety Act. Presumably, such statutes are enacted because these parties were historically unable to marshal sufficient resources to protect their interests and so Congress felt constrained to intervene. Thus it strains common sense to assume that because the Mine Safety Act imposes the burden of seeking administrative relief upon the mine operator that a similar burden is placed upon the miner.

See H. R. Rep. No. 1147, supra note 204.

The case of Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975), focused upon the burdens Congress imposed upon mine operators with the imminent danger closure procedures and the reason for this burden. The Old Ben Coal court noted that the primary purpose of the 1969 Act is to protect the miners health and safety. Id. at 31. Congress gave the inspector broad powers in order to prevent all mine accidents, not just those which attract national attention. To effectuate this congressional purpose and promote human safety—even at the expense of the mine operator's financial interests—the courts must defer to the inspector's findings. The court wrote:

Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb. On the other hand, the coal mine operator is principally concerned with dollars and profits. We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. We find no such evidence here.

Id. at 31. As such, Congress deliberately imposed a severe financial burdens upon the mine operator for the sake of the miner:

When Congress acted to vest inspectors with power to order a coal mine owner immediately to withdraw employees from a mine when the inspectors find imminent danger of a disaster existing, Congress was fully informed that the coal mine owner would suffer economic loss as a result of correcting the dangerous conditions before permitting the employees to return to work . . . . Congress meant for inspectors to have the authority it gave them . . . . The costs to coal mine owners in dollars is inconsequential compared to the risk of the loss of lives of the coal miners.

Id. at 36-37. Also note that in 1977 Congress deleted statutory language authorizing de novo district court review of civil penalties imposed upon mine operators. Now, all operator civil penalty challenges must be made under § 105 of the Act's administrative review provisions. Under the current Act, the district court only has jurisdiction to collect unpaid civil penalties plus accrued interest. 30 U.S.C. § 820 (j) (Supp. IV 1980). Congress repealed the 1969 Act's provision for de novo district court review because mine operators had used the district courts to delay collections. This, Congress determined, undermined the deterrence effect of the mandatory civil penalties. E.g., S. Rep. No. 181 supra note 43, at 44.
Also, due process concerns do not serve as an analytical tool for defining the outer limit for the protected party's exhaustion requirement as they do for the regulated party. The statute's especial beneficiary often seeks to effectuate the remedial statute's intended change in the status quo with a hoped-for improvement in the party's social, economic or legal situation. The regulated party by comparison often seeks to protect a current life, liberty or property right by preventing the remedial statute's changes in the status quo. While agency inaction can leave unaffected the regulated party's rights, agency inaction often frustrates the protected party's hoped-for benefit.

Agency action against the regulated party infringes upon constitutional rights and raises due process issues. But unless the remedial statute creates a vested statutory property interest in the protected party such as with welfare payments, then the protected party's hoped-for benefits do not represent an interest protected by the Due Process Clause. While due process concerns prevent the exhaustion requirement from extinguishing the regulated party's property rights, the protected party's lack of due process protections permits the exhaustion requirement to completely extinguish the remedial statute's intended benefits.

This analysis applies to the Mine Safety Act. Courts construe the Act as a remedial statute for the especial benefits of the miners. Although miners might possess statutory "rights" to Category I enforcement actions, Pinkney v. Ohio EPA indicates that miners do not possess an interest in the Act's intended benefits protectable under the Due Process Clause. Thus, forcing a miner to exhaust his statutory remedies under section 105(d), section 107(e), and section 106(a) whenever the inspector or Secretary refuses to issue a section 104(d) unwarrantable failure withdrawal order after making the requisite findings could deny miners the intended statutory benefit of safer working conditions. Limited financial resources could prevent miners from challenging the inspector's or the Secretary's actions starting at the administrative law judge level, through the Commission level, and then up to the appeals court level. The delay in pursuing a case through these levels could make any relief too late to prevent an injury and, at any rate, subjects miners to increased hazards during the interim.

E. Limitations to the Exhaustion Requirement

The Leedom exception cases implicitly react to the problem that the protected party lacks a reasonable limitation upon the burdens imposed by the

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204 See supra note 205.
205 E.g., Old Ben Coal Corp., 523 F.2d 25 at 31.
207 Mine Safety Act §§ 105(a), 107(e), 105(d), 113(d), 106(a), 30 U.S.C. §§ 815(a), 817(e), 815(d), 823(d), 816(a) (Supp. V 1981).
MINER AS LITIGANT

exhaustion and exclusivity principles. *Leedom*, of course, involved a protected party (professional employees) who did not possess a constitutionally protected right to a bargaining unit composed of professional employees. Therefore, the protected party did not have a due process right to judicial review of the NLRB's creation of a mixed bargaining unit without a prior professional employee vote. As such, the exclusivity principle in *Leedom* threatened to foreclose judicial review completely and to deny the professional employees the voice in self-representation that Congress intended. *Leedom* responded to this threat by finding a statutory "right" in the professional employees and by creating a presumption that all statutory "rights" are enforceable through federal judicial review.\(^{213}\) Hence, *Leedom*, by creating a statutory "right" which is not necessarily the same as a constitutional or substantive right, expanded the range of statutory interests which are judicially reviewable notwithstanding the exclusivity principle.

*Oestereich v. Selective Service System Local Board No. 11*\(^{214}\) confronts the problem of finding some limitation to the burdens imposed by the exhaustion principle. In *Oestereich*, the Court ruled that the plaintiff ministry student possessed a statutory "right" to the draft exemption unlawfully revoked by the Selective Service Board. Thus, *Oestereich* is similar to *Leedom* because the plaintiff's statutory "right" was violated. However, in *Oestereich* the statute did provide for ultimate judicial review of the Selective Service Board's action. Plaintiff could wait until he received an induction notice, could report to the induction center, and then could refuse induction. Upon being arrested the plaintiff could bring a writ of habeas corpus challenging the induction notice as resulting from the illegal cancellation of his exemption. Alternatively, at his criminal trial for refusing induction, the plaintiff could raise the defense that the induction notice was invalid because the exemption was invalidly cancelled.\(^{215}\) Thus, *Oestereich* did not present a case in which the exclusivity principle threatened to prevent judicial review of the plaintiff's statutory "right." *Oestereich* instead presented the issue of whether the plaintiff could enjoin the Selective Service Board's cancellation of his exemption without exhausting the statute's prescribed remedies. Justice Douglas, writing for the *Oestereich* Court, rejected the need for the plaintiff to exhaust the statutory remedies. Requiring exhaustion of remedies, Douglas wrote, is "to construe the [Selective Service] Act with unnecessary harshness."\(^{216}\)

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\(^{213}\) *Leedom*, 358 U.S. at 190. The presumption that a legal right is judicially enforceable goes back to *Marbury v. Madison* where Chief Justice Marshall said that "where there is a legal right, there is also a legal remedy by suit, or action by law, whenever that right is invaded." 5 U.S. 368, 378, 1 Cranch. 137, 163 (1803) (quoting *BLACKSTONE*, VOL. III COMMENTARIES 23).

\(^{214}\) 393 U.S. 233 (1968).

\(^{215}\) *Id.*

\(^{216}\) *Id.* at 238.
Justice Douglas incorporates into his *Oestereich* opinion the concerns expressed in his *Whitney National Bank* dissent. In both opinions Douglas objects to an agency's use of the exhaustion requirement to cause significant changes in the status quo without lawful authority and to remove legal proscriptions upon wrongful agency conduct. Douglas wrote in *Oestereich*:

> We deal with conduct of a local Board that is basically lawless. It is no different in constitutional implications from a case where induction of an ordained minister or other clearly exempt person is ordered (a) to retaliate against the person because of his political views or (b) to bear down on him for his religious views or his racial attitudes or (c) to get him out of town so that the amorous interests of a Board member might be better served.

The statutory review procedure itself would cause a drastic change in the status quo. Plaintiff, a free individual, may invoke the statutory review procedure through a writ of habeas corpus or criminal trial defense only by instigating his arrest for refusing induction.

A basic problem with *Leedom* is the creation of an exception to the *Bethlehem Shipbuilding* exhaustion requirement and *Whitney* exclusivity principle without relating this exception to the quality of statutory decision-making. While the exhaustion requirement and exclusivity principles attempt to preserve the statutory decision-making process, *Leedom* instead focuses upon the plaintiff's possession of a statutory "right." Thus, *Leedom* weighs the plaintiff's interest against the statutory review procedures and favors the plaintiff's interest when it reaches the level of being a statutory "right." No attempt is made to fashion an exception to the exhaustion requirement and exclusivity principle by considering the quality of future decision-making. Instead, *Leedom* considers only the past quality of agency decision-making by characterizing it as clearly erroneous or patently illegal.

In *McKart v. United States*, the Court confronts the task of relating the grant of an exception to the exhaustion requirement and exclusivity principle with the values underlying that requirement and principle. *McKart* arose under the Selective Service Act after the Selective Service Board cancelled defendant inductee's exemption as the sole surviving son of a family in which a parent was killed during military service. After the Selective Service Board cancelled defendant's exemption, the defendant failed to appeal the cancellation through the statutory channels and also failed to report for induction.

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218 393 U.S. at 237.
219 Justice Harlan's concurring opinion in *Oestereich* indicates that this very procedure of obtaining adjudicatory review may be unconstitutional. No person should be denied or be forced to surrender his liberty without a hearing in a competent forum. 393 U.S. at 243 n.6.
220 *Leedom*, 358 U.S. at 188.
duction. Subsequently, the federal government prosecuted defendant McKart, who attempted to raise the illegality of the cancellation of his exemption as a defense. The issue in McKart was whether the defendant's failure to challenge the Selective Service Board's cancellation through the administrative procedures foreclosed the defendant's challenge during his criminal trial. Thus, McKart raised the issue of permitting an exception to the exhaustion requirement to preserve a possible criminal defense, rather than to permit district court review prior to completion of an administrative review proceeding.

Justice Marshall, writing for the McKart court, permitted this exception after employing a test which balanced the plaintiff's burden in losing a criminal defense versus the burden to the statutory scheme in allowing McKart or similarly situated draft registrants to avoid exhausting the administrative remedies. Marshall stated the balancing test as follows:

[Use of the exhaustion doctrine in criminal cases can be exceedingly harsh. The defendant is often stripped of his only defense; he must go to jail without having a judicial review of an assertedly invalid order. This deprivation of judicial review occurs not when the affected person is affirmatively asking for assistance from the courts but when the Government is attempting to impose criminal sanctions on him. Such a result should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review . . . . Even if there is no such compelling interest when petitioner's case is viewed in isolation, we must also ask whether allowing all similarly situated registrants to bypass administrative appeal procedures would seriously impair the Selective Service System's ability to perform its functions.]

As this quote indicates, the inability to raise a defense to criminal prosecution imposes a severe burden on the defendant. By comparison, Marshall concluded that creating an exception to the exhaustion requirement in these situations imposed a lesser burden upon the statutory scheme or agency decision-making. As to agency decision-making, Marshall wrote that the dispute involved only purely legal issues—the legal basis of the exemption cancellation—and was not committed to the Board's discretion. As to the burden upon the statutory scheme, Marshall concluded that this exception would not encourage similarly situated registrants to ignore their administrative remedies if their draft classifications are changed. The fear of actual induction or facing criminal prosecution would encourage most registrants to pursue available administrative remedies. Marshall therefore wrote: "Accordingly, in the present case, where there appears no significant interest to be served

\[ Id. at 197 (emphasis added). \]
\[ Id. at 197-98. The McKart Court found that whether the Selective Service Act entitled defendant McKart to a draft exemption was purely an issue of statutory construction not within the Selective Service Board's discretion.\]
in having the System decide the issue before it reaches the courts, we do not believe that petitioner's failure to appeal his classification should foreclose all judicial review."

The McKart balancing test presents no logical barrier to defining the litigant's interest according to concerns inherent in the statutory scheme. In Leedom, for example, the litigant professional employees raised a concern inherent to the statutory scheme: employee representation and bargaining through representatives of their own choosing. Under the McKart test, the interest of professional employees in self-representation through an homogeneous bargaining unit would be weighed against the burden to the statutory scheme and statutory decision-making in permitting district court review. Presumably, this burden is minimal in Leedom because the NLRB had acted contrary to the statutory scheme and had already decided to create a mixed bargaining unit. Also, the statutory scheme of judicial review in the appellate courts is not burdened because such review was not available to the litigant professional employees. Thus the McKart test would support the Leedom outcome without having to characterize the litigant's interest as a statutory "right," although the litigant's possession of such a "right" argues for granting an exception.

Similarly, the McKart test presents no logical barrier to considering the litigant's peculiar expertise or role within the statutory scheme as a part of the litigant's interest. Such a consideration is of a two-fold nature. First, where the court would normally require exhaustion of remedies because the court lacks the expertise necessary to make an independent finding, the court may weigh the possible assistance which the litigant could provide. Second, where the litigant seeks judicial action to compel or lay the groundwork for initiating the statutory review procedures, as in the Environmental Defense Fund cases, the court may give weight to the peculiar expertise which the litigant could bring to those subsequent proceedings and to the litigant's intended role in those subsequent proceedings.

IV. A PROPOSED MODEL

Assuming that a nonstatutory basis for jurisdiction exists, the issue confronting the federal district or appeals court is whether the Bethlehem Shipbuilding exhaustion requirement and the Whitney National Bank exclusivity of statutory procedures principle foreclose the court from assuming nonstatutory jurisdiction. Our review of Bethlehem Shipbuilding, Whitney National Bank, and the development of the Leedom cases up to McKart now allows us to propose a model for analyzing this issue.

224 Id. at 200.
225 See supra text accompanying notes 104-27.
A. Weighing the Litigant's Interests

The essential goal of this model is to resolve the issue by focusing upon the litigant's substantive position in the statutory scheme. This requires the court's initial consideration of: (1) the benefits or burdens which the statute confers or imposes upon the litigant; (2) the relationship of the litigant's suit to those benefits or burdens; and (3) the litigant's role in the statute's decision-making process. After making these initial determinations, the court should apply an expanded McKart balancing test so that the court's decision to grant an exception to the exhaustion requirement or exclusivity principle is related to the values underlying the requirement or principle.\(^{226}\) Identifying the nature of the litigant's interest for the McKart balancing test draws upon the initial determination described above. The litigant's statutory interest will be increased by his invocation of a benefit conferred by the statute and his role in the statute's decision-making scheme. Conversely, the litigant's statutory interest is severely diminished by a statutory intent to impose the burden of exhausting administrative remedies upon the litigant as a regulated party. Additionally, the court must determine whether the litigant's interest is increased or reduced by factors exogenous to the statute. A vested constitutional right, such as to free speech or due process, or an important legal goal, such as allowing a criminal defendant to present an available defense, should be given weight.

Against the litigant's interest must be weighed the burden to the statutory scheme and decision-making process in permitting similarly situated litigants to avoid the statutory remedies. An initial consideration, of course, is whether the statutory remedies are available to the litigant. Another consideration should be a determination of whether the litigant has a practical interest in using nonstatutory judicial review to obstruct, rather than advance, the effectuation of the statute's congressional purpose. Added to these considerations are the values underlying the exhaustion requirement and the exclusivity principle. One of the most important of these is allowing the agency to apply its expertise to any complex factual issues underlying the legal dispute.

B. Basis for Review

As mentioned above, the court must initially determine whether the statute confers a benefit or a burden upon the litigant. This initially requires the

\(^{226}\) If it is clear to the court that there are no statutory procedures to exhaust or make exclusive, the court may logically give a zero weighting in favor of requiring exhaustion of remedies. However, if the statutory procedures are ambiguous in their coverage of this legal dispute, the court may go forward with this balancing test as described. That is, in deciding whether to construe the statutory procedures to cover this dispute as a prelude to requiring exhaustion, the court may employ this balancing test.
court to decide if the statute is remedial in nature according to whether: (1) the statute reasonably identifies a class of persons whose rights, interests, or needs it is intended to protect or benefit; (2) the statute is designed to effectuate a change in the status quo so as to enhance the relative or absolute position—socially or economically—of the protected class; and (3) Congress enacted the statute because the protected class was previously unable to advance its position at common law or under traditional constitutional doctrines.

Next, the court should determine whether the litigant is a member of the statute's protected class and is litigating an interest which the statute, in its remedial aspects, is intended to protect. This involves an inquiry into whether: (1) the litigant is in court as a member of the protected class; (2) the litigant is suing to vindicate an interest which the statute is intended to protect; and (3) the litigant seeks a change in the status quo, which the exhaustion of remedies would delay or frustrate, rather than a preservation of the status quo. If the litigant seeks to preserve the status quo and the means exist for the status quo's preservation while the statutory procedures are exhausted, the court should probably decline review. This follows from the litigant's lacking an interest to place into the McKart balancing test since the litigant has nothing to lose by exhausting his remedies.

The court must now determine the litigant's role in the statutory decision-making process and whether the court's assumption of jurisdiction will advance such decision-making. The court may first assess whether the litigant possesses a special expertise within the statutory scheme. That is, does the statute require the consideration of a factor or issue within the litigant's special knowledge or experience? If the litigant possesses special expertise, the court must still assess whether its assumption of jurisdiction will help to exploit that expertise. The court must ask whether: (1) the litigant's expertise can compensate for the agency's not rendering a prior finding; (2) the litigant is merely asking the court to compel the initiation of administration proceedings in which the litigant will participate; or (3) the dispute is already within the court's expertise. By asking these questions, the court can determine whether the litigant is intended to have a special participatory role in future administrative proceedings. If such a future role is intended, the court may decide that it can advance future statutory decision-making by directing the agency to initiate review proceedings.

By making all of the above determinations, the court is able to assess the litigant's statutory interest. Added to this interest may be any exogenous interests such as the protection of a due process right. Together, the litigant's statutory interest and exogenous interest constitute the litigant's interest for the purpose of an expanded McKart balancing test. On the other side are

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227 See supra text accompanying notes 41-45 and 104-27.
228 See supra text accompanying notes 104-27.
the traditional concerns underlying the exhaustion requirement and the exclusivity principle: (1) agency expertise in factual matters; (2) the need for agency autonomy and discretion; (3) the danger of conflicting litigation; and (4) the court’s inability to prescribe an effective legal remedy. We must note that this balancing need not produce an all or nothing determination as to whether to allow the litigant’s suit. This balancing would also allow the court to limit or expand the scope of review, burdens of proof, or selection of remedies while still granting jurisdiction over the suit.

C. Applying the Test

We may now return to the cases arising under the federal mine safety legislation. In light of the above balancing test, the courts properly dismissed the case for lack of jurisdiction in Sink v. Morton, American Coal Co. v. United States, Lucas v. Morton and Bituminous Coal Operators’ Ass’n v. Marshall. In each of these four cases, the litigant was a mine operator rather than a miner. As such, the mine operator raised an independent economic interest, rather than a remedial statutory interest. The litigant therefore, was a regulated party upon whom Congress presumably intended to place the burden of exhausting the statutory remedies. Furthermore, the litigants in these four cases were seeking to preserve the status quo pending conclusion of the statutory review process and the courts in these cases indicated a method for so preserving the status quo. As such, the burden to these litigants in exhausting the statutory procedures was slight and the balance under a McKart test favored dismissal.

The cases of Bituminous Coal Operators’ Ass’n v. Secretary of the Interior and Association of Bituminous Contractors v. Andrus sustained direct court jurisdiction in a suit brought by mine operators and mine contractors. Thus, the litigant was not a protected party. Sustaining direct court jurisdiction in Bituminous Contractors seems proper simply because there were no applicable statutory review procedures to exhaust or make exclusive. Section 106 at that time expressly precluded review of the issue raised. Analyzed within an expanded McKart balancing test, the plaintiff raised an independent economic interest for which there were no countervailing exhaustion or exclusivity interests.

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229 529 F.2d 601 (4th Cir. 1975); see supra text accompanying note 168.
230 639 F.2d 659 (10th Cir. 1981); see supra text accompanying notes 170-73.
232 82 F.R.D. 350 (D.D.C. 1979); see supra text accompanying notes 179-84.
233 547 F.2d 240 (4th Cir. 1977).
234 581 F.2d 853 (D.C. Cir. 1978); see supra text accompanying notes 183-87.
235 581 F.2d at 856-57.
236 Besides statutory review being unavailable under 30 U.S.C. § 816(a) (1976), there was also no opportunity to disrupt the agency decision-making process. By virtue of its decision in Affinity Mining Co., 80 I.D. 231, 235 (1972), the Interior Board had already decided that the coal construction company should be fined. Thus the agency decision maker had already rendered a decision.
Bituminous Coal on the other hand, could have been decided the opposite way with the court dismissing the case for lack of district court jurisdiction. Bituminous Coal, as with Lucas and Sink, involved a dispute in which the status quo might have been preserved pending the outcome of the statutory proceedings. Thus, the plaintiff’s burden to the administrative decision-making process was also minimal. Conversely, however, the burden to the administrative decision-making process was also minimal. According to Bituminous Coal, neither section 105 nor section 106 provided review of the Secretary’s promulgation of the disputed regulation. Hence, there were no expressly applicable review procedures to exhaust. Additionally, allowing the lawsuit imposed a minimal burden upon the statutory scheme. Bituminous Coal involved the validity of issuing fines under the 1969 Act to a mine operator for violations by a mine contractor who is performing work for the mine operators. However, the 1969 Act provided that a fined mine operator could challenge the fine either before the Commission or before a federal district court. Thus, Bituminous Coal really involved the issue of whether the mine operator could challenge this type of fine now (prior to issuance) or later (after issuance) in a federal district court. Thus, the particular forum was predetermined. Practically, it made sense to decide the issue now, rather than later. A decision as to who could be fined might enhance the deterrence value of the fines. At least one of the parties, the mine operator or the mine contractor, would eventually be subject to the fine. If that party is certain that he will be liable, he will have the clear incentive to prevent the violations. Also, a decision could clarify for the inspectors whom they may fine. As such, under the expanded McKart test, it would be possible, if not necessary, to uphold the Bituminous Coal decision.

The case of Council of the Southern Mountains, Inc. v. Donovan, which dismissed a case brought by a miner’s representative for lack of jurisdiction is more difficult to justify. Southern Mountains involved a protected party challenging the Secretary’s failure to issue the more stringent section 104(d) unwarrantable failure citation after making the requisite findings. The plaintiff alleged that the Secretary was undermining the deterrance value of the Mine Safety Act and subjecting miners to increased safety risks. Thus, the plaintiff raised a concern inherent in the statute—safer mines—and sought a
beneficial change in the status quo which the exhaustion of remedies would delay or frustrate completely.\textsuperscript{241}

On the other hand, this plaintiff's contribution to the statutory decision-making process is weaker in this case than in the usual case. Congress contemplates that the miner or miners' representative will contribute his special knowledge about this particular mine's conditions to the decision-making process. However, in \textit{Southern Mountains} the plaintiff alleged that the Secretary should issue a section 104(d) citation at all mines, not just at plaintiff's. Thus, the plaintiff's special knowledge about its mines plays less of a role within the context of the overall lawsuit.

As counterweights to the plaintiff's interests are the usual concerns that the Commission should be allowed to decide the factual issues underlying plaintiff's allegation that the inspector's findings for penalty assessment purposes constitute the requisite findings for citation issuance purposes. Thus, \textit{Southern Mountains} presented a significant ripeness issue because factual determinations requiring the Commission's expertise were involved.\textsuperscript{242}

However, in \textit{Southern Mountains} there are strong arguments for the district court's assuming jurisdiction in the suit. First, there is a serious doubt as to whether the Commission possesses jurisdiction to hear miner-initiated challenges or to provide adequate relief by directing the Secretary to issue the appropriate citations.\textsuperscript{243} Second, the alternative to the district court hearing a challenge to the Secretary's alleged general policy of not issuing section 104(d) citations,\textsuperscript{244} would be numerous individual challenges to the Secretary's failure to issue the appropriate citations. Plaintiff in \textit{Southern Mountains} alleged that the entire Mine Safety Act enforcement system had collapsed and

\textsuperscript{241} 516 F. Supp. at 960. Plaintiff alleged that the Secretary was engaged in a pattern or practice of refusing to issue a § 104(d) citation when the necessary findings were made. As such requiring exhaustion of remedies would work a financial hardship on the miners who must then litigate each separate failure of the Secretary to issue a § 104(d) citation. The court advised plaintiff to bring a test case before the Commission to determine if an inspector's penalty assessment findings could be used for citation issuance purposes by the court.

\textsuperscript{242} The ripeness issue, not discussed here, is the weak spot of the plaintiff's case. The court was clearly troubled at the prospect of deciding for itself whether an inspector's assessment findings may be used to determine the nature of the underlying violation for citation issuance purposes. 516 F. Supp. at 960. The court suggests that after the issue is resolved by the Commission favorable to the plaintiff, it might consider entertaining a similar suit. \textit{Id}.

\textsuperscript{243} \textit{See supra} text accompanying notes 38-40 and note 40.

\textsuperscript{244} However, \textit{see supra} notes 241-42. If the court's opinion is correct, it is because the court requires on ripeness grounds, a prior determination by the Commission that the inspector's penalty assessment findings may be used for citation issuance purposes. At that point the court would have the requisite inspector findings of a § 104(d) violation. But if the inspector findings issue is resolved, the court's primary objection on the grounds of lack of subject matter jurisdiction, 516 F. Supp. at 961, is untenable in this paper's analysis.
that this collapse was beyond the statutory review procedure's ability to cope. Thus, there are sufficient grounds under an expanded McKart balancing test for concluding that Southern Mountains was incorrectly decided.

CONCLUSION

In general, courts have failed to distinguish either the statutory interests of the protected party verses the regulated party or their intended roles in the statutory decision-making process. As a result, the courts apply the exhaustion requirement and exclusivity of remedies principle in a mechanical fashion without first determining whether Congress intended the protected party to bear the burden of exhausting administrative remedies or the risk of not obtaining judicial review under the exclusivity principle. Additionally, the courts have uncritically deferred to claims of agency expertise—especially where such expertise is intertwined with claims of prosecutorial discretion—without a prior analysis of the decision-making contributions which the litigant may make and which Congress intended for the litigant to make. Rather than undertaking a prior analysis of the litigant's interests in the statutory scheme and possible contribution to the statutory decision-making process, the courts, when necessary, have mitigated the exhaustion requirement and exclusivity principle by finding a statutory "right" in the litigant. By employing the statutory "right" concept, the courts have created a presumption of judicial review in the face of the exclusivity principle and have permitted nonexhaustion to avoid an excessively harsh result.

In the future, courts have the opportunity to focus instead upon the benefits and burdens to the statutory scheme entailed by the courts' assuming or denying jurisdiction. This new focus requires, in the first instance, an analysis of the relationship between the litigant's practical interests and the statutory scheme. Do the litigant's practical interests favor the rapid implementation of the statutory scheme or do his interests favor delay and obstruction? Second, this new focus requires an analysis of the litigant's intended contribution to the statutory decision-making process. If the litigant has a special expertise to bring to the decision-making process or a special role in that process, the court should decide whether assuming jurisdiction will, on balance, assist or harm the quality of statutory decision-making.

In adopting this new focus, courts may discover that the issue of whether the statutory review provisions cover this legal dispute is illusory. That is, a determination that the administrative review commission does have statutory jurisdiction in this dispute need not preclude the determination that the courts also have nonstatutory jurisdiction. Under this new focus, the real issue will be whether the courts' assuming nonstatutory jurisdiction will, on balance, assist in implementing the statutory scheme. As such, the courts may determine that their assumption of nonstatutory jurisdiction is compatible with the Review Commission's statutory jurisdiction.
Because the exclusivity principle is intended to protect the exhaustion requirement, when the courts adopt a flexible exhaustion analysis, they should also adopt a more flexible exclusivity analysis. By adopting a balancing test to determine whether to require the exhaustion of statutory remedies by this litigant, the courts will therefore adopt a balancing test to determine whether the statutory review procedures create concurrent, as opposed to exclusive, Review Commission jurisdiction.

When the courts conclude that they have concurrent nonstatutory jurisdiction to hear this type of litigant, they leave it to the litigant to decide whether to proceed before the Review Commission or to proceed instead before the courts. The litigant is therefore granted rapid access to the most convenient and effective forum. Given the miner's unique interests and role in the Mine Safety Act's statutory scheme, the courts may often conclude that when the miner is the litigant, such concurrent jurisdiction is appropriate.