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In the

Supreme Court of the United States

National Independent Coal Operator's Association, Et Al.,
Petitioners,

v.

Secretary Of The Interior, Et Al.,
Respondents.

No. 73-2066

and

Secretary Of The Interior,
Petitioner,

v.

Delta Mining, Inc., Et Al.,
Respondents.

No. 74-521

Washington, D. C.
October 6, 1975

Pages 1 thru 44

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NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, ET AL.,

Petitioners,

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SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

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SECRETARY OF THE INTERIOR,

Petitioner,

v.

No. 74-521

DELTA MINING, INC., ET AL.,

Respondents.

Washington, D. C.,

Monday, October 6, 1975.

The above-entitled matter came on for argument at 10:04 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOHN L. KILCULLEN, ESQ., Webster, Kilcullen & Chamberlain, 1747 Pennsylvania Avenue, N. W., Washington, D. C.; on behalf of National Independent Coal Operator's Association, et al.

FRED BLACKWELL, ESQ., 1707 H Street, N. W., Washington, D. C.; on behalf of Delta Mining, Inc., and G.M.W. Coal Company.

A. RAYMOND RANDOLPH, JR., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Secretary of the Interior, et al.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 73-2066, the National Independent Coal Operator's Association against the Secretary of the Interior, and the consolidated case, the Secretary of the Interior against Delta Mining Company.

Mr. Kilcullen, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN L. KILCULLEN, ESQ.,

ON BEHALF OF THE NATIONAL INDEPENDENT

COAL OPERATOR'S ASSOCIATION, ET AL.

MR. KILCULLEN: Mr. Chief Justice and members of the Court:

These consolidated cases present a single legal issue as to whether the Bureau of Mines of the Department of Interior, in assessing civil penalties for alleged violations of the Federal Coal Mine Health and Safety Act, followed strictly the procedural requirements spelled out by Congress in the Act.

The Act directs that the operator of a coal mine in which a violation occurs shall be assessed a civil penalty by the Secretary of the Interior in an amount not less than $10,000 for each violation.

The penalty provisions of the statute are mandatory. That is, the Secretary must assess a penalty in each instance where he finds a violation.

In this respect, the Act differs from other occupa-

tional and safety acts, such as OSHA, which give the administrative agency discretion to assess penalties where a fault is found.

Here the statute requires, in each case, that a penalty be assessed regardless of fault.

Because of the mandatory nature of the penalty provisions of this statute, Congress wrote into the Act certain procedural safeguards, which must be followed by the Secretary in assessing these penalties.

The Act expressly provides that a penalty shall be assessed by the Secretary only after the mine operator charged with the violation has had an opportunity for a public hearing, and the Secretary has determined by decision incorporating findings of fact that a violation occurred, and the amount of the penalty which is warranted.

The statute also requires that hearings be subject to the provisions of the Administrative Procedure Act.

In determining the amount of the penalty the Secretary must consider six criteria spelled out in the statute:

The operator's prior record of violations; the size of his business; whether he was negligent; the gravity of the violation; his good-faith effort to achieve compliance; and whether the penalty would affect his ability to continue in business.

These cases are before the Court because the Secretary

has not applied these procedural safeguards. Instead, he has adopted a summary type of procedure under which he has authorized the Bureau of Mines to issue a proposed order, a proposed assessment in advance of any hearing or any finding or determination that a violation occurred.

Unless the mine operator requests formal adjudication within a certain number of days after he receives such a proposed order, the order becomes final by its terms.

The Bureau of Mines assessment officer who issues these assessment orders is not a qualified administrative law judge, nor does he have authority to hold hearings or to adjudicate disputed issues.

On deposition, he admitted that he made no effort to determine whether a violation had in fact occurred, and he also admitted that in fixing the amount of the penalty he simply followed a pre-set penalty schedule, which gave no consideration to the six statutory criteria.

In the National Independent Coal Operator's case, the District Court found that the assessment officer gave no meaningful consideration to the six statutory criteria for determining penalties, and that he made no independent determination as to whether the charged violation had occurred.

In the Delta Mining group of cases, the District Court refused enforcement of these penalty assessment orders on the same ground: that there had been -- they were not based

on a genuine determination as to the occurrence of a violation or consideration of the statutory criteria for determining the penalty amount.

Now, the government has argued that the statutory language requires only that the mine operator be given an opportunity for a hearing, and if he does not request a hearing there is no need for a decision incorporating findings of fact.

In other words, the procedural requirements of the Act are satisfied simply by advising the operator that he can request a hearing. The balance of the section which calls for a determination, the government says, becomes inoperative once he has been given this opportunity for a hearing.

The District Courts in the cases below rejected this argument and held that in all cases, before an assessment order can become final, it must be supported by a decision incorporating the Secretary's findings that a violation did occur, and the amount of the penalty which is warranted; and held that the proceedings leading to the orders sought to be enforced by the Secretary did not comply with the requirements of the Act.

QUESTION: Mr. Kilcullen, isn't your version of what Congress provided here rather elaborate by the standards of normal administrative law, such -- if Congress clearly provided it, certainly that's the way it ought to be. But if there's ambiguity, isn't there some question as to whether this isn't a rather unusually elaborate proceeding?

MR. KILCULLEN: I don't think so, Your Honor. I think that it simply follows the standard procedure for adjudicating penalties. Any penalty to be asserted against the citizen, there must be some adjudicative process; and this is simply what the Congress provided here, that there must be a determination.

QUESTION: Well, he has an opportunity for an adjudication if he wants one.

MR. KILCULLEN: But the statute says that the Secretary must apply these criteria in making a determination and unless he's done so, the operator's failure to request a hearing does not validate the -- or does not cure the Secretary's failure to comply with the statute.

He has to find that there has been a violation, and, having found that there's a violation, he must then decide what the amount of the penalty must be. And in doing so, he has to take into account these six criteria.

The procedure that has been followed here eliminates that. It simply involves issuing a proposed order and advising the operator that if he doesn't request a hearing, the proposed order becomes final.

QUESTION: And if he requests a proceeding without more, all the procedure goes in; right?

MR. KILCULLEN: Yes, sir. That initiates the hearing procedure, and then the --

QUESTION: Well, why didn't you do that?

MR. KILCULLEN: Your question is why did not the operators request a hearing?

QUESTION: Yes, sir.

MR. KILCULLEN: I can't answer that question, other than to say that the operators undoubtedly felt that this procedure -- that these orders were not in accordance with the statutory procedure, that the orders were not valid orders.

QUESTION: It wouldn't have cost him anything to send a note, would it?

MR. KILCULLEN: Well, in every one of these cases -- Your Honor, in every one of these cases --

QUESTION: All you had to do was send a notice that "we want a hearing". Isn't that right?

MR. KILCULLEN: In every one of these cases, the operator protested, filed a protest with the assessment officer. And sent in material to establish that the circumstances of the violation were such that a penalty, the penalties assessed should not be --

QUESTION: Just like a lawyers' fight, you just wanted to try this out.

MR. KILCULLEN: Sir?

QUESTION: It's a lawyers' fight; you just wanted to try this statute out. When all you had to do was send in one little piece of paper saying, "I request a hearing."

MR. KILCULLEN: Well, I don't know whether you're correct in saying it's a lawyers' fight. I believe that the mine operator is entitled to the due process that is set out in the statute, Your Honor. And his failure to request a hearing does not entitle the Secretary to disregard the statute. He can't avoid his responsibility to adjudicate; he's got to make a determination. He can't assume that a violation occurred, which he does in these -- which the assessment officer does.

He can't assume the existence of a violation. He must find, under the statute he must find that there was, in fact, a violation.

And if he finds that, as I say, he then has to determine the amount that's to be assessed.

QUESTION: Mr. Kilcullen, are the operators really claiming that they don't know what these alleged violations consist of? Or are they really arguing litigation here?

MR. KILCULLEN: Litigation, Your Honor?

No, I think that they are not given adequate notice as to what the nature of the charge is. The District Court so found in the National Independent case. That all they get is a pro forma printed form, with some blanks filled in, that says "You have been assessed" or "We propose to assess a penalty of" so much money; without any explanation of why or how the penalty was determined.

QUESTION: Well, isn't that the reason for requesting a

hearing, then?

MR. KILCULLEN: Well, the Secretary originally set up a procedure whereby in each case the matter would be sent to the Office of Hearings and Appeals, and then the Bureau of Mines had to request, had to file a petition for an assessment, in which they would spell out the circumstances, all of the factual background and so on.

In that circumstance, the matter would then go to an Administrative Law Judge, who would take testimony and make findings.

And then a further appeal from that to the Board of Mine Operations Appeals.

Now, after this procedure was in effect for a year, the Secretary decided he was going to take a shortcut, and he then adopted this new summary procedure under which the assessment office would send out these proposed penalties.

Now, the important point, I think, is that the assessment officer made no adjudication, no attempt to adjudicate. He didn't -- he admitted that he made no attempt to find whether a violation had occurred. He simply took the notice of violation that had been issued by the Mine Inspector and, on the basis of that, he issued the penalties.

Now, the penalties were in large amounts in many cases, running $5,000 to $10,000.

QUESTION: But the Mine Inspector did make an effort

to find out whether a violation had occurred, didn't he?

MR. KILCULLEN: Well, he found a situation which he considered to be a violation, but that does not prove the existence of a violation. There has to be some actual proof.

In many of these instances -- and these cases are now being heard by Administrative Law Judges -- when the evidence is heard, it's found that there was not in fact a violation. The Mine Inspector misread the situation.

QUESTION: And that sort of a hearing was open to any of your clients on request?

MR. KILCULLEN: They could go to a hearing; right. The question is whether the order, which became final without a hearing, was a valid order. Because it was not based upon a determination as to the existence of a violation, or the application of the statutory criteria.

QUESTION: Well, you say it wasn't based upon a determination of the existence of a violation. Why, at that stage of the administrative proceeding, isn't the adjudicating officer entitled to take the representations of the Mine Safety Inspector?

MR. KILCULLEN: There is no adjudicative officer in this procedure, Your Honor. The Secretary dispensed with an adjudicative officer. All he has is an assessment officer, who --

QUESTION: Well, call it an -- why isn't the assessment officer, then, entitled to take a finding of the Mine Safety

Inspector?

MR. KILCULLEN: Why is he not entitled to take it?

QUESTION: Yes.

MR. KILCULLEN: Because it's an unproved violation, and it has to be established by adequate evidence.

QUESTION: Well, you say it has to be proved twice, then, in the course of an administrative hearing: first, at the preliminary stage and then, if a hearing is requested, again.

MR. KILCULLEN: There is no -- no, sir, I don't understand. I think perhaps I'm not getting across.

The assessment officer just follows a -- it's a ministerial act with him; all he does is just -- in fact his staff, his clerical staff, just filled in the blanks on these forms, these preprinted forms. And he made no effort to adjudicate or make any determination of any of these questions. He just sent out an order and he said: Unless you pay this order or request a hearing, it becomes a final order of the Secretary.

We contend, Your Honor, that the Secretary can't disregard the statute. His failure to comply with the statutory requirements cannot be waived by the person who is charged with the violation.

QUESTION: You mean even if the mine operator had, in writing, expressly purported to dispense with the need for

a hearing, or with findings, --

MR. KILCULLEN: He could pay -- pay the penalty and settle the case at that level if he wished. But if he did not wish to pay this penalty, he filed -- in these cases, as we have indicated -- he filed a protest. He said: "I think this is erroneous; it's wrong."

Now, at that stage he should have -- if the Secretary wanted to make this penalty a final penalty, he should have gone through the adjudicative process.

QUESTION: Well, did you rest on any constitutional argument below?

Did you make a constitutional argument?

MR. KILCULLEN: We did -- we did in fact make a constitutional argument in this case.

QUESTION: And that was rejected, too, I take it?

MR. KILCULLEN: No, no, the District Court held in our favor, --

QUESTION: The District Court did.

MR. KILCULLEN: -- in each case; and the Third Circuit held in our favor in the one case.

QUESTION: Yes.

MR. KILCULLEN: Now, the Court of Appeals for the District of Columbia --

QUESTION: Did they reject the constitutional argument?

MR. KILCULLEN: They didn't consider the constitutional

argument. They read the statute. They said, We're going to go back and try to find out what Congress meant in this statute, and they -- we feel they misread completely the statute.

QUESTION: Are you pressing a constitutional claim here?

MR. KILCULLEN: Well, the question of due process of law, I think, is a proper question here. The --

QUESTION: So your answer is yes, you are pressing that?

MR. KILCULLEN: Yes; yes, sir.

QUESTION: Now, you didn't ask for a post-assessment hearing, either, I take it. Couldn't you have had a de novo hearing before a jury?

MR. KILCULLEN: Well, that is a question, the statute is ambiguous on that point; and, in fact, in the District Court --

QUESTION: Let's assume you could have. You didn't find out whether you could -- anyway, whether you could have had that kind of a hearing or not?

MR. KILCULLEN: This would come up in a situation where the Secretary goes into the District Court for enforcement, as he did in the Delta Mining case.

QUESTION: Yes.

MR. KILCULLEN: And the operator then says: "I think this order of the Secretary is invalid, it wasn't properly

issued."

QUESTION: Unh-hunh.

MR. KILCULLEN: "And I want to have a full de novo trial on these issues." Now, --

QUESTION: But it was available to you, wasn't it?

MR. KILCULLEN: No. The government said in the Delta Mining case, in the pretrial conference, the government contended that this de novo trial provision of the statute does not give the operator the right to have and adjudicate -- to adjudicate the fact of the violation. In fact, in the Appendix, on page --

QUESTION: Because of failure to exhaust? Is that what --

MR. KILCULLEN: Well, they didn't spell it out in those forms. They said that the statute -- the way the statute reads, the -- excuse me, Your Honor, I'll just read the --

QUESTION: What page, Mr. Kilcullen? If you're reading from the record.

Well, we'll find it, don't use any more of your time.

MR. KILCULLEN: I have it right here, I believe. It's in the Appendix. Here it is, in the Appendix, on page 6 -- I'm sorry, it's on page 6 of the government's brief, the addendum page 6.

It says the court, that is, the District Court, "shall have jurisdiction to enter a judgment enforcing,modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary, or it may remand the proceedings to the Secretary for such further action as it may direct. The court should consider and determine de novo all relevant issues, except issues of fact which were or could have been litigated in review proceedings before a court of appeals under Section 106 of this Act" --

MR. CHIEF JUSTICE BURGER: Mr. Kilcullen, I think you're getting into Mr. Blackwell's time now.

MR. KILCULLEN: Yes, sir. Well, the point simply, I'll just finish up on that point.

The government argued in the pretrial conference that these issues could have been litigated in an appeals proceeding under section 106, and therefore the operator was not entitled to de novo consideration in the trial court.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Blackwell.

ORAL ARGUMENT OF FRED BLACKWELL, ESQ.,

ON BEHALF OF DELTA MINING, INC., ET AL.

MR. BLACKWELL: Mr. Chief Justice, and may it please the Court:

I want to emphasize that there is no consideration of health or safety of the miners attaching to the issues in

this case. The coal mine inspector issues a notice to abate a condition which he considers unsafe. That inspector's order must be obeyed within the time he allows for the correction, otherwise the affected part of the mine is closed down.

So there is absolutely no connection between this case and the safety actions which are taken in the day-to-day operations in the mine. The penalty assessment process comes many months after the condition has been corrected.

I would also like to emphasize that we're not asking this Court to give us any due process protection beyond that already spelled out in the statute. We merely ask that the Secretary be required to honor the express penalty assessment procedures that are already there.

We contend that the penalty orders in these cases are invalid for a number of reasons. The major one of which is that the Secretary did not comply with section 109(a)(1) and (a)(3) of the Act. The first sentence in each of these provisions requires that a violation must occur before a penalty can be assessed. Violation must occur before a penalty can be assessed.

However, the testimony of the Secretary's assessment officer, Mr. Everett Turner, shows that no proper finding of a violation has been made in these cases. The Turner testimony, Appendix page 93, shows that the assessment officer looked solely to the charge in the inspector's unsworn statement, and

assumed, on the basis of that, that a violation had occurred.

No written finding of violation was put in the assessment order, and in the Delta and G.M.W. cases no written finding that a violation had occurred was issued until long after the final penalty orders had been issued.

In one instance, the finding of violation come almost one year and eight months after the penalty order was issued. The findings were never presented to the operators prior to the Secretary's enforcement action, and we saw the findings for the first time when we received the complaint, as attachments -- as exhibits attached to the complaint.

Moreover, these findings, when they did come, although it's an adjudicatory function to find such a violation, the findings were made by Mr. Turner, Mr. Everett Turner, who is the Secretary's assessment officer. He is not a hearing officer; he is not a juridical officer.

This penalty process was not under the jurisdiction of a juridical officer at any time during the process.

QUESTION: Wasn't that in part because it's the government's position that there was no occasion absent a request for a hearing?

MR. BLACKWELL: That's the government's -- the government's position is that there is a distinction in the penalty assessment procedure in a hearing and a nonhearing situation. That the statute simply does not contain such a

distinction. In fact, when the Secretary first implemented the Coal Act in 1970, his construction of the statute was the same as our construction here today; the penalty assessment function was placed under the jurisdiction of a hearing officer from the very beginning. If he had maintained that procedure which was in conformity with the statute, we wouldn't have this problem today.

Now, the fact that a hearing has not been held cannot by any stretch of the imagination justify a government agency dispensing a sanction, a monetary penalty, issuing the order "you pay this", and then, months later, say "By the way, you were guilty of something". "You were guilty of a violation of a standard.". That's why we're fighting --

QUESTION: Mr. Blackwell, if you had had a hearing, how long would it taken?

MR. BLACKWELL: The hearing in these cases could have taken -- well, the --

QUESTION: About a year?

MR. BLACKWELL: No, not a year, sir.

QUESTION: That comes pretty close, though.

MR. BLACKWELL: Three to -- pardon?

QUESTION: Pretty close to a year, isn't it?

MR. BLACKWELL: To a year?

QUESTION: Yes.

MR. BLACKWELL: The hearing in the Delta and G.M. --

no, I can't agree with that at all, Your Honor.

QUESTION: Well, how long?

MR. BLACKWELL: Three to five, seven days, I would say, at the outside.

QUESTION: And when would it be decided?

MR. BLACKWELL: When would it have been decided?

QUESTION: Yes.

MR. BLACKWELL: Well, if the hearing examiner is not too --

QUESTION: You mean to tell me that if you asked for a hearing you would get one within three days?

MR. BLACKWELL: Oh, oh, I thought -- excuse me.

QUESTION: I never heard of an administrative agency doing that in history!

MR. BLACKWELL: Excuse me, I misunderstood you; I thought you asked how long the hearing would take if it were held.

QUESTION: No, no. That's what I meant, when will it be finished?

MR. BLACKWELL: Well, the administrative hearing, if it had been asked, would have -- could have been concluded, I say, within a year after the assessment order.

QUESTION: Which is the same time you have here. You complained about it took a year. Am I right?

MR. BLACKWELL: Yes -- no, I'm not complaining about

a year, I am pointing out that one of the findings of violation of a standard in a mine, on which the penalties were based, was not made until a year and eight months after the penalty assessment was issued. Verdict first; trial afterwards!

I just can't square this with American jurisprudence by any stretch of the imagination.

QUESTION: How would you compare this, Mr. Blackwell, with traffic violations, where the traffic violation is asserted in the notice and where you can get a trial if you want, but if you don't ask for a trial, the penalty is automatic, isn't it?

MR. BLACKWELL: Mr. Chief Justice, yes, that's correct. I think it is a grave error to inject the traffic ticket violation into this case.

No. 1, there are no $10,000 traffic tickets in this country; and we have -- these penalties can be up to $10,000. But, more basically, all of these traffic ticket procedures are established under a city ordinance, under a State code, and I believe I've seen maybe some by court order.

Those procedures, then, must -- how they work, must be measured by the originating authority in the ordinance. Here we have a different set of procedures, with its own source of statutory authority. We must measure these procedures by its statutory source, and the traffic ticket by its statutory source.

QUESTION: But in some situations, a traffic citation or driving under the influence of liquor might have, if not a $10,000 impact, a very large impact.

MR. BLACKWELL: Right.

QUESTION: But does not that same procedure prevail?

MR. BLACKWELL: Well, I see your interest in that area, Your Honor. I would point out this additional, very important distinction in my mind:

No. 1, the traffic ticket -- the traffic regulations and all of that attach to a conditional privilege, in the first place: a license to drive a car.

The State issues this, and you agree to abide by all of these. There is -- you don't have to have a license to go into the mining business.

And, No. 2, from the very first instance in which the auto driver recieves that ticket in his hand, he is under the jurisdiction of the court. He is summoned to a hearing. He is told that he can forfeit collateral and not appear before that. But he is before a judicial forum from the very moment that he receives that ticket. And those procedures are established by their own source of statutory authority.

Here we have a different statutory authority, and --

QUESTION: Mr. Blackwell, do you have objections to the new regulations?

MR. BLACKWELL: Your Honor, --

QUESTION: I understand they don't solve the problem of past assessments. But for the -- do we have any problem in this case as to the future validity of a set of regulations?

MR. BLACKWELL: In this case, those new regulations are not involved at all, Your Honor. It's only the former regulations.

QUESTION: At least the old regulations that we're arguing about have been replaced?

MR. BLACKWELL: They have been replaced. And I have had no reason to study those, to make even a speculative judgment on their validity or nonvalidity.

QUESTION: But what's at issue here is past assessments, then?

MR. BLACKWELL: That's right. It was the method in which the past assessments were issued under the former regulation.

All I know is -- I'm just not familiar with what's going on under the new regulation, except I have information that the nonhearing situation under the new regulations are causing no practical problems. The hearing examiners are able to deal with these expeditiously, and there's no backup there.

QUESTION: If we had before us just the judgment of the Court of Appeals for the District of Columbia Circuit, I suppose there would be a serious question of mootness, wouldn't

there, since all you sought in that action was to enjoin the operation of these procedures?

MR. BLACKWELL: Well, I think you have a serious question of mootness, in any event; and the only thing that might save it is the government's 2,000 cases distributed to the District Attorneys all over the country that they say they want to enforce.

QUESTION: Well, doesn't that resolve the mootness issue as to the Third Circuit's case, though, where there you did have an effort to enforce these penalties, and the government seeks to enforce them regardless of the effect of these new rules?

You don't contend that's moot, do you?

MR. BLACKWELL: No, no. No. As I said, that is what prevents it; the 2,000 cases prevents the mootness.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Blackwell.

MR. BLACKWELL: I may just conclude, gentlemen, the Third Circuit had all of these arguments before it as well as the D. C. Court of Appeals, when it rendered its decision.

MR. CHIEF JUSTICE BURGER: Mr. Randolph.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.,

ON BEHALF OF THE SECRETARY OF INTERIOR, ET AL.

MR. RANDOLPH: Mr. Chief Justice, and may it please the Court:

Mr. Justice Rehnquist, in the D. C. Circuit case, they also sought a declaratory judgment, to the extent that the court might hold that the regulations are invalid, and that, in turn, might affect pending cases for enforcement. The action may not be moot.

In our brief in opposition in the D. C. Circuit case we pointed out only that so long as that decision stands it really has no effect outside of the Circuit, because of the fact that there are no mines within the District of Columbia. And, therefore, it would be proper for this Court only to hear the Delta Mining case; but I don't think it's technically moot, because of the declaratory judgment aspect of it.

These are the first cases that have reached the Court --

QUESTION: Mr. Randolph, why does the declaratory judgment aspect change the mootness question?

MR. RANDOLPH: Well, if the regulations are held invalid, then the argument -- and the argument indeed was in Delta Mining -- that therefore the penalties assessed under those regulations are invalid as well.

And if those penalties assessed are invalid, then enforcement actions can't be sought and must be dismissed; that would be the argument. That was the holding in the Delta Mining case.

QUESTION: Well, was it that the regulation was

invalid, or was it the construction of what the regulations say?

MR. RANDOLPH: No, the regulations were held invalid in the Delta Mining case.

The regulations under which the penalties were assessed were held invalid.

These are the first cases, obviously, to reach the Court involving the Federal Coal Mine Health and Safety Act of 1969. And I might point out to the Court that this Act is a culmination of federal legislative efforts dealing with coal mining that dates back to 1865.

The purpose of the Act was to cure some of the problems, many of the problems that led to the failure of past legislation.

The purpose of the Act, as well, was to protect the coal miners; the primary purpose, to protect their health and safety. Congress recognizing that they were engaged in the most hazardous occupation within the United States.

Congress found that between 1960 and 1968, under the past law, that federal inspectors that had observed 1.3 -- had observed 1.3 million violations of the Advisory Safety Code of the Bureau of Mines. The major problem -- one of the major problems that Congress identified, even enforcing the existing laws -- and this is in the Senate Report, right in the very beginning of the Report on this bill, -- was that the enforcement procedures didn't work. Congress said they

were too complex, they were too difficult. It made it impossible to secure compliance even with the laws that were on the books at that time. And therefore, Congress abandoned, in this Act, it abandoned the approach of seeking voluntary compliance. It imposed 125 specific mandatory standards of health and safety that coal mine operators must comply with. And it imposed penalties for violations of those standards, in order to make it no longer profitable for the coal mine operators to continue operating in violation of the law, to make it no longer profitable for them to operate in violation of Health and Safety Standards at the expense of the miners.

The issue in this case is one of statutory interpretation. I think I will explain later that it goes beyond the particular regulations that are involved here.

The question specifically is, what does section 109(a)(3) of this Act require when the Secretary assesses a penalty in the absence of a request for the holding of an administrative hearing?

More specifically, a written detailed findings of fact, such as those required under the APA after a hearing, are those kinds of findings of fact required to be incorporated in the Secretary's assessment order when there has been no hearing, and when, indeed, the mine operator is entitled to a trial de novo, in a District Court, on all issues; and a trial by jury on all factual issues.

And let me add, right here at the outset, that the statement that was -- I believe Mr. Kilcullen quoted, of the attorney in the pretrial proceedings in the Delta Mining case, about what "de novo" means is not the position of the government. The position of the government is that de novo trial on all issues means an absolute de novo trial on all issues of fact and law; that the administrative proceedings become irrelevant, they wash out.

I'd like to put this case in its proper perspective, by just outlining for the Court the steps that lead to an assessment, and finally the steps that lead into the District Courts.

We begin with the mine inspectors themselves, and these are people specifically required by the Act, under section 505,to be experienced people in mining. All the people appointed by the Secretary to administer this Act are required by the statute itself to be experienced mining people.

The mine inspector approaches the mine without any advance notice. In fact, the statute specifically prevents him from giving any notice. Each mine within the United States must be inspected entirely four times a year. There are also spot inspections, periodically. For dangerous mines, where there have been fatalities or serious accidents within the past five years, there must be a spot check once out of every five days by a mine inspector.

The union representative has an absolute right to accompany the mine inspector when he reaches the mine. The company official, I'm told, usually does, as well.

Let's suppose the mine inspector goes into the mine shaft and, as in Delta Mining, G.M.&W. and the Mears Company mines, he finds violations of the Act.

At that point he writes out a detailed notice of violation -- quite analogous, Mr. Chief Justice, to a traffic ticket -- under Section 104(e) of the Act, he's required to set down precisely what he finds is wrong, what sections of the Act or the regulations are violated.

And then he also sets a time for abatement. In this case, I notice in the Delta Mining situation, the operator had one month to correct that violation.

Now, this is handed, this notice of violation is required by the statute to be handed right there to the company official. But that's not all. The Act also requires specifically that the mine inspector post the notice of violation, saying what was wrong and where in the mine, and how long it is before it can be -- before it has to be corrected. He must post that notice on a bulletin board.

And to give you an idea of how careful Congress was in this detailed Act, there's even a section in the Act, 107(a), that requires mine operators to have bulletin boards, so they wouldn't get into the problem of having no place to post it.

The bulletin boards must be right outside the mine entrance.

Then the mine inspector returns to check to see whether there's been an abatement, to check to see whether the violation has in fact been remedied.

If it hasn't, if there has been no abatement, the mine inspector can order withdrawal of all people from the area of the violation. Or he can extend the time for correcting the violation.

But let's suppose that the violation has been abated. If that's done, then the notice of violation and the abatement notice is sent to the asse~ment office of the Bureau of Mines.

Now, what I've just described is happening, I think we said in our brief, at the rate of 80,000 times a year. 80,000 violations of the Health and Safety Standards of the Act and regulations.

That was wrong. That figure is not accurate today. Because the latest figures show that that rate has increased now to 110,000 violations a year.

Congress could have stopped right there. It could have let the Traffic Officer, it could have let the Mine Inspector write out a fine, serve it on the mine operator, and say: Either pay it or litigate in District Court.

The APA would not have been applicable at all to that situation. If the Court will notice, in Section 554(a)(3) of

the APA, it specifically is made inapplicable, the findings of fact requirement, the hearing requirement, to situations involving inspections. And that's precisely what this is.

It's also made inapplicable -- the APA hearing requirements and finding of fact requirements are totally inapplicable when there is a trial de novo in a District Court available.

But Congress didn't stop right there. No. It gave another step in the process. It required the Secretary himself to assess the penalties. And it gave -- it thought it advisable to give the mine operators an opportunity for a hearing.

The way that has been operating, the way it operated under the old regulation, is that the Assessment Officer would, after getting the notice of violation, the abatement, would make up a proposed order of assessment, the Assessment Officer is a man, as I said, experienced in mining, and send it to the mine operator.

It's not an order to pay, he can't be required to pay; it just says that "You have 15 days to protest this."

In the Delta Mining case, the addendum at page 28 of our brief, shows that there was a protest. It wasn't on the basis that we didn't violate the Act. It wasn't -- there was no allegation in the protest that we haven't violated the Act, it was that the -- this is a new mine, people have to be trained; we showed good faith in trying to abate, and so on and so forth.

But let's assume in the usual case that the operator does protest. If he does not protest, the proposed assessment order, then the order becomes the final order of the Secretary.

He can request a hearing at this point, but let's assume he doesn't.

The Assessment Officer takes the protest from the mine operator, reconsiders, and let's assume he re-issues the assessment order.

The mine operator again has the opportunity to request a hearing. And I might add that if he does request a hearing, the hearing itself is de novo. Nothing that went on before is considered to be bearing one way or another on whether there's a violation.

And if he loses the hearing, I might add, he has the opportunity to appeal within the administrative process to the Board of Mine Operations Appeal.

But let's assume he doesn't request a hearing, because that's the situation in this case.

If he doesn't request a hearing, then the order, the proposed order of assessment becomes the final order of the Secretary. Now, that sets forth the amount of the fine, it sets forth the regulations violated, it sets forth the days on which the notices of violation were issued, and so on and so forth.

I might add, also, that this isn't all. This isn't

the mine operator's only opportunity to find out what he's been charged with and why he's been assessed a certain penalty. In fact, under the old regulations, one of the most normal occurrences was that conferences were held, informal conferences. It may be as little as simply the picking up of a telephone and calling the Assessment Officer and asking him: "Why the penalty you assessed against me was $25 instead of $50?"

QUESTION: Are you going to deal with the conjunctive language in section 109(a)(3), which seems to cut against your point?

MR. RANDOLPH: Yes. If you please, I'll do it now. I'd like to just finish up this summary.

As a matter of fact, the GAO report that surveyed the operations of the Assessment Office pointed out that for three Assessment Officers, 35 percent of their time was spent in informal conferences.

Now, even after all this, the Secretary cannot collect a cent from the mine operators. He can't collect anything. I can't force the mine operator to pay.

He must go to the District Court, where the trial is de novo on all relevant issues, and regarding issues of fact, the mine operators can request a jury trial. I notice that Delta Mining and G.M.W. infact did requrest a jury trial in this case.

What this means is simply this:

That after all these administrative proceedings, regardless of what went on during those administrative proceedings, as soon as the mine operator does not pay, they are all transformed into nothing more than a charge, an allegation, a complaint in a civil case. The administrative proceedings are not facts, they are simply allegations to be proved like any other case in a District Court.

Now, the claim here is that the mine operator who never requested an administrative hearing can defend a de novo trial and enforcement action on the basis that the Secretary did not make adequate findings of fact. The relevant statute, 109(a)(3) scarcely compels such a result on its language.

It's always difficult to argue orally about whether a statute is plain on its face or it's not plain. The very fact that Judge MacKinnon, Chief Judge Bazelon, Judge McGowan -- and, incidentally, I might add, the GAO itself in its report thought that the statute did not require written findings of fact when no hearing had been held, is at least some evidence that reasonable men differ on whether this statute means one thing or another.

Our reading is that the findings of fact are necessary as to a violation and as to a penalty only after the mine operator has taken advantage of his opportunity for an APA type hearing.

The Secretary, himself, has always read the

statute this way. There have been a number of statements in the argument that said that originally the Secretary read the statute the other way, and required findings of fact with regard to every order. That is not so.

The original regulations which were issued, I might add, Saturday, March 28, 1970, were enjoined, incidentally, in a case called Ratliff v. Hickel in the Western District of Virginia, in a suit by the mine operators; so that these regulations did not go into effect -- I don't think a single penalty was assessed under them. But these original regulations, which are contained in 35 Federal Register 5256, said only that the hearing examiner has to determine the amount of the penalty which is warranted, and incorporate in his decision the violation of an order that the penalty be paid.

The only time findings of fact were required under those regulations is after a hearing, which is precisely the point we're making here.

Now, back to the statutory language itself.

I think the reading that we propose, Mr. Justice Rehnquist, certainly is within the meaning of the -- reasonably within the wording, so that the language can bear that meaning. Whether it's conclusive or not conclusive, on the face of this statute, I think is really beside the point.

QUESTION: Mr. Randolph, could I interrupt you here. As I recall, Judge Adams, in the Third Circuit opinion,

argued that the APA itself requires findings where there is a hearing. And, therefore, that under the Secretary's interpretation of these statutes, section 109 adds nothing.

Do you have an answer to that one?

MR. RANDOLPH: Well, I have a copule of answers to that, Mr. Justice Blackmun.

First of all, I think it's the wrong question. The question should have been, when you look at this statute, 109(a)(3), notice that the APA is invoked right at the bottom; it's the last sentence.

The question should have been: Why, after requiring findings of fact and a decision in a hearing, did Congress invoke the APA in the last part of the section?

The answer to that, if that question had been asked -- and, incidentally, it wasn't, by the court -- the answer to that is quite clear: that Congress wanted to bring in to bear on the hearing all of the detailed requirements about what we mean by a hearing examiner, when the hearing has to be held, notice, and so on, that would be swept in by a reference to the APA.

It had to refer specifically to the APA to accomplish that, for two reasons: First of all -- and I don't think this was mentioned in our brief -- section 507 of the Act, this Act, the Coal Mine Act, specifically says that the APA is inapplicable, this entire Act, unless it's expressly so provided.

So Congress had to invoke the APA for that reason, No. 1.

And, No. 2, the APA would not have applied here, in this case, otherwise, because of the trial de novo in the District Court, which would make the APA inapplicable.

And I might add the really remarkable thing about this statute is that the mine operators are even given an opportunity for a hearing. That's the remarkable thing about this statute. That cuts against the grain of jurisprudence, because in de novo, trial de novo situations, hearings are not required.

Now, getting back to the particular language, we think that this language is illuminated by the legislative history that bears on it. This is not a detailed -- what I am about to tell the Court is not a detailed analysis of reports and a snippet of a hearing, and maybe a line from another report, and so on and so forth, this is, I think, probably the most solid legislative history that one can have. Because I rely on the House provision, and what that said, and the Senate bill, and what that said, and what happened when they were put together and emerged from conference.

And I think this will explain why that conjunction is there.

These two provisions, the House bill and the Senate bill, the predecessors of section 109(a)(3) are set out in our

brief on pages 24 to 25.

One thing is absolutely clear from both these bills. And that is that no findings of fact were required, except in regard to a hearing, after a hearing was held.

The Senate bill could hardly be more explicit on this point. The original Senate bill from which this statute is derived said that the mine operator, 25 -- I'm sorry, page 24 to 25 of our brief.

QUESTION: Of your Delta brief?

MR. RANDOLPH: Yes. The other brief didn't go that high, I don't believe.

Now, the Senate bill, which is on page 25, originally said that the -- "An order assessing a civil penalty ... shall be issued by the Secretary" et cetera, et cetera,"only after the mine operator has been given an opportunity for a hearing, and the Secretary has determined by decision incorporating findings of fact based on the record of such hearing."

Now, that language is absolutely clear, that the only time findings of fact were required was when there was a hearing, which is our point.

The House bill, I think, was just as clear.

The Conference Committee took those bills, the House bill and the Senate bill, and what they did to that language that I just quoted, on page 25, is that instead of saying "incorporating findings of fact based on the record of such

hearing", they took out "based on the record of such hearing" and added instead "therein".

There's not a word in the Conference Report that they were intending to change the meaning of this provision by doing that, by trying to streamline the language. We don't think they did.

As a matter of fact, since the Senate and House bills were in agreement on this point, -- I think we mentioned this in the brief -- Conference Committees are appointed to resolve differences between the houses. They're to compromise.

Here there was no difference. The two bills were the same, they were put together -- the mine operators argue that something new came out.

If that were true, then the Conference Committee had exceeded its authority, and a point of order would have been put on the Floor, and that would have defeated this entire legislation.

We find that incredible to believe, since the legislative history is perfectly plain.

Now, -- and that's why the conjunction is in there, Mr. Justice Rehnquist, because it's derived from this particular provision on page 25.

Now, the mine operator's only point, really -- and I don't think they stressed this in their argument, but since it's [illegible] -ief I'll deal with it -- for requiring findings of fact

is, in cases where there's no hearing, is simply this: If the mine operators had these findings of fact, they'd be more apt to pay. And that would relieve the courts of some of the burden of enforcement suits.

Let me respond to that.

There's three points that I think are against it. No. 1, Congress never considered it, Congress never considered whether the administrative burden entailed by that kind of a process, as outweighed by the alleged benefits that the mine operators cite.

No. 2, the underlying assumption that the mine operators will tend to pay more lacks any support whatever. There's no evidentiary support for that. And if the idea is that the mine operators need more information, because if they only knew what they were being charged with and why they were being penalized they would pay, the fact is they could have gotten that information, indeed in many cases did, if not by talking to the Mine Inspector, calling up the hearing officer, seeking an informal conference, they had that opportunity.

And yet, still, we have, under these old regulations, more than 18,000 violations that have not been paid yet.

The third point, and I think this is probably the most significant, is as to the burden on the courts, I think -- we think -- personally, that the burden might well increase if

you accept the mine operators' arguments. Because what does it mean? It means that the mine operators are then given one more opportunity to contest in a de novo enforcement action to argue that the whole action should be dismissed, not because they didn't violate the Act, not because the penalty is too high, but because the findings of fact were not adequate. Not sufficient under administrative law.

Professor Davis, in his Administrative Law Treatise, says, at section 1601, that the amount of litigation involved where the adequacy of administrative findings is nothing short of tremendous. If that is what this results in, if a holding for the mine operators results in that, it means that every enforcement action will be met at the outset with the contest over whether the findings of fact were detailed enough, were sufficient enough, and so on and so forth.

And that, I think Mr. Blackwell used the argument of Alice in Wonderland, that is Alice in Wonderland like.

Why? Because the only importance of those administrative proceedings is merely that they are a charge, they are simply a claim. They wash out, as soon as the enforcement action is brought. They are irrelevant.

QUESTION: You mean brought in court?

MR. RANDOLPH: Yes.

QUESTION: Well, but it's certainly not unknown to administrative law, even where you have a trial de novo to

require some sort of procedural safeguards in the administrative proceeding, and some sort of an administrative record.

MR. RANDOLPH: I think that if -- in light of the system that's now set up, that there are administrative safeguards. Indeed, there are more than enough administrative safeguards for the mine operators. They have a right to --

QUESTION: But that isn't the argument you were making a minute ago. A minute ago you were saying it doesn't make any difference whether there are or not, because the whole thing washes out when an enforcement action is brought.

MR. RANDOLPH: I said it doesn't make any difference whether the findings of fact were adequate enough, detailed enough, because the court, in an enforcement action, can't rely upon them, anyway.

They are irrelevant to whether the -- and the jury is the one that determines the facts. Mr. Blackwell, indeed, requested a jury.

So what is the -- the jury is not going to consider whether the administrator's findings of fact were sufficient or not. They are just irrelevant to that consideration.

Now, I think this is where the Third Circuit went wrong in the Delta Mining case. If you read the opinion by that Court, there's not a word in the entire opinion -- the words "de novo" don't appear within the entire opinion. I don't know whether the Court mistakenly thought that this was

the kind of case where the administrative action is reviewed on the basis of sufficiency of the evidence, but I would point out that there are two things that I think this Court can see the error that the Court of Appeals fell into in the *Delta Mining* case.

One of the main reasons, on page 11a of the -- our petition, I'll read it to the lourt. The Court of Appeals, in *Delta Mining*, said: Judicial review of a final administrative determination is heralded as a right and such review is rendered practically impossible, or at least vastly more difficult where the agency's decision is not accompanied by express findings.

That goes precisely to the point that I was just discussing. It's not rendered more difficult, because there is no review of the agency's findings. This is a de novo trial, the agency's findings are transformed merely into a charge that has to be proven.

So I think that's wrong.

On page 12a, the Court said finally: Though it might not be beyond Congress' power to provide for the entry by the Secretary of penalty assessment orders without findings of fact, such a provision would run against the grain of much of our administrative jurisprudence.

I submit that it's just the other way around. Requiring findings of fact when there's been no administrative

hearing runs directly against the grain of our administrative jurisprudence, because the APA, which is a reflection of that tradition, says specifically that, No. 1, hearings are not required; No, 2, findings of fact are not required, when there is an opportunity for de novo review of all the issues in a District Court proceeding.

That's precisely what this statute provides.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Randolph. Your time is used up, Mr. Kilcullen.

MR. KILCULLEN: It has been used up, sir?

MR. CHIEF JUSTICE BURGER: Beg pardon?

MR. KILCULLEN: Did you say my time has been used up?

MR. CHIEF JUSTICE BURGER: It has been used completely, yes.

MR. KILCULLEN: Thank you.

MR. CHIEF JUSTICE BURGER: Unless you have some statement with reference to factual matters as distinguished from legal argument, your time has expired.

MR. KILCULLEN: I thought I had reserved some time. Apparently not.

MR. CHIEF JUSTICE BURGER: The case is submitted. Thank you, gentlemen.

[Whereupon, at 11:02 o'clock, a.m., the case in the above-entitled matter was submitted.]