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Fallout from the Sago Mine Disaster: Congress's Tinkering with Agency Discretion
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I. INTRODUCTION: THE SAGO MINE DISASTER WAS THE CATALYSTS FOR VERY AGGRESSIVE LEGISLATION IN THE SENATE THAT WAS AIMED AT THE MINE SAFETY AND HEALTH ADMINISTRATION.

The beginning of 2006 was marked in the national media by the Sago mining disaster in West Virginia. In that accident, fourteen miners lost their lives when an explosion caused a cave in and trapped them inside. The resulting media storm brought the issue of mine safety to the forefront of the national consciousness and sparked action on both state and federal levels of government. [1]

The inquiry of the Sago incident revealed a mine with a history of non-compliance with the Mine Safety and Health Administration's (MSHA) regulations.[2] Moreover, the slow rescue response and erroneous survivor estimates[3] raised doubts about MSHA's handling of the situation. These concerns were heightened when two more mine collapses occurred a few weeks after the Sago disaster killing two more miners.[4]

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[1] *See, e.g.,* Ian Urbina, *West Virginia Governor Urges Mining Moratorium*, N.Y. TIMES, Feb. 2, 2006, at A15 [hereinafter Urbina, *Mining Moratorium*] ("Just weeks after the death of 14 West Virginia miners, two more mine workers were killed yesterday in separate accidents, prompting Gov. Joe Manchin III to urge all coal companies in the state to cease operations until safety could be reviewed. . . . [T]he West Virginia Congressional delegation had only hours earlier introduced sweeping legislation to improve mine safety, hasten emergency response time and toughen penalties for habitual safety violators.").

[2] *Panel I of a Hearing of the Labor, HHS and Education Subcommittee of the Senate Appropriations Committee: The Sago Mine Disaster and an Overview of Mine Safety*, Federal News Service, Jan. 23, 2006 [hereinafter Panel I] (For the year of 2005, the Sago mine had 208 citations and fines amounting to $27,000 at the time of the first Senate hearing.).

[3] *See, e.g.,* Panel I, *supra* note 2 (Rescue efforts did not begin until after 11 hours had lapsed. It took "two hours before MSHA was notified . . . another two hours before MSHA personnel arrived . . . . another one-and-a-half before rescue teams arrived . . . . [a]nd another five hours before the first team entered the Sago mine") (quoting Senator Robert Byrd); *See, e.g.*, James Dao, *In a Miners' Town, Grief, Anger and Questions*, N.Y. TIMES, Jan. 5, 2006, at A1 (It was originally reported that, of the thirteen men trapped, there were 12 survivors, but, in fact, only one man survived the initial collapse.).

[4] *See, e.g.,* Urbina, *Mining Moratorium*, *supra* note 1.

The ensuing examination by the Senate committee raised questions over the general mining practices within the United States and MSHA's handling of its mission.[5] Chief among these concerns were MSHA's delay in updating safety procedures and adopting new technology as well as the aggressiveness with which the agency prosecuted violators. According to Senator Byrd, the agency had the legal authority to implement changes to improve safety, but chose not to use it.[6] Since he felt that the agency had failed to do its job, Byrd argued that Congress should intervene and force changes through legislation.

Unsurprisingly, several senators put forward different kinds of remedial measures to address mine safety. The changes most often discussed fall along the lines of increasing fines and requiring the industry to adopt the latest safety technology.[7] However, as MSHA policy choices became a more significant issue during the hearings, proposals were advanced to deal with the more troubling issue of agency discretion.

Since 2001, there has been a decrease in major fines for safety violations and, of those, nearly half have not been collected.[8] Moreover, "[f]ederal records show that in the last two years the federal mine safety agency has failed to hand over any delinquent cases to the Treasury

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[5] *See* Panel I, *supra* note 2 (During a senate oversight hearing, the acting assistant secretary of Labor of Mine Safety and Health, David Dye, was questioned over the agencies failure to require the industry to adopt the latest safety technology and practices as adopted in other mines within the United States.). *See also* Ian Urbina, *Senators Threaten to Intervene to Improve Mine Safety*, N.Y. TIMES, Mar. 3, 2006, Section A, at 21 (hereinafter "Ian Urbina, *Senators Threaten*").

[6] *Id.* ("The federal mine safety agency 'had the legal authority to require better equipment and better communication, but it didn't use it.' . . . 'It had the legal authority to require higher fines . . . [i]t didn't use it.'") (quoting Senator Byrd).

[7] *See, e.g., Id.* (Senator Edward Kennedy "suggested that perhaps it was time to adopt the best available technology rather than study the matter indefinitely."); *See also* Urbina, *Mining Moratorium*, *supra* note 1("[T]he West Virginia delegation . . . introduced sweeping legislation to improve mine safety, hasten emergency response times, and stiffen penalties for habitual safety violators.").

[8] *See* Ian Urbina & Andrew W. Lehern, *U.S. is Reducing Safety Penalties for Mine Flaws*, N.Y. TIMES, Mar. 2, 2006, Section A, at 1 [hereinafter Urbina, *U.S. is Reducing*].

Department for further collection efforts, as is supposed to occur after 180 days."[9] Given the high visibility of the disaster and the impression of agency collusion and neglect, it is unsurprising that Congress's response has been very aggressive.

A measure introduced by Senator Arlen Specter would not only raise the maximum amount that can a company can be penalized, but would also strip administrative law judges (ALJs) of the ability to reduce fines for violations that were flagrant or habitual.[10] Although the Specter's proposal would increase the maximum fine by at a factor of eight, the truly startling piece of this proposal is the move to restrict ALJ discretion. In effect, this bill would impose a mandatory sentencing requirement.

This second piece of the Specter measure seems to be at odds with the issues and concerns that were raised at the hearings.[11] In particular, stripping the ALJs of discretion does nothing to solve the discretionary enforcement problems that are at the center of the debate. For example, ALJs have little to do with negotiations between the agency and the industry when they are developing a settlement.[12] Nor are ALJs charged with reporting delinquents to the Treasury Department for further collection proceedings.

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[9] *Id.* (Dirk Filpot, an agency spokesman, "said delinquent cases had not moved to the Treasury Department since 2003 because of computer problems. He could not say when the problems would be corrected.") However, when Senator Hillary Clinton received a similar response from assistant secretary Dye, she pointed out that the agency could have hand delivered the referrals to the Treasury Department across the street. *See, e.g.,* Urbina, *Senators Threaten, supra* note 5.

[10] *See* 152 Cong. Rec. S 1415 (Where Senator Arlen Specter outlines the provisions of his bill S 2308); *See also* Urbina, *U.S. is Reducing, supra* note 8 ("Senator Arlen Specter . . . introduced a measure to raise the maximum penalty . . . to $500,000, from the current $60,000. The law would also prohibit administrative law judges from reducing fines for violations deemed flagrant or habitual.")

[11] *Id.* ("'The agency keeps talking about issuing more fines, but it doesn't matter much,' said Bruce Dial, a former inspector for the mine safety agency. 'The number of citations means nothing when the citations are small, negotiable and most often uncollected.'").

[12] Although an ALJ has no direct role in the crafting of settlements, they do have the power to reject a proposed agreement. *See* MSHA v. Amax Lead Company of Missouri, 4 FMSHRC 975 (1982). From this perspective, this proposal seems to be an attempt to get around the negotiation process and use the ALJ's to indirectly cabin agency discretion.

Moreover, there are alternative measures better suited to deal with any qualms Congress may have regarding MSHA's policy choices and resource allocations. For instance, Congress has proposed to require more reporting from MSHA. This would have the effect of increasing congressional oversight and would be an effective means of exerting political pressure on the executive branch to explain its enforcement choices, thereby, increasing accountability.

In addition, Congress could consider reformulating the criteria that ALJs use to lower fines. Rather than dictate a particular outcome, Congress could further limit the factors that ALJs are permitted to consider in making their determination. Thus, allowing ALJ's to make their decisions based on the evidence presented instead of a de facto rule.

Congress is also not limited to purely legislative measures to address problems that they perceive in MSHA. The Senate can exercise its power to advise and consent, as exemplified by Senator Byrd who blocked the confirmation of Richard M. Stickler. [13] By blocking this nomination, Senator Byrd is sending a strong message to the executive branch about the kind of regulators that should be administering MSHA.[14]

II. The Proposal to Strip ALJ's of Discretion Runs Afoul of Constitutional Protections in the VI Amendment and Raises Serious Balance of Powers Concerns.

Nevertheless, the most significant problems that are posed by removing ALJ discretion are constitutional. In large measure, the issue posed in this case is similar to that of *U.S. v. Booker*.[15]

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[13] *See, e.g.,* Associated Press, *Byrd Blocking Mine Appointment*, N.Y. TIMES, Mar. 15, 2006, at A23.
[14] *See Id.* (Senator Byrd said he needed "more assurances that Mr. Stickler would be a strong leader" before confirming him as the top mine safety regulator.").
[15] U.S. v. Booker, 543 U.S. 220 (2005).

In that case, the Supreme Court stated that it was unconstitutional to compel judges to adhere to the Federal Sentencing Guidelines. Instead, the guidelines were deemed to be advisory.

This decision rested on the presumption that the sanctions imposed as a result of criminal proceedings had to correlate with the findings of fact.[16] Although *Booker* dealt with criminal proceedings and jury trials, it nonetheless stresses the importance of VI Amendment guarantees.[17] The issue then becomes whether the quasi-judicial nature of the agency hearings should be accorded the same types of protections as a criminal trial by jury.

Despite the fact that the administrative hearings have no jury, it is implicit that the ALJ takes on the role of independent finder of fact. The ALJ is in a position similar to the role that a judge in a civil or criminal proceeding assumes when the defendant has waived her VI Amendment right to trial by jury. In such a case the judge is still required to act as the finder of fact and is bound to base the sentencing on the facts before her.

This positioning of the ALJ is reinforced by the statutorily delineated considerations for imposing a civil penalty. The statute creates two different tracks that are to be used in assessing the appropriate fine.[18] The first requires the Secretary to base their assessment on agency regulations, while the ALJ is required to make a separate assessment based on six statutorily defined considerations.[19]

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[16] *Id.* at 227

[17] Amendment VI secures the right to trial by jury.

[18] The agency assesses the penalty amount through its own assessment regulations, while ALJ's are bound by the six criteria enumerated in 30 USCS § 820. *See* MSHA v. United States Steel Mining Co., 5 FMSHRC 1148 (1984); *see also* MSHA v. Douglas R. Rushford Trucking, 22 FMSHRC 598 (2000).

[19] The relevant section states that the "commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 USCS § 820(i).

Moreover, according to the statute, the Secretary's assessment is made prior to the fact finding determination by the ALJ. Specifically, the Secretary, "[i]n proposing civil penalties under this Act, . . . may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."[20] Consequently, the ALJ serves as a check on the agency to ensure that the penalties assessed are commiserate with creating ambiguities. Although the Specter measure is limited to cases of flagrant or habitual violations, the measure does not define what constitutes flagrant or habitual. Setting aside the obvious cases of non-compliance, the problem arises in determining the weight of remedial action or changing circumstances. Furthermore, since penalties can also be cited against operators for employee action,[21] there is a question of weighting the different kinds of citations.

The ALJ must have the ability to independently assess the facts and judge the appropriateness of the proposed fines. Especially since the assessment made by the Secretary is done prior to the hearing and, thus, before a full airing of the facts. Removing ALJ discretion runs counter to the fairness values that are inherent in any judicial proceeding and embodied in the VI Amendment. The mere fact that an agency hearing is a quasi-judicial does not diminish the importance of that value.

Furthermore, stripping ALJ's of discretion invokes distinct separation of powers issues. This issue is presented by the dual role of the ALJ. Even though they preside over quasi-judicial proceedings, the ALJ is still considered a part of the administrative structure and, therefore, part

[20] *Id.*
[21] *See* Northwestern Mining Department v. MSHA, 868 F.2d 1195 (10th Cir. 1989).

of the executive. Despite the similarities in form and function to an Article III federal judge, an ALJ is not part of the judiciary.[22]

As such, the ALJ is an agent of the executive and is charged with the dual purpose of enforcing the law and implementing policy of the executive. As a consequence, Congressional interference with the ALJ must be carefully scrutinized. Especially in the current political environment, where there is considerable tension between all three branches over the scope of executive power.

Under a strong unitary executive theory, the overall policy choice of the executive is entitled to considerable weight. Even though the President is precluded from dictating the outcome of any given case, he is not prohibited from establishing a general policy. In the case of MSHA, the Bush administration has enunciated a policy of improving agency and industry relationships.[23]

This policy has evinced itself in MSHA's lack of aggressiveness and the types of penalties that the agency has sought to impose.[24] In essence, the policy is at the heart of the discontent in Congress. Since Congress is unable to change the policy as dictated by the executive, it has sought to affect it indirectly by altering agency discretion.

The measure proposed by Senator Specter is by no means the most aggressive tack that could is available to Congress, but it nonetheless implicates issues the broader issues of executive power and Congressional oversight. The question then becomes whether Congress would be

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[22] *See* FMC v. South Carolina Ports Authority, 535 U.S. 743, 770 (Breyer Dissent, 2002) ("Constitutionally speaking 'independent' agencies belong neither to the Legislative Branch nor to the Judicial Branch of Government. . . . [T]he agencies, even 'independent' agencies, are more appropriately considered to be a part of the Executive Branch.").

[23] *See, e.g.,* Urbina, *U.S. is Reducing, supra* note 8 ("'The Bush administration ushered in this desire to develop cooperative ties between regulators and the mining industry,' said Tony Oppegard, a top official at the agency in the Clinton administration . . . . [Ms. Raulston, spokeswoman for the National Mining Association agreed saying,]'The agency realized in recent years that you can't browbeat operators into improved safety, and this general approach has worked.'").

[24] *Supra* note 11.

overstepping its bounds and encroaching on the prerogatives of the executive branch. Furthermore, if Congress is unable to reign in executive policy through legislation, there arises the additional question of viable alternative approaches.

From the viewpoint of a weak executive theory, Congress should have the power to limit the discretion of agencies, because the agencies are creatures of statute. The purpose of an agency is bound by Congressional intent, in that the statute proscribes the goals and measures of the agency. If Congress chooses to limit the scope of agency discretion, it has the power to do so by reforming the empowering statute of the agency.

Although such a reading could conceivably impede the President's ability to manage the executive branch, it is not inconsistent with Justice Jackson's three levels of executive power.[25] Rather, if Congress were to exercise its legislative power to limit agency discretion it would conform to Jackson's weakest placement of the executive. Thus, Congress can bend the policy implemented through agency action through procedure.

As the purpose of the executive is to implement and uphold the law, any legislative changes by Congress shape the manner and scope of executive policy. While Congress does not dictate executive policy, it can affect it. Indeed, it is essential that Congress be able to influence policy to fulfill its role in balancing the executive.

III. Conclusion: The Proposed Scheme to Strip ALJ's of Discretion is an Inferior Approach to the MSHA Problem and It will have Unintended Consequences.

[25] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (Jackson Concurring 1952) (President has greatest power to act when doing so with the express or implicit permission of Congress. President has weakest authority when he acts without authority or against Congressional will. There is also a grey zone where inherent legislative power and executive power overlap.)

Although there is controversy surrounding the issue of executive authority, Congress does have the power to implement legislation that dictates its own policy priorities. The fact that they may be at odds with the scheme of the executive is irrelevant. The executive's duty to uphold the administering law as dictated by Congress trumps the executive's desire to further their own policy goals through the agency.

Nevertheless, above both legislative and executive branches is the constitutional framework that encompasses them. Despite the fact that Congress may adjust the empowering statute to suit its prerogatives, it is constrained by the right due process. In particular, the Specter measure raises significant concerns by short-circuiting the assessment process and imposing a remedy that was calculated prior to a full hearing of the facts.

At the moment, the issue of mine safety has tremendous momentum and it is very likely that the measure will pass the Senate. If this piece of the measure survives committee and avoids a veto to become law, there could be significant unintended results. Ironically, these results would stem from further use of agency discretion.

Given the current policy of the Bush administration, if the measure were to go into effect there would be a precipitous drop in the number of fines that would be leveled against operators. Since the term habitual is undefined, the administration—eager to keep the industry intact—would be more cautious in citing companies for fear of developing track records for well run and productive mines. Moreover, the administration would cut back for fear of causing flight from the industry sparked by the fear of the significantly heftier fines and the inability to plead their case, especially large companies that own several mines and have as a consequence greater exposure.

Moreover, even if the implementation of the law did not result in fewer citations and prosecutions, the remedy proposed does nothing to address the issue of collecting on the judgments. The imposition of enormous fines that will not be collected would be an even greater farce than the small claims that are currently at issue. It would do nothing to improve the safety of the mining industry and would further erode the standing of MSHA as an effective agent of the government.

Disturbingly, there is every indication that this policy would continue unabated without some sort of effective action on the part of Congress.[26] Discretion is still an issue, but limiting discretion in the manner the Senator Specter's bill does is too vague. If the concern is the dollar amount fined at adjudications, then the best alternative would be to reshape the elements to be considered by the ALJ to grant less leeway. Specifically, excise the element that requires an ALJ to take into account an operator's ability to remain in business.

However, for this author, the larger and more pressing issue is the issue of delinquency. Legislative action alone is insufficient to deal with this problem. Rather Congress must use both its constitutionally derived powers and the political leverage of the moment to press the administration and the agency for change.

[26] *See* Urbina, *U.S. is Reducing*, *supra* note 8 ("'Operators know that it's cheaper to pay the fine than to fix the problem,' Mr. Addington[, a lawyer for the Appalachian Citizens Law Center in Prestonburg, KY,]said. 'But they also know the cheapest of all routes is to not pay at all. It's pretty galling.'").