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OSHA After Ten Years: A Review and Some Proposed Reforms

*Mark A. Rothstein**

I. INTRODUCTION

The human cost of a system that tolerates industrial accidents and occupational disease is staggering. In the past thirty years more American workers have died at workplaces than American soldiers in any war. At least 14,500 workers die each year in industrial accidents, and one worker in ten is injured.¹ At least 100,000 workers die each year from occupational disease and at least 390,000 contract some form of occupationally-connected illness.² The National Cancer Institute estimates that up to twenty percent of all cancers are related to occupational and environmental exposure.³

In the late 1960s the federal government finally responded to growing concern from labor and community groups over dangerous working conditions. In 1969 the Mine Enforcement Safety Administration and the Environmental Protection Agency were established. The following year Congress passed the Occupational

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1. According to the testimony of former Labor Secretary George Shultz, deaths and injuries caused by industrial accidents annually result in the loss of 250 million employee work days. The accidents and deaths cause over \$1.5 billion in lost wages and result in an annual loss to the nation's Gross National Product of \$8 billion. In addition, the Public Health Service estimates that there are 390,000 new cases of occupational disease each year. REPORT OF THE SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE (submitted to accompany S. 2193), S. REP. NO. 91-1281, 91st Cong., 2d Sess. 1-5 (1970).

2. See THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH 111 (1972).

3. NATIONAL CANCER INSTITUTE & NATIONAL INSTITUTE OF ENVIRONMENTAL HEALTH SCIENCES, ESTIMATES OF THE FRACTION OF CANCER INCIDENCE IN THE UNITED STATES ATTRIBUTABLE TO OCCUPATIONAL FACTORS (Draft Summary 1978). See also Ashford, *The Magnitude of the Occupational Health Problem*, in SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE & HOUSE COMM. ON EDUCATION, 94TH CONG., 2D SESS., PROCEEDINGS OF THE INTERDEPARTMENTAL TASK FORCE CONFERENCE ON OCCUPATIONAL DISEASES AND WORKER'S COMPENSATION 295 (Jt. Comm. Print (1976)).

Safety and Health Act.⁴ The Act created the Occupational Safety and Health Administration (OSHA) in the Department of Labor, and its research arm, the National Institute for Occupational Safety and Health (NIOSH) in the Department of Health, Education and Welfare (now Health and Human Services). Congress was convinced that the Act could effectively reduce the number of work-related deaths, injuries, and illnesses.

Despite such initial high hopes, OSHA has experienced profound difficulties in the years since its inception. From the outset the Act's implementation has been hampered by underfunding, poor administration, misdirected enforcement, and relentless assaults by critics. Moreover, since 1977, as the federal government has moved to implement the goals of the Act more forcefully, the criticism of OSHA has intensified. Serious questions regarding OSHA's expense, effectiveness, and priorities have been raised and have resulted in a variety of proposals to alter the basic structure of the Act. In the Ninety-sixth Congress alone, forty-six bills were introduced to amend OSHA,⁵ including six bills that would repeal the Act.

This Article reviews the first ten years of rulemaking, enforcement, and adjudication under the Act. The Article identifies various problem areas that have developed in these activities and for each area discusses whether past and present efforts to meet the problems have been adequate. In light of the Act's troubled history, the Article suggests several amendments to the Act, as well as administrative reforms, to facilitate the Act's implementation. The Article does not, however, attempt to address all of the myriad legal and policy issues or all of the Act's provisions that would benefit from congressional redrafting. Instead, the Article is necessarily limited to a discussion of broad policy developments and the essential amendments and reforms needed to make the Act efficient and effective.

4. 29 U.S.C. §§ 651-678 (1976). The Act was signed into law on December 29, 1970, and took effect on April 28, 1971.

5. S. 251, 270, 625, 1112, 1170, 1486, 1572, 2153. H.R. 187, 372, 425, 426, 427, 428, 458, 553, 664, 738, 771, 794, 795, 826, 1018, 1376, 1377, 1378, 1379, 1855, 2116, 2310, 3032, 3132, 3156, 3466, 3696, 4397, 4831, 4973, 5642, 6539, 6692, 6861, 6862, 6896, 7006, 7623.

II. RULEMAKING

A. *Initial Standards*

1. National Consensus Standards

Under section 6(a) of the Act⁶ the Secretary of Labor was initially authorized to adopt, as the agency's own regulations governing workplace conditions, "national consensus standards"⁷ and "established federal standards"⁸ without having first to comply with the lengthy rulemaking procedures of either section 6(b)⁹ or the Administrative Procedure Act.¹⁰ This special authority, which expired after two years,¹¹ was included in the Act to assure that workers would be protected as soon as possible after the statute's effective date.¹² Because they were adopted without the burden of rulemaking procedures, the standards did provide immediate coverage to millions of employees across the nation. Unfortunately, because the standards were adopted so quickly, they became the source of numerous problems and legal controversies. This was especially true for the national consensus standards.

Most of the difficulties with national consensus standards can be traced to the fact that they were privately adopted, optional measures.¹³ Many of the standards were poorly drafted, extremely

6. 29 U.S.C. § 655(a) (1976).

7. 29 U.S.C. § 652(9) (1976) defines "national consensus standard" as follows:

The term "national consensus standard" means any occupational safety and health standard or modification thereof which (1), has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope of provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

8. 29 U.S.C. § 652(10) (1976) defines "established federal standard" as follows:

The term "established Federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on December 29, 1970.

9. 29 U.S.C. § 665(b) (1976).

10. 5 U.S.C. §§ 551-559 (1976).

11. For this reason these standards are often referred to as "interim standards." This term, however, is misleading. Although the authority for adopting these standards was limited, the standards, once adopted, are permanent.

12. The purpose of this procedure is to establish as rapidly as possible national occupational safety and health standards with which industry is familiar. These standards may not be as effective or as up-to-date as is desirable, but they will be useful for immediately providing a nationwide minimum level of health and safety.

S. REP. No. 91-1282, 91st Cong., 2d Sess. 6 (1970).

13. See Hamilton, *The Role of Nongovernmental Standards in the Development of*

general, vague, redundant, contradictory, or hopelessly outdated. The requirements were usually couched as specification standards¹⁴ rather than as more flexible performance standards.¹⁵ Other standards were advisory, directory, or precatory and were never intended to be given binding effect.

In its haste to promulgate an initial standards package, OSHA did not review the standards carefully.¹⁶ Consequently, some of the national consensus standards adopted under section 6(a) were trivial, outdated, and even ludicrous. For example, two of the more notorious standards adopted by OSHA were a prohibition on the use of ice in drinking water¹⁷ and a requirement that all workplace toilet seats be "open-front."¹⁸ Although these and similar questionable standards were not zealously enforced, they were the source of embarrassment to OSHA and contributed greatly to the Agency's developing image of over-enforcement of the Act and of nitpicking.¹⁹

In 1978 OSHA revoked 607 general industry standards and 321 special industry (vertical) standards covering barrelmaking, bakery equipment, and laundry machinery and operations.²⁰ The revoked standards were considered unnecessary or unrelated to occupational safety and health. Unfortunately, while this decision to concentrate on "common-sense" priorities and to take other, simi-

Mandatory Federal Standards Affecting Safety or Health, 56 TEX. L. REV. 1329 (1978); Moran, *Occupational Safety and Health Standards as Federal Law: The Hazards of Haste*, 15 WM. & MARY L. REV. 777 (1974); Morey, *Mandatory Occupational Safety and Health Standards—Some Legal Problems*, 38 LAW & CONTEMP. PROB. 584 (1974).

14. *E.g.*, Ladder rungs must be made of wood and must be one inch in diameter.

15. *E.g.*, Ladder rungs must be capable of supporting 500 pounds.

16. On May 29, 1971, only a month and a day after the effective date of the Act, OSHA published its initial standards package. 36 Fed. Reg. 10,466-714 (1971). This package consisted of both national consensus standards—derived from the American National Standards Institute (ANSI) and the National Fire Protection Association (NFPA)—and established federal standards—based on the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1976); Service Contract Act, 41 U.S.C. §§ 351-357 (1976); Construction Safety Act, 40 U.S.C. §§ 327-333 (1976); National Foundation on the Arts and Humanities Act, 20 U.S.C. §§ 951-953 (1976); and Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1976).

17. 29 C.F.R. § 1910.141(b)(1)(iii) (1972), *revised*, 38 Fed. Reg. 10,932 (1973). The standard was directed at the nineteenth century practice of obtaining and storing ice cut from rivers and lakes that might be polluted.

18. 29 C.F.R. § 1910.141(c)(3)(iii) (1972), *revised*, 38 Fed. Reg. 10,933 (1973).

19. See McBride, *The "National Consensus" Standards Were A Bad Mistake . . .*, 87 AFL-CIO AM. FEDERATIONIST, July, 1980, at 5; Whiting, *OSHA's Enforcement Policy*, 31 LAB. L.J. 259, 261 (1980).

20. 43 Fed. Reg. 49,726 (1978). OSHA had originally proposed the revocation of 1100 standards. 42 Fed. Reg. 62,734 (1977).

lar measures²¹ to simplify and improve OSHA standards was a laudable effort by OSHA, the actions were too narrow in scope and far too late.

2. Incorporation by Reference

Many standards included within the initial standards package were not published in full but were "incorporated by reference" to their original sources. The complete versions of these standards may be examined at OSHA's national office and are obtainable from the nearly two dozen private drafters, whose names and addresses appear in the pertinent standards.²² The practice of incorporation by reference has been upheld by the Occupational Safety and Health Review Commission (Commission)²³ and the Fourth Circuit.²⁴ Nevertheless, incorporation is a highly questionable policy that should be changed. All applicable OSHA regulations should be published in a single source and should be official, free, and readily available.²⁵

3. Mandatory vs. Optional Standards

Administrative and judicial review of standards promulgated under section 6(a) has raised several legal issues. In almost every case the controversy evolved because a private, optional standard was adopted as a government-enforced, mandatory requirement.²⁶ For example, in *Noblecraft Industries, Inc. v. Secretary of Labor*,²⁷ the employer argued that the omission of an explanatory headnote contained in an American National Standards Institute (ANSI) standard invalidated the Secretary's purported permanent adoption of the standard. The Ninth Circuit rejected this conten-

21. See 44 Fed. Reg. 65,566 (1979).

22. 29 C.F.R. § 1910.6(b) (1980). A complete list of all standards incorporated by reference and their private sources appears at 45 Fed. Reg. 44,090 (1980).

23. *Ladish Co.*, 8 OSHC 1809, [1980] OSHD (CCH) ¶ 24,687; *Charles A. Gaetano Constr. Corp.*, 6 OSHC 1463, [1978] OSHD (CCH) ¶ 22,630; *Leader Evaporator Co.*, 4 OSHC 1292, [1976-1977] OSHD (CCH) ¶ 20,781 (1976).

24. *Dunlop v. Ashworth*, 538 F.2d 562 (4th Cir. 1976).

25. OSHA has recently given some indication that it may eliminate the ad hoc incorporation by reference of some standards. A proposed revision of the electrical standards for general industry, for example, would end mandatory reference to the 250,000 word 1971 National Electrical Code and substitute a 15,000 word text. 44 Fed. Reg. 55,274 (1979).

26. The argument that the section 6(a) process of adopting ANSI standards was an impermissible delegation of legislative and administrative authority to a private organization was rejected in *Noblecraft Indus., Inc. v. Secretary of Labor*, 614 F.2d 199, 203 (9th Cir. 1980).

27. 614 F.2d 199 (9th Cir. 1980).

tion, noting that the omitted language was "essentially a direction to the enforcing agency that exemptions should be liberally granted"²⁸ and as such was superfluous in light of section 6(d)'s variance provision.²⁹

In attempting to give binding effect to previously-optional private standards, the Secretary in some instances changed the wording of the standard from "should" to "shall." In *Usery v. Kenne-cott Copper Corp.*,³⁰ however, the Tenth Circuit affirmed the Commission's holding that the Secretary was not authorized by section 6(a) to make such changes. Furthermore, the court in *Marshall v. Pittsburgh-Des Moines Steel Co.*³¹ held that the Secretary's subsequent "interpretation" of an ANSI standard could not change the effect of an already-adopted standard from advisory to mandatory.

Together these holdings have created a dilemma for the Secretary. Changing "should" to "shall" is impermissible, but adopting the "should" wording makes the standard merely optional. This means that to give binding effect to the many national consensus standards containing "should" language, section 6(b) rulemaking procedures would be required—a result directly contrary to the purpose of section 6(a). Thus, in theory, the Secretary could argue that because all national consensus standards were optional, section 6(a) contains an implied grant of authority to promulgate the standards as mandatory OSHA standards. This argument, however, is undermined by the Secretary's ill-advised statement in the initial standards package that the adopted national consensus standards "contain only mandatory provisions of the standards promulgated by those two organizations [ANSI and NFPA]."³²

The obvious solution is a complete repromulgation of the section 6(a) standards package in accordance with the notice and comment requirements of section 6(b).³³ This procedure would

28. *Id.* at 204.

29. See generally M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW §§ 45-48 (1978).

30. 577 F.2d 1113 (10th Cir. 1977); accord, *Marshall v. Union Oil Co.*, 616 F.2d 1113 (9th Cir. 1980).

31. 584 F.2d 638 (3d Cir. 1978); accord, *Marshall v. Anaconda Co.*, 596 F.2d 370 (9th Cir. 1979).

32. 36 Fed. Reg. 10,466 (1971). This suggests that ANSI standards in the "should" form are not even optional, but were instead never intended to be adopted by OSHA at all.

33. It may be theorized that the Secretary has declined to repromulgate the § 6(a) standards for two reasons. First, the Secretary may believe that even if the standards contain some flaws, they are valid and enforceable notwithstanding some contrary judicial opinions. Second, the Secretary may prefer to suffer an occasional defeat in a single case than to

eliminate the problems created by the mandatory-advisory distinction. In addition, new standards could resolve other controversial issues, such as the meaning of certain words³⁴ and the frequently asserted vagueness of standards.³⁵

B. Health Standards

1. Development

Although the initial standards package contained mostly safety standards, OSHA also adopted threshold limit values (TLV's)³⁶ for 400 toxic substances. These TLV's were developed by the American Conference of Government Industrial Hygienists, a private organization, and adopted as federal standards in 1969 pursuant to the Walsh-Healey Act.³⁷ The standards were inadequate, however, and an urgent need existed for scientific research and the promulgation of new health standards to prevent the estimated 100,000 deaths annually caused by occupational diseases.³⁸

The National Institute for Occupational Safety and Health (NIOSH) was established by section 22 of the Act³⁹ to research and develop recommended OSHA standards.⁴⁰ Because an estimated

open up the entire standards package to wholesale substantive attacks. If this conjecture is true, the wisdom of engaging in such an administrative "holding action" may be questioned because the present standards would still be enforceable during the promulgation period of the new standards. OSHA's current approach, according to OSHA Safety Standards Director Jerry Purswell, is to review entire subparts of standards. [1980] 10 OCCUP. SAFETY & HEALTH REP. (BNA) 5.

34. For example, defining the word "provide," used in many standards, has been particularly controversial. *Compare* *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113 (10th Cir. 1977) ("provide" does not mean "require use of" personal protective equipment), *with* *Marshall v. Southwestern Indus. Contractors & Riggers, Inc.*, 576 F.2d 42 (5th Cir. 1978) ("provide" does mean "require use of"). An employer's obligation to "provide" safety equipment has been generally read as not requiring the employer to bear the cost. *Budd Co. v. OSHRC*, 513 F.2d 201 (3d Cir. 1975) (safety shoes).

35. *Compare* *Cotter & Co. v. OSHRC*, 598 F.2d 911 (5th Cir. 1979), *and* *B & B Insulation, Inc. v. OSHRC*, 583 F.2d 1364 (5th Cir. 1978), *with* *General Dynamics Corp. v. OSHRC*, 599 F.2d 453 (1st Cir. 1979), *and* *S & H Riggers & Erectors, Inc.*, 7 OSHC 1260, [1979] OSHD (CCH) ¶ 23,480.

36. A threshold limit value (TLV) represents the maximum time-weighted average concentration to which a healthy worker may be exposed for a normal 40-hour work week up to eight hours a day over a working lifetime (40-50 years) without becoming ill. N. TRUEFF, ENVIRONMENT AND HEALTH 221 (1980).

37. 34 Fed. Reg. 7946 (1969).

38. THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, 1972, at 111 (1972).

39. 29 U.S.C. § 671 (1976).

40. NIOSH was established in the Department of Health, Education and Welfare (now the Department of Health and Human Services). As the successor to the Bureau of

25,000 toxic substances are used or generated by American business and industry, including 500 to 600 new substances each year,⁴¹ NIOSH needed to take action immediately. Unfortunately, NIOSH was understaffed, underbudgeted, and ineffective in developing health standards.⁴² In its first three and one-half years of operation NIOSH produced only eighteen criteria documents with standards recommendations.⁴³

The Labor Department must share the blame with NIOSH for slow health standards development. In the Act's first five years, OSHA promulgated permanent health standards only three times, issuing regulations covering asbestos, vinyl chloride, and fourteen separate carcinogens. Furthermore, these standards were promulgated in response to private petitions for emergency temporary standards rather than through the procedures of section 6(b). Much of the fault for the initial delay in promulgating health standards has been attributed to OSHA's so-called "22 milestones,"⁴⁴ the agency's detailed procedures for standard development.⁴⁵ Other structural problems, however, continue to prevent OSHA from responding promptly to the need for new health standards. One of the greatest criticisms of the OSHA standard issuance process is that it simply takes too long. For example, when a district court in *National Congress of Hispanic American Citizens v. Marshall*⁴⁶ ordered OSHA to submit a timetable for developing a field sanitation standard, the agency replied that a period of fifty-four months would be necessary.⁴⁷

Recent efforts at promulgating health standards also have been delayed by the sheer volume of the testimonial and other evidence introduced into hearing records. Although by statute OSHA rulemaking is "notice and comment" informal rulemaking,⁴⁸ OSHA

Occupational Safety and Health (BOSH), NIOSH assumed a tradition of extreme ineffectiveness. See J. PAGE & M. O'BRIEN, *BITTER WAGES* 88-94 (1973).

41. GENERAL ACCOUNTING OFFICE, REPORT TO THE SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE: SLOW PROGRESS LIKELY IN DEVELOPMENT OF STANDARDS FOR TOXIC SUBSTANCES AND HARMFUL PHYSICAL AGENTS FOUND IN WORKPLACES 16 (1973).

42. See Page & Munsing, *Occupational Health and the Federal Government: The Wages Are Still Bitter*, 38 *LAW & CONTEMP. PROB.* 651, 654-57 (1974).

43. *Id.* at 655-56.

44. See Boyd, *Dispelling the Standard Myths*, *TRIAL*, Oct. 1975, at 13, 21.

45. THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, 1974, at 10-11 (1976).

46. 626 F.2d 882 (D.C. Cir. 1979) (remanding to district court).

47. [1980] OSHD (CCH) ¶ 24,542.

48. The standard of review prescribed by § 6(f), however, is "substantial evidence," which is generally used in adjudicatory proceedings or formal rulemaking. See Note, *Judi-*

has issued regulations providing for hearings before an administrative law judge (ALJ); interested parties have the right to submit written comments, to testify in person, and to conduct cross-examination.⁴⁹ The comments, exhibits, and testimony that must be reviewed have often reached massive and time-consuming proportions.⁵⁰

Since 1976 OSHA has made some progress in promulgating important new health standards. Standards that seek to limit exposure to lead, benzene, coke oven emissions, arsenic, and cotton dust have been promulgated. In 1980 OSHA promulgated a long-awaited standard concerning the identification, classification, and regulation of occupational carcinogens.⁵¹ This "generic carcinogen standard" seeks to provide the framework for dealing with the estimated 500 cancer causing substances found in American workplaces.⁵²

2. Judicial Review

Each new health standard has industry-wide impact, carries with it millions of dollars in compliance costs, and involves important matters of employee health. Consequently, virtually all of OSHA's new health standards have been challenged in the federal courts of appeals⁵³ pursuant to section 6(f) of the Act.⁵⁴ The cases

cial Review Under the Occupational Safety and Health Act: The Substantial Evidence Test as Applied to Informal Rulemaking, 1974 DUKE L.J. 459.

49. 29 C.F.R. §§ 1911.1-1911.18 (1980). The effect of these regulations is to create a "hybrid" form of rulemaking.

50. For example, the record in the cotton dust case exceeded 105,000 pages, *AFL-CIO v. Marshall*, 617 F.2d 636, 647 (D.C. Cir. 1979), *cert. granted sub nom. American Textile Mfrs. Inst., Inc. v. Marshall*, 101 S. Ct. 68 (1980), and the record in the generic carcinogen standard exceeded 250,000 pages. Shabecoff, *First Uniform U.S. Rules Set Up to Reduce Cancer in Workplace*, N.Y. Times, Jan. 16, 1980, § A, at 1, col. 1. In light of the Supreme Court's decision in the benzene case, *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 100 S. Ct. 2844 (1980), requiring greater evidence of the benefits expected of the proposed standard, lengthy hearing records are likely to continue. See notes 89-90 *infra* and accompanying text.

51. 45 Fed. Reg. 5002-296 (1980).

52. Whereas OSHA promulgated only 20 carcinogen standards in the Act's first nine years, OSHA head Eula Bingham is optimistic that, as a result of the new rulemaking initiative, ten new carcinogens can be regulated each year. Shabecoff, *supra* note 50.

53. See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 100 S. Ct. 2844 (1980) (benzene); *American Iron & Steel Inst. v. OSHA*, 577 F.2d 825 (3d Cir. 1978), *cert. granted sub nom. Republic Steel Co. v. OSHA*, 100 S. Ct. 3054, *cert. dismissed*, 101 S. Ct. 38 (1980) (coke oven emissions); *AFL-CIO v. Marshall*, 617 F.2d 636 (D.C. Cir. 1979) *cert. granted sub nom. American Textile Mfrs. Inst. v. Marshall*, 101 S. Ct. 68 (1980) (cotton dust); *Taylor Diving & Salvage Co. v. United States Dep't of Labor*, 599 F.2d 622 (5th Cir. 1979) (hyperbaric diving); *Society of Plastics Indus., Inc. v. OSHA*, 509 F.2d 1301 (2d Cir.

often involve difficult and complex issues of scientific evidence, regulatory policy, and economic impact.

The most recent, and perhaps most controversial, case involving an OSHA health standard was *Industrial Union Department, AFL-CIO v. American Petroleum Institute (API)*.⁵⁵ In *API* the Supreme Court, hearing a standards case for the first time, addressed the validity of OSHA's benzene standard. The Fifth Circuit had invalidated the standard because OSHA failed to provide a quantitative estimate of the benefits flowing from a reduction in the permissible exposure limit.⁵⁶

The Fifth Circuit based its decision on its construction of an obscure definitional section of the Act, section 3(8),⁵⁷ which provides: "The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." The court held that, in light of the requirement that standards be "reasonably necessary or appropriate," the Secretary must determine "whether the benefits expected from the standard bear a reasonable relationship to the costs imposed by the standard."⁵⁸ The court was, essentially, fashioning a three-part test: (1) whether substantial evidence supports the Secretary's estimate of expected benefits; (2) whether substantial evidence supports the Secretary's estimate of expected costs; and (3) whether the benefits bear a reasonable relationship to the costs.

While requiring a relationship between costs and benefits, the Fifth Circuit stopped short of requiring "an elaborate cost-benefit analysis."⁵⁹ According to the court, the cost-benefit question does not even arise unless the Secretary has presented substantial evidence of a standard's expected benefits and costs. Thus, because

1975) (vinyl chloride); *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974) (asbestos); *Florida Peach Growers Ass'n v. United States Dep't of Labor*, 489 F.2d 120 (5th Cir. 1974) (organophosphorous pesticides); *Dry Color Mfrs. Ass'n v. United States Dep't of Labor*, 486 F.2d 98 (3d Cir. 1973) (14 carcinogens).

54. 29 U.S.C. § 655(f) (1976).

55. 100 S. Ct. 2844 (1980).

56. *American Petroleum Inst. v. OSHA*, 581 F.2d 493, 505 (5th Cir. 1978).

57. 29 U.S.C. § 652(8) (1976).

58. 581 F.2d at 503. The court relied on its previous construction in *Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n*, 569 F.2d 831 (5th Cir. 1978), of similar language in the Consumer Product Safety Act.

59. 581 F.2d at 503.

there was inadequate evidence of expected benefits,⁶⁰ the cost-benefit question was not reached by the court.

On July 2, 1980, the last day of its 1979-1980 Term, the Supreme Court affirmed the Fifth Circuit's decision. The Court was sharply divided, and five separate opinions were issued by the Justices. Justice Stevens, writing for a plurality of four Justices,⁶¹ rejected the government's argument that section 3(8) is meaningless and is overshadowed by section 6(b)(5),⁶² the section of the Act that specifically details the requirements for standards dealing with toxic materials or harmful physical agents.⁶³

In so ruling, Justice Stevens found it unnecessary to address the much-debated language of section 6(b)(5), which requires the Secretary to promulgate standards that will protect the employee's health "to the extent feasible." It is from this language that the feasibility and cost-benefit analysis controversy arises. According to Justice Stevens, the requirements of section 3(8) must be met before any consideration of section 6(b)(5) can occur. In Justice Stevens' view,

[Section 3(8)] requires the Secretary, before issuing any standard, to determine that it is reasonably necessary *and* appropriate to remedy a significant risk of material health impairment. Only after the Secretary has made the threshold determination that such a risk exists with respect to a toxic substance, would it be necessary to decide whether § 6(b)(5) requires him to select the most protective standard he can consistent with economic and technological feasibility, or whether, as respondents argue, the benefits of the regulation must be commensurate with the costs of its implementation.⁶⁴

60. There was no serious dispute over the estimate of the costs.

61. Chief Justice Burger and Justice Stewart joined in the plurality opinion and Justice Powell joined in all parts of the plurality opinion but part III-D.

62. 29 U.S.C. § 655(b)(5) (1976).

63. Section 6(b)(5) provides as follows:

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

64. 100 S. Ct. at 2863 (emphasis added). The Court incorrectly paraphrased § 3(8) as requiring a standard to be "reasonably necessary *and* appropriate." Actually, a standard need only be "reasonably necessary *or* appropriate." See text accompanying note 57 *supra*.

By this holding, the plurality opinion in effect added a fourth element to the Fifth Circuit's test⁶⁵ that had to be satisfied before the other three questions could even be raised. In order to show that the new standard was "reasonably necessary or appropriate," the Secretary had to prove that the present permissible exposure limit, 10 p.p.m., inadequately protected workers: "[T]he burden was on the Agency to show, on the basis of substantial evidence, that it is at least more likely than not that long-term exposure to 10 ppm of benzene presents a significant risk of material impairment."⁶⁶ Of great importance is Justice Stevens' statement that the Act "was not designed to require employers to provide absolutely risk-free workplaces," but was only intended to require "the elimination, as far as feasible, of significant risks of harm."⁶⁷ Thus, the new benzene standard could not be justified merely because *some* risks exist at present levels.

In affirming the Fifth Circuit, the plurality opinion found that the Secretary had failed to prove that there are significant risks of benzene exposure at the levels of the present standard. In so finding, the Court rejected the Secretary's theory that there is no absolutely safe level for a carcinogen and that the industry has the burden of showing that there *is* a safe exposure level.⁶⁸ This part of the opinion casts great doubt on the validity of OSHA's generic carcinogen policy, which is based on the theory that there is no safe level for a carcinogen.⁶⁹

Chief Justice Burger's concurring opinion focused on the lack of evidence in the record to support the new standard. The Chief Justice emphasized that "[w]hen the administrative record reveals only scant or minimal risk of material health impairment, respon-

65. The Court, of course, neither adopted the Fifth Circuit's analysis—which has been characterized as being comprised of three parts, *see* note 58 *supra* and accompanying text—nor suggested that the problem should be analyzed in these terms.

66. 100 S. Ct. at 2869.

67. *Id.* at 2864. *See generally* *So It's a Carcinogen, But How Bad?*, N.Y. Times, July 9, 1980, § A, at 18, col. 1.

68. OSHA argued that, because of a lack of available scientific evidence, all doubts should be resolved in favor of the exposed employee. To do otherwise, the agency reasoned, would require waiting for leukemia deaths (caused by benzene) to justify the standard. 100 S. Ct. at 2869.

69. Justice Stevens sought to ameliorate the seemingly harsh effects of the plurality opinion by indicating that (1) as long as it can be shown that a workplace is unsafe, "significant risk" need not be calculated with mathematical precision; (2) a "significant risk" can be shown by using the "best available evidence" and need not wait for scientific certainty; and (3) as demonstrated by other decisions, other ways exist to prove the significance of risks. 100 S. Ct. at 2871. One example given by the Court of an acceptable quantification of risk is the coke oven emissions standard. *Id.* at 2871-72 n.64. *See* note 96 *infra*.

sible administration calls for avoidance of extravagant, comprehensive regulation."⁷⁰

Justice Powell concurred in part and in the judgment. Although he regarded the question as close, he joined with the plurality in concluding that the Secretary had failed to prove that the standard was "reasonably necessary." Perhaps as a concession to the closeness of the facts, he then analyzed the economic feasibility of the standard based on the assumption that the Secretary had proved the need for the standard. Although following the analytical framework of the plurality, Justice Powell went beyond that opinion by interpreting the "feasible" language of section 6(b)(5) as mandating OSHA to consider whether the benzene standard's "substantial costs" are justified. According to Justice Powell, OSHA had simply concluded that the costs were justified but had failed to explain or document the method by which such a conclusion was reached. Justice Powell's concurrence is thus important because his analysis goes farther than that of both the Court plurality and the Fifth Circuit by requiring cost-justification not only as a matter of theory but also as the basis for invalidating a standard.

Justice Rehnquist merely concurred in the judgment. In a separate opinion he initially rejected the plurality's position "that § 3(8) acts as a general check upon the Secretary's duty under § 6(b)(5) to adopt the most protective standard feasible."⁷¹ Having dispensed with the "threshold" problem, Justice Rehnquist then turned directly to section 6(b)(5), arguing that the section's standard of "feasibility" renders meaningful judicial review impossible.⁷² Justice Rehnquist contended that Congress, by failing to provide the Secretary with adequate parameters for regulation, had unconstitutionally delegated legislative authority to the executive. No other opinion provided a detailed analysis of the delegation issue, however, and even Justice Rehnquist admitted that the doctrine had fallen into "desuetude."⁷³

Justice Marshall's somewhat strident dissent was joined in by

70. 100 S. Ct. at 2875 (Burger, C.J., concurring).

71. *Id.* at 2883 (Rehnquist, J., concurring in the judgment).

72. *Id.*

73. *Id.* at 2886. Justice Rehnquist would invalidate the first sentence of § 6(b)(5) as it applies to any toxic substance or harmful physical agent for which a safe level is unknown or otherwise infeasible, but not as to toxic substances or harmful physical agents for which safe levels are feasible. *Id.* at 2887 & n.8. It is not clear how this limitation eliminates the problem of defining what is "feasible." Justice Rehnquist's argument was rejected by the dissent. *Id.* at 2902 n.30 (Marshall, J., dissenting).

Justices Brennan, White, and Blackmun. The dissent accused the plurality of ignoring the plain meaning of the Act "in order to bring the authority of the Secretary of Labor in line with the plurality's own views of proper regulatory policy."⁷⁴ According to the dissent, the plurality, by fashioning a restrictive rule of law from the "reasonably necessary or appropriate" language, "placed the burden of medical uncertainty squarely on the shoulders of the American worker, the intended beneficiary of the Occupational Safety and Health Act."⁷⁵ Justice Marshall also criticized the plurality for reevaluating the complex scientific evidence presented to the agency without giving deference to the findings of the Secretary.⁷⁶ In addition, the dissent rejected the industry's argument that the "feasible" language in section 6(b)(5) requires an elaborate cost-benefit analysis; the dissent interpreted "feasible" as mandating only that standards be economically and technologically achievable.⁷⁷

It is important to note that the plurality's view on the effect of section 3(8) is a minority view of the Court. Justice Rehnquist joined with the four dissenters in concluding that section 3(8) was not intended to have the significance attributed to it by the plurality.⁷⁸ Justice Powell's concurrence conceded that the sufficiency of the evidence justifying a new standard was a close question.⁷⁹ On both points, the plurality view may be criticized. With regard to section 3(8), as the dissent points out, "reasonably necessary or appropriate" clauses are common in regulatory statutes, and they have never been read "as having a substantive content that supersedes a specific congressional directive embodied in a provision that is focused more particularly on an agency's authority."⁸⁰ In

74. *Id.* at 2887.

75. *Id.* at 2888.

76. *Id.* at 2890.

77. *Id.* at 2902.

78. As Justice Rehnquist stated: "I therefore find it difficult to accept the conclusion of the lower court, as embellished by respondents, that § 3(8) acts as a general check upon the Secretary's duty under § 6(h)(5) to adopt the most protective standard feasible." *Id.* at 2883.

79. *Id.* at 2877.

80. *Id.* at 2897 (Marshall, J., dissenting). The Consumer Product Safety Act provision, the construction of which in *Aqua Slide 'N' Dive v. Consumer Prod. Safety Comm'n*, 569 F.2d 831 (5th Cir. 1978), was applied to OSHA by the Fifth Circuit in *American Petroleum Inst. v. OSHA*, 581 F.2d 493 (5th Cir. 1978), *aff'd sub nom. Industrial Union Dep't. AFL-CIO v. American Petroleum Inst.*, 100 S. Ct. 2844 (1980), is substantially different from § 3(8). The text of 15 U.S.C. § 2058(c)(A) provides:

(2) The Commission shall not promulgate a consumer product safety rule unless it finds (and includes such finding in the rule)—

fact, similar language is used in other sections of the Act with an apparently benign intent.⁸¹

The congressional intent behind section 3(8) may be easier to discern if that section is read in the context of other similar provisions in the Act.⁸² Section 6(a)⁸³ authorizes the Secretary to adopt national consensus standards and established federal standards "unless he determines that the promulgation of such standard would not result in improved safety or health for specifically designated employees." Section 9(a)⁸⁴ authorizes the Secretary to issue a "notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health." Section 24(a)⁸⁵ authorizes the Secretary to compile statistics of injuries and illnesses "other than minor injuries requiring only first aid treatment. . . ." Read in light of these other sections, it appears that section 3(8) is merely a general definitional section. The provision provides only that OSHA standards must be related to the purposes of the Act and may not be concerned solely with efficiency, productivity, convenience, aesthetics, or trivial matters.

A final criticism of the plurality's use of section 3(8) is that the plurality misreads and misquotes the section as having been written in the conjunctive rather than in the disjunctive.⁸⁶ Section 3(8) requires that a standard be "reasonably necessary or appropriate." The plurality, like the Fifth Circuit, seems to have focused unduly on whether a standard is necessary rather than whether it is appropriate. The common definition of appropriate is "especially suitable, compatible, or fitting."⁸⁷ Certainly, it is especially suitable, compatible, and fitting for OSHA to regulate worker exposure to benzene. The determination of whether the standard as promul-

(A) that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product.

81. For example, § 8(c)(1) of the Occupational Safety and Health Act, 29 U.S.C. § 657(c)(1) (1975), authorizes the Secretary to require employers to make, keep, preserve, and make available certain records "as necessary or appropriate for the enforcement of this Act. . . ." Section 28(a) of the Act authorizes the Small Business Administration to make such loans as it "may determine to be necessary or appropriate to assist any small business concern" in complying with the Act.

82. As the dissent observes, § 6(b)(5) of the Occupational Safety and Health Act received extensive legislative attention, but § 3(8)—a supposedly crucial limitation on § 6(b)(5)—received none at all. 100 S. Ct. at 2898 (Marshall, J., dissenting).

83. 29 U.S.C. § 655(a) (1976).

84. *Id.* § 658(a).

85. *Id.* § 673(a).

86. *See* 100 S. Ct. at 2862, 2863.

87. WEBSTER'S NEW COLLEGIATE DICTIONARY 56 (1974).

gated is valid should have been based on sections 6(b)(5) and 6(f).⁸⁸

With respect to the plurality's analysis of the evidentiary support for the benzene standard, it must be remembered that the case involved a record containing fifty volumes of testimony dealing with complex and unsettled scientific issues. The plurality emphasized what it termed OSHA's "inadequate" rejection of industry testimony that a dose-response curve could be formulated on the basis of current epidemiological data and that current exposure levels would cause at most two deaths every six years.⁸⁹ The plurality failed to acknowledge, however, the admission by an industry witness that the promising figures were based on a "lousy set of data" and consequently were only "slightly better than a guess."⁹⁰ More importantly, section 6(f) provides that on judicial review "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." The substantial evidence rule does *not* require that an agency provide a detailed refutation of every adverse witness who testifies in a rulemaking proceeding. Such a burden would be impossible to meet and would ignore the requirement that the record be considered "as a whole."

It is ironic that the benzene case could be precedent setting, because the regulation of benzene raises issues somewhat atypical from the control of other toxic substances and carcinogens. The number of employees that would benefit from the new regulation is relatively small—35,000.⁹¹ Benzene-induced leukemia has a relatively low incidence rate⁹² and a long latency

88. It is beyond the scope of this Article to set forth an elaborate framework for analysis of standards under § 6(b)(5) and § 6(f) of the Occupational Safety and Health Act. See generally Berger & Riskin, *Economic and Technological Feasibility in Regulating Toxic Substances Under the Occupational Safety and Health Act*, 7 *ECOLOGY L.Q.* 285 (1978); McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 *Geo. L.J.* 729 (1979); Note, *Cost-Benefit Analysis for Standards Regulating Toxic Substances Under the Occupational Safety and Health Act: American Petroleum Institute v. OSHA*, 60 *B.U. L. Rev.* 115 (1980).

89. 100 S. Ct. at 2870.

90. *Id.* at 2894 n.23 (Marshall, J., dissenting).

91. *Id.* at 2899 & n.28. By contrast, the cotton dust standard affects between 250,000 and 800,000 employees. *AFL-CIO v. Marshall*, 617 F.2d 636, 646 & n.19 (D.C. Cir. 1979), cert. granted *sub nom.* *American Textile Mfrs. Inst. v. Marshall*, 101 S. Ct. 68 (1980).

92. Although benzene exposure may increase an individual's likelihood of contracting leukemia, the incidence of leukemia among exposed workers is only thirteen per 100,000. See 100 S. Ct. at 2852-53 & nn.9 & 12. By contrast, as many as 20-30% of cotton workers suffer from byssinosis. 617 F.2d at 646 & un.17 & 20.

period.⁹³ Moreover, there is relatively little epidemiological or laboratory data concerning exposure to the chemical,⁹⁴ and the expected benefits of a sharp reduction in the permissible exposure limit are difficult to quantify.⁹⁵ The benzene decision is certainly important, but the uniqueness of the facts, the divisiveness of the Court, and the narrowness of the holding may be limiting factors.⁹⁶

C. Judicial Review

1. Venue Reform

Section 6(f) of the Act⁹⁷ provides, in pertinent part:

Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard.

Although permitting judicial review of OSHA standards in the court of appeals for the circuit in which the filing party "resides or has his principal place of business" appears simple and fair, two related procedural problems have arisen.

The first problem under section 6(f) judicial review involves

93. The latency period for benzene-induced leukemia could range from two to over 20 years. 100 S. Ct. at 2893 (Marshall, J., dissenting). By contrast, damage from chronic lead exposure may be "sudden." See 44 Fed. Reg. 60,980 (1979) (Appendix A to lead standard, 29 C.F.R. § 1910.1025 (1980)).

94. 100 S. Ct. at 2859 & n.35, 2894 & n.23 (Marshall, J., dissenting). By contrast, there is much better data on the effect of vinyl chloride and other substances. See *id.* at 2871-72 n.64.

95. *Id.* at 2862.

96. On the same day that it issued its decision in the "benzene case," the Court granted certiorari in a case challenging the validity of the coke oven emissions standard. *American Iron & Steel Inst. v. OSHA*, 577 F.2d 825 (3d Cir. 1978), *cert. granted sub nom. Republic Steel Corp. v. OSHA*, 100 S. Ct. 3054 (1980). Because the need for a new coke oven emissions standard was adequately demonstrated, see note 69 *supra*, this case promised to resolve the issue of cost-benefit analysis. On August 26, 1980, however, the industry petitioners moved to dismiss their previously-granted petition, and on September 10, 1980, the Court granted the motion. 101 S. Ct. 38 (1980). Subsequently, the Court agreed to rule on the issue of the economic impact of OSHA standards when it granted certiorari in the "cotton dust" case. *AFL-CIO v. Marshall*, 617 F.2d 636 (D.C. Cir. 1979), *cert. granted sub nom. American Textile Mfrs. Inst., Inc. v. Marshall*, 101 S. Ct. 68 (1980).

In *United Steelworkers v. Marshall*, 8 OSHC 1810 (D.C. Cir. Aug. 15, 1980), a case decided after the "benzene case," the D.C. Circuit upheld the lead standard as applied to the primary and secondary lead smelting industries and the battery manufacturing industry. According to the court, the Secretary must construct a reasonable estimate of compliance costs and must demonstrate the reasonable likelihood that these costs will not threaten the existence or competitive structure of an industry. *Id.* at 1864.

97. 29 U.S.C. § 655(f) (1976).

"forum shopping." In this context, "forum shopping" does not involve the choice of a circuit based simply on residence or place of business.⁹⁸ Instead, because judicial review is usually sought by trade associations and groups of employers or employees that can be said to "reside" in a number of circuits, "forum shopping" more specifically entails the selection of a circuit that is deemed to be a favorable forum.⁹⁹

The second, related problem concerns the so-called "race to the courthouse" that invariably occurs whenever there are two or more "adversely affected persons" seeking review in different courts of appeals.¹⁰⁰ Section 2112(a) of title 28 of the United States Code, which is specifically referred to in section 11(a) of the Act, provides, in part:

If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.¹⁰¹

Industrial Union Department, AFL-CIO v. Bingham demon-

98. Pursuant to § 11(a) of the Occupational Safety and Health Act, 29 U.S.C. § 660(a) (1976), any person adversely affected or aggrieved by an order of the Occupational Safety and Health Review Commission may obtain judicial review in the United States court of appeals for the circuit in which the violation is alleged to have occurred, the circuit in which the employer has its principal office, or in the D.C. Circuit. The statistical variations in relief granted by the courts in § 11(a) judicial review cases may account for some degree of "forum shopping" as well. See Rothstein, *Judicial Review of Decisions of the Occupational Safety and Health Review Commission—1973-1978: An Empirical Study*, 56 CHI.-KENT L. REV. 607, 627-30 (1980). Nevertheless, the "race to the courthouse" problem that exists under § 6(f) has not been troublesome under § 11(a) because there is usually only one aggrieved person in a § 11(a) adjudication.

99. Because most of this expensive appellate litigation is undertaken by industry trade associations and union groups, their interests would necessarily be an important factor in venue reform.

100. To date, these "races" have been contested by both industry and union petitioners. Presumably, any new rulemaking action under § 6(b) of the Act, except for revocation or modification of existing standards would "adversely affect" an industry petitioner. A union petitioner may or may not support a new standard. Nevertheless, even when unions are satisfied with a new standard, a "protective" challenge urging judicial approval can be filed in a hospitable circuit. No court has yet considered the issue of whether such a petitioner has standing under § 11(a). See generally 68 COLUM. L. REV. 166, 170 (1968).

101. This general venue provision for judicial review of administrative matters has created "race to the courthouse" problems under a variety of statutes. See Note, *Venue for Judicial Review of Administrative Actions: A New Approach*, 93 HARV. L. REV. 1735, 1742-44 (1980).

strated the procedural complications that arise from multiple filings.¹⁰² OSHA had held a conference with various invited labor and industry leaders on April 29, 1977, at which time the benzene standard was signed. Immediately after the meeting, the AFL-CIO filed a petition for review with the Circuit Court of Appeals for the District of Columbia. Less than an hour later, after a press conference, OSHA filed the standard with the Federal Register. The standard was published in the Federal Register on May 3, 1977, and on May 10, 1977, the American Petroleum Institute filed a petition for review in the Fifth Circuit. On June 7, 1977, the Fifth Circuit transferred that proceeding to the D.C. Circuit, the court of first filing, pursuant to section 2112(a). Immediately thereafter the American Petroleum Institute filed a motion to retransfer the entire case to the Fifth Circuit.

In a divided opinion, the D.C. Circuit held that in the absence of any OSHA regulation the standard was "issued" when it was signed at the private conference. Therefore, the AFL-CIO petition was considered timely filed in the D.C. Circuit. Nevertheless, "in the interest of justice," the court ordered the case retransferred to the Fifth Circuit, where "the first petition was filed subsequent to the disclosure of the agency decision to the general public."¹⁰³

After the decision in *Industrial Union Department*, OSHA promulgated a regulation that indicated that standards are "issued" when they are filed with the Federal Register.¹⁰⁴ Although the regulation gave all parties the same starting time, it did not end the "race to the courthouse." Indeed, even with a uniform starting time, problems of varying sorts have arisen. For example, in *American Iron & Steel Institute v. OSHA*¹⁰⁵ a conflict developed involving two challenges to OSHA's lead standard. When OSHA "issued" its standard on November 13, 1978, the Steelworkers immediately filed a petition for judicial review in the Third Circuit at 8:45 a.m. EST. At precisely the same time, 7:45 a.m. CST, the Lead Industries Association filed a petition in the Fifth

102. 570 F.2d 965 (D.C. Cir. 1977).

103. *Id.* at 972. Judge Leventhal's opinion was the consensus of the panel. Judge Wilkey concurred in the result, but asserted that a standard should not be considered issued until it has been disclosed to the public. Therefore, he believed that the AFL-CIO petition was premature. *Id.* at 973. Judge Fahy agreed with Judge Leventhal that the AFL-CIO petition was filed in a timely fashion but asserted that the D.C. Circuit was a more convenient forum and should retain jurisdiction over the case. *Id.* at 979.

104. 42 Fed. Reg. 65,166 (1977).

105. 592 F.2d 693 (3d Cir. 1979).

Circuit.¹⁰⁶ In ruling on the venue question,¹⁰⁷ the Third Circuit refused to go beyond the official notations of the time of filing to determine if one petition had been filed seconds before the other petition.¹⁰⁸ The court declared that "unlike race tracks, . . . courts are not equipped with photoelectric timers, and we decline the invitation to speculate which nose would show as first in a photo finish."¹⁰⁹ The court then ordered that the proceedings be transferred to the D.C. Circuit, which was deemed "obviously a convenient forum"¹¹⁰ because a petition to review an EPA lead standard had recently been filed by the industry in that court.¹¹¹

Forum shopping and races to the courthouse are problems that exist under other statutes as well,¹¹² but recent OSHA cases have called attention to the magnitude of the problem.¹¹³ These

106. The union considered the Third Circuit a more hospitable forum because of its recent decision upholding the coke oven emissions standards. *See American Iron & Steel Inst. v. OSHA*, 577 F.2d 825 (3d Cir. 1978), *cert. granted sub nom. Republic Steel Corp. v. OSHA*, 100 S. Ct. 3054, *cert. dismissed*, 101 S. Ct. 38 (1980). The industry considered the Fifth Circuit a more hospitable forum because of its recent decision invalidating the benzene standard. *See American Petroleum Inst. v. OSHA*, 581 F.2d 493 (5th Cir. 1978), *aff'd sub nom. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 100 S. Ct. 2844 (1980).

107. Following the procedure adopted by the D.C. Circuit in *American Public Gas Ass'n v. FPC*, 555 F.2d 852 (D.C. Cir. 1976), the Third and Fifth Circuits conferred on the matter and the Fifth Circuit agreed to defer to the Third Circuit's determination of the proper forum. 592 F.2d at 695.

108. The industry claimed that its petition was filed ten seconds earlier. *Id.*; [1978] 8 OCCUP. SAFETY & HEALTH REP. (BNA) 1156.

109. 592 F.2d at 695.

110. *Id.* at 698. The Labor Department and counsel for the union were located in Washington, while the industry counsel was in New York City.

111. This justification for transfer may be questioned, however. As the court observes, *id.* at 697-98, the petitioners had no choice of forum under the Clean Air Act. Moreover, it is unlikely that both the legal issues and judicial panels in the two cases would be the same.

112. *See generally* Haworth, *Modest Proposals to Smooth the Track for the Race to the Court House*, 48 GEO. WASH. L. REV. 211 (1980); Note, *supra* note 101.

113. When OSHA promulgated its "generic carcinogen standard," 45 Fed. Reg. 5002 (1980), it was not clear when the standard was "issued" and whether it was a "regulation" to be challenged in district court or a "standard" to be challenged in the court of appeals pursuant to § 6(f) of the Act. Consequently, the American Industrial Health Council filed simultaneous challenges in the United States District Court for the Southern District of Texas and the Fifth Circuit. In *American Indus. Health Council v. Marshall*, 494 F. Supp. 941 (S.D. Tex. 1980), the court, defining the generic carcinogen standard as an occupational safety and health standard under § 3(8) of the Act, 29 U.S.C. § 652(8) (1976), held that the regulation was not reviewable in district court. *Cf. Louisiana Chem. Ass'n v. Bingham*, 8 OSHC 1950, [1980] OSHD (CCH) ¶ 24,803 (W.D. La.) (OSHA's Access to Employee Exposure and Medical Records standard not reviewable in district court). In *American Petroleum Inst. v. OSHA*, 8 OSHC 2025, [1980] OSHD (CCH) ¶ 24,779 (5th Cir.), the Fifth Circuit held that it, rather than the D.C., Third, or Seventh Circuits, was the proper forum for review of the generic carcinogen standard, because only the Fifth Circuit could rule on the appeal

regrettable practices will continue until section 2112(a) is amended. Congressional action is essential to preserve the integrity of the judiciary and to ensure that judicial review is consistent and knowledgeable.

The simplest solution would be to amend section 2112(a) to provide that when timely and valid petitions are filed in any two or more circuits, venue will lie in the D.C. Circuit.¹¹⁴ The proceedings could be transferred to circuits other than the D.C. Circuit upon a showing that one party would be inconvenienced or that the interests of justice would thereby be served.¹¹⁵ This proposal would not only eliminate forum shopping and races to the courthouse, but would also satisfy other concerns: (1) it would allow cases involving purely local interests to be decided in the circuit of those interests; (2) it would enable the D.C. Circuit to develop an expertise and a consistency in deciding the validity of administrative action that involves matters of national concern;¹¹⁶(3) it would make the determination of venue predictable and logical;¹¹⁷ and (4) it would not

from the district court's dismissal of the challenge. The opposite result, however, was reached by the same court in *Louisiana Chem. Ass'n v. Bingham*, No. 80-3850 (5th Cir. Sept. 4, 1980). In that case, the Fifth Circuit transferred the Access to Employee Exposure and Medical Records standard challenge to the D.C. Circuit, despite the pending appeal of the dismissal of an action brought in a Louisiana district court.

114. Congress has already made the D.C. Circuit the exclusive forum for certain actions of the Department of Energy, 15 U.S.C. § 766(c) (Supp. I 1977) (regulations of "general and national applicability"); the Environmental Protection Agency, 42 U.S.C. § 300j-7(a)(1) (1976) (drinking water), § 4915(a) (1976) (noise), § 6976(1) (1976) (solid waste disposal), and § 7607(b)(1) (Supp. I 1977) (air pollution); the Federal Communications Commission, 47 U.S.C. § 402(b) (1976) (licensing decisions); the Tax Court, 26 U.S.C. § 7482(b)(3) (1976) (declaratory judgments about interests on governmental obligations); and the Mine Safety and Health Administration, 30 U.S.C. § 953(d) (Supp. I 1977) (grants to states).

115. The Administrative Conference of the United States has issued a draft recommendation proposing that the Administrative Office of the United States Court determine venue when, within ten days of an agency action, two or more circuits are petitioned. The Administrative Office would select venue from the courts petitioned according to a "scheme of non-periodic rotation," so that no party could predict the forum for a particular challenge. The existing power of the courts to transfer a case for the convenience of the parties would not be affected. *See* 45 Fed. Reg. 61,636 (1980).

Another suggestion is to amend 28 U.S.C. § 2112(a) to create a judicial clearinghouse similar to the Judicial Panel on Multidistrict Litigation, which would receive all petitions and then assign cases to the circuit deemed to have the greatest expertise in that particular area. *See Note, supra* note 101, at 1757-59.

Still another recent proposal would make minor changes in 28 U.S.C. § 2112(a) that would provide clearer guidelines for the transfer of cases to the most convenient forum. *See Haworth, supra* note 112, at 213.

116. *See Note, supra* note 101.

117. Admittedly, this proposal provides the second party filing a petition a degree of control over the selection of a forum. That party would be able to change the forum to the D.C. Circuit simply by filing a petition in any other circuit. On the other hand, making the

require the establishment of an elaborate judicial mechanism for case screening and assignment.¹¹⁸

This proposal is especially suitable for OSHA cases. OSHA regulations are national in scope; the D.C. Circuit is thus not likely to be an inconvenient forum. Because review is limited to the agency record and neither employers nor employees will appear in court, "[t]he only significant convenience factor which affects petitioners seeking review of rulemaking on an agency record is the convenience of counsel who will brief and argue the petitions."¹¹⁹ Moreover, as a practical matter, the counsel retained by petitioners in OSHA standards challenges typically practice in Washington, D.C.¹²⁰

2. Exclusivity

In addition to pre-enforcement judicial review under section 6(f), persons adversely affected or aggrieved by OSHA standards may challenge the validity of the regulations in two other ways. Adjudicatory proceedings may be brought before the Occupational Safety and Health Review Commission (the Commission) under section 10(c).¹²¹ Additionally, judicial review of the Commission's actions may be obtained pursuant to section 11(a).¹²²

The Commission has held,¹²³ with judicial approval,¹²⁴ that it has authority to rule on the validity of OSHA standards. A challenge to the validity of a standard may involve either substantive claims, such as vagueness,¹²⁵ or procedural claims that allege improper promulgation.¹²⁶ When the Act was adopted, it was gener-

D.C. Circuit the exclusive forum would preclude other circuits from deciding cases involving purely local questions.

118. *But see* Note, *supra* note 101; discussion of Administrative Conference proposal, *supra* note 115.

119. *United Steelworkers v. Marshall*, 592 F.2d 693, 697 (3d Cir. 1979).

120. For example, in *Industrial Union Dep't, AFL-CIO v. Bingham*, 570 F.2d 965 (D.C. Cir. 1977), in which the industry counsel urged retransfer from the D.C. Circuit to the Fifth Circuit (New Orleans), three of the four counsel representing the industry petitioners were from Washington, D.C., and one was from Oklahoma City. *Id.* at 966.

121. 29 U.S.C. § 659(c) (1976).

122. 29 U.S.C. § 660(a) (1976).

123. *Kennecott Copper Corp.*, 4 OSHC 1400, [1976-1977] OSHD (CCH) § 20,860 (1976), *aff'd* 577 F.2d 1113 (10th Cir. 1977); *Consolidated Freightways Corp.*, 5 OSHC 1481, [1977-1978] OSHD (CCH) ¶ 21,846 (1977), *petition for review dismissed*, No. 77-2515 (9th Cir. 1979).

124. *Atlantic & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541, 551 (3d Cir. 1976).

125. *See, e.g.*, *Cape & Vineyard Div. v. OSHRC*, 512 F.2d 1148 (1st Cir. 1975); *Brennan v. OSHRC (Santa Fe Trail Transp. Co.)*, 505 F.2d 869 (10th Cir. 1974).

126. *See, e.g.*, *Noblecraft Indus., Inc. v. Secretary of Labor*, 614 F.2d 199 (9th Cir.

ally assumed that no distinction would be made between the two types of claims by the Commission or the courts of appeal.

In *National Industrial Constructors, Inc. v. OSHRC*,¹²⁷ however, the Eighth Circuit held that while substantive attacks may be raised in actions under sections 6(f), 10(c), or 11(a), procedural attacks must be raised in a section 6(f) proceeding. Otherwise, they will be deemed waived. As the court stated,

While the unreasonableness of a regulation may only become apparent after a period during which an employer has made a good faith effort to comply, procedural irregularities need not await the test of time and can be raised immediately. The agency's interest in finality, coupled with the burden of continuous procedural challenges raised whenever an agency attempts to enforce a regulation, dictates against providing a perpetual forum in which the Secretary's procedural irregularities may be raised.¹²⁸

The Ninth Circuit took exactly the opposite view, though, in *Marshall v. Union Oil Co.*¹²⁹ The court in that case declared that it would be improper to "foreclose a challenge to the procedural validity of an OSHA regulation in the absence of express authorization from Congress."¹³⁰

The problem with the existing situation is demonstrated by the fact that both *National Industrial Constructors* and *Union Oil Co.* involved procedural challenges to standards adopted under section 6(a). In this context, the Ninth Circuit correctly observed that "to require the regulated employers to comb through industry standards and object to their promulgation at the outset would have been burdensome; especially when it is realized that a multitude of regulations could have been promulgated without notice or hearing within two years of the enactment of OSHA."¹³¹ On the other hand, the Eighth Circuit appropriately adhered to the policy that, in the interest of expediency, section 6(f) judicial review should be the exclusive forum for procedural challenges to newly-promulgated OSHA standards. Obviously, some resolution is needed to this conflict.

The valid considerations of efficiency and fairness could both be accommodated by a rule that would apply an exclusive chal-

1980); *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113 (10th Cir. 1977).

127. 583 F.2d 1048 (8th Cir. 1978).

128. *Id.* at 1052.

129. 616 F.2d 1113 (9th Cir. 1980).

130. *Id.* at 1118. *Accord*, *Deering Milliken, Inc. v. OSHRC*, 630 F.2d 1094 (5th Cir. 1980).

131. 616 F.2d at 1118.

lenge provision only to rulemaking pursuant to section 6(b).¹³² In those circumstances, failure to file for review under section 6(f) would preclude review of procedural matters before the Commission or courts unless good cause is shown. Good cause might be demonstrated, for example, by a showing that at the time of promulgation the person challenging the standard was not in business or was not affected by the standard until after the sixty day challenge period provided by section 6(f) had expired.

III. ENFORCEMENT

A. Overview

1. Inspectors

Individual workplace inspections are an important part of the Act's statutory compliance scheme. Because of the unprecedented scope of the Act's coverage, a large number of well-trained safety and health professionals is needed.¹³³ Regrettably, when the Act went into effect there was a woeful shortage of inspectors,¹³⁴ and little was done initially to correct the problem. In June, 1973, more than two years after the Act took effect, OSHA had a staff of only 456 compliance safety officers and 68 industrial hygienists¹³⁵ to serve five million workplaces¹³⁶ and 65 million employees.¹³⁷

The inspectors were not only few in number, but they were also poorly trained. Most inspectors lacked a formal safety and health education and were given only a four-week training course of dubious quality before being "turned loose" on American business.¹³⁸ Rather than viewing their mission as one of assisting in the elimination of workplace hazards, some inspectors were concerned

132. Such a rule would be valuable if the § 6(a) standards were repromulgated in toto. See notes 33-35 *supra* and accompanying text.

133. See generally N. ASHFORD, *CRISIS IN THE WORKPLACE* 424-57 (1976).

134. In 1970 there were twice as many fish and game wardens in the United States as safety and health inspectors. S. REP. 91-1282, 91st Cong., 2d Sess. 21 (1970).

135. THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, 1973, at 33 (1973).

136. UNITED STATES DEP'T OF LABOR, *OCCUPATIONAL INJURIES AND ILLNESSES IN THE UNITED STATES BY INDUSTRY*, 1973, at vii (1975).

137. UNITED STATES DEP'T OF LABOR, *OCCUPATIONAL INJURIES AND ILLNESSES IN THE UNITED STATES BY INDUSTRY*, 1974, at 1 (1976). By contrast, the Bureau of Mines had 700 inspectors for 23,000 mine sites. C. Culhane, *Labor, Business Press Administration to Change Safety and Health Program*, Nat'l J., June 1, 1972, at 1094, cited in N. ASHFORD, *supra* note 133, at 427.

138. N. ASHFORD, *supra* note 133, at 448.

only with citing employers for as many violations as possible.¹³⁹ Because the inspector was often the first and only direct link between OSHA and the business community, much ill will and misunderstanding was generated from the start.¹⁴⁰

Since 1976 OSHA has made progress in increasing the quantity and quality of inspectors. As of May, 1980, OSHA had 996 safety officers and 579 industrial hygienists.¹⁴¹ OSHA inspectors are now required to have professional safety and health credentials,¹⁴² and the training programs have been improved.¹⁴³ Under OSHA's revised procedures, inspections now are also more thorough.¹⁴⁴ Moreover, inspectors are no longer under a quota system, and they are not rated or evaluated on the number of violations cited.¹⁴⁵

Despite these commendable and essential improvements, many more inspectors are needed for effective implementation of the Act. According to Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, if safety inspections of high hazard industries were conducted once each year and if inspections of low hazard industries were conducted once every ten years, 7,800 state and federal safety inspectors would be required. If health inspections in high hazard industries were conducted once each year and low hazard industries were not inspected, 5,900 industrial hygienists would be required.¹⁴⁶ Thus, even under a highly concentrated system, there are presently fewer than one-third the number of inspectors needed.¹⁴⁷

139. See Tysse, "Big Mother" and the Businessman, TRIAL, Oct. 1975, at 14, 22.

140. *Id.* See also *Occupational Safety and Health Act Review: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 54 (1974) (remarks of Sen. Dominick) (OSHA inspectors alleged to engage in punitive and harassing tactics).

141. Whiting, *supra* note 19, at 262.

142. Industrial hygienists must have at least a bachelor's degree in a physical or natural science or in engineering. Safety engineers must have either a bachelor's degree in engineering or must be licensed professional engineers. Safety specialists must have at least three years of safety experience. Conversation with OSHA Office of Personnel (Jan. 1980).

143. Whiting, *supra* note 19, at 261-62.

144. From 1976 to 1980, the average time for safety inspections increased from 11.2 to 16.5 hours and the average time for health inspections increased from 27.2 to 39.4 hours. *Id.* at 262.

145. *Id.*

146. [1979 Transfer Binder] EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 11,662.

147. There are currently 2393 state inspectors, [1980] 9 OCCUP. SAFETY & HEALTH REP. (BNA) 1108, and 1575 federal inspectors, Whiting, *supra* note 19, at 261-62. This total of 3968 state and federal inspectors is then compared to the 13,700 estimate.

2. Employee Training

Congress intended that OSHA be a cooperative effort between employers, employees, and government. Little effort was made initially, however, to develop safety and health awareness "from the bottom up" through employee training and education programs. In 1973 OSHA conceded that its program for private sector training was "inadequate for achieving substantial gains in voluntary compliance."¹⁴⁸ In 1974 OSHA initiated a series of correspondence courses and one day seminars, but there was little progress in designing or implementing large scale training programs. In 1978, however, OSHA began awarding grants to labor organizations, employer associations, educational institutions, and nonprofit organizations for the development of safety training centers.¹⁴⁹ According to OSHA officials, this grant program has been very successful. In its first year of operation over 20,000 employers and employees received occupational safety and health instruction.¹⁵⁰ Nevertheless, it is too soon to assess whether the grant program is adequate or whether OSHA and NIOSH will need to take a more direct role in the training process.¹⁵¹

3. On-Site Consultation

OSHA's consultative services program combines state and private consultation as a substitute for federal on-site consultation.¹⁵² The program was originally given a low priority in funds and effort, and suffered from inadequate planning, direction, and evaluation.¹⁵³ There were significant variations among the states in cover-

148. THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, 1973, at 13 (1975).

149. The first awards, totaling \$6.4 million in grants to 86 groups, were announced on October 8, 1978. For fiscal year 1980, \$11 million has been awarded for training grants.

150. [1980] EMPL. SAFETY & HEALTH GUIDE (CCH) No. 463, at 4.

151. Section 21 of the Act, 29 U.S.C. § 670 (1976), provides general authority for OSHA and NIOSH to conduct employee training and to require employer-administered training for employees. Cf. Federal Mine Safety and Health Act of 1977, § 115, 30 U.S.C. § 825 (Supp. II 1978) (detailing required employer safety and health programs and setting minimum training standards for new miners).

152. OSHA believes that the Act precludes federal on-site consultation because § 9(a), 29 U.S.C. § 658(a) (1976), requires the Secretary to issue citations for any "believed" violations found and because § 17(f), 29 U.S.C. § 666(f) (1976), prohibits giving advance notice of inspections. See COMPTROLLER GENERAL'S REPORT TO THE CONGRESS, LABOR NEEDS TO MANAGE ITS WORKPLACE CONSULTATION PROGRAM BETTER 1 (1978) [hereinafter cited as CONSULTATION PROGRAM].

153. CONSULTATION PROGRAM, *supra* note 152, at 29.

age, services, and procedures.¹⁵⁴ States that relied upon federal enforcement of the Act often failed to provide state funds for on-site consultation. As late as June, 1977, only twelve of thirty-one jurisdictions without state plans offered on-site consultation.

In 1977 OSHA increased the amount of federal funding for consultation programs from fifty percent to ninety percent for all jurisdictions. By January 1, 1979, every jurisdiction had some form of on-site consultation program: seven jurisdictions with approved state plans provided on-site consultation directly; sixteen jurisdictions with approved plans provided on-site consultation under section 23(g)¹⁵⁵ grants; twenty-three nonplan jurisdictions provided on-site consultation under section 7(c)(1)¹⁵⁶ agreements; and the remaining ten jurisdictions provided on-site consultation by direct contracts between OSHA and private firms.¹⁵⁷ The diversity of these programs makes it imperative that OSHA provide improved training, coordination, and monitoring of consultants.

By regulation, OSHA gives consultation priority to small employers.¹⁵⁸ Nevertheless, studies have shown that a high percentage of consultations have involved employers with more than fifty employees¹⁵⁹ and that few small employers have requested consultation.¹⁶⁰ Employers who used the consultation service, however, generally have been pleased,¹⁶¹ and the program seems to have improved. In 1979 one of every six OSHA-related visits to a workplace was a consultative visit.¹⁶² Congress also places a high value

154. *Id.*

155. 29 U.S.C. § 672(g) (1976). This section authorizes the Secretary of Labor "to make grants to the States to assist them in administering and enforcing programs for occupational safety and health contained in State plans approved by the Secretary pursuant to section 667 of this title." *Id.*

156. 29 U.S.C. § 656(c)(1) (1976). This section authorizes the Secretary of Labor to, "with the consent of any state or political subdivision thereof, accept and use the services, facilities, and personnel of any agency of such state or subdivision with reimbursement . . . [i]n carrying out his responsibilities under this chapter." *Id.*

157. CONSULTATION PROGRAM, *supra* note 152, at 55.

158. 29 C.F.R. § 1908.4(c) (1980).

159. CONSULTATION PROGRAM, *supra* note 152, at 7. Of six states studied, the percentage of consultation visits to small employers ranged from 16% (Michigan—safety inspections) to 88% (West Virginia).

160. W. DUNKELBERG, OSHA ACTIVITY IN THE SMALL BUSINESS COMMUNITY 10 (1976). Less than 3% of the 420,000 members of the National Federation of Independent Businesses requested on-site consultation.

161. CONSULTATION PROGRAM, *supra* note 152, at 6.

162. In 1979 there were 28,000 consultative visits under OSHA grants and 17,000 on-site consultations by the states. On May 21, 1980, OSHA announced its plan to encourage the 15 states offering on-site consultation under state plans pursuant to § 18(b) of the Act, 29 U.S.C. § 667(b) (1976), to convert to § 7(c)(1), 29 U.S.C. § 656(c)(1) (1976), agreements.

on on-site consultation. A funding limitation begun in the fiscal 1979 Department of Labor-Department of HEW Appropriations Act¹⁶³ prohibits OSHA from assessing penalties for nonserious violations against employers with ten or fewer employees that request on-site consultation and make good faith efforts to eliminate the cited hazard.

4. Enforcement Priorities

The planning and implementation of OSHA's compliance inspections has changed in the course of ten years from OSHA's most lamentable failure to the area of its greatest improvement to now the subject of its greatest controversy.

Data compiled on OSHA inspections from 1974 through 1980 demonstrates conclusively that the much-voiced criticism that early enforcement of the Act concentrated on trivial matters rather than upon health hazards and serious safety hazards was well-founded.¹⁶⁴

The statistics illustrate that in fiscal year 1974, 97% of all inspections were for safety hazards; in fiscal year 1973, 98.7% of all alleged violations were cited as nonserious; and as late as fiscal year 1976, the average proposed penalty was \$32.73. While many

Federal funding would increase from 50% to 90% and states would be expected to comply with the requirements set out at 29 C.F.R. Part 1908 (1980). See [1980] *EMPL. SAFETY & HEALTH GUIDE* (CCH) ¶ 12,020. State plans officials have reacted negatively to the proposal and view it as further unwarranted federal encroachment on the states. See [1980] 10 *OCCUP. SAFETY & HEALTH REP.* (BNA) 241-42.

163. Departments of Labor and HEW Appropriations Act, 1979, Pub. L. No. 95-480, 92 Stat. 1567.

164. The following figures are based on OSHA Compliance Activity Reports, FY 1973-1980.

Table 1

Safety Inspections and Health Inspections,
FY 1974 to FY 1980

<u>FY</u>	<u>Total Insp.</u>	<u>Safety</u>	<u>%</u>	<u>Health</u>	<u>%</u>
1974	77,093	74,753	97.0	2340	3.0
1975	80,949	73,331	90.6	7618	9.4
1976	90,369	84,854	93.9	5515	6.1
1977	59,932	51,091	85.2	8841	14.8
1978	57,242	46,625	81.5	10,617	18.5
1979	57,937	46,796	80.8	11,141	19.2
1980	63,363	51,492	81.3	11,871	18.7

serious hazards went undetected,¹⁶⁵ OSHA often issued citations when no hazards existed at all.¹⁶⁶ Follow-up inspections to deter-

Table 2
Violations Alleged, by Degree,
FY 1973 to FY 1980

<u>FY</u>	<u>Total Viols.</u>	<u>Nonserious</u>	<u>%</u>	<u>Serious</u>	<u>%</u>	<u>Repeated and Willful</u>	<u>%</u>
1973	152,996	150,947	98.7	-----	---	2049*	1.3
1974	292,185	287,896	98.5	3226	1.1	1063	0.4
1975	318,972	312,805	98.1	-----	---	5987*	1.9
1976	380,356	367,778	96.7	7820	2.0	4758	1.3
1977	181,942	156,425	80.0	20,914	11.5	4603	2.5
1978	134,484	96,356	71.6	33,155	24.7	4973	3.7
1979	128,544	85,871	66.8	37,718	29.3	4955	3.9
1980	132,419	82,945	62.6	44,695	33.8	4779	3.6

*For 1973 and 1975, serious, willful and repeated violations were reported as a single figure.

Table 3
Penalties Proposed by OSHA per Violation,
FY 1973 to FY 1980

<u>FY</u>	<u>Violations</u>	<u>Penalties</u>	<u>Average Penalty</u>
1973	152,996	\$ 4,942,972	\$ 32.30
1974	292,185	6,825,328	23.36
1975	318,792	8,245,496	25.86
1976	380,356	12,449,706	32.73
1977	181,942	11,601,062	63.76
1978	134,484	19,839,467	147.52
1979	128,544	22,966,230	178.66
1980	132,419	25,497,832	192.55

165. See COMPTROLLER GENERAL'S REPORT TO THE CONGRESS, WORKPLACE INSPECTION PROGRAMS WEAK IN DETECTING AND CORRECTING SERIOUS HAZARDS (1980) [hereinafter cited as WORKPLACE INSPECTION PROGRAM].

166. For example, in one celebrated incident, OSHA reportedly cited a small marina because an employee was out in a boat scraping barnacles without wearing a lifejacket, even

mine if hazards were abated were either not conducted or were conducted months after the initial inspection.¹⁶⁷ Although a high percentage of all inspections were based on apparently legitimate employee complaints,¹⁶⁸ the inspections usually failed to reveal workplace hazards.¹⁶⁹

Beginning in 1977, OSHA made major changes in its enforcement priorities. The following changes occurred in the nature of OSHA enforcement: (1) a decrease in the overall number of inspections; (2) a decrease in the number of safety inspections; (3) an increase in the number of health inspections; (4) a decrease in the overall number of violations cited; (5) a decrease in the number of nonserious violations cited; (6) an increase in the number of serious, willful, and repeated violations cited; and (7) an increase in the amount of average proposed penalties.¹⁷⁰ Other remedial measures taken by OSHA include a revised complaint procedure that makes complaint inspections more selective¹⁷¹ and a "common sense" enforcement policy that provides for the issuance of a de minimis notice when noncompliance with a standard does not directly or immediately affect occupational safety and health.¹⁷²

OSHA inspections may be divided into two broad classes: unprogrammed (imminent danger, catastrophe, and fatality investigations and employee complaints) and programmed. On November 1, 1980, OSHA issued a new system for conducting programmed inspections.¹⁷³ The new system attempts to simplify OSHA's 1978 scheduling system. As with the previous system, ninety-five percent of programmed inspections will be conducted in "high hazard" industries.¹⁷⁴

though the water was only three feet deep. *Occupational Safety and Health Act Review: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 58 (1974) (remarks of Sen. Dominick).

167. WORKPLACE INSPECTION PROGRAM, *supra* note 165.

168. In fiscal year 1980, 25.4% of all inspections were based on employee complaints. OSHA COMPLIANCE ACTIVITY REPORT FOR FY 1980 (1980).

169. According to a study by the General Accounting Office, 80% of all complaint inspections failed to reveal serious or nonserious hazards. COMPTROLLER GENERAL'S REPORT TO THE CONGRESS, HOW EFFECTIVE ARE OSHA'S COMPLAINT PROCEDURES? (1979).

170. See Tables 1-3, *supra* note 164.

171. OSHA Instruction CPL 2.12A (1979). See M. ROTHSTEIN, *supra* note 29, at § 209 (Supp. 1980). According to OSHA, the new complaint procedures decreased by 24% the number of complaint inspections, freeing OSHA to conduct more inspections in high hazard industries. [1980] 9 OCCUP. SAFETY & HEALTH REP. (BNA) 995.

172. OSHA Program Directive No. 200-68 (1977). See *Occupational Safety and Health Act*, § 9(a), 29 U.S.C. § 658(a) (1976); M. ROTHSTEIN, *supra* note 29, at §§ 89, 301.

173. OSHA Instruction CPL 2.25A (1980).

174. OSHA attempts to establish a "presence" in each dangerous industry to en-

The initial selection of a particular category of employment (e.g., high hazard general industry, construction, target health) is based on an Annual Field Operators Program Plan projection made at the area office level. Establishments within a category are randomly selected from an establishment list for that category and placed in an inspection cycle. Whether an establishment is considered "high hazard" is based on the enterprise's Standard Industrial Classification (SIC).¹⁷⁵

OSHA is also experimenting with compliance scheduling based on the safety record of a particular establishment rather than industry-wide statistics.¹⁷⁶ Even before the Act was passed, some members of Congress called OSHA's enforcement scheme an "authoritarian, penalty-oriented, 'bull-in-the-china-shop' approach."¹⁷⁷ After ten years, the views of some members of Congress have not changed. Calling OSHA "the most despised Federal Agency in existence,"¹⁷⁸ Senator Schweiker proposed the Occupational Safety and Health Improvements Act of 1980,¹⁷⁹ which would sharply revise OSHA's enforcement policy. Under the controversial Schweiker bill, employers with a low injury rate and no work-related employee deaths during a fiscal year would be "rewarded" by having OSHA precluded from conducting routine safety inspections the following year. The exemptions would be based on data obtained from state workers' compensation agencies. When this information is unavailable, however, employee affidavits would suffice.¹⁸⁰

Critics of the Schweiker approach question the wisdom of exempting approximately ninety percent of all employers from coverage under the Act.¹⁸¹ Organized labor and other groups also oppose

courage employer safety and health actions by the threat of an inspection.

175. These figures are based on information gathered by the Bureau of Labor Statistics.

176. [1980] 10 OCCUP. SAFETY & HEALTH REP. (BNA) 559.

177. Additional Minority Views on H. REP. 91-1291, 91st Cong., 2d Sess., (1970), compiled in LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 890 (Comm. Print 1971).

178. 125 CONG. REC. S-19249 (1979) (remarks of Sen. Schweiker).

179. S. 2153, 96th Cong., 1st Sess., 125 CONG. REC. S-19250 (1979).

180. Other features of the bill include reduced penalties for employers with advisory safety committees or those using any form of consultation service (including those provided by workers' compensation insurance carriers). In addition, penalties would not be assessed for serious or nonserious violations by either exempt employers (those that were inspected after a fatality or employee complaint) or employers with ten or fewer employees.

181. See Lehner, *Georgia Fruitcake, and OSHA's Sticks*, Wall St. J., Apr. 14, 1980, at 24, col. 4 (eastern ed.). According to Senator Schweiker, the main purpose and effect of his proposal would be to make OSHA more effective by better targeting inspection resources on

the provision that would permit OSHA inspections only *after* the occurrence of a serious accident or fatality. Opponents fear that exempt employers would be tempted to become lax. Furthermore, critics argue that state workers' compensation data would not be uniform, consistent, or accurate. They note that, due to the nature of accident recording, workplace changes that create safety and health hazards might not be reflected in workers' compensation statistics for a year or more—and only after deaths or injuries. Finally, OSHA supporters contend that OSHA's new scheduling system already targets its inspections on high hazard industries.

While the notion of encouraging voluntary compliance and rewarding safe employers is laudable, the Schweiker bill is simply unworkable. It is precisely because employers did not voluntarily provide safe workplaces that OSHA was originally created. Moreover, the Schweiker plan is based on the faulty premise that an annual or periodic OSHA inspection is a hardship by itself.¹⁸² Such a conclusion ignores the reality of OSHA's present efforts. Those individuals for whom an OSHA inspection could conceivably be a burden—small employers and employers in low hazard industries—are not likely to be inspected. The *possibility* of an inspection may, however, encourage compliance. On the other hand, those individuals on whom OSHA inspections focus—employers in high hazard industries—either have unsafe workplaces¹⁸³ that should definitely be inspected or have safe workplaces and merely suffer the slight inconvenience of a periodic OSHA inspection,¹⁸⁴ with no citations, penalties, or abatement requirements.

employers with poor safety records.

182. Less than two percent of employers with ten or fewer employees were inspected by federal or state OSHA inspectors. Those inspected were (1) in high hazard industries like construction, manufacturing, and grain elevators; or (2) in response to employee complaints, serious accidents, or to follow-up on abatement actions. See Whiting, *supra* note 19, at 267.

183. Presumably, these employers would have high accident rates and would be inspected under either approach. In addition, OSHA has begun four pilot projects that attempt to base inspections on individual employer compliance history rather than industry-wide averages. See [1980] 10 OCCUP. SAFETY & HEALTH REP. (BNA) 559.

184. According to one estimate, the average cost to an employer with 100 to 200 employees of an OSHA inspection would be about \$1000, including \$600 to \$700 for compliance costs. J. MENDELLOFF, REGULATING SAFETY: AN ECONOMIC AND POLITICAL ANALYSIS OF OCCUPATIONAL SAFETY AND HEALTH 137 (1979). Cf. Oi, *On the Economics of Industrial Safety*, 38 LAW & CONTEMP. PROB. 669, 698 & n.80 (1974) (estimating cost of an OSHA inspection at \$200 for an employer and \$250-300 for OSHA). Even the \$1000 figure represents only a small percentage of what some employers spend in attempting to prevent an OSHA inspection. See Lehner, *OSHA Resisters May Suffer From Bad Advice*, Wall St. J., Oct. 18, 1979, at 16, col. 3 (eastern ed.).

5. OSHA's Effectiveness and Expense

At the heart of the "OSHA reform" efforts is the belief that OSHA has been ineffective in reducing workplace injuries and illnesses and that the annual costs of compliance with OSHA are excessive.¹⁸⁵ As support for his proposed Occupational Safety and Health Improvements Act of 1980,¹⁸⁶ Senator Schweiker noted that from 1972 to 1978, while the overall injury and illness rate declined from 10.5 to 9.4 per 100 employees, injuries and illnesses resulting in lost workdays increased from 3.2 to 4.1 per 100 employees.¹⁸⁷ Senator Schweiker concluded from these figures that "the success of the act in delivering on its promise has been substantially less than overwhelming."¹⁸⁸ OSHA supporters countered, however, with statistics compiled by the National Safety Council that demonstrate a decrease in the workplace death rate per 100,000 workers from 17 in 1973 to 13 in 1979.¹⁸⁹ The OSHA supporters also pointed out that there has been a substantial decline in injuries and illnesses in the hazardous industries to which OSHA devotes most of its inspection efforts.¹⁹⁰

Despite the frequency with which they are cited, injury and illness statistics, such as those just noted, are not conclusive indicators of OSHA's impact. This is true for several reasons. First, in order to determine whether OSHA has been effective, it is necessary to predict what injury and illness rates would have been in the absence of OSHA and to compare those figures with the actual rates.¹⁹¹ Obviously, no such data exists. Second, it has been estimated that only about twenty-five percent of workplace injuries are preventable by enforcement of current OSHA standards.¹⁹² The remaining injuries are either unpreventable (e.g., traffic accidents, heart attacks, or violent acts) or are presently not covered

185. According to McGraw-Hill Publications Co., capital expenditures for compliance with OSHA were \$3.7 billion in 1980 and will be \$3.5 billion in 1981. [1980] 10 *Occup. Safety & Health Rep.* (BNA) 16.

186. S. 2153, 96th Cong., 1st Sess., 125 *CONG. REC.* S-19250 (1979).

187. 125 *CONG. REC.* S-19248 (1979) (remarks of Sen. Schweiker).

188. *Id.*

189. See [1980] *EMPL. SAFETY & HEALTH GUIDE* (CCH) No. 468, at 3.

190. From 1973 to 1978, injuries and illnesses at construction sites and in the machinery industry declined by 19%, and injuries and illnesses in the primary metals industry declined by 18%. Whiting, *supra* note 19, at 268.

191. J. MENDELOFF, *supra* note 184, at 94. See also Ginnold, *A View of the Costs and Benefits of the Job Safety and Health Law*, *MONTHLY LAB. REV.*, Aug. 1980, at 24.

192. *FINAL REPORT OF THE INTERAGENCY TASK FORCE ON WORKPLACE SAFETY AND HEALTH*, II-7 (1978) [hereinafter cited as *TASK FORCE REPORT*].

by OSHA regulations. A study conducted in California that was limited to an examination of OSHA-regulated hazards revealed that the enforcement of OSHA standards led to a twenty percent reduction in injuries.¹⁹³ Third, increases in lost workday cases may be traced to increases in strains, sprains, and overextensions.¹⁹⁴ The California study noted that, while the number of falls from elevations decreased, the total number of slips and falls remained the same.¹⁹⁵ It has been theorized that more employees now "stretch" sprains into lost workday accidents in order to take advantage of increased workers' compensation benefits.¹⁹⁶ Finally, the benefits of OSHA enforcement may not be presently quantifiable. For example, it has been estimated that the asbestos standard saves 1596 lives per year.¹⁹⁷ Yet, because asbestos-related diseases may have latency periods of twenty to thirty years, the impact of present enforcement efforts may not be realized statistically for many years.

A similar data-related controversy surrounds the compliance costs that the Act imposes on American business and industry. Business groups charge that the costs are not justified and that as much as one-third of the expenditures required for compliance may be wasted.¹⁹⁸ Conversely, pro-OSHA groups and individuals assert that the benefits of OSHA outweigh the costs. According to one study,¹⁹⁹ OSHA's safety program prevents 350 deaths and 40,000 to 60,000 injuries each year, resulting in an annual benefit of \$5.1 billion. In addition, statistics indicate that the Act results in new jobs, a decrease in lost worktime, increased productivity, and other benefits.²⁰⁰

193. See J. MENDELOFF, *supra* note 184, at 113. In California, since 1973 amputations have declined by over 40%, explosion injuries have declined by over 28%, and crushing injuries have declined by over 17%. Whiting, *supra* note 19, at 269. See also *Work Injuries and Illnesses in California Quarterly* (1980) (43% decline in fatality rate in the period of 1969-1978).

194. See Whiting, *supra* note 19, at 269 (13% increase in sprains and strains in California between 1973 and 1978).

195. J. MENDELOFF, *supra* note 184, at 113-16.

196. *Id.*

197. SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION, S. DOC. NO. 96-13, 96th Cong., 1st Sess. 69 (Comm. Print 1978).

198. See DE BERNARDO, *OSHA: OVERPRICED AND UNDER THE GUN* (1979) (U.S. Chamber of Commerce publication citing a study by Williams and Engel).

199. R. NADER, M. GREEN & N. WAITZMAN, *BUSINESS WAR ON THE LAW: AN ANALYSIS OF THE BENEFITS OF FEDERAL HEALTH/SAFETY ENFORCEMENT* (1979).

200. See Whiting, *Regulatory Reform and OSHA: Fads and Realities*, 30 *LAB. L.J.* 514 (1979). See also SUBCOMM. ON SCIENCE, TECHNOLOGY, AND SPACE OF THE SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, 96TH CONG., 2D SESS. ENVIRONMENTAL AND

As with the statistics of OSHA's effectiveness, estimates of compliance costs and benefits are neither precise nor wholly reliable. Cost-effectiveness is a difficult criterion with which to evaluate the impact of federal regulation. As one Senate panel stated, "[G]eneral assertions on whether the burden is too great, or whether the expense far exceeds the benefits, should—on the basis of existing knowledge—be guarded and qualified."²⁰¹

6. Congressional Appropriations Limitations

Despite increasing political pressure, the substantive provisions of the Act have not been amended since its passage in 1970. There have been, however, a number of provisions attached to Labor Department appropriations that have placed limits on OSHA enforcement.

Beginning in 1976, Congress attempted to channel OSHA's enforcement activities into the most critical areas and to relieve the burden on employers in industries with little or no serious occupational safety and health hazards. Consistent with this approach the Labor Department-HEW Appropriations Act for fiscal year 1977²⁰² contained two limitations. First, OSHA could not assess penalties for first-instance nonserious violations unless ten or more violations were cited. Second, farmers with ten or fewer employees, except those with migrant labor camps, were exempted from the Act.

These limitations were continued in fiscal year 1978²⁰³ and were supplemented by two additional provisions in the fiscal year 1979 appropriations.²⁰⁴ First, OSHA could not promulgate or enforce any regulation restricting work activity in any recreational hunting, fishing, or shooting area. Second, OSHA could not assess penalties for nonserious violations against small employers that requested on-site consultation and made good faith efforts to abate violations.

The continuing appropriations resolution for fiscal year 1980²⁰⁵ contained the four previous limitations and added three

HEALTH/SAFETY REGULATIONS, PRODUCTIVITY, GROWTH, AND ECONOMIC PERFORMANCE: AN ASSESSMENT 58-65 (Comm. Print 1980) (safety and health regulations reduced productivity growth rate by only 0.05% between 1970 and 1975).

201. See STUDY ON FEDERAL REGULATION, *supra* note 197.

202. Act of Sept. 30, 1976, Pub. L. No. 94-439, 90 Stat. 1418.

203. J. Res. of Dec. 9, 1976, Pub. L. No. 95-205, 91 Stat. 1460.

204. Act of Oct. 18, 1978, Pub. L. No. 95-480, 92 Stat. 1567.

205. J. Res. of Nov. 20, 1979, Pub. L. No. 96-123, 93 Stat. 923.

important new ones.²⁰⁶ The most important provision prohibits OSHA from inspecting employers with ten or fewer employees in industries with three-digit standard industrial classification injury and illness rates of less than seven per one hundred employees. There are several exceptions to the limitations, specifically, inspections are permitted (1) in response to complaints, (2) for failures to correct, (3) for willful violations, (4) to investigate accidents, (5) for imminent dangers, (6) for health hazards, and (7) to investigate discrimination complaints. Under the 1980 Appropriations Bill, OSHA is also prohibited in states with approved plans from inspecting workplaces for six months after a state inspection. Exceptions are provided for investigations of employee complaints or fatalities, special studies, and accompanied monitoring visits. Additionally, a final new limitation prohibits any enforcement activity on the Outer Continental Shelf in excess of the authority granted to OSHA in the Outer Continental Shelf Lands Act²⁰⁷ and the Outer Continental Shelf Lands Act Amendments of 1978.²⁰⁸

Even if major amendments are not made to the Act, it is likely that enforcement limitations will continue to be added to appropriations bills.²⁰⁹ Nevertheless, a policy of increasingly broader exemptions may be questioned. It has been estimated that 120 fatalities and 190,000 injuries will occur annually in industries exempt from OSHA coverage under the 1980 Appropriations Resolution.²¹⁰ There is little justification for jeopardizing the health and safety of employees by relieving employers of the alleged burdens of OSHA compliance.

206. The 1981 appropriations resolution contains the same limitations as the 1980 resolution. J. Res. of Dec. 16, 1980, Pub. L. No. 96-536 (providing funding through June 5, 1981).

207. 43 U.S.C. §§ 1331-1343 (1976).

208. Act of Sept. 18, 1978, Pub. L. No. 95-372, 92 Stat. 629.

209. On July 30, 1980, the Senate voted 85 to 14 to amend the Act to prohibit routine safety inspections of employers with ten or fewer employees and better than average safety records. See Shabecoff, *Administration Assails Senate "Antiworker" Vote*, N.Y. Times, July 31, 1980, § D, at 1, col. 2. See generally Seminario, *OSHA's Future: Fighting Perennial Battles*, AFL-CIO AM. FEDERATIONIST, July, 1980, at 20.

210. Whiting, *supra* note 19, at 264. If the Schweiker Bill were passed or added as an appropriations limitation, the results would be even more unfortunate. On April 27, 1978, a scaffold collapsed on an electric utility cooling tower at Willow Island, West Virginia, killing 51 employees. The prime contractor would have been exempt under the Schweiker bill for having a safe workplace. See *Hearings on S. 2153 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 5 (1980) (Testimony of Joseph W. Powell); *Hearings on S. 2153, Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 20-21 (1980) (Testimony of Ray Denison).

B. *The Carrot and the Stick*

A lack of acceptance by employers has been one of OSHA's most persistent problems.²¹¹ Enforcement of the Act depends on voluntary, preinspection compliance. The present enforcement scheme has been ineffective because there are no incentives for compliance and insufficient deterrents for noncompliance. New initiatives are needed in both areas.

1. Incentives

Although the Schweiker bill justifiably sought to encourage safe and healthful workplaces through a reward system, the plan for implementation was flawed in two respects. First, the rewards to employers would come at the expense of employees. Second, the rewards would operate *prospectively*; that is, a good past safety record would lead to a possibly unjustified limited exemption in the future.

Any workable incentive system must avoid the shortcomings of the Schweiker approach. One of the easiest and most effective incentives involves the use of taxes.²¹² As a means of encouraging and rewarding actual compliance, tax incentives, beyond those now in existence, could be provided for the purchase of new safety and health equipment.²¹³ The tax incentive would be for a limited duration and would be contingent upon compliance with a particular standard. For example, in order to qualify for a tax credit or deduction for the purchase of equipment to comply with a certain new standard, the equipment would have to be purchased and installed during the standard's phase-in period. Tax incentives could also be made available to employers that have low employee injury

211. See TASK FORCE REPORT, *supra* note 192, at II-6, VIII-1.

212. Tax incentives already exist for a variety of "encouraged" expenditures, but the only one that assists employers in compliance with OSHA is the investment tax credit, I.R.C. § 38. Other examples of tax incentives are I.R.C. § 40 (jobs credit); I.R.C. § 44(c) (residential energy credit); I.R.C. § 167(k) (accelerated depreciation of expenditures to rehabilitate low income housing); I.R.C. § 169 (accelerated amortization of pollution control equipment). Section 552 of the Revenue Act of 1978, Pub. L. No. 95-600, § 552, 92 Stat. 2763, required the Secretary of the Treasury to study possible tax incentives for OSHA compliance. See generally McDaniel & Kaplinsky, *The Use of the Federal Income Tax System to Combat Air and Water Pollution: A Case Study in Tax Expenditures*, 12 B.C. IND. & COMM. L. REV. 351 (1970); Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

213. Industry is investing \$3 billion a year in capital equipment for workplace safety and health, but this sum has remained virtually unchanged, after adjustments for inflation, since 1970. TASK FORCE REPORT, *supra* note 192, at IV-22.

rates. This proposal, although similar in theory to the Schweiker bill, would not expose employees to new risks and would be easier to administer.²¹⁴ Fraud could be deterred through normal Internal Revenue Service audits. Furthermore, section 17(g)²¹⁵ of the Occupational Safety and Health Act makes it a crime punishable by imprisonment for not more than six months, a fine of up to \$10,000, or both, to knowingly file any false document required to be maintained under the Act.

A variety of other incentives should also be explored. One proposal would amend federal tax law to prevent employers with high injury and illness rates from deducting that part of their workers' compensation cost that exceeds the average cost for employers of similar size in their industry. This proposal would also allow employers with low injury and illness rates to deduct the full average cost of workers' compensation even if their own cost is much lower.²¹⁶ A second proposal would involve direct government economic assistance to employers.²¹⁷

2. Deterrents

OSHA's present deterrent against noncompliance is the assessment of civil penalties. OSHA's proposed penalties have been so small, however, that they are hardly a deterrent to most employers.²¹⁸ Moreover, ninety percent of the cases in which a notice of contest is filed by the employer are settled.²¹⁹ If the case is not settled, there is a seventy percent chance that the proposed pen-

214. Under the system, no reliance upon affidavits or workers' compensation data would be necessary. Instead, employer-maintained records of accidents and illnesses, which already are required by OSHA, would be used. It might be argued by employees that such a credit would encourage employers to keep injured employees on the job to keep down the lost workday rate. Nevertheless, workers' compensation insurance rates already are enough incentive for some unscrupulous employers to engage in this practice.

215. 29 U.S.C. § 666(g) (1976).

216. See TASK FORCE REPORT, *supra* note 192, at IV-11.

217. *Id.* at IV-17 to -20.

218. See note 164 *supra*. A record \$786,190 proposed penalty assessed against Newport News Shipbuilding and Dry Dock Co. was a recent notable exception. [1980] E.M.P.L. SAFETY & HEALTH GUIDE (CCH) No. 460, at 3. The company has contested the alleged violations and penalties.

219. This high settlement rate is mandated by the increased percentage of contested cases and the small legal staff of the Secretary. Consequently, settlement agreements often permit the employer to promise to abate the cited hazards in exchange for a reduction or elimination of the proposed penalties. While this policy *does* result in prospective abatement, it removes the penalty deterrent and may encourage employers to wait until they are cited to eliminate hazards.

alty will be reduced or vacated entirely.²²⁰

The Act imposes its most severe civil penalties for repeated²²¹ and willful²²² violations and for failure to correct²²³ previously cited hazards. These penalties, however, are used only infrequently.²²⁴ In fact, the Act's criminal sanctions for giving advance notice of an inspection²²⁵ and for filing false records or making false statements²²⁶ have *never* been used. In the few criminal actions brought under section 17(e)²²⁷ for willful violations resulting in the death of one or more employees, the maximum sentence has been a \$5000 fine—one-half the maximum civil penalty.²²⁸ In addition, no steps have been taken to prevent employers from filing spurious notices of contest or bad faith petitions for modification of abatement solely for the purpose of delay.²²⁹

The Corporate Crime Bill,²³⁰ introduced in the House Judiciary Committee in 1980, provides for fines of up to \$250,000 and sentences of up to five years for corporate officials and fines of up to \$1,000,000 for corporations convicted of failing to report within fifteen days a "serious concealed danger" involving health and safety or dangerous products to the appropriate federal regulatory agency, including OSHA. Also, any employer who discriminates against an employee "whistleblower" would be subject to a \$10,000 fine and one year imprisonment.

OSHA will not be a meaningful deterrent until the cost of

220. According to Commission figures for fiscal 1978, the citation was vacated in 19% of the cases, the penalty was reduced to \$0 in 4% of the cases, the penalty was reduced in 47% of the cases, the Secretary's proposal was affirmed in 29% of the cases, and the penalty was increased in 1% of the cases.

221. Section 17(a) of the Act, 29 U.S.C. § 666(a) (1976), provides for a maximum of \$10,000 for each violation.

222. *Id.* Although the Act does not define "willful violation," § 17(a) provides that "any employer who willfully . . . violates [the Act] . . . may be assessed a civil penalty of not more than \$10,000 for each violation."

223. Section 17(d) of the Act, 29 U.S.C. § 666(d) (1976), provides for a maximum of \$1000 for each day during which a failure to correct continues.

224. *See* note 164 *supra*.

225. Section 17(f) of the Act, 29 U.S.C. § 666(f) (1976), provides for a fine of up to \$1000 or imprisonment for up to six months, or both.

226. Section 17(g) of the Act, 29 U.S.C. § 666(g) (1976), provides for a fine of up to \$10,000 or imprisonment for up to six months, or both.

227. 29 U.S.C. § 666(e) (1976). Conviction carries a fine of up to \$10,000 or imprisonment for up to six months, or both for the first offense, and subsequent offenses carry fines of up to \$20,000 or imprisonment for up to one year, or both.

228. *See* M. ROTHSREIN, *supra* note 29, at 321 n.49.

229. For an explanation of, and proposals to eliminate, this problem, *see id.* at 289-93.

230. H.R. 7040, 96th Cong., 2d Sess. (1980). *See* [1980] 9 OCCUP. SAFETY & HEALTH REP. (BNA) 1146.

noncompliance becomes greater than the cost of compliance. According to one recommendation, high workers' compensation rates could be an effective deterrent. If legislation were passed establishing federal minimum payment levels for workers' compensation, the greatly increased costs to employers with unsafe and unhealthful workplaces would make compliance with OSHA cost-effective.²³¹

C. Other Issues

1. Inspections

In *Marshall v. Barlow's, Inc.*,²³² the Supreme Court held that nonconsensual OSHA inspections may only be made pursuant to a warrant. Although the numerous legal issues raised by *Barlow's* are beyond the scope of this Article,²³³ the case has had an important impact on OSHA enforcement. An increasing number of employers are insisting that a warrant be presented,²³⁴ and this has placed an added burden on OSHA personnel.²³⁵ It is possible, however, that once a more definitive rule of probable cause for OSHA warrants evolves,²³⁶ and as courts begin to require exhaustion of employer claims before the Commission,²³⁷ the percentage of employers demanding warrants will return to "manageable proportions."

In *Barlow's* the Supreme Court indicated that, with an appropriate regulation, the Secretary could obtain an ex parte warrant.²³⁸ When his original regulation authorizing "compulsory process" was held not to include ex parte warrants,²³⁹ the Secretary

231. See TASK FORCE REPORT, *supra* note 192, at IV-12 to -14. For a discussion of the efforts to pass federal workers' compensation legislation, see De Leon, *Workers' Compensation: A Legal System in Jeopardy*, 29 FED'N INS. COUNSEL Q. 337 (1979).

232. 436 U.S. 307 (1978).

233. See generally M. ROTHSTEIN, *supra* note 29, at 65-74 (Supp. 1980); Rothstein, *OSHA Inspections After Marshall v. Barlow's, Inc.*, 1979 DUKE L.J. 63; Note, *Procedures for Attacking OSHA Inspection Warrants*, 66 VA. L. REV. 983 (1980).

234. According to OSHA's Office of Management Data, 2.6% of employers demanded warrants in the period from October, 1978 to April, 1980. At least some of these demands may simply reflect bad legal advice. See Lehner, *supra* note 184.

235. The Court in *Barlow's* predicted: "We doubt that the consumption of enforcement energies in the obtaining of such warrants will exceed manageable proportions." 436 U.S. at 321. See also *id.* at 316 n.11.

236. See, e.g., *Burkhart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir. 1980).

237. See, e.g., *Babcock & Wilcox Co. v. Marshall*, 610 F.2d 1128 (3d Cir. 1979).

238. 436 U.S. at 320 n.15.

239. *Cerro Metal Prods. v. Marshall*, 467 F. Supp. 869 (E.D. Pa. 1979), *aff'd*, 620 F.2d 964 (3d Cir. 1980).

issued an "interpretive rule"²⁴⁰ redefining "compulsory process" to include ex parte warrants. In *Cerro Metal Products Co. v. Marshall*,²⁴¹ however, the Third Circuit held that the amendment was a legislative change and *not* an interpretive rule; consequently, OSHA had failed to comply with the notice and comment requirements of the Administrative Procedure Act (APA).²⁴²

Another inspection-related OSHA regulation ran afoul of the APA in *Chamber of Commerce v. OSHA*.²⁴³ In that case the D.C. Circuit reasoned that an amendment to an OSHA regulation²⁴⁴ that "interpreted" section 11(c)(1)²⁴⁵ as requiring that employees be compensated for "walkaround" time was a legislative rule rather than an interpretive regulation. The court thus held that the provision was not exempt from the APA's notice and comment requirement. The D.C. Circuit noted that, in addition to the APA's legal requirements, ample administrative and political justification exists for public involvement in the determination of policy matters. As the court observed, "Charting changes in policy direction with the aid of those who will be affected by the shift in course helps dispel suspicions of agency predisposition, unfairness, arrogance, improper influence, and ulterior motivation."²⁴⁶

2. State Plans

In *AFL-CIO v. Marshall*²⁴⁷ the D.C. Circuit examined the Secretary's criteria for the approval of state plans under section 18 of the Act. The court held that OSHA's regulations and practices were inadequate to ensure that approved state plans maintained sufficient personnel and adequate funding.²⁴⁸ On remand, the district court ordered OSHA to submit a comprehensive plan estab-

240. 43 Fed. Reg. 59,838 (1978) (amending 29 C.F.R. § 1903.4 (1978)).

241. 620 F.2d 964 (3d Cir. 1980). *Contra*, *Stoddard Lumber Co. v. Marshall*, 627 F.2d 984 (9th Cir. 1980).

242. OSHA has subsequently promulgated a new regulation in accordance with the APA. See 45 Fed. Reg. 65,916 (1980).

243. *Chamber of Commerce of the United States v. OSHA*, No. 78-2221 (D.C. Cir. July 10, 1980).

244. 42 Fed. Reg. 47,344 (1977) (amending 29 C.F.R. § 1977.21 (1979)).

245. 29 U.S.C. § 660(c)(1) (1976).

246. *Chamber of Commerce of the United States v. OSHA*, No. 78-2221 (D.C. Cir. July 10, 1980). The regulation was subsequently revoked, 45 Fed. Reg. 72,118 (1980), and proposed again in accordance with the APA. 45 Fed. Reg. 75,232 (1980).

247. 570 F.2d 1030 (D.C. Cir. 1978).

248. These requirements are mandated by §§ 18(c)(4) and (5) of the Act, 29 U.S.C. §§ 667(c)(4), (5) (1976).

lishing federal benchmarks for state staffing and funding.²⁴⁹

OSHA's state plan benchmarks were submitted to the court on April 25, 1980.²⁵⁰ The plan, which would require an overall increase in state inspectors from 2393 to 7462 over a five year period,²⁵¹ was described by several state agencies as "totally without justification, economically impractical, politically impossible, administratively unachievable, and simply put, ridiculous."²⁵² In an *amici curiae* brief, a number of states argued that OSHA should be required to go through a rulemaking process before adopting its proposed benchmarks.²⁵³

The *AFL-CIO* case has cast further doubt on the continued viability of a state plan system whose effectiveness has long been questioned.²⁵⁴ In the Act's ten year existence none of the twenty-three state plans has been given final approval, and two state plans have been withdrawn because they were too expensive for the states to fund.²⁵⁵ In addition OSHA has recently begun actions to withdraw its preliminary approval of two other state plans.²⁵⁶ Organized labor has long opposed state plans, believing them to be ineffective. Multi-state corporations also have become disenchanted with state plans because of the added burden of complying with variations in the requirements and procedures among the state and federal programs. In light of these circumstances, Congress should consider the repeal of section 18 in order to make the federal scheme applicable in every state.

3. Federal Employee Protection

Section 19(a)²⁵⁷ of the Act requires the head of each federal agency to establish and maintain a comprehensive occupational safety and health program that is consistent with OSHA's promul-

249. *AFL-CIO v. Marshall*, 6 OSHC 2128, [1978] OSHD (CCH) ¶ 23,177 (D.D.C.).

250. See [1980] 9 OCCUP. SAFETY & HEALTH REP. (BNA) 1107.

251. OSHA recommended a phase-in period of ten years, but the district court's order on remand directed OSHA to prepare a five year phase-in period.

252. [1979] 9 OCCUP. SAFETY & HEALTH REP. (BNA) 469 (statement of John C. Brooks, North Carolina Commissioner of Labor and Chairman of the National Occupational Safety and Health State Plan Association, after reviewing a draft version of the benchmark plan).

253. [1980] 10 OCCUP. SAFETY & HEALTH REP. (BNA) 123.

254. See, e.g., COMPTROLLER GENERAL'S REPORT TO THE CONGRESS, STATES' PROTECTION OF WORKERS NEEDS IMPROVEMENT (1976).

255. The Connecticut plan was abolished in 1977 and the Colorado plan was abolished in 1978.

256. Withdrawal of approval proceedings are pending against the Virginia and Indiana state plans. See 45 Fed. Reg. 65,625 (1980) (Virginia plan).

257. 29 U.S.C. § 668(a) (1976).

gated standards. This congressional directive to the departments and agencies of the federal government has been augmented by executive orders²⁵⁸ and by regulations of the Secretary of Labor.²⁵⁹

Despite the provision's seemingly strong underpinning, implementation of section 19 has been a dismal failure. From 1974 to 1976, work-related fatalities increased from 104 to 122 and total injuries and illnesses increased from 121,052 to 174,989.²⁶⁰ These increases have been attributed in great part to the weak enforcement of the federal government program.²⁶¹ Specifically, the Secretary of Labor's authority has been limited to coordination and consultation, and agencies have not been required to comply with actual OSHA standards.

On February 26, 1980, a new executive order was issued to give added protection to Federal Government employees.²⁶² Among other provisions, the executive order (1) requires agency heads to comply with OSHA standards except when the Secretary of Labor approves alternatives; (2) requires agency heads to render workplaces free of recognized hazards that are causing or are likely to cause death or serious physical harm;²⁶³ (3) assures employees protection against discrimination for the exercise of protected rights, such as filing reports about unsafe working conditions; (4) provides for the establishment of occupational safety and health committees composed of representatives of management and an equal number of nonmanagement employees to monitor the agency's job safety and health performance; and (5) authorizes the Secretary of Labor to conduct unannounced inspections under certain circumstances²⁶⁴ and, if violations are found, to report them to the head of the agency and the occupational safety and health committee.

258. Exec. Order No. 11612, 36 Fed. Reg. 13,891 (1971); Exec. Order No. 11807, 39 Fed. Reg. 35,559 (1974); Exec. Order No. 12196, 45 Fed. Reg. 12,769 (1980).

259. 29 C.F.R. Part 1960 (1979); *Field Operations Manual* ch. XIX (1980). OSHA has issued new regulations for federal employee safety and health programs. 45 Fed. Reg. 69,796 (1980).

260. OCCUPATIONAL SAFETY AND HEALTH STATISTICS OF THE FEDERAL GOVERNMENT FY 1976, at 1-2 (1978).

261. See TASK FORCE REPORT, *supra* note 192, at VI-24 to -27.

262. Exec. Order No. 12,196, 45 Fed. Reg. 12,769 (1980). The effective date, originally scheduled for July 1, 1980, was delayed until October 15, 1980. Exec. Order No. 12,223, 45 Fed. Reg. 45,235 (1980); 45 Fed. Reg. 64,873 (1980).

263. This requirement corresponds to the Act's "general duty clause," 29 U.S.C. § 654(a)(1) (1976).

264. The circumstances are (a) if an agency does not have an occupational safety and health committee; (b) if the committee has filed reports of unsafe or unhealthful conditions; or (c) if the committee has not responded to an employee's complaint of an imminent danger.

The need for such an executive order was underscored two years ago when a district court in the District of Columbia dismissed an action brought by federal employees for injunctive relief against allegedly unsafe conditions.²⁶⁵ The executive order is particularly important in light of the fact that congressional attempts to increase the protection afforded employees of the United States Postal Service, whose injury rate is extremely high, have also been unsuccessful.²⁶⁶ It remains to be seen whether the new executive order—the only existing protection for federal employees—will be successful in improving the often substandard working conditions that federal workers encounter.

IV. ADJUDICATION

A. *The Role of the Commission*

The Occupational Safety and Health Review Commission is an independent, quasi-judicial administrative agency created to adjudicate contested matters resulting from the Secretary of Labor's issuance of citations and proposed penalties.²⁶⁷ The creation of an independent adjudicatory panel was part of an amendment to the Senate bill offered by Senator Javits. The original legislation would have placed the adjudicative function within the Department of Labor.²⁶⁸ The Act's scheme for adjudication represents an experiment in administrative procedure that differs from traditional administrative structures in which both enforcement and adjudication functions are vested in a single agency.

In general, the concept of an independent adjudicatory body has been received favorably. The most attractive feature is that "[t]he creation of a separate quasi-judicial agency removes the appearance of an improper commingling of the functions of prosecu-

265. *Federal Employees for Non-Smokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978), *aff'd*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 444 U.S. 926 (1979) (neither implied right of action under § 19 of OSHA nor federal common-law right of action); *Rambeau v. Dow*, 553 F.2d 32 (7th Cir. 1977) (failure to exhaust administrative remedies).

266. S. 2558, 96th Cong., 2d Sess. (1980); H.R. 826, 6913, 96th Cong., 2d Sess. (1980). In 1977 Postal Service employees suffered 90,358 accidents, accounting for 44.5% of all injuries and 16.2% of all fatalities in the federal sector. [1979] 9 OCCUP. SAFETY & HEALTH REP. (BNA) 34. See also [1980] 10 OCCUP. SAFETY & HEALTH REP. (BNA) 485-86.

267. See generally M. ROTHSTEIN, *supra* note 29, at §§ 341-357.

268. Many business leaders feared delegating both enforcement and adjudication powers to the Secretary of Labor. *Occupational Health and Safety Act: Hearings on Amendment No. 1061 to S. 2193 Before the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. (1970) (remarks of Sen. Javits).

tor and judge.²⁶⁹ A second independent adjudicatory body, the Mine Safety and Health Review Commission,²⁷⁰ was created in 1977 when Congress passed the Federal Mine Safety and Health Act.²⁷¹

Despite receiving such general support as an institution, the Occupational Safety and Health Review Commission has been the subject of several specific criticisms.²⁷² The Commission has been troubled by a lack of unanimity of its members,²⁷³ a lack of consistency in decisions,²⁷⁴ a lack of clarity in opinion writing,²⁷⁵ and an inability to decide cases promptly.²⁷⁶

B. The Commission's Case Load

1. The Backlog

Perhaps the single greatest challenge facing the Commission is dealing with its ever-increasing case load. Although the number of

269. Currie, *OSHA*, 1976 AM. B. FOUNDATION RESEARCH J. 1107, 1160.

270. 30 U.S.C. § 823 (Supp. II 1978).

271. 30 U.S.C. §§ 801-962 (Supp. II 1978).

272. See generally Couric, *OSHR: Not Yet an Authoritative, Respected Voice*, Legal Times of Washington, July 7, 1980, at 8, col. 1.

273. A recent study revealed that 79.8% of the Commission decisions reaching the courts of appeals contained a dissenting opinion. Rothstein, *supra* note 98, at 621. Moreover, personality clashes among Commission members have often resulted in vitriolic opinions. See, e.g., Francisco Tower Serv., Inc., 4 OSHC 1459, [1976-1977] OSHD (CCH) ¶ 20,917 (1976); Francisco Tower Serv., Inc., 3 OSHC 1952, [1975-1976] OSHD (CCH) ¶ 20,401 (1976).

274. The Commission has frequently changed its position on key issues. For recent examples of Commission reversals, see Keppel's Inc., 7 OSHC 1442, [1979] OSHD (CCH) ¶ 23,622, *petition for review dismissed*, No. 79-2045 (3d Cir. Jan. 8, 1980) (oral notice of contest); S & H Riggers & Erectors, Inc., 7 OSHC 1260, [1979] OSHD (CCH) ¶ 23,480, *petition for review filed*, No. 79-2358 (5th Cir. June 7, 1979) (burden of proving feasibility); Gilbert Mfg. Co., 7 OSHC 1611, [1979] OSHD (CCH) ¶ 23,782 (contest of abatement date); Potlatch Corp., 7 OSHC 1061, [1979] OSHD (CCH) ¶ 23,294 (repeated violation); IMC Chem. Group, Inc., 6 OSHC 2075, [1978] OSHD (CCH) ¶ 23,149, *rev'd*, 9 OSHC 1031, [1980] OSHD (CCH) ¶ 24,990 (withdrawal of citation); Owens-Illinois, Inc., 6 OSHC 2162, [1978] OSHD (CCH) ¶ 23,218 (trade secrets).

275. As the dissenting opinion in *Farmers Export Co.* noted:

The failure to confront issues and to fully explain the rationale for a decision contributes to the subsequent issuance of inconsistent decisions by the Commission's administrative law judges and the need for Commission review of such decisions, thereby unnecessarily adding to the Commission's case load and the general confusion and delay that characterize the adjudication of OSHA cases.

Farmers Export Co., 8 OSHC 1655, 1665 n.8, [1980] OSHD (CCH) ¶ 24,569, at 30,088 (Cottine, Comm'r, dissenting). See also *Samson Paper Bag Co.*, 8 OSHC 1515, [1980] OSHD (CCH) ¶ 24,555.

276. Even Chairman Cleary has been quoted as saying that he is "not particularly proud of the speed with which cases are disposed of" by the Commission. [1980] 9 OCCUP. SAFETY & HEALTH REP. (BNA) 949. See notes 277-96 *infra* and accompanying text.

citations issued has declined sharply since fiscal year 1976,²⁷⁷ the decrease has been more than offset by a significant increase in the number of citations that are contested.²⁷⁸ It is likely that the increased notice of contest rate is the result of changes in OSHA's enforcement policy that emphasize (1) health hazards (with their attendant high abatement costs); (2) serious, willful, and repeated violations; and (3) higher proposed penalties.²⁷⁹

The Commission's high settlement rate, which is currently around ninety percent, has helped to reduce its workload.²⁸⁰ Nevertheless, the Commission's administrative law judges (ALJs) take a long time to decide cases that proceed to a hearing, and the Commission takes an even longer time to decide cases that are later directed for review. A 1978 study²⁸¹ found that Commission ALJs took an average of 169 days to decide cases and that the Commission took an average of 437 days from the date of the direction for review to issue a decision. The total of 606 days²⁸² was

277. See Table 2, *supra* note 164.

278.

Table 4

Contested Cases, FY 1973 to FY 1980

<u>FY</u>	<u>Notices of Contest</u>	<u>Percentage of Citations Contested</u>
1973	1425	2
1974	2172	3
1975	3177	4
1976	4896	5
1977	4214	7
1978	5483	10
1979	6704	12
1980	7402	15

This table is based on OSHA Compliance Activity Reports for FY 1973 to FY 1980. Effective November 1, 1980, OSHA Area Directors are authorized to enter into informal settlement agreements with employers before notices of contest are filed and the litigation process begins. [1980] *EMPL. SAFETY & HEALTH GUIDE* (CCH) No. 494, at 1.

279. See Tables 1-3, *supra* note 164. Cases appealed to the United States courts of appeals are even more likely to involve other than nonserious violations, high penalties, and high abatement costs. See Rothstein, *supra* note 98, at 610-14.

280. According to the Commission, 92.0% of all cases in fiscal year 1980 were resolved without a hearing. This figure includes settlements and unilateral actions, such as withdrawal of the complaint by the Secretary or withdrawal of the notice of contest by the employer. OSHRC Office of Information, October 26, 1980.

281. *COMPTROLLER GENERAL'S REPORT TO THE CONGRESS, ADMINISTRATIVE LAW PROCESS: BETTER MANAGEMENT IS NEEDED* 11 (1978).

282. This total does not include the period from the filing of the notice of contest to the date of the hearing. According to Commission figures for 1976, an average of 150 days elapsed between the filing of the notice of contest and the hearing. This figure is, undoubtedly, even higher today due to increased emphasis upon pleadings and discovery. See note

the longest time required by any of the agencies studied and compares with 281 days for the Department of Labor and 386 days for the Interstate Commerce Commission.

No single or simple explanation exists for the Commission's long delays in deciding cases. The following factors may be relevant, however. First, because the filing of a notice of contest stays an employer's abatement requirement,²⁸³ employers have little incentive to have their cases decided promptly. In some instances, employers actually endeavor to delay the proceedings as long as possible. Second, understaffing and, perhaps, incompetence²⁸⁴ in the Department of Labor has caused delays in the adjudicatory process.²⁸⁵ Third, the lack of unanimity among Commission members has delayed the decisional process because of the frequency of separate opinions²⁸⁶ and the constant reconsideration of precedent.²⁸⁷ Fourth, OSHA cases are increasingly complex and focus upon time-consuming evaluation of health hazards, cost-benefit analysis, and general duty clause violations.²⁸⁸

296 *infra*.

283. Sections 10(b) and 17(d) of the Act, 29 U.S.C. §§ 659(b), 666(d) (1976). Although the issue is beyond the scope of this Article, the Commission should consider promulgating disciplinary rules for lawyers and other representatives appearing before the Commission who file pleadings, motions, and other documents in bad faith or for delay purposes or who otherwise engage in contumacious conduct. The ultimate sanction might be prohibiting them from appearing before the Commission.

284. Commissioner Barnako has criticized OSHA's "cavalier" attitude toward Commission cases and has asserted that in 75% of the cases OSHA has filed at least one request for an extension to file a brief and sometimes has requested three or four extensions. [1980] *EMPL. SAFETY & HEALTH GUIDE* (CCH) No. 411, at 3-4. *See also* *Dravo Corp. v. OSHRC*, 584 F.2d 637, 638 n.1 (3d Cir. 1978) (court critical of OSHA's repeated failure to meet briefing deadlines); *Ringland-Johnson, Inc. v. Dunlop*, 551 F.2d 1117, 1118 (8th Cir. 1977) (court critical of OSHA's "shipshod handling of litigation").

285. The quality of all government ALJs has also been questioned. *See* *Olin Constr. Co. v. OSHRC*, 525 F.2d 464, 466 n.3 (2d Cir. 1975) (urging organized course of instruction for ALJs to eliminate their "rash of . . . blunders"). *See generally* *Scalia, The ALJ Fiasco—A Reprise*, 47 *U. CHI. L. REV.* 57 (1979). Little evidence exists, however, to suggest that Commission ALJs are less qualified or trained than the ALJs of other agencies who complete their decisions more promptly. Thus, even if Commission ALJs are too slow, this would not account for the inter-agency disparity. In fiscal year 1980 the Commission's 46 ALJs issued 581 decisions. This number amounts to about one decision per month for each ALJ. *See* *Table 6 infra*.

286. A study of Commission decisions appealed to the United States courts of appeals found that fully 94.7% of the cases contained a concurrence, a dissent, or both. *Rothstein, supra* note 98, at 621.

287. *See* note 274 *supra*.

288. According to John Mills, Acting Director of OSHA's Office of Field Coordination, employers were cited under the general duty clause, § 5(a)(1), 29 U.S.C. § 654(a)(1) (1976), 5,000 times in 1979, compared with "1,500 or fewer" citations in 1974. [1980] 10 *OCCUP. SAFETY & HEALTH REP.* (BNA) 68.

The combination of an increased caseload and a slow decision-making process has resulted in a large backlog of cases awaiting decision. At the end of July, 1975, the Commission had a backlog of "only" 432 cases.²⁸⁹ During 1976, however, the backlog grew tremendously, due to former Commissioner Moran's "protest policy" that effectively directed every case for review.²⁹⁰ On January 1, 1977, 1012 cases awaited decision.²⁹¹ Although much of the current backlog is still attributed to former Commissioner Moran's directions for review,²⁹² by August 3, 1977, the backlog had been reduced to 407 cases²⁹³—roughly the 1975 level. In the last three years the backlog has dropped somewhat but remains at between 300 and 400 cases.²⁹⁴

The problem with the Commission's backlog is not so much the number of cases awaiting decision as it is the length of time the cases are on review. Of the cases pending on September 2, 1980, half had been on review before the Commission for more than two years.²⁹⁵ Moreover, the length of time from the filing of the notice of contest was even longer; nearly ten percent of the cases had been in the adjudicatory process for five years or longer. In one case the notice of contest had been filed ninety-two months earlier.²⁹⁶ Because the filing of a notice of contest stays a cited employer's abatement requirement, employees of employers ultimately found in violation will be deprived of protection under the Act for more than seven years. If the cases are appealed, the delay will be even longer.

289. [1975] 5 OCCUP. SAFETY & HEALTH REP. (BNA) 593.

290. See *Francisco Tower Serv., Inc.*, 3 OSHC 1952, [1975-1976] OSHD (CCH) ¶ 20,401 (1976).

291. [1977] 7 OCCUP. SAFETY & HEALTH REP. (BNA) 346.

292. According to Chairman Cleary, former Commissioner Moran's numerous directions for review "almost crippled" the Commission. [1980] 9 OCCUP. SAFETY & HEALTH REP. (BNA) 949.

293. See note 291 *supra*.

294. On September 30, 1977, the backlog was 413 cases. [1977] 7 OCCUP. SAFETY & HEALTH REP. (BNA) 829. By September 30, 1978, the backlog was down to 325 cases, [1978] 8 OCCUP. SAFETY & HEALTH REP. (BNA) 830, but by March 7, 1980, it was up to 403 cases. OSHRC, CASES PENDING WITH THE COMMISSIONERS (Mar. 7, 1980). As of September 2, 1980, 368 cases were pending. OSHRC, CASES PENDING WITH THE COMMISSIONERS (Sept. 2, 1980). By September 30, 1980, the backlog was 338 cases. OSHRC News Release 80-33 (Oct. 15, 1980).

295. OSHRC, CASES PENDING WITH THE COMMISSIONERS (Sept. 2, 1980). Of the 368 cases on review, 183 had been pending for more than two years.

296. *Id.* According to Commissioner Barnako, the average case takes four years to go from notice of contest to Commission decision. [1980] 9 OCCUP. SAFETY & HEALTH REP. (BNA) 949.

2. The Commission's Efforts to Reduce Its Docket

(a) Procedural Prerequisites

An ALJ's determination may be directed for review by any member of the Commission within thirty days of the date of the decision.²⁹⁷ Such review can be brought about by the filing of a petition for discretionary review (PDR) by an aggrieved party or by a Commission member acting on his own. Since 1977 the Commission has attempted to limit both avenues of review.

Although the Act does not specifically provide for PDRs, they have been a part of the Commission's Rules of Procedure since 1972.²⁹⁸ The original rule did not require that the PDR state specific grounds for relief. The filing of a PDR merely called attention to an alleged error. Upon review, all issues would be examined.

In January, 1977, however, the Commission adopted rule 91a,²⁹⁹ which provided, among other things, that a PDR may be filed only upon one or more of the following grounds: (1) a finding of material fact is not supported by the preponderance of the evidence; (2) a decision by an ALJ is contrary to the law or to the rules or decisions of the Commission; (3) the determination involves a substantial question of law, policy, or abuse of discretion; or (4) a prejudicial procedural error occurred.³⁰⁰ Another subpart of the rule limited review to questions actually raised in the PDR.³⁰¹

The importance to an aggrieved party of filing a PDR was demonstrated in *Keystone Roofing Co. v. OSHRC*.³⁰² Relying on the language of section 11(a), which states that "[n]o objection that has not been urged before the Commission shall be considered by the court,"³⁰³ the Third Circuit in *Keystone Roofing* held that

297. Occupational Safety & Health Act, § 12(j), 29 U.S.C. § 661(i) (1976).

298. Commission's Rules of Procedure, Rule 91, 29 C.F.R. § 2200.91 (1972).

299. Commission's Rules of Procedure, Rule 91a, 29 C.F.R. § 2200.91a (1977). An amendment of the Commission's rules, which became effective in 1980, renumbered rule 91a to rule 92. 44 Fed. Reg. 70,105 (1979).

300. Commission's Rules of Procedure, Rule 91a(b)(1)-(4), 29 C.F.R. § 91a(b)(1)-(4) (1977). This rule has been given implicit congressional approval. When Congress enacted the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-962 (Supp. II 1978), it specifically provided for the filing of PDRs before the Mine Safety and Health Review Commission and limited the available grounds to those set out in rule 91a(b)(1)-(4). 30 U.S.C. § 823(d)(2)(A)(ii) (1976).

301. Commission's Rules of Procedure, Rule 91a(c), 29 C.F.R. § 2200.91a(c) (1977).

302. 539 F.2d 960 (3d Cir. 1976). *Accord*, McGowan v. Marsball, 604 F.2d 885 (5th Cir. 1979).

303. 29 U.S.C. § 660(a) (1976).

an employer's failure to file a PDR precluded judicial review. The consequence of failing to file a PDR is now expressed in the 1980 amendment to rule 91(a).³⁰⁴

The 1977 amendments to the Commission's Rules of Procedure also limited the grounds upon which a member could order review on his own motion. Rule 91a(c) precluded Commission review of issues that had not been raised before the ALJ.³⁰⁵ Rule 91a(e) further limited review to those cases involving "novel questions of law or policy or questions involving conflict in administrative law judges' decisions."³⁰⁶

A final procedural prerequisite to Commission review is the filing of briefs before the Commission. In some cases in which briefs were not filed, the direction for review has been vacated and the ALJ's decision affirmed—even when review was ordered as a result of the aggrieved party filing a PDR.³⁰⁷ Although this policy was upheld by the Fifth Circuit,³⁰⁸ it is formalistic and burdensome.³⁰⁹ Moreover, Commissioner Cottine has criticized the Commission for finding a lack of "compelling public interest" in almost every case in which no brief has been filed.³¹⁰

304. 29 C.F.R. § 2200.91(a) (1980).

305. The requirement that all issues must be raised before the ALJ is now embodied in rule 92(d), which provides in pertinent part: "Except in extraordinary circumstances, the Commission's power to review is limited to issues of law or fact raised by the parties in the proceedings below." 29 C.F.R. § 2200.92(d) (1980).

306. 29 C.F.R. § 2200.91a(e) (1977). Prior Commission decisions had already denied review in cases in which no PDR was filed unless a "compelling public interest" or a "novel question of law" existed. *See Sletten Constr. Co.*, 4 OSHC 1403, [1976-1977] OSHD (CCH) ¶ 20,850 (1976); *Water Works Install. Corp.*, 4 OSHC 1339, [1976-1977] OSHD (CCH) ¶ 20,780 (1976). Under the 1980 amendments, the requirements originally contained in rule 91a(e) are now a part of rule 92(d).

307. *Compare Prestressed Systems, Inc.*, 8 OSHC 1972, [1980] OSHD (CCH) ¶ 24,697 (employer filed "general" PDR but no brief), *and Die-Underhill, a Joint Venture*, 4 OSHC 1146, [1975-1976] OSHD (CCH) ¶ 20,509 (1976) (review ordered on different issue than that raised in the PDR), *with Hartwell Excavation Co.*, 4 OSHC 1263, [1976-1977] OSHD (CCH) ¶ 20,727 (1976), *and Ace Window Cleaning Co.*, 4 OSHC 1230, [1975-1976] OSHD (CCH) ¶ 20,668 (1976) (review ordered by Commissioner sua sponte). *See also PPG Indus.*, 8 OSHC 2003, [1980] OSHD (CCH) ¶ 24,733 (Commission vacated sua sponte direction for review, even though the employer filed a 32 page brief, because the ALJ's finding that the violation was de minimis made the employer "not an aggrieved party"). *Id.*

308. *McGowan v. Marshall*, 604 F.2d 885, 890 (5th Cir. 1979).

309. "While it may be reasonable to require that *some* formal objection to an ALJ's decision be made before review is ordered, it is an inordinate burden to demand the pleading of precise exceptions *and* comprehensive briefs as a precondition to Commission review." M. ROTHSTEIN, *supra* note 29, at 429 (emphasis in original).

310. *O.E.C. Corp.*, 8 OSHC 1257, [1980] OSHD (CCH) ¶ 24,480 (Cottine, Comm'r, dissenting); *Keco Indus., Inc.*, 7 OSHC 2048, [1979] OSHD (CCH) ¶ 24,117 (Cottine, Comm'r, dissenting) (involving validity of OSHA search warrants).

(b) *Reorganization of Personnel*

Beginning in August, 1979, the personal legal staff of each Commissioner was reduced from sixteen to six attorneys, and the remaining attorneys and support staff were reassigned to the Office of the General Counsel. The General Counsel was given the added responsibility of drafting decisions for consideration by the Commissioners and their staffs. Although Commission Chairman Cleary has asserted that the reorganization helped to decrease the backlog of cases,³¹¹ the data is inconclusive.³¹²

(c) *Simplified Proceedings*

Commission Chairman Cleary has long advocated the use of simplified proceedings that would save time and expense for parties appearing before the Commission.³¹³ It was not until March 1, 1980, however, that the Commission implemented optional simplified proceedings for a one year trial period.³¹⁴

No pleadings, motions,³¹⁵ discovery,³¹⁶ or interlocutory appeals³¹⁷ are permitted under simplified proceedings. If the issues cannot be resolved at a mandatory pretrial conference,³¹⁸ a hearing will be conducted in accordance with the APA.³¹⁹ The Federal Rules of Evidence will not apply, however.³²⁰ An official transcript is prepared,³²¹ and post-hearing written arguments are permitted.³²² The ALJ issues a written decision, which is reviewable in the same manner as all other cases.³²³

Although simplified proceedings may be requested by any party,³²⁴ an objection by any party prevents the use of simplified

311. See OSHRC News Release 80-33 (Oct. 15, 1980) (noting increased case production in fiscal year 1980). See also Couric, *supra* note 272.

312. See notes 330-44 *infra* and accompanying text.

313. See Cleary, *Pleading and Practice Before the Occupational Safety and Health Review Commission*, 24 LAB. L.J. 779, 787 (1973).

314. 44 Fed. Reg. 70,106 (1979). The rules for simplified proceedings appear at 29 C.F.R. §§ 2200.200-211 (1980) and correspond to rules 200-211 of the Commission's Rules of Procedure.

315. Commission's Rules of Procedure, Rule 204.

316. *Id.* at Rule 209.

317. *Id.* at Rule 210.

318. *Id.* at Rule 206(b).

319. *Id.* at Rule 206(c).

320. *Id.* at Rule 206(c)(1).

321. *Id.* at Rule 207.

322. *Id.* at Rule 206(c)(2).

323. *Id.* at Rule 208.

324. *Id.* at Rule 203(a)(1).

proceedings.³²⁵ In addition, simplified proceedings are restricted to certain types of cases. They may not be used in section 5(a)(1) cases or in cases alleging violation of any health, noise, ventilation, or radiation standard.³²⁶

According to Commission officials, simplified proceedings have thus far been a disappointment.³²⁷ In the first three months of the experiment, requests for simplified proceedings were received in only twenty-two percent of eligible cases—a total of 262 requests.³²⁸ All but one of the requests were filed by employers, and the Secretary objected to the requests in 101 cases.³²⁹ Furthermore, all but one of the cases in which no objection was filed were settled.³³⁰ The high settlement rate suggests that settlement probably would have occurred in any event.

It is unlikely that optional simplified proceedings will have a noticeable impact on Commission adjudication. While at one time simplified proceedings may have alleviated the burden placed on employers cited for trivial matters, OSHA enforcement and adjudication is now increasingly technical and complex. In short, simplified proceedings is an idea whose time has come—and gone.

(d) *Inflow and Outflow of Cases*

The Commission's backlog results from more cases coming into the adjudicatory system than are leaving it. Some mention already has been made of the Commission's attempts to expedite decisionmaking³³¹ and to limit the intake of cases.³³² A review of some statistics may serve to illustrate the nature of the problem.

Table A indicates a sharp increase in the number of notices of contest being filed. This increase, however, has been offset by an increase in the settlement rate. While more settlements mean some added administrative burdens,³³³ the number of cases decided each

325. *Id.* at Rule 203(b)(2)-(4).

326. *Id.* at Rule 202.

327. *See* [1980] 10 OCCUP. SAFETY & HEALTH REP. (BNA) 200.

328. *Id.*

329. *Id.*

330. *Id.* Of the 161 requests not objected to by the Secretary, 105 were granted. The others were denied by the Commission because of ineligibility, untimeliness, or other reasons. [1980] EMPL. SAFETY & HEALTH GUIDE (CCH) No. 480, at 11.

331. *See* notes 311-30 *supra* and accompanying text.

332. For a discussion of the procedural prerequisites to Commission review, *see* notes 297-310 *supra* and accompanying text.

333. All settlements must be in accord with the Commission's requirements and must be approved by the Commission. *See, e.g.,* IMC Chem. Group, Inc., 6 OSHC 2075, [1978] OSHD (CCH) ¶ 23,149, *rev'd*, 9 OSHC 1031, [1980] OSHD (CCH) ¶ 24,990; Dawson Bros., 1

year by ALJs has remained about the same.

TABLE A³³⁴

Commission Case Load, FY 1973-1980

FY	Notices of Contest ³³⁵	Total Dispositions ³³⁶	Settlements ³³⁷	Percent Settled	ALJ Decisions
1973	1533	1164	708	60.8	456
1974	2686	2228	1453	65.2	775
1975	3362	3064	2195	71.6	869
1976	5282	4617	3687	79.9	930
Transition Quarter ³³⁸					
1977	1365	1339	1125	84.0	214
1977	3859	4138	3415	82.5	723
1978	5537	4503	3927	87.2	576
1979	6938	5657	5018	88.7	639
1980	7963	7302	6721	92.0	581

The following table shows the number of decisions of the ALJs.

OSHC 1024, [1971-1973] OSHD (CCH) ¶ 15,039 (1972).

334. Tables A-E are based on unpublished statistics requested by the author from the Commission's Office of Information, October, 1980.

335. The Commission's figures of notices of contest are considerably higher than figures published by OSHA. See Table 4, *supra* note 278. Neither agency has been able to explain the discrepancy. One possible explanation is that the Commission counts contested petitions for modification of abatement as notices of contest, while OSHA does not.

336. "Total dispositions" is the sum of settlements plus ALJ decisions. Because the disposition of a case is often *not* made in the same year as the notice of contest, it is not appropriate to compare these figures on a yearly basis. Nevertheless, in theory, the total notices of contest minus the total dispositions equals the backlog of cases at the ALJ level. Using the Commission's notice of contest figures, this would (theoretically) total 4513 cases through fiscal year 1980. Using the OSHA notice of contest figures, this would (theoretically) total 1361 cases through the end of fiscal year 1979. According to Chief ALJ Paul Tenney, the actual ALJ "case inventory"—backlog—as of October 21, 1980, was 2470. In addition, there were about 1000 cases awaiting disposition of the Commission's Executive Secretary.

337. "Settlements" encompasses all cases that did not reach a hearing, including unilateral withdrawals by either side.

338. Beginning in 1977, the start of the fiscal year was changed from July 1st to October 1st, thus necessitating a "transition quarter."

Table B
Productivity of ALJs, FY 1974-1980

<u>FY³³⁹</u>	<u>ALJ Decisions</u>	<u>ALJs³⁴⁰</u>	<u>Average Number of Decisions per ALJ</u>
1974	775	38	20.4
1975	869	37	23.5
1976	930	44	19.8
1977	723	44	16.4
1978	576	43	13.4
1979	639	47	13.6
1980	581	46	12.6

Table B indicates a decline in the number of decisions per ALJ in the last three years, perhaps as a result of the increased complexity of OSHA cases. Although the energy of ALJs is expended to varying degrees in nonhearing cases, the Commission's ALJs averaged only about one full decision per month in fiscal year 1980.

As shown in Table C, there has been a dramatic decline in the number and percentage of cases directed for review.

Table C
Directions for Review, FY 1973-1980

<u>FY</u>	<u>ALJ Decisions</u>	<u>Directions for Review</u>	<u>Percent</u>
1973	456	304	66.7
1974	775	313	40.4
1975	869	369	42.5
1976	930	683	73.4
Transition Quarter	214	159	74.3
1977	723	408	56.4
1978	576	147	25.5
1979	639	149	23.3
1980	581	136	23.4

The large number of cases directed for review in fiscal 1976, the transition quarter, and fiscal year 1977 are the result of former Commissioner Moran's policy of directing numerous cases for review simply to raise the issue of whether the Commission should have discontinued the publication of decisions in an official reporter.³⁴¹ Thus, it is more meaningful to compare fiscal years 1973-1975 with fiscal years 1978-1980, during which the number of cases

339. For purposes of this Table, neither fiscal year 1973 nor the transition quarter are included.

340. These figures represent the number of ALJs at the end of the first quarter of the fiscal year.

341. See M. ROTHSTEIN, *supra* note 29, at § 465.

directed for review has been reduced by over half.

The propensity of each Commission member to direct review is indicated in Table D. Commissioner Barnako and Chairman Cleary decreased their total directions for review by about one-half from 1978 to 1979, and even more drastically from 1979 to 1980. At the present rate, fewer than 100 cases will have been directed for review in 1980, with two-thirds of the cases directed by Commissioner Cottine.

Table D
Directions for Review by Commissioner,
CY 1978-1980

		Cleary	Barnako	Cottine
CY 1978	Sua Sponte	4	0	20
	PDRs	<u>54</u>	<u>39</u>	<u>24</u>
	Total	<u>58</u>	<u>39</u>	<u>44</u>
CY 1979	Sua Sponte	12	2	16
	PDRs	<u>19</u>	<u>17</u>	<u>46</u>
	Total	<u>31</u>	<u>19</u>	<u>62</u>
CY 1980 (Jan.- Sept.)	Sua Sponte	0	3	8
	PDRs	<u>8</u>	<u>9</u>	<u>37</u>
	Total	<u>8</u>	<u>12</u>	<u>45</u>

Table E shows the number of Commission decisions for each fiscal year.

Table E
Commission Decisions, FY 1973-1980

<u>FY</u>	<u>Decisions</u>
1973	84
1974	174
1975	298
1976	382
Transition Quarter	139
1977	759
1978	224
1979	153
1980	221

According to the Commission, the marked increase in decisions from fiscal year 1979 to fiscal year 1980 demonstrates that the 1979 reorganization of the Commission has been a success.³⁴² Neverthe-

342. See OSHRC News Release, *supra* note 311.

less, disregarding fiscal year 1973 (when the Commission was still "gearing up") and fiscal year 1976, the transition quarter, and fiscal year 1977 (when large numbers of former Commissioner Moran's directions for review were simply vacated), the Commission issued an average of 212 decisions per year from fiscal year 1974 through fiscal year 1979. Therefore, fiscal year 1980, with its 221 decisions, was about an average year. Only the fact that fiscal year 1979 was the least productive year since 1973 made fiscal year 1980 seem so productive.

As a final note, in the last three years the number of Commission decisions that are actually remands to an ALJ has increased substantially. In 1978 remands accounted for only 19.9% of Commission decisions—31 of 156. In 1979, however, remands accounted for 29.6% of Commission decisions—42 of 142—and in the first nine months of 1980, remands made up 32.9% of Commission decisions—57 of 173. Even though, for statistical purposes, these cases are considered Commission "decisions," they remain within the Commission's adjudicatory system and will require additional time and resources to conclude.³⁴³

As already noted, the Commission has reduced substantially the number of cases being directed for review and may not address the merits of cases directed for review if the aggrieved party does not file a brief.³⁴⁴ It is unlikely, however, that the Commission can achieve much more of an "inflow" reduction without neglecting its statutory responsibility. Accordingly, the Commission should reconsider whether to continue reducing inflow in attempting to re-

343. The most important statistic is the number of Commission final orders, which consists of the number of decisions minus the number of remands. Meaningful progress has been made only if the number of final orders greatly exceeds the number of directions for review in a given year. In other words, if all of the cases now pending before the Commission were remanded to the ALJs, the backlog would be eliminated, but in reality the delays in adjudication would simply shift to a different level within the Commission. Fiscal years 1979 and 1980 were the only years in which Commission decisions exceeded directions for review. Only in fiscal year 1980 was the number of Commission final orders greater than the number of directions for review. Of the 221 decisions in fiscal year 1980, there were 64 remands, for a total of final orders of 157—only 21 more than the number of directions for review. In computing the number of decisions issued, the Commission excludes "directions for review and orders," but includes interlocutory appeals, and counts consolidated cases as the number of docket numbers disposed of. On balance, this computation method tends to overstate the number of "decisions."

Commissioner Cottine has criticized the Commission's new affinity to remand cases needlessly, simply as a means of reducing the Commission's own caseload. See J.L. Foti Constr. Co., 8 OSHC 1666, [1980] OSHD (CCH) ¶ 24,572 (Cottine, Comm'r, concurring in part and dissenting in part).

344. See notes 307-10 *supra* and accompanying text.

duce its backlog. The statistics also reveal that despite the good faith and best efforts of the Commission, case productivity has remained about the same over the past few years.³⁴⁵ Consequently the only solution appears to be some major institutional changes to accelerate the final disposition of cases.

3. Proposed Administrative Reforms

(a) Case Priorities

The impact that adjudicative delays have upon employee exposure to hazards varies greatly from case to case. In some cases, each day without abatement heightens the risk of occupational injury or illness. In other cases, a prolonged adjudication has little or no deleterious impact on employee safety and health. Unfortunately, the Commission has taken no meaningful steps to identify the cases in which a prompt decision is essential in order to give those cases first priority.³⁴⁶

The Commission should delegate to its Executive Secretary and Chief ALJ the responsibility for identifying and giving highest priority in assignment of cases to ALJs to cases involving health hazards, durational violations,³⁴⁷ safety violations of high gravity,³⁴⁸ and actions for failure to abate. Lowest priority should be given to violations of low gravity, transitory violations,³⁴⁹ and pen-

345. It may well be that because of the increased complexity of OSHA cases, *see note 288 supra* and accompanying text, the Commission has had to work much harder just to decide the same number of cases. The problem of complexity, however, promises to be even more pronounced in the future.

346. Commission's Rules of Procedure, Rule 101, 29 C.F.R. § 2200.101 (1980), provides for expedited proceedings in all actions involving petitions for modification of abatement (PMAs) and in other cases in which expedited proceedings are ordered by any Commissioner in response to a motion by any party or on the Commissioner's own motion. The rule has proven ineffective in the few cases in which it has been applied. Even if this procedure were effective, however, it would primarily expedite the small percentage of cases on review before the Commission, and would not facilitate case assignments to or hearings by the ALJs.

347. A durational violation continues for a limited period of time and then is terminated by a change in working conditions. Durational violations are common in the construction industry. Some examples are violations for unshored trenches and for unguarded perimeters at a building construction site. *See M. ROTHSTEIN, supra note 29, at § 291.*

348. Gravity is composed of the following factors: (1) the likelihood of an injury resulting from the violation; (2) the severity of a resultant injury; and (3) the extent to which the standard has been violated (the amount of employee exposure—both in terms of number of employees and duration). *Baltz Bros. Packing, 1 OSHC 118, [1971-1973] OSHD (CCH) ¶ 15,464 (1973).*

349. A transitory violation is short-lived and usually self-abating, such as a crane contacting an overhead power line and an industrial explosion. *See M. ROTHSTEIN, supra note 29, at § 291.*

alty-only contests.³⁵⁰ A similar policy should be adopted by the Commission with respect to cases directed for review.

In deciding petitions for modification of abatement (PMAs),³⁵¹ mootness is a common problem. Frequently the extension sought in the petition will have passed before the case is decided.³⁵² One possible administrative solution would be to assign, on a rotating basis, one ALJ in each regional office to hear all PMAs.

(b) *Standard of Review*

The Commission has the ultimate responsibility for making findings of fact in contested cases.³⁵³ Consequently, the Commission is authorized to reject an ALJ's decision that it considers contrary to the preponderance of the evidence.³⁵⁴ The Commission gives deference to the ALJ only on the issue of witnesses' credibility,³⁵⁵ and even in this area the Commission has not always adopted the determinations of an ALJ.³⁵⁶ If the ALJ's findings of fact are rejected, the Commission may supplement the record with its own findings of fact.³⁵⁷

A 1979 study of 129 final Commission decisions³⁵⁸ found that in fifty-four of the decisions, or 41.9%, a controversy had existed as to the accuracy of the ALJ's findings of fact. This statistic suggests that too much of the Commission's energy and resources may be spent in unnecessary reweighing of the factual record.

The Commission has the authority "to develop its own principles for determining the sufficiency of evidence, which can be used

350. See generally M. ROTHSTEIN, *supra* note 29, at § 266.

351. PMAs are already decided on an expedited basis. See note 346 *supra*.

352. See generally M. ROTHSTEIN, *supra* note 29, at §§ 290, 292.

353. *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976). See generally Cleary, *Some Aspects of Agency Review of Initial Decisions of Administrative Law Judges*, 31 *LAB. L.J.* 531 (1980).

354. *General Dynamics Corp.*, 6 OSHC 1753, [1978] OSHD (CCH) ¶ 22,873, *aff'd on other grounds*, 599 F.2d 453 (1st Cir. 1979); *Champlin Petroleum Co.*, 5 OSHC 1601, [1977-1978] OSHD (CCH) ¶ 21,951 (1977), *rev'd on other grounds*, 593 F.2d 637 (5th Cir. 1979).

355. See *Okland Constr. Co.*, 3 OSHC 2023, [1975-1976] OSHD (CCH) ¶ 20,441 (1976).

356. *C. Kaufman, Inc.*, 6 OSHC 1295, [1977-1978] OSHD (CCH) ¶ 22,481 (1978); *J.D. Blum Constr. Co.*, 4 OSHC 1255, [1976-1977] OSHD (CCH) ¶ 20,735 (1976). In *General Dynamics Corp. v. OSHRC*, 599 F.2d 453 (1st Cir. 1979), however, the First Circuit cautioned the Commission that "the ALJ's decision to give or deny credit to a particular witness' testimony should not be reversed absent an adequate explanation of the grounds for the reviewing body's source of disagreement with the ALJ." *Id.* at 463.

357. *Hidden Valley Corp.*, 1 OSAHRC 62, 1 OSHC 1005, [1971-1973] OSHD (CCH) ¶ 15,035 (1972).

358. Cases remanded to the ALJ were excluded.

to overrule decisions of an ALJ who applies conflicting rules."³⁵⁹ This developmental authority extends to the standard of review by which the Commission evaluates the factual findings of ALJs. Much of the responsibility for excessive reevaluation of the record lies in the Commission's use of the "preponderance of evidence" test. Consequently, the Commission should consider adopting the "clearly erroneous" rule with respect to evidentiary matters that is embodied in Rule 52(a) of the Federal Rules of Civil Procedure. Rule 52(a) provides that in nonjury cases "findings of fact shall not be set aside unless clearly erroneous." The clearly erroneous rule effectively makes the trial court's findings of fact presumptively valid and places the burden of convincing the appellate court otherwise on the petitioning party.³⁶⁰ A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."³⁶¹

Adopting the clearly erroneous rule would allow the Commission to confront the legal issues in cases without spending undue time reweighing the facts. At the same time, the clearly erroneous standard is not overly deferential to the initial finder of facts;³⁶² therefore, the Commission would have the flexibility to correct any mistakes made by the ALJs.

(c) *Limited Review Period*

Much of the delay that characterizes Commission decision-making may be attributed to the fact that in complex and controversial cases the Commissioners seldom reach agreement.³⁶³ The

359. *A.E. Burgess Leather Co. v. OSHRC*, 576 F.2d 948, 951 (1st Cir. 1978). *Accord*, *National Steel & Shipbuilding Co. v. OSHRC*, 607 F.2d 311, 316 (9th Cir. 1979); *Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127, 134 (6th Cir. 1978).

360. See 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2585 (1971).

361. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

362. By comparison, under the substantial evidence rule, courts "are not at liberty to draw an inference different from the one drawn by the [Commission], even though it may seem more plausible and reasonable to us." *National Steel & Shipbuilding Co. v. OSHRC*, 607 F.2d 311, 316 (9th Cir. 1979) (quoting *NLRB v. Millmen & Cabinet Makers Union*, Local 550, 367 F.2d 953, 956 (9th Cir. 1966)).

363. The Commission's various interpretations of the components of a "repeated violation" illustrate the agency's inability to resolve an issue. The Commission's decision on the issue in *George Hyman Constr. Co.*, 5 OSHC 1318, [1977-1978] OSHD (CCH) ¶ 21,774 (1977), *aff'd*, 582 F.2d 834 (4th Cir. 1978), was a three-way split. There was no consensus opinion on the definition until 1979, when *Potlatch Corp.*, 7 OSHC 1061, [1979] OSHD (CCH) ¶ 23,294, was decided. In the interim, the Commission and the ALJs avoided the controversy by holding that whenever the penalty involved was \$1000 or less (the maximum for a nonrepeated violation), it was irrelevant whether the violation was repeated. See, e.g.,

final outcome is often further delayed because a high percentage of these cases are ultimately decided by the courts of appeals.³⁶⁴ In addition, appellate review may dilute the value³⁶⁵ of the Commission's decision.³⁶⁶

The Commission could expedite the review process by adopting a rule that would require it to decide cases within one year. Under such a rule, a case that remains undecided after a year would be vacated, and the ALJ's determination would be affirmed; however, the decision would not have precedential value. The rule would also provide that, after a majority of the Commission had agreed on the disposition of a case, the remaining member would have thirty days in which to prepare a separate opinion. Consequently, a single member could not delay the proceedings in the face of a disposition by the majority until the one year period had elapsed. The Supreme Court, except in rare instances, decides cases in a single term. The Commission should act in a similar fashion.

4. Proposed Statutory Amendments

(a) *Expanding the Commission*

Congress should amend section 12 of the Act to expand the Commission from three members who serve staggered six-year terms to five members who serve staggered five-year terms. Under the amendment, three-member panels would be authorized to decide cases, with the vote of two members needed to direct a case for review.

The proposed amendment would expedite case handling in several ways. First, with three-member panels authorized to decide cases, the Commission's backlog would be decreased simply be-

National Steel & Shipbuilding Co., 6 OSHC 1680, [1978] OSHD (CCH) ¶ 22,808, *aff'd on other grounds*, 607 F.2d 311 (9th Cir. 1979); F.H. Sparks of Md., Inc., 6 OSHC 1356, [1978] OSHD (CCH) ¶ 22,543. Fortunately, this procedure is no longer followed. *See* Leone Indus., Inc., 8 OSHC 2222, [1980] OSHD (CCH) ¶ 24,933.

364. *See* Rothstein, *supra* note 98, at 610-14.

365. According to attorney Scott Railton, "[m]ost people look at the review commission as a way station to the court of appeals." Couric, *supra* note 272, at col. 4. Nevertheless, the courts of appeals are more likely to affirm violations than is the Commission. *See* Rothstein, *supra* note 98, at 615.

366. In some cases, even after a protracted time on review, the Commissioners are unable to reach agreement. *See, e.g.,* Samson Paper Bag Co., 8 OSHC 1515, [1980] OSHD (CCH) ¶ 24,555. Moreover, under the Commission's "Backlog Reduction Project" high priority was given to noncomplex and noncontroversial cases that could be decided quickly and to "reconsideration remands" to the ALJ. *See* note 343 *supra*.

cause more Commissioners would be available to decide cases. Similar provisions have proved successful for the National Labor Relations Board³⁶⁷ and the Mine Safety and Health Review Commission.³⁶⁸ Important cases could still be decided by the entire Commission.³⁶⁹ Second, the proposal, by requiring the vote of two members to direct a case for review, would alleviate the current "one dissenter" problem that is inherent in a system that allows direction for review by a single member. Third, the proposal would facilitate consistency in Commission decisionmaking. The Commission has frequently overruled existing precedent every two years as a new third member has been appointed.³⁷⁰ Although under the proposed amendment a new appointment would be made each year, the impact of the new appointee on the Commission's policies would be lessened. Finally, the proposal would permit Commission decisionmaking during periods in which a vacancy exists on the Commission.³⁷¹ Often, the remaining two members have been unable to agree on the outcome of cases. In many instances the Commission has attempted to "dispose" of the case by affirming the ALJ's decision by a divided vote. Some courts,³⁷² however, have contended that the practice violates section 12(f)'s requirement that "official action can be taken only on the *affirmative* vote of at least two members."³⁷³ Expanding the Commission to five members would eliminate the problem in all but the most unusual of circumstances.³⁷⁴

367. See 29 U.S.C. § 153(b) (1976).

368. See 30 U.S.C. § 823(c) (Supp. II 1978).

369. By rule, members would be able to review all pending cases and determine those that should be considered en banc.

370. See note 276 *supra*.

371. For example, Commissioner Van Namee's term expired in April, 1975; however, Commissioner Barnako was not sworn in until August, 1975. Although Commissioner Moran's term expired in April, 1977, Commissioner Cottine was not sworn in until May, 1978.

372. Compare *Shaw Constr., Inc. v. OSHRC*, 534 F.2d 1183 (5th Cir. 1976), and *Cox Bros. v. Secretary of Labor*, 574 F.2d 465 (9th Cir. 1978), and *Willamette Iron & Steel Co. v. Secretary of Labor*, 604 F.2d 1177 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1337 (1980) (Commission decisions held invalid), with *Marshall v. Sun Petroleum Prods. Co.*, 622 F.2d 1176 (3d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3443 (Dec. 15, 1980), and *George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834 (4th Cir. 1978), and *L.E. Myers Co. v. OSHRC*, 589 F.2d 270 (7th Cir. 1978) (Commission decisions upheld).

373. 29 U.S.C. § 661(e) (1976) (emphasis added).

374. Conceivably, a panel with one vacancy could split an en banc decision two-to-two; however, this possibility would arise very infrequently. A one-to-one decision of the present Commission is much more likely. Moreover, the demonstrated predisposition of Commission members makes it likely that numerous one-to-one situations could arise. See Rothstein, *supra* note 98, at 622.

Today's political climate makes it unpopular to expand a federal administrative body. A merger of the Occupational Safety and Health Review Commission with the Mine Safety and Health Review Commission to form a new five-member tribunal should, however, be explored. In fact, a corresponding merger of OSHA with the Mine Safety and Health Administration would not only increase administrative and enforcement efficiency, but would also eliminate troublesome overlaps in jurisdiction.³⁷⁵

(b) *Discrimination Cases*

Section 11(c)(1) of the Act prohibits retaliation in the form of discrimination or discharge against an employee for the exercise of any right "related to" the Act.³⁷⁶ Pursuant to section 11(c)(2), a complaint must be filed with the Secretary within thirty days after the occurrence of the alleged discrimination. After the complaint is filed, the Secretary will usually conduct an investigation to determine the validity of the complaint. If the Secretary determines that a complaint has merit, an attempt will be made to negotiate a settlement. If the case cannot be settled, the Secretary may bring an action in United States District Court on behalf of the complainant to restrain violations and to obtain all appropriate relief, including reinstatement and back pay.

In general, the courts have construed section 11(c) to provide affected employees broad protection against discriminatory treatment.³⁷⁷ Nevertheless, implementation of the Act's antidiscrimination provision has been seriously flawed. OSHA simply lacks the personnel and resources needed to investigate adequately and litigate employee complaints of discrimination. In fiscal year 1980, OSHA received over 3500 discrimination complaints,³⁷⁸ which were

375. See 44 Fed. Reg. 22,827 (1979) (MSHA-OSHA agreement setting forth areas of authority of each agency).

376. See generally M. ROHSTEIN, *supra* note 29, at §§ 187, 188.

377. See, e.g., *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980) (upholding Secretary's regulation interpreting § 11(c) as prohibiting discrimination against employees for refusing to perform assigned tasks because of a reasonable apprehension of death or serious physical harm and an inability to remedy the condition through resort to normal channels); *Marshall v. Intermountain Elec. Co.*, 614 F.2d 260 (1980) (refusing to apply state statute of limitations to § 11(c) action); *Marshall v. Commonwealth Aquarium*, 469 F. Supp. 690 (D. Mass.), *aff'd*, 611 F.2d 1 (1st Cir. 1979) (reporting health hazard to NIOSH protected under § 11(c)). *But see* *Chamber of Commerce v. OSHA*, No. 78-2221 (D.C. Cir. July 10, 1980), 8 OSHC 1648, [1980] OSHD (CCH) ¶ 24,596 (Secretary's regulation interpreting § 11(c) as requiring that employees be compensated for time spent accompanying OSHA inspector held invalid).

378. Although the fiscal year ends on September 30, the "end of the year" statistics

handled by a staff of only fifty-nine.³⁷⁹ During the same year, the case backlog grew from 1559 to over 2100.³⁸⁰ More importantly, 446 cases found to be meritorious could not be filed in district court because of inadequate resources.³⁸¹

In light of the foregoing figures, the Secretary has pursued a policy of using his office's resources only when there is no other way to protect the complainant's rights. OSHA has promulgated a regulation³⁸² that postpones action on a section 11(c) complaint until arbitration proceedings are complete and any complaints filed with other agencies or bodies are resolved. Furthermore, OSHA will defer to the extra-agency results if (1) the other proceeding has dealt adequately with all factual issues; (2) the proceedings were fair, regular, and free of procedural infirmities; and (3) the outcome of the proceeding was not clearly repugnant to the purpose and policy of the Act.

OSHA's deferral policy may be criticized as inconsistent with the statute and with legislative intent.³⁸³ Moreover, the regulation is arguably at variance with the procedures adopted under analogous statutory schemes.³⁸⁴ Nevertheless, the courts have differed on the legitimacy of both pre-arbitral and post-arbitral deference.³⁸⁵ In the related case of *Newport News Shipbuilding & Drydock Co. v. Marshall*³⁸⁶ a Virginia district court held that the Sec-

are as of August 29, 1980. As of that date 3548 complaints had been filed in fiscal year 1980. Telephone interview with Chris Graybill of OSHA's Office of Information, October 1, 1980.

379. OSHA has 51 investigators and eight supervisors in its discrimination section. *Id.*

380. The backlog stood at 2117 as of August 29, 1980. *Id.*

381. This figure is as of August 29, 1980. *Id.*

382. 29 C.F.R. § 1977.18 (1980).

383. See M. ROHSTEIN, *supra* note 29, at § 188.

384. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII of Civil Rights Act of 1964); *Norfolk & W. Ry. v. Nemitz*, 404 U.S. 37 (1971) (§ 5(2)(f) of Interstate Commerce Act); *United States Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971) (Federal Maritime Wage Act of 1970); *Leone v. Mobil Oil Corp.*, 523 F.2d 1153 (D.C. Cir. 1975) (Fair Labor Standards Act). Even the National Labor Relations Board (NLRB), whose deferral rule "inspired" OSHA, will not give deference to arbitration in matters of individual discrimination under section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-168 (1976), or in cases arising under § 8(a)(4) of the NLRA for alleged discrimination resulting from the filing of charges with or for testimony before the NLRB. See, e.g., *Potter Elec. Signal Co.*, 237 N.L.R.B. 209 (1978) (§ 8(a)(3)); *Virginia-Carolina Freight Lines, Inc.*, 155 N.L.R.B. 52 (1965) (§ 8(a)(4)).

385. Compare *Marshall v. N.L. Indus., Inc.*, 618 F.2d 1220 (7th Cir. 1980), and *Brennan v. Alan Wood Steel Co.*, 3 OSHC 1654, [1975-1976] OSHD (CCH) ¶ 20,136 (E.D. Pa. 1975) (post-arbitral deference rejected), with *Brennan v. Pasco Steel Corp.*, No. 74-73 COL (D. Md. 1975) (pre-arbitral deference upheld), and *Marshall v. General Motors Corp.*, 6 OSHC 1200, [1978] OSHD (CCH) ¶ 22,532 (N.D. Ohio) (post-arbitral deference upheld).

386. 8 OSHC 1393, [1980] OSHD (CCH) ¶ 24,510 (E.D. Va.).

retary could not defer to the judgment of the NLRB when a section 11(c) complaint had been filed previously with the Secretary.³⁸⁷

The Secretary's backlog of discrimination cases would be reduced if individual employees could bring section 11(c) actions in district court. The Act, however, does not provide for private actions, and no implied right of action has been found. In *Taylor v. Brighton Corp.*³⁸⁸ a group of employees allegedly discharged for reporting safety violations to OSHA brought an action against their former employer in district court. Plaintiffs maintained that a private right of action should be implied under section 11(c) of the Act.³⁸⁹ The Secretary of Labor, appearing as amicus curiae, urged the court to accept plaintiffs' argument that an implied remedy is necessary to facilitate the objectives of the Act. The Sixth Circuit declined the Secretary's invitation, however, and held that "[a] private cause of action is simply inconsistent with the enforcement plan provided by Congress."³⁹⁰ The court was not persuaded by the Secretary's argument that the administrative burdens that accompany the disposition of section 11(c) claims justify a finding of a private action. As the court stated:

The Secretary says he has neither the resources nor the personnel to handle all § 11(c) complaints adequately. Moreover, he expects the number of such complaints to increase dramatically due to his current campaign to alert employees of their OSHA rights. A private right of action should be implied, the Secretary argues, because individual suits offer the only realistic hope of protecting employees from retaliatory discrimination.

The Secretary should address his arguments to Congress, not the

387. An employee's right under § 11(c) of the Act to engage in safety and health activity may also be protected under other laws, including § 8(a)(1) of the NLRA. *See, e.g., Jim Causley Pontiac v. NLRB*, 620 F.2d 122 (6th Cir. 1980). Both concerted activity and the presence of a union contract may, however, be necessary for § 8(a)(1) protection. *See NLRB v. Bighorn Beverage*, 614 F.2d 1238 (9th Cir. 1980). OSHA and the NLRB have entered into a memorandum of understanding that gives OSHA primary responsibility for redressing employee discrimination based on the exercise of rights related to safety and health. 40 Fed. Reg. 26,083 (1975). The stated reason for this agreement is that while employee rights are explicitly protected by § 11 of OSHA, they are only implicitly protected by § 8 of the NLRA. *Id.*

388. 616 F.2d 256 (6th Cir. 1980).

389. The plaintiffs also sought to proceed under the federal Civil Rights Acts of 1866, 1871, and 1964, 42 U.S.C. §§ 1981, 1985(3), 2000e (1976). The Sixth Circuit affirmed the dismissal of the § 1985(3) action because the plaintiffs did not allege that the purported conspiracy was motivated by class-based animus. 616 F.2d at 264-67. The remaining claims based on alleged racial discrimination were not dismissed by the district court and therefore were not addressed by the Sixth Circuit. *Id.* at 258 un.4-5.

390. *Id.* at 263.

courts.³⁹¹

Congress has already provided an excellent antidiscrimination procedure in the Mine Safety and Health Act of 1977.³⁹² Section 105 of that Act authorizes "any miner, applicant for employment, or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against" to file a complaint with the Secretary within sixty days of the alleged violation.³⁹³ Upon receipt of the complaint, the Secretary forwards a copy to the respondent and begins an investigation within fifteen days.³⁹⁴ The section provides that the Secretary shall, upon a determination that the complaint has merit, apply to the Mine Safety and Health Review Commission (MSHRC) for an order immediately reinstating the miner pending a final resolution of the complaint.³⁹⁵ A hearing is then held before the MSHRC on an expedited basis, with the complaining miner, applicant, or representative entitled to present additional evidence on his behalf.³⁹⁶ The MSHRC has the authority to order all appropriate relief, including reinstatement with back pay and interest.³⁹⁷

Within ninety days of the receipt of a complaint the Secretary must notify the complainant of his determination of the validity of the allegation.³⁹⁸ A complainant has the right to file an action on his own behalf before the MSHRC if the Secretary determines that the complaint is without merit. The action must be filed within thirty days after receipt of the Secretary's notice.³⁹⁹ Private and MSHA-initiated hearings are conducted in the same manner. Both costs and attorney fees are awarded by MSHRC to a successful private complainant.⁴⁰⁰ All orders of MSHRC are subject to judicial review in the United States Court of Appeals for the District of Columbia Circuit or for the circuit in which the violation is alleged to have occurred.⁴⁰¹

391. *Id.* at 263-64.

392. 30 U.S.C. § 815 (Supp. II 1978).

393. 30 U.S.C. § 815(c)(2) (Supp. II 1978). Section 11(c)(2) of the Act requires that the complaint be filed within 30 days.

394. 30 U.S.C. § 815(c)(2) (Supp. II 1978).

395. *Id.*

396. *Id.*

397. *Id.* For MSHRC construction of MSHA's anti-discrimination provision, see *Pasula v. Consolidation Coal Co.*, [1980] OSHD (CCH) ¶ 24,878.

398. 30 U.S.C. § 815(c)(3) (Supp. II 1978).

399. *Id.*

400. *Id.*

401. 30 U.S.C. § 816 (Supp. II 1978).

Because a meaningful antiretaliation provision is essential to effective enforcement of the Occupational Safety and Health Act,⁴⁰² section 11(c) of the Act should be amended to adopt antidiscrimination procedures similar to those provided in the Mine Safety and Health Act. Such procedures would lessen the Secretary's case load, remove a potential burden from the district courts, provide more consistent decisionmaking, and expedite the processing of claims. Furthermore, the procedures, by adopting the substantial evidence rule, would accord due deference to the Commission's technical expertise and experience.⁴⁰³

(c) *Judicial Review*

Section 11(a) of the Act provides that "any person adversely affected or aggrieved by an order of the Commission"⁴⁰⁴ may seek review by filing a petition for review in any United States court of appeals for the circuit in which the alleged violation occurred, the circuit in which the employer has its principal office, or in the Court of Appeals for the District of Columbia. Under section 11(b), the Secretary may seek review only in the circuit in which the alleged violation occurred or in which the employer has its principal place of business.

The courts of appeals have a "mixed" record in deciding OSHA cases. In cases involving traditional administrative law issues, such as exhaustion of remedies,⁴⁰⁵ finality,⁴⁰⁶ and substantial evidence,⁴⁰⁷ courts have been relatively consistent and knowledgeable in their decisions.⁴⁰⁸ On the other hand, courts have sometimes been unable to decide even simple OSHA cases promptly⁴⁰⁹ and

402. See generally Hancock, *Employer Retaliation Can Chill Workers' Support for OSHA*, AFL-CIO AM. FEDERATIONIST, July, 1980, at 13, 14.

403. Thus, judicial review would be facilitated. See notes 365-67 *supra* and accompanying text.

404. 30 U.S.C. § 816(a)(1) (Supp. II 1978). In addition to employers and the Secretary, petitions for judicial review have been filed by individual employees, *Godwin v. OSHRC*, 540 F.2d 1013 (9th Cir. 1976), and by labor unions, *UAW v. OSHRC*, 557 F.2d 607 (7th Cir. 1977).

405. See, e.g., *Marshall v. Able Contractors, Inc.*, 573 F.2d 1055 (9th Cir.), *cert. denied*, 439 U.S. 826 (1978); *Keystone Roofing Co. v. OSHRC*, 539 F.2d 960 (3d Cir. 1976). See also *Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685 (N.D. Ga.), *aff'd mem.*, 409 U.S. 1070 (1972).

406. See, e.g., *Robberson Steel Co. v. Marshall*, 7 OSHC 1952 (10th Cir. 1978); *Fieldcrest Mills, Inc. v. OSHRC*, 545 F.2d 1384 (4th Cir. 1976).

407. See, e.g., *Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127 (6th Cir. 1978); *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973).

408. See generally Rothstein, *supra* note 98.

409. For example, in *Usery v. Lacy*, 628 F.2d 1226 (9th Cir. 1980), the Commission

have often been unclear about the Act's enforcement and adjudication system.⁴¹⁰

In cases in which the Secretary and Commission have agreed on the interpretation of a regulation or section of the Act, the courts have accorded the interpretation the "normal degree of judicial deference."⁴¹¹ In many instances, however, the Secretary and Commission have adopted different interpretations. The circuits are divided on the question of which interpretation should be given deference in such cases, although most courts have deferred to the Commission.⁴¹² Even when a court accords an interpretation some degree of deference, however, there is no assurance that the interpretation will be adopted. For example, in *Kent Nowlin Construction Co. v. OSHRC*⁴¹³ the Tenth Circuit indicated that courts should not "rubber stamp" administrative decisions that frustrate the underlying congressional policy.⁴¹⁴

Another "institutional" conflict concerns the issue of whether the Commission may appear before the courts of appeals to defend

vacated a citation on the ground that the Secretary had failed to prove that the employer was engaged in a business affecting commerce, as required by § 3(5) of the Act. 29 U.S.C. § 652(5) (1976). Insofar as the case raised a single, uncomplicated issue that had already been addressed by the Ninth Circuit in *Godwin v. OSHRC*, 540 F.2d 1013 (9th Cir. 1976), the Commission was clearly in error. The petition for review was filed on June 3, 1976, but the court did not issue its decision until September 24, 1980—over four years later.

410. For example, in *D. Federico Co. v. OSHRC*, 558 F.2d 614 (1st Cir. 1977), the court remarked that "we would strongly urge OSHRC [*sic*] to straighten up its own trenches lest the employers it prosecutes be able to slip through unscathed." *Id.* at 617. In another case, *Noranda Aluminum, Inc. v. OSHRC*, 593 F.2d 811 (8th Cir. 1979), the court remanded a case to the Secretary to reevaluate the abatement requirement of a citation in light of the employer's supervening revision of its work procedures. The court gave no indication of its authority for remanding a case to the enforcement agency.

411. *American Airlines, Inc. v. Secretary of Labor*, 578 F.2d 38, 39 n.1 (2d Cir. 1978). *Accord*, *Wisconsin Elec. Power Co. v. OSHRC*, 567 F.2d 735, 738 (7th Cir. 1977); *Western Waterproofing Co. v. Marshall*, 576 F.2d 139, 142 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978); *Irvington Moore, Division of United States Natural Resources, Inc. v. OSHRC*, 556 F.2d 431, 434 (9th Cir. 1977); *Clarkson Constr. Co. v. OSHRC*, 531 F.2d 451, 457 (10th Cir. 1976).

412. *Compare Brennan v. Southern Contractors Serv.*, 492 F.2d 498, 501 (5th Cir. 1974), *and Breunan v. OSHRC (Kesler & Sons Constr. Co.)*, 513 F.2d 553, 554 (10th Cir. 1975) (deference given to Secretary), *with Dunlop v. Rockwell Int'l*, 540 F.2d 1283, 1289-90 (6th Cir. 1976), *and Brennan v. OSHRC (Ren M. Fiegen, Inc.)*, 513 F.2d 713, 715-16 (8th Cir. 1975) (deference given to Commission).

413. 593 F.2d 368 (10th Cir. 1979).

414. *Id.* at 371. The general rule is simply that "[t]he Commission's interpretations of OSHA's provisions are entitled to deference where they are reasonable and consistent with the Act's purposes." *Central of Ga. R.R. v. OSHRC*, 576 F.2d 620, 624 (5th Cir. 1978). *See generally M. Rothstein, supra note 29, at §§ 488-89.*

its orders.⁴¹⁵ The Fourth⁴¹⁶ and Fifth⁴¹⁷ Circuits have held that the Commission is a proper party; the Third⁴¹⁸ and Ninth⁴¹⁹ Circuits have taken the opposite approach. In the most recent case, *Marshall v. Sun Petroleum Products Co.*,⁴²⁰ the Third Circuit adopted a restrictive approach, contending that "the Review Commission was designed strictly as an independent adjudicator, with no rulemaking authority . . . no . . . policy role in administering the Act, and accordingly, no right to independent representation in judicial review procedures before this court."⁴²¹

V. CONCLUSION

During the last ten years, the Occupational Safety and Health Act has led to new scientific research, improved recordkeeping, and greater public awareness of the problem of job-related injury and illness. This substantial increase in occupational safety and health information has confirmed Congress' wisdom in enacting a comprehensive national occupational safety and health statute. The pervasiveness, severity, and national scope of the problem and the inadequacy of private and state initiatives have underscored the need for federal action. It is painfully clear, however, that OSHA has far to go to reach its goal. The dramatic improvements in the last four years in implementing OSHA have not established that the Act is working, but only that it *can* work.

Critics of OSHA point to unsuccessful past programs, the Act's expense, and the absence of data showing conclusive and significant reductions in injury and illness rates as warranting major structural changes and significant limitations on the Act's coverage. Nevertheless, prior disappointments do not diminish the ur-

415. In many respects, this issue focuses on whether the Commission is considered as a traditional administrative agency or as a quasi-judicial body. See Moran, *Parties to Proceedings in the Court of Appeals Under the Occupational Safety and Health Act of 1970*, 15 B.C. INDUS. & COMM. L. REV. 1089 (1974).

416. *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1267 (4th Cir. 1974).

417. *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 648 n.8 (5th Cir. 1976).

418. *Marshall v. Sun Petroleum Prods. Co.*, 622 F.2d 1176 (3d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3443 (Dec. 15, 1980).

419. *Dale M. Madden Constr., Inc. v. Hodgson*, 502 F.2d 278, 280 (9th Cir. 1974).

420. See *Marshall v. Sun Petroleum Prods. Co.*, 622 F.2d 1176 (3d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3443 (Dec. 15, 1980).

421. *Id.* at 1184. According to § 14 of the Act, 29 U.S.C. § 663 (1976), the Solicitor of Labor is authorized to represent the Secretary in any civil litigation under OSHA, subject to the direction and control of the Attorney General. Although the Commission is not explicitly mentioned in the section, if it were to appear before the courts of appeals, it would probably also be subject to the direction and control of the Attorney General. It is uncertain how conflict between the Commission and the Secretary should be resolved when both are represented by the Attorney General.

gent need to protect all workers, nor do concerns about expense and inconvenience justify a sweeping reduction in the scope or goal of the statute.

This Article has suggested several ways in which the OSHA rulemaking, enforcement, and adjudication functions can be improved. Most of these proposals can be implemented quickly and with a minimum of administrative inconvenience. The list of proposals is not meant to be all-inclusive; rather, it is simply intended to illustrate the kinds of broad policy changes that are needed.

If the Act's lofty goal of ensuring workplace safety and health is to be realized in the next ten years, there must be renewed commitment on the part of Congress and renewed concern and cooperation on the part of employers and employees. In short, OSHA should not be abandoned, but can and must be made to work.

