THE SPLIT-ENFORCEMENT MODEL: SOME CONCLUSIONS FROM THE OSHA AND MSHA EXPERIENCES*

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I. INTRODUCTION

When the Occupational Safety and Health Act[1] (OSH Act) was enacted, it adopted a relatively novel and seldom-used feature in federal administrative practice—the split-enforcement model for agency adjudications. In this model, a major area of regulatory activity is divided between two wholly separate, independent agencies. This model contrasts with the more frequently encountered arrangement in which all administrative or regulatory functions—rulemaking, enforcement, and adjudication—are housed within a single agency. In the case of the OSH Act, one agency in the Department of Labor (DOL), the Occupational Safety and Health Administration (OSHA), has the responsibility for setting and enforcing health and safety standards. Challenges to those standards are adjudicated by the independent, three-member Occupational Safety and Health Review Commission (OSHRC).[2]

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[1]29 U.S.C. §§ 651–678 (1982).

[2]The Occupational Safety and Health Review Commission would refer to this administrative model as the "split-function" model. They point out that enforcement is not split between the Department of Labor and the Review Commission. Indeed they are correct: all the elements of enforcement—investigation, citation, and prosecution—are vested in the Department of Labor; only adjudicatory authority is lodged in the Review Commission. Nonetheless, for the purposes of this discussion, we shall often refer to the arrangement as the "split-enforcement" model. That formulation, however, is intended to suggest nothing different from what the review commisson would mean by "split-function model."

A similar division of responsibilities exists in the area of mine safety and health. The Federal Mine Safety and Health Amendments Act of 1977[3] (MSH Act) assigns to the Mine Safety and Health Administration (MSHA), also within the DOL, the task of developing and promulgating mandatory safety and health standards for the nation's mining industry. Challenges to those standards are adjudicated by the independent Federal Mine Safety and Health Review Commission (MSHRC), which is composed of five members.[4]

Why, in these areas, has there been such a departure from the traditional, cohesive administrative schemes that prevail in other regulatory areas? Why has there been the perceived need to separate the rulemaking and adjudicatory functions so completely from each other? How has this arrangement worked? Are there modifications that might be made to improve the regulatory processes in these areas? Should this bifurcated model be followed in other administrative areas? In the area of occupational safety and health, the success of the split-enforcement model has been mixed, at best. Better results seem to have been achieved in the mine-safety area. How can these differences be explained?

The purpose of this article is two-fold: first, to examine just how the split-enforcement model has worked—particularly in the areas of occupational safety and health and mine safety and health; and second, to suggest how the scheme may be improved in these areas and in others where its use may be contemplated.

Section II of this article reviews the statutes and the legislative histories of these two programs. Section III examines some of the problems and early conflicts in the OSHA program, with particular emphasis on the "deference" conflicts between the DOL, in which OSHA is housed, and the independent OSHRC. Section IV looks at

[3]30 U.S.C. §§ 801–962 (1982).

[4]Previously this "split-enforcement" arrangement has been used in federal income tax dispute cases. The Board of Tax Appeals, the predecessor to the United States Tax Court, was empowered to hear disputes from the Internal Revenue Service. *See* 26 U.S.C. § 7441 (1982).

The current system for enforcing certain provisions of the Federal Aviation Act divides responsibilities between the Federal Aviation Administration and the National Transportation Safety Board. *See* 49 U.S.C. § 1903(a)(9) (1985). Some recent congressional proposals to create a separate and independent Social Security Review Commission to adjudicate appeals from the denial of social security or disability benefits have been advanced. During the 98th Congress, two bills to create an independent Social Security Review Commission, H.R. 3541 and S. 1911, were introduced. Neither bill was enacted. Earlier proposals to adopt a split-enforcement arrangement were also considered in connection with the Fair Housing Amendments Act of 1979. Congress, however, eventually settled for the traditional unitary model in that legislation.

the same questions in the context of MSHA-MSHRC. Section V evaluates one of the frequent justifications cited for adopting this model—the enhanced prospects for due process. Section VI attempts to draw some conclusions and proposes some recommendations regarding future uses of the split-enforcement concept.

II. THE LEGISLATIVE HISTORY

A. Occupational Safety and Health

The OSH Act requires every covered employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[5] Congress gave the Secretary of Labor broad authority both to adopt any existing safety standard and, by rule, to "promulgate, modify, or revoke any occupational safety or health standard. . . ."[6]

The adoption of the occupational health and safety statute stirred intense controversy and disagreement from the very beginning. Even though there was considerable unanimity of opinion that American workers needed federal legislative protection in their workplaces,

[5]29 U.S.C. § 654(a)(1) (1982).

[6]*See generally*, 29 U.S.C. §§ 654–661 (1982). The OSH Act also authorizes the Secretary to conduct inspections and investigations of employment sites. If the Secretary concludes "that an employer has violated a requirement . . . standard, rule . . . order . . . or regulation (of OSH Act)," he issues a citation to the employer, who, within fifteen working days, must notify the Secretary whether the employer intends to contest the citation. If the employer fails to contest the citation within the fifteen-day period, the citation and any penalty assessed under it become final, and neither is subject to review by any court or by any other agency. If, on the other hand, the employer notifies the Secretary that the employer intends to contest the citation, "the Secretary shall immediately advise the Commission (OSHRC) of such notification, and the Commission shall afford an opportunity for a hearing . . . (and) thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance."

The hearing, initially before an administrative law judge (ALJ), is conducted in accordance with Section 554 of the Administrative Procedure Act, but without regard to Section 554(a)(3). The report of the administrative law judge becomes the final report of the Commission within thirty days after the judge's report, unless within that period a Commission member has directed that the ALJ's report be reviewed by the Commission.

Judicial review may be obtained in any United States court of appeals for the circuit in which the violation is said to have occurred or in which the employer has its principal office. Either the Secretary of Labor or any person who claims to be adversely affected or aggrieved by the Commission's order may petition for a review of the Commission's decision. Section 660 (a) also provides the District of Columbia Circuit as an additional forum, available to "any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 659. . . ."

there was little agreement about how those federal standards would be promulgated and enforced. A principal focus of the legislative debate concerned the arrangement of the rulemaking, enforcement, and adjudicatory functions of the agency that would be responsible for this new program. Who would make the rules, and how extensive would be his authority to interpret those rules and to penalize violators of them?

One of the original bills introduced in Congress would have followed the traditional administrative model and reposed all three functions—rulemaking, enforcement, and adjudication—in the DOL.[7] That bill enjoyed enthusiastic support from Democrats and from organized labor, which apparently felt that it could expect more vigorous and stringent protection from its traditional government ally. Another bill, more strongly endorsed by business interests, would have divided the three administrative functions among three separate agencies—one to promulgate the regulations, a second agency within the DOL to enforce them, and a third independent agency to adjudicate challenges to them.[8] As it finally emerged from Congress, the OSH Act embodies a compromise, engineered in the main by then-Senator Jacob Javits of New York. The concern of both the Javits compromise and the more far-reaching bill that called for the complete three-way division of responsibilities was that so concentrated a grant of power to the Secretary and the DOL, as envisioned by the Democrats' original bill, would create an appearance of unfairness and, therefore, compromise the prospects for due process in adjudicatory challenges to the Department's standards. In a statement of his individual views accompanying an early version of the act, Senator Javits remarked that:

> . . . [H]earing and determination of enforcement cases by an independent panel more closely accords with traditional notions of due process than would hearing and determination by the Secretary. In the latter case the Secretary is essentially acting as prosecutor and judge. Any finding by the Secretary in favor of a respondent would essentially be a repudiation of his own Department's employees. While this type of enforcement has been used in connection with other statutes, is contemplated by the Administrative Procedures [sic] Act, and is not jurisdictionally defective on due process grounds, the awkward mechanics it imposes on heads of Departments who wish to exercise their adjudicatory power personally in order to preserve due process has not been appreciated. What happens is that one official of the Department (e.g., the Deputy Solicitor) will take the position of prosecutor and another official (e.g., the Solicitor) will take the position of a neutral in order to advise the Secretary.

[7]H.R. 843, 90th Cong., 2d Sess. (1967).
[8]H.R. 13373, 91st Cong., 1st Sess. (1969); S. 2788, 91st Cong., 1st Sess. (1969).

> More important, because of the awkwardness of this procedure and the heavy burden of personally reviewing hundreds of enforcement cases, it is highly likely that the Secretary of Labor will not even exercise his power under the Committee bill personally, but will delegate it to a panel of officials within the Department. . . . The net result will be enforcement by a panel anyway, but not one which is independent. . . .[9]

Even though Javits recognized that the unitary model existed in other statutes and was "not jurisdictionally defective on due process grounds," he pressed for and prevailed in dividing the responsibilities between the Secretary of Labor and the independent review commission. It was Javits' view, and the view of several others in Congress, that "the independent Panel approach would . . . preserve due process more easily, and thereby instill much more confidence in the whole program in workers and businessmen alike."[10]

B. Mine Safety and Health

The MSH Act repealed the Federal Metal and Nonmetallic Mine Act[11] and substantially amended the Federal Coal Mine Health and Safety Act.[12] The result placed coverage of the entire mining industry, metal and non-metal, under one act; transferred enforcement responsibility from the Secretary of Interior to the Secretary of Labor; streamlined the procedures for promulgating and enforcing health and safety standards; and created an independent review commission to resolve contested citations.[13]

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[9]S. REP. No. 1282, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5177, 5218. *See also*, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY & HEALTH ACT OF 1970, at 195 (1970). The Javits amendment also reflected a concern for speed of enforcement. The amendment allowed for immediate, self-enforcing orders at the conclusion of the administrative proceeding. The original Senate bill provided that no enforceable order to correct a violation would issue until both the administrative proceeding and any availed-of judicial proceedings had ended. Javits believed that his compromise would save between six months and two years in most contested cases.

[10]*See*, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY & HEALTH ACT, *supra* note 9.

[11]30 U.S.C. § 721 (repealed 1977).

[12]30 U.S.C. §§ 801–962 (1982).

[13]*See generally*, 30 U.S.C. §§ 813–823 (1982). The MSHAct empowers the Secretary to promulgate mandatory health and safety standards and includes detailed provisions for the inspections of mines. The MSHAct requires the Secretary to conduct frequent mine inspections to determine, among other things, whether the mine operators have complied with the mandatory health or safety standards and other provisions of the Act. When an inspector concludes that a mine operator has violated the Act or one of the standards issued pursuant to it, "he shall with reasonable promptness, issue a citation to the operator," which must specify "a reasonable time for the abatement of the violation." An operator's failure to abate the citation may result in an order requiring all persons to be withdrawn from the area of the mine affected by the citation, until the Secretary of

In many ways the mine-safety statute resembles the occupational safety and health statute. Both statutes divide rulemaking and adjudicatory authority between the DOL and an independent review commission. Yet there are important differences between the two statutes and the programs they have created.

The most obvious difference—and perhaps the most crucial—between the two statutes is in the breadth of their coverage. The OSHAct potentially covers every conceivable kind of industrial and occupational category, almost every conceivable employment situation, almost every employer—from General Motors to the neighborhood greengrocer. By its terms, the OSH Act applies to "every person engaged in a business affecting commerce who has employees." Only the United States government, the states of the United States, and their political subdivisions are excluded from its coverage.[14] It would appear to be an almost impossible task for OSHA to know with any accuracy just how many "persons" are subject to its jurisdiction at any particular time. Furthermore, except for the statutory charge requiring "every employer to furnish each of his employees employment and a place of employment which are free from recognized hazards,"[15] there is little identity of interests or commonality to unite those subject to OSHA's regulatory jurisdiction.

The MSH Act, on the other hand, applies to a discrete and insular employment sector, whose membership, although varied in size and geographic location, is more similar and homogeneous with respect to the industrial activities and the occupational hazards to which they are exposed. According to one MSHA official, at almost any given moment, it is possible for MSHA to determine with substantial accuracy the number of persons and mines subject to its jurisdiction.[16] MSHA

Labor determines that the violation has been abated. For each citation, the Secretary may propose a civil penalty, which may not exceed $10,000 for each violation.

The MSHAct also permits operators to contest citations and proposed penalties within thirty days of their issuance. If, within the thirty-day period, the operator does not notify the Secretary that the operator intends to contest the citation, both the citation and the proposed penalty become a "a final order of the Commission . . . not subject to review by a court or agency." If the operator files a timely contest, the case is heard by an administrative law judge of the review commission. Any person adversely affected or aggrieved by a decision of an ALJ may file, within thirty days after the issuance of that a decision, a petition for discretionary review by the Commission. If not satisfied with the Commission's decision, such person, within thirty days of the issuance of the decision, may obtain judicial review in an appropriate court of appeals.

[14]29 U.S.C. § 652(a) (1982).

[15]*Id.* at § 654(a).

[16]Interview with Frank O'Gorman, Federal Mine Safety and Health Administration, Arlington, Virginia (February 3, 1986).

regulates only one industry. OSHA, by comparison, regulates virtually everything else.[17]

On the other hand, unlike the legislative history of OSH Act, the mine-safety legislative history discloses no spirited debates or disagreements regarding use of this bifurcated administrative arrangement. On the contrary, the committee report accompanying the bill that became law states rather matter-of-factly that:

> [T]he Committee realizes that alternatives to the establishment of a new independent reviewing body exist. . . . The Committee also recognizes that there are organizational and administrative justifications for avoiding the establishment of new administrative agencies. However, the Committee believes that the considerations favoring a completely independent adjudicatory authority outweigh these arguments.
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> The Committee believes that an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program.[18]

Again, preserving due process and eliciting more confidence in the program are asserted as reasons for this novel administrative arrangement. Is some fundamental change at work here?

The idea of separation of functions is not a novel concept in administrative law.[19] It is almost axiomatic that some functions should be separate from others, that the prosecutor should be distinct from the investigator and from him who would decide disputed questions of fact.[20] That is basic to the American idea of due process. Yet, in administrative law, due process has never been held to require that those functions be as separate, as independent as they are in the

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[17]There is at least one other difference. Unlike OSHRC, MSHRC is composed of five members who are empowered to act in panels. One commentator has called for enlarging OSHRC from its current three to five members. *See* Rothstein, *infra* note 25.

[18]S. REP. NO. 181, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 3401, 3446–7.

[19]The Administrative Procedure Act provides for a system of internal separation of functions in agencies that exercise both rulemaking and adjudicatory authorities. The main provisions are in Section 554(d) of the APA. The provision is applicable only to cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing" with certain exceptions laid down at Section 554(a) and Section 554(d).

[20]According to Professor Kenneth Davis, "What the Administrative Procedure Act calls 'separation of functions' is designed to prevent contamination of judging by the performance of inconsistent functions, including primarily prosecuting and investigating, and secondarily instituting proceedings, negotiating settlements, and testifying. Many agencies, either through agency heads or their staffs or both, perform all these various functions. The problem is to separate inconsistent functions in such a way as to protect the judging function." *See generally*, K. C. DAVIS, ADMINISTRATIVE LAW TEXT (3d ed. 1972), Ch. 13.

OSHA-OSHRC and the MSHA-MSHRC schemes.[21] In fact, one of the advantages traditionally associated with the American administrative agency is its unique combination of rulemaking, enforcement, and adjudicatory functions.[22] What, then, can explain these breaks with tradition?[23]

During the OSHA legislative debates, Senator Javits conceded that the traditional administrative arrangement is "not defective on due process grounds." The legislative report on the MSH Act, on the other hand, asserts that such a complete separation "is essential to provide due process and [instill] much more confidence in the program." Little else, however, is said in either legislative discussion regarding what is in some ways a really radical decision—the decision to separate the traditional administrative functions in so unconventional a fashion.

And how would these divisions of responsibility really work? In the legislative history of the MSH Act, Congress does attempt to clarify its intentions with respect to how this division of administrative responsibilities between MSHA and MSHRC should function. At one point, the committee report provides that, "[s]ince the Secretary of Labor is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts."[24]

Even such a meager statement of congressional intention is absent from the OSH Act. Was this "directive" included in the mine-safety statute in view of the evidence that the OSH Act agencies and the courts reviewing their decisions were often confused regarding the

[21]The case law generally rejects the notion that the combining of judging with prosecution or investigation is *ipso facto* a denial of due process. *See, e.g.* Marcello v. Bonds, 349 U.S. 302 (1955).

[22]*See, e.g.*, B. SCHWARTZ, ADMINISTRATIVE LAW § 1.5 (2d ed. 1984), *citing*, *Report of Attorney General's Committee on Administrative Procedure* (1941).

[23]No other administrative models of separation go as far as the examples provided by the OSHA-OSHRC and MSHA-MSHRC schemes. The National Labor Relations Board (NLRB), however, does provide an example of a different kind of separation. The Taft-Hartley Act of 1947 provides for a General Counsel of the NLRB, who is appointed directly by the President for a four-year term. The General Counsel is completely independent of the Board. His authorities include investigating and prosecuting labor violations. He has final authority to investigate charges, issue complaints, and prosecute those complaints before the Board, which under the statute is an adjudicatory agency only. The substance—if not the form—of the NLRB, therefore, is of two separate agencies with the independent Office of General Counsel performing the investigating and prosecuting functions and the five-member Board limited to hearing and deciding cases. *See*, 29 U.S.C. § 153 (1982).

[24]S. REP. No. 181, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S. CODE & ADMIN. NEWS 3401.

extent of their respective responsibilities? Can the confusion between OSHA and OSHRC be attributed to the absence of clear congressional directives to the two agencies? If so, has this statement in the MSH Act obviated similar confusion between MSHA and MSHRC? And what of the congressional champions' principal reasons for advocating such a complete separation of functions: has this administrative arrangement resulted in more fairness and due process or instilled more confidence in either regulatory program?

Is it the statutes themselves, the ways in which the agencies created under them are expected to operate, or is there something unique about these regulatory programs that may explain these departures? What conclusions may fairly be drawn from these experiences—in the case of OSHA-OSHRC, now more that fifteen years; in the case of MSHA-MSHRC, almost ten?

III. INSTITUTIONAL CONFLICTS: THE OSH ACT

In principle the idea of separate, independent adjudication is appealing. It is so fundamental a feature of Anglo-American law that no one could quarrel with the concept. Yet the independent adjudication under the OSH Act has not met with universal acclaim. In fact, confusion regarding the precise nature of OSHRC's role was a major source of the early and persistent criticism of the OSHA program. An earlier study chronicled many of the Commission's initial problems. Among the problems cited were the Commission's tremendous caseload and its delay in deciding contested cases—due, in large measure, to one commissioner's "protest policy" which effectively directed every case for full Commission review; and the lack of unanimity among the Commissioners, which delayed the decision process because of the frequency of separate opinions.[25]

OSHA was born with a problem that really was not of its own making. Section 6(a) of the OSH Act directed the Secretary "as soon as practicable" to promulgate as a national health and safety standard "any national consensus standard, and any established federal standard."[26] These "received" standards were to be promulgated without the necessity of complying with the provisions of the APA.[27] OSHA,

[25]*See* Rothstein, *OSHA After Ten Years: A Review and Some Proposed Reforms*, 34 VAND. L. REV. 71 (1981). *See also* Sullivan, *Independent Adjudication and Occupational Safety and Health Policy: A Test for Administrative Court Theory*, 31 ADMIN. L. REV. 177 (1979).

[26]29 U.S.C. § 655(a) (1982).

[27]*Id.*

therefore, began its life with several regulations that it had had no hand in devising. The administrative problems developed almost immediately.[28]

Some of OSHA's early problems may be attributed to its forced reception of these consensus standards, many of which had been privately adopted and which previously had functioned primarily as optional, aspirational, measures.[29] Review of standards promulgated pursuant to Section 6(a) would present special difficulties. What, in their origins, were mainly intended to be voluntary standards are by virtue of Section 6(a) transformed into enforceable government requirements. What should be the government's attitude regarding these "standards"? Do they become enforceable as the original non-government promulgators might have intended? Or, might the government insist on a different level of compliance or compliance by companies which, although members of the target industry, may not have subscribed to the original, voluntary standards? And finally, is the government, by adopting these consensus standards, saddled with the entire "legislative history" from the industrial organizations that developed them? These are but some of the questions that appear neither to have been asked nor considered in the legislative discussions of the OSH Act.

The Review Commission, or at least one member of the Commission, has taken the view that, because such standards themselves did not emanate from the Secretary, the Commission should be free to reinterpret such standards whenever it disagrees with the construction or effect that the Secretary might give to them.[30] As one might expect, that

[28]*See*, Rothstein, *supra* note 25.

[29]Professor Rothstein's text on occupational safety highlights some of the early problems encountered because of this wholesale adoption of industry standards without public comment.

At one point he writes:

> The overwhelming majority of safety standards were adopted from already existing private standards. These standards are hardly models of clarity and precision and have been subject to considerable criticism.
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> Because of the poor quality of many standards the Commission and courts have been forced to choose between two competing interests. On the one hand, the immediate safety of employees suggests the need for the broadest possible construction and the widest application of standards to best effectuate the remedial purpose of the Act. On the other hand, due process considerations favor a strict construction of standards so that employers will not be penalized without having received adequate prior notice of the required conduct.

See M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 125 (2d ed. 1983).

[30]Interview with E. Ross Buckley, Chairman, Occupational Safety and Health Review Commission, Washington, D.C. (August 8, 1985).

view has led to several disputes between the DOL and the Review Commission. Not only should the Commission be free to make its own determination regarding the meaning of a consensus standard, but, according to this view, it should also be free to interpret the meaning of any established federal standard promulgated under 6(b).[31]

OSHA officials, of course, are not impressed with that argument. Instead they argue that OSHA was given the rulemaking authority and that its judgment regarding the meaning of the rules—be they 6(a) or 6(b) rules—should be conclusive. Furthermore, they maintain that since the vast majority of standards promulgated are still 6(a) standards, the Commission could, under the guise of adjudicating, effectively set occupational health policy, thereby eviscerating the authority Congress sought to repose in the Secretary.[32]

Whether they be 6(a) or 6(b) standards, a major source of contention has existed over how authority under the Act is intended to be distributed between OSHA and OSHRC. An examination of some of the principal disputes between these agencies confirms the struggle that periodically has raged between OSHA and the Commission. Not only that, but this examination also reveals that the federal courts have not been much more successful than have the two agencies at determining just how this allocation of responsibilities should operate.

A. *A. Amorello and Sons*: The Problem of Deference

1. *Before the Commission*

One might well read the Commission's duty to "issue an order, based on findings of fact,"[33] as narrowly circumscribing the Commission's role to ascertaining whether, in fact, the cited employer has done what the Secretary forbade (or has refused to do what the Secretary has decreed). That language does not imply—at least, it does not unavoidably imply—that the Commission would have any role whatsoever in evaluating the wisdom, utility, or the subjective necessity for the challenged standard. Rather, the language seems more plausibly to suggest that the Commission make the more objective, neutral determination

[31]Standards other than the consensus and other received industry standards, promulgated on the Secretary's own initiative are often called "6-b" standards, referring to the section of the OSHAct that empowers the Secretary to issue new safety standards. *See*, 29 U.S.C. § 655.

[32]Interview with Frank White, Associate Solicitor, and Daniel Mick, Counsel for Regional Trial Litigaton, Occupational Safety and Health Administration, Washington, D.C. (August 28, 1985).

[33]29 U.S.C. § 659(c) (1982).

that the cited employer either did or did not violate the DOL's standard. Yet, neither the Commission nor many reviewing courts have been willing consistently to ascribe to the Commission that singular responsibility.

Donovan v. A. Amorello and Sons[34] is one of the more recent cases to have faced the conflict that has frequently flared between OSHA and OSHRC.

OSHA had charged Amorello, a Worcester, Massachusetts, contractor, with violating an OSHA regulation which states:

> No employer shall permit earthmoving . . . equipment which has an obstructed view to the rear to be used in reverse gear unless the equipment has in operation a reverse signal alarm distinguishable from the surrounding noise level or an employee signals that it is safe to do so.[35]

In response to a complaint regarding an unshored trench, an OSHA compliance officer and his supervisor visited an Amorello worksite in Worcester, Massachusetts. There they observed a front-end loader operating in reverse. According to the Commission decision, "(n)either the compliance officer nor his supervisor heard a backup alarm."[36] Even though, later during the inspection, the compliance officer was shown that the loader was equipped with an alarm, his report concluded that Amorello was in violation of the standard because "a backup alarm was required to be in operation while the loader was in motion because the view to the rear was obstructed."[37]

The administrative law judge who heard Amorello's contest did not decide the issue of whether the company's loader had an obstructed view. Rather, he vacated that item, because the compliance officer subsequently admitted that he had heard an alarm during the inspection. The ALJ then determined that, because of this "credibility finding," the compliance officer's testimony "was otherwise entitled to no weight."[38]

At the Commission hearing, OSHA argued that the ALJ's reasons for refusing to credit the compliance officer's testimony were unsound. Furthermore, OSHA contended that a violation was proved "because the standard requires either a reverse alarm or a signalman if the view to the rear is obstructed to any extent."[39] OSHA maintained that the

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[34]761 F.2d 61 (1st Cir. 1985).
[35]29 C.F.R. § 1926.602(a)(9)(ii) (1984).
[36]11 OSHRC 2040 (1984).
[37]*Id.*
[38]*See*, Brief for Petitioner (Secretary of Labor) at 5, Donovan v. Amorello and Sons, Inc., 761 F.2d 61 (1st Cir. 1985) (No. 84-1568).
[39]*Id.*

operator's view to the rear was obstructed by an exhaust pipe and by the position of the loader's engine. The ALJ decided that the Secretary's citation should be vacated. By a vote of 2-1, the Commission affirmed the ALJ's decision to vacate the citation.[40]

Even though the Commission affirmed the administrative law judge's decision to vacate the citation, it did so for reasons different from those of the ALJ. The Chairman of the Commission wrote that:

> [The] evidence establishes that the loader's operator had a clear view to the rear, unblocked by any part of the loader, except for two feet immediately behind it, where the view was limited only by the location of the loader's engine. The question therefore reduces to whether the two-foot limitation created by the engine compartment amounts to an "obstructed view to the rear" *within the meaning of the standard.* (emphasis added) I think not.[41]

According to the Chairman's opinion, this condition was not within the meaning of the standard because it "is not a significant obstruction created by a special part of the vehicle . . . that obstructs the operator's view during the entire course or a significant portion of the rearward travel."[42] In addition, the majority commissioners justified their decision on the basis that the operator's rear field of vision was limited "only during the first two feet of travel; after that, the operator's field of vision encompassed areas previously seen to be clear."[43] The Chairman's opinion concludes with the observation that "the phrase 'obstructed to the rear' did not appear in the proposed version of this standard. . . ." Because the originally proposed standard would have required backup alarms on all earthmoving equipment, the opinion found that the phrase "obstructed view to the rear" was not meant "to govern minor limitations that are common to nearly all earthmoving equipment."[44] The Commission thus concluded that, because there was no "significant" obstruction, there was no violation of the OSHA regulation.

Commissioner Buckley, concurring in the Chairman's decision, wrote that the obstructed view existed for a distance of only two feet from the rear of the loader, that the inspectors did not see the machine operate during the first two feet of its rearward motion and, therefore, that they could not know the alarm was not working.

Commissioner Cleary, dissenting, rejected the reading of his colleagues and maintained that the citation should be affirmed. In his

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[40] 11 OSHRC 2040 (1984).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*

view, the purpose of the standard is "to ensure that employees are not in the path of earthmoving equipment."[45] As he saw it, the majority's interpretations would defeat the purpose of the standard. Furthermore, Cleary acknowledged that his colleagues had "effectively rewritten [the standard] to limit its applicability to 'significant' obstructions."[46] The result, he said, would be to except obstructions that are common to nearly all earthmoving equipment from the coverage of the standard.

Cleary could discern no reason to conclude that the addition of the phrase "obstructed to the rear" to the proposed standard would render the standard inapplicable to minor limitations. But perhaps most significantly, Cleary would have affirmed the Commission's decision, because, as he said:

> [T]he majority interpretations also introduce a mischievous element of subjectivity into a standard that objectively sets forth the circumstances under which compliance is required. Heretofore, an employer could confine his inquiry to whether the view of the operator was obstructed within the plain meaning of the term. An employer now must also determine whether the obstruction is "significant." But there is little guidance as to when a "significant" obstruction exists. . . . I am unclear as to when an obstruction ceases to be a "minor limitation" and becomes "significant" and I suspect employers who apply this standard in the future will share my confusion. Under the rationale in the concurring opinion, instead of determining whether the entire path to the rear of equipment is in the operator's view, an operator must take "several factors" into account to decide whether the view is obstructed. Little guidance is provided as to how to apply these factors or when these factors combine to yield a conclusion that an obstructed rear view exists.[47]

Among the commissioners who decided *Amorello*, only Cleary seems to have appreciated the institutional roles that had been assigned the respective agencies. Cleary's dissenting opinion recognizes, even if it does not explicitly state so, that the Secretary may employ whatever subjective criteria he thinks appropriate when he promulgates a regulation. He, of course, may eschew subjective criteria altogether. That is the nature of legislative choices—subjective, preferential in many instances. When promulgating rules pursuant to his statutory charge, the legislator may call on any and all of the knowledge or information available to him.[48] The adjudicator's role, however, must be different.

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *See generally*, B. SCHWARTZ, ADMINISTRATIVE LAW (2d ed. 1984) § 4.8: "Rulemaking is the administrative equivalent of the legislative process of passing a statute. Agencies engaged in rulemaking are, as a general proposition, no more subject to constitutional procedural requirements than is the legislature engaged in enacting a statute. . . . Nor is

The adjudicator must evaluate facts and evidence to ascertain whether the party charged with a violation has followed—or, as the case may be, refused to follow—the legislator's decree.[49] In *Amorello*, the majority commissioners did not discharge their responsibilities under the Act. Rather, they strayed into the field of subjectivity and sought to exercise a function that, by logic if not by law, belongs to the Secretary.

2. *In the Court of Appeals*

Having failed to persuade the Commission that the *Amorello* citation should be affirmed, the Secretary of Labor sought review in the Court of Appeals for the First Circuit. In an opinion by Judge Breyer, the court vacated the decision of the Commission. In vacating the Commission's order, the court held that OSHA's interpretation of its regulation should be controlling so long as it is reasonable.[50] That reasonableness, according to the court, should be evaluated in light of "the agency's likely greater knowledge of the rule's intended purpose and the agency's practical understanding of how competing interpretations may affect the agency's regulatory mission."[51] In siding with the Secretary, the *Amorello* court based its decision on two considerations: the legislative history and practical administrative requirements.

First, the court examined the legislative history of the OSH Act, concluding that it "suggests that OSHRC's mission is primarily factual in nature, its role is to hear charges of violations . . . [and] to guarantee that those charged are adjudicated fairly."[52] The court reasoned that, even though Congress did establish OSHRC as an independent review

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the rulemaking process bound by the principle of exclusiveness of the record. The agency may look beyond the record and rely on the kinds of investigative and other extrarecord materials used by legislative committees. It may act not only on the basis of the hearing record, but also upon the basis of information in its own files and its knowledge and expertise."

[49]Adjudicators, as distinguished from rulemakers, are generally limited to a "record" of *some* kind in making their decisions and judgments. The adjudicator must be guided by "all the relevant factors" and those alone; and in the context of formal proceedings, the relevant factors must appear within the four corners of the record. *See, e.g.* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). *See also*, 5 U.S.C. §§ 554, 556, & 557.

[50]761 F.2d 61, 63. *See also* Donovan v. Daniel Marr & Son, 763 F.2d 477, 483 (1st Cir. 1985) (following *Amorello* yet saying: "This does not mean that a persuasive interpretation by the Commission will give way to a marginal interpretation by the Secretary; but where, as here . . . the Commission's view seems, if not insupportable, at least strained, there can be little choice as to which reading we must accept."); Isaac v. Harvard University, 769 F.2d 817 (1st Cir. 1985), Brock v. Schwarz-Jordan, Inc., 777 F.2d 195 (1st Cir. 1985), Practico v. Portland Terminal Co., 783 F.2d 255, 269 (1st Cir. 1985) (Campbell J., dissenting).

[51]761 F.2d at 63.

[52]*Id.* at 65.

commission, it intended that the Commission's powers would be very limited. Because Congress did not elect to place rulemaking authority in an agency separate from OSHA suggests that "Congress did not intend OSHRC to possess broad powers to set policy through the creation of rules—powers that other agencies sometimes exercise in adjudicatory (as well as rulemaking) proceedings."[53]

Second, the *Amorello* court found that "practical administrative considerations favor looking to OSHA for a more authoritative interpretation of a regulation."[54] OSHA chose the language of the regulation; it is more likely to have "an institutional memory" of its meaning and purpose.[55] Because OSHA is both the "legislating" and "enforcing" authority, that dual responsibility "provides it with expert knowledge of the practical outcomes of different interpretations."[56] The court did not gainsay that OSHRC too has acquired some expertise from adjudicating disputes over OSHA regulations and that that expertise is entitled to some weight in appropriate circumstances. "But" the court said, "that experience arises out of its having adjudicated many cases; it is likely factual in nature; and it necessarily concerns examples of rule violations (which are presumably less typical than instances of compliance)."[57]

The *Amorello* court, it may be said, decided the question of whose interpretation should prevail by examining the intended functions of the two agencies. The court reviewed the functions of the two agencies in the context of the entire administrative apparatus that Congress has here created. In addition, it also examined what Congress asserted to have been its primary aims when it departed from the traditional administrative arrangement when this statute was adopted.

Even though Congress chose to divide the administrative responsibilities between two agencies, it nonetheless gave to OSHA the rulemaking and enforcement authority. While the concept of such divided responsibilities may have been novel, what constitutes rulemaking surely is not. Furthermore, it is almost a canon of administrative law that courts should defer to an agency's interpretation of its own regulation unless that interpretation is demonstrably irrational.[58] Moreover, it is clear that, in devising the OSHA-OSHRC administrative scheme, Congress intended merely to give to the independent review com-

[53]*Id.*
[54]*Id.* at 66.
[55]*Id.*
[56]*Id.*
[57]*Id.*
[58]*See, e.g.*, Udall v. Tallman, 380 U.S. 1, 16–17 (1965).

mission only *one* of the functions that traditionally more integrated agencies exercise. Had Congress intended an even more radical departure—such as giving the Commission authority both to interpret regulations and to adjudicate disputes arising under them—it would seem to demand more specificity and clarity of statement on that point than the OSH Act's legislative history reveals.

But that notion itself seems basically incompatible with the chief purpose that has frequently been cited for this administrative division. As unedifying as the legislative history here may be, one thing does seem clear: Congress did not want the framer of the rule to decide disputes arising under the rules that he had formulated. It is equally apparent that Congress did not intend that the adjudicator be able to formulate the rules on which he would then sit in judgment. What the First Circuit sought to do here is what courts should do whenever they are called upon to discover legislative purpose and legislative intent particularly when that purpose and intent may not be readily discernible from the language of the statute: give force and effect to the legislation so as not to defeat the legislature's overall aim. The judicial inquiry in such a case as this one then is simple: What was the legislature's purpose, its intent in separating these functions? The answer is almost deceptively simple as well—to remove the resolution of adjudicatory challenges from the control of the rulemaker and, as a corollary, to remove the rulemaking responsibilities from the control of the adjudicatory authority. To permit the Commission to "rewrite" an OSHA regulation in this way and then to decide that Amorello did not violate that regulation would be to permit what Congress had legislated to prevent.

B. Similar Judicial Responses

The position of the First Circuit has been taken by other courts. The Fifth Circuit also has maintained that, in choosing between the Secretary's interpretation of his agency's regulation and OSHRC's construction, the Secretary's interpretation, if reasonable, should govern. One case, *Brennan v. Southern Contractors Service*,[59] involved an OSHA rule which required use of a safety net where the use of other safety devices would be impractical. After the fatal fall of one of its employees, Southern was cited for violating the regulation. A safety expert tes-

[59]492 F.2d 498 (5th Cir. 1974). *See also* Schwarz-Jordan, Inc., 777 F.2d 195, 197 (5th Cir. 1985) ("This court has held that the *Secretary's* interpretation is controlling as long as it is one of several reasonable interpretations, although it may not appear as reasonable as some others.").

tified before the ALJ that safety belts rather than safety nets would be practical.[60] In light of that testimony, the ALJ determined that the regulation required safety nets "only if one of the other safety devices is impractical,"[61] whether it was being utilized or not. The Commission affirmed the ALJ's construction of the regulation.

The Fifth Circuit reversed the Commission, holding that the Commission's interpretation would undermine the purpose of the OSH Act—"to protect the health and safety of workers and to improve physical working conditions on employment premises."[62] Significantly, the court also held that "the promulgator's interpretation is controlling as long as it is one of several reasonable interpretations."[63]

A Tenth Circuit panel reached a similar conclusion in *Brennan v. OSHRC and Kesler and Sons Construction Company*.[64] That case involved the construction of a statutory term rather than a regulation. Initially Kesler had been cited for noncompliance with certain OSHA-mandated safety standards. The citation ordered immediate abatement for all violations and assessed penalties on the company. Kesler did not contest the citation. The company was then later cited for failing to correct the violations. Kesler contested the notification of failure to correct and the penalty assessment. Following the required hearing, the ALJ found that the company had failed to correct the cited violations, yet he reduced the penalty. On review by the Commission, OSHRC reversed the ALJ. The OSHA-OSHRC dispute centered on Section 9 of the statute, which provides that a citation fix a reasonable time for abatement.[65] The citation issued by the Secretary had ordered immediate abatement. The Commission, however, maintained that there could be no reinspection until the expiration of the fifteen-day period during which the employer was allowed to contest the citation. In the court's view, the Commission's interpretation of the statute would amount to permitting an employer "fifteen working days to correct a condition calling for immediate abatement, even though he

[60]492 F.2d at 500.

[61]29 C.F.R. § 125.105(a) (1973).

[62]492 F.2d at 501. *But see* Brennan v. OSHRC and Ron M. Fiegen, Inc., 513 F.2d 713 (8th Cir. 1975). *See also*, Everglades Sugar Refinery v. Donovan, 685 F.2d 1076, 1081 (5th Cir. 1981). *Cf.*, H.B. Zachiry Co. v. OSHRC, 638 F.2d 812, 817 (5th Cir. 1981). *But see*, Coca-Cola Co. v. Atchison, Topeka and Santa Fe Ry. Co., 608 F.2d 213, 222 (5th Cir. 1979); Usery v. Kennecott Copper Co., 577 F.2d 1113, 1119 (10th Cir. 1977); Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976).

[63]492 F.2d at 501.

[64]513 F.2d 533 (10th Cir. 1975).

[65]29 U.S.C. § 658(a) (1982).

did not contest the citation."[66] In siding with the Secretary, the court said "the interpretation given a statute by the administrative agency charged with its enforcement should be accepted by the courts, if such interpretation be a reasonable one. And this is true even though there may be another interpretation of the statute which is itself equally reasonable."[67]

By their decisions, these courts have recognized that interpreting agency regulations and statutory provisions is an essential aspect in the formulation of policy. These cases suggest that the responsibility for the formulation of policy is vested in the Secretary and the DOL.

Other courts have been even more explicit in maintaining that the policymaking responsibilities under the OSHAct reside with the Secretary. Examples of this view come from the Ninth Circuit and, more recently, from both the Third and the District of Columbia circuits.

In a case that involved the ability of the Secretary of Labor to compromise penalties that had been assessed by a Commission order, the Ninth Circuit held that:

> [P]olicy-making is arguably a by-product of the Commission's adjudication. But the Act imposes policy-making responsibility upon the Secretary, not the Commission. Whatever "policies" the Commission establishes are indirect. Only those established by the Secretary are entitled to enforcement and deference in court.[68]

In a similar case, the Third Circuit, reviewing the legislative history of the OSHAct, concluded that "the Review Commission's mandate was strictly limited to adjudication."[69] The court amplified its position, saying that contrary to assertions of the Commission "that it is a major policy-making body under OSHA, the fact is that the Act confers all rulemaking responsibilities on the Secretary, not the Commission."[70] The court went on to hold that "the Review Commission was designed strictly as an independent adjudicator, with no rulemaking authority

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[66]*See*, 29 U.S.C. § 659(a): "If, within fifteen working days from the receipt of the notice issued by the Secretary, the employer fails to notify the Secretary that he contests the citation or the proposed assessment of penalty, and no notice is filed by an employee or representative of employees . . . within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency."

[67]513 F.2d at 554.

[68]Dale Madden Construction Inc. v. Hodgson, 508 F.2d 278 (9th Cir. 1974).

[69]Marshall v. Sun Petroleum Products, 620 F.2d 1176 (3rd Cir. 1980).

[70]*Id.* at 1183.

other than for procedural hearings, no direct policy role in administering the Act. . . ."[71]

That position is also echoed in a recent decision of the District of Columbia Circuit. According to that court, citing *Atlas Roofing*,[72] "the [OSH]Act creates public rights that are to be vindicated by the Secretary through government management and enforcement of a complex administrative scheme. . . . [W]e are persuaded that enforcement of the Act is the sole responsibility of the Secretary."[73]

What these cases demonstrate is that, even though Congress may have departed from the traditional administrative structure when it divided rulemaking and adjudicatory authority between these two agencies, it did not depart so radically from the traditional administrative functions that it would, at the same time and with no legislative statement to indicate why, also divest the rulemaker of the authority to be the interpreter of its own rules and of the statute pursuant to which they have been promulgated.

C. The Contrary Position

It is by no means the unanimous judicial position that the Secretary's view is entitled to greater deference when it differs from that of the Commission. Several courts have sided with the Commission and maintained that OSHRC was intended to exercise an independent judgment on the meaning of OSHA-promulgated standards. In fact, a majority of the circuits that have considered this issue appear to have sided with the Commission.[74] Nothing in the legislation itself, the debates, or the accompanying reports can support such a conclusion. Nonetheless, the cases are there.

Brennan v. Gilles and Cotting, Inc.[75] is one such case. Gilles and Cotting, Inc. (Gilles) was the general contractor on a construction project at NASA's Manned Space Flight Center in Greenbelt, Maryland. Gilles had subcontracted the glass construction work on the project to Southern Plate Glass Company (Southern). Following the collapse of a scaffolding which caused the death of two workers on Southern's payroll, the Secretary of Labor issued citations against both Southern and Gilles for "serious violations"[76] of the safety regulations governing scaffolds.[77]

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[71]*Id.* at 1184.

[72]Atlas Roofing Co., Inc. v. OSHRC, 430 U.S. 442 (1977).

[73]Oil, Chemical and Atomic Workers v. OSHRC, 671 F.2d 643, 649 (D.C. Cir. 1982).

[74]For example, the Fourth, Sixth, Eighth, and possibly Second circuits favor the Commission. The First, Fifth, and Tenth circuits favor the Secretary. *See generally*, text and accompanying notes at pp. 325–38.

[75]504 F.2d 1255 (4th Cir. 1974).

[76]*See* 29 U.S.C. § 666(j) (1982).

Southern did not contest its liability, but Gilles challenged both the citation it had received and the proposed penalty. The ALJ decided two things: first, that the fatal scaffolding had been constructed in violation of OSHA's safety regulations; and second, that under the statute, Gilles, as the general contractor, was liable for safety violations that posed hazards to the employees of his subcontractors.[78] In a split decision, OSHRC reversed the decision of the ALJ. In exonerating Gilles, the Commission essentially maintained that none of Gilles's employees were "affected" by the hazardous condition of the scaffolding and that Gilles should not be held jointly responsible for the dangers that Southern's scaffolding created for Southern's employees.[79] The Secretary appealed.

In reviewing OSHRC's decision, the Fourth Circuit limited its inquiry to the issue of "whether, in addition to a subcontractor, a general contractor should be responsible for safety violations hazardous to a subcontractor's workers."[80] In other words, the issue reduced to a question of statutory interpretation: whether the term "employer" as used in the Act "should be interpreted to cover general contractors as 'joint employers' . . . or 'statutory employers'."[81]

The court readily admitted that the statute does not on its face resolve the question.[82] The answer, therefore, had to be sought by divining the purpose of the legislation. In attempting to do so, the court rejected a mechanical application of the common-law definitional tests for "employee," as the Commission had urged. Because the states vary so in their "common" law analyses of "employee," such an approach would have been unavailing. The court correctly pointed out that "[a]s a Congressional enactment of nationwide application, OSHA requires a single consistent definition of 'employer' throughout the country so that there will be uniform application of this national legislation in all states."[83] According to the court, the operative consideration, therefore, should be "the purpose of the statute and not the technical distinctions of the common law."[84] Having concluded that the

[77]29 C.F.R. § 1926.451 (1984).

[78]504 F.2d at 1256–57. According to the ALJ, Gilles was legally responsible under the Act because (1) Gilles's workers, as well as those of other subcontractors, had "access" to the hazard and could be exposed to injury from the scaffolding's collapse, and (2) in construction projects where subcontractors are also used, it is logical and necessary that overall safety and accident prevention be the responsibility of the general contractor.

[79]*Id.* at 1257.

[80]*Id.* at 1260.

[81]*Id.*

[82]*Id.*

[83]*Id.* at 1261.

[84]*Id.*

purpose of the statute should inform the construction to be given "employee" in this case, the court nevertheless decided that the question of whether the general contractor should be concurrently liable for his subcontractor's workers "can be answered either way."[85] It then inexplicably held that "since Congress has chosen the Occupational Safety and Health Review Commission as the *enforcing agency* [emphasis added], the choice between these two alternatives is appropriately committed to it."[86] Rather summarily this court rejected the Secretary's view that it is the DOL to which such discretion is committed.

The court conceded that the Secretary's rulemaking authority is broad. However, it maintained that "it is the power to adopt rules or policies *in adjudication* [emphasis in original] which we are concerned with in this case. The statute vested adjudicatory functions in the Commission."[87] The court examined the legislative history and maintained that: "[A]s is made clear by the lengthy Congressional debates over enforcement procedures and the successful floor amendment withdrawing the Secretary's authority over adjudications . . . Congress deliberately created the Commission separate and independent of the Secretary."[88]

Yet that does not answer the relevant questions. There is no dispute that Congress created the Commission to be separate and independent of the Secretary. The real question is how are these two concededly independent agencies intended to administer one regulatory program. It seems that the Fourth Circuit has misconstrued the intention of Congress in at least four respects.

First, contrary to the court's assertion, Congress did not choose the OSHRC as the "enforcing agency." The authority to enforce the statute clearly resides with the Secretary and OSHA. Second, the fact that adjudicatory authority is withheld from the Secretary does not necessarily mean that Congress also intended to withhold from the Secretary the authority to decide who might properly be subject to the coverage of the Act and its regulations. Third, the court worries that accepting the Secretary's approach would render the Commission "little more than a specialized jury, an agency charged only with fact-finding."[89] Even if that were true, it is a choice that the legislature apparently has made, and no court should seek to reallocate that legislatively determined division of responsibility. Finally, the court's assertion that "it is

[85] *Id.*
[86] *Id.* at 1261–62.
[87] *Id.* at 1262.
[88] *Id.*
[89] *Id.*

the power to adopt rules or policies *in adjudication* which we are concerned with in this case"[90] ignores what the Commission has actually done in this instance. This is not an instance where the Commission has adopted "rules or policies" with respect to *how* the adjudication would proceed before the Commission. That, it seems, would not create a problem at all. If that were the case, the Commission essentially would be doing what almost all other agencies are empowered to do—adopting rules of procedure to aid in discharging its duties and responsibilities. Rather, what the Commission has done here, and done with the approval of the court, is to decide what the general and substantive reach of a standard should be. That is clearly a legislative determination, not an adjudicatory one, and as such, it is one for the Secretary to make. It is true, as the court points out, that "Congress intended that [the Commission] would have the normal complement of adjudicatory powers possessed by traditional agencies. . . ."[91] But it is also true that Congress intended that the Commission have *only* adjudicatory powers. At least, in that respect, the Commission—and with respect to legislative authority, OSHA—are not traditional agencies. This decision of the Fourth Circuit would upset this congressional determination and, thereby, confer upon the Commission more authority than Congress intended it to exercise.

Other circuits have come to substantially similar conclusions when confronted with a disagreement between the Secretary and the Commission. The Eighth Circuit has also concluded that, in such a circumstance, it is the Commission to whom the courts should defer. This court has gone so far as to say that "the Secretary may recommend an interpretation of a regulation to the Commission, but his recommendation does not necessarily control the Commission's conclusion."[92]

An early case from the Second Circuit appeared to adopt the view that it is the Secretary's determination that should be accorded special weight.[93] In one of that court's first enforcement proceedings under the OSH Act, it concluded that, because "Congress apparently placed primary reliance upon promulgation by the Secretary of specific regulations . . . [i]t is especially important that these regulations be construed to effectuate congressional objectives."[94] That statement would seem almost inexorably to place the Second Circuit on the side that advocates deferring to the Secretary on matters of interpretation. A

[90]*Id.*
[91]*Id.*
[92]Brennan v. OSHRC and Ron M. Fiegen, Inc., 513 F.2d 713 (8th Cir. 1975).
[93]Brennan v. OSHRC and Gerosa, Inc., 491 F.2d 1340 (2d Cir. 1974).
[94]491 F.2d at 1343.

more recent Second Circuit case, however, casts some doubt on such an inference.[95]

Western Electric, Inc. had been cited by the Secretary for violating an OSHA emergency regulation that required employer testing for the presence of vinyl chloride, a known carcinogen. Western Electric did not begin immediately to test for the presence of vinyl chloride because the company hygienist concluded that the plant did not use the raw materials that were suspected of producing the gas. Nonetheless, because of his concern for the workers' safety, the hygienist monitored the area he believed to be most susceptible to releasing vinyl chloride. OSHA, however, cited Western Electric for failing to monitor other areas as well. The ALJ, "relying on the plain language of the standard, which requires physical monitoring of any operation releasing vinyl chloride gas . . . held that Western Electric had violated the standard by failing to monitor [other areas]."[96] The review commission, however, set aside the ALJ's findings, maintaining that Western Electric could "reliably predict from the physical circumstances that the concentration of vinyl chloride would be well below the danger level set by the Secretary."[97] The Secretary, on the other hand, argued that such an interpretation of the standard was unreasonable in that "the standard expressly requires physical monitoring of every operation in which vinyl chloride is released. . . ."[98]

A Second Circuit panel reversed the Commission's decision. The reversal came, however, because the court determined that the Commission's interpretation was unreasonable. The court seemed to imply that, had the Commission's interpretation been a "more reasonable" one, it might have upheld the determination. The panel remarked that "this court has consistently held that its role is to decide whether the Commission's interpretation of the regulation is unreasonable and inconsistent with its purpose, the normal standard for review of the interpretation of a regulation by an agency charged with its administration."[99]

If what the court intended to suggest here is that, so long as there are reasonable but different interpretations of a regulation by OSHA and

[95]Marshall v. Western Electric, 565 F.2d 240 (2d Cir. 1977). *But see*, Brock v. Schwarz-Jordan, Inc., 777 F.2d 195 (5th Cir. 1985).

[96]565 F.2d at 243–44.

[97]*Id.* at 244.

[98]*Id.*

[99]*Id. See also*, Brennan v. OSHRC and Gerosa, Inc., 491 F.2d 1340, 1344 and n.1 (describing as "simplistic" the thought that the meaning of a regulation might best be fathomed by its author, here the Secretary). *Accord*, Brennan v. OSHRC and Underhill Construction Corp., 513 F.2d 1032 (2d Cir. 1975).

the review commission, it could or would enforce the review commission's interpretation, it is my opinion that the court is wrong. That the review commission might give the regulation a reasonable interpretation is irrelevant. What is relevant is that Congress has reposed the authority to decide what a standard means to the Secretary, and it should not matter that others could or would be equally reasonable in their interpretations of the same standard. It is not their decision to make.

Such an attitude, I submit, reveals a fundamental misunderstanding of what Congress intended when it divided the administrative functions in this novel way. While it may be true that Congress did not wish to have the administrative functions combined as they are in the traditionally arranged agencies, there is no evidence whatsoever to indicate that Congress intended the Commission to set the substantive standards or to substitute its judgment for that of the Secretary—the administrative officer to whom responsibility for the substantive standards was committed. However sparse the legislative history may be—and it is true that it could have been more helpful—logic and administrative efficiency, if nothing else, argue that the role of the Commission is to adjudicate alleged violations of the standards, nothing more. What the standards mean and to whom they should apply are legislative determinations, decisions that, absent a congressional directive to the contrary, are ordinarily vested in the promulgator of the rule. It is, then, an obvious usurpation for either the Commission or a reviewing court unilaterally to deprive the Secretary of that authority.

It is clear from the legislative history of the OSH Act that Congress, in trying to settle the quarrel over how the administrative functions would be allocated, was concerned primarily with resolving a *political* problem. By adopting this "split-enforcement" arrangement, Congress solved the immediate political problem—who would make the rules, who would resolve disputes arising from those rules. Yet it is not clear that Congress solved the "administrative" problem it had been so preoccupied with. Perhaps while focusing too critically on the *who*, Congress may have ignored some of the more important ramifications of the choice it had settled on, or perhaps it did not fully appreciate the significance of the choices it had made or their likely consequences. It might have been expected that, when a single regulatory program is divided between two agencies, some conflicts would develop. Nowhere in the legislative history, however, is any thought or discussion devoted to that possibility. No guidance is provided regarding how potential conflicts should be resolved. It is almost as though Congress were totally oblivious to the possibility and likelihood that tension and some

measure of confusion would develop between these two agencies. Neither the agencies involved nor the courts, however, are given any legislative indication of how Congress intended potential institutional conflicts to be resolved. Simply to repose rulemaking and enforcement authority in one agency and adjudicatory authority in another may have seemed, at first, a neat resolution to a vexing political problem. However, it was but the beginning of several others.

IV. INSTITUTIONAL CONFLICTS: THE MSH ACT

Even though Congress did attempt to clarify the division of responsibilities between the Mine Safety Administration and the Mine Safety and Health Review Commission, there nonetheless have been some "turf fights" between the two agencies. The disagreements, however, do not appear to have been as frequent as those between OSHA and OSHRC. In one case, a court indicated that a bulletin from the DOL interpreting a provision of the MSHA "is entitled to deference unless it can be fairly said not to be a reasoned and supportable interpretation of the Act."[100] Because that case involved a situation where the Secretary and the review commission—although not the administrative law judge—were in agreement on the interpretation of the Act, it provides no basis for determining how the court would have decided the issue had the two agencies disagreed regarding the interpretation.

At least one court has had the opportunity squarely to face that issue, but the court declined to do so because, as the court put it, "the Commission's construction [was] plainly incorrect and insupportable by the terms of the Act."[101] The case involved a question regarding the right of a representative of mine workers to participate in so-called "spot" inspections of the mines without suffering a loss of pay.[102] The Commission had held that the representatives were entitled to pay only for what are called "regular" inspections, that is, inspections of a mine in its entirety. The Secretary's position was that the Act entitled the representatives to receive their pay, often called walk-around money, for any inspection they observed.

The court sided with the Secretary's reading of the statute. But it felt no necessity to decide the more general question, observing that:

[100]Magma Copper Co. v. Secretary of Labor, 645 F.2d 694, 696 (9th Cir. 1981).

[101]United Mine Workers of America v. Federal Mine Safety and Health Review Comm'n, 671 F.2d 615 (D.C. Cir. 1982).

[102]30 U.S.C. § 813(a) & (f) (1982).

> . . . [The] Secretary of Labor has raised the issue of whether, as a general procedural matter, his interpretation of the Act or that of the Commission is entitled to "special weight." The Court need not decide what weight should generally be afforded to a decision by the Commission relative to that given a conflicting interpretation by the Secretary, since in this instance, the Commission's construction is plainly incorrect and insupportable by the terms of the Act and therefore entitled to no deference.[103]

Nonetheless, in pressing its claim before the D.C. Circuit, the Secretary made many of the same arguments that have frequently been advanced in the OSHA-OSHRC dispute: the rulemaking, enforcement, and prosecution powers under the MSH Act are assigned to the Secretary. It is the Secretary who promulgates safety and health standards, carries out statutorily mandated inspections, enforces citations and orders, proposes and collects civil penalties, and defends his actions before administrative and judicial tribunals. The Commission, on the other hand, is given but three functions, all of which are analogous to judicial functions: to adjudicate contested cases, to assess civil penalties, and to approve settlements in cases pending before it.[104]

The Secretary also maintained that deference should be paid to the Secretary's construction of the Act's provisions because "as opposed to the Commission, he was involved in the development of the Act. The Commission, on the other hand, is a creature of the Act."[105]

Even though the court did not resolve the deference issue in the walk-around money case, the DOL considers the case a major victory for the Secretary and the Department in clarifying the agencies' respective roles.[106]

Another "turf" battle between the Secretary and MSHRC has now made its way to the District of Columbia Circuit for resolution.[107] The issue in this case is whether, under the MSH Act, the Secretary may cite the owner-operator of a mine for a violation committed by its independent contractor.[108] The Secretary says yes; MSHRC's answer is no. According to the Secretary, there is a history of judicial precedent

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[103]671 F.2d at 623, n. 26.

[104]*See* Brief of Petitioner (Secretary of Labor) at 52, Marshall v. UMW, 671 F.2d 615 (D.C. Cir. 1982).

[105]*Id.* at pp. 53–54.

[106]Interview with Cynthia Attwood, Associate Solicitor, and Michael A. McCord, Counsel, Appellate Litigation, Mine Safety and Health Administration, Office of the Solicitor, Arlington, Virginia (September 7, 1985).

[107]Donovan v. Cathedral Bluffs, No. 84-1492, (D.C. Cir. filed Jan. 18, 1985).

[108]*See*, Brief of Petitioner (Secretary of Labor), Donovan v. Cathedral Bluffs.

which endorses his right under the Act to determine whom to prosecute—precedent which the Commission, attempting to enhance its "policymaking" role under the Act, has chosen to ignore.[109]

But the number of such disputes between MSHA and MSHRC pales in comparison to those between OSHA and OSHRC. What can account for such differences? Why does this arrangement appear to have worked, with minimal difficulty in the one case, and to have been so fraught with problems in the other?

To be sure, the mine safety statute was enacted seven years after the OSH Act. OSHA and OSHRC are the first major regulatory agencies to have to contend with so complete a separation of functions. There are always unforeseen problems in being first. MSHA and MSHRC have had the advantage of observing and, therefore, avoiding some of the initial mistakes that plagued the occupational safety agencies. Yet that fact alone may not explain all differences.

On the deference question, part of the explanation for the relative absence of disputes between MSHA and MSHRC may well be attributed to the legislative history of the mine statute, which directs both the Commission and the courts to accord "weight" to the Secretary's determinations.[110] With such a statement, Congress at least went on record suggesting that, as a primary matter, the Secretary's construction of this statute and of the regulations promulgated pursuant to it are to be highly valued. Of course, such a statement does not in and of itself implement the congressional intention, but it does minimize the potential for conflicts, and, at the same time, it raises a heavy presumption against anyone who would ignore or discount the Secretary's interpretation. It may not be worth much, but it must surely be worth more than no congressional directive at all.

There are other possible reasons to explain the relatively smooth accommodations that have been achieved by MSHA-MSHRC. Chief among them may be the narrower scope of their activities and respon-

[109]*Cathedral Bluffs* is, among other things, a case regarding the extent of the Secretary's "prosecutorial discretion" in enforcing the Mine Act and how the exercise of that discretion should be viewed by the Commission. The Secretary's view is that the Act gives him broad discretion to determine against whom to enforce the provisions of the Act and that the Secretary's determination cannot be overturned without demonstrating that he has abused that discretion. Oral argument was held in Donovan v. Cathedral Bluffs Shale Oil Co. on September 13, 1985.

The case was decided on July 29, 1986, *sub. nom.* Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986). On the deference question, the Court sided with the Secretary, saying: "We see no reason to depart from the view we announced, with regard to the Mine Act, in *Carolina Stalite*, which leaves interpretive discretion where it normally resides, with the policy-maker rather than the adjudicator" *Id.* at 537 n.2.

[110]*See supra* note 18 and accompanying text.

sibilities. The MSH Act governs only mining. There is much more finiteness in its scope. The population is a limited one—miners and mine operators. The health and safety hazards to which mining exposes its workers tend to be the same, wherever the mine is located. The OSH Act, on the other hand, governs everything else, and everything else is a vast universe of companies, industries, firms, enterprises, you name it. Their only commonality may be that they all have employees. Mine safety officials emphasize the significance of this difference between themselves and their OSHA counterparts. According to one MSHA official, his agency can obtain at almost any moment a virtually precise record of the numbers of mines and miners subject to its jurisdiction. With such discrete responsibilities, he maintains, MSH Act agencies can become really expert in the industry and in the regulatory matters under its supervision.[111]

Not only that, but the regulatory powers of MSHA may also explain why the MSH Act agencies have not been as beleaguered by conflicts as OSHA and OSHRC have been. Mine inspectors possess enormous power under the mine safety statute and, therefore, may be able to induce a greater degree of cooperation from mine operators, in the first instance. For example, under the statute, an inspector's entry into the mine is authorized.[112] Furthermore, the statute prohibits advance notice of a mine inspection.[113] It also empowers the Secretary to order an immediate abatement of hazards detected and to close off access to a mine until the violation is abated.[114] In short, a mine safety inspection official can exact almost immediate compliance from a mine operator. OSHA inspectors, on the other hand, cannot obtain such immediate results. In fact, OSHA citations to abate can be stayed until after a decision by OSHRC. So, in an OSHAct case, there may be little reason initially to comply with the Secretary's citation. One has little to lose. But, because of the immediacy of the MSHA inspector's citation and unless the operator believes the citation to be utterly frivolous or egregious, there is every reason to comply at once. There is, in fact, too much to lose, particularly when one's mining operation could be halted or severely curtailed. MSH Act officials maintain, however, that there is little likelihood of a frivolous or egregious citation, because all their inspectors are or were themselves miners, who generally would be

[111]Interview with Frank O'Gorman, Federal Mine Safety and Health Administration, Arlington, Virginia (February 3, 1986).
[112]30 U.S.C. § 813(a) (1982).
[113]*Id.*
[114]*Id.*

more capable of making realistic assessments of mining hazards than would be inspectors unschooled in the industry.[115]

V. GREATER DUE PROCESS?

The institutional conflicts—the problem of deference—has been a great problem with the split-enforcement model, at least with the OSH Act agencies. But the problem surfaced only after the passage and implementation of the OSHA statute. Perhaps the problem should have been forecasted or anticipated. But, for whatever reasons, the issue did not figure in the legislative discussions. What did figure very prominently in the legislative discussions, with respect to both the OSH Act and the MSH Act, was the notion that such a strict separation of rulemaker from the adjudicator would enhance the prospects for due process and thereby instill greater confidence in the regulatory programs. The legislative proponents of both statutes focused much of their discussion and attention on the enhanced prospects for due process that this split-enforcement scheme was expected to ensure. Have those predictions been borne out? Does the split-enforcement arrangement ensure, any more so than the traditional, cohesive agency structure, that due process will be enhanced, that the regulatory programs themselves would be perceived to be more credible?

It is very difficult, if not impossible, to demonstrate empirically that the one arrangement is "better" than the other in providing due process. Even though the traditional model has withstood constitutional challenges to its housing all the administrative apparatus under one roof,[116] the impression persists that no agency that may, at the same time, be responsible for licensing, policing, adopting rules, and deciding challenges can be completely fair and objective when those rules or policies are challenged before it. That impression appears to be based on the view that no matter how many bars, barriers, or Chinese walls are erected to shield the policymakers and the prosecutors from the quasi-judicial authorities, the agency itself still maintains a vested interest in ensuring that a particular result is reached, that particular policies are protected or advanced. Whether that assumption is provable or not, it *is* a frequent impression.

The answer then may well be that it does not ultimately matter whether the split-enforcement model does, in fact, ensure any more

[115]Interview with Frank O'Gorman, Federal Mine Safety and Health Administration, Arlington, Virginia (February 3, 1986).

[116]*See, e.g.* Withrow v. Larkin, 421 U.S. 35 (1975); Federal Trade Comm'n v. Cinderella Career and Finishing Schools, 404 F.2d 1308 (D.C. Cir. 1968).

due process or instill any more confidence than the traditional administrative arrangements. What may matter more is what advantage one *thinks* or *believes* the one model may possess over the other. And that, of course, depends on whom one talks to and on what one's interests in a particular regulatory program may be.

One industry observer maintains that the split-enforcement model with the consequent independent adjudicator "balances" the sometimes over-aggressiveness of the rulemaker (in this instance the OSHA rulemaker). A separate and independent adjudicator evens out the odds.[117] Implicit in that observation, it seems to me, is the belief that recourse to an agency other than the one that promulgated the challenged standard is a *sine qua non* of due process. According to this observer, "there is a good argument to be made that the 'policeman' should not also be 'judge' and 'jury'; he's got too much to lose. How can he be 'right' in issuing a citation on one side and 'wrong' when he adjudicates it on the other?"[118]

This observer further maintains that even greater due process would be assured if members of the review commission are conversant, if not necessarily expert, in specific health and safety areas. If the adjudicator had more of a working scientific knowledge or knowledge of particular industries and their hazards, the Commission could be expected to reach a more "realistic" assessment regarding alleged violations. According to this observer, as it now stands, many industry officials simply calculate their costs of compliance to determine which is more economical—acceding to OSHA's rule, however irrational one might think it, or challenging the rule before the Commission and perhaps in the federal courts.[119] That is, due process becomes a bottom-line consideration, and it sometimes may be cheaper (better?) to switch than fight.

As one might expect, an observer from organized labor has a somewhat different view. Labor, it may be recalled, advocated vesting all the administrative powers of the OSHA program in the DOL. According to one labor official, it is not that the independent adjudicator ensures that there will be more due process. What it does ensure—at least, what has happened with the OSH Act—is a process that was not originally intended. "Too often," she contends, "what OSHRC has engaged in is a review not of the law, but of the facts, of OSHA's judgment of the risks and hazards, and that was never contemplated when the statute

[117]Interview with David Sarvadi, Vice President, A.F. Meyer and Associates, McLean, Virginia (December 16, 1985).
[118]*Id.*
[119]*Id.*

was adopted."[120] In addition, she also contends that the Commission's willingness to engage in those factual reviews has led to interminable delays in disposing of some OSHA citations. "Some cases from 1978," she says, "still remain unresolved. Can that honestly be called more due process? If so, for whom?"[121]

Despite those criticisms, there are some government officials who do advocate a more general use of the split-enforcement model.[122] In fact, the Associate Solicitor at MSHA believes the split-enforcement model is much to be preferred. She concedes that there may be some sacrifices in efficiency and policy coordination. Nonetheless, she maintains that those sacrifices are far outweighed by the benefits that are derived from having the "institutional conflicts" on the public record for examination, discussion, evaluation. Intra-agency disputes, she maintains, are frequently resolved with no public awareness of the considerations that may have informed the resolutions. She believes that it is much more likely that resolutions achieved in a split-enforcement arrangement are achieved openly and with more public knowledge and understanding of the compromises and accommodations reached.[123] Of course, this unqualified endorsement of the split-enforcement model comes from one whose experience with it generally has been very good, and that may well be attributable to both the discreteness of the mine safety program and the clarity with which its congressional proponents expressed themselves on the division of authority.

From one whose agency's experiences with the split-enforcement model have not been uniformly good, there comes neither a wholesale condemnation nor an aversion to its more general use. Rather there is an insistence that any future programs employing the split-enforcement model be much more carefully drafted so that it is clear what each agency's responsibilities are. According to this observer, if more due process is the desideratum, it should be unarguably clear precisely what authority each agency has.[124] Otherwise, rather than ensuring more due process, the resulting confusion may assure none.

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[120]Interview with Peg Seminario, Assistant Director, Department of Occupational Safety and Health and Social Security, AFL-CIO, Washington, D.C. (February 10,1986).

[121]*Id.*

[122]Interview with E. Ross Buckley, Chairman, Occupational Safety and Health Review Commission, Washington, D.C. (August 8, 1985).

[123]Interview with Cynthia Attwood, Associate Solicitor, Mine Safety and Health Administration, Office of the Solicitor, Arlington, Virginia (September 7, 1985).

[124]Interview with Frank White, Associate Solicitor, Occupational Safety and Health Administration, Washington, D.C. (August 28, 1985).

VI. CONCLUSION

Is the split-enforcement model to be preferred over the more traditional unitary arrangement? In the end, that question may well be unanswerable. It is, of course, debatable whether one model is "better" than the other. Whatever may be one's attitude about the perceived advantages of the split-enforcement model—greater assurance that due process prevails or more confidence on the part of those subject to the regulatory authority—there is indeed a greater necessity that split-enforcement programs be more carefully designed than the unitary administrative programs.

If the OSHA experience is any example, and it must be some, a major problem likely to confront any regulatory program divided between two agencies is that of the inherent institutional conflicts that can develop. In 1970 when the OSHA statute was enacted it might have been—and it may still be—a salutary and commendable idea to separate completely rulemaking and enforcement powers from the adjudicatory ones. Whatever ideas may have informed the original decision—greater confidence in the program, enhanced prospects for due process, or simply a quick solution to a troubling political problem—it is now evident that the total separation of functions has not worked in the OSHA program as Congress and its other champions must have hoped.

The major oversight in the OSHA legislation, it seems to me, though not necessarily in the concept itself, was in Congress's failing seriously and carefully to examine the possible administrative and judicial difficulties this bifurcation of responsibilities would create. It may have been possible in 1970 to ignore the potential problems in the expectation (the hope?) that none would develop and that, even if some did, the two agencies themselves could solve them. That possibility no longer exists. Nor may it be possible any longer to expect the twelve branches of the court of appeals to solve these institutional problems. To be sure, the Supreme Court could provide a resolution, assuming that it considers the problems important enough to merit its attention. But not even a Supreme Court decision would guarantee that these issues, particularly the deference question, would be resolved in the way the legislature would choose.[125] The OSH Act, the regulatory

[125] *See, e.g.*, Cuyahoga Valley Railway Co. v. United Transportation Union, 474 U.S. 3, (1985). Although not specifically addressing the deference issue, this recent Supreme Court decision may conceivably augur the Court's view on the deference question. In considering whether the Commission could prevent the Secretary from withdrawing a citation issued by his department, the Court, in a *per curiam* opinion, held that "the

program it established, and the review commission it created are all creatures of the legislature. The legislature, therefore, ought to clearly indicate how it intends them all to function.

As for the prospects of greater due process, it simply is not possible at this time to say whether the split-enforcement model is achieving this goal.[126] It should not be pretended, nor is it here intended to be suggested, that the traditional administrative model is not susceptible to intra-agency conflicts that may often rival those which have been seen to exist with the split-enforcement model. Nonetheless, such intra-agency conflicts are more easily, even if not more readily, resolved because the ultimate responsibility for decision devolves on a single chief administrator or a single multi-member agency. The decision of that administrator or that agency is definitive, subject to reversal only by a court of competent jurisdiction or revision by the legislature. The same cannot be said of a regulatory program for which responsibility is divided between two agencies. Divided regulatory programs must be expected inherently to encounter more administrative problems and difficulties than might a similar program housed entirely under one administrative roof. Such a program is, in a very real sense, potentially and practically, the servant of two masters and of possibly many more when the reviewing courts are counted. No program can be efficient or effectively administered in such a divided environment unless the responsibilities of each agency are carefully delimited.

When it enacts a program using the split-enforcement model, Congress has a special obligation to draw the perimeters of each agency's responsibilities. A mere declaration or statement that one agency's determinations should be given special weight may be sufficient. Such a statement appears to have aided in minimizing conflicts between MSHA and MSHRC.

The congressional proclivity to legislate very broadly and generally,

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Secretary has unreviewable discretion to withdraw a citation charging an employer with violating the Occupational Safety and Health Act." Furthermore, the Court also said that "it is the Secretary, not the Commission, who sets the substantive standards for the work place, and only the Secretary has the authority to determine if a citation should be issued to an employer for unsafe working conditions, 29 U.S.C. § 658. . . . The Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections."

[126]With only the examples of OSHA-OSHRC and MSHA-MSHRC from which to reason, it may be premature to attempt any generalizations regarding the desirability of this model over the traditional unitary model. Furthermore, how would one determine which model (or which agency operating under which model) would represent the "control" group for comparison purposes?

to leave the details to be worked out later, while fraught with potential danger in the traditional model, is particularly dangerous when regulatory responsibilities are divided between two agencies. Therefore, in any future use of the split-enforcement model, the responsibility of the rulemaker, the adjudicator, and the reviewing courts should be set forth with greater specificity than some recent Congresses have been wont to demonstrate. The tendency to do less should be resolutely avoided. As a general matter, the rulemaker should clearly be created to function as the policymaker, and the other participating agents—both the quasi-adjudicatory agency and the courts—must be required to see him that way and to restrain their impulse to usurp that role. And once Congress has clarified the responsibilities and authorities of the two independent agencies, the agencies and the reviewing courts then have a concomitant responsibility to ensure that their assigned limitations are observed.

When considering future uses of the split-enforcement model, Congress should also refrain from placing too much on a program's regulatory agenda.[127] Some of the OSH Act agencies' problems may stem from the sheer magnitude of their tasks. Likewise, much of the success of the MSH Act agencies must be attributed to the manageability of their charge.

In the area of occupational safety and health, the statute and, as a result, the whole regulatory program could be improved in one important way. The OSH Act should be amended unambiguously to provide that, in adjudicatory challenges to standards promulgated by the Secretary pursuant to his authority under the statute, the review commission must accept the Secretary's interpretation of the standard as conclusive, unless it can be clearly shown that the Secretary's interpretation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[128] The same standard should guide a reviewing court in discharging its responsibilities under the Act. While such an amendment may not completely eliminate conflicts between the agencies (what could?), it should certainly go far toward minimizing them.[129] The arbitrary-and-capricious standard is, by no means, a

[127]No doubt this admonition should also caution against repeating the OSHA experience with the "consensus" standards. If a regulatory agency is required to adopt preexisting rules or standards from some other source, private or otherwise, there is a special obligation on the part of Congress to "instruct" the adopting agency as to how these adopted rules or standards should be enforced in their new administrative milieus. *See*, M. Rothstein *supra* n. 29.

[128]*See* 5 U.S.C. § 706 (2)(A) (1982).

[129]In comments to the Administrative Conference on the report on which this article is based, OSHRC concedes that certain institutional conflicts did exist between OSHA and

talisman capable of magically transforming a confusing regulatory scheme into a more intelligible and predictable one. It is, however, a standard with which judicial authorities have had long experience and which they can be expected to apply more uniformly. It is, after all, a court to which the Occupational Safety and Health Review Commission compares itself.[130] Such an amendment would give specific legislative endorsement to what one can only surmise to be the unarticulated assumption on which Congress based this bifurcated scheme.[131] The

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the review commission. According to OSHRC, "This occurred in large part because OSHA and OSHRC were the first agencies to operate under so complete a separation of functions in administering a single statute. Further, as the consultant's report indicates, some ambiguities in the OSH Act and its legislative history regarding the roles of each agency also contributed to the conflict." OSHRC maintains, however, that "[a]s a result of judicial decisions and its own experience, most of the institutional disputes between the Commission and OSHA have been resolved. Therefore, the Commission does not believe that it is necessary to amend OSH Act to specify more clearly the scope of the authority of the respective agencies. However, the Commission believes that it would be helpful if Congress uses as much specificity as possible in defining the roles of the agencies, if the split-function scheme is adopted in other areas of the law. Thus, some of the uncertainty the Commission faced in its early days would be avoided."

See, OSHRC Comments Regarding the Committee on Adjudications's Proposed Recommendations on the 'Split-Enforcement Model for Agency Adjudication,' at pp. 5–6 (August 20, 1986).

[130]Interview with Paul A. Tenney, Chief Administrative Law Judge, Occupational Safety and Health Review Commission (August 28, 1985).

[131]The OSH Act might be further improved with a second amendment. Congress should consider amending section 12 of the OSH Act to expand the Commission's membership to five from the current three. *See* 29 U.S.C. § 661(a) (1982).

If one but focuses on the workload of OSHRC in comparison to that of the larger MSHR, one might be persuaded, even without more, that OSHRC's membership should be enlarged.

For example, in fiscal year 1981, OSHRC received 3,739 notices of contest. Most of these contested decisions were disposed of without hearings. Nonetheless, the agency's ALJs did render 415 decisions; the Commission itself rendered 215. In FY-1982, the corresponding figures were 1,489; 218; and 168. In FY-1983, they were 1,223; 166; and 102. The FY-1984 numbers were 1,307; 159; and 88. The FY-1985 figures were 1,435; 164; and 53. (Statistics provided by OSHRC Office of Public Information)

By contrast, in FY-1981, MSHRC ALJs received 2,350 penalty and contested review citations. In that period, the Commission itself disposed of 116 cases, a number which includes petitions for discretionary review that were granted, petitions that were denied, decisions and orders terminating cases, as well as cases continued from the previous year. In FY-1982, the comparable numbers were 1,450 and 107. The FY-1983 figures were 1,243 and 67. The figures for FY-1984 were 1,412 and 72. In FY-1985, the comparable figures were 1,490 and 59. (Statistics provided by MSHRC Office of General Counsel)

Of course, the contrary argument might also be advanced—that is, that MSHRC is indeed too large and its membership should be decreased. The major problems, however, do appear to have existed with the smaller OSHRC and its disproportionately heavier caseload.

Enlarging the review commission to five would allow its work to continue with minimal interruption or delay when a vacancy occurs. With a three-member commission, one

split-enforcement model may well have advantages over the traditional, unitary model. It may not. It may be that whatever advantages do exist with the split-enforcement model are only perceived ones. Whether the advantages are only perceived ones or not, it will matter little if Congress does not take care to ensure that its intent is more clear, less ambiguous. Otherwise, whatever benefits Congress might intend, or whatever advantages might be expected from such an arrangement, could all be lost in confusion and in debilitating bureaucratic struggles.

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vacancy can seriously retard its work; two could virtually paralyze it. *See*, Rothstein, *supra* n. 25.

In addition, Congress might also consider empowering the commission to operate in panels of three, with the requirement that the affirmative vote of three members be necessary to direct a case for review. The commission could still retain the authority to decide important cases *en banc*. Such an arrangement already exists and works well with the MSHRC. On an expanded commission, members would be appointed for staggering terms of five years. A five-member commission would avoid the sort of inertia that could hamper the commission's work when a vacancy exists. During much of early 1985, OSHRC's work came to a virtual halt because it had only one member. By August 1985, the Commission was again at its full complement; however, two of the three members at that time held recess appointments. Such gaps in continuity could be avoided if the OSH Act included a hold-over provision for departing members. The absence of a hold-over provision is an obvious deficiency in the statute. *See*, 29 U.S.C. § 661(a) (1982).

A larger commission would not so easily be subject to frequent shifts in policy. To be sure, under the suggestion, a new commissioner would be appointed every year; however, the incremental impact of such an appointment would be less severe and potentially less jolting than it would be on a three-member commission. On a three-member panel the replacement of a single member may, at any time, radically alter commission policy. Increased confidence also was regularly cited by proponents as a principal reason for favoring the split-enforcement model. A measure of stability in the adjudicatory process and in the development of commission precedents is essential to obtaining that desired confidence. A five-member commission should help to promote that requisite stability.