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WHEN A WORKER IS KILLED: DO OSHA PENALTIES ENHANCE WORKPLACE SAFETY?

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

EXAMINING THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, FOCUSING ON PENALTIES RELATED TO WORKPLACE SAFETY

APRIL 29, 2008

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WHEN A WORKER IS KILLED: DO OSHA PENALTIES ENHANCE WORKPLACE SAFETY?

TUESDAY, APRIL 29, 2008

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:01 a.m., in Room SD–430, Dirksen Senate Office Building, Hon. Edward M. Kennedy, chairman of the committee, presiding.

Present: Senators Kennedy, Murray, Enzi and Isakson.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. We will come to order.

This is our first hearing that we have had since my friend and colleague, Mike Enzi, announced that he was going to run for reelection in the State of Wyoming, and I wished him well. I am going to wish him well today. I do not know how long in the year I will continue to wish him well. Not sufficiently well so he will ever gain chairmanship of this committee again.

[Laughter.]

But we are always delighted to have a chance to work with him, and we do wish you all the best, Mike. You kept everybody in suspense here. Some of us were crossing our fingers and uncrossing them over time.

This morning our committee considers the important issue of keeping the hard-working men and women of America safe on the job.

Last year 5,840 workers went off to work and never came back. They were killed on the job. Each of these deaths is a tragedy for workers and their families. We should be doing more to respond to these tragedies by granting greater protection for the Nation's workers. Unfortunately, OSHA seems to be doing less.

Julie Primeau's family in Fitchburg, MA, is an example of a family changed forever by such a tragedy. Last year her brother Christopher, a commercial diver, was killed on the job when a 9-ton piling came loose and crushed him. As Julie learned later, two divers had previously been killed working for the same employer. Julie and her mother were devastated by Christopher's death, but their grief was intensified by OSHA's failure to prevent it after two earlier deaths.

My office has issued a report today that OSHA is not living up to its responsibility for investigating dangers in the workplace and preventing them. The report shows, for example, that the median

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penalty for a workplace fatality last year was only $3,675. In other words, in cases investigated by OSHA where workers were killed on the job, half of all employers were fined less than $3,675.

Workers' lives are obviously worth more than that. Employers who ignore their employees' safety should pay a penalty that will force them to change their negligent ways. It is the only realistic way to save lives. A mild slap on the wrist is not enough.

The maximum civil penalty for a safety violation is only $70,000. By comparison, violating the South Pacific Tuna Act of 1988 can lead to a fine of $325,000. Protecting tuna fisheries is important, but so is safeguarding workers' lives and we need to raise OSHA's penalties if we hope to deter unsafe working conditions.

Unbelievably, the report also found that OSHA routinely downgrades the severity of violations or withdraws the violations entirely in the course of its investigating and often does not bother to collect the penalties it issues. In many cases where a worker is killed, the employer never has to pay anything. How can we expect workplaces to become safer if OSHA will not bother to collect fines from employers who break the law?

Also, OSHA cannot effectively use the threat of prison as a deterrent because the maximum criminal penalty, when an employer willfully violates workplace safety laws and a worker dies, is 6 months in jail. If you improperly import an exotic bird, you can go to jail for 2 years. If you deal in counterfeit money, you are looking at 20 years. But if you gamble with the lives of your employees and one of them is killed, you risk only 6 months in jail. No wonder of the 10,000 fatalities that OSHA has investigated in the past 5 years, only 10—only 10—criminal prosecutions have resulted. That is why so many companies treat safety violation as another cost of doing business.

What frustrates families like Julie Primeau is the knowledge that these tragic and needless deaths will continue. If we are serious about improving workplace safety, we need to raise penalties, create a serious threat of criminal prosecution in the worst cases. The point of a penalty is not retribution but deterrence. Deterrence is the only way to solve this problem.

OSHA cannot detect and correct every violation. It would take OSHA 133 years to inspect every work site in its jurisdiction. Instead, we need a law with teeth so that employers will be vigilant about complying with safety laws. That should not be controversial. Experts from across the political spectrum agree, including Jerry Scannell who led OSHA during the first Bush administration. As he told our committee earlier this month, we need to increase the penalties and strengthen the criminal sanctions or we will never persuade CEO's to take OSHA and workplace safety seriously.

A number of us have introduced the Protecting America's Workers Act to give OSHA the support it needs to change employers' behavior. It makes reasonable increases in civil penalties, especially in the most serious cases. It also creates a strong criminal penalty, including the possibility of felony charges and significant prison terms.

Finally, we must help families frustrated by being left out of the process. Every year too many families get letters like the one the Primeau family received. They feel excluded and disrespected. Sen-

ator Isakson and I have offered an amendment to the Budget Act this year to require OSHA to give families a voice.

The problem of worker fatalities is not going away. As the economy continues its decline, the pressure on American workers to increase productivity is growing. Achieving higher production often means cutting corners on safety. We all know where that leads: more accidents, more injuries, more deaths.

Even in these difficult economic times, workers deserve to have their safety put first. This committee is committed to worker safety.

We have an outstanding panel of witnesses here today, and I look forward to their testimony.

Just before recognizing Senator Enzi, I will just show these charts here which illustrate the points that I was making earlier. This is a willful violation causing a fatality, $70,000. South Pacific Tuna Act is $325,000. Clean Air Act violation is $270,000. Willful violations for the Fluid Milk Promotion Act is $130,000.

Not only are the penalties weak but the enforcement is too. If you look at what has happened with the enforcement—so you have weak penalties and then weaker enforcement—you see the decline. The initial penalty, $5,900. Then it went down $2,225. So the final penalty is $3,675. So we see that the supervisors cut the initial penalties. That is in the civil area.

Now, if you look in the criminal area, it is just about the same. You have willful causing of worker's death, 6 months. And then you have unlawful hunting of migratory birds, 2 years; counterfeiting, 20; mail fraud, 30; piracy on the high seas, life. Here it is the loss of a life, willfully causing a worker's death. Willful, 6 months.

And finally, this chart here which is sort of a summation of what happens. You have the OSHA fatality inspections. Between 2003 and 2008, it is 9,800. That is over the 5-year period. Now, of the willful violations eligible for referral, it is 237 made by OSHA. Cases OSHA referred to DOJ for criminal prosecution, of the 237, only 50. And the cases prosecuted by the Department of Justice over that 5-year period, 10. So this is a rather fierce indictment.

The conclusion one has to reach—as one who was here at the time the OSH Act was passed and has seen the difference when we have good enforcement and an effective law—is that, boom, the numbers just go down like a stone. The violations go down. The loss of lives go down. Then when there is a relaxation of enforcement, we find out what happens out there in the workforce.

So this is an important hearing and we are very grateful for our witnesses.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR KENNEDY

This morning our committee considers the important issue of keeping the hard-working men and women of America safe on the job.

Last year, 5,840 workers went off to work and never came back. They were killed on the job. Each of these deaths is a tragedy for workers and their families. We should be doing more to respond to these tragedies by granting greater protection for the Nation's workers. Unfortunately, OSHA seems to be doing less.

Julie Primeau's family in Fitchburg, MA is an example of a family changed forever by such a tragedy. Last year, her brother Christopher, a commercial diver, was killed on the job when a nine-ton piling came loose and crushed him. As Julie learned later, two other divers had previously been killed working for the employer.

Julie and her mother were devastated by Christopher's death. But their grief was intensified by OSHA's failure to prevent it after the two earlier deaths.

My office has issued a report today that OSHA is not living up to its responsibility for investigating dangers in the workplace and preventing them. The report shows, for example, that the median penalty for a workplace fatality last year was only $3,675. In other words, in cases investigated by OSHA where workers were killed on the job, half of all employers were fined $3,675 or less. Workers' lives are obviously worth far more than that. Employers who ignore their employees' safety should pay a penalty that will force them to change their negligent ways. It's the only realistic way to save lives. A mild slap on the wrist isn't enough.

The maximum civil penalty for a safety violation is only $70,000. By comparison, violating the South Pacific Tuna Act of 1988 can lead to a fine of $325,000. Protecting tuna fisheries is important, but so is safeguarding other workers' lives, and we need to raise OSHA's penalties if we hope to deter unsafe working conditions.

Unbelievably, the report also found that OSHA routinely downgrades the severity of violations or withdraws the violations entirely in the course of its investigating, and often doesn't bother to collect the penalties it issues. In many cases where a worker is killed, the employer never has to pay anything. How can we expect workplaces to become safer if OSHA won't bother to collect fines from employers who break the law?

Also, OSHA can't effectively use the threat of prison as a deterrent, because the maximum criminal penalty when an employer willfully violates workplace safety laws and a worker dies is 6 months in jail. If you improperly import an exotic bird, you can go to jail for 2 years. If you deal in counterfeit money, you're looking at 20 years. But if you gamble with the lives of your employees and one of them is killed, you risk only 6 months in jail. No wonder that of the 10,000 fatalities OSHA has investigated in the past 5 years, only 10 criminal prosecutions have resulted.

That's why so many companies treat safety violations as just another cost of doing business. What frustrates families like Julie Primeau's is the knowledge that these tragic and needless deaths will continue.

If we're serious about improving workplace safety, we need to raise penalties and create a serious threat of criminal prosecution in the worst cases. The point of a penalty is not retribution, but deterrence. Deterrence is the only way to solve this problem. OSHA can't detect and correct every violation. It would take OSHA 133 years to inspect every worksite in its jurisdiction. Instead, we need a law with teeth, so that employers will be vigilant about complying with safety laws.

That shouldn't be controversial. Experts from across the political spectrum agree, including Gerry Scannell, who led OSHA during the first Bush administration. As he told our committee earlier this

month, we need to increase the penalties and strengthen the criminal sanctions, or we'll never persuade CEO's to take OSHA and worker safety seriously.

A number of us have introduced the Protecting America's Workers Act to give OSHA the support it needs to change employers' behavior. It makes reasonable increases in civil penalties—especially in the most serious cases. It also creates a strong criminal penalty, including the possibility of felony charges and significant prison terms.

Finally, we must help families frustrated by being left out of the process. Every year, too many families get letters like the one the Primeau family received. They feel excluded and disrespected. Senator Isakson and I offered an amendment to the budget this year to require OSHA to give families a voice.

The problem of workplace fatalities isn't going away. As the economy continues its decline, the pressure on America's workers to increase productivity is growing. Achieving higher production often mean cutting corners on safety. We all know where that leads—more accidents, more injuries, and more deaths. Even in these difficult economic times, workers deserve to have their safety put first.

This committee is committed to worker safety. We have an outstanding panel of witnesses here today, and I look forward to their testimony.

The CHAIRMAN. I will recognize Senator Enzi.

OPENING STATEMENT OF SENATOR ENZI

Senator ENZI. Thank you, Mr. Chairman. I appreciate your kind comments before the official start. I too look forward to working with you.

I appreciate your scheduling today's hearing. It is a very important topic. As the title of this hearing indicates, much of today's testimony will focus on how employers are punished after a death occurs at their worksite and is caused by negligent or even willful disregard of safety regulations. I think everyone would agree that such an employer should face appropriate sanction. However, I think America's employees would appreciate it even more if the hearing were focused on the prevention of all workplace accidents.

When I was elected to the Senate, the reason I wanted to join this committee is I was interested in workplace safety and had run some safety programs. And when I first got here, that was the first bill I drafted. Being a novice in Washington, I thought that the way you did that was kind of the same as in the Wyoming legislature. So I asked members of the committee to sit down with me and go through the bill a section at a time. Even the ranking member of the committee, Senator Kennedy, did that. We went through that bill a section at a time. I did find out later that that was not normal.

[Laughter.]

I appreciated all the help, all the comments I got, and as a result of that, we made the first eight changes in OSHA since its inception.

There are a lot of changes that need to be made yet. And there are ways that we can work together and do those. There are a lot of things that I proposed in that original legislation that I will bring up again because I am pretty sure that it would cut down on the number of deaths and, more importantly, the number of accidents. An accident is a very painful thing for an entire family as well. And the only way we are ever going to get at that is to examine the near misses. Sometimes people get away from an accident and nobody pays any attention to it. But we ought to be paying attention to those. We ought to be figuring out what caused the near miss, as well as an accident, as well as a death, and figuring out how we can keep that from ever happening again.

I know one State had a policy that they encouraged families, as the dad or the mom left for work, to say, come home safely. And they found that even decreased accidents.

I want to thank Mr. Hayes for all of the help that he has given and the consulting he has given on these issues over the years, and I appreciate everyone's testimony today.

The experts at the Occupational Safety and Health Administration have developed extensive industry and hazard-specific regulations designed to reduce the risk of workplace injury and death. In this day of electronic technology, I am a little disappointed in just exactly how that is compiled and how people are able to access it. I think there are a lot of different combinations of the numbers that would help us get down to the causes of these accidents.

Mostly these reports, that have to be done by business, have extensive detail in them and are required to hang on bulletin boards but are not looked at by anybody. They look too technical. They look too bureaucratic. Then after they have been posted, they get mailed in. So, far as I can tell, they kind of get filed away at that point. We are missing a huge resource that, with today's technology, could help us cut down on accidents.

Now, I did notice that the statistics show that the workplace fatalities are decreasing, that is, decreasing as a percentage of per 100,000 workers. It is an increasing number of deaths, and that is because we have more people in the workplace now than we have had before. And I do not know which is the best measurement. I do not know if it even makes any difference. What we want to do is eliminate deaths and injuries.

Of course, if we have more people coming into the workforce, we have people who are less trained, and if they are in a particular job for a shorter period of time, there is a greater possibility that they will have an accident. There are two ends to that spectrum from the numbers that I looked at, and that is the first 6 months on the job are the most dangerous, and the time after 5 years is the most dangerous. People get a little complacent at some point in their work and figure that they know everything about the job, and then they have accidents. There is a lot that we can do to reduce that.

Now, I did notice that only 1 in 4 of the deaths were workplace facilities, because many were highway or aircraft-related accidents. Our highways are not a very safe place if you have to drive to work. I notice that in the Wyoming statistics—and we have a record of a lot of fatalities in Wyoming, but most of those occur on

the highway on the way to work. So we have got to figure out something to do on that.

I was pleased to see that the fatality rates also decreased among Hispanic employees, although it remains higher than the other demographic groups. And younger workers also see a significant decrease in fatality rates, and that is the group that considers themselves invulnerable. So that leads to a higher rate by itself.

Now, despite this progress, more needs to be done to reduce the risk of fatalities in workplaces so that no family has to deal with the tragic loss of a loved one, as my friend, Ron Hayes, who is sitting on today's panel, had to do. What strategies work best? Penalties are a part of the equation, but just like the death penalty cannot deter every crime, so too is their utility limited.

When it comes to workplace safety, I am willing to think outside the box. Over my career, I have introduced legislation to improve compliance with workplace safety and regulations and reward employers who go above and beyond to create a safe work environment. I like incentives. Programs such as the voluntary protection programs have been shown to make workplaces safer and save money. We should talk about expanding them to smaller employers and making them even more effective.

Workplace drug testing is another important way to reduce risk of injury and death in the workplace. I think in my original bill, I suggested that anyone at the scene of an accident ought to be tested. That should be a part of the investigation. The investigations need to be thorough.

All of the regulations and required compliance in the world are not going to work if an employer or manager disregards them because their judgment is impaired, which was the reason for the drug testing portion. I like the idea of the families being involved, too. We talked about that with the Sago Mine accident.

The field of workers compensation in insurance has developed a long record of experimentation with strategies to make workplaces safer and has some measurable results. Every State creates its own workers comp regime. Let us look at the best practices out there and determine if there are new ideas that can be translated at the Federal level.

The small business owner who is here today, Mr. George Jenson, I am sure will explain the multiple and significant motivations every businessman has to want to maintain the safest workplace possible. First and foremost, most businesses cannot operate without employees. So keeping them safe and satisfied that they are well treated is to the benefit of every employer.

I think Mr. Jenson will also point out that the insurance coverage he must carry every single day focuses heavily on the company's safety program. While he has never had an OSHA penalty to pay, he is continually motivated by the insurance rates he has to pay to put safety first.

We have a declining workforce in the United States and increasing needs. So I think employers are becoming ever more cognizant about the need to keep their employees safe. There will be bad actors and we need to do something about that.

Finally, I know that this hearing was scheduled to coincide with Workers Memorial Day. I certainly join the rest of the committee

in honoring all the lives that have been lost in workplace accidents no matter what the cause. Although the rates are improving overall, the presence of two witnesses today who have lost loved ones reminds us that every loss is one too many. By looking seriously at the whole issue and by making no subject off limits, we can pay them the best tribute of real progress in reducing workplace fatalities.

Since Chairman Kennedy referenced his staff's report, I would like to say a word about that too because it just came out yesterday. I have not read it yet, and I doubt any of today's witnesses have either. I understand that it is based on extensive and costly data requests from OSHA. Yet, I also understand that OSHA has had no opportunity to review and respond to the report's interpretation of the data. It seems to me that such an opportunity should be provided to provide clear and accurate information, give us more information, and to be a serious addition to the dialogue on workplace safety beyond political rhetoric. Worker safety is too important of an issue for anything less.

I welcome today's witnesses and I look forward to your testimony.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Isakson, do you want to say a brief word? You are very much involved in this issue.

STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Well, thank you very much, Mr. Chairman. I had not planned to, but you know a politician will never pass up the opportunity to say something.

The CHAIRMAN. That is what I was afraid of.

[Laughter.]

Senator ISAKSON. Let me just, first of all, welcome all of our witnesses and reiterate what both the Chairman and the Ranking Member have said. Our first and foremost, primary obligation is for workplace safety.

Let me also observe that I ran a company for 33 years. It was a major sales organization, but I also operated two golf courses that had a lot of high-risk jobs, heavy equipment, people on the development side. I got up every morning recognizing that if I had an accident or I had a worker hurt, it was not in the best interest of the worker, but it sure as heck was not in the best interest of the company either. We spent as much time or more focusing on safety than any other single thing.

So we want to do everything we can to prevent any accident from happening, but I know personally how hard business owners and operators work for the safety of their employees. I used to say that all my assets had two legs and they could walk out the door in a second either because of pay or because of security or because of safety. And that, in the end, is the best motivation we could possibly have.

The last thing I will point out—again, this is not to minimize anything because we are here to talk about the 4.0 per 100,000 fatalities in the workforce in 2006. But as a rate, that is the lowest in history. It has declined from 5.3 in 1994 per 100,000 FTE to 4.0. My goal is to accelerate that to get it to 0.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Murray has been a leader in this whole area on our committee as well. If she wants to make a comment, we always value her suggestions and ideas.

STATEMENT OF SENATOR MURRAY

Senator MURRAY. Thank you very much, Mr. Chairman, and thank you for holding this hearing today. I want to thank all of the witnesses for being here as well.

Yesterday was Workers Memorial Day, and today we remember and honor those who have lost their lives on the job. I want to extend a special welcome to the witnesses with us today who have lost family members to tragedies on the job, and they are going to testify to us today about their experiences with OSHA and their fight for better workplace safety policies.

I think, Mr. Chairman, that all of us here share the very same goal, to ensure that every worker who goes to work returns home safely to his or her family at the end of the day. But as we know, tragically thousands of workers are killed and millions more become hurt or sick each year on the job. In far too many of those cases, the cause of death or injury was preventable. According to the AFL-CIO's 2000 report on workplace injuries and illnesses, the number of deaths on the job has risen over the last year especially among Hispanic workers. We know that the most recent job fatality data shows that there were 5,840 fatal workplace injuries in 2006. That is up from 5,734 the year before. Among Hispanics, the fatality rate was 25 percent higher than that for other workers. On average, 16 workers died every day in 2006, and more than 11,000 were injured or made sick on the job.

Mr. Chairman, Monday was also the 37th anniversary of the Occupational Safety and Health Administration, which was created, we know, to ensure workplace safety laws and regulations to protect our workers on the job. I wish that we were here today to celebrate how OSHA is effectively holding employers accountable for maintaining safe working conditions, but I think the disturbing reality is that OSHA is not yet living up to its mission to make workers safer on the job. In the last year, we have held several hearings examining OSHA's performance and from my first oversight hearing on OSHA a year ago to the hearing I held on dangerous industries earlier this month, evidence shows us that for the last 7 years, OSHA has been dangerously ineffective.

I am concerned that OSHA's enforcement strategy relies too heavily on voluntary employer compliance programs, and I am deeply concerned the fines that have been issued are far too weak. Records from last year show that the average OSHA penalty after a worker died on the job was just $10,133 nationwide. And the penalty for willful violations was just $36,720, about half the maximum allowable.

So we know that OSHA is not as strong as it could be and should be if employers are able to consider the rules optional and if they believe that fines are just part of the cost of doing business.

Now, Mr. Chairman, I have more that I would like to submit for the record from my opening statement.

But I look forward to hearing our witnesses' testimony today, and I thank you, Mr. Chairman, for your leadership in trying to move us to a better direction. Thank you.

[The prepared statement of Senator Murray follows:]

PREPARED STATEMENT OF SENATOR MURRAY

Thank you, Mr. Chairman, for holding this hearing. And, thanks to our witnesses for being here this morning. Yesterday was Workers' Memorial Day, a day we remember and honor those who have lost their lives on the job.

So I want to extend a special welcome to the witnesses with us today, who have lost family members to tragedies on the job, and who will testify about their experiences with OSHA and their fight for better workplace safety policies.

Mr. Chairman, each of us here shares the same goal—to ensure that every worker returns home safely to his or her family at the end of each day.

But tragically, thousands of workers are killed and millions more become hurt or sick each year on the job. In far too many of those cases, the cause of death or injury was preventable.

According to the AFL–CIO's 2008 Report on Workplace Injuries and Illnesses, the number of deaths on the job has risen over the last year, especially among Hispanic workers.

The most recent job fatality data show that there were 5,840 fatal workplace injuries in 2006, up from 5,734 fatalities the year before. Among Hispanics, the fatality rate was 25 percent higher than that for other workers. On average, 16 workers died every day in 2006 and more than 11,000 were injured or made sick on the job.

Mr. Chairman, Monday was also the 37th anniversary of the Occupational Safety and Health Administration, which was created to enforce workplace safety laws and regulations, and to protect workers from injury, illness, and death on the job.

So, I wish we were here today to celebrate how OSHA is effectively holding employers accountable for maintaining safe working conditions.

But the disturbing reality is that OSHA is not living up to its mission to make workers safer on the job.

In the last year, we have held several hearings examining OSHA's performance.

From my first oversight hearing on OSHA a year ago to the hearing I held on dangerous industries earlier this month the evidence shows that for the last 7 years, OSHA has been dangerously ineffective.

I am concerned that OSHA's enforcement strategy relies too heavily on voluntary employer compliance programs.

I am deeply concerned that the fines OSHA has issued against bad actors are far too weak.

Records from last year show that the average OSHA penalty after a worker died on the job was just $10,133 nationwide.

The penalty for willful violations was just $36,720, about half of the maximum allowable penalty.

OSHA simply cannot be as strong as it could be, and should be, if employers are able to consider the rules optional and if they believe that fines are nothing more than a cost of doing business.

We, in the congressional majority, are not the only ones sounding the alarm bell.

At a hearing of my Employment and Workplace Safety Subcommittee earlier this month, the former OSHA director under the first President Bush, Jerry Scannell, also said he believes that penalties must be significant to deter bad actors.

That's why we're here today.

We want to send a clear message that one worker's death, injury, or illness is unacceptable if it's preventable.

It's why I have co-sponsored the Chairman's Protecting America's Workers Act, which amends OSHA to expand coverage, increase penalties, and protect whistleblowers.

It's why the Chairman and I have asked the GAO to investigate whether OSHA is doing enough to ensure employers are accurately reporting workplace injuries and illnesses.

Since my hearing last year, I've continued to hear stories about underreporting, and about OSHA's lax efforts to ensure that employers are reporting accurately.

When it comes to the health and safety of American workers, we can't allow OSHA just to take employers at their word.

As policymakers, we must have accurate, sound data in order to ensure OSHA is doing its job.

So I'm looking forward to seeing the results of this investigation.

Mr. Chairman, I'm proud of the work we have done in this committee to increase oversight of OSHA.

When it comes to worker safety, we have come a long way in this country.

But clearly, we still have more to do.

Our economy was built on the backs of hard-working Americans.

And they deserve a government that works as hard as they do to keep businesses honest about the dangers they face on the job.

The CHAIRMAN. Thank you very much, Senator Murray.

We will now hear from our panel. Peg Seminario, Director of Safety and Health, the AFL–CIO. She has served on numerous Federal agency and scientific advisory boards, holds an M.S. degree in industrial hygiene from the Harvard School of Public Health, and a B.A. in biological sciences from Wellesley College.

Professor David Uhlmann, Director of Environmental Law and Policy at the University of Michigan Law School. Prior to joining the law school faculty, he was the chief of the U.S. Department of Justice's Environmental Crime Section. While at the Department of Justice, Professor Uhlmann created the Worker Endangerment Task Force within the Environmental Crimes Section.

Ron Hayes is founder, with his wife, of Families in Grief Hold Together, or FIGHT, an organization that supports families that have lost a loved one on the job. He founded the organization after his son Patrick was killed in 1995 in an accident in the grain bin he was cleaning.

Don Smith has spent the past 20 years as a workplace safety expert. In 2005, his son, 22-year-old Donald, was electrocuted while working in a poultry processing plant. Thank you for being here.

George Jenson, President of the Jenson Fire Protection, Inc. based in Laurel, MD. His company has approximately 10 employees that travel and work on construction projects throughout the State of Maryland.

Welcome, all of you, here. We will start off with Peg Seminario.

STATEMENT OF PEG SEMINARIO, DIRECTOR OF SAFETY AND HEALTH, AFL–CIO, WASHINGTON, DC

Ms. SEMINARIO. Thank you very much, Senator Kennedy, Senator Enzi, Senator Isakson, and Senator Murray, for holding this hearing today, but also thanks to all of you for your leadership over the years on this very, very important issue.

As was pointed out, yesterday was Workers Memorial Day, the anniversary of when the OSHA law went into effect. At the time OSHA was passed, it did promise workers the right to a safe and healthful place of employment, and when you look over the years, there has been tremendous progress that has been made as far as the reduction in worker deaths in this country. But more recently what we have seen is that progress has halted.

There was new data that came out of BLS about 2 weeks ago which gave us a fuller picture of what is going on, and what it showed was that workplace fatalities went up in 2006. It showed us that the rate did not go down. In fact, if you look over the last 5 years, the rate has essentially stayed the same. For some groups of workers it has gotten worse: Hispanic workers, Latino workers, immigrant workers, very, very major increases in workplace fatalities.

And when you look closer as to what is going on, you also see some other things that are quite disturbing. You see that the fatalities from falls, fires and explosions, workers being caught in machinery, crushed, confined spaces. Those kind of fatalities are actually going up. What has been going down are the fatalities due to assaults. So the kinds of things that OSHA has standards to deal with that can be dealt with—these fatalities can be prevented. We have seen an increase in those fatalities in recent years, and to me that is quite, quite disturbing.

So why is this happening? I think one of the reasons it is happening is that we are not doing enough to prevent these fatalities at all levels. One of the fundamental problems is that the Occupational Safety and Health Act and its enforcement is really too weak to create an incentive to either improve conditions or to deter violations, as has been pointed out by Senator Kennedy. There are not any mandatory inspections with OSHA. OSHA is rarely in America's workplaces. They are there, on average, once every 133 years. So that means that having a strong deterrence with enforcement is even more important.

But then we look at the law itself, and it was pointed out the maximum penalty for a serious violation of a law is $7,000. The maximum penalty for a willful is $70,000. But you look at fatality cases, and by far the serious violations are those that are cited. And that is where we start. And then the OSHA law allows for and OSHA does apply reductions for size, reductions for good faith, reductions for history. And so where you end up in a typical fatality case is penalties, as Senator Kennedy said, on average were

$10,000, but the median penalty, that in the middle as far as half the employers having that record of enforcement, is only $5,900 to begin with and $3,600 after the fact.

So what are the kinds of situations that are resulting in those kind of fatalities? When you look, you see it is cases such as occurred in Pennsylvania where two sewer workers working for a company digging a trench—it was unshored. The contractor was cited for a serious violation, cited for a violation of the General Duty Clause, no safety training. The initial penalty was only $1,500 for the death of two workers. It was settled for $1,000.

A painting company in New Jersey, a violation for failing to provide fall protection in the death of an immigrant worker. The initial penalty, $2,000; settled to $1,400.

And the list goes on and on. So that is what happens in typical enforcement cases.

So why is that the case? It is the law. You start with low penalties, you reduce them further, and that is just to begin with, and then you settle out the cases for even less.

There has been a recent series in the *Las Vegas Sun* that has been running, showing on the Las Vegas Strip a series of worker fatalities, 9 workers killed and another one last Saturday, 10 workers dead. Enforcement case after enforcement case. Penalties started out at $7,000, reduced to zero—zero—in these workers' deaths. These are big companies. This is a big employer on a big construction job.

And so we see essentially that the civil enforcement under OSHA is not strong enough to deter violations to begin with and only gets weaker as it proceeds.

On the criminal side, the situation is even worse. David Uhlmann will speak to that. But one statistic on that that is worth citing by comparison. If you look at criminal enforcement under OSHA for the last 38 years, you see during that time only 68 criminal prosecutions, 68 in 37 years, a total of 42 months in jail. There were 340,000 workplace deaths during that time. By comparison, last year alone, for environmental crimes there were 340 criminal enforcement actions for environmental crimes resulting in jail time of 64 years. So 340 for environmental crimes in 1 year, 68 over the entire time of OSHA. And I think that speaks volumes.

Just in conclusion, there is legislation that is introduced that would address the major deficiencies in OSHA. We think it is a good bill, a sound bill, and we would encourage the committee to move on this legislation and to put in place a stronger structure and a stronger prevention for protecting workers in this country.

Thank you.

[The prepared statement of Ms. Seminario follows:]

PREPARED STATEMENT OF PEG SEMINARIO

Senator Kennedy, Ranking Member Enzi, and other members of the committee, I appreciate the opportunity to testify today on the issue of penalties for workplace fatalities under the Occupational Safety and Health Act.

Yesterday, April 28, was Workers Memorial Day—a day unions and others here and around the globe remember those who have been killed, injured and diseased on the job. Here in the United States, it also marked the 38th anniversary of when the Occupational Safety and Health Act went into effect.

Nearly four decades after the job safety law was passed, we find that the promise of safe jobs for American workers is far from being fulfilled. Without question,

progress has been made in improving protections and in reducing job fatalities, injuries and illnesses. But in recent years that progress has come to a halt, and for some groups of workers the situation is getting much worse.

THE NUMBER OF WORKPLACE FATALITIES HAS INCREASED—FATALITY RATES REMAIN UNCHANGED—FOR SOME WORKERS JOBS ARE MORE DANGEROUS

This month, the Bureau of Labor Statistics (BLS) issued revised workplace fatality statistics for 2006, which showed that job deaths increased in 2006 to 5,840, as opposed to declining as originally reported. The job fatality rate for 2006 was 4.0/100,000 workers—essentially the same as it has been for the past 5 years. (Attachment 1).

For some groups of workers, the situation is getting worse. In 2006, the number of fatalities among Hispanic workers jumped to 990, the highest number ever reported since BLS began the Census of Fatal Occupational Injuries (CFOI) in 1992. (Attachment 2). The fatality rate among Hispanic or Latino workers also increased to 5.0/100,000 (from 4.9/100,000 in 2005), 25 percent greater than for the workforce as a whole. Deaths among immigrant workers also increased to 1,046 fatalities. This increase in Latino and immigrant worker deaths was due almost entirely to increased deaths in the construction industry.

The latest fatality report also shows other disturbing news. In 2006, the number of workplace deaths from falls, exposure to harmful substances or environments (such as confined spaces) and fires and explosions increased significantly. The number of deaths from falls reached an all-time high with 827 deaths reported, with most of the increase in fatalities coming in the construction industry. (Attachment 3). These trends are particularly disturbing since these hazards are subject to OSHA standards and oversight.

In fact, a close review of the job fatality data since 1992 when the fatality census began, shows that the only significant decline in the job fatality numbers has been for deaths due to assaults and violent acts. For all the other major causes of workplace deaths, the number of fatalities have remained essentially the same or have increased. (Attachment 4).

The vast majority of workplace deaths could be prevented if protective safety and health measures were followed. But the fact is that for too many employers, the safety of workers is secondary, taking a back seat to production. For some employers, there is a total and blatant disregard for workers. Worker safety requirements and other worker protections are totally ignored.

These include employers like McWane, Inc., one of the largest producers of steel pipe in the United States, where over the course of a 10-year period (1995–2005), 11 workers were killed and thousands were injured at multiple facilities around the country. This persistent violator racked up violation after violation in dozens of OSHA investigations. But in virtually every case, penalties were reduced and citations dropped, resulting in enforcement actions that were little more than a slap on the wrist. It wasn't until the *New York Times* exposed McWane's pattern of abuse and violations in 2003, and criminal prosecutions were pursued largely using environmental statutes, that McWane was moved to change its manner of operating.

THE OCCUPATIONAL SAFETY AND HEALTH ACT IS TOO WEAK TO CREATE AN INCENTIVE TO IMPROVE CONDITIONS AND DETER VIOLATIONS

The Occupational Safety and Health Act places the responsibility on employers to protect workers from hazards and to comply with the law. The law relies largely on the good faith of employers to address hazards and improve conditions. For this system to work, it must be backed up with strong and meaningful enforcement. But at present, the Occupational Safety and Health Act and the OSHA enforcement program provide little deterrence to employers who put workers in danger. OSHA inspections and oversight of workplaces is exceedingly rare. There are no mandatory inspections even for the most dangerous industries or workplaces. Between Federal OSHA and the States there are approximately 2,100 inspectors. OSHA has the capacity and resources to inspect workplaces on average once every 92 years—once every 133 years in the Federal OSHA States. Over the years OSHA's oversight capacity has been diminished. Federal OSHA has fewer staff today than it did in 1975, but a much bigger job with twice as many workers and workplaces and new hazards to cover.

Since there is no regular oversight, strong enforcement when workplaces are inspected and violations are found is even more important. But the penalties in the OSH Act are weak. Serious violations of the law (those that pose a substantial probability of death or serious physical harm to workers) are subject to a maximum penalty of $7,000. Willful and repeated violations carry a maximum penalty of $70,000

and willful violations a minimum of $5,000. These penalties were last adjusted by the Congress in 1990 (the only time they have been raised). Unlike all other Federal enforcement agencies (except the IRS), the OSHAct is exempt from the Federal Civil Penalties Inflation Adjustment Act, so there have not even been increases in OSHA penalties for inflation, which has reduced the real dollar value of OSHA penalties by about 39 percent. For OSHA penalties to have the same value as they did in 1990, they would have to be increased to $11,500 for a serious violation and to $115,000 for a willful violation of the law.

By comparison, the Mine Safety and Health Act requires mandatory inspections—four per year at underground mines and two per year at surface mines. As a result of congressional action following the Sago mine disaster and other disasters in 2006, the Mine Act now provides for much tougher penalties. The MINER Act increased maximum civil penalties for violations to $60,000 (from $10,000), which may be assessed on an instance-by-instance basis. The 2006 mine safety legislation also added a new provision for "flagrant" violations, with a maximum civil penalty of $220,000.

The maximum civil penalties provided for under the OSHAct are rarely assessed. Indeed, just the opposite is the case. In fiscal year 2007, the average penalty for a serious violation of the law was $906 for Federal OSHA and $913 for the State OSHA plans combined. Again this is the average penalty for violations that pose a substantial probability of death or serious physical harm. For violations that are "other" than serious, which also carry a statutory maximum of $7,000, the average Federal OSHA penalty was just $40. Clearly, for most employers these levels of penalties are not sufficient to change employer behavior, improve workplace conditions or deter future violations.

Even in cases where workers are killed, penalties are abysmally low. According to OSHA inspection data, the average serious penalty in fatality cases for fiscal year 2007 was just $2,343 for Federal OSHA and $3,988 for the State plans combined. The average total penalty assessed in fatality cases was just $10,133 nationally ($12,226 for Federal OSHA and $7,525 for the OSHA State plans). These averages include open cases, which when finally resolved, will result in a reduction in these average penalty levels. Average penalties in fatality cases for fiscal year 2003–06, where most cases have been resolved, show a national average of $6,078 ($6,646 for Federal OSHA and $5,363 for the State plan States). All of these average penalties include several high penalty cases, which increase the averages. (Attachment 5).

A State-by-State review shows that there is wide variability in penalties assessed in cases involving worker deaths, with the penalties in some States exceedingly low. For example, in fiscal year 2007 Alaska's average penalty in worker fatality cases was just $750, and in Oregon the average penalty was $793. (Attachment 6).

OSHA highlights the few cases where it imposes high penalties. These cases are the subject of press releases that are posted prominently on the agency's Web site. But these high penalty cases are the exception. The norm in most fatality cases is minimal citations and penalties of just a few thousand dollars, with these cases receiving little attention. For example:

- In 2004, two Pennsylvania sewer workers, Robert Hampton, 43 and Larry Dunning, 61, were asphyxiated and died while working in a 10-foot deep manhole. No confined space entry procedures were followed or protection provided. The contractor, Rittenbaugh, Inc., was cited for one serious violation of the general duty clause (since there still is no confined space entry standard for construction) and one serious violation of safety training requirements, with an initial penalty of $1,500. The case was settled for $1,000.
- In New Jersey, Jose Duran Painting was cited for one serious violation and penalized $2,000 in the death of an immigrant worker, for failing to provide fall protection. The penalty was reduced to $1,400.
- In Michigan, in 2006, Midwest Energy Cooperative, was fined $4,200 for 2 serious violations for excavation and safety program requirements in the death of Danny Young, 27, who was killed when a backhoe hit a gas line which exploded. The case was settled for $2,940.
- In Austin, TX, in September 2004, a worker was killed in a trench cave in. The sewer contractor, ID Guerra, was cited for one serious and one repeat violation of OSHA's trenching standards, and penalized $8,400, including a $5,600 penalty for the repeat violation. Despite being cited by OSHA for a similar trenching violation in 2003, OSHA reduced the repeat penalty in the fatality case to just $2,800. (Under the act, the maximum penalty for a repeat violation is $70,000).

What kind of message does it send to employers, workers and family members, that the death of a worker caused by a serious or even repeated violation of the law warrants only a penalty of a few thousands dollars? It tells them that there is little

value placed on the lives of workers in this country and that there are no serious consequences for violating the law.

THE OSHACT AND OSHA ENFORCEMENT POLICIES DISCOUNT PENALTIES FOR VIOLATIONS EVEN IN CASES OF WORKER DEATH

So why are penalties for workplace fatalities and job safety violations so low? The problems are largely systemic and start with the OSHAct itself. The act sets low maximum penalty levels, particularly for serious violations, which carry a maximum of $7,000. This is the most common type of violation cited in fatality cases and other enforcement cases. These penalty levels are then adjusted downward based on employer size, good faith, history, and gravity of the violation. Under OSHA policy, violations directly related to fatalities are supposed to be classified as high-gravity, but penalty reductions are still allowed for employer size and history. Reductions for employer size range from 20 percent (for employers with 101–250 employees) to 60 percent (for employers with 1–25 employees); and the reduction for no history of serious, willful or repeat violations in the past 3 years is an additional 10 percent. So in many cases there is an automatic 30 to 70 percent discount in penalties, regardless of the gravity of the violations that are found.

OSHA's general policy is to group multiple instances of the same violation into one citation, with one penalty. So, for example, if five workers are injured due to an employer's failure to provide guarding for machines, the employer will only be cited once for the violation, even though five workers were hurt. This policy further minimizes the level of overall penalties in enforcement cases, including fatalities.

In 1986, OSHA instituted a policy to provide for instance-by-instance penalties in those cases where there was a flagrant and willful violation of the law. This "egregious" policy as it came to be known, was designed to penalize employers who put workers at risk and to send a message to other employers about the potential consequences of not complying with the law. Over the years, the egregious policy has had some positive impact, particularly when used as part of an industry-wide enforcement initiative, as was the case in the 1980's and early 1990's, when it was used for widespread injury reporting and ergonomic hazard violations. But in recent years, the impact of the policy has been reduced, as the Bush appointees to the Occupational Safety and Health Review Commission (OSHRC) have taken an exceedingly restrictive view of the types of violations that may be cited on an instance-by-instance basis. For example, OSHRC ruled that an employer could not be cited on a per-employee, instance-by-instance basis for failing to provide respirators or training to workers exposed to asbestos.

The initial citations and penalties in OSHA enforcement cases, weak to begin with, are reduced even further in the resolution of cases. Due to limited staff and resources, OSHA area directors and Department of Labor solicitors are under tremendous pressure to settle cases and avoid time consuming and costly litigation. In both informal settlements by the agency, and formal settlements after employer challenges to OSHA citations, penalties are routinely cut by another 30–50 percent. Indeed, it is OSHA practice to offer employers an automatic additional 30 percent penalty reduction at the time the citations are issued, no questions asked, if the employer agrees to correct all violations. (Attachment 7). The effect of these policies and practices in most cases is to reduce penalties to a level too minimal to have any effect.

A recent in-depth investigation by the *Las Vegas Sun* of construction worker fatalities on the Las Vegas Strip highlighted the weakness of OSHA enforcement in responding to and preventing workplace fatalities. Over the past 16 months, nine construction workers have died on a massive construction project overseen by some of the Nation's largest contractors. In more than $30 billion dollars worth of currently ongoing building projects along the Strip, construction workers are facing massive speedup pressure to complete projects on time amid unsafe conditions, including inadequate fall protection measures, faulty equipment, and lack of required safety training that led to some of the deaths.

The *Sun* reported that Nevada OSHA inspections of the nine fatalities initially resulted in findings of serious violations of safety standards and penalties, albeit fairly low. However, in case after case during informal conferences with the contractors, the agency withdrew many citations and reduced the penalties, in some cases removing all the citations and penalties in their entirety. For example, in a case involving the death of Harvey Englander, a veteran operating engineer, who was killed when struck by a man-lift in August 2007, Nevada OSHA issued 3 serious violations with $21,000 in penalties against the Pernini Building Company for lockout and training violations. The citations and penalties were later withdrawn. Just a few months later, in October 2007, Harold Billingsly, a 46-year-old iron worker

fell to his death, falling 59 feet through an unguarded opening. SME Steel Contractors was issued three serious citations and penalized $13,500 for failing to provide fall protection and other violations. But, as in the Perini case, following an informal conference with the company, Nevada OSHA withdrew all the citations and penalties.

As a result of the *Sun* exposé, Federal OSHA and the Nevada legislature are examining Nevada OSHA enforcement practices, which already are changing. The public scrutiny has also led to much greater attention to safety requirements at the Las Vegas construction projects on the Las Vegas strip. But, if it hadn't been for the enterprising work of the *Sun* reporters, it's unlikely that these dangerous practices and conditions would have changed.

Another way the impact of OSHA enforcement in fatality cases is minimized is through downgrading the classification of citations from willful to serious, which greatly undermines any possibility of criminal prosecution under the OSHAct. In some cases OSHA has utilized a practice of changing the characterization of willful or repeat violations to "unclassified," even though the OSHAct makes no provision for the issuance of such citations. For example, in a fatality investigation of a worker death at McWane Inc. Atlantic Cast States Iron Pipe Company in March 2000, OSHA downgraded four repeat violations to "unclassified" violations, even though the company had been cited previously for serious violations in a fatality that occurred at the same facility the year before.

Employers will seek "unclassified" violations, particularly in fatality cases, not only to undermine the potential for criminal prosecution, but to lessen the impact of the violations in any civil litigation and to keep willful or repeat violations off their safety and health record. The use of these "unclassified" violations may allow for settlements with higher monetary penalties or additional safety and health requirements. But these "unclassified" violations greatly weaken the deterrent effect of OSHA enforcement to prevent future occurrence of similar violations.

In fiscal year 2003 there were 50 unclassified violations in Federal OSHA fatality cases and in fiscal year 2004 there were 49 such violations. In recent years that number has dropped, and for fiscal year 2007, OSHA inspection data shows no unclassified violations associated with fatality cases. But the OSHA policy of allowing unclassified citations, even in fatality cases, is still on the books.

ENHANCED ENFORCEMENT PROGRAM—A LIMITED STEP IN THE RIGHT DIRECTION

In 2003, in response to the *New York Times* exposé on McWane, Inc's history and pattern of worker deaths and OSHA's weak enforcement actions, OSHA adopted a new Enhanced Enforcement Program (EEP). The purpose of the program as described by then-OSHA Assistant Secretary John Henshaw was to target "employers who are indifferent to their obligations under the OSHAct." Under the program, employers with worker fatalities with high gravity serious, willful or repeat violations, or other inspections resulting in multiple serious, willful or repeat violations, are subject to enhanced oversight. This enhanced scrutiny includes follow-up inspections and/or inspections at other facilities of the employer and may result in stricter settlement practices and enforcement actions in future cases.

In fiscal year 2007, there were 719 inspections involving EEP cases, compared to 467 EEP cases in fiscal year 2006, 593 EEP cases in fiscal year 2005 and 313 EEP cases in fiscal year 2004. Many of these cases were among small employers (25 or fewer) who had workplace fatalities with a serious violation, but no prior OSHA history. In 2008, OSHA modified the EEP program for cases involving fatalities with a serious violation to include only those employers who had a history of similar serious, willful or repeat violations or another workplace fatality in the last 3 years.

This increased oversight of more serious violators by OSHA is welcome, but the program is limited in its impact in terms of deterring future violations and affecting employer behavior. The program includes no provisions for actually enhancing penalties against serial violators or even changing practices for informal settlements or penalty reductions in future cases. For example, in one EEP case at ADM Milling in Nebraska, in 2003, the employer was cited for serious and repeat violations of lock-out/tag-out, machine guarding and electrical safety requirements. Initial penalties of $124,000 were proposed, reduced to $62,000 in an informal settlement. Two years later a follow-up inspection at the same plant found 2 repeat violations for machine guarding standards. Penalties of $50,000 were proposed, but were later reduced by OSHA to $32,500 in an informal settlement—clearly not a deterrent for a company the size of ADM, which had $44 billion in sales in 2007.

Under the EEP, expansion of investigations to other facilities of the same employer is not automatic, and only occurs in limited cases. Thus, the program provides little leverage to force employers who have similar violations and unsafe prac-

tices at multiple facilities to change the behavior and address hazards on a corporate-wide basis.

OSHA keeps an internal list of employers who are targeted for this enhanced enforcement and notifies employers that they have been targeted for enhanced scrutiny. But there is no public disclosure of the list of companies that are being targeted under the EEP due to their history of fatalities and serious, willful or repeat job safety violations. Publicizing this list could increase public awareness and scrutiny of these companies and create an added incentive for these companies to change their safety and health practices.

OSHA CRIMINAL PENALTIES ARE WEAK AND PROVIDE ALMOST NO DETERRENCE

If the civil penalties under the Occupational Safety and Health Act provide little deterrence or incentive for employers, the criminal penalties are even weaker. Under the Occupational Safety and Health Act, criminal penalties are limited to those cases where a willful violation of an OSHA standard results in the death of a worker, and to cases of false statements or misrepresentations. The maximum period of incarceration upon conviction is 6 months in jail, making these crimes a misdemeanor.

The criminal penalty provisions of the OSHAct have never been updated since the law was enacted in 1970 and are weaker than virtually every other safety and environmental law. For example, since 1977 the Mine Safety and Health Act has provided for criminal penalties for willful violations of safety and health standards and knowing violations for failure to comply with orders or final decisions issued under the law, and the Mine Act makes these violations a felony. Unlike the OSHAct, these criminal penalties are not limited to cases involving a worker's death.

Federal environmental laws have also been strengthened over the years to provide for much tougher criminal penalties. The Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act all provide for criminal prosecution for knowing violations of the law, and for knowing endangerment that places a person in imminent danger of death or serious bodily harm, with penalties of up to 15 years in jail. Again, there is no prerequisite for a death or serious injury to occur.

The weak criminal penalties under the OSHAct result in relatively few prosecutions. With limited resources, Federal prosecutors are not willing or able to devote significant time or energy to these cases. According to information provided by the Department of Labor, since the passage of the act in 1970, only 68 cases have been prosecuted, with defendants serving a total of 42 months in jail. During this time, there were 341,000 workplace fatalities according to National Safety Council and BLS data, about 20 percent of which were investigated by Federal OSHA. In fiscal year 2007, there were 10 cases referred by DOL for possible criminal prosecution, but to date the Justice Department has not acted on any of them.

By comparison, according to EPA in fiscal year 2007 there were 340 criminal enforcement cases initiated under Federal environmental laws and 226 defendants charged resulting in 64 years of jail time and $63 million in penalties—more cases, fines and jail time in 1 year than during OSHA's entire history. The aggressive use of criminal penalties for enforcement of environmental laws, and the real potential for jail time for corporate officials, serve as a powerful deterrent to environmental violators.

The contrast between the weak enforcement provisions of the OSHAct and the stronger environmental law provisions can be starkly seen in cases involving both workplace safety and environmental violations.

The case of Eric Ho is one example. In 1998, Ho was engaged in a building renovation project in Houston, TX. The building contained asbestos. Ho hired 11 undocumented workers from Mexico to remove the asbestos, and failed to provide them with any training, respirators or protective equipment. A city building inspector stopped the work due to the lack of proper permits, but Ho continued to do the work secretly at night to avoid detection. Two months into the job, an explosion from a gas line occurred at the site, releasing asbestos into the air.

OSHA inspected and issued serious and willful citations against Ho for failing to provide workers with respirators and training required by the OSHA asbestos standard. But these violations could not be criminally prosecuted under the OSHAct, because despite the flagrant violations, no workers were killed. At the same time, however, Ho was criminally prosecuted and convicted for violations of the Clean Air Act for his illegal asbestos-removal activities.

It is worth noting that OSHA proposed significant civil penalties against Ho, citing him on an instance-by-instance, per employee basis for exposing the 11 workers to asbestos hazards without respirators or training. But the Occupational Safety and Health Review Commission struck down these instance-by-instance violations,

and greatly reduced the penalties, finding that OSHA's respirator and asbestos training standards did not allow for per-employee, instance-by-instance violations.

In recent years the Justice Department launched a new Worker Endangerment Initiative that focuses on companies that put workers in danger while violating environmental laws. The Justice Department prosecutes these employers using the much tougher criminal provisions of environmental statutes. Under the initiative, the Justice Department has prosecuted employers such as McWane, Inc. a major manufacturer of cast iron pipe, responsible for the deaths of several workers; Motiva Enterprises, which negligently endangered workers in an explosion that killed one worker, injured eight others and caused major environmental releases of sulfuric acid; and British Petroleum for a 2005 explosion at a Texas refinery that killed 15 workers.

These prosecutions have led to major criminal penalties for violations of environmental laws, but at the same time underscore the weaknesses in the enforcement provisions of the Occupational Safety and Health Act.

In the Motiva case, the company pleaded guilty to endangering its workers under the Clean Water Act and was ordered to pay a $10 million fine. The company also paid more than $12 million in civil penalties for environmental violations. In contrast, in 2002 following the explosion, OSHA initially cited the company for 3 serious and 2 willful violations with proposed penalties of $161,000. As a result of a formal settlement, the original serious and willful citations were dropped and replaced with "unclassified" citations carrying $175,000 in penalties, greatly undermining any possibility of criminal enforcement under the OSHAct.

In the BP Texas City refinery disaster, where 15 workers were killed and another 170 injured, under a plea agreement, the company pleaded guilty to a felony violation of the Clean Air Act and agreed to pay $50 million in penalties and serve a 3-year probation. BP also agreed to pay $100 million in criminal penalties for manipulating the propane market. But BP paid no criminal penalties under the OSH Act, even though 15 workers died and OSHA issued hundreds of civil citations for willful, egregious violations of the law. And under the OSH Act, even if BP had paid criminal penalties, it would have been a misdemeanor, not a felony. Cases like this send a terrible message to workers about the value our laws place on their health and safety on the job.

CONGRESS MUST ACT—THE OCCUPATIONAL SAFETY AND HEALTH ACT SHOULD BE STRENGTHENED

In 1970, the Congress enacted the Occupational Safety and Health Act, declaring that workers' lives were important and protecting workers' safety and health was a national priority. That same kind of commitment and congressional action is needed today.

The Occupational Safety and Health Act must be strengthened to provide for strong, meaningful enforcement that will deter violations and serve as an incentive to improve conditions and protect workers from harm.

The OSHA civil penalties should be increased—significantly. The enhanced penalties for mine safety adopted by Congress in the MINER Act in 2006—$60,000 for serious violations and $220,000 for flagrant violations—provide a good guide. There should also be a floor for penalties in fatality cases, to take into account the harm that has been done. These increased penalties should be automatically adjusted for inflation, as is the case with other Federal laws, so their impact is not diluted with the passage of time.

OSHA's authority to issue violations and assess penalties for each instance of a violation should be made clear and unambiguous. The greater the number of workers put at risk or in danger or who have been injured or killed due to workplace violations, the greater the penalty should be. The use of "unclassified" citations should be prohibited.

Consideration should also be given to adopting special provisions to address safety and health practices at the corporate level. Presently, the enforcement structure of the OSHAct is focused primarily at the establishment level, which as the committee heard at a hearing earlier this month, is inadequate to change the practice and culture at the corporate level. Requirements for corporate officials to address identified violations and hazards on a corporate-wide basis would greatly enhance the act's effectiveness, and result in improved workplace conditions and greater protection for workers.

The criminal enforcement provisions of the act must also be strengthened and expanded. At a minimum, criminal violations should be made a felony carrying a significant prison term and monetary fines, and expanded to cover cases where violations cause serious injury to workers. The law should make clear that responsible

corporate officials are subject to prosecution in appropriate cases. As a matter of fundamental fairness and sound public policy, the criminal provisions of the Occupational Safety and Health Act should be strengthened so that violations of workplace safety laws carry at least the same potential consequences under our criminal justice system as violations of Federal environmental statutes.

For these legislative improvements to be effectively implemented, OSHA and the Department of Labor must be given additional resources to enforce the law.

The committee has before it legislation that would accomplish most of these recommendations. The Protecting America's Workers Act (S. 1244), introduced last year by Senator Kennedy with the support of many others, would improve the foundation for worker's job safety protections. It would strengthen OSHA enforcement by increasing civil and criminal penalties and expanding their scope. It would also put in place a mandatory minimum penalty in cases involving worker deaths, so that we would no longer see the current meager fines of a few thousand dollars in fatality cases. Family members of victims would also be given rights in OSHA fatality investigations.

In addition to strengthening enforcement, the Protecting America's Workers Act (PAWA) would extend the act's coverage to State and local public employees, flight attendants and other workers who currently lack OSHA protection. It would enhance the anti-discrimination provisions of the OSHAct to better protect workers from retaliation, by bringing the law into line with other Federal whistleblower statutes.

The Protecting America's Workers Act is a good, sound bill that should be enacted into law.

Four decades after the passage of the Occupational Safety and Health Act, its time for the country and the Congress to keep the promise to workers to protect them from death, injury and disease on the job.

ATTACHMENTS

ATTACHMENT 1

Workplace Fatalities Since the Passage of OSHA [1,2]

Year	Work Deaths	Employment (000)[3]	Fatality Rate[4]
1970.....	13,800	77,700	18
1971.....	13,700	78,500	17
1972.....	14,000	81,300	17
1973.....	14,300	84,300	17
1974.....	13,500	86,200	16
1975.....	13,000	85,200	15
1976.....	12,500	88,100	14
1977.....	12,900	91,500	14
1978.....	13,100	95,500	14
1979.....	13,000	98,300	13
1980.....	13,200	98,800	13
1981.....	12,500	99,800	13
1982.....	11,900	98,800	12
1983.....	11,700	100,100	12
1984.....	11,500	104,300	11
1985.....	11,500	106,400	11
1986.....	11,100	108,900	10
1987.....	11,300	111,700	10
1988.....	10,800	114,300	9
1989.....	10,400	116,700	9
1990.....	10,500	117,400	9
1991.....	9,900	116,400	9
1992[2].....	6,217	117,000	7
1993.....	6,331	118,700	8
1994.....	6,632	122,400	5
1995.....	6,275	126,200	5
1996.....	6,202	127,997	4.8
1997.....	6,238	130,810	4.7
1998.....	6,055	132,684	4.5
1999.....	6,054	134,666	4.5
2000.....	5,920	136,377	4.3
2001.....	5,915*	136,252	4.3
2002.....	5,534	137,700	4.0
2003.....	5,575	138,928	4.0
2004.....	5,764	140,411	4.1
2005.....	5,734	142,894	4.0
2006.....	5,840	145,501	4.0

[1] Fatality information for 1971-1991, from National Safety Council Accident Facts, 1994.

[2] Fatality information for 1992 to 2006 is from the Bureau of Labor Statistics, Census of Fatal Occupational Injuries In 1994, the National Safety Council changed their reporting method for workplace fatalities and adopted the BLS count. The earlier NSC numbers are based on an estimate, the BLS numbers are based on an actual census.

[3] Employment is an annual average of employed civilians 16 years of age and older from the Current Population Survey, adjusted to include data for resident and armed forces from the Department of Defense.

[4] Deaths per 100,000 workers.

* Excludes fatalities from the events of September 11, 2001.

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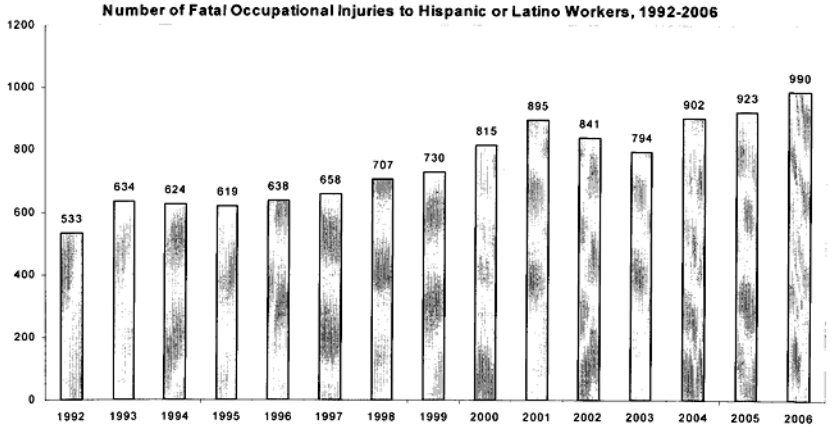
ATTACHMENT 2

Number of Fatal Occupational Injuries to Hispanic or Latino Workers, 1992-2006



ATTACHMENT 3

Number of Fatal Work Injuries By Event or Exposure, 1992-2006*

EVENT OR EXPOSURE	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2006
TOTAL FATALITIES	**6,217**	**6,331**	**6,632**	**6,275**	**6,202**	**6,238**	**6,055**	**6,054**	**5,920**	**5,915**	**5,534**	**5,575**	**5,764**	**5,734**	**5,840**	**5,840**
Transportation Incidents	2,484	2,499	2,762	2,587	2,601	2,605	2,645	2,618	2,573	2,524	2,385	2,364	2,490	2,493	100	2,459
Assaults and Violent Acts	1,281	1,329	1,321	1,280	1,165	1,111	962	909	930	908	840	902	809	792	45	788
Contact With Objects and Equipment	1,004	1,045	1,017	916	1,010	1,035	944	1,030	1,006	962	872	913	1,009	1,005	112	993
Falls	600	618	665	651	691	716	706	721	734	810	719	696	822	770	78	827
Exposure to Harmful Substances or Environments	605	592	641	609	533	554	576	533	481	499	539	486	464	501	537	547
Fires and Explosions	167	204	202	207	185	196	206	216	177	188	165	198	159	159	137	202

*Census of Fatal Occupational Injuries. Bureau of Labor Statistics

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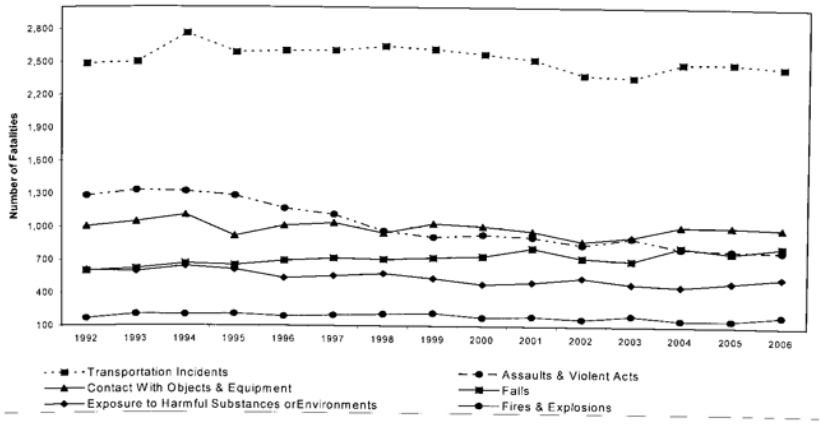
ATTACHMENT 4

Number of Fatal Work Injuries by Event or Exposure, 1992-2006*



ATTACHMENT 5

AVERAGE TOTAL PENALTY ($) PER OSHA FATALITY INSPECTION, FY 2003-2007 [1]

Fiscal Year	Number of Fatality Inspections Conducted	Total Penalties ($)	Average Total Penalty Per Inspection ($)
FY 2003			
Federal States	1,504	7,120,953	6,756
State Plan States	816	3,448,520	4,214
Nation Wide	1,870	10,559,473	5,647
FY 2004			
Federal States	1,115	7,502,645	6,729
State Plan States	890	4,557,757	5,121
Nation Wide	2,005	12,060,402	6,015
FY 2005			
Federal States	1,131	7,522,700	6,651
State Plan States	887	5,714,741	6,443
Nation Wide	2,018	13,237,441	6,560
FY 2006			
Federal States	1,106	7,133,639	6,450
State Plan States	950	5,391,602	5,675
Nation Wide	2,056	12,525,241	6,092
FY 2007			
Federal States	1,048	12,813,214	12,226
State Plan States	841	6,328,528	7,525
Nation Wide	1,889	19,141,742	10,133

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ATTACHMENT 6

STATE BY STATE OSHA FATALITY INVESTIGATIONS, FY 2007

State	Number of OSHA Fatality Investigations Conducted, FY 2007 [1]	Total Penalties [1] ($)	Average Total Penalty Per Investigation ($)	Rank of Average Penalty [2]	State or Federal Program [3]
Alabama	31	233,772	7,541	17	FEDERAL
Alaska	4	3,000	750	49	STATE
Arizona	26	168,910	6,497	22	STATE
Arkansas	29	156,340	5,391	29	FEDERAL
California	193	2,749,295	14,245	7	STATE
Colorado	28	179,435	6,408	23	FEDERAL
Connecticut	16	70,007	4,375	33	FEDERAL
Delaware	2	0	0	50	FEDERAL
Florida	113	990,221	8,763	12	FEDERAL
Georgia	63	416,341	6,609	21	FEDERAL
Hawaii	9	17,218	1,913	47	STATE
Idaho	12	23,650	1,970	46	FEDERAL
Illinois	53	312,985	5,905	26	FEDERAL
Indiana	39	109,937	2,819	42	STATE
Iowa	22	99,250	4,511	31	STATE
Kansas	29	104,775	3,613	38	FEDERAL
Kentucky	30	328,920	10,964	10	STATE
Louisiana	32	141,180	4,412	32	FEDERAL
Maine	6	17,065	2,844	41	FEDERAL
Maryland	25	104,386	4,175	35	STATE
Massachusetts	21	147,110	7,005	18	FEDERAL
Michigan	43	291,625	6,782	19	STATE
Minnesota	21	701,937	33,426	3	STATE
Mississippi	29	240,220	8,283	13	FEDERAL
Missouri	25	2,658,708	106,348	1	FEDERAL
Montana	9	55,925	6,214	24	FEDERAL
Nebraska	15	342,252	22,816	4	FEDERAL
Nevada	27	269,705	9,989	11	STATE

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State	Number of OSHA Fatality Investigations Conducted, FY 2007 [1]	Total Penalties [1] ($)	Average Total Penalty Per Investigation ($)	Rank of Average Penalty [2]	State or Federal Program [3]
New Hampshire	6	46,860	7,810	16	FEDERAL
New Mexico	13	52,737	4,057	36	STATE
New York	72	585,130	8,127	14	FEDERAL
North Carolina	68	151,349	2,226	44	STATE
North Dakota	4	26,997	6,749	20	FEDERAL
Ohio	57	926,705	16,258	6	FEDERAL
Oklahoma	30	2,874,325	95,811	2	FEDERAL
Oregon	32	25,375	793	48	STATE
Pennsylvania	67	379,388	5,663	27	FEDERAL
Rhode Island	5	24,500	4,900	30	FEDERAL
South Carolina	31	134,560	4,341	34	STATE
South Dakota	3	39,150	13,050	8	FEDERAL
Tennessee	44	237,500	5,398	28	STATE
Texas	185	1,119,602	6,052	25	FEDERAL
Utah	22	46,950	2,134	45	STATE
Vermont	3	39,100	13,033	9	STATE
Virginia	54	438,640	8,123	15	STATE
Washington	64	255,565	3,993	37	STATE
West Virginia	27	72,475	2,684	43	FEDERAL
Wisconsin	20	389,830	19,492	5	FEDERAL
Wyoming	12	43,099	3,592	39	STATE
Total or National Average	**1,889**	**19,141,742**	**10,133** [4]		

[1] OSHA IMIS Fatality Inspection Reports, FY 2007.

[2] Rankings are based on highest to lowest average total penalty ($) per fatality inspection (1-highest, 50-lowest).

[3] Under the OSHAct, states may operate their own OSHA programs. Connecticut, New Jersey and New York have state programs covering state and local employees only. Twenty -one states and one territory have state OSHA programs covering both public and private sector workers.

[4] National average is per fatality investigation for all federal OSHA and state OSHA plan states combined. Federal OSHA average is $12,226 per fatality investigation; state plan OSHA states average is $7,525 per fatality investigation.

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Attachment 7

Example of OSHA Informal Settlement Offer

IMPORTANT NOTICE

(READ THIS CAREFULLY)

The proposed penalties assessed for this inspection's citation(s) reflect reductions that have been granted for the size, good faith, and history of the employer.

ORIGINAL PENALTY	$12,500.00
PROPOSED PENALTY	$7,125.00

INFORMAL SETTLEMENT OFFER

An additional 30% reduction in penalties (rounded to the nearest dollar) will be granted if all citation items are abated and the **INFORMAL SETTLEMENT AGREEMENT** is signed.

However, full payment for the settlement amount must be paid to OSHA within 15 Federal working days (excluding weekends and Federal holidays) from the receipt of the citation. **In addition,** a detailed abatement plan must be submitted with the **INFORMAL SETTLEMENT AGREEMENT** for those items which have not been abated and for those requiring a longer abatement period.

REDUCED PENALTY AMOUNT FOR INFORMAL SETTLEMENT:	$4,988.00

Corrective Action, taken by you for each alleged violation should be submitted to this office on or about the abatement date(s) indicated on the Citation and Notification of Penalty and included with the submitted **INFORMAL SETTLEMENT AGREEMENT**. A work sheet has been provided to assist in submitting the required abatement information.

This is the only offer for penalty reductions that will be made.

Meetings may be held to discuss questions concerning citation/violation issues (other than the penalties) or dates and methods of abatement prior to the final contest date of the citation. Please contact the U.S. Department of Labor - OSHA at (319)259-7542 for an appointment.

The CHAIRMAN. Thank you.

Mr. Uhlmann.

STATEMENT OF DAVID M. UHLMANN, DIRECTOR OF THE ENVIRONMENTAL LAW AND POLICY PROGRAM, UNIVERSITY OF MICHIGAN LAW SCHOOL, ANN ARBOR, MI

Mr. UHLMANN. Thank you, Chairman Kennedy, Ranking Member Enzi, and members of the committee.

As the chairman indicated, I am currently a professor of the University of Michigan Law School, but I speak to you today as much as a former Federal prosecutor. I served for 17 years at the Justice Department, the last 7 as the chief of the Environmental Crimes Section. I am pleased to have the opportunity to talk to you today about the desperate need to strengthen the criminal provisions of the Occupational Safety and Health Act.

Senator Enzi made comments that I think are very appropriate about the fact that we need to do what we can to get to a point where there are no accidents, no injuries, no deaths at the workplace. One of the people who led our efforts at the Justice Department to address worker endangerment issues was Senator Enzi's friend, Tom Sansonetti, the former Assistant Attorney General. I do not think it is a partisan issue.

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Our worker safety laws are laudable in many respects. We have very broad coverage, and I know we will hear about the fact that there is an awful lot that is regulated in the workplace.

And certainly it is true, as Senator Isakson said, that most employers care deeply about making sure that there are not any accidents, there are not any injuries, there are not any deaths. And for most employers, worker safety is a top priority.

But there always will be some employers who do not think the law applies to them, who do not value worker safety, who think that their workers are expendable. And for those employers, a credible criminal enforcement threat is essential if we are going to do something about worker injuries and worker deaths.

I would like to quickly tell you about a case that I prosecuted at the Justice Department that I think exemplifies or highlights the shortcomings of the current law. It was a case in Idaho. It involved a facility called Evergreen Resources, ironically named because it was a facility that had a history of worker safety and environmental violations.

In August 1996, the owner of that company, a man named Allan Elias, who went to Wharton and was an attorney I am sad to say, sent his workers into a tank of cyanide waste and a 20-year-old man in his first job out of high school named Scott Dominguez suffered severe and permanent brain damage inside that tank. There was no safety equipment. There was no testing of the air inside the tank. There was no testing of the waste that was being dumped out onto the ground.

When emergency response vehicles came out to the scene and asked what was in the tank, Mr. Elias said there was nothing in the tank that could hurt anybody, even though he was the person who put cyanide in it. When emergency room doctors were trying to save the victim's life, Mr. Elias lied to them and said there was no possibility that there was cyanide in the tank. The next day when OSHA showed up, Mr. Elias lied again, said he had a confined space entry permit and went down the street to Kerr McGee and got their safety manual and doctored up the confined space entry permit and submitted that to OSHA.

Now, we were able to bring Mr. Elias to justice. We charged him with criminal violations of the knowing endangerment provisions of the environmental laws, and he was convicted after a 3½-week trial and sentenced to 17 years in jail.

But he did not commit a criminal violation of the worker safety laws when he sent his workers into that cyanide tank. He did not commit a criminal violation of the worker safety laws even though OSHA cited him for willful violations, even though a jury unanimously found that he knowingly placed his workers in imminent danger of death or serious bodily injury. He did not commit a criminal violation of the worker safety laws because no one died that day. And it is only a crime under the worker safety laws if you willfully commit a violation of the Occupational Safety and Health Act and it causes death.

Now, there is something wrong with the law if sending your workers into a tank of cyanide waste, ruining a young man's life is not a crime under the worker safety laws, and it is a 17-year felony under the environmental laws.

So it is time for Congress to act, and I would urge Congress to pass the Protecting America's Workers Act so that five things can happen with the law.

First, violations of the worker safety laws, criminal violations, should be felonies. The reality of life as a Federal prosecutor and the priorities and the resource constraints that the Justice Department has is we are never going to see significant criminal prosecution if the laws remain misdemeanors.

Second, the penalties today, 6 months in jail. The message we send about the value of a worker's life when it is 6 months in jail if a worker is killed through a willful violation of the law is the wrong message. The maximum sentence should be measured in years, not in months.

Third, endangerment, as Senator Enzi talked about, should be a crime. If an employer knowingly violates the worker safety law and puts his or her employees at risk of injury or death, that should be a crime, regardless of whether some intervening event occurs that spares somebody's life as in the Elias case—there were emergency room doctors—or regardless of the fact that nobody is injured because of some luck of fate.

Fourth, the mental State requirement should be knowingly, not willfully. Willful violations mean that ignorance of the law is a defense, which is contrary of most American jurisprudence. Employers have a duty, should have a duty to know the law and when they act in ways that put their workers at risk in complete disregard of the law, it should not be a defense for them to claim that they did not know it was a violation.

And last, it needs to be clear that individuals are responsible under this act. Supervisors who order their employees into dangerous situations, responsible corporate officers who know the violations are occurring and fail to prevent them all should be criminally liable.

As has been said a number of times this morning, the Occupational Safety and Health Act was passed over 30 years ago. It is time to make the guarantee of a safe workplace promised by the act a reality. It is time to strengthen the criminal provisions of the law.

I thank you for the opportunity to testify today.

[The prepared statement of Mr. Uhlmann follows:]

PREPARED STATEMENT OF DAVID M. UHLMANN

Thank you Chairman Kennedy, Senator Enzi, and members of the committee for holding today's hearing and for giving me the opportunity to testify before you.

My name is David Uhlmann. I am the Jeffrey F. Liss Professor from Practice and the Director of the Environmental Law and Policy Program at the University of Michigan Law School. Prior to joining the Michigan faculty in July 2007, I served for 17 years in the U.S. Department of Justice, the last seven as Chief of the Environmental Crimes Section.

During my tenure at the Justice Department, we prosecuted a number of environmental criminal cases involving worker injuries and deaths. Based on those successful prosecutions, we developed a worker endangerment initiative to highlight the fact that environmental crimes frequently place America's workers at risk of death or serious bodily injury—and to prosecute companies that systematically violate both the environmental laws and our worker safety laws.

The Justice Department's worker endangerment initiative has produced a number of high-profile prosecutions involving companies such as BP Products North America, McWane, Inc., Motiva Enterprises, LLC, and W.R. Grace & Co. The worker

endangerment initiative has focused on companies where profits have taken precedence over compliance with the law and workers have been treated as if they were expendable. Criminal prosecution of those companies protects American workers, upholds the rule of law, and ensures that corporate outlaws do not have a competitive advantage over companies that make compliance a priority.

The success of the Justice Department's worker endangerment initiative, however, has highlighted the woeful inadequacy of the criminal provisions of our worker safety laws. Most of the cases brought by my former colleagues charged violations of the endangerment provisions of the environmental protection statutes [1] and Title 18 of the United States Code, which makes it a crime to make false statements,[2] obstruct justice,[3] and commit conspiracy to defraud the United States by impeding the effective implementation of government regulatory programs.[4] Typically, the crimes charged were felonies, punishable by up to 15 years in jail for knowing endangerment and 20 years in jail for some forms of obstruction of justice. The endangerment provisions of the environmental laws and title 18 also cover a wide range of misconduct in the workplace.

Only one case brought to date under the worker endangerment initiative, the prosecution of McWane for a worker death at its Union Foundry plant, has utilized the criminal provisions of the Occupational, Safety, and Health Act (the "OSH Act").[5] Prosecution under the OSH Act is extremely limited, because the OSH Act only covers (1) willful violations of worker safety regulations that (2) result in worker death. Even if a willful violation occurs that results in death, the crime is only a Class B misdemeanor, with a maximum sentence of 6 months in jail.

The criminal provisions of our worker safety laws are so weak that they do little to protect America's workers. Limiting prosecution to willful violations makes ignorance of the law a defense, contrary to the time-honored maximum of American jurisprudence that ignorance of the law is not a defense. Focusing exclusively on violations involving worker deaths ignores the pain and anguish that results from serious injuries, which also may warrant criminal remedies. Misdemeanor violations provide little deterrence and minimal incentive for prosecutors and law enforcement personnel, who reserve their limited resources for the crimes that Congress has deemed most egregious by making them felonies (with significant maximum penalties). Finally, only "employers" can be prosecuted for criminal violations of the OSH Act, which means that the mid-level managers who have the greatest day-to-day responsibility for unsafe working conditions often are immune from criminal prosecution under the OSH Act.

In my testimony today, I will explain why Congress should strengthen the criminal provisions of our worker safety laws by enacting the Protecting America's Workers Act.

First, I will describe one of the cases that I prosecuted at the Justice Department that helped lead to our worker endangerment initiative and exposed the inadequacy of the criminal provisions of our worker safety laws. Second, I will explain why a stronger criminal program under the OSH Act would promote greater compliance with our worker safety laws. Third, I will suggest possible changes to the OSH Act and the Protecting America's Workers Act to provide a more effective criminal enforcement scheme and ensure compliance with our worker safety laws.

THE CYANIDE CANARY [6]

In August 1996, Scott Dominguez collapsed and nearly died inside a 35,000 gallon steel storage tank while working at Evergreen Resources, a fertilizer manufacturing facility in Soda Springs, ID. The owner of Evergreen Resources was Allan Elias, a Wharton graduate and attorney who had a long history of environmental and worker safety violations. Elias previously used the 35,000 gallon tank for a cyanide leaching operation and to store phosphoric acid. Cyanide and phosphoric acid react to form deadly hydrogen cyanide gas; expert testimony at trial established that there was enough cyanide in the storage tank to kill thousands of people.

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[1] *See, e.g.,* 42 U.S.C. § 7413(c)(4) (negligent endangerment under the Clean Air Act) and 42 U.S.C. 7413(c)(5) (knowing endangerment under the Clean Air Act).

[2] 18 U.S.C. § 1001.

[3] 18 U.S.C. §§ 1503, 1505, 1512, and 1519.

[4] 18 U.S.C. § 371.

[5] 29 U.S.C. § 666(e).

[6] Joseph Hilldorfer And Robert Dugoni, "The Cyanide Canary: A Story Of Injustice" (2004). Former EPA Special Agent Hilldorfer and co-author Dugoni provide a first-hand account of the prosecution of *United States* v. *Elias*, 269 F.3d 1003 (9th Cir. 2001), for environmental crimes that left the victim permanently brain-damaged. Multiple worker safety violations occurred, but no worker safety crime, because of the deficiencies of the OSH Act.

Elias nonetheless ordered Dominguez and his co-workers to clean out the tank and dump the cyanide-laced sludge from the bottom of the tank. Elias ignored the pleas of his workers for safety equipment and for tests to determine whether it was safe to go inside the tank. Elias refused to prepare the required "confined space entry permit" detailing the steps that were being taken to protect the workers and enable them to be rescued if someone was injured inside the tank. Elias did so even though he had been warned for years by the Occupational Safety and Health Administration ("OSHA") about the dangers of sending workers into confined spaces like the tank without safety equipment and appropriate testing. When the workers complained of sore throats and difficulty breathing, Elias told them to finish the job or find work somewhere else.

Dominguez, a recent high school graduate without significant work experience, felt like he did not have any choice. So, on August 27, 1996, wearing just jeans and a t-shirt, Dominguez descended into the tank on a ladder, a 20-year-old with his whole life ahead of him. Two hours later, covered in sludge and barely breathing, Dominguez emerged from the tank on a stretcher, his life shattered by Elias's blatant disregard for the health and safety of his workers.

In the frantic minutes before paramedics rescued Dominguez, firefighters asked Elias whether there was anything in the tank that could explain what had happened to Dominguez or put the rescuers at risk. Elias lied and said there was nothing but mud inside the tank.

After the ambulance rushed Dominguez to the hospital, the emergency room doctor, John Wayne Obray, called Elias twice to ask what was inside the tank. On the second call, Dr. Obray asked Elias whether there was any possibility that cyanide was in the tank. Elias lied and said no.

The next day OSHA inspectors interviewed Elias, who lied again and said that he had a confined space entry permit for the tank cleaning operation. Later that morning, Elias went to a neighboring facility operated by Kerr McGee Chemical Corporation and borrowed a safety manual, which included instructions about how to prepare a confined space entry permit. He then prepared and backdated a confined space entry permit for the tank cleaning operation and submitted the false permit to OSHA, claiming it had been prepared before Dominguez was hurt.

The United States charged Elias with three felony counts under the environmental laws, including knowing endangerment under the Resource Conservation and Recovery Act ("RCRA"), which carries a maximum penalty of 15 years in prison. In addition, the United States charged Elias with one felony count under title 18 of the United States Code for submitting the fabricated confined space entry permit to OSHA.[7] During the 3½-week trial, Dominguez testified that he did not know there was cyanide in the tank, and that he entered the tank without safety equipment because "I really, really, really did, really did trust Allan."[8]

After less than 6 hours of deliberations, the jury convicted Elias on all counts on May 7, 1999. U.S. District Court Judge B. Lynn Winmill sentenced Elias to 17 years in prison, which until recently was the longest sentence ever imposed for environmental crime.

The Justice Department hailed the Elias conviction and the resulting sentence, because it demonstrated that "environmental crimes are real crimes, and those who flout our environmental laws will go to prison for a long time."[9] The proof of knowing endangerment in the Elias case, however, was based as much upon evidence that Elias violated OSHA regulations governing confined space entries as it was on the accompanying unpermitted disposal of hazardous waste in violation of RCRA. Indeed, the Elias case was as much a worker safety case as it was an environmental case under the Federal pollution prevention laws.

Yet Elias did not commit a criminal violation of the worker safety laws.

Elias did not commit a worker safety crime, even though OSHA cited Elias for willful violations of worker safety regulations. Elias did not commit a worker safety crime, even though the jury found unanimously that Elias knew he was placing his workers in imminent danger of death or serious bodily injury. Elias did not commit

[7] The United States charged the falsified permit as a violation of 18 U.S.C. § 1001, instead of the OSH Act's false statement provision, 29 U.S.C. § 666(g), because a false statement under title 18 is a felony, punishable by up to 5 years in jail. A false statement under the OSH Act is a Class B misdemeanor, punishable by up to 6 months in jail. Elias was convicted and sentenced to the statutory maximum penalty of 5 years in jail on the title 18 false statement charge.

[8] *United States* v. *Allan Elias* (D. Idaho, CR No. 98–00070–E–BLW), Trial Transcript at 3499 (Testimony of Scott Dominguez, May 3, 1999).

[9] "Idaho Man Given Longest-Ever Sentence for Environmental Crime," *United States Department of Justice Office of Public Affairs Press Release* (Statement of Assistant Attorney General Lois J. Schiffer, April 29, 2000).

a worker safety crime, even though he was convicted of multiple environmental felonies, including knowingly endangering his workers.

Allan Elias did not commit a worker safety crime, because Scott Dominguez did not die.

Elias committed egregious crimes and deserved the 17-year prison sentence imposed by Judge Winmill. The Elias case provides a stark contrast, however, between the strength of the criminal provisions of the environmental laws and the weakness of the criminal provisions of the worker safety laws. It is appropriate that endangering workers during a hazardous waste violation carries a 15-year maximum sentence per count; it is illogical that the same conduct during a worker safety violation is not a crime unless a worker dies—and even then only a 6-month misdemeanor per count (which, in all likelihood, means 6 months per worker death).

The criminal provisions of the environmental laws are not an effective antidote for the weakness of the criminal provisions of the worker safety laws. Most environmental crime occurs in a workplace setting and involves the mishandling of hazardous substances or pollutants, which can place workers at risk. However, many cases involving danger to workers cannot be prosecuted under the environmental laws, because they do not involve mishandling of hazardous wastes, or unlawful releases of hazardous air pollutants into the ambient air, or illegal discharges of pollutants into waters of the United States. Relying on the environmental laws to protect America's workers means that, in many cases, America's workers will be left unprotected.

Moreover, even when environmental laws apply, their enforcement can raise complicated regulatory issues. Elias challenged his convictions on the grounds that the applicable definition of hazardous waste was too vague to be criminally enforced. While the Ninth Circuit did not agree with Elias, his ability to make such an argument shows the limits of environmental criminal enforcement as the primary method of addressing worker endangerment cases.

In sum, while the Elias prosecution was successful, and the worker endangerment initiative has excelled because of the extraordinary efforts of career prosecutors at the Justice Department, criminal investigators at the U.S. Environmental Protection Agency ("EPA"), and oft-maligned compliance officers within OSHA, the environmental laws cannot make up for the inherent weaknesses of the criminal provisions of our worker safety laws.

THE NEED FOR A STRONG CRIMINAL PROGRAM

Most companies in the United States comply with the law and care about protecting their workers. For those companies, worker safety is more than a legal requirement; it is a moral and ethical obligation. But experience teaches that there always will be companies that take a different approach, companies with owners like Allan Elias who think that the law does not apply to them or that, if they get caught, they can either avoid penalties or simply pay a modest fine.

Sadly, under the existing OSH Act, the companies that think there are not significant penalties for violating OSHA regulations probably are correct. Willful or repeated violations carry a statutory maximum of $70,000 per violation,[10] a number which has not been increased in decades and pales in comparison to the cost of an effective corporate compliance program.

Criminal penalties can be much higher than administrative penalties under the OSH Act, because title 18 sets a maximum penalty of $500,000 for misdemeanors that are committed by organizational defendants and result in death[11] or twice the gain or loss associated with the offense[12] (whichever is greater). As discussed above, however, criminal violations only apply if a willful violation results in worker death. Even if the criminal provisions apply, most U.S. Attorney's Offices—faced with the challenge of prosecuting cases across a wide range of Federal regulatory programs, in addition to drug and gun crimes—focus on felony cases and are unable to devote limited prosecutorial resources to misdemeanor cases for regulatory crime.

The net result is a worker safety program where most violators—even willful violators—will face only administrative violations and relatively modest penalties if they are cited. That makes it easy for companies to put profits before compliance and to view any penalties that may result as a "cost of doing business." A company that epitomized that approach is McWane.

McWane is a privately owned company that operates pipe manufacturing facilities across the United States. Although pipe manufacturing is inherently dangerous,

[10] 29 U.S.C. § 666(a).
[11] 18 U.S.C. § 3571(c)(4).
[12] 18 U.S.C. § 3571(d).

McWane facilities were particularly hazardous places to work. From 1995 to 2003, at least 4,600 workers were injured at McWane plants,[13] giving McWane one of the worst safety records in the United States.

Yet, despite McWane's alarming record of worker injuries and deaths, the company's only criminal conviction prior to 2005 was a single misdemeanor count in July 2002 under the OSH Act for willful violations of the worker safety laws that resulted in a worker being crushed to death at McWane's Tyler Pipe facility in Tyler, TX. McWane paid a fine of $250,000.

In January 2003, as a pilot project for the worker endangerment initiative, the Justice Department and EPA began a criminal investigation of environmental and worker safety violations at five McWane facilities: Atlantic States Cast Iron Pipe Company in New Jersey; McWane Cast Iron Pipe Company in Alabama; Pacific States Cast Iron Pipe Company in Utah; Tyler Pipe in Texas; and Union Foundry in Alabama. The investigations revealed a company that was a persistent violator of worker safety and environmental laws, and which made it a practice to lie to and deceive OSHA inspectors and Federal and State environmental officials to conceal its illegal activity.

McWane eventually pleaded guilty in September 2005 to criminal charges under the OSH Act at its Union Foundry facility, and received a criminal sentence of $4.25 million. McWane also pleaded guilty to Clean Air Act crimes at Pacific States, with a criminal sentence of $3 million, and at Tyler Pipe, with a criminal sentence of $4.5 million. McWane chose to stand trial for the violations committed at its Atlantic States and McWane Cast Iron Pipe facilities, where multiple McWane officials were charged. After lengthy trials, however, McWane and most of the individual defendants were convicted, although final sentences have not been imposed.[14]

While the criminal cases against McWane have not ended, the multi-million dollar criminal fines imposed against McWane and the years of adverse publicity resulting from the criminal investigations and prosecutions may have changed McWane's approach to worker safety. In a follow-up piece to the exposé that launched the McWane investigations,[15] *Frontline* interviewed dozens of McWane employees who describe a "new McWane" where worker safety and environmental compliance are now a priority. Former OSHA Administrators and senior Justice Department officials now advise McWane about its regulatory compliance programs.

Only time will tell whether there is a new corporate attitude at McWane. It is revealing, however, that the company ignored worker safety in the face of years of worker injuries and deaths, and accompanying administrative penalty actions (and a single criminal conviction). McWane only began to make changes when the United States launched a concerted, national investigation and prosecution effort, with multiple indictments for felony violations and multi-million dollar criminal penalties for those crimes. The McWane prosecutions therefore speak volumes about the role of a strong criminal program in promoting worker safety and compliance.

A strong criminal program, particularly one where individual corporate officials may face significant jail time if they commit criminal violations, sends a message to the regulatory community about the need to make compliance with worker safety laws a priority. Companies that do not care about worker safety for its own sake will pay far more attention to worker protection if they fear criminal sanctions and possible jail time for corporate officials who put workers at risk.

Criminal enforcement also provides benefits beyond punishment and deterrence of criminal activity. In regulatory programs where there is a credible criminal enforcement threat, companies are quicker to resolve administrative penalty actions and respond more productively to regulatory inspections. The OSHA inspectors trained as part of the Justice Department's worker endangerment initiative describe many companies that are indifferent or hostile to OSHA compliance officers. That would not be the case if the OSHA enforcement scheme included a more significant criminal enforcement threat than the current OSH Act provides.

Finally, companies that make worker safety a priority should not feel threatened by a stronger criminal enforcement program. Stronger criminal provisions would not be used to criminalize accidents, which sometimes happen despite the best efforts of employers and employees. Criminal enforcement only would occur in situations

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[13] David Barstow and Lowell Bergman, "A Dangerous Business: At a Texas Foundry, an Indifference to Life" (*N.Y. Times*, January 8, 2003).

[14] Sentencing in the Atlantic States case has not occurred more than 2 years after the trial ended (which lasted 7 months and was the longest environmental crimes trial ever in the United States). A new trial may be necessary in the McWane Cast Iron Pipe case after the U.S. Court of Appeals for the Eleventh Circuit reversed the convictions on Clean Water Act jurisdictional grounds, *United States* v. *Robison*, 505 F.3d 1208 (11th Cir. 2007), *reh'g en banc denied* (2008), unless the United States seeks and obtains Supreme Court review of the case.

[15] "A Dangerous Business Revisited," *Frontline* (February 5, 2008).

where there was a knowing violation of a worker safety requirement. Only companies that routinely violate our worker safety laws would be at risk. Those companies should not have a competitive advantage over companies that devote the necessary resources to worker safety, and we want companies that are chronic violators to be worried about criminal prosecution, so that they will comply with the law.

THE PROTECTING AMERICA'S WORKERS ACT

The criminal provisions of the Protecting America's Workers Act would be a substantial improvement over existing law. First, the Protecting America's Workers Act makes most criminal violations of the OSH Act felonies, which is consistent both with the act's emphasis on public health and safety as well as the approach taken in most other Federal regulatory programs. Second, the Protecting America's Workers Act expands the criminal provisions to reach violations that cause serious bodily injury but not death. In this regard, the Protecting America's Workers Act acknowledges the devastation and suffering that can result from serious injuries.

There is no question that criminal violations of the OSH Act should be felonies. It is a felony to commit criminal violations of the environmental laws; it is a felony to commit criminal violations of our hazardous transportation laws and many wildlife laws. Insider trading, customs violations, tax crimes, antitrust violations, food and drug violations, and transportation of stolen vehicles are felonies. False statements, mail and wire fraud, obstruction of justice, perjury, false declarations, and conspiracy in violation of title 18 all are felonies. The list goes on and on, but the point is simple: when criminal worker safety violations occur, they should be felonies too. Otherwise, the message that is sent is that the United States does not care about worker safety.

Upgrading OSH Act violations to felony status also is essential if Congress wants to see meaningful criminal enforcement of our worker safety laws. From 2003 to 2007, only eight criminal cases were brought for violations of the OSH Act. Absent action by Congress, criminal cases will remain infrequent because Federal prosecutors will not devote significant resources to cases that Congress relegates to misdemeanor status. Prosecutors occasionally will accept plea agreements to lesser included misdemeanor charges, but they rarely will initiate complex investigations and prosecutions if the most serious, readily provable offense is a misdemeanor.

There also is no question that criminal prosecution under the OSH Act should be possible even in cases where death does not occur. The Elias case is a classic example of a situation where death did not occur but a criminal prosecution under the OSH Act should have been possible. The fact that the emergency room doctors were able to save Scott Dominguez's life had no bearing on the extent to which Elias violated the worker safety laws or his mental state when he committed those violations. While the fact that a worker dies may be relevant to the sentence that is imposed, it should have no effect on whether a criminal violation has occurred.

The Protecting America's Workers Act could be improved, however, by criminalizing endangerment and knowing violations of the worker safety laws, and by addressing the role of individual liability. The act also should address resources for criminal investigations.

Worker Endangerment: The Protecting America's Workers Act would promote worker safety more effectively, if it were expanded to cover violations that endanger workers. As noted above, there is no difference in the nature of the violation committed by a defendant or the defendant's mental state if a particular outcome occurs, whether that outcome is death, serious bodily injury, or the intervention of some good fortune that prevents any harm. Criminal culpability should be determined based on the risk associated with a defendant's misconduct and the degree to which the defendant is aware of that risk, not whether the risk becomes a reality.

The environmental laws again are instructive, since they make knowing endangerment a crime whenever a defendant commits a Clean Water Act, RCRA, or Clean Air Act violation and "knows at the time that he [or she] thereby places another person in imminent danger of death or serious bodily injury."[16] If a similar provision were added to the Protecting America's Workers Act, the new law would do more to prevent violations that put American workers at risk.

Knowing Violations: The Protecting America's Workers Act also would provide greater protection for workers if "knowing" violations of the worker safety laws that endangered workers (or caused serious bodily injury or death) were covered. Most Federal environmental crimes and most Federal regulatory crime address knowing

[16] 33 U.S.C. § 1319(c)(3)(A) (the Clean Water Act); 42 U.S.C. § 6928(e) (RCRA); and 42 U.S.C. § 7413(c)(5)(A) (the Clean Air Act). The Clean Air Act also contains a negligent endangerment provision. 42 U.S.C. § 7413(c)(4).

violations of the law, which require that the defendants knowingly engage in the conduct that is prescribed.[17] In other words, knowledge of the facts is required (e.g., that a confined space entry is occurring without a confined space entry permit, appropriate testing, and/or safety equipment), but knowledge of the law is not (e.g., that OSHA rules require a confined space entry permit, appropriate testing, and safety equipment).

The problem with the current version of the OSH Act and the Protecting America's Workers Act is that both are limited to "willful" violations. The use of willfulness places the worker safety laws outside the mainstream of Federal criminal law. More importantly, by requiring willfulness, the OSH Act and the Protecting America's Workers Act make ignorance of the law a defense. It is a long-standing principle of American jurisprudence that ignorance of the law is not a defense, and ignorance of the law should not be a defense where the health and safety of America's workers are involved. Employers who are covered by the OSH Act have a duty to know the law. They should not be able to escape criminal liability for knowing violations that place workers at risk by claiming that they did not know that safety measures were required.

Individual Liability: The Protecting America's Workers Act also should address the scope of individual liability for criminal violations of our worker safety laws. As noted above, individual liability plays a central role in any criminal enforcement scheme, since the threat of jail time is arguably the single greatest deterrent provided by the criminal law. Unfortunately, the current version of the OSH Act applies only to "employers," which are defined under the act as "a person engaged in a business affecting commerce who has employees. . . . "[18] The limited definition of employers absolves most, if not all, mid-level managers of criminal responsibility, even though they are likely to be the individuals with knowledge of worker safety violations.

A better approach to individual liability would be to impose criminal responsibility on all supervisory personnel who are responsible for the violations, which can occur in two ways. First, supervisors who are directly involved or order that the misconduct occur should be criminally liable, which is standard in Federal criminal cases. Second, supervisors who (1) know that the conduct is occurring; (2) have the authority to prevent the conduct from occurring; and (3) fail to prevent the conduct should be held responsible under the "responsible corporate officer" doctrine (although its scope extends beyond individuals with corporate titles to include all persons who meet the three elements of the doctrine). The responsible corporate officer doctrine also is used in criminal prosecutions under the environmental laws.[19]

Investigative Resources: A final issue for the Protecting America's Workers Act is the need for law enforcement resources to investigate worker safety crimes. OSHA compliance officers do an outstanding job investigating worker safety violations. They are not criminal investigators, however, and fourth amendment concerns would be raised if they obtained evidence for purposes of a criminal investigation. Moreover, once a criminal investigation begins, witnesses must be interviewed, evidence reviewed, subpoenas issued, and, in some cases, search warrants executed, all of which must be done by law enforcement officials.

During the Justice Department's worker endangerment initiative, we relied upon EPA's criminal investigators to provide law enforcement support. In cases that are not environmental crimes, however, Federal prosecutors would require another source of investigative support. There are two alternatives: first, the Federal Bureau of Investigation ("FBI") could provide agent support; and, second, a criminal investigation division could be established within OSHA. Unfortunately, the FBI has few resources today for crimes other than counterterrorism, and hiring criminal investigators at OSHA would take time and political will that may be lacking. At some point, however, the need for investigative resources for OSH Act violations must be addressed.

CONCLUSION

The criminal provisions of the environmental laws and the OSH Act were enacted during the 1970's when much of the modern regulatory State was created. Within a decade, Congress had changed the environmental laws—which also began as misdemeanor violations—because Federal prosecution resources are generally reserved

[17] *Bryan* v. *United States*, 524 U.S. 184, 191–199 (1998).

[18] 29 U.S.C. § 652(5).

[19] The "responsible corporate office" doctrine originated in a Supreme Court case interpreting the Federal Food, Drug, and Cosmetic Act. *United States* v. *Dotterweich*, 320 U.S. 277 (1943). Its use in the environmental crimes context has been considered by a number of courts, most notably in *United States* v. *Iverson*, 162 F.3d 1015, 1022–25 (9th Cir. 1998).

for felony cases, and Congress recognized that the benefits of a strong environmental crimes program would be lost without felonies.

It has been 20 years since Congress amended the environmental laws, and it is long past the time for Congress to take the same approach to our worker safety laws. Some workers do not have a choice about where they work, either because jobs are scarce in their communities or they have not had the educational opportunities that would enable them to seek higher-paying and safer jobs. But all of us deserve a safe place to work and the ability to come home to our families in good health each night. We can do more to protect our workers and ensure that all companies in the United States honor our best traditions of caring for our workers, neighbors, and friends.

By passing the Protecting America's Workers Act, with the improvements suggested during my testimony today, we can make good on the promise of a safe workplace made 30 years ago when Congress first enacted the Occupational Safety and Health Act.

Thank you again for the opportunity to testify before you today.

The CHAIRMAN. Mr. Hayes.

STATEMENT OF RON HAYES, DIRECTOR, FIGHT PROJECT, FAIRHOPE, AL

Mr. HAYES. Thank you to you great American heroes.

This is 14 years that we are still talking about the same problems. Fourteen years ago, my son Patrick was killed. He did not have to die on the job, but he worked for a company that did not care about human life. The first person I reached out to, after I found out that OSHA was not going to do the job, was Senator Kennedy.

Here is my Western Union telegram, the 3rd of May.

> "OSHA does not want you to know the information I have. Big business does not want you to know the information I have. But my son called out from his grave the information you need to make a decision on OSHA reform. Please contact me."

And you did, Senator Kennedy, and you started working and helping, and we have been working together for years.

In 1999, I met my great friend, Senator Mike Enzi. He and I have been working together on many different things, and we think similar in a lot of issues.

I still believe that OSHA has to have a felony charge. I will always believe that. And make no mistake about it. There is no amount of money that you can place on my child's life, not 1 penny. You could give me a million dollars today and it will not change the fact that Pat is gone. And I miss my little buddy.

But I am going to tell you some ways to make OSHA better. I have said this for 14 years. I have studied OSHA. I have fought with them. I have beat them up. I have worked with them. We have done a lot of good, progressive and positive things. I still believe OSHA has to be a 50/50 mix. I believe OSHA has to be the educator and the enforcer. I am going to give you 12 ideas that I have that is in my testimony that will make OSHA better. And this has come from years of studying OSHA.

We have a systemic problem within OSHA. There are many good people that work in OSHA, but those people are not allowed to expand and work and help the worker. And I am going to promise you right now any worker in this country will tell you OSHA runs interference for big business, and that is it. There is no way to tell

it to you any other way. I am telling you the truth. That is what the average worker in this country knows.

The second thing they know is their life is worth diddly because OSHA is not going to prosecute, and it is ridiculous. We have prosecution in everything else. I can kick a mule in the rear in a park somewhere in this country and I am going to jail. But a small businessman can kill 9 of his 10 employees and still get a 70 percent discount on the penalties. That is wrong, guys. Wrong. I do not care whether you are Republican or Democrat. It is wrong and it is wrong to put these families in a grieving process.

No. 1, make sure we have regular oversight hearings every 6 months and make OSHA appear and talk about the issues raised the past 6 months.

Have OSHA employees trained in criminal investigative techniques.

Have an ombudsman to represent and help the families.

Have a special fatality investigating team.

Take away the discretionary immunity clause that OSHA employees have and open them up to outside scrutiny. Let me go after them. I tell you, we will get the truth.

Tie OSHA's budget to line items to be accomplished each year and make them prove that outcome.

Set aside a special budget amount yearly just for prosecuting and criminal enforcement of bad actors, not the good companies, the bad boys.

Make all OSHA offices follow its policy and procedures.

Make all State OSHA programs be equal to or better than Federal offices, and make sure that they are followed.

Have a special mechanism where we can reopen a case because right now, folks, God cannot even reopen an OSHA case if it is closed. I want Pat's case reopened. And I can tell you if it was reopened, it would have been handled differently. We all know that now.

Have a felony charge for willfully killing an employee and give OSHA some teeth and make them bite.

Have the family present during all OSHA settlement meetings with the companies. I promise you, put me in front of those company lawyers and OSHA ain't going to back down. I will come across that table. They ain't backing down. But they will not allow me in the room with them. Put me in the room with them and see what happens.

Increase the fine structure to send a clear message of the importance of human life and limb. In 1970, when the OSH Act was enacted, yes, the fines were okay. You could buy crystal for 10 cents. You could buy a loaf of bread for less than 50 cents. Thirty-five thousand dollars at that time, that was a lot of money. That sent a clear message. But we are in a different age. You could buy a home then that did not cost as much as a car now.

We have to send a clear message. We need a felony charge, and we need stiffer and stronger penalties.

Thank you.

[The prepared statement of Mr. Hayes follows:]

PREPARED STATEMENT OF RON HAYES

I would like to thank the Senate Labor Committee for allowing me the honor to testify about OSHA issues. For 14 years I have monitored, fought with and tried to change this agency for the better. As of this date we still have many problems and issues to correct. What I have learned over the years is there is no consistency within this agency; the only consistent part of this agency is the failure to protect the Great American worker. There is no honor or justice for the 16 workers that are killed on a daily basis or the thousands of workers injured as well. The very agency given the task of safe guarding the American workplace by Congress fails to do so miserably every day.

My Fight with this agency started in 1993 when our 19-year-old son was killed on the job. Pat was working for a company that had no regard for human life and had a long history with this agency, even the corporate safety director told OSHA his company worked under the roll of the dice plan, we won't change our ways until something bad happens. I can tell you something bad happened and they did change their ways but OSHA didn't do it I had to, there was no help or justice for Pat. OSHA treated us like we were dirt. So Dot and I started our Fight project (Families In Grief Hold Together) to help other families and try and make sense out of this tragic experience. We found along the way many great people to work with and help, in fact, we have helped hundreds of families over the past 14 years, we have given hundreds of safety classes and have presented hundreds of proactive safety speeches. And yes we have helped many OSHA folks as well, both State and Federal. We continue to work toward an agency that will protect and serve the American workers and their families.

Losing a loved one on the job is very difficult to deal with but when the very agency that is supposed to protect them, fails in correcting, investigating and prosecuting the company that killed your loved one, it is even harder to bare. This agency could and should do a better job. But day after day it fails.

Through the years I have heard many excuses of why this agency can't do their job. I know and will always believe it can do a better job. But it will take a huge measure of oversight by this committee and the entire congress to make it work. I truly believe that Congress did not mean for OSHA to fail, neither did Congress want a jack booted terrorist agency. But what has happened over the years, are lack of oversight and a culture of laziness, the only way to make this agency change is to change the way we handle it. Oversight and budget restraints is the way to move this agency forward, I will give you my ideas for change later in this document.

The No. 1 questions I have heard from every family member are: Why can't OSHA do its job?; Why can't OSHA fine the company more?; Why can't OSHA prosecute the company in a criminal manner?; and Why does OSHA reduce the penalties? These are all good and fair questions and someone should give us a straight answer but to date I have not heard one good reason for any reductions of fine for a fatality.

In 1995 while working with NBC Dateline show we told America, using OSHA's records, how the agency only collects 50 cents on every dollar they fine a company, it still happens today and many companies simply never pay their fines at all and because no one seems to check or better yet care, OSHA continues to let violators walk away free. All you have to do is check their records to see how low the fines are and truly how much a life is worth. Every year there are many cases that should be prosecuted for criminal standards but because of the poor investigating techniques and the reluctance of the Justice Department to prosecute, after all it's just a misdemeanor to kill an employee.

These cases fall by the wayside and no one seems to care, except for the family. I can tell you I will never stop trying to get someone to listen and help correct a real travesty of justice we families experience on a daily basis. OSHA can and will be better, I hope I see it in my lifetime and with the help of this great committee we can have justice of all our fallen workers.

I am now going to tell you how you can have a better OSHA, one that is compassionate as well as strong:

1. Make sure we have regular oversight hearings every 6 months. Make OSHA appear and talk about issues raised during the past 6 months.
2. Have OSHA employees trained in criminal investigating techniques.
3. Have an ombudsman to represent and help families.
4. Have a special fatality investigating team.
5. Take away the discretionary immunity clause that OSHA staff have and open these people up to outside scrutiny.
6. Tie OSHA's budget to line items to be accomplished each year and make them prove its outcome.

7. Set aside a special budget amount yearly, just for prosecuting and criminal enforcements of bad actors.
8. Make all OSHA offices follow it's policy and procedures to the letter.
9. Make all State OSHA offices be equal to or better than Federal offices.
10. Have a felony charge for willfully killing an employee, give OSHA some teeth and make them bite.
11. Have the family present during all OSHA settlement meetings with the companies.
12. Increase the fine structure to send a clear message of the importance of human life and limb.

I will close by saying that even though I was thrust into this fight, I am so proud of what has been accomplished over the past 14 years and the many great people I have met and the great work that I have been privileged to see accomplished. It is not all gloom and doom. There are many great people that work tirelessly each and everyday in the OSHA agency to make a difference, there are as in every business bad folks but I feel the good out weighs the bad. When we tap into the good and let these men and women shine, we will see the agency we all need and deserve. I would be glad to answer any and all questions and will be glad to help with any OSHA issue you may have. I am deeply proud of my country and this great committee. Thank you again for this great opportunity.

The CHAIRMAN. Thank you very much, both Mr. Hayes and Mr. Smith. It is very difficult to talk about your loss. We understand that. I think what is enormously impressive certainly to me is the fact that you have taken this incredible loss and really turned it into something that is constructive and positive and useful and helpful to others. I think that certainly makes a very powerful impression on all of us.

Mr. Smith.

STATEMENT OF DONALD COIT SMITH, RESIDENT, TEMPLE, TX

Mr. SMITH. Senator Kennedy, Senator Enzi, Senator Isakson, Senator Murray, thank you for inviting me here today.

My name is Donald Coit Smith. My official title is Division Safety Manager for a polyurethane manufacturer. My specialties include inspecting and investigating to OSHA standards.

I also have the title of father to a son killed on the job.

On March 26, 2005, my son Donald Wilcher Smith, was electrocuted to death at the Anderson Farms chicken processing plant when handling a pump that had 480 volts of electricity flowing through it. He was 22 years, 9 months, and 30 days old.

I do not have the capacity to adequately describe the horror that possesses my soul from my son's death. To lose him caused me to reflect on my faith in God. To this day, I have issues with him over my loss.

However, I have come to believe that he took him for a reason, possibly to foster events that led me here today. To this, I must yield to a higher authority and it is why I do what I do. My mission is to do what it takes to strengthen the law so that what happened to my son will not happen to anyone else.

The penalty for killing my son was $12,000, negotiated down from only $31,000. That is apparently what my son's life was worth to OSHA and what they were willing to force his employer to spend to prevent my son from getting killed.

How do those two penalties given out for my son's death affect me? Well, frankly, mad does not describe it. The system I have worked in for all these years seems to have literally bargained his

life. For one thing, the penalties were no real incentive for compliance. They are, in effect, a minor cost of doing business.

OSHA's mission statement says it is to assure the safety and health of America's workers. Well, let us look at the word "assure." Webster's defines it as to make certain. From what I have seen OSHA does not make anything certain. If I had to change one thing that can make a profound difference in OSHA, it would be to make fines and punishment and enforcement so severe that employers would tremble at the thought of violating the code.

I have dealt with OSHA from the employer standpoint, but let me tell you that dealing with them from a parent's standpoint is dreadful. It started with the inspection of the death facility and getting information on the why and how of my son's death. I am not talking about the obvious fact that he was electrocuted, but how could this have happened and why were the events that led up to his death not avoided?

In my study of the situation from the information I have obtained through raw persistence, the root problems that surfaced were really simple. There was no commitment by the company. There was no deterrent from OSHA. I believe these two items are intertwined.

OSHA documents of law enforcement investigations are kept from families' eyes in part by the Freedom of Information Act. This includes negotiations and meetings, even though families follow procedures in filing documents to have access to these meetings. The meetings I petitioned for access, in accordance to law, took place without me ever being informed. It seems in my case OSHA was not willing to follow the law. While securing production secrets for the good of a company is important to lever any market advantage, when items are covered that could lead to revealing criminal-type actions, the whole legal system and those who made the law should be revised.

Part of that revision should be allowing families of workers killed on the job access to all information available, to include negotiations, meetings, and correspondence. This is why I and other families of workers killed on the job are pushing for a family bill of rights which would include this paragraph.

> "Family members should have the opportunity to interview co-workers and management that have knowledge of the facts of the case and any signed affidavits should be submitted, obtained, and applied by OSHA during investigations."

I will sum with the viewpoint of a parent of a dependant killed on the job. Unless laws are changed to allow prosecution and legal action to be filed by parents outside of workers comp protection and OSHA steps up their inspections with effective punitive actions, we will continue to see job deaths on a regular basis. But knowing exactly what happened to their loved ones is important. Just the knowledge may help. Allowing this knowledge to escape government and legal cover up is a step in helping families of workers killed on the job cope with their loss.

The one thing I know for sure is that my son died and there was nothing I could do about it. The laws of this Nation could not protect him. Fear of violating OSHA standards could not protect him. The value for human life could not protect him.

Thank you very much for this opportunity to have input, and in closing this address, I would like to leave you with what I have told my sons each time we part. I tell them, "te amo, mi hijos." And to this group I say may God bless you and God bless America.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF DONALD COIT SMITH

Good morning Senators and thank you for having me at this hearing.

My name is Donald Coit Smith. My official title is the Division Safety Manager for a polyurethane manufacturer with responsibilities for manufacturing plants in Texas, Oklahoma, and Colorado. This function I've held for over 19 years, with 30 years in the manufacturing field altogether. My specialties include inspecting and investigating to OSHA standards.

I also have the title of father to a son killed on the job.

SECTION ONE

I will begin by addressing my experiences with the Occupational Safety and Health Administration from the employer standpoint. Having been through several OSHA inspections, planned and otherwise, the courtesy and professionalism of those inspectors have been exemplary. I can safely say with reasonable accuracy that the knowledge gleaned from those inspectors has been a worthwhile activity. While reading the Code of Federal Regulations can be sometimes tedious, if not altogether aggravating, the times I've needed interpretations has been met with understanding and patience. I think a salute to those men and women is in order.

I have unfortunately seen citations and fines issued in some of our plants for various things, none of which were major but nonetheless were citations, and are what I consider violations of the law. Those violations were abated post haste, documents drafted reflecting the abatements, and a plea entered for immediate withdrawal of all fines levied. In all cases that I remember, every fine was reduced at least by half and some altogether dismissed.

This "process" is what was explained to me by my mentor as the proper way to deal with OSHA.

But I did not understand why these reductions were so easy to attain. I attributed it to the good nature and "helping hand" of those inspectors in their willingness to "settle" the account with the least possible effort. I also came to the opinion of viewing it as a possible revenue-generating function of the agency. To this date, I am still uncertain of the motivation to settle for less.

I spoke of fines for citations. In my opinion, what the fines represent is called a "cost of doing business" among corporate America. The pittance remitted for those fines seem, well pretty much just that . . . a pittance . . . or maybe more adequately stated, a nuisance settlement. I do not say they aren't justified, but rather the standpoint of OSHA as I've experienced is not one of grit but one of pacification and conciliation. On the OSHA Web site the mission statement in part is as follows: **OSHA's mission is to assure the safety and health of America's workers**. . . .

Let's look at the word "assure" closely. Webster's says it is to "make certain." Senators, OSHA doesn't make certain of anything from what I've been through. If I had to change one thing that could make a profound difference in OSHA, it would be to make fines and punishment so severe that employers would tremble at the thought of violating the code.

SECTION TWO

I told you at the beginning that my second title is father to a son killed on the job. I do not possess the capacity to adequately describe the horror that possesses my soul from my son's death. To lose him caused me to reflect on faith in my God. I still, to this day, have issues with Him over my loss. However, I have come to believe He took him for a reason of His own, possibly to foster events that led me to being here today. To this I must yield to a higher authority and is why I do what I do. I have a mission. That mission is to do what it takes to strengthen the law that will prevent what happened to my son from happening to anyone else. Looking at the statistics on America's job deaths, you'll see that about 6,000 people die in America from job-related activities each year. That is a figure that is 6,000 too many.

You know that I've dealt with OSHA from the employer standpoint, but let me tell you that dealing with them from a parent's standpoint is dreadful. I have been

met with resistance at virtually every corner I've had to turn. It started with the inspection of the death facility and getting information on the why and how of my son's death. I'm not talking about the fact that he was electrocuted . . . that was obvious. But how could this have happened? And why weren't the events that led up to his death avoided? In my study of the situation from the information I've obtained, the root problems that surfaced were really simple and stood out. A blind man could see them in a minute.

There was no commitment. There was no deterrent.

There were citations issued to the offending company by OSHA on my son's death. The original set totaled seven . . . all within 29 CFR 1910.147, which is the OSHA lockout regulation.

After the well-versed and experienced OSHA inspector painstakingly reviewed the case, making absolutely sure what he was indicating were true violations of Federal law, the lawyers for OSHA and the offending company got together and "negotiated" out all but two citations.

The original 7 citations called for a combined penalty of $31,000 with two of the seven citations not having any amount assigned. In the end, a fine of $12,000 was paid. It is interesting to note that, according to the OSHA Web site, one of the original seven citations that had zero dollars assigned was placed at $7,000 in the end, but the violation summary has the total penalty at $5,000. If I hadn't seen the pay off check with my own eyes I wouldn't know for sure myself.

The one thing I know for sure is that my son died and there was nothing I could do about it. The laws of this Nation couldn't protect him. Fear of violating OSHA standards couldn't protect him. The value for human life couldn't protect him.

How do the OSHA penalties given out for my son's death affect me? Well, frankly mad doesn't describe it. And every American should be mad as well. The system I've worked in for all these years, of which I had great faith, seems to have literally bargained his life. For one thing the penalties are no real incentive for compliance. As I said, the penalties are a "cost of doing business." What makes matters worse, if it can be, is the workers comp system which allows the State and the insurance industry (at least in Texas) to benefit from his death. Now to me that's just morally wrong. But that's another issue I'm working on.

SECTION THREE

My presence here is two-fold. To let you know how frustrated I am about OSHA's role in prevention of injury in the workplace and to urge you to do whatever it takes to get this job death atrocity under control.

I would suggest placing severe penalties, both monetarily and criminally, on operations violating Federal standards where job deaths occur. Current legislation is not a deterrent. Any review of the topic will show too well how little attention is paid to it.

SECTION FOUR

Excerpt from The Family Bill of Rights: Item 5:

Family members should have the opportunity to interview co-workers and management that have knowledge of the facts of the case and any signed affidavits should be submitted, obtained, and applied by OSHA during investigations.

"In viewing what is 'right' and what is 'wrong' with how families are treated in job-related deaths, I believe one must look at our current laws. To the naked eye it is obvious the law favors corporate America with regards to keeping information hidden. A closer viewpoint reveals just how this is done. All OSHA documents and local law enforcement investigations are kept from families' eyes (in part) via the Freedom of Information Act. This includes "negotiations" and OSHA/company meetings, even though families follow procedures in filing documents to have access to these meetings. Seems as though, at least in my case, OSHA was not willing to follow the law and no one was there to make them. While securing production secrets for the good of the company is important to lever any market advantage, when items are covered that would lead to revealing criminal-type actions, the whole legal system (and those who made the law) should be revised.

Part of that revision should be allowing families of workers killed on the job access to ALL information available, including negotiations and meetings/correspondence. Even investigating law enforcement is blocked from getting this part (ref: Bell County Sheriffs Office).

However, all this is virtually meaningless unless something is done to allow successful prosecution of negligent employers. Right now the only avenue is "gross" negligence and that is akin to the employer holding a gun to the employee's head and

pulling the trigger. I believe what is happening in this country is just that . . . only the employer's gun is their apathy and greed. And the law protects them!

Now at some point OSHA will render its investigation "public" but that is only a very small and insignificant document redacted to be almost useless. One can read the citations on the Web. This document does not have the interviews and reasons why OSHA "fines" are levied. These interviews go deeper to the root cause of job deaths. They can point to individuals and company policies that contribute/cause the job death. But let's review: the law protects these people. If a company is a subscriber to workers comp, they are untouchable and unless OSHA proves "gross negligence," Federal law keeps them safe. The maximum penalty for gross negligence? A fine and 6 months in jail (for someone . . . and you can bet it's not the boss).

I will sum with the view point of parents of dependents killed on the job. Unless laws are changed to allow prosecution and legal actions to be filed by parents outside of workers comp, protection, we will continue to see job deaths on a regular basis. But knowing exactly what happened to their loved ones is important. Just the knowledge may help. Allowing this knowledge to escape government/legal cover up is a step in helping families of workers killed on the job cope with their loss."

SECTION FIVE: CLOSING

Thank you very much for this opportunity to have input and, in closing this address, I'd like to leave you with what I've told my sons each time we part.

To them I say, "te amo, mi hijos."

And to all of you here I say: May God bless you and may God bless America.

The CHAIRMAN. Thank you very much, Mr. Smith. The best way we can try and respond to all of the loss, your loss and others', is to try and do something about all this. We are going to do what we can on this. You can be assured of that.

Mr. Jenson.

STATEMENT OF GEORGE W. JENSON III, OWNER, JENSON FIRE PROTECTION, INC., ELLICOTT CITY, MD

Mr. JENSON. Good morning, Senator Kennedy, Senator Enzi, Senator Murray, Senator Isakson. Thank you for having me here this morning.

My name is George Wyatt Jenson III, and I am President of Jenson Fire Protection. We are a residential sprinkler contractor based out of Laurel, MD. I often tell my daughter we save lives. We install fire sprinklers to save the lives of families.

I work for a number of large national-level builders throughout the area such as Ryan Homes and NVR, M/I Homes, and Toll Brothers. We provide our services to custom home builders throughout this area, track house builders, condominium builders, townhouse builders. I have approximately 10 employees that travel throughout the Maryland area working on my behalf.

As a small business owner, I am here to tell you that the home building industry is very difficult right now. We have rising home inventories and less and less qualified purchasers to purchase these homes. So it is tough. It is really mean out there.

One of the answers to our situation is not to cut corners or work cheaper but to work smarter, and that is what we try to do. For example, in spite of the fact that this is not the best market, I provide as an owner to all of my employees 100 percent paid health insurance, not HMO, but PPO. I firmly believe that every single employee of mine has the right to take their child to the same doctor that my wife and I take our child to. This is even at the disapproval of my accountant who says, George, you cannot do this. You should not. But that is what we try to do because of my beliefs.

The CHAIRMAN. Mr. Jenson, I want to personally commend you for it. That is not what this hearing is focused on, but you deserve a lot of credit.

Mr. JENSON. Sorry. I will get back on—

The CHAIRMAN. That is all right. If you want to talk about health insurance, it is okay with me.

[Laughter.]

Mr. JENSON. But what I am getting to is the worker safety, and that is going to be providing the best level of insurance. I provide 100 percent tools for all of my guys. I purchase everything from boots to shirts to shoes to coats, everything and anything to provide them the safest environment possible, again, at the cost of profit.

What drives me to do that is not OSHA. I hate to say it out loud, but as a small business owner, OSHA has been in my 20-year career more urban legend than fact. So what drives me are economic incentives. Every single year, January 26, at 12:00 a.m., my liability insurance on my company lapses. At 12:01, the 27th, is when it reenacts. It is one of the most difficult and daunting tasks getting reassigned a new insurance policy. So we have to have no incidences. We have to have no workers comp claims. We have to have no loss of time due to injury on the jobs. So we take an incredibly proactive approach at putting this together.

So I am driven by worker safety from a humanities perspective because, God forbid, I could not imagine looking at myself in the mirror knowing someone got hurt on my dime. Therefore, I spend a lot of my dimes to try to keep that from happening at the risk of profit.

And I will tell you I have been in this business for 20 years. I have been in business on my own—this is my third year. We began to put it in a perspective, $50 per $1,000 in revenue is based on liability, which is completely associated with safety.

This year I celebrated 2 years of incidents free and my rate was cut in half. I am paying $25 per $1,000 in revenue. We do $3 million to $5 million in revenue. It is a lot of money.

So in addition to these things, we try to provide the best of everything for these guys. Again, OSHA is not motivating me for this, and I have never seen an OSHA fine in my life. I do not even know if I know anyone who has ever received an OSHA fine. So, again, to me they have been urban legend.

My builders have policies in place. I have contractual agreements with them that says I have to provide this particular safety device.

The final thing that I will say is that the most daunting task that we have is getting around the Capital Beltway safely, and OSHA does not have any jurisdiction over that beltway. And that is very dangerous. Many of you travel the beltway. There is no guarantee you are going to get home.

OSHA did not tell us, but my insurance company with my annual audit suggested to me, why do we not go with this Nav Track situation. What this does is it is a global positioning device that attaches to my vehicles and it can monitor the speed, it can monitor the turns, whether it was a left-hand or right turn, and I have it all documented on a computer and I have a screen that will show exactly where my vehicles are. So if driver A is doing 80 in a 60, I can address that. I can address that within 5 minutes the mo-

ment I look up on that screen and see that truck moving and know where he is.

OSHA is not causing me to do this. What is causing me to do this is economics. In order to be competitive in the marketplace, I have to keep my risk at an ultimate low. If I do not, it will not be OSHA that puts me out of business. It will be the fact that I cannot get insurance.

So thank you for your time.

[The prepared statement of Mr. Jenson follows:]

PREPARED STATEMENT OF GEORGE W. JENSON III

Good Morning, Senator Kennedy and Senator Enzi. Thank you for inviting me here this morning to talk about the very important issue of worker safety. My name is George W. Jenson III. I am the President of Jenson Fire Protection, Inc., based in Laurel, MD. My company works in the home building industry as a full service provider of fire protection systems. The bulk of our work involves the installation of residential sprinkler systems. We serve a number of national-level builders such as NVR, Ryan Homes, M/I Homes, and Toll Brothers. In addition we provide our services to custom home builders, tract house builders, and condominium builders. I have a workforce of approximately 10 employees that travel and work on construction projects throughout the State of Maryland.

These are not easy times for any small business owner in the home building industry. We are caught between rising home inventories and a decreasing number of qualified purchasers. Our answer to this situation, however, is not to cut corners, or work cheaper. Our answer is to work smarter. For example, in spite of the fact that this is not the best market, I continue to provide my employees with the full range of benefits including largely company-paid health insurance. I continue this practice even during tough times not only because it is the right thing to do—it is also the smart business thing to do. Like every other good businessman, I know that the most valuable asset of my company is the people that work there. I want to recruit and retain the best people I can, because they directly affect my bottom line.

I have the same view when it comes to the safety of my employees on the job. I want to make sure they are working and traveling in safe conditions not only because it's the right thing to do, but because it is also the smart business thing to do.

Concern over a possible inspection by OSHA or Maryland State OSHA, or concern over a fine that might be imposed as a result of an inspection is not what motivates me to make working conditions as safe as I possibly can. Over my years in the business I have rarely seen an inspector on the job site, I have never been cited, and I honestly don't know how much an employer can be fined by the government for a safety violation. However, I devote effort and resources every day to ensuring that my workers are safe. I spend tens of thousands of dollars on safety equipment, make sure my people are properly trained in safety practices, monitor our procedures and work practices, and do everything else I can to make sure our employees work safe. As I said, I do this first and foremost because I am genuinely concerned about my employees. Fortunately I have never had an employee who has been seriously injured or killed on the job. Frankly, I think that is something that I would never recover from if it happened. To me, anyway, there couldn't be anything much worse than feeling you were responsible for something tragic like that.

Apart from my personal feelings, however, I place this emphasis on worker safety for very sound business reasons as well. From general liability, to workers' compensation, my company's insurance premiums are a huge cost of doing business. I cannot operate without insurance coverage, but it is a constant struggle to pay the cost of such insurance. A serious accident, or an on-the-job injury carries the real potential of raising my rates to the point that I could no longer remain in business. From a pure dollars and cents perspective, maintaining a safe workplace does not have much to do with avoiding a government fine. Fines don't put you out of business, but insurance costs do.

As a small businessman, one thing that has helped me a great deal in maintaining a safer workplace is not the government, it has been my own insurance carrier. My carrier doesn't want the huge cost of claims, or the exposure to increased liability any more than I do. Consequently, they are proactive about preventing accidents. At least once a year, my carrier actually comes and audits my work practices, procedures and equipment. They make practical suggestions about how to work safer, eliminate risk, and use training and equipment to make our employees safer. As I

mentioned, I've rarely seen any government safety people on the job site, and I've certainly never seen them involved in this kind of preventative work.

There may be some employers out there that don't care about safety, but I haven't seen them. The truth is if they don't care, they're probably not going to be in business long enough for me to know them. Most all of the employers, large and small, that I deal with day to day are no different than I am. They want a safe workplace because it is right for their employees, and because it makes bottom line sense for their business. We are on the same page with government on this score.

Many of us are struggling these days to keep our heads above water and to keep our employees working. If the government wants to help, it should do what our insurance companies do—help us to work more safely—not just look to fine us when something goes wrong. Thank you.

The CHAIRMAN. Well, thank you very much, Mr. Jenson, for telling us about your own experience and what drives you. You are to be commended. I do not think there is any of us that doubt that it makes a lot of good sense to have good health and safety records from a sound business point of view.

I think the most convincing, of course, for me was Paul O'Neil of Alcoa, a Republican in President Bush's cabinet, who took Alcoa from being one of the great American companies that had a lot of problems in terms of safety issues and made it No. 1, front and center. Paul O'Neil has testified and talked to me about it. I have traveled with him down to Pittsburgh to find out how he did it out in the field, and he says, it is the best business, keeping people healthy, keeping them safe.

Penalties are not going to do it for the Paul O'Neils, but there are people out there that are not as highly motivated as you. And we are asking ourselves, should people that go into the workplace and maybe not have an employer that is as committed as you are risk their lives and their families lives because they have an employer that is not as thoughtful as you. So that is something.

But I thank you for being here and for your message.

I would like to ask Mr. Uhlmann a question. We had Jerry Scannell here, who was the Republican head of OSHA for the first Bush administration. He said that corporate America only pays attention to high fines, threat of jail, and bad publicity. Those were the areas that he said.

In your experience, do you think that there are companies that treat OSHA penalties as just a cost of doing business? And do you know of any examples of where Congress has increased penalties and we saw a meaningful change in corporate behavior? I am probably interested in the second question first.

Mr. UHLMANN. Well, Congress changed the environmental laws and it made a dramatic change in corporate behavior. When the environmental laws were enacted, it was the same time that the Occupational Safety and Health Act was enacted, 1970's. Those laws were all misdemeanors with low penalties. We saw very little law enforcement activity, but many issues with compliance with the environmental laws. In the 1980's, so now over 20 years ago, Congress changed the environmental laws so that criminal provisions were felonies. They increased the possible fines under the civil provisions, and we have seen a dramatic increase in compliance in the United States.

I wish this were different. I used to say at the Justice Department that our job was to put ourselves out of business. Our job was to prosecute enough cases that there no longer would be a need for

anybody to enforce the law. And I wish that every company was like Mr. Jenson's or like Senator Isakson's company or the way Alcoa is today.

But that is not reality. That is not the way it is in the United States. That is not the way it is anywhere in the world. And there are always going to be companies like the one I described during my prepared testimony, and it is not just going to be small companies like Evergreen Resources. I mean, we prosecuted British Petroleum, the largest oil company in the world.

We prosecuted a company called McWane, which is a great example of the first part of your question, Mr. Chairman. You asked were there companies that just paid no attention to OSHA fines, and McWane is probably the best example that I know of. McWane is one of the world's largest pipe manufacturing companies, billions of dollars of sales every year. They could spend the money on compliance, but they chose not to. They chose not to even though they had scores of violations, scores of deaths at their facilities, OSHA was out there all the time. I mean, they were not urban legend at McWane. They were there all the time, but they were issuing these small penalties. There was never any kind of significant enforcement at McWane.

And it was not until we took a look at McWane over the last 5 years, prosecuted them at five different facilities, imposed multimillion dollar fines under the environmental laws, sent their senior management to jail that that has changed McWane, or at least that is what McWane is now saying. They have hired former OSHA directors. They have hired former top Justice officials to advise them about compliance. They are making a real effort at change.

But I just think there are always going to be companies like that, and unless you have a credible enforcement threat at the upper end for the, hopefully, small number of cases where you need it, you are not going to get compliance all the way up and down.

The CHAIRMAN. Well, are we relying on the environmental laws because OSHA will not enforce the laws more aggressively or because OSHA does not have the adequate tools to do the job? Why does the Justice Department not prosecute? Why don't the Justice Department prosecutors want to bring the cases under OSHA?

Mr. UHLMANN. Well, they are misdemeanors, Senator. The Justice Department is a big place, but it still has limited resources, a lot of different law enforcement priorities, and the Justice Department always has and always will emphasize criminal prosecution of the laws that Congress deems the most serious by making them felonies. These are misdemeanors. You are never going to see significant prosecution for worker safety crime under the Occupational Safety and Health Act as long as it remains a misdemeanor. It will not happen. Ten cases in the last 5 years. One of those was done by my old office, by the way, with a $4.2 million fine because we were more aggressive about how we were prosecuting these cases. That was McWane. I think that made a difference. But if these cases remain misdemeanor cases, you are going to see an occasional case like you do today and you are never going to see anything more.

The CHAIRMAN. Peg, is there anything you want to add on this?

Ms. SEMINARIO. I think that David has hit on it. What needs to be done is to make very clear that workers' lives are valued and that there are really serious consequences for actions that put workers in danger. Right now there is nothing in the law that does that. There is no message. So, what happens is that each of these deaths, which are tragedies, really are treated by OSHA sort of as a routine matter, and so there is not the import that needs to be there to send a very clear message that this kind of behavior will not be tolerated.

The CHAIRMAN. And just finally, how have the penalties changed in the last 30 years?

Mr. UHLMANN. Well, they have not changed at all, and that is part of the problem that Mr. Hayes talked about. I mean, a $70,000 fine in 1970 when I was 8 years old was a lot of money, and it is just not a lot of money for companies today that have multimillion dollar profits.

We should be clear. This is not all companies. I am not saying that corporate America does not care about worker safety and does not care about compliance with the law. I think a lot of companies make it a top priority and a lot of companies spend a lot of money on it. And frankly, those companies should not be at a competitive disadvantage against the companies that do not spend the kind of money on compliance that Mr. Jenson described. It is just not right. It is just not fair for some companies to get away with shirking their legal obligations, and yet that is what happens and that is what will continue to happen unless there is a credible threat of criminal prosecution for violations of the worker safety laws.

The CHAIRMAN. Senator Enzi.

Senator ENZI. Thank you, Mr. Chairman. I want to thank everybody for their testimony. It has been helpful. I have written down a lot of suggestions here. I am still trying to work on the comprehensive package.

Ms. Seminario, the Federal Government currently requires drug and alcohol testing for a broad range of workers in the transportation industry. That affected one of my clients when I was doing accounting, and it drove down the number of highway fatalities—or accidents, not fatalities. There is no doubt there are many nontransportation jobs in which drug and alcohol use or impairment pose equally serious risk to workers' lives and safety.

Would your organization support changes in the law that would extend federally mandated drug and alcohol testing to such jobs?

Ms. SEMINARIO. As far as changing the OSHA law to have OSHA get into the business of drug and alcohol testing, we do not think that that is really a good idea.

From our experience, the majority of workplace fatalities are occurring because of unsafe conditions, fires and explosions, as I said. You have got all kinds of injuries occurring in the workplace. And so the majority of OSHA's focus should be on those hazards themselves.

There are industries certainly where the drug use and the alcohol use are more of a problem. Different unions have engaged their collective bargaining and agreed to testing under strict protections for workers. But I think that while that may be a problem in some situations, that is not the major problem, and I think it diverts us

from really focusing on the hazards that are present that need to be dealt with. Again, that is not to minimize that where drug and alcohol use is a problem, that it should not be dealt with, but in my view that is not the major problem. It is not the major source of workplace fatalities or workplace injuries in most workplaces in the United States.

Senator ENZI. As you and Mr. Uhlmann mentioned, we need to look at this comprehensively. In fact, everybody mentioned we need to look at this comprehensively, and I think that is one area that needs some examination.

Ron, I want to thank you for being here today and for all your good work in the field of workplace safety and the way that you comfort families who have gone through the same sort of thing that you had to. You are very good at it and it makes a huge difference to families.

Over the years, we have worked together on this issue, and I believe we need to view this comprehensively. And I noticed your testimony did not mention a number of the provisions that I have urged over the years as being a necessary part, for instance, third party safety consultation, the VPP expansion, drug and alcohol testing, enhanced worker training and compliance assistance, and other preventive measures. Do you still support those measures as a large part of the overall approach, or has your position changed on that?

Mr. HAYES. No. My position has never changed. That is why I said OSHA should be 50/50. Their budget should be split right down the middle.

You know, a few years ago, you and Senator Kennedy took the OSHA budget, when they wanted the $32 million increase, and you split it up, and you asked OSHA to use $16 million to put a consultant in all 67 OSHA offices. Up until that point, OSHA did not like the idea of consultants. They were not going to spend the money to do it. They did not think it was worth it. But in all the hearings I have been to through the years, I heard small businessmen talking about needing help. Well, you all did it. You set it up. You made them do it.

Now it is the best thing since sliced bread. OSHA loves it. We have one person in each office. We actually need two or three now. They are overbooked. But I have seen it work in the State of Alabama and different States. I have seen these consultants go out there and do a great job and we are bringing down those things.

All these other ideas you are talking about, I think everything needs to be on the table. I gave you just a thumbnail sketch of what I think OSHA should look like.

I would like to make one comment to Mr. Jenson. I personally think that he is at a disadvantage because the reason he has so many problems getting insurance and fighting to get insurance is these bad actors we have. I mean, he is doing a great job with his company.

But what do you do with a company that Pat worked for when the corporate safety director said to OSHA the next morning after Pat was killed, our company operates under the roll of the dice philosophy, that being we will not change our ways until something bad happens? Well, guess what, folks. Something bad happened.

Pat died. And they did change their ways, but OSHA did not make them. I made them. OSHA did not do anything to them. In fact, the regional administrator in Atlanta went on record stating he was not even going to issue any citations to this company for killing Pat. Of course, we all know now that was all a mistake and it was a mess with all that.

But how does a family get justice and dignity and honor with an agency that is worthless? I am still a strong supporter of OSHA, always will be, but they have to be made to work. And the only people that is going to make them work is you guys. You are the people that have the control. I cannot make OSHA prosecute somebody. I cannot make the Justice Department. I can help them in a positive way. I can coach them. I can kick them, but I cannot make them do it. You have to write the law that makes them follow it. That is the only way it is going to work.

Thank you.

Senator ENZI. Thank you. My time is expired here. I have lots of questions yet.

The CHAIRMAN. Senator Isakson.

Senator ISAKSON. Thank you, Senator Kennedy. I want to thank you for allowing me to be a cosponsor with you on the amendment recommending what Mr. Hayes did with regard to family involvement prior to adjudication of OSHA. I think that is a tremendous recommendation and one of many that we need to move forward on.

I want to thank you, Mr. Smith, for your compelling testimony and your willingness to be here. It is very helpful to all of us.

Mr. Uhlmann, I made notes, and my writing is as bad as my eyesight, but I want to make sure I got this right. In the Elias case, he knowingly injected cyanide into the environment and then knowingly allowed the employees to be exposed to it. And under OSHA, because nobody died, there could not have been a criminal charge. Is that correct?

Mr. UHLMANN. That is correct, Senator.

Senator ISAKSON. Had one of those people died, there could be a criminal charge?

Mr. UHLMANN. We could have prosecuted him under the Occupational Safety and Health Act, charged him with a 6-month class D misdemeanor, but that would have been it.

Senator ISAKSON. If somebody had died.

Mr. UHLMANN. If somebody had died.

Senator ISAKSON. Under the environmental law, what would have happened?

Mr. UHLMANN. Under the environmental laws, he was charged first with knowing endangerment, and the crime of knowing endangerment means that you commit a violation, in this case, of the hazardous waste laws knowing at the time that you thereby place another person in imminent danger of death or serious bodily injury. That is a felony and the maximum penalty is 15 years in jail.

Senator ISAKSON. If any of you know, correct me, and I imagine Mr. Uhlmann is probably the person and possibly Ms. Seminario. In the 5,703 workplace deaths reported last year, it is my understanding that is the aggregate number of people who die regardless

of the cause of death, as long as they were involved or engaged in the workplace, meaning they could have had an automobile accident or a truck accident driving for you, Mr. Jenson, or could have had a heart attack. And I am not minimizing things here. I am just trying to find out if that is correct. Is that correct?

Ms. SEMINARIO. It is those deaths that are determined to be work-related, and so yes, if it is a transportation, highway incident—the person is engaged in work—yes, it would be work-related. As I said, the figures were revised a couple of weeks ago, and the toll for 2006 is now 5,840 deaths that occurred in 2006. And because of that revision, the numbers were higher but the rate also did not decline.

But what you see, as I said in my testimony, when you look at what is occurring, the highway incidents over the years have basically flat-lined. The homicides have gone way down, which is good news. That is the No. 2 cause. But these problems and these deaths that are occurring from fires and explosions, falls, people being crushed, those are increasing, and that to me is what is really, really troubling. Those things that are well recognized hazards that we have standards for, that we should be able to do something about—those deaths are on the rise.

I agree with Senator Enzi's suggestion that we look in more detail into what is going on, look beyond the totals and look to where this is occurring, what the problems are, what kind of employers, and try to fashion not only some overall solutions but some interventions that go to the heart of those problems.

Senator ISAKSON. I concur with that. What I am trying to get to is sort of a comment Mr. Uhlmann made to Mr. Jenson. You need to compel the person that willfully rolls the dice, as was stated by Mr. Hayes, and waits for something to happen. But you also do not want to throw a net down that takes an employer into a felony position when the employee is on drugs when the incident takes place or the employee willfully violates what is clearly demonstrated as well-trained, well-noticed, well-protected against, etc.

So that is one of the reasons I asked the question because if one of my employees is making a delivery and they have a traffic accident and they violate the law and they unfortunately die, that is a terrible thing, but should the employer be charged with a felony in that case? I think not if there is a contributing and mitigating factor. So I am not necessarily disagreeing with what you all are saying, but I am trying to point out it works both ways.

I agree with Senator Enzi on the drug testing. I had pre-employment drug testing in my company primarily because of the type of accidents that take place with lawn mowers and heavy equipment in the development business if somebody was engaged in taking narcotics or using alcohol. My point is, there have to be compelling factors for the negligence to be the threshold for the felony, I would think.

Mr. UHLMANN. Senator Isakson, I could not agree more. I think accidents happen in life and it is unfortunate when they happen. But criminal prosecution is not appropriate when an accident happens.

We used to say at the Justice Department that accidents waiting for a place to happen are not accidents, and when somebody, I

would say, knowingly rolls the dice, I mean, they know they are rolling the dice, they do not have to know it is illegal to roll the dice. They should not have to know it is illegal to roll the dice. And that is what we are concerned about. We should have the ability in this country in this age, in a modern society like ours, to say that a company that knows it is sending its workers into an unsafe environment, knows it is rolling the dice, knows it is putting workers at risk, that they may face felony prosecution.

The Justice Department does not have a long track record of doing a whole lot of these cases. So I am not too worried they are going to suddenly start criminally prosecuting every case under the sun. But if they were to start trying to criminalize accidents, I mean, judges and juries will bounce them right out of the courtroom. That is not appropriate use of criminal prosecution. That should not happen. It certainly would not have happened under my watch. But it is those egregious cases that we need to be able to address, and right now we cannot.

Mr. HAYES. Senator Isakson, I would like to make a statement, if you do not mind. Coming from someone that lost a loved one in the workplace, I believe these cases have to be on a case-by-case basis. I know a lot of great companies. I know a lot of companies that has had fatalities that were horrible, and they should not have been prosecuted under a felony charge. But you have got companies that have to be, and unless we get a felony charge in the OSHA act—because let me tell you what I did with the State.

There are State laws, reckless endangerment. I went to the State attorney of Florida. It took me about 6 months to make them look at this case. They then requested the OSHA file. OSHA refused to give them a file, even under subpoena, for a year. The State Attorney was telling me the entire time with the evidence that I had given him and the evidence they collected, that they could prosecute under State law. I thought we might have something here because OSHA was not going to do it.

Then the State Attorney had to sign a waiver in order to get Pat's file from the OSHA department stating they would not use any of the OSHA information for prosecution under State law. I was called into the State Attorney's office with my attorney, and they said we have got to drop it because we cannot use any of that evidence and we cannot get collaborative evidence now.

Where did that leave me? I can tell you I have been thrown out of the FBI's office several times trying to get them to look. That ain't going to happen. There is no justice for us when we have a company that is blatant. We have to have the felony charge.

Senator Enzi and I have been talking about this since 1999, and he was really good last year to mark it up in the SAFE Act. Of course, it never made it out of committee.

Senator Kennedy and Senator Corzine a few years ago brought up the felony charge.

We have to have all of you guys and ladies and gentlemen to put your mind together and say let us come up with a plan that is a case-by-case basis where we can go after the bad actors, where we can help the Mr. Jensons in this country, where we can show some justice and dignity and honor to the workers. That is what we have to have. That is why we are here today talking. That is why I am

talking blue in the face for 14 years for the same, identical thing I said 14 years ago. I want to see a felony charge before I die, guys. Just give a father that one little thing.

Senator ISAKSON. Thank you, Mr. Hayes.

Mr. HAYES. Thank you.

Senator ISAKSON. Thank you, Mr. Chairman.

The CHAIRMAN. That was a very eloquent and moving statement.

Let me just ask, Mr. Hayes, in addition to the help for the family, could you just—we talked about the inadequacy of the penalties, but we are also concerned about how OSHA treats and deals with families under these circumstances. This is really my final question. Then maybe Mr. Smith could say a word just about that. We can come back to you.

Mr. HAYES. Well, Charles Jeffers really did a great job in 1999. He asked me to go to the OSHA training institute and do a 1-hour sensitivity training class, and I did. And there is a memorandum and a policy that before any fatality for Federal OSHA, that they review this tape, which does not happen because your regular offices out there, your little area offices—that is their own little power deal. They do not do anything that they are told by the national office. It should be watched. Don and I actually took the tape and produced it and sent it to all 27 OSHA States.

And I will tell you a great success story is the State of Wyoming. In 1999, Senator Mike Enzi asked me to come to Wyoming and talk to his workers comp division in OSHA, and at that time, we set up a special policy for the OSHA office of Wyoming to call the families every 2 weeks. And I helped Johnny Long and Wayne and Steve set it up. And they actually call the families every 2 weeks and talk to them about the file, tell them where they are on inspections. We have had several cases in Wyoming that they could not issue a penalty because it was not an OSHA violation, and the families handled it. They were helpful. They were okay with it.

I only get involved in Wyoming cases if they have a really tough case, but because they show that compassion, they show that respect and dignity, we have gone from four or five calls a year in Wyoming to zero except helping Johnny maybe on a difficult case.

The State of North Carolina has a full-time ombudsperson and Steve handles every case unless it is a very difficult one, and then I get involved there.

We have a lady in Oregon that actually lost her brother on the job, and she helps the families there.

The Federal OSHA will not even give out my pamphlets. They will not hand my pamphlets out to the families. They do not want the families to know. The only way the families get in touch with me from Federal OSHA is if the family starts causing problems calling you folks, calling the media. That is when OSHA says, we better get some help. But by that time, it is a year or 2 years old, and I can help the families but I need to be up there up front.

I got a great case in Oregon a couple years ago—mine safety. Actually they send more families than OSHA does. They sent a family to me, and Rick called me. They buried his son on Monday, and on Tuesday morning, Rick called me and I started working with him. If he was here today, he would tell you that within a week's time, I had him doing certain things that would have taken him a year

on his own. I know the system in and out. If I can get in touch with them, I would be glad to help.

But OSHA does not want me to be in touch with these families because I know too much and I ask too many questions, and I put the eye on them. I put the family to work immediately getting files, getting response from other workers, putting information together, and actually going after them.

We have a perfect example this year in Kentucky. We had two families. One family contacted me in August, and I started helping that family. They got in touch with State OSHA because OSHA had not talked to them before. They started asking them specific questions that I gave them. At the end of that case, the company was fined $150,000. They had 16 citations.

Another case where this family sent a new family to me—their son was killed in April. They never talked to OSHA. They never talked to me until the last month. They got one fine for $4,500 because they did not know what to ask, where to go for help, how to get the information. They did not know enough.

OSHA is not going to help them. In fact, in the State of Kentucky, they do not want to release the file for 6 months because that is another issue with OSHA. If they can keep that file closed for 6 months, you ain't going to reopen it. God can't reopen that case. If I do not get involved early on to help these families get this information, they get nothing. They really get the shaft, guys.

The CHAIRMAN. Well, thank you all very much. This has been very—excuse me.

Senator ENZI. Could I do two more questions?

The CHAIRMAN. Sure.

Senator ENZI. Actually I have got a whole bunch more questions, and I will submit them to each of you because there is more information we need if we are going to do this comprehensively.

Mr. Uhlmann, since you have been involved in some prosecution, I want to know who should be the person that gets prosecuted in one of these OSHA criminal cases. Suppose the person who willfully violated the safety rule resulting in a worker's death is not the owner or the manager, but perhaps a co-worker or a supervisor further down. Would you support criminal prosecution of that individual? And would that be possible?

Mr. UHLMANN. Well, it would not be possible under the current OSHA law. Obviously, the decision about whether to prosecute in a specific case has to be based on the law and based on the facts of that case. Mr. Hayes correctly pointed out prosecutorial decisions have to be made on a case-by-case basis.

But my view is that individuals should be eligible, if you will, for prosecution under the Occupational Safety and Health Act if they knowingly place other people in unsafe working conditions and that conduct places other people at risk of serious bodily injury or death. So I would not limit the liability as it is limited under the current law to the employer, you know, the top corporate official, because in the Elias case, the top corporate official was Mr. Elias, and he was the person giving the orders. But so much of the time, particularly in bigger companies, there are layers and layers of management, and you want to impose the liability at that lower mid-level of management where the action is really happening,

where the illegal conduct is occurring, where the orders are going out. So that is the change I would make in the existing law.

Senator ENZI. Thank you. That clarifies it and that helps a lot.

Mr. Jenson, you mentioned that the insurance company plays a big role in helping keep your workplaces safe. Does your insurance carrier provide any—besides suggestions for what you need to do and I assume following up on them, do they provide any specific rebates or premium reductions based on your implementation of specific safety practices or the purchase or use of safety equipment? Does the State of Maryland offer any tax incentives for what you are doing with the safety-related equipment purchases or safety training or anything like that? And do these things help or would they help if they were implemented?

Mr. JENSON. The State of Maryland offers no sort of tax incentive that I am aware of or have taken advantage of. My insurance company specifically offers a significant reduction in rate for no occurrence, whether it is injury on the job, a risk injury, property damage, or anything like that. So yes. Over the 2 years that we have been in business, we have been able to capture a 50 percent reduction in rate, which is a tremendous amount of savings for us. Still this year, we are heading in the direction of no risk—I mean, no injury, no loss, or anything. So yes, that is privately done, but as far as the State, I am not aware of anything that I have been able to take advantage of from a tax perspective or OSHA I guess.

Senator ENZI. Does the insurance company come through and kind of do a safety audit and suggest things to you?

Mr. JENSON. Absolutely, absolutely. Again, I said that my insurance policy renews every January 27 at 12:01. We began getting together mid-year to kind of do a snapshot of what is happening thus far. They come to my office. They also go to sites randomly. They do not tell me when. I give them an indication of where we are for a week or two. So that begins in the middle of the year, and then they will come around November, as we get ready to submit for new insurance for the following year. So I get audited. I get visits quite frequently, at least twice a year.

Senator ENZI. Thank you. All of this has been very, very helpful, and there are obviously quite a few things that we could do. We never get anything done comprehensively, of course, but maybe we can do some different pieces again that will make things safer. And I think that is our goal.

So I thank you for holding this hearing.

The CHAIRMAN. Mr. Smith, I asked Mr. Hayes who gave a very eloquent statement—I would like to hear from you, if there is something you would like to add.

Mr. SMITH. I do not pretend to be as eloquent as Mr. Hayes.

The CHAIRMAN. You do pretty well.

Mr. SMITH. But I can safely say with reasonable accuracy that had I not had the experience that I have in dealing with OSHA, I would not have been able to go as far in learning more about my son's death. The red tape is just tremendous. Knowing how to surf through that and who to contact for help is a tremendous advantage. And that really should be available to all Americans.

Thank you.

The CHAIRMAN. Very good. Well, you are absolutely right. It should be. We will certainly work on that and other factors.

I want to thank all of you. It has been very instructive, interesting, and informational for us all. I am very grateful to all of you. We may have some other follow-on questions. We will get them to you. Yes, we do have some follow-on questions. We will get those to you soon.

The committee stands in recess.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR OBAMA

Given that yesterday was Workers Memorial Day, it is a fitting time to look at the Department of Labor's performance in enforcing workplace health and safety laws. And the report that the majority issued today proves that the agency is failing on the job. I thank the Chair for holding this hearing and for fulfilling this committee's responsibility to demand that the Administration enforce the laws that protect workers.

For the last 7 years, the Department of Labor has used its regulatory authority, like its sister agencies, as if its mandate were to err on the side of corporations over the public interest—even when its decisions undermine the spirit of the law and puts workers' lives at risk. The report that the majority staff has prepared, "Discounting Death: OSHA's Failure to Punish Safety Violations That Kill Workers," shows that the Occupational Safety and Health Administration (OSHA) systematically imposes small fines on employers, even in cases where safety violations led to a worker's death. And it almost immediately discounts a fine if the employer contests it.

By some estimates, more than 50,000 Americans lose their lives every year due to workplace accidents or job-related illnesses. This unconscionable number of deaths in a single year roughly equals the number of American soldiers lost in battle during the entire 16-year Vietnam War. For American workers, that's about one work-related fatality every 10 minutes—or 137 working families every single day who suffer a terrible tragedy, losing a father or mother, a husband or wife, a son or a daughter. In the report this committee issued today, a few of those husbands and wives and fathers and mothers express their pain of loss and deep distress that OSHA has refused to penalize firms to a level necessary to lead to safer workplaces and discourage additional deaths.

The stories included in the report remind us that there have been cases across the country where employers were cited for serious violations of our workplace safety laws but escaped with a slap on the wrist. OSHA used the informal settlement process to slash fines for employers and with each such action further undermined the deterrence effect of enforcement. And even where minimal fines were imposed, OSHA has failed to collect them in growing numbers each year. Combined, these actions invite employers to cut costs, even if it means putting their employees' lives at risk, with the assurance that the watchdog agency will not bite.

In the face of this Administration's abdication of responsibility, it is clear that Congress must play a greater role in improving workplace health and safety.

OSHA must be reinvigorated so that it can spearhead reductions in workplace fatalities, injuries, and illnesses. Public servants committed to the agency's mission of advancing worker safety and health should lead OSHA and the Mine Safety and Health Administration (MSHA). In addition, Congress must fund both OSHA and MSHA at higher levels to assure that there are more inspectors to reach more of the most dangerous workplaces. Real funding levels for OSHA and MSHA have not increased during the last 7 years,

even though the number of workers and workplaces covered has grown significantly. These new resources would also allow OSHA to build productive relationships and partnerships with business, labor, and non-profit organizations that can reduce injuries and fatalities. Rebuilding the leadership and strengthening the funding of these agencies is a starting place for a sound workplace health and safety policy.

In addition to increasing the enforcement staff to facilitate more inspections of dangerous workplaces, OSHA needs better and more strategic enforcement tools to deter noncompliance among those employers who disregard worker protection in favor of production speed or profit. OSHA can and should also improve how it targets inspections, so that its investigations focus on the employers and industries that pose the greatest risks to workers. It can also adapt its policies to make sure that employers do not avoid health and safety responsibilities by outsourcing work through subcontracting or misclassification of employees. OSHA enforcement should send a clear message to companies and their subcontractors about their fundamental responsibility to provide a safe workplace.

With specific regard to penalty policies, OSHA must have the requisite authority to impose meaningful penalties for noncompliance, particularly in the case of serious, repeat, and egregious violations. The bottom line is that when an employer exposes workers to serious hazards, it should pay fines that are more than just an ordinary cost of doing business.

I support legislation to strengthen OSHA's authority in this regard. The agency's "egregious penalty" policy allows OSHA to penalize the very worst employers with meaningful fines that can run as high as millions of dollars, but the policy is perpetually challenged by employers. The policy should be codified to end these challenges. And the OSH Act must be amended to strengthen criminal penalties—to enable the Department of Justice to prosecute a felony when an employer willfully causes death or serious bodily injury to a worker. Some of these changes are included in S. 1244, the Protecting America's Workers Act, a bill now pending before this committee which I strongly support.

I also support legislation to extend the coverage of the OSH Act to the estimated 8.6 million State and local government employees who presently lack any OSHA protection. These hard-working public servants deserve protection from the hazards they face every day in serving their communities. Notably, the proposed Protecting America's Workers Act, which I have co-sponsored, would effectuate this change.

The major features for a policy to improve workplace health and safety are clear. In fact, many of these changes do not require major legislation, but do require agency leadership and focus. The report issued today shows that this Administration is not taking its leadership responsibilities seriously.

Thank you.

TEXTILE RENTAL SERVICES ASSOCIATION OF AMERICA (TRSA),
MAY 12, 2008.

Hon. EDWARD KENNEDY, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20510.

DEAR MR. CHAIRMAN: On behalf of the Textile Rental Services Association of America (TRSA), I ask that this letter be included in the record for the April 29 Senate Committee on Health, Education, Labor, and Pensions (HELP Committee) hearing titled, "When a Worker Is Killed: Do OSHA Penalties Enhance Workplace Safety?"

Founded in 1912, TRSA is the world's largest textile service industry association, representing more than 1,000 industrial laundry facilities in 24 countries. The membership of TRSA represents a cross-section of the industry, including some of the world's largest textile service companies, along with numerous mid-size and one-plant operations. Our membership includes companies currently doing business in commercial laundering and rental services to commercial, industrial and institutional accounts, as well as firms selling services, equipment and supplies to commercial launderers and linen rental companies.

Promoting safety in our members' facilities has always been one of the core functions of TRSA. For example, safe practices have been a key component of the industry's Production Manufacturing Institute (PMI), which helps to train our maintenance and plant supervisory personnel. (TRSA jointly sponsors PMI with the Uniform Textile Services Association.) Currently, TRSA is developing a program that will help our membership to improve their safety records even more.

Thus, TRSA strongly supports the goal of a safer workplace. We have concerns, however, that increasing the use and severity of criminal penalties may be counterproductive. TRSA therefore urges the HELP Committee to be cautious and to contemplate carefully all of the issues and implications involved if it chooses to move forward on proposals such as S. 1244, the Protecting America's Workers Act. For this reason, TRSA urges you to ask for a review by the Committee on the Judiciary prior to any floor proceedings.

Most importantly, the HELP Committee needs to ensure that criminal penalties continue to rely on objective criteria. An extension of criminal penalties to decisions made in the course of everyday business operations and with no real intent to cause harm could wreak havoc. During an investigation following a workplace accident, for example, managers and workers with some knowledge about what happened may be advised by attorneys not to cooperate with OSHA representatives or other accident investigators. In addition, civil litigation may be delayed until criminal charges are finalized as civil trial judges would be justifiably reluctant to force potential witnesses to waive their rights under the Constitution's fifth amendment.

If the committee chooses to proceed with increasing the application and severity of criminal penalties under the Occupational Safety and Health (OSH) Act, TRSA encourages you and your colleagues to look at the Tire Recall, Enhancement, Accountability and Documentation Act (TREAD Act, P.L. 106–414) and Sec. 406 of the Coast Guard and Maritime Transportation Act of 2004 (P.L. 108–617). Both laws established new and enhanced criminal penalties related to product safety, but Congress granted discretion to the respective department secretaries in their application in order to ensure that investigators were not unnecessarily impeded in uncovering the cause of an accident because of due process rules and protections.

Safety is a paramount concern for TRSA and its member companies. For that reason, we would not like to see congressional action that could hamper investigations and safety improvement in the rare instances of an accident or violation. Should the HELP Committee decide to move forward on increasing criminal penalties for violations of the OSH Act, however, TRSA would look forward to working with you and other committee members to minimize adverse consequences that could result.

Thank you for your consideration of these views. Please let me know if you have any questions or would like additional information. I can be reached at lfineran@trsa.org or (703) 519–0029.

Sincerely,

LAWRENCE A. FINERAN,
Director, Government Affairs, TRSA.

[Whereupon, at 11:32 a.m., the hearing was adjourned.]

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