

PROTECTING AMERICA'S WORKERS ACT: MODERNIZING OSHA PENALTIES

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON

EDUCATION AND LABOR

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PROTECTING AMERICA'S WORKERS ACT: MODERNIZING OSHA PENALTIES

**Tuesday, March 16, 2010
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and Labor
Washington, DC**

The subcommittee met, pursuant to call, at 10:00 a.m., in room 2175, Rayburn House Office Building, Hon. Lynn Woolsey [chairwoman of the subcommittee] presiding.

Present: Representatives Woolsey, Payne, Bishop, Hare, Sablan, and McMorris Rodgers.

Also present: Representatives Titus and Kline.

Staff present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Andra Belknap, Press Assistant; Jody Calemine, General Counsel; Lynn Dondis, Labor Counsel, Subcommittee on Workforce Protections; David Hartzler, Systems Administrator; Sadie Marshall, Chief Clerk; Richard Miller, Senior Labor Policy Advisor; Revae Moran, Detailee, Labor; Alex Nock, Deputy Staff Director; James Schroll, Junior Legislative Associate, Labor; Mark Zuckerman, Staff Director; Kirk Boyle, Minority General Counsel; Ed Gilroy, Minority Director of Workforce Policy; Rob Gregg, Minority Senior Legislative Assistant; Richard Hoar, Minority Professional Staff Member; Alexa Marrero, Minority Communications Director; Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel; and Loren Sweatt, Minority Professional Staff Member.

Chairwoman WOOLSEY. A quorum is present. The hearing of the Subcommittee on the Workforce Protections will come to order.

At this time, I yield myself as much time as I require for my opening remarks.

Thank you all for being here. This is an exciting day. This morning's legislative hearing will examine the penalty provisions of H.R. 2067, the Protecting America's Workers Act. And we call it PAWA. So we will probably refer to that throughout our—this morning in the hearing. And we are also talking about the changes which have been circulated to further improve the bill since it has been introduced.

Since I became chair of this subcommittee over 2 years ago, I have made it my top priority to keep the promise of the Occupational Safety and Health Act enacted 40 years ago to protect the

health and safety of American workers. There is no question that this law has saved hundreds of thousands of lives. And countless others have avoided preventable illnesses and injuries.

But we can't claim victory, because over 5,000 workers a year are still killed on the job. Fifty thousand die from occupational disease. And millions of others become seriously injured or ill.

This subcommittee, and Chairman Miller's full committee, have held numerous hearings on OSHA's performance in carrying out the mandates of the OSH Act. Members have heard story after story of worker tragedies, and of deaths and injuries that could have been prevented if the employer had followed OSHA standards; and if OSHA had effectively enforced the law.

But now we have a new sheriff in town, with Secretary Solis. And when she says she wants "good jobs for everyone," she means that those jobs must be safe jobs. Already, under Assistant Secretary Michaels' leadership, OSHA is addressing some of the very problems that we have uncovered. So OSHA has started down the right path.

And both Chairman Miller and I will continue to perform our oversight function over the agency. However, there are limitations on OSHA's effectiveness unless Congress makes fundamental changes to the OSH Act, which is a law that has not been updated since it was first passed in 1970. That is why, last year, I reintroduced H.R. 2067, the Protecting America's Workers Act. H.R. 2067 addresses three major weaknesses in the OSH Act.

First, it provides OSHA coverage to the over 8.5 million state, county and municipal workers who currently have limited or no protection from safety and health hazards at work. Second, the bill makes changes to OSHA's "whistleblower" provisions, because today's process is inadequate—putting off decisions and depriving workers of due process. Finally, the bill brings OSHA enforcement into the 21st century by updating civil and criminal penalties. And that is what today's hearing is about—civil and criminal penalty provisions in section 310 and 311 of PAWA, as well as the proposed changes to the introduced bill.

Penalties are critical to the effective enforcement of the OSH Act, otherwise they become meaningless. OSHA civil penalties have not been increased in two decades, and they are extremely low. In addition, the OSH Act is exempted from the Inflation Adjustment Act, keeping penalties much, much lower than they would be if they had been adjusted for inflation over time.

And while OSHA can implement policy changes to increase the size of some penalties, it is clear that without a change in the penalty structure of the statute, they will never be high enough to be an effective deterrent, especially for those employers who are repeat violators. And the penalties under the OSH Act pale in comparison to penalties under other laws.

For example, under the Mine Act, egregious violations can carry civil penalties up to \$250,000. The penalty increases in PAWA are modest, and are roughly the same had the penalties been adjusted for inflation after they were updated in 1990. And these higher penalties also apply to OSHA state plans.

One of the critical features of PAWA's civil penalty structure is that it establishes significant minimum and maximum civil pen-

alties for violations which result in the death of a worker. Under current law, this is not the case. And as a result, when a worker dies due to an employer's violation, it is shocking how low the penalties turn out to be without a mandatory minimum.

In January 2009, Robert Fitch fell 84 feet to his death at an Archer Daniels Midland plant in Lincoln, Nebraska. The final settlement agreement reached by OSHA for this preventable death was exactly zero. This is unacceptable.

PAWA also makes needed changes to the criminal penalties, including making top management liable for criminal misconduct. Under current law, only corporations, and not corporate officials, can be criminally liable for willful violations; and this liability is limited only to cases where a worker has died.

For example, a worker in Idaho suffered permanent brain damage because, upon the orders of his employer, he entered a tank of cyanide waste without the proper protective equipment, in violation of OSHA's confined-space rules. The owner was successfully prosecuted under the environmental laws, and he was sentenced to 17 years in prison. But he could not be prosecuted under the OSH Act because the worker didn't die. But even if the owner had been prosecuted under the OSH Act, he would have been guilty of a misdemeanor, and serve only 6 months in jail.

The Justice Department has advised us that criminal misdemeanors under the OSH Act are rarely prosecuted. PAWA changes that. Employers, including top executives, can serve up to 10 years in jail for criminal behavior which causes the death or serious injury of a worker.

Congress needs to put teeth into these penalties so that employers are held accountable for their bad behavior, and so that they no longer view penalties as part of the cost of doing business.

I look forward to hearing from our witnesses. But before I introduce the panel, I recognize Ranking Member Kline for his opening statement.

[The statement of Ms. Woolsey follows:]

**Prepared Statement of Hon. Lynn C. Woolsey, Chairwoman,
Subcommittee on Workforce Protections**

This morning's legislative hearing will examine the penalty provisions of H.R. 2067, the Protecting America's Workers Act (PAWA), and the proposed changes, which have been circulated to further improve the bill.

Since I became chair of this subcommittee over two years ago, I have made it my top priority to keep

The promise of the occupational safety and health act enacted 40 years ago * * * to protect the health and safety of American workers.

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But we cannot claim victory because over 5,000 workers a year are still killed on the job, 50,000 die from occupational disease, and millions of others become seriously ill or injured.

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Second, the bill makes changes to OSHA's whistleblower provisions because today's process is inadequate; putting off decisions and depriving workers of due process.

Finally, the bill brings OSHA enforcement into the 21st century, by updating civil and criminal penalties.

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I look forward to hearing from our witnesses, but before I introduce panel one, I recognize ranking member McMorris-Rodgers for her opening statement.

Mr. KLINE. Thank you, Madam Chair.
Good morning to all present.
Welcome to our witnesses.

This morning's hearing is, in congressional terms, a legislative hearing. In other words, it is a direct examination and review of a particular piece of legislation—in this case, the Protecting America's Workers Act. This bill was introduced in April of last year and, since that time, has undergone some fairly substantial revisions. Through today's hearing, we will have an opportunity to review the proposed changes and, I hope, we will have a discussion about what other changes may be needed.

The title of this hearing and the substance of the legislation is described as "Modernizing OSHA Penalties." Certainly, it is worthwhile to review penalties under the Occupational Safety and Health Act, but I would suggest that a discussion of workplace safety is incomplete if it only focuses on penalties.

Witnesses in prior hearings have suggested that the Occupational Safety and Health Administration must achieve a balance between compliance assistance and enforcements. No one is suggesting a 50-50 split. But a single-minded focus on punishing individuals after accidents occur is simply the wrong direction for federal policy.

More appropriately, the focus of OSHA should be on preventing the accidents rather than merely responding to them. A proactive safety approach is one that protects employees from hazards and prevents accidents from happening.

The outliers for whom safety is not a concern will find no sympathy from anybody on this committee. As with all federal policy, when it comes to workplace safety, we must guard against unintended consequences. For instance, one consequence of upending 40 years of legal precedent may be a dramatic increase in litigation over safety and health citations. Litigations helps no one. Employers will be forced to spend resources in the courtroom, rather than on safety in the work room.

So I think we should ask: Is there another way—a better way that would not increase litigation? It is an issue we ought to explore today.

There are other issues that merit further discussion as well. For instance, some have tried to draw parallels between the Mine Act and the OSH Act. And while it is true that both laws address workplace health, there are important differences between these two statutes.

For example, the discussion draft before us today would require hazard abatement similar to the Mine Act; yet, there has been very little discussion about the fact that mine inspectors are required to have requisite experience before becoming inspectors. OSHA does not have an equivalent experience requirement.

Many of the performance standards in current regulation applied highly sophisticated and complex processes. "No inspector training or experience" may be an area that needs to be more fully examined.

I would close with a warning about one final unintended consequence—the danger that we could harm the very workers we are trying to help. Particularly in today’s economic climate, we must ensure efforts to enhance workplaces do not lead to job losses. Policies that impact our workplaces virtually always carry with them a cost, and we must be mindful not to impose any unnecessary or unnecessarily costly new requirements.

Workplace safety is an imperative, and every employer must abide by safety and health standards. But Congress should not make it more difficult to keep our workplaces safe and efficient by inserting unnecessary or overly punitive hurdles.

Again, I thank the chair for holding this hearing, and our witnesses for sharing their expertise. And I yield back.

[The statement of Mr. Kline follows:]

**Prepared Statement of Hon. John Kline, Senior Republican Member,
Committee on Education and Labor**

Thank you Madam Chair. Good morning and welcome to all the witnesses.

This morning’s hearing is, in congressional terms, a “legislative hearing”—in other words, it’s a direct examination and review of a particular piece of legislation, in this case the Protecting America’s Workers Act. This bill was introduced in April of last year and, since that time, has undergone some fairly substantial revisions. Through today’s hearing, we’ll have an opportunity to review the proposed changes and—I hope—we’ll have a discussion about what other changes may be needed.

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As with all federal policy, when it comes to workplace safety we must guard against unintended consequences. For instance, one consequence of upending 40 years of legal precedent may be a dramatic increase in litigation over safety and health citations. Litigation helps no one—employers would be forced to spend resources in the court room rather than on safety in the work room. So I think we should ask: Is there another way, a better way, that would not increase litigation? It’s an issue we ought to explore today.

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I would close with a warning about one final unintended consequence—the danger that we could harm the very workers we’re trying to help. Particularly in today’s economic climate, we must ensure efforts to enhance workplaces do not lead to job losses. Policies that impact our workplaces virtually always carry with them a cost, and we must be mindful not to impose any unnecessary or unnecessarily costly new requirements. Workplace safety is an imperative, and every employer must abide by safety and health standards. But Congress should not make it more difficult to keep our workplaces safe and efficient by inserting unnecessary or overly punitive hurdles.

Again, I thank the gentle lady for holding this hearing and our witnesses for sharing their expertise. I yield back.

Chairwoman WOOLSEY. Thank you, Congressman Kline.

Without objection, the members will have 14 days to submit additional materials for the hearing record.

I would like to introduce—we are going to have two panels. And I am going to introduce the first panel, and then we will hear from then and have our questions. Then we will have panel two.

I would like to introduce our very distinguished guest on panel one this morning. And I would like to welcome all of our witnesses. In this order—we will hear from the Honorable David Michaels, who is the assistant secretary of the Occupational Safety and Health Administration.

Before coming to OSHA in 2009, David Michaels was professor of environmental and occupational health at the George Washington University School of Public Health and Health Services. From 1998 to 2002, Dr. Michaels served as assistant secretary of energy for environmental safety and health. He received a master in public health and PhD from Columbia University, and a B.A. from City College of New York.

Following Dr. Michaels, Mr. John Cruden, who has served as the deputy assistant attorney general for the environment and natural resources division—of what—of the Department of Justice, since 1995. He is responsible for supervising a wide variety of environmental litigations, including the Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act.

Prior to his role as deputy, he served as chief of the division's environmental enforcement section, and as special counsel to the assistant attorney general for the civil division. John Cruden earned his J.D. from the University of Santa Clara, a master's degree in government and foreign affairs at the University of Virginia, and a B.S. from the U.S. Military Academy.

We will begin with you, Mr. Michaels.

Oh, wait a minute. I am sorry. I have to tell you something that I—you all know, so I didn't—I forgot to do this. You know about the lighting system. So when you get started, the lights are green and, by the time they turn yellow, you have 1 minute left of your 5 minutes. We promise not to cut you off. The floor doesn't open. You don't disappear. But when you see the yellow light—orange light—if you could start wrapping up, we would appreciate it. Then, we will hear the rest of what you have to say in our questions.

Thank you.

Now, Mr. Michaels?

**STATEMENT OF DAVID MICHAELS, ASSISTANT SECRETARY,
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
U.S. DEPARTMENT OF LABOR**

Mr. MICHAELS. Chairwoman Woolsey, Ranking Member Kline, members of the subcommittee, thank you for the opportunity to share the Department of Labor's views on the Protecting America's Worker Act, particularly the issue of enhanced penalties.

I am pleased to return to this committee having served as a Robert Wood Johnson health-policy fellow on the committee staff in 1994. Secretary Hilda Solis' vision for the Department of Labor is "good jobs for everyone." Good jobs are safe jobs. And the stronger OSHA—and stronger OSHA enforcement will save lives.

In 2001, a tank of sulfuric acid exploded at a Delaware oil refinery, killing a worker named Jeff Davis. His body literally dissolved in the acid. The OSHA penalty was only \$175,000; yet, in the same incidence, thousands of dead fish and crabs were discovered, allowing an EPA Clean Water Act citation of \$10 million. How can we tell Jeff Davis' wife and his five children that the penalty for killing fish and crabs is 50 times higher than the penalty for killing their husband and father?

Most employers want to do the right thing. But many others will comply with OSHA rules only if there are strong incentives to do so. OSHA's current penalties are often not large enough to provide adequate incentives, and they are very low in comparison with those of other public-health agencies.

Currently, serious violations—those that pose a substantial probability of death or serious physical harm—are subject to a maximum civil penalty of only \$7,000. Clearly, OSHA can never put a price on a worker's life. It is vital that OSHA be empowered to send a strong message, especially when a life is needlessly lost.

Despite inflation, monetary penalties for OSHA violations have been increased only once in 40 years. Unscrupulous employers often consider it more cost-effective to pay the minimum OSHA penalty than to correct the underlying hazard. OSHA criminal penalties are also inadequate for deterring the most egregious employer wrongdoing. The maximum period of incarceration upon conviction for a knowing violation that costs a workers life is 6 months in jail, making these crimes a mere misdemeanor.

Serious OSHA violations that result in death or serious bodily injury should be felonies like insider trading, tax crimes or customs and anti-trust violations. Employers who refuse to comply with safety and health standards—determining, rather, that it is worth the financial risk, will think again if there is a chance they will go to jail.

We also recognize that OSHA has a role to play in using our own authority to reevaluate penalty levels. OSHA has not adjusted its penalty formulas for over the last 2 decades—over the last 2 decades; therefore, in addition to our strong support of the necessary statutory changes in the—that this legislation would make, we are planning to implement long-overdue internal changes in our penalty policies. However, these steps are no substitute for the meaningful and substantial penalty changes including in this—included in this legislation.

Good jobs are also jobs where workers' voices are part of the conversation about creating safe workplaces. If employees fear they will lose their jobs or be otherwise retaliated against for actively participating in safety and health activities, they are not likely to do so. Achieving the goal of "good jobs for everyone" includes strengthening workers' voices in the workplace. Without robust job protections, these voices may be silenced. PAWA strengthens these protections.

PAWA also includes a number of sections that would expand the rights of victims' families. For the past 15 years, OSHA has included families in the investigation process. This legislation would make this policy permanent. No one is affected more than the—more by a workplace tragedy than workers and their families. So we fully recognize and appreciate their desire to be more involved in the remedial process.

One of the most significant changes to the OSH Act is the provision which requires abatement of serious, willful and repeat hazards during the contest periods. OSHA believes this protection is critical. Too often hazards remain uncorrected, and workers remain at risk because of a lengthy contest proceeding.

Madam Chair, I appreciate the thought and effort that has gone into PAWA. The administration supports both the goals of PAWA and many other specific provisions. We note that several sections would present significant budgetary and workload challenges for OSHA and OSHA's support agencies, including the solicitor's office and the review commission.

I look forward to working with you to ensure that we address these issues in the right way. Thank you, again, for the opportunity to testify today. I request that my written testimony be entered into the record, and I am happy to answer your questions.

[The statement of Mr. Michaels follows:]

**Prepared Statement of Hon. David Michaels, Assistant Secretary for
Occupational Safety and Health, U.S. Department of Labor**

Chair Woolsey, Ranking Member McMorris Rodgers, Members of the Subcommittee, thank you for the opportunity today to share the Department of Labor's views on the Protecting America's Workers Act (PAWA), particularly the issue of enhanced penalties.

Until 1970 there was no national guarantee that workers throughout America would be protected from workplace hazards. In that year the Congress enacted a powerful and far-reaching law—the Occupational Safety and Health Act of 1970 (OSH Act). The results of this law speak for themselves. The annual injury/illness rate among American workers has decreased by 65 percent since 1973, and while there are many contributing factors, the OSH Act is unquestionably among them. Employers, unions, academia, and private safety and health organizations pay a great deal more attention to worker protection today than they did prior to enactment of this landmark legislation.

But we cannot rest on our laurels. If we are to fulfill the Department's goal of providing good jobs for everyone, we must make even more progress. Good jobs are safe jobs, and American workers still face unacceptable hazards. More than 5,000 workers are killed on the job in America each year, more than 4 million are injured, and thousands more will become ill in later years from present occupational exposures. Moreover, the workplaces of 2010 are not those of 1970: the law must change as our workplaces have changed. The vast majority of America's environmental and public health laws have undergone significant transformations since they were enacted in the 1960s and 70s, while the OSH Act has seen only minor amendments. As a British statesman once remarked, "The only human institution which rejects progress is the cemetery."

I therefore appreciate the work of this Subcommittee in proposing legislation that would strengthen the law and significantly increase OSHA's ability to protect American workers. The Administration strongly supports the goals of the Protecting America's Workers Act (PAWA). Many provisions in the Act would enable OSHA more effectively to accomplish its mission to "assure safe and healthful working conditions for working men and women," which is also a key component of Secretary of Labor Solis' vision of Good Jobs for Everyone. Jobs cannot be good jobs unless they are safe jobs. Stronger OSHA enforcement will save lives.

Because OSHA can visit only a limited number of workplaces each year we need a stronger OSH Act to leverage our resources to encourage compliance by employers. We need to make employers who ignore real hazards to their workers' safety and

health think again. We need to bring OSHA into the 21st century. PAWA includes critical provisions that deal with significant weaknesses in the current law and more adequately ensure the safety and health of America's workers. Today, my testimony will focus on the key issue of enhanced penalties for occupational safety and health violations, and then turn to some of the bill's other provisions.

Safe jobs exist only when employers have adequate incentives to comply with OSHA's requirements. Those incentives are affected, in turn, by both the magnitude and the likelihood of penalties. Swift, certain and meaningful penalties provide an important incentive to "do the right thing." However, OSHA's current penalties are not large enough to provide adequate incentives. Currently, serious violations—those that pose a substantial probability of death or serious physical harm to workers—are subject to a maximum civil penalty of only \$7,000. Let me emphasize that—a violation that causes a "substantial probability of death—or serious physical harm" brings a maximum penalty of only \$7,000. Willful and repeated violations carry a maximum penalty of only \$70,000 and willful violations a minimum of \$5,000.

Currently, the average OSHA penalty is only around \$1,000. The median initial penalty proposed for all investigations in cases where a worker was killed conducted in FY 2007 was just \$5,900. Clearly, OSHA can never put a price on a worker's life and that is not the purpose of penalties—even in fatality cases. OSHA must, however, be empowered to send a stronger message in cases where a life is needlessly lost than the message that a \$5,900 penalty sends. We must not forget that a stronger message means stronger deterrence—and can therefore save lives.

In 2008, testimony before a Senate committee revealed numerous examples of small fines in very serious cases. In New Jersey an immigrant worker was killed in a fall. The original penalty against his employer for failing to provide fall protection was \$2,000 which was later reduced to \$1,400. In Michigan in 2006 the initial penalty against an energy cooperative was just \$4,200 when an employee died after a backhoe hit a gas line that exploded. The employer had violated standards for excavation and safety programs.

Monetary penalties for violations of the OSH Act have been increased only once in 40 years despite inflation during that period. Unscrupulous employers often consider it more cost effective to pay the minimal OSHA penalty and continue to operate an unsafe workplace than to correct the underlying health and safety problem. The current penalties do not provide an adequate deterrent. This is apparent when compared to penalties that other agencies are allowed to assess.

For example, the Department of Agriculture is authorized to impose a fine of up to \$130,000 on milk processors for willful violations of the Fluid Milk Promotion Act, which include refusal to pay fees and assessments to help advertise and research fluid milk products. The Federal Communications Commission can fine a TV or radio station up to \$325,000 for indecent content. The Environmental Protection Agency can impose a penalty of \$270,000 for violations of the Clean Air Act and a penalty of \$1 million for attempting to tamper with a public water system. Yet, the maximum civil penalty OSHA may impose when a hard-working man or woman is killed on the job—even when the death is caused by a willful violation of an OSHA requirement—is \$70,000.

In 2001 a tank full of sulphuric acid exploded at a Motiva refinery. A worker was killed and his body literally dissolved. The OSHA penalty was only \$175,000. Yet, in the same incident, thousands of dead fish and crabs were discovered, allowing an EPA Clean Water Act violation amounting to \$10 million—50 times higher.

PAWA makes much needed increases in both civil and criminal penalties for every type of violation of the OSH Act and would increase penalties for willful or repeat violations that involve a fatality to as much as \$250,000. These increases are not inappropriately large. In fact, for most violations, they raise penalties only to the level where they will have the same value, accounting for inflation, as they had in 1990.

In order to ensure that the effect of the newly increased penalties do not degrade in the same way, PAWA also provides for inflation adjustments for civil penalties based on increases or decreases in the Consumer Price Index (CPI). Unlike most other Federal enforcement agencies, the OSH Act has been 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%. PAWA's penalty increases are necessary to create at least the same deterrent that Congress originally intended when it passed the OSH Act almost 40 years ago. Simply put, OSHA penalties must be increased to provide a real disincentive for employers not to accept injuries and worker deaths as a cost of doing business.

We also recognize that OSHA has a role to play in using our own authority to establish penalty levels. OSHA has not adjusted its own penalty formulas over the last two decades. Therefore, in addition to our strong support of the necessary statutory changes that PAWA would make to OSHA's penalty structure, we are planning to implement long-overdue internal changes in our penalty proposal policies. These changes will be well-advertised so that all employers are aware of the new policies. However, OSHA believes any administrative changes we are able to make would still be inadequate to compel many employers to abate serious hazards. These steps are an effort to do the best with the outdated, antiquated tools we have. But we can only do so much within the constraints of the current OSH Act. This administrative effort is no substitute for the meaningful and substantial penalty changes included in PAWA.

Criminal penalties in the OSH Act are also inadequate for deterring the most egregious employer wrongdoing. Under the OSH 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 for a violation that costs a worker's life is six months in jail, making these crimes a misdemeanor.

The criminal penalty provisions of the OSH Act have never been updated since the law was enacted in 1970 and are weaker than virtually every other safety and health and environmental law. Most of these other Federal laws have 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. There is no prerequisite in these laws for a death or serious injury to occur. Other federal laws provide for a 20 year maximum jail sentence for dealing with counterfeit obligations or money, or mail fraud; and for a life sentence for operating certain types of criminal financial enterprises.

Simply put, serious violations of the OSH Act that result in death or serious bodily injury should be felonies like insider trading, tax crimes, customs violations and anti-trust violations.

Nothing focuses attention like the possibility of going to jail. Unscrupulous employers who refuse to comply with safety and health standards as an economic calculus will think again if there is a chance that they will go to jail for ignoring their responsibilities to their workers.

PAWA would amend the OSH Act to change the burden of proof from "willfully" to "knowingly." Specifically, Section 311 states that any employer who "knowingly" violates any standard, rule, or order and that violation results in the death of an employee is subject to a fine and not more than 10 years in prison. Most federal environmental crimes and most federal regulatory crime use "knowingly," rather than "willfully." This would ease the burden of proof currently required for a criminal violation under the OSH Act because it is easier to prove a knowing violation than to establish willfulness under current cases.

In addition, potential criminal liability is expanded to any responsible corporate officer or director, which addresses Federal court rulings that limited liability for OSHA violations to corporations and high-level corporate officials. This section is aimed at the small minority of corporate officials who have behaved irresponsibly, resulting in the death or maiming of their employees. OSHA currently has no penalties adequate to deter such conduct. The possibility of incarceration is a powerful deterrent. Twenty years ago the Inspector General of DOL noted that:

There is a visible odium that accrues to being indicted, convicted and jailed. I submit that it is the specter of precisely this kind of disgrace which will add to the credible deterrent at the Department of Labor.

Because OSHA's criminal penalties are considered misdemeanors Federal prosecutors often regard these cases as a poor use of scarce time and resources. Since passage of the OSH Act in 1970 fewer than 100 cases have been prosecuted while more than 300,000 workers have died from on-the-job injuries.

In the 1980s, the State of Texas and Los Angeles County demonstrated that aggressive criminal law enforcement procedures improved occupational safety and health. In Texas, the number of trenching fatalities dropped dramatically when one county adopted a well-publicized criminal prosecution effort. In addition, OSHA continues to work with New York State's prosecutors on similar prosecutions, even as recently as the Deutsche Bank case. The Subcommittee has wisely included a provision stating that nothing in PAWA shall preclude a state or local law enforcement agency from conducting criminal prosecutions in accordance with its own laws.

In addition to making much needed changes to the OSH Act's penalty provisions, PAWA would cover all public employees. There are more than 10 million Federal,

State and local government employees who do not receive the full range of protections from the OSH Act. According to 2008 BLS data, the total recordable case injury and illness incidence rate for state government employees was 21% higher than the private sector rate. The rate for local government employees was 79% higher. Clearly, some public sector jobs are extremely dangerous. Public employees deserve to be safe on the job, just as private-sector employees do.

Twenty-six states and one territory now provide federally approved OSHA coverage to their public employees. Nonetheless, in 2008 there were more than 277,000 injuries and illnesses with days away from work among state and local governmental employees.

I applaud the Subcommittee for addressing these issues. Realizing the fiscal difficulties that many states now face we would like to have further discussions with the committee about this section.

Good jobs are also jobs where workers' voices are part of the conversation about creating safe workplaces. The OSH Act was one of the first safety and health laws to contain a provision for protecting whistleblowers—section 11(c). This provision protects employees from discrimination and retaliation when they report safety and health hazards or exercise other rights under the OSH Act. This protection is fundamental to OSHA's capability for safeguarding the workforce. The creators of the OSH Act knew that OSHA would not be able to be at every workplace at all times, so the Act was constructed to encourage worker participation and rely heavily on workers to act as OSHA's "eyes and ears" in identifying hazards at their workplaces. If employees fear that they will lose their jobs or be otherwise retaliated against for actively participating in safety and health activities, they are not likely to do so. Achieving the goal of Good Jobs for Everyone includes strengthening workers' voices in their workplaces. Without robust job protections, these voices may be silenced.

In the 40 years since the OSH Act became law Congress has enacted increasingly expansive whistleblower protections, leaving section 11(c) in significant ways the least protective of the 17 whistleblower statutes administered by OSHA. There has been bi-partisan consensus for the past twenty-five years on the need for uniform whistleblower protections for workers in every industry. This Administration supports uniformity as well.

Notable weaknesses in section 11(c) include: inadequate time for employees to file complaints, lack of a statutory right of appeal; lack of a private right of action; and OSHA's lack of authority to issue findings and preliminary orders, so that a complainant's only chance to prevail is through the Federal Government filing an action in U.S. District Court. PAWA would strengthen section 11(c) by including the full range of procedures and remedies available under the more modern statutes and by codifying certain provisions, such as exemplary damages and the right to refuse to work, which have been available but not expressly authorized by current statute. There is no reason that workers speaking up about threats to their safety and health should enjoy less protection than workers speaking up about securities fraud or transportation hazards.

PAWA strengthens these protections. It makes explicit that a worker may not be retaliated against for reporting injuries, illnesses or unsafe conditions to employers or to a safety and health committee, or for refusing to perform a task that the worker reasonably believes could result in serious injury or illness. These protections are already implicit in the OSH Act, but PAWA would leave no doubt in employers' or employees' minds about these rights.

PAWA is an improvement on OSHA's current law in significant ways. It protects employees who refuse work because they fear harm to other workers. It eliminates the requirements that no reasonable alternative to a work refusal exist, and that there be no time to contact OSHA. It requires only that a reasonable person faced with the same circumstances would conclude that performing such duties would result in serious injury or illness to him or herself, or other workers, and when practical, the employee has tried to obtain a remedy from the employer.

Additionally, PAWA would increase the existing 30-day deadline for filing an 11(c) complaint would to 180 days, bringing 11(c) more in line with some of the other whistleblower statutes enforced by OSHA. Over the years many complainants who might otherwise have had a strong case of retaliation have been denied protection simply because they did not file within the 30-day deadline. Increasing the filing deadline to 180 days would greatly increase the protections afforded by section 11(c).

PAWA's adoption of the "contributing factor" test for determining when illegal retaliation has occurred would be a significant improvement in 11(c). It would make 11(c) consistent with other whistleblower statutes that have also adopted the "contributing factor" scheme. This would enhance the protections afforded to America's workers and improve workplace safety and health.

The private right to enforce an order is another key element of whistleblower protections and has been included in most other whistleblower statutes enforced by OSHA. It is critically important that if an employer fails to comply with an order providing relief, either DOL or the complainant be able to file a civil action for enforcement in a U.S. District Court.

PAWA also allows complainants or employers to move their case to the next stage in the administrative or judicial process if the reviewing entities do not make prompt decisions or rulings. For example, PAWA would allow complainants to “kick out” to a District court if the Secretary has not issued a final order within the prescribed number of days from the case filing, or “kick out” from an OSHA investigation to a hearing before an Administrative Law Judge (ALJ) if OSHA has not issued a decision within 120 days of the filing of the complaint.

The provision allowing employees in states administering OSHA-approved plans to choose between Federal and State whistleblower investigations would likely result in a significant increase in the number of Federal complaints. All 22 states that administer private sector plans currently provide protections at least as effective as Federal OSHA’s, as they are required to do under statute. We have reservations about this provision, because we are not sure this provision would add much protection for workers in those states, and it would be a significant drain on OSHA resources and those of the Solicitor of Labor.

These legislative changes in the whistleblower provisions are a long-overdue response to deficiencies that have become apparent over the past four decades.

The proposed legislation would prohibit employers from discouraging the reporting of work-related injuries and illnesses by employees. OSHA is strongly committed to accurate reporting of both injuries and illnesses. It shares the concern about under-reporting expressed by the Government Accountability Office and several academic studies. Only if we have confidence in the quality of the data that we collect on workers’ injuries and illness can we have confidence in our understanding of the scope of the dangers facing American workers and our targeted efforts to reduce those dangers. The agency believes that the most likely workplaces where under-reporting occurs are those with low injury/illness rates operating in historically high-rate industries. We have initiated a National Emphasis Program to target these workplaces and check their records. PAWA’s recordkeeping provisions would greatly enhance the effectiveness of our NEP.

PAWA includes a number of sections that would expand the rights of workers and victims’ families. For the past 15 years OSHA has informed victims and their families about our citation procedures and about settlements, and talked to families during the investigation process. PAWA would ensure this policy is strengthened and made permanent, as well as increase the ability of victims and family members to more actively participate in the process.

It would place into law, for the first time, the right of a victim (injured employee or family member) to meet with OSHA, to receive copies of the citation at no cost, to be informed of any notice of contest and to make a statement before an agreement is made to withdraw or modify a citation. No one is affected more by a workplace tragedy than workers and their families, so we fully recognize and appreciate their desire to be more involved in the remedial process. However, we do believe that clarification is needed of the provisions allowing victims or their representatives to meet in person with OSHA before the agency decides whether to issue a citation, or to appear before parties conducting settlement negotiations. This could be logistically difficult for victims and OSHA’s regional and area offices, resulting in delays in the negotiations and ultimate citation, which hurt the victim in the long run.

The rights of workers who wish to contest OSHA citations are expanded under PAWA. For the first time employees would be able to contest citations and modifications regarding the characterization of the violation (i.e., serious, willful, or repeated) as well as the adequacy of the penalty. This would result in providing employees more of a voice in the enforcement process and would provide a right for employees equal to the contest rights of employers.

One of the most significant changes to the OSH Act is the provision which requires abatement of serious, willful, and repeat hazards during the contest period. PAWA would enable OSHA to issue failure to abate notices to a workplace with a citation under contest. This provision would strengthen the right of workers to be protected from the most egregious workplace hazards.

OSHA believes this protection is critical. Too often hazards remain uncorrected because of lengthy contest proceedings—periods that can last a decade or more. A recent OSHA analysis found that between FY 1999 and FY 2009, there were 33 contested cases that had a subsequent fatality at the same site prior to the issuance of a final order. For instance, in 2009 OSHA cited a Connecticut company, T Keefe

and Sons, after an employee fell to his death through an improperly guarded floor hole while working at a casino in Uncasville, Connecticut. The company contested the citation. Several months later another employee of that company fell through a similarly improperly guarded hole, and received permanent disabling injuries.

Obtaining speedy abatement is one reason why OSHA settles cases. But we must ensure that neither contests nor lengthy settlement negotiations leave workers exposed to the hazards found during the initial inspection. The only situation worse than a worker being injured or killed on the job by a senseless and preventable hazard is having a second worker felled by the same hazard.

This is not the first time that this issue has been before Congress. During hearings on comprehensive OSHA reform in the 102nd and 103rd Congresses, numerous examples were presented of employees being hurt or killed while an inspection was under contest. While those opposing this provision argued that employers would needlessly spend large sums on abatement for a citation that is later overturned, business representatives testified that even when there is a contest most employers abate hazards during the review process.

GAO also has recommended that Congress require protection of workers during contests based on experience with the Federal Mine Safety and Health Act, which does not automatically stay abatement during litigation. Similarly, various environmental statutes also require that violations be corrected when they are identified. In weighing the balance between employee protection and employer contest rights, employee safety should take precedence. PAWA respects the rights of employers by allowing an appeal to OSHRC regarding the requirement to abate during contest.

Under PAWA, for the first time, OSHA would be required by law to investigate all incidents resulting in death or the hospitalization of two or more employees. OSHA's current enforcement policy is to investigate all fatalities and incidents resulting in the hospitalization of three or more workers. It should be noted, however, that "investigate" does not necessarily mean inspect, giving the agency discretion in using its enforcement resources most effectively.

The provision requiring employers to take appropriate measures to prevent destruction or alteration of evidence in regard to such incidents would support OSHA's compliance staff efforts in the conduct of investigations.

The use of unclassified citations is prohibited by the bill. The agency has substantially reduced the use of these citations (in FY 09 OSHA issued 10 unclassified citations compared with 26 in FY 07). OSHA recognizes that unclassified citations may reduce the deterrent effect of its enforcement activities by removing the stigma of willful violations and undermining the potential for criminal prosecution. Nevertheless, the ability to use unclassified citations does increase our flexibility in certain rare situations, for example, in some cases where we may have trouble sustaining a willful citation in court, changing the willful citation to unclassified allows us to maintain the penalty. We hope to discuss this provision further with the committee.

Madame Chair, I appreciate the thought and effort that has gone into the development of PAWA. I am reminded of the importance of your work by the compelling statement made by Becky Foster, the mother of a 19 year-old who was killed while working as a chipper attendant in the wood processing industry:

These penalties will not give companies any incentive to create a safe workplace. It just seems so unfair to watch the news and see a story about a CEO or someone in a large company that does not follow some type of regulation regarding the books. They get fines of hundreds of thousands of dollars and have to fight in court to stay out of jail. What kind of system penalizes a company more for monetary issues than it does for taking the lives of hard working people? These fathers, sons, brothers, and uncles can never be replaced. Our lives have been changed forever.

A fresh look at the OSH Act and its relevance for the 21st century is indeed overdue. The Administration supports both the goals of PAWA and many other specific provisions. We note that several sections of this Act would present significant budgetary and workload challenges for OSHA and OSHA's support agencies at the Department of Labor, including the Solicitors' office, as well as the Review Commission, which we will need to analyze fully. I look forward to working with you as this bill advances through the legislative process to perfect it and ensure that we address the crucial issues in precisely the right way.

Thanks again for the opportunity to testify today. I am happy to answer your questions.

Chairwoman WOOLSEY. Thank you.
Mr. Cruden?

**STATEMENT OF JOHN CRUDEN, ACTING DEPUTY ATTORNEY
GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVI-
SION, U.S. DEPARTMENT OF JUSTICE**

Mr. CRUDEN. Thank you to the members of the subcommittee for holding this meeting. And thank you for inviting me to testify. I would also ask that my prepared testimony be made a part of the record. And I am going to summarize it. But I am focusing on what the Department of Justice does, which is criminal prosecution.

Chairwoman WOOLSEY. Without exception.

Mr. CRUDEN. And I am going to highlight three parts of that testimony.

First, I want to summarize our Worker Endangerment Initiative. I want to talk briefly about two cases which illustrate the disparity between the current penalties available under the OSH Act, and other statutes—and then highlight three specific areas which I think can be improved.

In 2005, the environmental crimes section launched its Worker Endangerment Initiative to highlight the fact that we were finding that companies that were not taking care of the environment were also not taking care of their workers, often resulting in death or serious bodily injury. This initiative requires a coordinated effort with the Environmental Protection Agency, OSHA, and the Department of Justice.

I am very proud to tell you right now our environmental crimes prosecutors have trained over 2,000 OSHA investigators, EPA investigators, Department of Labor solicitors, and assisting U.S. attorneys in how to find this type of crime. This collaboration, now, has resulted in some of the cases that I have laid out for you in my prepared testimony. But I want to highlight just two of those, because it makes the point that I will try to make later in my testimony.

The first is the case of *United States v. Allen Elias*. Allen Elias was the owner of a fertilizer company in Idaho. And he ordered sludge workers into a tank to remove cyanide-laced sludge without telling them what was inside the tank or providing any protection for them. When one of the workers collapsed in the tank and was taken to the hospital, Elias lied about what had happened. And the 20-year-old employee suffered permanent brain damage. But Elias could not have been prosecuted under the current OSHA statute because the worker did not die. Instead, he was prosecuted under one of the environmental hazardous waste statute and received 17 years in prison.

The second example involves *United States v. Atlantic States Iron Pipe Company*, which is a New Jersey division of the McWane Company. In that case, we argued to the jury that the company had systematically violated the Clean Water Act and the Clean Air Act for years by discharging pollutants into the Delaware River; carbon monoxide and other pollutants into the air.

The company also ignored worker-safety laws and people were injured. Ultimately, the jury convicted Atlantic States and four of its managers for violations of the environmental statutes, making false statements, obstructing justice and defrauding in a conspiracy both OSHA and the EPA. Just last year, the court sentenced the managers to, collectively, over 12 years of prison.

With me today, just behind me, are two of our lead prosecutors who prosecuted that case—Deborah Harris and Andrew Goldsmith. It took 8 months. And they are also the individuals who have been leading our Worker Endangerment Initiative. And I am very proud of those two prosecutors.

But while our prosecutors have successfully done Elias and Atlantic States, that was really more of the result of the environmental statutes and what we call “Title 18 Crimes.” Those are the crimes that apply to everywhere—lying, cheating and stealing. But they point out the disparity in three areas between the OSHA statute and those others that I have enumerated.

First of all, as already been spoken to, the current statute is a misdemeanor limited to 6 months. And, by the way, you could get 12 months if you kill two people, if there are successive prosecutions. But that is the only way, as opposed to our normal felony statutes, which have up to 15 years in prison.

Second, there has to be a death in order to prosecute, which is totally different than other crimes. For instance, our environmental crimes may be based on a risk of death or serious bodily injury, or a knowing endangerment to human health and the environment.

Third, unlike most federal crimes, OSHA requires a willful action by a defendant. Court cases describe that as a “bad purpose”—again, significantly different to, then, the normal environmental standard of knowing actions.

Effective criminal prosecution requires statutes that appropriately punish, they deter other conduct, and they level the economic playing field. Measured against that standard, the current OSHA criminal provisions are inadequate.

I look forward to any questions that you might have regarding our experiences in these prosecutions. Thank you.

[The statement of Mr. Cruden follows:]

Prepared Statement of Hon. John C. Cruden, Deputy Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice

Thank you, Chairwoman Woolsey, Congresswoman McMorris Rodgers, and Members of the Committee, for holding this hearing today and inviting me to testify. I am pleased to be testifying with David Michaels, Assistant Secretary of Labor for Occupational Safety and Health.

My name is John C. Cruden. I am a Deputy Assistant Attorney General (DAAG) in the Environment and Natural Resources Division (ENRD) of the United States Department of Justice. I have served in that position since 1995. The Division’s mission is to enforce civil and criminal environmental laws to protect the health of our citizens and our environment, and to defend suits challenging environmental and conservation laws. We represent the United States in matters involving the Nation’s natural resources and public lands, wildlife protection, Indian rights and claims, and the acquisition of federal property.

One of my responsibilities as DAAG is to supervise our Environmental Crimes Section (ECS). ECS attorneys prosecute criminal violations of the country’s environmental and wildlife Conservation and Recovery Act (RCRA). ECS attorneys usually work in tandem with Assistant U.S. Attorneys on environmental crimes cases in nearly every federal judicial district in the nation. ECS also conducts extensive training on environmental crimes and serves as a nationwide clearinghouse for environmental crimes information.

ECS works closely with criminal investigators from many other federal government agencies on cases involving vessel pollution, violations of federal wildlife laws and smuggling, and interdiction. Specifically, ECS often works on its cases with the Environmental Protection Agency (EPA), the Fish and Wildlife Service (FWS), the Coast Guard, the National Oceanic and Atmospheric Administration (NOAA), and

the Occupational Safety and Health Administration (OSHA). ECS also initiates and participates in a number of environmental criminal enforcement task forces among federal, state and local agencies.

My testimony today will describe our experience in prosecuting companies and their officials for illegal conduct which either resulted in a worker death or injury or knowingly put workers at risk of death or injury. According to the most recent statistics from the Bureau of Labor Statistics, an average of sixteen workers dies every day at job sites in the United States from workplace injuries. Every year, over four million workers suffer a recordable illness or injury at work. ECS launched its Worker Endangerment Initiative (the 'Initiative') in 2005 to highlight that environmental crimes frequently put our country's workers at risk of death or serious bodily injury while they are on the job. The Initiative's driving goal is to prosecute companies and company officials who systematically violate both federal environmental laws and worker safety laws. Since its advent, the Initiative has produced a number of significant While ECS has successfully prosecuted environmental crimes in which workers were injured or killed, that success is based more on the availability of strong enforcement provisions and deterrent value of federal environmental statutes, as well as provisions of Title 18 of the United States Code, rather than the criminal provisions of the Occupational Safety and Health Act ("OSH Act") of 1970 (29 U.S.C. § 666). As set forth more fully in my testimony, the disparities between the OSH Act and environmental and Title 18 penalties is clear. For these reasons, the Department of Justice supports the strengthening of the OSH Act's criminal penalties to make those penalties more consistent with other criminal statutes and further the goal of improving worker safety.

Overview of the Worker Endangerment Initiative

The Initiative is a coordinated effort between EPA, DOJ and OSHA to prosecute employers who commit environmental crimes that endanger employees. The Initiative has two core principles: (1) environmental crime can lead to worker injuries and death; and (2) employers who do not comply with environmental laws may also be ignoring or avoiding worker safety laws. The Initiative involves not only investigations and prosecutions of these cases, but also inter-agency training and docket review.

One key component of the Initiative is to develop additional resources to identify and investigate environmental crimes by offenders whose conduct results in worker injuries or death. ECS attorneys travel throughout the country to provide government officials with criminal investigative and environmental training to identify indications of serious environmental crimes. ECS attorneys train OSHA compliance officers and senior managers, Department of Labor prosecutors have trained nearly two thousand government officials.

Another component of the initiative involves a docket review. Docket review consists of federal prosecutors, EPA agents and OSHA compliance officers collectively discussing information about companies identified by OSHA as potential violators of environmental and worker safety laws. Government officials review information about companies to determine whether any of them merit further investigation and/or prosecution.

Criminal Provisions of Major Environmental Protection Statutes

Most of the worker safety cases brought by ECS charge violations of the environmental protection laws and the general criminal provisions of Title 18 statutes. Before addressing the details of our cases, however, it is helpful to provide some background regarding the criminal provisions, including the mental state standards and available penalties, of the major environmental protection statutes and other criminal statutes we use in our cases.

A. The Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act ('RCRA'), 42 U.S.C. §§ 6901-6992, regulates hazardous waste 'cradle to grave,' that is, from its creation through its disposal. RCRA makes it illegal to store, treat or dispose of hazardous waste without a permit. 42 U.S.C. § 6928(d). RCRA also regulates the transportation of hazardous waste, establishing stringent requirements for documenting and labeling hazardous waste shipments.

Many of our RCRA cases involve the illegal dumping of hazardous waste. For example, in *U.S. v. Marchbanks*, Case No. 2:07-CR-00099 (N.D. Miss.), Randy Marchbanks and two of his employees were convicted in 2008 of RCRA violations for dumping hazardous paint and unpermitted sites in northern Mississippi. RCRA also includes a 'knowing endangerment' felony provision which provides for a term of imprisonment of up to 15 years and/or a fine of up to \$250,000 (for individuals) or \$1,000,000 (for organizations). 42 U.S.C. § 6928(e) and (f). The provision applies

when a defendant's mishandling of hazardous waste creates a serious risk to the health of others. 42 § 6928(e). Specifically, a defendant must knowingly transport, treat, store, dispose of, or export hazardous waste (the predicate offense), and at the time of the offense know that his or her conduct places another person in imminent danger of death or serious bodily injury. 42 § 6928(e) and (f).

B. The Clean Water Act

The Clean Water Act ('CWA'), 33 U.S.C. §§ 1251-1387, makes it illegal to discharge any pollutant into a water of the United States from a point source without a permit, or to violate the terms of a permit that contains limits on discharges. CWA violations typically involve polluters that dump secretly (i.e., without a permit). An example of a defendant convicted and sentenced based on a CWA violation is Gordon Tollison who was sentenced to a year and a day in prison for intentionally discharging untreated and under-treated sewage into state waterways despite numerous administrative orders and repeated admonitions. *United States v. Gordon Tollison*, Case No. 3:04-CR-00158 (N.D.Miss.). Those who violate the criminal provisions of the CWA often face prison sentences.

In addition to felony charges for knowing violations, the statute contains a 'knowing endangerment' provision for defendants whose violations under the Act create a serious risk of endangerment is up to fifteen years in prison and a fine of up to \$250,000, or both. *Id.* The CWA incorporates a responsible corporate officer doctrine which makes company managers criminally liable for illegal conduct they knew about and could have prevented, but failed to prevent. See 33 U.S.C. § 1319(c)(3) & (6).

C. The Clean Air Act

The criminal provisions of the Clean Air Act ('CAA'), 42 U.S.C. §§ 7401-7671, make it illegal to emit air pollutants in excess of permit limitations or without a permit. CAA regulations also govern the removal and handling of asbestos, an air pollutant which can cause fatal lung disease. ECS attorneys prosecute property owners and their contractors who operate illegally, often putting our workers and communities at risk. For example, in 2007 Branko Lazic was convicted of violating the CAA by improperly removing asbestos from an elementary school in Ambler, Pennsylvania. *United States v. Branko Lazic*, Case No. 2:07-CR-00324, (E.D.Pa.). Also, in *United States v. Construction Personnel, Inc.*, Case Nos. 1:00-CR-529, 1:00-CR-143, 1:00-CR-405 (D. Colo.), the president, vice president, project manager and secretary of the company were convicted of several Title 18 offenses arising out of their use of unauthorized, untrained and unprotected aliens in asbestos abatements. The defendants induced unauthorized aliens to enter and remain in the United States to perform illegal abatements. These aliens were not properly trained or certified to perform the work. As part of its sentence, the corporation set up a fund in excess of \$325,000 for use by the Department of Health and Human Services to track and treat employees exposed to asbestos. The individuals received sentences of up to 15 months' incarceration and up to \$7,500 in fines each. 42 U.S.C. § 7413(c)(5). The CAA also creates a misdemeanor for negligent endangerment. *Id.* § 7413(c)(4). The CAA holds corporate officials criminally liable if they had actual knowledge of the endangerment or if the defendant took affirmative steps to be shielded from relevant information. *Id.* § 7413(c)(5)(B).

D. Other Relevant Statutes

ECS's authority is not limited to prosecution of crimes committed under federal environmental statutes. ECS attorneys also make extensive use of the general criminal provisions set out in Title 18 of the United States Code B those that prohibit the more conventional crimes of lying, cheating, and stealing. The Title 18 provisions utilized by ECS involve crimes such as making false statements, obstruction of justice, and conspiracy to defraud the United States by impeding the effective implementation of government regulatory programs.

See 18 U.S.C. § 371 (conspiracy to defraud); 18 U.S.C. § 1001 (false statements); and 18 U.S.C. §§ 1505, 1512 and 1519 (obstruction of justice).

ECS also has brought cases under the OSH Act's criminal provisions (29 U.S.C. § 666(e)). As discussed in more detail later in my testimony, the penalties under that statute are significantly different than the other statutes in that they provide only up to 6 months maximum imprisonment for a criminal violation and require a worker death. Serious worker injury is not sufficient conduct to result in even a misdemeanor violation.

ENRD's Prosecution Experience Involving Worker Endangerment

Under the current criminal provisions of the OSH Act, ECS attorneys prosecuting worker safety incidents also examine post-injury or post-death acts of concealment

or deception through the potential punishment for either the environmental or Title 18 crimes significantly exceeds the maximum penalty under the current OSH Act.

A. *Pre-Initiative Cases*

Prior to the Initiative, ECS often litigated environmental crimes which directly led to worker injuries or death. We found, however, that even in environmental cases that raise severe worker safety issues, there was a substantial disparity between the remedies available to us under our environmental laws and those available to OSHA. One of the most notable examples of the disparity between the criminal provisions of the OSH Act and the environmental laws was in the case of *United States v. Allen Elias* (1999), in the District of Idaho. The case garnered national attention and led to, at the time, the longest sentence in an environmental crimes case. Allen Elias, the owner of a fertilizer company, ordered employees to remove cyanide-laced sludge from the interior of a 25,000 gallon railroad car. He did so without telling the employees what was inside the tank, and without providing the personal protective equipment they requested. When one of the workers collapsed in the tank and was taken to the hospital, Elias lied about the contents of the tank to rescue workers at the scene and to the treating physician. Elias's criminal conduct caused that twenty-year-old employee to suffer permanent brain damage. Despite the egregiousness of his conduct, however, Elias could not be prosecuted under the criminal provisions of the OSH Act for worker injuries, no matter how severe, because the OSH Act provides criminal penalties only for cases of death, and even then provides no more than six months of incarceration. In contrast, upon conviction for violations under RCRA's knowing endangerment and hazardous waste storage and disposal provisions, as well as making false \$6 million in restitution and clean up costs.

Another notable case is *United States v. Hansen* (1999), in the Southern District of Georgia, in which the defendants were the CEO, vice president and plant manager of Hansen, a chemical company that manufactured bleach, soda, gas, and acid. In Hansen, the defendants were charged and convicted under the CWA for knowingly endangering employees who often stood knee-deep in contaminated wastewater while working in the plant. Again, the OSH Act's criminal provision provided no recourse because, fortunately, no employees were killed. Upon conviction under the CWA, the three defendants were sentenced to 108-month, 46-month, and 78-month prison terms.

B. *The OSH Act*

While ECS has had success in prosecuting environmental crimes which led to worker death or injuries, those cases were brought under environmental statutes and Title 18 rather than the OSH Act's criminal provisions. The primary criminal provision of the OSH Act provides a misdemeanor:

Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than \$20,000 or by imprisonment for not more than one year, or by both. 29 U.S.C. § 666(e). As compared to environmental statutes and Title 18 crimes, the primary criminal provision of the OSH Act (1) has a higher mental state requirement; (2) only applies in limited requires the death of an employee as a prerequisite. Thus, under the criminal provisions of the OSH Act, if a worker dies because of the willful act of his or her employer, that employer faces a maximum conviction for a misdemeanor and only up to six months in jail. In contrast, if that same employer knowingly endangers the health or safety of its employees or the community by violating the nation's environmental protection laws, that employer may spend up to 15 years in jail.

While the worker endangerment initiative has been successful, that is largely the product of the application of environmental statutes. If a worker safety case does not involve the illegal handling of hazardous waste, or the unlawful release of hazardous pollutants into the air or illegal discharges of pollutants into waters of the United States, that case may not be prosecuted under the criminal environmental laws.

As a practical matter, the misdemeanor violations in the OSH Act provide little incentive for prosecutors and other law enforcement personnel who must reserve their limited resources for those crimes that Congress has deemed most egregious by designating them as felonies. The relatively low monetary penalties currently available to OSHA mean that unscrupulous companies may view such violations as

an acceptable cost of doing business. Accordingly, the Department of Justice supports the strengthening of the OSH Act's criminal penalties so that they are more consistent with other criminal statutes.

C. Worker Endangerment Initiative Cases

Although OSHA currently has limitations on the remedies available to it to address workplace safety issues, we have been able to address some of these issues indirectly through our environmental laws. The Initiative cases further demonstrate the principle that employers who do not comply with environmental laws may also be ignoring or avoiding worker safety laws. In prosecuting these cases, ECS has drawn upon the environmental statutes and Title 18 offenses, working with EPA and OSHA investigators. *United States v. Motiva Enterprises (D. Del.)* is an example of a case developed during the Initiative in which the prosecution was based solely on environmental violations. Motiva Enterprises LLP is the fifth largest oil refiner in the United States. On July 17, 2001, a 415,000 gallon tank containing spent sulfuric acid exploded at Motiva's Delaware City Refinery. The explosion killed one worker, injured numerous others, and resulted in a spill to the Delaware River that killed nearly 3,000 fish and crabs. In 2005, Motiva pleaded guilty to negligent endangerment of its workers under the CAA and to a knowing discharge under the CWA. Motiva was sentenced to pay a fine of \$10 million and to serve 3 years' probation.

ECS's worker endangerment initiative gained significant attention in its prosecution of McWane, Inc. (McWane). McWane is a large, privately-held cast iron pipe manufacturer with facilities across the nation. In January 2003, the New York Times and PBS's Frontline featured stories on the many deaths, injuries, and environmental violations occurring in McWane facilities nationwide. After investigation, ECS filed indictments against five divisions of McWane: McWane Cast Iron Pipe Inc. in Birmingham, Alabama; Union Pipe and Foundry in Anniston, Alabama; Tyler Pipe Company in Tyler, Texas; Pacific States Cast Iron Pipe Company, Provo, Utah; and Atlantic States Cast Iron Pipe Co. in Phillipsburg, New Jersey. These prosecutions involved charges of both environmental statutes and Title 18 crimes.

The most notable of the McWane cases involved the Atlantic States Cast Iron Pipe Co., and CAA by discharging petroleum waste products from its facility directly into the Delaware River, and carbon monoxide and other pollutants into the air. Moreover, the company systematically ignored worker safety laws and impeded OSHA in its efforts to ensure compliance with the OSH Act and to investigate accidents. Worker injuries presented in the indictment included a death from being crushed by a forklift, the loss of an eye and a crushed skull from removal of a saw blade guard, finger amputations caused by by-pass of cement mixer safety devices, and second and third degree burns caused by negligence and left untreated. In 2003, the grand jury returned a multi-count indictment against the company and five of its managers, alleging conspiracy to defraud OSHA and the EPA, false statement and obstruction of justice counts, and violations of the CWA and CAA. During an eight month trial from September 2005 to April 2006, the government called 50 witnesses including OSHA safety inspectors and industrial hygienists who had been repeatedly thwarted in their attempts to inspect and regulate Atlantic States. Atlantic States was convicted on 32 of the 33 counts on which the jury reached a verdict. Four of the managers were also convicted of conspiracy and various related offenses.

After extensive, post-verdict litigation, the court in 2009 sentenced the managers to 70, 41, 30, and 6 months' imprisonment. The company was placed on four years' monitored probation and ordered to pay an \$8 million fine. The terms of the probation require the company to submit biannual compliance reports to the court and pay for a court-appointed monitor. The case is currently on appeal to the Third Circuit Court of Appeals.

Shortly after the jury returned its guilty verdicts in Atlantic States, OSHA asked ECS to BP's Texas City plant that killed fifteen people. The explosion occurred when hydrocarbon vapor and liquid improperly released to the open air reached an ignition source. As a result of the joint efforts of ECS and the U.S. Attorney's Office in Houston, the company pleaded guilty to a criminal violation of the Clean Air Act's General Duty Clause, 42 U.S.C. § 7412(r)(7), and paid a record \$50 million fine. This was the first criminal prosecution under this section of the CAA.

Under the worker endangerment initiative, ECS litigated two cases which charged violations of the OSH Act. The first was another prosecution of McWane involving a worker death at its Union Foundry plant in Alabama, and the second was the prosecution of Tyson Foods involving a worker death at its River Valley Animal Foods plant in Arkansas.

In *United States v. Union Foundry Co. (N.D. Ala.)*, this division of McWane pleaded guilty in 2005 to both RCRA and OSH Act violations that led to the death of

an employee. The Union Foundry facility in Anniston, Alabama, manufactures iron pipe fittings (elbows, flanges, etc.) for industry. Among the many environmental violations at the facility, the company illegally stored and treated particulate matter, carbon monoxide, and lead from its baghouse, a pollution control device, without a permit. Additionally, from March 17, 2000, until August 22, 2000, Union Foundry allowed employees to work on a conveyor belt that did not have the required safety guard. As a result, employee Reginald Elston was caught in a pulley and crushed to death.

Union Foundry was sentenced to pay a \$3.5 million fine and serve a three-year term of probation. In addition, the company was ordered to propose a community service project valued. In our case against Tyson Foods, Inc., the company was convicted of violations that led to the death of an employee. Tyson's River Valley plants recycled poultry products into protein and fats for the animal food industry. Employees at the Tyson facilities often were exposed to hydrogen sulfide gas, a toxic gas produced by decaying feathers, when working on or near feather processors. In March 2002, a Tyson employee was hospitalized with hydrogen sulfide poisoning caused by exposure to the gas while performing maintenance on one of these feather processors.

As of October 2003, despite the fact that corporate safety and regional management were aware that hydrogen sulfide gas was present in the River Valley facilities, Tyson Foods did not take sufficient steps to implement controls or protective equipment to reduce exposure within prescribed limits or provide effective training to employees on hydrogen sulfide gas at the Texarkana facility. On October 10, 2003, River Valley maintenance employee Jason Kelley was overcome with hydrogen sulfide gas while repairing a leak from the same feather processor involved in the March 2002 incident. Mr. Kelley later died from his injuries. Another employee and two emergency responders were hospitalized due to exposure while attempting to rescue Kelley and two additional employees were treated at the scene. The company was sentenced to pay the maximum fine of \$500,000 and serve a term of probation for willfully violating worker safety regulations that led to Mr. Kelley's death.

D. Conclusion

A strong criminal enforcement program serves several purposes. First, it levels the economic playing field for law-abiding companies that often devote significant resources to compliance with worker safety and environmental laws. While most companies in the United States comply with these laws, such companies will find themselves at a competitive disadvantage against those companies that disobey these laws and consequently have lower costs because they choose not to devote financial resources to compliance.

Second, a strong criminal enforcement program strengthens administrative and civil enforcement programs. An aggressive criminal enforcement program makes civil and administrative enforcement efforts more effective. A comprehensive enforcement program provides an important deterrent to illegal activity, safeguards the nation's work force, and enforces the law.

In sum, adding felony provisions to the OSH Act, as proposed, would provide important tools to prosecute those employers who expose their workers to the risk of death or serious injury, whether charged in conjunction with environmental crimes or charged alone. The Department of Justice supports the strengthening of OSHA's criminal penalties to make it more consistent with other criminal statutes and further the goal of improving worker safety.

Thank you for the opportunity to share the experiences of ENRD with the subcommittee. I look forward to answering any questions you may have.

Chairwoman WOOLSEY. Thank you very much.

I would like to say that my ranking member had an emergency this morning, and she will be here in a bit. Congressman Kline came to fill in. And he can't stay, but Mrs. McMorris Rodgers—she will be here very soon. And she intended to be here all along.

So thank you very much, both of you.

First of all, our PAWA legislation, if its proposed changes seems to be a good fit for bringing OSHA into the 21st century. And that is—feels very good to us. I have some questions.

Mr. Cruden, on the next panels, the gentleman that represents the Chamber of Commerce is going to tell us that using "knowing"

versus “willing”—“willful” just is not the way to go, because we don’t know the definition of “knowing.” And, to me, the definition of “knowing” is illegally conducting business when you know about what—dangers that could have been prevented, but failed to prevent them.

Would you tell us what “knowing” means to the Department of Justice?

Mr. CRUDEN. Let me say two things about those. And—I realize we are talking about mental state, which is what prosecutors argue to juries all the time. But it is not words that we normally use.

First of all, the normal standard—the cases that we are most familiar with, and there is an entire body of law—many cases—is really on the “knowing” standard. The “willful” standard is actually somewhat unusual.

I am going to just tell you briefly what the leading Supreme Court decision on that—which is a case called *Bryan v. United States*. I have that decision with me. I would ask that it be made a matter of the record as well—

Chairwoman WOOLSEY. Without objection.

[The information follows:]

524 U.S. 184

BRYAN v. U.S.
Cite as 118 S.Ct. 1939 (1998)

1939

ensured that, in the absence of IOLTA intervention, the client's principal would earn nothing. *Webb's Fabulous Pharmacies* holds that a state law which places *that* ordinary kind of principal in an interest-bearing account (which interest the State unjustifiably keeps) takes "private property . . . for public use without just compensation." That holding says little about *this* kind of principal, principal that otherwise is barren. Nor do cases that find a private interest in property with virtually no economic value tell us to *whom* the fruits of that property belong when that property bears fruit through the intervention of another. *Ante*, at 1933 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); *Hodel v. Irving*, 481 U.S. 704, 715, 107 S.Ct. 2076, 2082–2083, 95 L.Ed.2d 668 (1987)).

If necessary, I should find an answer to the question presented in other analogies that this Court's precedents provide. Land valuation cases, for example, make clear that the value of what is taken is bounded by that which is "lost," not that which the "taker gained." *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195, 30 S.Ct. 459, 460–461, 54 L.Ed. 725 (1910) (opinion of Holmes, J.); see also *United States v. Miller*, 317 U.S. 369, 375, 63 S.Ct. 276, 280–281, 87 L.Ed. 336 (1943) ("[S]pecial value to the condemnor . . . must be excluded as an element of market value"); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 75–76, 33 S.Ct. 667, 676–677, 57 L.Ed. 1063 (1913). This principle suggests that the government must pay the current value of condemned land, not the added value that a highway it builds on the property itself creates. It also suggests that condemnation of, say, riparian rights in order to build a dam must be followed by compensation for these rights, not for the value of the electricity that the dam would later produce. Cf. *id.*, at 76, 33 S.Ct., at 677; *Twin City Power Co.*, *supra*, at 226–228, 76 S.Ct., at 261–263; *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 423–424, 427, 61 S.Ct. 291, 306–307, 308–309, 85 L.Ed. 243 (1940). Indeed, no one would say that such electricity was, for Takings Clause purposes, the owner's "private prop-

erty," where, as here, in the absence of the lawful government "taking," there would have been no such property.

These legal analogies more directly address the key assumption raised by the question presented, namely, that "absent the IOLTA program," no "interest" could have been earned. I consequently believe that the interest earned is *not* the client's "private property."

I respectfully dissent.



524 U.S. 184, 141 L.Ed.2d 197

Sillasse BRYAN, Petitioner,

v.

UNITED STATES.

No. 96–8122.

Argued March 31, 1998.

Decided June 15, 1998.

Defendant was convicted in the United States District Court for the Eastern District of New York, Trager, J., of conspiring to engage in the sale of firearms without a license and actually engaging in sale of firearms without a license, and he appealed. The Court of Appeals for the Second Circuit affirmed, 122 F.3d 90. Certiorari was granted. The Supreme Court, Justice Stevens, held that: (1) a conviction for "willfully" violating the statute requires a showing that the defendant knew his conduct was unlawful, not that he was aware of the particular licensing requirement; (2) the trial court erred by instructing the jury that a defendant need not know that his conduct was unlawful; and (3) the error did not require reversal.

Affirmed.

Justice Souter concurred and filed an opinion.

Justice Scalia dissented and filed an opinion, in which Chief Justice Rehnquist and Justice Ginsburg joined.

1. Weapons ⇌4

A conviction for dealing in firearms without a federal license requires a showing of willful conduct on the part of the defendant. 18 U.S.C.A. §§ 922(a)(1)(A), 924(a)(1)(D).

2. Criminal Law ⇌20

The word “willfully,” when used in the criminal law, typically refers to a culpable state of mind.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇌20

In order to establish a “willful” violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⇌20

“Willfully,” when used in a criminal statute, generally means done with a bad purpose, without justifiable excuse, stubbornly, obstinately, or perversely, or without ground for believing the act in question is lawful, or involving conduct marked by careless disregard whether a person has the right so to act.

5. Weapons ⇌4

A conviction for “willfully” violating statute prohibiting dealing in firearms without acquiring a federal license requires a showing that the defendant knew his conduct was unlawful, not that he was aware of the particular licensing requirement. 18 U.S.C.A. §§ 922(a)(1)(A), 924(a)(1)(D).

6. Weapons ⇌4

Fact that Congress used adverb “knowingly” to authorize punishment of certain unlawful acts involving firearms but used word “willfully” when referring to unlicensed dealing in firearms did not mandate conclusion that conviction for federal licensing violation

requires proof that defendant not only knew that his conduct was unlawful but also knew of the actual federal licensing requirement; the willfulness requirement did not carve out an exception to the rule that ignorance of the law is no excuse and knowledge that the conduct is unlawful is all that is required. 18 U.S.C.A. §§ 922(a)(1)(A), 924(a)(1)(D).

See publication Words and Phrases for other judicial constructions and definitions.

7. Weapons ⇌4

The term “willfully,” as used in statute criminalizing dealing in firearms without a federal license, required only a showing that the defendant knew his conduct was unlawful and not that he knew he was violating the particular licensing requirement in question, even though the Supreme Court had determined that knowledge of the actual offense was required in certain criminal tax and financial structuring cases; those cases were distinguishable, as they involved very complex areas where the unlawfulness of the conduct would not be as apparent in the absence of knowledge of the statutes. 18 U.S.C.A. §§ 922(a)(1)(A), 924(a)(1)(D).

8. Statutes ⇌216

The fears and doubts of the opposition are no authoritative guide to the construction of legislation.

9. Weapons ⇌3

The term “willful,” as used in gun control legislation, has not been interpreted by the courts to mean that a defendant must have actual knowledge of the provision being violated, as opposed to general knowledge that his conduct was wrongful, and consequently Congress did not intend to impose the actual knowledge requirement when it amended statute to prohibit dealing in firearms without a federal license; the lower courts did not uniformly apply an actual knowledge standard, and in many cases the issue was not raised because there was no question that the defendant knew the specific statute he violated. 18 U.S.C.A. §§ 922(a)(1)(A), 923(d)(1)(C, D), 924(a)(1)(D).

10. Weapons ⇐4, 17(6)

Trial court erred by instructing jury considering whether defendant violated statute prohibiting dealing in firearms without a federal license that the government was not "required to prove that [the defendant] had knowledge that he was breaking the law;" defendant's knowledge that he was acting unlawfully was a requirement for conviction, while knowledge of the precise provision violated was not, and to make the instruction accurate the phrase "that required a license" should have been added at the end. 18 U.S.C.A. §§ 922(a)(1)(A), 924(a)(1)(D).

11. Criminal Law ⇐1038.1(4), 1172.1(3)

An erroneous instruction in case involving dealing in firearms without a license, suggesting that defendant did not have to know he was engaging in unlawful activity to be convicted, did not require reversal; the defendant did not object to the instruction at trial, it was unlikely that the jury was misled given the other instructions that were given, the defendant did not raise the argument in the Court of Appeals, and the grant of certiorari did not cover the issue. 18 U.S.C.A. §§ 922(a)(1)(A), 924(a)(1)(D).

*Syllabus**

The Firearms Owners' Protection Act (FOPA) added 18 U.S.C. § 924(a)(1)(D) to the Criminal Code to prohibit anyone from "willfully" violating, *inter alia*, § 922(a)(1)(A), which forbids dealing in firearms without a federal license. The evidence at petitioner's unlicensed dealing trial was adequate to prove that he was dealing in firearms and that he knew his conduct was unlawful, but there was no evidence that he was aware of the federal licensing requirement. The trial judge refused to instruct the jury that he could be convicted only if he knew of the federal licensing requirement, instructing, instead, that a person acts "willfully" if he acts with the bad purpose to disobey or disregard the law, but that he need not be aware of the specific law that his conduct may be violating. The jury found

petitioner guilty. The Second Circuit affirmed, concluding that the instructions were proper and that the Government had elicited "ample proof" that petitioner had acted willfully.

Held: The term "willfully" in § 924(a)(1)(D) requires proof only that the defendant knew his conduct was unlawful, not that he also knew of the federal licensing requirement. Pp. 1944–1949.

(a) When used in the criminal context, a "willful" act is generally one undertaken with a "bad purpose." See, e.g., *Heikkinen v. United States*, 355 U.S. 273, 279, 78 S.Ct. 299, 303, 2 L.Ed.2d 264. In other words, to establish a "willful" violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful. *Ratzlaf v. United States*, 510 U.S. 135, 137, 114 S.Ct. 655, 657, 126 L.Ed.2d 615. The Court rejects petitioner's argument that, for two principal reasons, a more particularized showing is required here. His first contention—that the "knowingly" requirement in §§ 924(a)(1)(A)–(C) for three categories of acts made unlawful by § 922 demonstrates that the Government must prove knowledge of the law—is not persuasive because "knowingly" refers to knowledge of the facts constituting the offense, as distinguished from knowledge of the law, see, e.g., *United States v. Bailey*, 444 U.S. 394, 408, 100 S.Ct. 624, 633–634, 62 L.Ed.2d 575. With respect to the three § 924 "knowingly" categories, the background presumption that every citizen knows the law makes it unnecessary to adduce specific evidence to prove an evil-meaning mind. As regards the "willfully" category here at issue, however, the jury must find that the defendant acted with such a mind, *i.e.*, with knowledge that his conduct was unlawful. Also rejected is petitioner's second argument: that § 924(a)(1)(D) must be read to require knowledge of the law in light of this Court's adoption of a similar interpretation in cases concerned with willful violations of the tax laws, see, e.g., *Cheek v. United States*, 498 U.S. 192, 201, 111 S.Ct. 604, 610, 112 L.Ed.2d

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

617, and the willful structuring of cash transactions to avoid a bank reporting requirement, see *Ratzlaf*, 510 U.S., at 138, 149, 114 S.Ct., at 657–658, 663. Those cases are readily distinguishable because they involved highly technical statutes that threatened to ensnare individuals engaged in apparently innocent conduct. That danger is not present here because the jury found that this petitioner knew that his conduct was unlawful. Pp. 1944–1947.

(b) Petitioner's additional arguments based on his reading of congressional intent are rejected. FOPA's legislative history is too ambiguous to offer him much assistance, since his main support lies in statements made by opponents of the bill. See, e.g., *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394, 71 S.Ct. 745, 750–751, 95 L.Ed. 1035. His next argument—that, at the time FOPA was passed, the “willfulness” requirements in §§ 923(d)(1)(C)–(D) had uniformly been interpreted to require knowledge of the law—is inaccurate because a number of courts had reached different conclusions. Moreover, the cases adopting petitioner's view support the notion that disregard of a known legal obligation is sufficient to establish a willful violation, but in no way make it necessary. Petitioner's final argument—that § 922(b)(3), which is governed by § 924(a)(1)(D), indicates that Congress intended “willfully” to include knowledge of the law—fails for a similar reason. Pp. 1947–1949.

(c) The trial court's misstatement of law in a jury instruction given after the correct instructions were given—specifically, a sentence asserting that “the government [need not] prove that [petitioner] had knowledge that he was breaking the law”—does not provide a basis for reversal because (1) petitioner did not effectively object to that sentence; (2) in the context of the entire instructions, it seems unlikely that the jury was misled; (3) petitioner failed to raise this ar-

gument in the Second Circuit; and (4) this Court's grant of certiorari was limited to the narrow legal question hereinbefore decided. P. 1949.

122 F.3d 90, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, J.J., joined. SOUTER, J., filed a concurring opinion, *post*, p. 1949. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and GINSBURG, J., joined, *post*, p. 1949.

Roger B. Adler, Brooklyn, NY, appointed by court, for petitioner.

¹Kent L. Jones, Washington, DC, for respondent.

For U.S. Supreme Court briefs, see:

1998 WL 25503 (Pet.Brief)

1998 WL 84387 (Resp.Brief)

1998 WL 120285 (Reply.Brief)

Justice STEVENS delivered the opinion of the Court.

Petitioner was convicted of “willfully” dealing in firearms without a federal license. The question presented is whether the term “willfully” in 18 U.S.C. § 924(a)(1)(D) requires proof that the defendant knew that his conduct was unlawful, or whether it also requires proof that he knew of the federal licensing requirement.

I

In 1968 Congress enacted the Omnibus Crime Control and Safe Streets Act, 82 Stat. 197–239. In Title IV of that Act Congress made findings concerning the impact of the traffic in firearms on the prevalence of lawlessness and violent crime in the United States¹ and amended the Criminal Code

1. “Sec. 901. (a) The Congress hereby finds and declares—

“(1) that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within

their own borders through the exercise of their police power;

“(2) that the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotics addicts, mental defectives, armed

1187 to include detailed provisions regulating the use and sale of firearms. As amended, 18 U.S.C. § 922 defined a number of “unlawful acts;” subsection (a)(1) made it unlawful for any person except a licensed dealer to engage in the business of dealing in firearms.² Section 923 established the federal licensing program and repeated the prohibition against dealing in firearms without a license, and § 924 specified the penalties for violating “any provision of this chapter.” Read literally, § 924 authorized the imposition of a fine of up to \$5,000 or a prison sentence of not more than five years, “or both,” on any person who dealt in firearms without a license even if that person believed that he or she was acting lawfully.³ As enacted in 1968, §§ 922(a)(1) and 924 omitted an express scienter requirement and therefore arguably imposed strict criminal liability on every unlicensed dealer in firearms. The

groups who would supplant the functions of duly constituted public authorities, and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States;

“(3) that only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the businesses of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible . . .” 82 Stat. 225.

2. 82 Stat. 228. The current version of this provision, which is substantially the same as the 1968 version, is codified at 18 U.S.C. § 922(a)(1)(A). It states:

“(a) It shall be unlawful—

“(1) for any person—

“(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce.”

3. “§ 924. Penalties

“(a) Whoever violates any provision of this chapter . . . shall be fined not more than \$5,000 or imprisoned not more than five years, or both.” 82 Stat. 233.

4. “The Congress finds that—

“(b)(2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that ‘it is not the purpose of this title to place any

1968 Act also omitted any definition of the term “engaged in the business” even though that conduct was an element of the unlawful act prohibited by § 922(a)(1).

[1] In 1986 Congress enacted the Firearms Owners’ Protection Act (FOPA), in part, to cure these omissions. The findings in that statute explained that additional legislation was necessary to protect law-abiding citizens with respect to the acquisition, possession, or use of firearms for lawful purposes.⁴ FOPA therefore amended § 921 to include a definition of the term “engaged in the business,”⁵ and amended § 924 to add a scienter requirement as a condition to the imposition of penalties for most of the unlawful acts defined in § 922. For three categories of offenses the intent required is that the defendant acted “knowingly;” for the fourth category, which includes “any other provision of this chapter,” the required intent is that the defendant acted “willfully.”⁶ 1189 The

undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.” 100 Stat. 449.

5. “Section 921 of title 18, United States Code, is amended—

“(2) The term ‘engaged in the business’ means—

“(C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms . . .” 100 Stat. 449–450.

6. Title 18 U.S.C. § 924(a)(1) currently provides:

“Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever—

“(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief

§ 922(a)(1)(A)⁷ offense at issue in this case is an “other provision” in the “willfully” category.

II

The jury having found petitioner guilty, we accept the Government’s version of the evidence. That evidence proved that petitioner did not have a federal license to deal in firearms; that he used so-called “straw purchasers” in Ohio to acquire pistols that he could not have purchased himself; that the straw purchasers made false statements when purchasing the guns; that petitioner assured the straw purchasers that he would file the serial numbers off the guns; and that he resold the guns on Brooklyn street corners known for drug dealing. The evidence was unquestionably adequate to prove that petitioner was dealing in firearms, and that he knew that his conduct was unlawful.⁸ There was, however, no evidence that he was aware of the federal law that prohibits dealing in firearms without a federal license.

Petitioner was charged with a conspiracy to violate 18 U.S.C. § 922(a)(1)(A), by willfully engaging in the business of dealing in firearms, and with a substantive violation of that provision.⁹ After the close of evidence, petitioner requested that the trial judge instruct the jury that petitioner could be convicted only if he knew of the federal

¹⁹⁰licensing requirement,¹⁰ but the judge re-

from disability under the provisions of this chapter;

“(B) knowingly violates subsection (a)(4), (f), (k), (i), (v), or (w) of section 922;

“(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(f); or

“(D) willfully violates any other provision of this chapter.

“shall be fined under this title, imprisoned not more than five years, or both.”

7. See n. 2, *supra*.

8. Why else would he make use of straw purchasers and assure them that he would shave the serial numbers off the guns? Moreover, the street corner sales are not consistent with a good-faith belief in the legality of the enterprise.

9. Although the prohibition against unlicensed dealing in firearms is set forth in § 922, sec n. 2,

jected this request. Instead, the trial judge gave this explanation of the term “willfully:”

“A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.”¹¹

Petitioner was found guilty on both counts. On appeal he argued that the evidence was insufficient because there was no proof that he had knowledge of the federal licensing requirement, and that the trial judge had erred by failing to instruct the jury that such knowledge was an essential element of the offense. The Court of Appeals affirmed. 122 F.3d 90 (C.A.2 1997). It concluded that the instructions were proper and that the Government had elicited “ample proof” that petitioner had acted willfully. App. 22.

Because the Eleventh Circuit has held that it is necessary for the Government to prove that the defendant acted with knowledge of the licensing requirement, *United States v. Sanchez-Corcino*, 85 F.3d 549, 553-554 (C.A.11 1996), we granted certiorari to resolve the conflict. 522 U.S. 1024, 118 S.Ct. 622, 139 L.Ed.2d 507 (1997).

§ 922(a)(1)

[2-5] The word “willfully” is sometimes said to be “a word of many meanings” whose

supra, the criminal sanction is set forth in § 924(a)(1), see n. 6, *supra*.

10. “KNOWLEDGE OF THE LAW”

“The Federal Firearms Statute which the Defendant is charged with, conspiracy to violate and with allegedly violated [*sic*], is a specific intent statute. You must accordingly find, beyond a reasonable doubt, that Defendant at all relevant times charged, acted with the knowledge that it was unlawful to engage in the business of firearms distribution lawfully purchased by a legally permissible transferee or gun purchaser.

“[Y]ou must be persuaded that with the actual knowledge of the federal firearms licensing laws Defendant acted in knowing and intentional violation of them.” App. 17 (citing *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994)).

11. App. 18-19.

construction is often dependent on the context in which it appears. See, e.g., *Spies v. United States*, 317 U.S. 492, 497, 63 S.Ct. 364, 367, 87 L.Ed. 418 (1943). Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. As we explained in *United States v. Murdock*, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933), a variety of phrases have been used to describe that concept.¹² As a general matter, when used in the criminal context, a “willful” act is one undertaken with a “bad purpose.”¹³ In other words, in order to establish a willful violation of a statute, “the Government must prove that the defendant acted with knowledge that his conduct was unlawful.” *Ratzlaf v. United States*, 510 U.S. 135, 137, 114 S.Ct. 655, 657, 126 L.Ed.2d 615 (1994).

12. “The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose (*Felton v. United States*, 96 U.S. 699 [24 L.Ed. 875]; *Potter v. United States*, 155 U.S. 438 [15 S.Ct. 144, 39 L.Ed. 214]; *Spurr v. United States*, 174 U.S. 728 [19 S.Ct. 812, 43 L.Ed. 1150]); without justifiable excuse (*Felton v. United States*, *supra*; *Williams v. People*, 26 Colo. 272, 57 P. 701; *People v. Jewell*, 138 Mich. 620, 101 N.W. 835; *St. Louis, I.M. & S. Ry. Co. v. Batesville & W. Tel. Co.*, 80 Ark. 499, 97 S.W. 660; *Clay v. State*, 52 Tex.Cr. 555, 107 S.W. 1129); stubbornly, obstinately, perversely, *Wales v. Miner*, 89 Ind. 118, 127; *Lynch v. Commonwealth*, 131 Va. 762, 109 S.E. 427; *Claus v. Chicago Gt. W. Ry. Co.*, 136 Iowa 7, 111 N.W. 15; *State v. Harwell*, 129 N.C. 550, 40 S.E. 48. The word is also employed to characterize a thing done without ground for believing it is lawful (*Roby v. Newton*, 121 Ga. 679, 49 S.E. 694), or conduct marked by careless disregard whether or not one has the right so to act, *United States v. Philadelphia & R. Ry. Co.*, 223 Fed. 207, 210; *State v. Savre*, 129 Iowa 122, 105 N.W. 387; *State v. Morgan*, 136 N.C. 628, 48 S.E. 670.” 290 U.S., at 394–395, 54 S.Ct., at 225.

13. See, e.g., *Heikkinen v. United States*, 355 U.S. 273, 279, 78 S.Ct. 299, 303, 2 L.Ed.2d 264 (1958) (“There can be no willful failure by a deportee, in the sense of § 20(c), to apply to, and identify, a country willing to receive him in the absence of evidence . . . of a ‘bad purpose’ or ‘non-justifiable excuse,’ or the like . . . [I]t cannot be said that he acted ‘willfully’—i.e., with a ‘bad purpose’ or without ‘justifiable excuse’”); *United States v. Murdock*, 290 U.S. 389, 394, 54 S.Ct. 223, 225, 78 L.Ed. 381 (1933) (“[W]hen used in a criminal statute [willfully] generally means an act done with a bad purpose”); *Felton v. United*

[6] Petitioner argues that a more particularized showing is required in this case for two principal reasons. First, he argues that the fact that Congress used the adverb “knowingly” to authorize punishment of three categories of acts made unlawful by § 922 and the word “willfully” when it referred to unlicensed dealing in firearms demonstrates that the Government must shoulder a special burden in cases like this. This argument is not persuasive because the term “knowingly” does not necessarily have any reference to a culpable state of mind or to knowledge of the law. As Justice Jackson correctly observed, “the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.”¹⁴ Thus, in *United States v.*

States, 96 U.S. 699, 702, 24 L.Ed. 875 (1877) (“Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. ‘The word ‘willfully,’” says Chief Justice Shaw, ‘in the ordinary sense in which it is used in statutes, means not merely ‘voluntarily,’ but with a bad purpose.’” 20 Pick. (Mass.) 220. ‘It is frequently understood,’ says Bishop, ‘as signifying an evil intent without justifiable excuse.’ Crim. Law, vol. i. sect. 428”); 1 L. Sand, J. Siffert, W. Loughlin, & S. Reiss, *Modern Federal Jury Instructions & para; 3A.01*, p. 3A-18 (1997) (“‘Willfully’ means to act with knowledge that one’s conduct is unlawful and with the intent to do something the law forbids, that is to say with the bad purpose to disobey or to disregard the law”).

14. In his opinion dissenting from the Court’s decision upholding the constitutionality of a statute authorizing punishment for the knowing violation of an Interstate Commerce regulation, Justice Jackson wrote:

“It is further suggested that a defendant is protected against indefiniteness because conviction is authorized only for knowing violations. The argument seems to be that the jury can find that defendant knowingly violated the regulation only if it finds that it knew the meaning of the regulation he was accused of violating. With the exception of *Screws v. United States*, 325 U.S. 91 [65 S.Ct. 1031, 89 L.Ed. 1495], which rests on a very particularized basis, the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law. I do not suppose the Court intends to suggest that if petitioner knew nothing of the existence of such a regulation its ignorance would constitute a defense.” *Boyce Motor Lines, Inc. v. United*

Bailey, 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980), we held that the prosecution fulfills its burden of proving a knowing violation of the escape statute “if it demonstrates that an escapee knew his actions would result in his leaving physical confinement without permission.” *Id.*, at 408, 100 S.Ct., at 634. And in *Staples v. United States*, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), we held that a charge that the defendant’s possession of an unregistered machinegun was unlawful required proof “that he knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun.” *Id.*, at 602, 114 S.Ct., at 1795. It was not, however, necessary to prove that the defendant knew that his possession was unlawful. See *Rogers v. United States*, 522 U.S. 252, 254–255, 118 S.Ct. 673, 674–676, 139 L.Ed.2d 686 (1998) (plurality opinion). Thus, unless the text of the statute dictates a different result,¹⁵ the term “knowingly” merely requires proof of knowledge of the facts that constitute the offense.

With respect to the three categories of conduct that are made punishable by § 924 if performed “knowingly,” the background presumption that every citizen knows the law makes it unnecessary to adduce specific evi-

States, 342 U.S. 337, 345, 72 S.Ct. 329, 333, 96 L.Ed. 367 (1952).

15. *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), was such a case. We there concluded that both the term “knowing” in 7 U.S.C. § 2024(c) and the term “knowingly” in § 2024(b)(1) literally referred to knowledge of the law as well as knowledge of the relevant facts. See *id.*, at 428–430, 105 S.Ct., at 2089–2091.

16. Justice Jackson’s translation of the terms *mens rea* and *actus reus* is found in his opinion for the Court in *Morrisette v. United States*, 342 U.S. 246, 251, 72 S.Ct. 240, 243–244, 96 L.Ed. 288 (1952).

17. Even in tax cases, we have not always required this heightened *mens rea*. In *United States v. Pomponio*, 429 U.S. 10, 97 S.Ct. 22, 50 L.Ed.2d 12 (1976) (*per curiam*), for example, the jury was instructed that a willful act is one done “with [the] bad purpose either to disobey or to disregard the law.” *Id.*, at 11, 97 S.Ct., at 23. We approved of this instruction, concluding that “[t]he trial judge . . . adequately instructed the jury on willfulness.” *Id.*, at 13, 97 S.Ct., at 24.

dence to prove that “an evil-meaning mind” directed the “evil-doing hand.”¹⁶ More is required, however, with respect to the conduct in the fourth category that is only criminal when done “willfully.” The jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful.

[7] Petitioner next argues that we must read § 924(a)(1)(D) to require knowledge of the law because of our interpretation¹⁷ of “willfully” in two other contexts. In certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating. See, e.g., *Cheek v. United States*, 498 U.S. 192, 201, 111 S.Ct. 604, 610, 112 L.Ed.2d 617 (1991).¹⁷ Similarly, in order to satisfy a willful violation in *Ratzlaf*, we concluded that the jury had to find that the defendant knew that his structuring of cash transactions to avoid a reporting requirement was unlawful. See 510 U.S., at 138, 149, 114 S.Ct., at 657–658, 663. Those cases, however, are readily distinguishable. Both the tax cases¹⁸ and *Ratzlaf*¹⁹ involved

18. As we stated in *Cheek v. United States*, 498 U.S. 192, 199–200, 111 S.Ct. 604, 609–610, 112 L.Ed.2d 617 (1991):

“The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term ‘willfully’ as used in the federal criminal tax statutes as carving out an exception to the traditional rule [that every person is presumed to know the law]. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.”

19. See *Bates v. United States*, 522 U.S. 23, 31, 118 S.Ct. 285, 290, 139 L.Ed.2d 215 (1997) (noting that *Ratzlaf*’s holding was based on the “particular statutory context of currency structuring”); *Ratzlaf*, 510 U.S., at 149, 114 S.Ct., at 663 (Court’s holding based on “particular context[e]” of currency structuring statute).

highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct.²⁰ As a result, we held that these statutes “[c]arv[e] out an exception to the traditional rule” that ignorance of the law is no excuse²¹ and require that the defendant have knowledge of the law.²² The danger of convicting individuals engaged in apparently innocent activity that motivated our decisions in the tax cases and *Ratzlaf* is not present here because the jury found that this petitioner knew that his conduct was unlawful.²³

¹⁹⁶Thus, the willfulness requirement of § 924(a)(1)(D) does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required.

20. *Id.*, at 144–145, 114 S.Ct., at 660–661 (“[C]urrency structuring is not inevitably nefarious . . . Nor is a person who structures a currency transaction invariably motivated by a desire to keep the Government in the dark”; Government’s construction of the statute would criminalize apparently innocent activity); *Chuek*, 498 U.S., at 205, 111 S.Ct., at 612 (“[I]n ‘our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law,’ and ‘[i]t is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care.’” *United States v. Bishop*, 412 U.S. 346, 360–361, 93 S.Ct. 2008, 2017–2018, 36 L.Ed.2d 941 (1973) (quoting *Spies v. United States*, 317 U.S. 492, 496, 63 S.Ct. 364, 366–367, 87 L.Ed. 418 (1943))”); *Murdock*, 290 U.S., at 396, 54 S.Ct., at 226 (“Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct”).

21. *Chuek*, 498 U.S., at 200, 111 S.Ct., at 609–610; see also *Ratzlaf*, 510 U.S., at 149, 114 S.Ct., at 663 (noting the “venerable principle that ignorance of the law generally is no defense to a criminal charge,” but concluding that Congress intended otherwise in the “particular context” of the currency structuring statute).

22. Even before *Ratzlaf* was decided, then-Chief Judge Breyer explained why there was a need for specificity under those statutes that is inapplicable when there is no danger of conviction of a defendant with an innocent state of mind. He wrote:

“I believe that criminal prosecutions for ‘currency law’ violations, of the sort at issue here, very much resemble criminal prosecutions for tax law violations. Compare 26 U.S.C. §§ 60501,

IV

[8] Petitioner advances a number of additional arguments based on his reading of congressional intent. Petitioner first points to the legislative history of FOPA, but that history is too ambiguous to offer petitioner much assistance. Petitioner’s main support lies in statements made by opponents of the bill.²⁴ As we have stated, however, “[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.” *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394, 71 S.Ct. 745, 750, 95 L.Ed. 1035 (1951). “In their zeal to defeat a bill, they understandably tend to overstate its reach.” *NLRB v. Fruit Packers*, 377 U.S. 58, 66, 84 S.Ct. 1063, 1068, 12 L.Ed.2d 129 (1964).²⁵

7203 with 31 U.S.C. §§ 5322, 5324. Both sets of laws are technical; and both sets of laws sometimes criminalize conduct that would not strike an ordinary citizen as immoral or likely unlawful. Thus, both sets of laws may lead to the unfair result of criminally prosecuting individuals who subjectively and honestly believe they have not acted criminally. *Cheek v. United States*, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991), sets forth a legal standard that, by requiring proof that the defendant was subjectively aware of the duty at issue, would avoid such unfair results.” *United States v. Aversa*, 984 F.2d 493, 502 (C.A.1 1993) (concurring opinion).

He therefore concluded that the “same standards should apply in both” the tax cases and in cases such as *Ratzlaf*. 984 F.2d, at 503.

23. Moreover, requiring only knowledge that the conduct is unlawful is fully consistent with the purpose of FOPA, as FOPA was enacted to protect law-abiding citizens who might inadvertently violate the law. See n. 4, *supra*; see also *United States v. Andrade*, 135 F.3d 104, 108–109 (C.A.1 1998).

24. For example, Representative Hughes, a staunch opponent of the bill, stated that the willfulness requirement would “make it next to impossible to convict dealers, particularly those who engage in business without acquiring a license, because the prosecution would have to show that the dealer was personally aware of every detail of the law, and that he made a conscious decision to violate the law.” 132 Cong.Rec. 6875 (1986). Even petitioner’s *amicus* acknowledges that this statement was “undoubtedly an exaggeration.” Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 14.

25. See also *Andrade*, 135 F.3d, at 108–109.

[9] Petitioner next argues that, at the time FOPA was passed, the “willfulness” requirements in other subsections of the statute—§§ 923(d)(1)(C)–(D)—had uniformly been interpreted by lower courts to require knowledge of the law; petitioner argues that Congress intended that “willfully” should have the same meaning in § 924(a)(1)(D). As an initial matter, the lower courts had come to no such agreement. While some courts had stated that willfulness in § 923(d)(1) is satisfied¹⁹⁷ by a disregard of a known legal obligation,²⁶ willful was also interpreted variously to refer to “purposeful, intentional conduct,”²⁷ “indiffer[ence] to the requirements of the law,”²⁸ or merely a “conscious, intentional, deliberate, voluntary decision.”²⁹ Moreover, in each of the cases in which disregard of a known legal obligation was held to be sufficient to establish willfulness, it was perfectly clear from the record

that the licensee had knowledge of the law;³⁰ thus, while these¹⁹⁸ cases support the notion that disregard of a known legal obligation is sufficient to establish a willful violation, they in no way stand for the proposition that it is required.³¹

Finally, petitioner argues that § 922(b)(3), which is governed by § 924(a)(1)(D)’s willfulness standard, indicates that Congress intended “willfully” to include knowledge of the law. Section 922(b)(3) prohibits licensees from selling firearms to any person who the licensee knows or has reasonable cause to believe does not reside in the licensee’s State, except where, *inter alia*, the transaction fully complies with the laws of both the seller’s and buyer’s State. The subsection further states that the licensee “shall be presumed, . . . in the absence of evidence to the contrary, to have had actual knowledge of the

26. See, e.g., *Perri v. Department of the Treasury*, 637 F.2d 1332, 1336 (C.A.9 1981); *Stein’s Inc. v. Blumenthal*, 649 F.2d 463, 467–468 (C.A.7 1980).

27. *Rich v. United States*, 383 F.Supp. 797, 800 (S.D. Ohio 1974).

28. *Levin v. Blumenthal*, 590 F.2d 268, 269 (C.A.8 1979); *Fin & Feather Sport Shop v. United States Treasury Department*, 481 F.Supp. 800, 807 (D.Neb. 1979).

29. *Prino v. Simon*, 606 F.2d 449, 451 (C.A.4 1979) (internal quotation marks omitted); see also *Stein’s*, 649 F.2d, at 467 (“[I]f a person 1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements, the violation is willful” (internal quotation marks omitted)).

30. *Perri*, 637 F.2d, at 1336 (“The district court found Perri knew a strawman transaction would violate the Act”); *Stein’s*, 649 F.2d, at 468 (“The record shows that the plaintiff’s agents were instructed on the requirements of the law and acknowledged an understanding of the Secretary’s regulations. Nevertheless, and despite repeated warnings from the Secretary, violations continued to occur” (footnote omitted)); *Powers v. Bureau of Alcohol, Tobacco and Firearms*, 505 F.Supp. 695, 698 (N.D. Fla. 1980) (“Bureau representatives inspected Powers August 31, 1976. They pointed out his many violations, gave him a copy of the regulations, thoroughly explained his obligations, and gave him a pamphlet explaining his obligations. As of that date Powers knew his obligations”); *Shyda v. Director, Bureau of Alcohol, Tobacco and Firearms*, 448 F.Supp. 409, 415 (M.D. Pa. 1977) (“[A]t the formal administrative

hearing petitioner admitted on the stand under oath that he was aware of the specific legal obligation at issue”); *Mayesh v. Schultz*, 58 F.R.D. 537, 540 (S.D. Ill. 1973) (“The uncontroverted evidence shows clearly that plaintiff was aware of the above holding period requirements. Mr. Mayesh had been previously advised on the requirements under Illinois law, and he clearly acknowledged that he was aware of them”); *McLemore v. United States Treasury Department*, 317 F.Supp. 1077, 1078 (N.D. Fla. 1970) (finding that both the owner of the pawnshop, as well as his employees, had knowledge of the law).

31. In *Mayesh*, for example, the court stated:

“The uncontroverted evidence shows clearly that plaintiff was aware of the above holding period requirements. Mr. Mayesh had been previously advised on the requirements under Illinois law, and he clearly acknowledged that he was aware of them. . . . Since the material facts are undisputed, as a matter of law the plaintiff clearly and knowingly violated the Illinois holding provisions . . . and hence, 18 U.S.C. § 922(b)(2). This court can only consider such action to have been ‘willful’ as a matter of law. There is no basis for trial of any disputed facts in this connection. This is sufficient to justify refusal of license renewal.” 58 F.R.D., at 540. See also, e.g., *Perri*, 637 F.2d, at 1336 (stating that when a dealer understands the requirements of the law, but knowingly fails to follow them or is indifferent to them, willfulness “is established,” *i.e.*, is satisfied); *Stein’s*, 649 F.2d, at 468 (“Evidence of repeated violations with knowledge of the law’s requirements has been held sufficient to establish willfulness” (emphasis added)); *McLemore*, 317 F.Supp., at 1078–1079.

State laws and published ordinances of both States.”³² Although petitioner argues that the presumption in § 922(b)(3) indicates that Congress intended willfulness to require knowledge of the law for all offenses covered by § 924(a)(1)(D), petitioner is mistaken. As noted above, while disregard of a known legal obligation is certainly¹⁹⁹ sufficient to establish a willful violation, it is not necessary—and nothing in § 922(b)(3) contradicts this basic distinction.³³

V

[10] One sentence in the trial court’s instructions to the jury, read by itself, contained a misstatement of the law. In a portion of the instructions that were given after the correct statement that we have already quoted, the judge stated: “In this case, the government is not required to prove that the defendant knew that a license was required, *nor is the government required to prove that he had knowledge that he was breaking the law.*” App. 19 (emphasis added). If the judge had added the words “that required a license,” the sentence would have been accurate, but as given it was not.

[11] Nevertheless, that error does not provide a basis for reversal for four reasons. First, petitioner did not object to that sentence, except insofar as he had argued that the jury should have been instructed that the Government had the burden of proving that he had knowledge of the federal licensing requirement. Second, in the context of the entire instructions, it seems unlikely that the jury was misled. See, e.g., *United States v. Park*, 421 U.S. 658, 674–675, 95 S.Ct. 1903, 1912–1913, 44 L.Ed.2d 489 (1975). Third, petitioner failed to raise this argument in the Court of Appeals. Finally, our grant of certiorari was limited to the²⁰⁰ narrow legal

32. 18 U.S.C. § 922(b)(3).

33. Petitioner also argues that the statutory language—“willfully violates any other provision of this chapter”—indicates a congressional intent to attach liability only when a defendant possesses specific knowledge of the “provision[s] of [the] chapter.” We rejected a similar argument in *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971). Although that case involved the word “knowingly” (in the phrase “knowingly

question whether knowledge of the licensing requirement is an essential element of the offense.

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice SOUTER, concurring.

I join in the Court’s opinion with the caveat that if petitioner had raised and preserved a specific objection to the erroneous statement in the jury instructions, see Part V, *ante*, at 1949, I would vote to vacate the conviction.

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice GINSBURG join, dissenting.

Petitioner Sillasse Bryan was convicted of “willfully” violating the federal licensing requirement for firearms dealers. The jury apparently found, and the evidence clearly shows, that Bryan was aware in a general way that some aspect of his conduct was unlawful. See *ante*, at 1944, and n. 8. The issue is whether that general knowledge of illegality is enough to sustain the conviction, or whether a “willful” violation of the licensing provision requires proof that the defendant knew that his conduct was unlawful specifically because he lacked the necessary license. On that point the statute is, in my view, genuinely ambiguous. Most of the Court’s opinion is devoted to confirming half of that ambiguity by refuting Bryan’s various arguments that the statute clearly requires specific knowledge of the licensing requirement. *Ante*, at 1945–1949. The Court offers no real justification for its implicit conclusion that either (1) the statute unambiguously requires only general knowledge of illegality,

violates any such regulation”), the response is the same:

“We . . . see no reason why the word ‘regulations’ [or the phrase ‘any other provision of this chapter’] should not be construed as a shorthand designation for specific acts or omissions which violate the Act. The Act, so viewed, does not signal an exception to the rule that ignorance of the law is no excuse . . .” *Id.*, at 562, 91 S.Ct., at 1700.

or (2) ambiguously requiring only general knowledge is enough. Instead, the Court curiously falls back on “the traditional rule that ignorance of the law is no excuse” to conclude that “knowledge that the conduct is unlawful is all that is required.” *Ante*, at 1947. In my view, this case calls for the application of a different canon—“the familiar rule that, ‘where there is ¹²⁰¹ambiguity in a criminal statute, doubts are resolved in favor of the defendant.’” *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285, 98 S.Ct. 566, 572–573, 54 L.Ed.2d 538 (1978), quoting *United States v. Bass*, 404 U.S. 336, 348, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971).

Title 18 U.S.C. § 922(a)(1)(A) makes it unlawful for any person to engage in the business of dealing in firearms without a federal license. That provision is enforced criminally through § 924(a)(1)(D), which imposes criminal penalties on whoever “willfully violates any other provision of this chapter.” The word “willfully” has a wide range of meanings, and “its construction [is] often . . . influenced by its context.” *Ratzlaf v. United States*, 510 U.S. 135, 141, 114 S.Ct. 655, 659, 126 L.Ed.2d 615 (1994), quoting *Spies v. United States*, 317 U.S. 492, 497, 63 S.Ct. 364, 367, 87 L.Ed. 418 (1943). In some contexts it connotes nothing more than “an act which is intentional, or knowing, or voluntary, as distinguished from accidental.” *United States v. Murdock*, 290 U.S. 389, 394, 54 S.Ct. 223, 225, 78 L.Ed. 381 (1933). In the present context, however, inasmuch as the preceding three subparagraphs of § 924 specify a *mens rea* of “knowingly” for other firearms offenses, see §§ 924(a)(1)(A)–(C), a “willful” violation under § 924(a)(1)(D) must require some mental state more culpable than mere intent to perform the forbidden act. The United States concedes (and the Court apparently agrees) that the violation is not “willful” unless the defendant knows in a general way that his conduct is unlawful. Brief for United States 7–9; *ante*, at 1946 (“The jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful”).

That concession takes this case beyond any useful application of the maxim that ignorance of the law is no excuse. Everyone agrees that § 924(a)(1)(D) requires some knowledge of the law; the only real question is *which* law? The Court’s answer is that knowledge of *any* law is enough—or, put another way, that the defendant must be ignorant of *every* law violated by his course of conduct to be innocent of willfully violating the licensing requirement. The Court points to no ¹²⁰²textual basis for that conclusion other than the notoriously malleable word “willfully” itself. Instead, it seems to fall back on a presumption (apparently derived from the rule that ignorance of the law is no excuse) that even where ignorance of the law *is* an excuse, that excuse should be construed as narrowly as the statutory language permits.

I do not believe that the Court’s approach makes sense of the statute that Congress enacted. I have no quarrel with the Court’s assertion that “willfully” in § 924(a)(1)(D) requires only “general” knowledge of illegality—in the sense that the defendant need not be able to recite chapter and verse from Title 18 of the United States Code. It is enough, in my view, if the defendant is generally aware that the *actus reus* punished by the statute—dealing in firearms without a license—is illegal. But the Court is willing to accept a *mens rea* so “general” that it is entirely divorced from the *actus reus* this statute was enacted to punish. That approach turns § 924(a)(1)(D) into a strange and unlikely creature. Bryan would be guilty of “willfully” dealing in firearms without a federal license even if, for example, he had never heard of the licensing requirement but was aware that he had violated the law by using straw purchasers or filing the serial numbers off the pistols. *Ante*, at 1944, n. 8. The Court does not even limit (for there is no rational basis to limit) the universe of relevant laws to federal *firearms* statutes. Bryan would also be “act[ing] with an evil-meaning mind,” and hence presumably be guilty of “willfully” dealing in firearms without a license, if he knew that his street-corner transactions violated New York City’s business licensing or sales tax ordinances. (For that matter, it ought to suffice if Bryan

knew that the car out of which he sold the guns was illegally double-parked, or if, in order to meet the appointed time for the sale, he intentionally violated Pennsylvania's speed limit on the drive back from the gun purchase in Ohio.) Once we stop focusing on the conduct the defendant is actually charged with (*i.e.*, selling guns without §209a license), I see no principled way to determine *what* law the defendant must be conscious of violating. See, *e.g.*, *Lewis v. United States*, 523 U.S. 155, 174–175, 118 S.Ct. 1135, 1146, 140 L.Ed.2d 271 (1998) (SCALIA, J., concurring in judgment) (pointing out a similar interpretive problem potentially raised by the Assimilative Crimes Act).

Congress is free, of course, to make criminal liability under one statute turn on knowledge of another, to use its firearms dealer statutes to encourage compliance with New York City's tax collection efforts, and to put judges and juries through the kind of mental gymnastics described above. But these are strange results, and I would not lightly assume that Congress intended to make liability under a federal criminal statute depend so heavily upon the vagaries of local law—particularly local law dealing with completely unrelated subjects. If we must have a presumption in cases like this one, I think it would be more reasonable to presume that, when Congress makes ignorance of the law a defense to a criminal prohibition, it ordinarily means ignorance of the unlawfulness of the specific conduct punished *by that criminal prohibition*.

That is the meaning we have given the word “willfully” in other contexts where we have concluded it requires knowledge of the law. See, *e.g.*, *Ratzlaf*, *supra*, at 149, 114 S.Ct., at 663 (“To convict Ratzlaf of the crime with which he was charged, . . . the jury had to find he knew the structuring in which he engaged was unlawful”); *Cheek v. United States*, 498 U.S. 192, 201, 111 S.Ct. 604, 610, 112 L.Ed.2d 617 (1991) (“[T]he standard for the statutory willfulness requirement is the ‘voluntary, intentional violation of a known legal duty.’ . . . [T]he issue is whether the defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating”). The

Court explains these cases on the ground that they involved “highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct.” *Ante*, at 1947. That is no explanation at all. The complexity of the tax and currency laws may explain why the Court interpreted §209a “willful” to require some awareness of illegality, as opposed to merely “an act which is intentional, or knowing, or voluntary, as distinguished from accidental.” *Murdock*, 290 U.S., at 394, 54 S.Ct., at 225. But it *in no way* justifies the distinction the Court seeks to draw today between knowledge of the law the defendant is actually charged with violating and knowledge of *any* law the defendant could conceivably be charged with violating. To protect the pure of heart, it is not necessary to forgive someone whose surreptitious laundering of drug money violates, unbeknownst to him, a technical currency statute. There, as here, regardless of how “complex” the violated statute may be, the defendant would have acted “with an evil-meaning mind.”

It seems to me likely that Congress had a presumption of offense-specific knowledge of illegality in mind when it enacted the provision here at issue. Another section of the Firearms Owners' Protection Act, Pub.L. 99–308, 100 Stat. 449, prohibits licensed dealers from selling firearms to out-of-state residents unless they fully comply with the laws of both States. 18 U.S.C. § 922(b)(3). The provision goes on to state that all licensed dealers “shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States.” *Ibid*. Like the dealer-licensing provision at issue here, a violation of § 922(b)(3) is a criminal offense only if committed “willfully” within the meaning of § 924(a)(1)(D). The Court is quite correct that this provision does not establish beyond doubt that “willfully” requires knowledge of the particular prohibitions violated: the fact that knowledge (attributed knowledge) of those prohibitions will be *sufficient* does not demonstrate conclusively that knowledge of *other* prohibitions will *not* be sufficient. *Ante*, at 1948–1949. But though it does not

demonstrate, it certainly *suggests*. To say that only willful violation of a certain law is criminal, but that knowledge of the existence of that law is presumed, fairly reflects, I think, a ¹²⁰⁶presumption that willful violation requires knowledge of the law violated.

If one had to choose, therefore, I think a presumption of statutory intent that is the opposite of the one the Court applies would be more reasonable. I would not, however, decide this case on the basis of any presumption at all. It is common ground that the statutory context here requires some awareness of the law for a § 924(a)(1)(D) conviction, but the statute is simply ambiguous, or silent, as to the precise contours of that *mens rea* requirement. In the face of that ambiguity, I would invoke the rule that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *United States v. Bass*, 404 U.S., at 347, 92 S.Ct., at 522, quoting *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971).

“The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.” *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L.Ed. 37 (1820).

In our era of multiplying new federal crimes, there is more reason than ever to give this ancient canon of construction consistent application: by fostering uniformity in the interpretation of criminal statutes, it will reduce the occasions on which this Court will have to produce judicial havoc by resolving in defendants’ favor a Circuit conflict regarding the substantive elements of a federal crime, see, e.g., *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998).

I respectfully dissent.



524 U.S. 206, 141 L.Ed.2d 215

¹²⁰⁶PENNSYLVANIA DEPARTMENT OF
CORRECTIONS, et al., Petitioners,

v.

Ronald R. YESKEY.

No. 97-634.

Argued April 28, 1998.

Decided June 15, 1998.

State prison inmate, who was denied admission to prison boot camp program due to history of hypertension, sued Pennsylvania Department of Corrections and several officials under the Americans With Disabilities Act (ADA). The United States District Court for the Middle District of Pennsylvania, William W. Caldwell, J., dismissed for failure to state a claim, and inmate appealed. The Court of Appeals for the Third Circuit, 118 F.3d 168, reversed and remanded. Certiorari was granted. The Supreme Court, Justice Scalia, held that Title II of the ADA, prohibiting “public entity” from discriminating against “qualified individual with a disability” on account of that individual’s disability” applied to inmates in state prisons.

Court of Appeals affirmed.

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ADA’s Title II, prohibiting “public entity” from discriminating against “qualified individual with a disability” on account of that individual’s disability, covered inmates in state prisons, thus allowing state inmate to maintain ADA claim based on his exclusion, for health reasons, from prison boot camp program, the successful completion of which would have led to his early release; text of ADA was not ambiguous, and it unmistakably included state prisons and prisoners within its coverage. Americans with Disabilities Act of 1990, §§ 201(1)(B), 202, 42 U.S.C.A. §§ 12131(1)(B), 12132; 61 P.S. § 1123.

Mr. CRUDEN [continuing]. Because the Supreme Court says, as a general matter, when you use, in the criminal context, a “willful” act, it is really one undertaken for a bad purpose. In other words, in order to establish a willful violation, the government must prove that the defendant acted with knowledge that his conduct was unlawful.

That is different than the “knowing” standard, and the court says that. The “knowing” standard—you don’t have to prove a reference to a culpable state of mind or a knowledge of the law. And, therefore, even though it is a standard that fundamentally says—in the “knowing”—you know what you are doing at the time that you do it—it is not an accident, it is not a mistake—that is a standard that is most other laws. The willful standard is just higher. But it is elaborated in more detail in the Supreme Court case that I mentioned.

Chairwoman WOOLSEY. And “knowing” is used with RCRA and the Water Act and Air?

Mr. CRUDEN. In the Clean Water Act and the Resource Conservation Recovery Act and the Clean Air Act—all of those used “knowing” and “knowing endangerment” as the prerequisites for criminal activity.

Chairwoman WOOLSEY. Okay. Thank you.

Mr. CRUDEN. Dr. Michaels, OSHA, you say, is considering, and is revising, its penalty policy. So why isn’t that enough? I mean, what changes are forthcoming under that policy? And why won’t that be adequate to compel many employers to abate serious hazards?

Mr. MICHAELS. Chairwoman Woolsey, members of the committee, what OSHA does now is we have a penalty structure that is set first, by law. In the OSH Act, we are allowed maximum penalty for \$7,000 for a serious violation. But, then, we have all sorts of considerations within that. We can’t go above \$7,000, and we generally start at a slightly lower point. And, then, we reduce it for the size of the employer. And we always give small employers a reduction.

We look at good faith—if an employer was trying to do the right thing. We look at their history. There are a number of factors we look at. And so what that means is the average penalty is quite a bit lower than the maximum we are allowed. And we think that is important. And, actually, the OSH Act requires that we put those considerations in.

What that means, though, as a result, is even in the most egregious case—and we have had fatalities—which, we think it is very important to issue a strong penalty to issue a—have a deterrent effect—we have a fatality, and our maximum penalty is \$7,000. We think that is simply unacceptable.

Chairwoman WOOLSEY. So, a question to both of you: The Clean Water Act and RCRA and the Clean Air Act—they are all newer than OSH Act, right?

Mr. CRUDEN. Yes.

Chairwoman WOOLSEY. Is that why they were more, you know, forthcoming and—as—I mean, it appears that our love for fish and birds is way stronger than our value and love for human beings and our workers. But that can’t be true. So—

Mr. MICHAELS. I can't speak to Congress' rationale for putting this together, but it is obvious to me, when the maximum penalty for violating the South Pacific Tuna Act is \$250,000, but the maximum penalty for a serious violation of the OSH Act is \$7,000—that sort of inequity is what we are dealing with. And we believe it should be changed.

Mr. CRUDEN. And let me draw your attention—I have been talking about environmental crimes. But we also prosecute Title 18 crimes of the United States of code. These are for lying, cheating or stealing. And they include misrepresentation. There is a provision of the OSHA statute of misrepresentation that limits it to 6 months. On the other hand, if you prosecute under our normal Clean Air Act, it would be 2 years. Under 18 USC 1001, it is 5 years. So there is a disparity as opposed to other statutes beyond environmental crimes.

Chairwoman WOOLSEY. Right. Thank you very much.

Congressman Sablan?

Mr. SABLAN. Thank you very much, Madam Chairman, and thank you for your leadership in this very important matter.

I don't have a question. I actually have a compliment for OSHA for making a lot of the work environment in the Northern Mariana Islands a safe place—a much safer place. We do still need to get more involved in these issues. And I am very happy that we are trying to increase the penalties, and probably give the Department of Justice more tools in which to work with.

Thank you very much.

Thank you.

Mr. MICHAELS. Thank you, sir.

Chairwoman WOOLSEY. No questions?

Mr. SABLAN. No questions.

Chairwoman WOOLSEY. Oh. Thank you very much.

Congressman Hare?

Mr. HARE. Thank you, Madam Chair, and thanks for having this hearing this morning.

Dr. Michaels, I want to welcome you to the committee, and I am pleased that you were finally confirmed by the Senate. It is no short—that is some sort of a miracle sometimes, there.

Your appearance here, today, is a homecoming, as I understand. You had worked for the committee staff for—17 years ago, when Bill Ford was the chairman. So I want to welcome you back.

I just have a couple questions I want to ask. To clear up the record—because the second panel, you probably won't have a chance to respond. Dr. Michaels, is one of the biggest weaknesses in the OSH Act's current penalty the lack of a meaningful deterrent for senior corporate officials who are responsible for things?

And let me just—you know, we saw, for example, at BP, the executives in London repeatedly cut the budget for process safety at its U.S. refineries. And, despite warnings and safety—the safety was in peril—and we found, by the Chemical Safety Board, to be a root cause of that explosion, which killed 15 and injured 170. So I would just like to get your take on that, if you wouldn't mind.

Mr. MICHAELS. Yes, this administration agrees with the provision of PAWA that says that we hold responsible—corporate executives responsible—because they make decisions that affect workers' lives.

There is no question that, you know, as we look at the deterrent effect, we know that the provisions have to go beyond simply, you know, a relatively small fine and a misdemeanor.

And we believe in the lessons—we believe the lessons from many other successful legislation is to determine exactly who, at the corporate level, is able to make those changes that we need to be made. And that really goes to the very high corporate officials.

Mr. HARE. Well, if I could, Mr. Secretary, I would like to ask you and Mr. Cruden that—you are going to hear some—we are going to hear some testimony, as I understand it, that because of this provision provided for criminal liability for corporate officers—results in a witch hunt.

Would you concur with that this is going on some sort of a witch hunt when we go after the CEOs of these companies that—

Mr. CRUDEN. No, there will be no witch hunt. What there would be, though, is more effective deterrents.

Our prosecution is not just for punishment. We are hoping that everybody else who is similarly situated learns of that and decides that they won't do it. And there is another aspect I think people lose sometimes, that OSHA accomplishes, and I think that the Department of Justice does, too—and that is to level the economic playing field.

We know that most companies are trying to comply with the law. But those companies who don't spend the money to train, who don't get the extra equipment—they are actually getting a competitive advantage against those companies that are complying with the law.

So one of the things that we accomplish in these prosecutions is actually to protect those small businesses who are doing their absolute best to meet all the standards of the law that exist.

Mr. HARE. And I would agree with you, because I believe that the vast majority of corporations and companies want to do the best that they can for their employees.

Mr. CRUDEN. We agree.

Mr. HARE. But we have instances—and I have seen this at the—hearing after hearing, here—where some—you know, a small percent—believe it is just better to pay the fine and keep, you know, practicing as usual. And that is got to stop. And I think that when we find that—I think those penalties got to be, you know, severe, because what is happening is everybody, then, gets pulled into this thing that they are all alike, which is simply not the case.

And, just lastly, as a point—you know, I didn't bring my hand-drawn chart this morning, but I had some people in my office about 2 months ago, and they brought out this chart. And they were complaining about what you guys are doing. And they were saying, "Look at these number of inspections. They are going up." And I am going, "Yes?" And, at the same time, their charts showed the amount of accidents going down.

So when they left, I looked over, I think, at Kevin—and I said to my legislative director—and said, "I think they just made the case for me, here."

And I think that it is important that, you know, people have an opportunity—I worked in a clothing factory for 13 years. We had two OSHA inspections. They lasted a total—the first one lasted a

total of 2½ minutes. And the second one, they went way out, and they were there for about 7. So I appreciate what you do every day. And I thank you.

I yield back.

Chairwoman WOOLSEY. Congressman Bishop?

Mr. BISHOP. Thank you, Madam Chair, and thank you for holding this hearing—and my appreciation to the witnesses.

Last April, I introduced a bill, H.R. 2199. It is called the Protecting Workers from Imminent Dangers Act of 2009. And, if passed, it would give OSHA the authority to immediately shut down a work site in the event of imminent danger to workers' health or safety.

As I understand it, that is authority that MSHA currently has—currently has its authority—that the New York City version of OSHA has. And so my question, A—and this is to the Secretary Michaels—has OSHA ever considered implementing such authority? If such authority were to be legislatively granted, how would OSHA respond to that?

Mr. MICHAELS. Congressman Bishop, I am familiar with your bill.

You know, this administration doesn't yet have a position, though we do look at this issue as a very serious one.

As you know, we do not have the authority to shut down a job. The Mine Safety Health Administration's authority is a phone call. If they get a report that a certain condition exists, they get on the phone. They can call the mine operator. And the job must be shut down, even before the inspector gets there. And OSHA has nothing at all comparable to that. And we would look forward to working very closely with you to look at this bill, and to make sure, you know—well, we would look forward to working very closely with you on this bill.

Mr. BISHOP. I would hope we would get some bipartisan support on this. I was interested to hear Representative Kline, in his opening comments, talk about the value of being proactive and preventing injuries before they occur, as opposed to punishing employers when injuries do occur. So I would hope we would get some bipartisan support.

Could you, Secretary Michaels, just sort of walk us through current OSHA procedures when a worksite shows evidence of imminent danger to the workers?

Mr. MICHAELS. Our inspector—you know, I think, actually—Actually, Rich Fairfax, here—he is our—the chief of enforcement is here. And if he could join me up here, he can probably address this much more clearly than I can.

Mr. FAIRFAX. Thank you.

When our inspectors are on-site, and they run into an imminent danger or we receive a call, and we investigate—the first thing we do is raise the issue with the employer and ask them to fix it immediately. If they decline or don't take any action, then we do—what we do is we will post what is called an imminent-danger notice, and we contact—or, you know, make contacts with the workers and ask them to move away from the area.

So we post an imminent-danger notice and if that still doesn't work, then we go back with our attorneys and we seek a temporary restraining order against the——

Chairwoman WOOLSEY. Will the gentleman yield 1 minute? Would you please state your name for the record?

Mr. FAIRFAX. Oh, I am sorry—Richard Fairfax. I am the director of enforcement programs for OSHA.

Chairwoman WOOLSEY. Thank you very much.

Mr. BISHOP. If I may, Madam Chair—could you estimate the sort of elapsed time from the time that OSHA first becomes aware of what reasonable people would consider to be an imminent danger, to the point where you would seek a court order to shut down a workplace?

Mr. FAIRFAX. Actually, I accomplish it in about an hour—maybe 1½.

Mr. BISHOP. Really?

Mr. FAIRFAX. Yes.

Mr. BISHOP. Okay.

Mr. FAIRFAX. You know that is just if everything is perfect, and we can get hold of the judge and everything.

Mr. BISHOP. And when things aren't perfect?

Mr. FAIRFAX. Then it takes 2 or 3 hours.

Mr. BISHOP. Really?

Mr. FAIRFAX. Yes.

Mr. BISHOP. But you can get it done in a day?

Mr. FAIRFAX. We take this very, very seriously.

Mr. BISHOP. Okay.

Mr. FAIRFAX. When we have information, you know, pointing to that, then we respond and work with our attorneys and get a judge right away.

Mr. BISHOP. Thank you very much.

Madam Chair, I yield back.

Chairwoman WOOLSEY. Thank you.

Congressman Payne?

Mr. PAYNE. Thank you very much.

I have been somewhat troubled in the last decade or so, where we have seen the number of the workplace seem to become more hazardous. We have seen deaths from employers—employees—especially around the New York, New Jersey area—jobs like construction workers, faulty equipment, the—and so I might just ask both of you, in general: Have you, during, say, the past eight or 10 years, seemed to get a feeling that there has been a relaxation, or either a lack of serious concern on the part of the employer about occupational safety?

For example, I am mentioning primarily the construction trade in New York, where just the other day, I think it was determined that, knowingly, some equipment was faulty, but the firm went forward with it. I just wondered what your opinion is—both of you.

Mr. MICHAELS. I think that is an interesting question.

I can't speak to the construction industry in New York. My impression from looking at, at least, some of the statistics, which I think are very limited, is that there is really a bifurcation—that there are some employers who recognize the importance of safety,

and they are doing a better and better job, and their injury rates really are going down, and the hazards we see are going down.

On the other hand, there are a lot of employers who have decided that they don't need to do that at all. And some of them are employers who hire immigrant workers who don't speak English, who are willing to cut corners, and who knows that they are not going to pay any of the costs of workplace injuries because these employees will never apply for workers' compensation, or they rarely will, and they will disappear.

And that is my impression. One of the problems we are facing is I think our statistics aren't very good. And, you know, we have—we see the numbers going down. But I think the—I am the statistician. I have some interest in this question from a professional level. And there has been some recent studies—and I have these—I would like to add them to record—showing that the Bureau of Labor Statistics—reports we get from employers are incomplete.

In fact, there was a study recently done on amputations in Michigan industry. Now, amputations are something that is pretty clear. When they happen in the workplace, we know that they have occurred. And the Bureau of Labor Statistics got reports from—this is 2007—of less than 200. When Michigan state went to hospitals in Michigan and found how many amputations really occurred in workplaces that year, it was almost 800. So they missed three out of four.

So we don't really know what is—from a statistical point of view, we don't really know what is going on. But we see that certain industries—things are pretty bad. And other ones, they are getting much better. So we have to focus on those places where the employers really are not taking their responsibility seriously, and workers are getting hurt. And they tend to be the workers that—who are also—already the poorest and have the least understanding of what their rights are.

Mr. CRUDEN. Your question is almost precisely the reason why we initiated the Worker Endangerment Initiative at the Department of Justice, and reached out to OSHA and EPA—because, again, our finding that companies that were violating environmental laws were cutting corners in protecting their own workers.

And those things seem to go in tandem. And those cases that I was describing—all of those cases meet exactly what you are talking about, and that is individuals who are, in fact, going through series—not just one or two—but series of turning their eye toward what is, in fact, serious risks to workers. And those serious risks ought to be something that we can address with our criminal statutes, and not just death. And our prosecutions actually prevent those companies from just passing along to the consumers the cost of doing business.

And so, again, I think what you have captured is, again, exactly the reason we started our Worker Endangerment Initiative.

Mr. PAYNE. I have a question regarding the safety.

We recently went to a coal mine—Chairman took some—a trip to a coal mine in West Virginia. And the leadership of the mine said that the big difference that they saw—not the leadership of the mine, but some of the federal officials were saying that the training component that is a part of the—I see a red light flashing.

I saw it go on, but I know they keep flashing, so I can't stop in the middle of this statement, but let me—

Chairwoman WOOLSEY. We are not going to. Go ahead, Mr. Payne.

Mr. PAYNE. Could you give me a second?

They said that the time that is taken for training of the coal miners' safety procedures—which, of course, takes time out of the workday because you are doing it, and it is sort of a—maybe a little production loss—but it is very important. Do you feel that the conscientious—as you mentioned, a conscientious, you know, person—does this kind of thing even as a negative to the bottom line, but the overall safety of the worker is preserved?

Mr. MICHAELS. There is no question that the responsible employers who take safety and health seriously include training—a training component as part of their management system—these are employers who understand that safety and health is a continuous process, and that part of that is making sure workers know how to protect themselves, and who is responsible for safety in the workplace, and how to work with—how to work together to make sure safety is accomplished.

Those employers that do no training at all, certainly, are ones that we think are much more likely to be places where the injury rates are higher.

Chairwoman WOOLSEY. If there is no objection, I would like to include the studies that Dr. Michaels was referring to, into the record.

[The information follows:]

CME Available for This Article at ADDEM.org

How Much Work-Related Injury and Illness is Missed By the Current National Surveillance System?

Kenneth D. Rosenman
Alice Kalush
Mary Jo Reilly
Joseph C. Gardiner
Mathew Reeves
Zhewui Luo

Learning Objectives

- Summarize data collected by the U.S. Bureau of Labor Statistics (BLS) on the prevalence of work-related illnesses and injuries in the state of Michigan, and on risk rates for different forms of employment.
- Appraise the ability of BLS estimates to accurately determine the frequency of illnesses and injuries, separately and together, compared to that of four other Michigan data bases combined.
- Outline possible problems with the current BLS system for estimating work-related illnesses and injuries, and what measures might be adopted to obtain more precise estimates for help in deciding how to allocate available public health resources.

Abstract

Objective: We sought to estimate the undercount in the existing national surveillance system of occupational injuries and illnesses. **Methods:** Adhering to the strict confidentiality rules of the U.S. Bureau of Labor Statistics, we matched the companies and individuals who reported work-related injuries and illnesses to the Bureau in 1999, 2000, and 2001 in Michigan with companies and individuals reported in four other Michigan data bases, workers' compensation, OSHA Annual Survey, OSHA Integrated Management Information System, and the Occupational Disease Report. We performed capture-recapture analysis to estimate the number of cases missed by the combined systems. **Results:** We calculated that the current national surveillance system did not include 61% and with capture-recapture analysis up to 68% of the work-related injuries and illnesses that occurred annually in Michigan. This was true for injuries alone, 60% and 67%, and illnesses alone: 66% and 69%, respectively. **Conclusions:** The current national system for work-related injuries and illnesses markedly underestimates the magnitude of these conditions. A more comprehensive system, such as the one developed for traumatic workplace fatalities, that is not solely dependent on employer based data sources is needed to better guide decision-making and evaluation of public health programs to reduce work-related conditions. (*J Occup Environ Med.* 2006;48:357-365)

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The national surveillance system for occupational injuries and illnesses, which is administered by the U.S. Department of Labor Bureau of Labor Statistics (BLS), is based on reports from employers. As stated on the BLS web site: "The responsibility for collecting statistics on occupational injuries and illnesses was delegated to the Bureau of Labor Statistics. In order to further the purposes of this act (OSHA), the language was quite specific: 'the Secretary of Labor shall compile accurate statistics on work injuries and illnesses which shall include all disabling, serious or significant injuries and illnesses, whether or not involving loss of time from work other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.'"

The national statistics on occupational injuries and illnesses are derived from a sampling strategy rather than a census of all work-related injuries and illnesses. In response to a National Academy of Sciences report in 1987,¹ which showed that the BLS national estimates missed 50% of acute work-related deaths, BLS began the Census of Fatal Occupational Injuries (CFOI). CFOI is a complete census that uses multiple data sources, covers all workers, and is not dependent on an employer either being aware of the condition or responding to a survey. However, no such system has ever been implemented to improve the national

estimates for nonfatal work-related injuries and illnesses.

A number of studies have documented that the current system to derive national estimates for work-related injuries and illnesses undercount both chronic conditions and acute injuries.⁷⁻¹³ These studies were based on comparisons of counts of work-related injuries or illnesses from nonemployer-based data sources, such as hospital discharge data, or medical records with the BLS estimates but were not based on an actual matching of individuals reported within the different systems. We present the results of matching both the number of reports of injuries and illnesses, and individuals with days away from work and companies from multiple databases, from companies who participated in the BLS annual survey in Michigan in 1999, 2000, and 2001.

We present the numbers and percentage of work-related injuries and illnesses missed in Michigan by the BLS survey estimates. We use capture-recapture analysis to estimate the number of injuries and illnesses missed in Michigan by both BLS and Workers' Compensation. We present these data for overall injuries and illnesses and also by specific conditions and industrial sectors.

Materials and Methods

Data Sources

A summary of the five data bases used in the analysis for the years 1999, 2000 and 2001 follows:

BLS Annual Survey. The BLS survey is an annual survey of a sample of employers by state, industry type, and employment size (www.bls.gov/iif/home.htm). In all states, it excludes the self-employed, farms with fewer than 11 employees, private households, and federal employers. In 27 states, but not Michigan, public employees are excluded. All injuries and illnesses from facilities in the mining and railroad sectors tracked by the U.S. Department of Labor Mine Safety and Health Administra-

tion and the Department of Transportation's Federal Railroad Administration are included in the BLS survey results. Using appropriate sampling weights and a nonresponse adjustment factor, total estimates of injuries and illnesses and estimates by state and industrial sector are calculated based on the injuries and illnesses reported by the selected companies. The information collected for each company includes counts of total injuries, injuries with restricted workdays, total illnesses, illnesses with restricted workdays, and illnesses categorized by seven disease categories.

If the employer has 30 or fewer employees with injuries or illnesses with at least 1 day away from work, details about the conditions are obtained for each of the employees. If the employer has greater than 30 employees with injury or illness with at least 1 day away from work, a random time period is selected in which no more than 30 employees had an injury or illness with at least 1 day away from work. The information collected includes: employee name, date of injury or illness, number of lost workdays, but not employee social security number. BLS does not collect employee-level data on any cases without lost work time.

Occupational Safety and Health Administration (OSHA) Annual Survey. The OSHA annual survey is a survey of a sample of employers with one or more employees in all sectors except government, mining, railroad, postal services, private households or services (www.michigan.gov/cis/0,1607,7-154-11407_30929-39,936--00.html). OSHA uses the survey for enforcement purposes. For agriculture, an establishment must have 11 or more employees to be included. The database does not collect details on individuals. It does include company names, total injuries, injuries with restricted days, injuries with days away from work, total illnesses, illnesses with restricted workdays, and illnesses with days away from

work and illnesses by seven disease categories.

Michigan Bureau of Workers' Disability and Compensation First Injury and Illness Reports (WC). Public and private Michigan employers are required to have Workers' Compensation Insurance except the federal government, the railroads, shipping and harbor employers, employers with less than 3 employees, some agricultural employers, and the self employed (www.michigan.gov/wca).

All Michigan employers who are required to provide Workers' Compensation insurance are required to report to the Bureau of Workers' Disability and Compensation on what is titled a "Form 100" all injuries and illnesses "which arise out of and in the course of the employment, or on which a claim is made and result in any of the following: 1) disability extending beyond seven consecutive days, 2) death; or 3) specific losses." Although employers are not required to report disability lasting fewer than 7 consecutive days, approximately 20% of the reports submitted to Workers' Compensation do not meet the 7-day criteria. All Form 100 reports, including the ones that do not meet the 7-day criteria, have the individual's name and social security number, company name, number of lost workdays, date of injury, nature of injury, and body part affected. If an employer disputes the work-relatedness of the claim, then either the employee can request mediation or hearing (Form 104) or an employer can file a notice of dispute (Form 107). All Forms 100, 104, and 107 with injury dates in 1999, 2000, and 2001 were used after removing all duplicate reports. Although Forms 104 and 107 do not have the number of lost workdays, the Workers' Compensation Bureau estimated that 75% of these forms were filed for lost workday cases of at least 7 consecutive days.

Michigan Occupational Disease Reports (OD). Michigan law requires all health care providers, including hos-

pitals, clinics, laboratories, and employers, to report all known or suspected work-related illnesses but *not* injuries to the State (part 56 of PA of 1978; www.chm.msu.edu/oem/resources/ni_publicillcode_part56.pdf). The computerized OD records contain the affected employee's name and social security number, the employer's name and address; date of diagnosis; and diagnosis or clinical impression coded according to the International Classification of Diseases (ICD-9th Revision). No information on lost workdays is collected.

OSHA Integrated Management Information System (IMIS). When a Federal or State Plan OSHA inspection is conducted in Michigan, the compliance officer reviews the injury and illness log maintained by the employer (only required if an employer has 11 or more employees). Information on the total number of injuries and illnesses (by seven disease categories) is collected. Company names are collected but not employees' names.

Data for all five aforementioned databases are collected by one agency in Michigan, the Michigan Department of Labor and Economic Growth (MDLEG). Access to the BLS annual survey data was given under the auspices of the Intergovernmental Personnel Act Assignment agreements. All access to BLS data occurred in a locked room in the BLS offices with strict review by BLS of all analyses, both electronic and paper, before the results of analyses were removed from the office.

Matching was performed at two levels: person to person matching for the three data bases that have names of individuals (BLS, WC, and OD) and company level matching for all five data bases (BLS, OSHA, WC, OD, IMIS) for the years 1999, 2000 and 2001.

Person-level matching was conducted using an algorithm model.¹⁴ Databases were compared two at a time, using the database with the fewer number of records to check against the database with the larger number of records.

The ranking system used to characterize the likelihood of potential matches was based on information about the employee's first and last name, social security number, and age at diagnosis; the nature of the injury or illness reported; the date when the injury or illness occurred; and company name and the Employer Identification Number (EIN; the EIN is a unique number assigned to companies but not individual facilities by the United States Internal Revenue Service) where the injury or illness occurred. Manual comparison of the records was performed after the initial computer matching because many records had some missing information and this also allowed us to address typographical errors, transposed numbers, and the order of words.

Acute diagnoses were matched if they were within 6 months of a previous injury and chronic diagnoses if they were within a year. There were three different schemes of diagnosis coding used (ICD 9, BLS Nature of Injury Code, and Workers' Compensation Nature of Injury Code). Because of difficulties in matching the diagnoses in the different data bases, diagnosis information was used only when the person/company information was unclear about whether the record matched.

To estimate the total number of injuries and illnesses with days away from work from the person level matches, we only used the BLS and WC databases because we were unable to identify which of the OD reports had days away from work. We performed the match for cases with greater than seven days away from work because we were concerned that the WC database was incomplete for individuals with 1 to 7 days away from work. For the relatively small number of companies ($n=200$) with more than 30 workers who had injuries or illnesses with days away from work, that BLS does subsampling, the date of injury in the worker compensation database

had to occur within the BLS subsampling date to be considered a match.

Company-level matching was conducted in a manner similar to the person-level matching except all five databases could be used. Companies that had been matched between databases from the person-level matching were considered as matching at the company-level match. After these matches were identified, the company databases were compared two at a time, using the database with the fewer number of records to check against the database with the larger number of records.

The highest level of matching was when the company name, location, and EIN matched exactly. Using the same method as the person-level match confirmation, a manual comparison of each potential set of matches was completed for the company-level matching.

To estimate the total number of injuries and illnesses derived from the company matches, we assumed that if matching companies were in more than one of the data bases that the cases reported from those companies in different databases represented the same individuals. This assumption would favor conservative results because it is likely that some of the cases recorded actually represented different people.

To derive the injury and illness estimates, we applied the BLS sampling weights adjusted for nonrespondents to the largest number recorded in any of the data bases where the company matched to a BLS company that was included in the annual survey.

To derive our final estimates we applied the percentage of undercount calculated in the person-to-person match after the capture-recapture analysis to the published BLS estimate of all Michigan injuries and illnesses.

We estimated the undercount of worker illnesses and injuries by applying standard capture-recapture methodology.^{15,16} For the BLS and WC databases, person to person matching was done in each time

period, by strata defined by injury type and facility. With independent reporting to each registry, the mean count λ_k in the k -th stratum was estimated under the assumption that the total count N_k was Poisson distributed (with mean λ_k), and that conditionally on N_k , the count of injuries in the BLS and count of injuries in the WC are binomially distributed. Finally, the stratum weights w_k were applied to get an estimate of the total count $\sum_k w_k \lambda_k$ across all strata.

Results

Table 1 shows the average number and range of companies, reports before weighting, and the final estimates for all injuries and illnesses and those with days away from work for the 3 years 1999 to 2001 for the BLS annual survey in Michigan. Table 2 shows the average WC data for the 3 years, 1999 to 2001. Table 3 shows the average number and range of reports received and companies for OD, OSHA, and IMIS for the 3 years, 1999 to 2001. Table 4 shows the company level match with weighting across the five databases. Adding all the cases provided an estimated average of 386,402 injuries and illnesses for 1999 to 2001. The BLS estimate for 1999 to 2001 on the average was 74% of the total injuries and illnesses. BLS and WC combined missed less than 1% of the total injuries and illnesses from the companies in the BLS Annual Survey.

The results for company level match within industry categories for 1999 to 2001 are shown in Table 5 and by whether it was an injury or illness in Table 6. The BLS estimates by industry ranged from 45% of total injuries and illnesses for the transportation, communications and electrical services (SIC 40–49) to 94% of total injuries and illnesses for agriculture (SIC 01–09). The BLS estimates for injuries was appreciably greater, 90% of total injuries, than that for illnesses, 50% of total illnesses.

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TABLE 1
Summary of Data From the Bureau of Labor Statistics, Michigan 1999 to 2001

	1999–2001 Average (Range)
Companies	5,801 (5,555–5,934)
Injuries and illnesses before weighting	98,846 (84,838–109,365)
Number of companies reporting injury or illness	2,560 (2,412–2,719)
Injuries and illnesses with days away from work before weighting	10,151 (8,567–11,407)
Number of companies reporting injury or illness with days away from work	1,890 (1,730–2,016)
Total weighted injuries and illnesses	281,566 (258,000–296,700)
Weighted injuries and illness with days away from work	65,205 (58,300–88,400)

TABLE 2
Summary of Data From Workers' Compensation, Michigan 1999 to 2001

	1999–2001 Average (Range)
Companies claims of first reports or requests for medication or notices of dispute	25,708 (24,468–27,018)
Number of claims of first reports	58,331 (51,028–62,897)
Number of claims of first reports >7 days	49,613 (43,178–54,201)
Number of requests for medication or notices of disputes	22,335 (21,481–23,312)
Number of medical only claims	133,901 (108,567–161,882)
Total first claims and medical-only claims	192,256 (169,636–224,836)

TABLE 3
Summary of Data From Occupational Disease (OD) Reports, OSHA Survey, and Integrated Management Information System (IMIS), Michigan 1999 to 2001

	1999–2001 Average (Range)
OD	
Number of companies	687 (618–742)
Number of reports	19,579 (17,287–21,351)
OSHA	
Number of companies	3,453 (3,323–3,673)
Number of reports	106,503 (98,783–116,236)
IMIS	
Number of companies	6,269 (4,691–7,611)
Number of reports	44,644 (30,357–54,764)

Table 7 shows the person level match and capture–recapture analysis for BLS and WC. Adding all cases with greater than 7 days away from work after weighting provided an estimate of 79,379 and after including capture–recapture, 95,033. This compared to the BLS data alone, which estimated 30,800 (38.8% and 32.4%). For injuries, adding all injuries there were an estimated 66,020 and 80,399 after including the capture–recapture estimate. This compared with the BLS

data alone, which estimated 26,292 injuries, 39.8% and 32.7% respectively. For illnesses, adding all illnesses there were an estimated 13,359 illnesses and 14,634 illnesses after including the capture–recapture estimate. This compared to the BLS data alone, which estimated 4508 illnesses, 33.7% and 30.8%, respectively.

These same results for person match by specific industries are shown in Table 8, by specific types of injuries in Table 9, and by specific

TABLE 4
Number of Reports of Injuries and Illness After Company Match Between the Bureau of Labor Statistics (BLS) Annual Survey, Workers' Compensation, Occupational Disease, OSHA Annual Survey, and IMIS Data Base, Michigan 1999 to 2001

Data Bases						Number of Reports, 1999-2001 Average (Range) Weighted
BLS	WC	OD	OSHA	IMIS		
Yes	No	No	No	No	55,359 (50,582-59,301)	
Yes	Yes	No	No	No	127,018 (103,995-129,944)	
Yes	Yes	Yes	No	No	12,349 (7,956-19,604)	
Yes	Yes	Yes	Yes	No	25,593 (14,914-35,047)	
Yes	Yes	Yes	Yes	Yes	25,995 (20,659-32,053)	
Yes	Yes	Yes	No	Yes	3,038 (764-7,278)	
Yes	Yes	No	Yes	No	38,590 (29,315-45,582)	
Yes	Yes	No	Yes	Yes	27,818 (13,664-39,326)	
Yes	Yes	No	No	Yes	14,835 (8,006-20,674)	
Yes	No	No	No	Yes	3,075 (2,288-4,593)	
Yes	No	No	Yes	No	7,603 (5,329-11,192)	
Yes	No	Yes	Yes	No	1,395 (380-2,825)	
Yes	No	Yes	No	No	414 (169-855)	
Yes	No	Yes	No	Yes	210 (107-313)*	
Yes	No	No	Yes	Yes	2,410 (1,071-4,515)	
Yes	No	Yes	Yes	Yes	2,113 (1,040-3,185)*	
No	Yes	Yes	Yes	Yes	—	
No	Yes	No	Yes	Yes	128 (15-114)	
No	Yes	No	No	Yes	2,483 (203-5,248)	
No	Yes	No	No	No	35,310 (14,062-49,690)	
No	Yes	No	Yes	No	991 (167-2,011)	
No	Yes	Yes	No	No	—	
No	Yes	Yes	Yes	No	25 (-)	
No	Yes	Yes	No	Yes	—	
No	No	Yes	Yes	Yes	—	
No	No	No	Yes	Yes	169 (-)	
No	No	No	No	Yes	—	
No	No	Yes	No	No	—	
No	No	Yes	Yes	No	—	
No	No	Yes	No	Yes	—	
No	No	No	Yes	No	—	
Total						385,402 (352,138-442,047)†

*There was no number for a year as the number was suppressed to comply with BLS confidentiality rules.
†Total includes individual rows of matching database combinations that were suppressed because of small numbers to comply with BLS confidentiality rules.
OD, occupational disease; IMIS, Integrated Management Information System; WC, worker's compensation; OSHA, Occupational Safety and Health Association.

types of illnesses in Table 10. Our estimate of all injuries and illnesses in Michigan averaged 869,034 for the 3 years (Table 11).

Discussion

On the basis of the results of our analysis, we estimate that the number of work-related injuries and illnesses in Michigan is three times greater than the official estimate derived from the BLS annual survey. We

estimate there were an average of 869,034 injuries and illnesses per year in Michigan from 1999 to 2001, not 281,567 per year as estimated by BLS. To derive these total estimates, we used capture-recapture analysis of our estimate of the BLS undercount from Table VII for greater than 7 days away from work. The analysis in Table 7 is based on the actual matching of persons with injuries and illness reported by companies in

the BLS survey (Table 11). This analysis indicated that the BLS survey only captured 31% to 33.5% of the total estimate of annual injuries and illness. Although the BLS undercount, which ranged from 512,149 to 645,484 work-related injuries and illnesses per year appears very large, this estimate is consistent with a recent analysis based on statistical models that BLS missed 33% to 69% of work-related injuries alone without considering how many additional work-related illnesses were being missed.¹⁷ The BLS estimate of work-related injuries and illness is equivalent to 1 in 15 workers a year in Michigan with a work-related injury or illness whereas our estimate is one in five; although the estimated incidence would be less as some workers may have more than one injury/illness per year. Even our estimate may undercount the true burden because, the self employed and most agriculture are not included in the BLS and WC databases and both of these systems are likely to miss illnesses with long latency periods such as the pneumoconiosis and cancer.

The data we used for these analyses demonstrate that alternate databases report additional cases beyond what a company reports to BLS either when they report some cases or when a company reports they have no cases. In the top half of Table 4, where a company in BLS reported at least one case, additional cases were identified from the other databases. The bottom half of Table 4 shows cases identified in companies in the BLS survey where those companies said they had no cases but alternate data bases indicated there actually were cases. Workers' Compensation was the largest source of cases missed by the BLS survey.

There are multiple reasons why the current BLS national system for estimating work-related injuries and illnesses is incomplete: 1) lack of coverage of government workers in half the states although not in Michigan where government workers are

TABLE 5
Number of Reports of Injuries and Illnesses After Company Match Between BLS Annual Survey, Workers' Compensation, Occupational Disease Reports, OSHA, and IMIS by Industry, Michigan 1999 to 2001

Standard Industrial Classification	BLS 1999-2001 Average (Range)	Percent*
Agriculture, forestry, fishing (01-09)	3,233 (2,900-3,700)	94 (87-99)
Mining (10-14)	533 (500-600)	77 (74-81)
Construction (15-17)	15,733 (14,400-16,900)	79 (73-86)
Manufacturing (20-39)	125,100 (109,600)	83 (77-92)
Auto Manufacturing (37)	(47,833) (43,400-51,600)	77 (69-90)
Transportation, comm., elec. svcs (40-49)	14,733 (12,000-16,200)	45 (26-58)
Wholesale trade (50-51)	15,433 (12,800-19,300)	65 (49-82)
Retail trade (52-59)	35,167 (31,600-37,500)	61 (54-70)
Finance, insurance, real estate (60-67)	3,133 (3,100-3,200)	67 (66-82)
Services (70-89)	39,800 (36,500-42,400)	62 (46-61)
Public Administration (91-97)	9,337 (8,100-9,700)	69 (66-75)

*Percent of total combined BLS, WC, OD, OSHA, and IMIS estimates reported by BLS. For abbreviations, see Table 4 footnote.

TABLE 6
Company Match Between BLS Annual Survey, Workers' Compensation, Occupational Disease, OSHA, and IMIS by All Injuries and All Illnesses, Michigan 1999 to 2001

Injury/Illness	BLS 1999-2001 Average (Range)	Percent*
All illnesses	35,500 (31,700-37,400)	50 (32-60)
All injuries	246,133 (226,300-269,300)	90 (69-90)

*Percent of total combined BLS, WC, OD, OSHA and IMIS estimates reported by BLS. For abbreviations, see Table 4 footnote.

TABLE 7
Person Match Between Bureau of Labor Statistics (BLS) Annual Survey and Workers' Compensation (WC) Claims, Michigan 1999 to 2001

BLS	WC	Number of Individuals 1999-2001 With >7 Days Away From Work Average (Range)
Combined		
Yes	Yes	13,685 (9,025-17,594)
Yes	No	17,115 (14,462-18,791)
No	Yes	48,579 (45,614-54,073)
No	No	15,654 (8,256-19,691)
Total		95,033 (80,957-105,996)
Standard error		(3,822)
Injuries		
Yes	Yes	11,850 (8,231-15,663)
Yes	No	14,442 (12,089-15,704)
No	Yes	39,728 (36,746-44,189)
No	No	14,379 (7,669-17,748)
Total		80,399 (68,350-89,105)
Standard error		(3,589)
Illnesses		
Yes	Yes	1,825 (704-2,799)
Yes	No	2,673 (2,273-3,259)
No	Yes	8,851 (7,796-9,890)
No	No	1,275 (587-1,943)
Total		14,624 (12,617-17,891)
Standard error		(487)

covered; 2) lack of coverage of the self-employed and farms with fewer than 11 employees in all states; 3) the perception by employers of financial and regulatory disincentives for complete reporting; 4) employers not knowing about former employees or retirees who develop diseases with a long latency period between first exposure and manifestation of the disease (eg, pneumoconiosis); 5) socioeconomic disincentives for employees of making their employer aware of a work-related condition; and 6) the use of a sampling strategy, rather than a complete census.

Even if one expanded the BLS annual survey to include Workers' Compensation information our data indicate a substantial percentage of cases would still be missed (~18%; Table 7). These estimates of missed cases do not include injuries not covered by either the BLS annual survey, or Workers' Compensation such as the self-employed, family farmers, and Federal employees. It is estimated that exclusion of these workers causes an additional 25% undercount beyond that missed by undercounting of BLS and WC covered employees.⁶

There are a number of assumptions and limitations associated with our analyses. To identify people, we had the Social Security Number for all data sets except BLS (90% missing), which made it necessary to do textual matches on people's names. BLS often did not have the full first name or there was a variation in the first (eg, Robert versus Bob) or last name (eg, marriage or spacing). Last name and first name alone was not enough to match a person (eg, John Smith). And additional fields such as age, date of birth and employer information were used. When matching companies we were missing the EIN for OSHA and OD. Even when an EIN is available it is assigned to the corporate entity not the specific facility. This made it necessary to do textual matches on company names and addresses. To minimize overestimating the BLS undercount, ques-

TABLE 8

Person Match Between Bureau of Labor Statistics (BLS) Annual Survey, and Workers' Compensation (WC) Claims for >7 Days Away from Work by Industry, Michigan 1999 to 2001

Standard Industrial Classification	BLS 1999-2001		Percent*	Percent†
	Average (Range)	Percent*		
Agriculture, forestry, fishing 01-09	342 (326-398)	62 (54-72)	62 (54-72)	58 (50-65)
Mining 10-14	129 (103-168)	100 (-)	100 (-)	49 (46-51)
Construction 15-17	3,541 (3,320-3,851)	63 (60-67)	63 (60-67)	57 (56-60)
Manufacturing 20-39	10,243 (9,219-11,299)	49 (44-53)	49 (44-53)	38 (33-40)
Auto Manufacturing 37	(3,005) (2,287-3,875)	47 (40-57)	47 (40-57)	35 (26-43)
Transportation, comm., elec. svcs 40-49	2,605 (2,392-3,013)	14 (9-20)	14 (9-20)	10 (8-12)
Wholesale trade 50-51	1,694 (1,398-2,114)	63 (55-75)	63 (55-75)	59 (48-71)
Retail trade 52-59	3,455 (2,783-4,050)	37 (29-50)	37 (29-50)	36 (27-49)
Finance, insurance, real estate 60-67	477 (390-594)	62 (51-69)	62 (51-69)	58 (49-63)
Services 70-89	5,921 (5,522-6,401)	46 (36-55)	46 (36-55)	40 (31-51)
Public Administration 91-97	2,292 (2,148-2,545)	59 (50-68)	59 (50-68)	51 (41-51)
Total	30,800 (27,117-33,226)	59 (37-41)	59 (37-41)	32 (31-34)

*Percent of total combined BLS and WC estimates reported by BLS.

†Percent of total including capture-recapture estimates reported by BLS.

‡Published BLS numbers differ from calculated total because of rounding.

TABLE 9

Person Match Between Bureau of Labor Statistics (BLS) Annual Survey, and Workers' Compensation Claims (WC) for >7 Days Away from Work by Injury, Michigan 1999 to 2001

Injury	BLS 1999-2001		Percent*	Percent†
	Average (Range)	Percent*		
00, 09	3,131 (2,617-3,910)	46 (39-51)	46 (39-51)	46 (39-51)
00. Traumatic injuries, unsp.	(1,491) (1,287-1,996)	94 (92-96)	94 (92-96)	94 (92-96)
09. Other traumatic injuries	(1,640) (1,229-1,913)	32 (23-40)	32 (23-40)	32 (23-40)
01, 02	17,416 (14,912-18,798)	37 (34-40)	37 (34-40)	31 (23-33)
01. Traumatic injuries to bones	(4,192) (3,531-4,598)	53 (50-55)	53 (50-55)	52 (49-54)
02. Traumatic injuries to muscles, tendons, etc	(13,222) (11,380-14,195)	34 (30-38)	34 (30-38)	29 (28-30)
03, 04, 05	4,091 (3,895-4,214)	58 (55-61)	58 (55-61)	56 (55-58)
03. Open wounds	(1,945) (1,681-2,104)	47 (42-50)	47 (42-50)	46 (42-49)
04. Surface wounds and bruises	(1,743) (1,557-1,910)	81 (73-86)	81 (73-85)	81 (73-85)
05. Burns	402 (287-471)	52 (47-55)	52 (47-55)	52 (47-55)
06. Intracranial injuries	109 (73-141)	54 (40-81)	54 (40-81)	54 (40-81)
07. Effects of environmental conditions	—	—	—	—
08. Multiple traumatic injuries	1,056 (895-1,179)	39 (34-41)	39 (34-41)	38 (23-41)

*Percent of total combined BLS and WC estimates reported by BLS.

†Percent of total including capture-recapture estimates reported by BLS.

Totals were not calculated because of differences in nomenclature of injury/illness recording schemes in BLS and in WC.

TABLE 10

Person Match Between Bureau of Labor Statistics (BLS) Annual Survey, and Workers' Compensation (WC) Claims for >7 Days Away from Work by Illness, Michigan 1999 to 2001

Illness	BLS 1999-2001		Percent*	Percent†
	Average (Range)	Percent*		
7a. Skin	71 (50-107)	38 (33-49)	38 (33-49)	38 (33-49)
7c. Respiratory conditions due to toxic agents	26 (2-50)	23 (3-40)	23 (3-40)	23 (3-40)
7d. Poisoning	35 (0-84)	51 (0-100)	51 (0-100)	51 (0-100)
7e. Disorders due to physical agents	21 (0-45)	29 (0-54)	29 (0-54)	29 (0-54)
7f. Disorders associated with repeated trauma	1,957 (1,821-2,212)	59 (54-65)	59 (54-65)	57 (50-64)
7g. Other	16,447 (14,244-17,421)	34 (30-37)	34 (30-37)	28 (27-30)

*Percent of total combined BLS and WC estimates reported by BLS.

†Percent of total including capture-recapture estimates reported by BLS.

Totals were not calculated because of differences in nomenclature of injury/illness recording schemes in BLS and in WC.

TABLE 11
Illustration of Calculations Used to Estimate Total Number of Injuries and Illnesses based on Individual with Greater Than 7 Days Away from Work, Michigan 1999 to 2001

BLS	WC	1999-2001 Average (Range)	
Yes	Yes	13,685 (6,025-17,594)	A
Yes	No	17,115 (14,462-18,791)	B
No	Yes	48,679 (45,614-54,079)	C
No	No	15,654 (6,736-19,691)	D
Total		95,033 (80,967-106,995)	Total/(A + B + C + D)
Cases in BLS and/or WC		79,379 (72,731-87,306)	A + B + C
Cases in BLS only		30,800 (27,117-33,226)	A + B
Percentages captured by BLS without capture-recapture estimate		0.388 (0.373-0.410)	(A + B)/(A + B + C)
Percentage captured by BLS where total includes capture-recapture estimate		0.324 (0.310-0.335)	E = (A + B)/(A + B + C + D)
BLS Estimate		281,567 (258,000-296,700)	F
Our Estimate		869,034 (770,149-935,484)	F/E

tionable matches were considered matches.

BLS only collects personal identifiers on individuals with days away from work. When matching the total number of injuries and illnesses, we assumed that reports of injuries and illnesses from the same companies in different databases represented the same people. This clearly was not true. Where we had information on the individual, we found that cases in the different databases from the same companies were definitely not identical. Partly due to this conservative assumption, we found much less of an undercount by BLS for all injuries and illnesses (10%; Table 4) than for those with days away from work (61%; Table 7). Intuitively, it does not make sense that there is more under recording for the severe cases that have days away from work as compared to all cases. However, a survey of employer records from 200 establishments in 1987 in Massachusetts and Missouri and a nationwide survey of employer records from 250 establishments in 1998 showed that under recording of lost workday injuries was two to three times as frequent as under recording for all cases 25% versus 10% in 1987 and 22% to 33% versus 11% in 1998.¹⁷

The larger difference in undercount for days away from work cases

may be partly explained by the differences in recording by companies. We have anecdotal knowledge that in some larger companies that the individual responsible for completing the BLS annual survey and maintaining the OSHA log from which the BLS annual survey is derived is different from the person in the company responsible for tracking workers' compensation. Any discrepancy in recording cases in the BLS and worker compensation databases would be greater for cases with days away from work which were potentially included in the worker compensation database in contrast to the medical only claims which were not. However, it is likely that a large part of the difference is secondary to the fact that we overmatched for all injuries and illnesses where no information on individual people was available. Finding matches between the databases when one does not truly exist will increase the BLS estimate and accordingly decrease any estimated undercount.

Capture-recapture depends on a number of assumptions, including 1) all cases in the population have the same probability of being identified in the different data bases and 2) ascertainment in the different data bases is independent between any two data sources.¹⁸ The likelihood that an employer became aware of a workplace injury and

illness will vary by company. As described previously, who completed the BLS annual survey and their awareness of who has filed for Workers' Compensation may differ by company. One would also suspect that Workers' Compensation and the BLS annual survey are not independent, ie, being in one likely increase the chance of being in the other database. If this were true then the capture-recapture estimate would favor the BLS annual survey appearing more complete than it really is and would not account for the BLS undercount reported in this analysis. Furthermore, if one ignored the estimated cases missed according to the capture-recapture analysis, the BLS estimate still missed 61% of cases as compared to 68% when capture-recapture results were included (Table 7).

The number of cases missed varied by industry category 0% to 86% (Table 8). Our results show that there was more variation in incomplete reporting between types of injuries (6-71%; Table 9) and types of illnesses (43-77%; Table 10) than between all injuries combined and all illnesses combined (67% versus 69%) across all industries (Table 7). Accordingly, one cannot use a single factor to account for the underestimate. For certain industries like agriculture there did not seem to be much of an

undercount. One would like to think that was because the injuries and illnesses were being captured but it is more likely given the nature of farming in Michigan, self-employed and not covered by either the BLS annual survey, OSHA inspections nor the WC system that all systems were missing cases from this industry.

To obtain more accurate estimates of work-related injuries and illnesses, changes in the current system will be needed to address the undercount. The development of the national CIOI system for occupational fatal injuries is an example of basic changes that were implemented to correct the undercount in fatal work-related injuries. CIOI uses multiple data sources that cover all employees and data sources that are not dependent on an employer either being aware of the condition or submitting the report. No such comprehensive system for nonfatal work-related injuries and illnesses exists at either the national or state level. Azaroff et al.¹⁹ has described the conceptual filters that lead to underreporting: worker needs to report injury/illness or medical care to supervisor; health care provider needs to recognize work-relatedness; treatment needs to be charged to workers' compensation; health care provider needs to participate in an occupational disease-reporting system; and the injury/illness needs to be recorded by the employer. Any comprehensive system that is designed in the future will need to address potential impediments at each of these decision points to ensure more complete reporting than the current system.

A more comprehensive surveillance system for work-related injuries and illnesses would be useful to inform decision-making on the allo-

cation of public health resources to occupational health and safety in comparison to other public health issues and to prioritize, target and evaluate both public health and enforcement activity to reduce work-related injuries and illnesses.

Acknowledgment

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[Additional submission from Mr. Michaels, "Work Related Amputation in Michigan, 2007," may be accessed at the following Internet address:]

<http://www.oem.msu.edu/userfiles/file/Annual%20Reports/Amputations/2007%20MI%20WR%20amputations.pdf>

Chairwoman WOOLSEY. Now, we have a guest of—Congresswoman Titus from Nevada is here. She is a member of the Education and Labor Committee. And this is an issue of great interest to her. So I would like to recognize her for 5 minutes.

Ms. TITUS. Thank you very much, Madam Chairman, for allowing me to join this very important subcommittee hearing.

The Protecting American Workers Act proposes to update both the civil and criminal penalties under the 1970 OSHA. So the penalties will function as an effective deterrent, and hold those responsible for unsafe working conditions accountable.

As you well know, my home state of Nevada is one of 22 states that has developed its own independent program. Now, these state programs are required by law to be at least as effective as the federal standards. And, yet, Title Four of the Protecting America Work Act recognizes the fact that changes to OSHA don't automatically apply to the states with an approved state plan.

The bill instructs these states to change their plans to conform with the federal law. But the question is: What if a state chooses not to comply? Issues of state non-compliance have recently been brought to light in Nevada. And what is very clear from the recent OSHA special review of Nevada's program is that we have not been doing a good job of enforcing those standards in the state.

Yet, under current law, federal OSHA has only two options to make Nevada comply and protect its workers. One is to ask nicely. And the other is to take the much more drastic action and take over the state plan. Now, this is an extreme step that removes the state's control, leaves state and local government employees unprotected, and adds cost to the federal government for funding and running the state plan.

That is why, this morning, with the help of the chairwoman, I introduced legislation called Ensuring Worker Safety Act. And it would provide workers with safety standards and more effective enforcement, but also would allow the states to still play an important role, and protect states' rights. And it would do this by giving OSHA some options other than just the two extremes.

It would establish a formal mechanism for identifying a problem with a state plan, and compel a remedy, without beginning the process of withdrawing approval.

Now, I would like to ask you if such concurrent enforcement would be a good tool for OSHA so that you don't have to take one of the two extreme steps, and would allow states to remedy the problem, but give you some control during that period; and would also put some timelines in place so they can't drag this process out forever?

So I would ask that to the—Secretary Michaels. And, then, I would ask you, Mr. Cruden, if you would talk about how concurrent enforcement has been effective in dealing with environmental law.

Mr. MICHAELS. Congresswoman Titus, first, thank you for your work examining the effectiveness of state plans, and, particularly, the Nevada plan.

Too many Nevadans have died needlessly in workplaces because of—and I think the inadequacies of OSHA regulation have posed a difficult challenge there, and are—really need to be addressed. And our audit there has determined some very significant problems. And we are now looking at other states as well. And I think, with your help, we have really begun to take on this issue. And it is a very important one.

I haven't seen your legislation. I had heard it was coming. We certainly need tools to—you have summarized the problem very clearly. We have the death penalty available. We could take over a state plan, or we could ask very nicely. But we don't have anything in between.

And for us to have effective oversight of state plans, we need additional tools. And so I think anything that helps us get there will be very welcome. And I look forward to working with you on this.

Ms. TITUS. Thank you.

Mr. CRUDEN. In environmental law, we actually have a long history of working with states, because they are an integral part of what we try to accomplish in this notion that we refer to as "Cooperative Federalism," where states actually, in environmental prosecution, bring most of the cases—civilly, certainly—but there is, in fact, a place for federal actions, and, then, at the very top of those, federal criminal actions.

But in the United States today, most of the—your environmental prosecutions are done by state and local governments, which I actually think is the right way to do it. But there has to be a check and balance. There has to be a way that we are assuring that those prosecutions are consistent across the country, and meet the minimum standards that I believe you are advocating.

Ms. TITUS. Thank you.

And thank you, Madam Chairman. And I look forward to working on this legislation with your guidance, and with help from OSHA, as we move forward.

Chairwoman WOOLSEY. Oh, thank you, Congresswoman, for being here.

Thank you, panel one. You have helped us a lot. You have filled in a lot of the questions. And we will go forward from here. And the next step forward is panel two. Thank you.

Look who is here.

We have been joined by our ranking member, Congresswoman McMorris Rodgers.

I gave your apologies.

Mrs. MCMORRIS RODGERS. Thank you.

Chairwoman WOOLSEY. I told them it was beyond your control, which—if we could have put this off, we would have.

Mrs. MCMORRIS RODGERS. Yes.

Chairwoman WOOLSEY. That was beyond our control.

So now I would like to introduce our second panel of very distinguished witnesses.

First, in this order of presentation—Mr. Eric Frumin serves as the health and safety coordinator for Change to Win. Eric serves as chair of the Labor Advisory Committee on OSHA Statistics to the U.S. Bureau of Labor Statistics from 1983 to 2003. He received his B.A. from the State University of New York in 1979, and his master's degree from New York University in 1981.

Next, Mr. Jonathan Snare is a partner in Morgan Lewis' Labor and Employment Practice. Mr. Snare's practice focuses on labor-related issues, including occupational safety and health, mine safety and health, and whistleblower cases.

He received his J.D. from Washington and Lee University School of Law and his B.A. from the University of Virginia.

And I think you heard me say that the—we do have a lighting system here. The green light goes on when you start speaking. And by the time it gets to yellow, if you are wrapping up, you know you will get finished.

Thank you.

We will start with you, Mr. Frumin.

**STATEMENT OF ERIC FRUMIN, HEALTH AND SAFETY
COORDINATOR, CHANGE TO WIN**

Mr. FRUMIN. Thank you, Chairman Woolsey, Ranking Member McMorris Rodgers, and members of the subcommittee, for the opportunity to testify today.

I am Eric Frumin, Health and Safety Coordinator for Change to Win. I have worked in this field for 36 years.

We greatly appreciate the leadership of Chairman Miller, Ms. Woolsey, the subcommittee, for holding this hearing, and for your determined interest in the serious problems confronting workers, ethical employers, OSHA and others concerned with the severe gaps in OSHA's enforcement, including, specifically, the question of outdated penalties.

These shortcomings endanger workers' lives, and Congress has the power to close the gaps and strengthen the protections that workers deserve. We strongly support the Protecting America's Workers Act. We also support the other changes that we now understand the committee is considering, to further improve the bill.

And I would note that the AFL-CIO has submitted a statement of support as well.

First, let us recognize that the OSH Act has made a substantial difference for workers and employers. But 40 years on, the—OSHA's enforcement program is too weak in many respects. OSHA's ability to effectively conduct enforcement programs has been diminished. And even with the important additional resources which President Obama and Secretary Solis have added, the number of inspectors has still not kept pace with the growth of the workforce.

Many of the deficiencies in enforcement rest with the act itself, and must be addressed through congressional action. The maximum and minimum penalties are too small to deter misconduct, particularly in comparison with environmental and other safety laws.

OSHA continues to find and cite repeated violations where employers don't even fix the violations for which OSHA had cited them before. Why should negligent managers feel free in such—to engage in such negligence in the first place? Stronger sanctions are clearly necessary to make them fix these dangerous conditions the first time, without waiting for workers to suffer injury.

And the problem of recidivist behavior is not limited to smaller employers. Major employers, like BP, have just paid tens of millions of dollars for failing to keep their promises to their employees, their shareholders, and their communities, not to mention, OSHA.

In 2005, the Cintas—OSHA cited the Cintas Corporation a \$2,000 penalty for failing to guard machinery which was very dangerous, and which was the subject of a very—near-fatal incident a year before. Shortly thereafter, Eleazar Torres Gomes died at a

Cintas plant in Oklahoma. And another Cintas employee from Yakima, Washington—Mrs. McMorris Rodgers—close to your district—was very severely injured at the same—around the same time.

After multiple worker complaints, OSHA inspections, and a \$3 million penalty, Cintas finally agreed to fix the same hazards in 106 locations in 36 states around the country. It should not have required his death in order for Cintas to accept its responsibilities to its employees, and fix those problems, after being cited the first time, especially when they knew how serious that problem was.

The current penalties are much too low. The message to employers and workers in their communities, and shareholders, is pretty clear: Workers' lives don't mean much, and corporate executives have little to fear from the secretary of labor, under current law.

In other cases, large companies like Xcel Energy, Incorporated hire others to do hazardous work because they know the work is dangerous. For instance, Xcel recently allowed a very disreputable contractor with a history of OSHA violations to work in a very dangerous situation. And it led to an incident where five employees died. Under the current OSHA statute, huge companies like Xcel, who hire these disreputable contractors, are exempt from liability.

And this is the indictment that the U.S. attorney secured against Xcel. And in this case, they did it for—they indicted Xcel for aiding and abetting that contractor. I would like to have this entered into the record.

But the corporate executives at——

Chairwoman WOOLSEY. Without objection.

[The information follows:]

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Case No.

**UNITED STATES OF AMERICA,
Plaintiff,**

v.

- 1. Xcel Energy, Inc.,**
- 2. Public Service Company of Colorado,**
- 3. RPI Coating, Inc.,**
- 4. Philippe Goutagny, and**
- 5. James Thompson,
Defendants.**

INDICTMENT
18 U.S.C. §§ 2, 1519
29 U.S.C. § 666

The Grand Jury charges that:

1. On October 2, 2007, five men – Gary Foster, Don DeJaynes, Dupree Holt, Anthony Aguirre, and James St. Peters, all of whom were employed by RPI COATING, INC. – died at the Cabin Creek Hydro Plant, near Georgetown, Colorado. XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO operate the plant. The men were working inside a large, drained water pipe – called a penstock – when a fire erupted, but they did not die from exposure to the fire's heat and flames. Their escape from the penstock was blocked by the fire, and they survived inside the penstock for about one hour before dying from asphyxiation due to inhalation of carbon monoxide produced by the fire. The five deaths were caused by violations of the Occupational Safety and Health Administration's workplace safety and health regulations, as alleged below, which resulted in the fire and the failure to rescue the

men.

2. XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO operate the Cabin Creek Hydro Plant, located on Guanella Pass Road at about 10,000 feet elevation. It is a pumped storage electric power generation plant. Water is stored in an upper reservoir at about 11,000 feet elevation. During the day that water flows downhill through the penstock to turbines that generate electricity, and then into a lower reservoir at about 10,000 feet elevation. During the night the water is pumped back up through the penstock to the upper reservoir. The plant is located at a remote mountain site accessible only on a winding mountain road.

3. The penstock is a pipe running approximately 4,000 feet through a mountain. The penstock consists of three sections of differing construction. The upper section is a 15-foot diameter concrete pipe dropping vertically about 20 feet, then at a 55° angle for approximately 1,000 feet. The middle section is a 15-foot diameter concrete pipe dropping at a 10° angle for approximately 1,500 feet. The lower section is an approximately 12-foot diameter steel pipe dropping at a 2° angle for approximately 1,500 feet, then dropping vertically for about 50 feet to the turbines.

4. The steel section of the penstock had a lining to protect the steel from the water. By 2007, the lining of the steel section of the penstock had reached the end of its useful life. The Cabin Creek relining project involved maintenance of the penstock's lining system by removing the old liner and replacing it with a new epoxy liner.

5. In 2007, XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO contracted with RPI COATING, INC. to perform the maintenance work. RPI COATINGS, INC. is a specialty coatings application company headquartered in Sante Fe Springs, California. Both XCEL ENERGY, INC. and PUBLIC SERVICE

COMPANY OF COLORADO participated in the planning, bidding, review, execution, and supervision of the penstock relining project.

6. PHILIPPE GOUTAGNY was the owner, president, and member of the board of directors of RPI COATING, INC. He had the authority to direct and control all of the activities of RPI COATING, INC., including the Cabin Creek penstock relining project. He was involved in the planning and supervision of the project. He visited and inspected the project on about September 24, 2007.

7. JAMES THOMPSON was a vice-president and member of the board of directors of RPI COATING, INC. He had the authority to direct and control many of the activities of RPI COATING, INC. He was involved in planning the Cabin Creek relining project, and he directed and supervised the project. He visited and inspected the project on about September 24, 2007.

8. The penstock was a permit-required confined space subject to the Occupational Safety and Health Administration's general industry confined space regulation, found at 29 C.F.R. §1910.146, and other regulations specified below. However, prior to the penstock relining project, XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO consistently treated the penstock as a non-permit-required confined space.

9. XCEL ENERGY, INC., PUBLIC SERVICE COMPANY OF COLORADO, RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON were all aware that the relining project posed recognized serious health and safety hazards to their employees working inside the penstock. Additionally, during the penstock relining project several incidents occurred that posed health and safety hazards to employees working inside the penstock, and XCEL ENERGY, INC., PUBLIC SERVICE COMPANY

OF COLORADO, RPI COATING, INC., and JAMES THOMPSON knew about those incidents. Nonetheless, XCEL ENERGY, INC., PUBLIC SERVICE COMPANY OF COLORADO, RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON did not comply with the confined space regulation at 29 U.S.C. §1910.146.

10. During the bidding, planning, contract negotiation, pre-job, and execution phases of the relining project in 2007, XCEL ENERGY, INC., PUBLIC SERVICE COMPANY OF COLORADO, and RPI COATING, INC. considered whether the penstock relining project involved a permit-required confined space entry. At a September 2007 pre-job meeting, representatives of XCEL ENERGY, INC., PUBLIC SERVICE COMPANY OF COLORADO, and RPI COATING, INC., including JAMES THOMPSON, discussed whether the project involved a permit-required entry, and they all agreed that they would follow RPI COATING, INC.'s confined space program. However, XCEL ENERGY, INC., PUBLIC SERVICE COMPANY OF COLORADO, RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON did not develop and implement a written permit space program that complied with the requirements of the confined space regulation at 29 C.F.R. §1910.146.

11. During the planning, contract negotiation, and execution phases of the relining project in 2007, XCEL ENERGY, INC., PUBLIC SERVICE COMPANY OF COLORADO, and RPI COATING, INC. considered what to do in the event rescue and emergency services were needed for the penstock relining project. At a July 2007 safety training exercise at the Cabin Creek Hydro Plant the upcoming penstock relining project was discussed, and a representative of the Clear Creek Fire Authority told XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO representatives that his agency would like to do some preparation and training at the Cabin Creek Hydro Plant

in anticipation of the relining project. XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO did not conduct such an exercise. At a September 2007 pre-job meeting, representatives of XCEL ENERGY, INC., PUBLIC SERVICE COMPANY OF COLORADO, and RPI COATING, INC., including JAMES THOMPSON, discussed rescue and emergency services options. XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO instructed RPI COATING, INC. that in the event rescue and emergency services were needed during the project its employees should call the control room operators at Cabin Creek Hydro Plant, who would, in turn, call 911.

12. From about September 4 to October 2, 2007, during the outage of the Cabin Creek Hydro Plant while the upper reservoir and penstock were drained of water, RPI COATING, INC. employees undertook blasting the old lining system from the steel pipe section and applying the new epoxy liner, all under the supervision of XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO. During that period, XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO had their employees working intermittently inside the penstock, performing inspections, doing welding, supervising and inspecting the relining project, and other general industry activities.

13. On October 2, 2007, an employee of XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO entered the penstock early in the morning to perform welding, and then left the penstock. Thereafter, RPI COATING, INC. employees began spraying the new epoxy liner onto the steel pipe section. They had methyl ethyl ketone, a common industrial solvent also known as MEK, inside the penstock to clean their application equipment. MEK is a Class 1-B flammable liquid which is volatile at low temperatures. They encountered difficulties with the epoxy

application equipment, and they brought additional MEK into the penstock to clean their application equipment.

14. XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO were familiar with MEK, and they knew that RPI COATING, INC. had two 55-gallon drums of MEK on site for use in the relining project and that MEK was recommended for use with the epoxy materials. It was foreseeable to XCEL ENERGY, INC., PUBLIC SERVICE COMPANY OF COLORADO, RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON that RPI COATING, INC. would use the MEK inside the penstock during the relining project and that the presence of MEK inside the penstock could cause injury and death to people working inside the penstock.

15. On October 2, 2007, the MEK that RPI COATING, INC. employees brought into the penstock volatilized into the air in the work space, causing employees to suffer irritation and complain to their managers. An ignition source in the vicinity of the epoxy sprayer ignited the MEK vapor, starting a fire. There was only one viable egress point, which was located at the low end of the penstock. The fire was located between the five men who died and that egress point, so the five men retreated up the penstock, but they were unable to get past the 55° section of the penstock. Several RPI COATING, INC. employees located on the other side of the fire escaped the penstock and lived. RPI COATING, INC. employees called the Cabin Creek control room operators, who, in turn, called 911. Numerous rescue and emergency responders came to the plant, but they were not trained and equipped for the task, and their efforts did not succeed in rescuing the five trapped men.

16. XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO committed the following acts which caused the deaths of the five employees:

- a. XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO willfully violated 29 C.F.R. 1910, §§ 146(c)(1), (c)(2), (c)(4), (c)(8)(i), (d)(9), and (k)(1)(i) through (v).
- b. XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO aided, abetted, counseled, commanded, induced, and procured the commission of violations of 29 C.F.R. §§1910.146(k)(1)(i) through (v) by RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON.

The provisions that XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO violated, which provisions are standards, rules, and regulations promulgated and prescribed pursuant to Title 29, United States Code, Chapter 15, are more particularly described as follows:

Provisions of 29 CFR 1910 Violated and a General Description of the Provisions	Manner and Means By Which These Defendants Violated the Provisions
§146(c)(1): The employer shall evaluate the workplace to determine if any spaces are permit-required confined spaces.	XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO evaluated the penstock via hazard assessments, but they did not determine that the penstock was a permit-required confined space.
§146(c)(2): If the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by any other equally effective means, of the existence and location of and the danger posed by the permit spaces.	XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO did not inform their exposed employees, by posting danger signs and by other equally effective means, of the existence and location of and the danger posed by entry into the penstock for the relining project.

<p>§146(c)(4): If the employer decides that its employees will enter permit spaces, the employer shall develop and implement a written permit space program that complies with §146. The written program shall be available for inspection by employees and their authorized representatives.</p>	<p>XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO did not develop and implement a written permit space program for the Cabin Creek job that complied with §146.</p>
<p>§146(c)(8)(i): When an employer (host employer) arranges to have employees of another employer (contractor) perform work that involves permit space entry, the host employer shall inform the contractor that the workplace contains permit spaces and that permit space entry is allowed only through compliance with a permit space program meeting the requirements of §146.</p>	<p>XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO arranged to have employees of another employer, RPI Coating, Inc., perform work inside the penstock that involved permit space entry, but they did not inform RPI COATING, INC. that the penstock was a permit space and that entry was allowed only through compliance with a permit space program meeting the requirements of §146.</p>
<p>§146(d)(9): Develop and implement procedures for summoning rescue and emergency services, for rescuing entrants from permit spaces.</p>	<p>XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO developed and implemented a procedure for summoning rescue and emergency services – which was call the Cabin Creek control room operators, who would then call 911 – but they did not develop and implement procedures for rescuing entrants from permit spaces.</p>

<p>§146(k)(1)(i): An employer who designates rescue and emergency services pursuant to paragraph (d)(9) of §146 shall evaluate a prospective rescuer's ability to respond in a timely manner, considering the hazard(s) identified.</p>	<p>XCEL ENERGY, INC., PUBLIC SERVICE COMPANY OF COLORADO, and RPI COATINGS, INC. were required to comply with §146(k)(1)(i). RPI COATINGS, INC. discussed with XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO what should be done in the event rescue and emergency services were needed. XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO directed RPI COATING, INC. to call the Cabin Creek control room operators, who would call 911. However, XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO did not evaluate the prospective rescuers' ability to respond in a timely manner, considering the hazards identified.</p>
<p>§146(k)(1)(ii): An employer who designates rescue and emergency services pursuant to paragraph (d)(9) of §146 shall evaluate a prospective rescue service's ability, in terms of proficiency with rescue-related tasks and equipment, to function appropriately while rescuing entrants from the permit space.</p>	<p>XCEL ENERGY, INC., PUBLIC SERVICE COMPANY OF COLORADO, and RPI COATINGS, INC. were required to comply with §146(k)(1)(i). RPI COATINGS, INC. discussed with XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO what should be done in the event rescue and emergency services were needed. XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO directed RPI COATING, INC. to call the Cabin Creek control room operators, who would call 911. However, XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO did not evaluate the prospective rescuers' ability, in terms of proficiency with rescue-related tasks and equipment, to function appropriately while rescuing entrants from the permit space.</p>

<p>§146(k)(1)(iii): An employer who designates rescue and emergency services pursuant to paragraph (d)(9) of §146 shall select a rescue team or service that has the capability to reach victims within a time frame that is appropriate for the permit space hazards identified and that is equipped for and proficient in performing the needed rescue services.</p>	<p>XCEL ENERGY, INC., PUBLIC SERVICE COMPANY OF COLORADO, and RPI COATINGS, INC. were required to comply with §146(k)(1)(i). RPI COATINGS, INC. discussed with XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO what should be done in the event rescue and emergency services were needed. XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO directed RPI COATING, INC. to call the Cabin Creek control room operators, who would call 911. However, XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO did not select a rescue team and service that had the capability to reach victims within a time frame that was appropriate for the permit space hazards identified and that was equipped for and proficient in performing the needed rescue services.</p>
<p>§146(k)(1)(iv): An employer who designates rescue and emergency services pursuant to paragraph (d)(9) of §146 shall inform each rescue service of the hazards they may confront when called on to perform rescue at the site.</p>	<p>XCEL ENERGY, INC., PUBLIC SERVICE COMPANY OF COLORADO, and RPI COATINGS, INC. were required to comply with §146(k)(1)(i). RPI COATINGS, INC. discussed with XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO what should be done in the event rescue and emergency services were needed. XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO directed RPI COATING, INC. to call the Cabin Creek control room operators, who would call 911. However, XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO did not inform each rescue service of the hazards they may confront when called on to perform rescue at the site.</p>

<p>§146(k)(1)(v): An employer who designates rescue and emergency services pursuant to paragraph (d)(9) of §146 shall provide the rescue team or service selected with access to all permit spaces from which rescue may be necessary so that the rescue service can develop appropriate rescue plans and practice rescue operations.</p>	<p>XCEL ENERGY, INC., PUBLIC SERVICE COMPANY OF COLORADO, and RPI COATINGS, INC. were required to comply with §146(k)(1)(i). RPI COATINGS, INC. discussed with XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO what should be done in the event rescue and emergency services were needed. XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO directed RPI COATING, INC. to call the Cabin Creek control room operators, who would call 911. However, XCEL ENERGY, INC. and PUBLIC SERVICE COMPANY OF COLORADO did not provide the rescue team and service selected with access to all permit spaces from which rescue may be necessary so that the rescue service could develop appropriate rescue plans and practice rescue operations.</p>
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17. RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON willfully violated the following standards, rules, and regulations, which provisions were promulgated and prescribed pursuant to Title 29, United States Code, Chapter 15:

Provisions of 29 CFR 1910 Violated and a General Description of the Provisions	Manner and Means By Which These Defendants Violated the Provisions
<p>§146(c)(1): The employer shall evaluate the workplace to determine if any spaces are permit-required confined spaces.</p>	<p>RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON did not evaluate the workplace to determine if any spaces were permit-required confined spaces.</p>
<p>§146(c)(2): If the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by any other equally effective means, of the existence and location of and the danger posed by the permit spaces.</p>	<p>RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON did not inform exposed employees, by posting danger signs and by any other equally effective means, of the existence and location of and the danger posed by the permit spaces.</p>

<p>§146(c)(4): If the employer decides that its employees will enter permit spaces, the employer shall develop and implement a written permit space program that complies with §146. The written program shall be available for inspection by employees and their authorized representatives.</p>	<p>RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON did not develop and implement a written permit space program for the Cabin Creek job that complied with §146.</p>
<p>§146(d)(2): Identify and evaluate the hazards of permit spaces before employees enter them.</p>	<p>RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON did not identify and evaluate the hazards of the penstock before their employees entered it.</p>
<p>§146(d)(3)(iv): Develop and implement the means, procedures, and practices necessary for safe permit space entry operations, including ventilating the permit space as necessary to eliminate or control atmospheric hazards.</p>	<p>RPI COATING, INC. installed a ventilation system inside the penstock, but the ventilation system was inadequate to eliminate and control the atmospheric hazards resulting from the presence of MEK inside the penstock.</p>
<p>§146(d)(4)(ii): Provide ventilating equipment needed to obtain acceptable entry conditions.</p>	<p>RPI COATING, INC. installed a ventilation system inside the penstock, but at the time of the fire on October 2, 2007, one of the dehumidification units and the dust collector were not operating, and the ventilation system was inadequate to obtain acceptable entry conditions.</p>
<p>§146(d)(5)(i): Evaluate permit space conditions when entry operations are conducted, including test conditions in the permit space to determine if acceptable entry conditions exist before entry is authorized to begin, and, if entry is authorized, entry conditions shall be continuously monitored in the areas where authorized entrants are working.</p>	<p>RPI COATING, INC. conducted air monitoring at the entrance hatch, but it failed to continuously monitor the air where entrants were working.</p>
<p>§146(d)(5)(ii): Evaluate permit space conditions when entry operations are conducted, including test or monitor the permit space as necessary to determine if acceptable entry conditions are being maintained during the course of entry operations.</p>	<p>RPI COATING, INC. conducted air monitoring at the entrance hatch, but it did not monitor the permit space where its employees were working as necessary to determine if acceptable entry conditions were being maintained during the course of entry operations.</p>

<p>§146(d)(9): Develop and implement procedures for summoning rescue and emergency services, for rescuing entrants from permit spaces.</p>	<p>RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON developed and implemented a procedure for summoning rescue and emergency services – which was call the Cabin Creek control room operators, who would then call 911 – but they did not develop and implement procedures for rescuing entrants from permit spaces.</p>
<p>§146(d)(13): Review entry operations when the employer has reason to believe that the measures taken under the permit space program may not protect employees and revise the program to correct deficiencies found to exist before subsequent entries were authorized.</p>	<p>RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON had reason to believe that the measures taken under the permit space program may not protect employees, based upon their own observations of the penstock on about September 24, 2007, and based upon their knowledge that the sprayer would be located inside the penstock during application of the epoxy liner, necessitating the introduction of a solvent into the penstock.</p>
<p>§146(d)(13): Review entry operations when the employer has reason to believe that the measures taken under the permit space program may not protect employees and revise the program to correct deficiencies found to exist before subsequent entries were authorized.</p>	<p>RPI COATING, INC. and JAMES THOMPSON had reason to believe that the measures taken under the permit space program may not protect employees, based upon events occurring inside the penstock during the job, including an injury to Greg Ledbetter, Jr., multiple instances of evacuation of the penstock due to high levels of carbon monoxide, and damage to electrical equipment.</p>
<p>§146(k)(1)(i): An employer who designates rescue and emergency services pursuant to paragraph (d)(9) of §146 shall evaluate a prospective rescuer's ability to respond in a timely manner, considering the hazard(s) identified.</p>	<p>RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON did not evaluate a prospective rescuer's ability to respond in a timely manner, considering the hazards identified.</p>

<p>§146(k)(1)(ii): An employer who designates rescue and emergency services pursuant to paragraph (d)(9) of §146 shall evaluate a prospective rescue service's ability, in terms of proficiency with rescue-related tasks and equipment, to function appropriately while rescuing entrants from the permit space.</p>	<p>RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON did not evaluate a prospective rescue service's ability, in terms of proficiency with rescue-related tasks and equipment, to function appropriately while rescuing entrants from the permit space.</p>
<p>§146(k)(1)(iii): An employer who designates rescue and emergency services pursuant to paragraph (d)(9) of §146 shall select a rescue team or service that has the capability to reach victims within a time frame that is appropriate for the permit space hazards identified and that is equipped for and proficient in performing the needed rescue services.</p>	<p>RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON did not select a rescue team and service that had the capability to reach victims within a time frame that was appropriate for the permit space hazards identified and that was equipped for and proficient in performing the needed rescue services.</p>
<p>§146(k)(1)(iv): An employer who designates rescue and emergency services pursuant to paragraph (d)(9) of §146 shall inform each rescue service of the hazards they may confront when called on to perform rescue at the site.</p>	<p>RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON did not inform any rescue services of the hazards they may confront when called on to perform a rescue at the site.</p>
<p>§146(k)(1)(v): An employer who designates rescue and emergency services pursuant to paragraph (d)(9) of §146 shall provide the rescue team or service selected with access to all permit spaces from which rescue may be necessary so that the rescue service can develop appropriate rescue plans and practice rescue operations.</p>	<p>RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON did not provide the rescue team and service selected with access to all permit spaces from which rescue may be necessary so that the rescue service could develop appropriate rescue plans and practice rescue operations.</p>
<p>§106(e)(2)(v)(a): Flammable liquids shall be kept in covered containers when not actually in use.</p>	<p>RPI COATING, INC. maintained MEK inside the penstock in uncovered buckets when not actually in use.</p>

<p>§106(e)(2)(iv)(c): Class 1 liquids may be used only where there are no open flames or other sources of ignition within the possible path of vapor travel.</p>	<p>RPI COATING, INC. used MEK, a Class 1 liquid, inside the penstock where there were sources of ignition within the possible path of vapor travel.</p>
<p>§106(e)(2)(iv)(d): Flammable liquids shall be drawn from or transferred into vessels, containers, or portable tanks within a building only through a closed piping system, from safety cans, by means of a device drawing through the top, or from a container or portable tanks by gravity through an approved self-closing valve.</p>	<p>RPI COATING, INC. drew and transferred MEK into vessels, containers, and portable tanks within a building, that is, the penstock, by several means, including pouring MEK from plastic buckets into the sprayer's hoppers and by pumping MEK from plastic buckets into the sprayer, neither of which complied with §106(e)(2)(iv)(d).</p>
<p>§106(e)(6)(i): Adequate precautions shall be taken to prevent the ignition of flammable vapors.</p>	<p>RPI COATING, INC. did not take precautions adequate to prevent the ignition of flammable vapors in that it failed to adequately control and eliminate MEK vapors and all sources of ignition.</p>
<p>§106(e)(7)(i)(a): All electrical wiring and equipment shall be installed according to the requirements of Subpart S of Part 1910.</p>	<p>RPI COATING, INC. and JAMES THOMPSON supplied the Cabin Creek job with equipment not rated to be used within classified locations, including lights, a sprayer, and power distribution centers.</p>
<p>§304(g)(5): The path to ground from circuits, equipment, and enclosures shall be permanent, continuous, and effective.</p>	<p>RPI COATING, INC. used a sprayer inside the penstock that did not have a permanent, continuous, and effective path to ground.</p>
<p>§157(d)(1): Portable fire extinguishers shall be provided for employee use and selected and distributed based on the classes of anticipated workplace fires and on the size and degree of hazard which would affect their use.</p>	<p>RPI COATING, INC. provided fire extinguishers, but it failed to distribute them based upon the classes of anticipated workplace fires and on the size and degree of hazard which would affect their use.</p>
<p>§157(d)(4): The employer shall distribute portable fire extinguishers for use by employees on Class B fires so that the travel distance from the Class B hazard area to any extinguisher is 50 feet or less.</p>	<p>RPI COATING, INC. provided fire extinguishers, but it failed to distribute them within 50 feet of the employees' work area inside the penstock.</p>

COUNTS 1 - 5

Violating OSHA Regulation and Causing Death, 29 U.S.C. §666

18. Paragraphs 1 through 17 are realleged and incorporated into Counts 1 through 5 by reference.

19. On or about October 2, 2007, in the State and District of Colorado, XCEL ENERGY, INC., PUBLIC SERVICE COMPANY OF COLORADO, RPI COATING, INC., PHILIPPE GOUTAGNY, and JAMES THOMPSON were employers who willfully violated standards and rules promulgated by the Occupational Safety and Health Administration (OSHA) pursuant to section 655 of Title 29, United States Code, and willfully violated regulations prescribed pursuant to Chapter 15 of Title 29, United States Code, and those violations, which are specified above in paragraphs 16 and 17 and apply to all counts, caused death to the employee specified below for each count:

Count	Deceased Employee
1	Gary Foster
2	Don DeJaynes
3	Dupree Holt
4	Anthony Aguirre
5	James St. Peters

20. All of the foregoing was in violation of Title 29, United States Code, Section 666, and Title 18, United States Code, Section 2.

COUNT 6

Obstruction, 18 U.S.C. §1519

21. On or about October 3, 2007, and continuing thereafter to August, 2009, in the State and District of Colorado, RPI COATING, INC. knowingly altered, destroyed, concealed, and covered up records, documents, and tangible objects, to wit: Gary

Foster's and Don DeJaynes' cameras and journals and Greg Ledbetter Sr.'s cell phone, with the intent to impede, obstruct, and influence the investigation and proper administration of a matter within the jurisdiction of a department and agency of the United States, to wit: the Occupational Safety and Health Administration and the Chemical Safety Board.

22. All of the foregoing was in violation of Title 18, United States Code, Sections 2 and 1519.

A TRUE BILL.

Ink signature on file in the clerk's office
Foreperson

DAVID M. GAQUETTE
United States Attorney

s/John Haried _____
John Haried
Assistant United States Attorney__
1225 Seventeenth Street, Suite 700
Denver, Colorado 80202
Telephone: (303) 454-0100
Facsimile: (303) 454-0404
E-mail: John.Haried@usdoj.gov
Attorney for Government__

DATE: August 27, 2009

DEFENDANT: XCEL ENERGY, INC.

ADDRESS: Minneapolis, Minnesota

COMPLAINT FILED? YES NO

IF YES, PROVIDE MAGISTRATE CASE NUMBER: _____
IF NO, PROCEED TO "OFFENSE" SECTION

HAS DEFENDANT BEEN ARRESTED ON COMPLAINT? YES NO

IF NO, A NEW WARRANT IS REQUIRED

OFFENSE:

COUNT ONE THROUGH FIVE: Title 29, United States Code, Section 666,
Violating OSHA Regulation and Causing Death.

LOCATION OF OFFENSE (COUNTY/STATE): Clear Creek County, Colorado.

PENALTY: COUNT ONE THROUGH FIVE: NMT \$500,000 fine for each Count;
\$100 Special assessment fee.

AGENT: Michael Lynham, OSHA

AUTHORIZED BY: John Haried
Assistant U.S. Attorney

ESTIMATED TIME OF TRIAL:

five days or less over five days other

THE GOVERNMENT

will seek detention in this case will **not** seek detention in this case

The statutory presumption of detention is or is not applicable to this defendant. **(Circle one)**

OCDEF CASE: Yes No

DATE: August 27, 2009

DEFENDANT: PUBLIC SERVICE COMPANY OF COLORADO

ADDRESS: Denver, Colorado

COMPLAINT FILED? YES NO

IF YES, PROVIDE MAGISTRATE CASE NUMBER: _____
IF NO, PROCEED TO "OFFENSE" SECTION

HAS DEFENDANT BEEN ARRESTED ON COMPLAINT? YES NO

IF NO, A NEW WARRANT IS REQUIRED

OFFENSE:

COUNT ONE THROUGH FIVE: Title 29, United States Code, Section 666,
Violating OSHA Regulation and Causing Death.

LOCATION OF OFFENSE (COUNTY/STATE): Clear Creek County, Colorado.

PENALTY: COUNT ONE THROUGH FIVE: NMT \$500,000 fine for each Count;
\$100 Special assessment fee.

AGENT: Michael Lynham, OSHA

AUTHORIZED BY: John Haried
Assistant U.S. Attorney

ESTIMATED TIME OF TRIAL:

five days or less over five days other

THE GOVERNMENT

will seek detention in this case will **not** seek detention in this case

The statutory presumption of detention **is** or **is not** applicable to this defendant. **(Circle one)**

OCDEF CASE: Yes No

DATE: August 27, 2009

DEFENDANT: RPI COATING, INC..

ADDRESS: Santa Fe Springs, California

COMPLAINT FILED? YES NO

IF YES, PROVIDE MAGISTRATE CASE NUMBER: _____
IF NO, PROCEED TO "OFFENSE" SECTION

HAS DEFENDANT BEEN ARRESTED ON COMPLAINT? YES NO

IF NO, A NEW WARRANT IS REQUIRED

OFFENSE:

COUNT ONE THROUGH FIVE: Title 29, United States Code, Section 666,
Violating OSHA Regulation and Causing Death.

COUNT SIX: Title 18, United States Code, Section 1519, Obstruction.

LOCATION OF OFFENSE (COUNTY/STATE): Clear Creek County, Colorado.

PENALTY: COUNT ONE THROUGH FIVE: NMT \$500,000 fine for each Count;
\$100 Special assessment fee.

COUNT SIX: NMT \$500,000 fine; \$100 Special assessment fee.

AGENT: Michael Lynham, OSHA

AUTHORIZED BY: John Haried
Assistant U.S. Attorney

ESTIMATED TIME OF TRIAL:

five days or less over five days other

THE GOVERNMENT

will seek detention in this case will **not** seek detention in this case

The statutory presumption of detention **is** or **is not** applicable to this defendant. **(Circle one)**

OCDETF CASE: Yes No

DATE: August 27, 2009

DEFENDANT: PHILIPPE GOUTAGNY

YOB: 1953

ADDRESS: Santa Anna, California

COMPLAINT FILED? YES NO

IF YES, PROVIDE MAGISTRATE CASE NUMBER: _____
IF NO, PROCEED TO "OFFENSE" SECTION

HAS DEFENDANT BEEN ARRESTED ON COMPLAINT? YES NO

IF NO, A NEW WARRANT IS REQUIRED

OFFENSE:

_____ COUNT ONE THROUGH FIVE: Title 29, United States Code, Section 666,
Violating OSHA Regulation and Causing Death.

LOCATION OF OFFENSE (COUNTY/STATE): Clear Creek County, Colorado.

PENALTY: COUNT ONE THROUGH FIVE: NMT 6 months imprisonment for each count;
NMT \$250,000 fine for each count, or both; \$100 Special assessment fee

AGENT: Michael Lynham, OSHA

AUTHORIZED BY: John Haried
Assistant U.S. Attorney

ESTIMATED TIME OF TRIAL:

five days or less over five days other

THE GOVERNMENT

will seek detention in this case will **not** seek detention in this case

The statutory presumption of detention **is** or **is not** applicable to this defendant. (Circle one)

OCDETF CASE: Yes No

DATE: August 27, 2009

DEFENDANT: JAMES THOMPSON

YOB: 1949

ADDRESS: West Canyon Lake, California

COMPLAINT FILED? YES NO

IF YES, PROVIDE MAGISTRATE CASE NUMBER: _____
IF NO, PROCEED TO "OFFENSE" SECTION

HAS DEFENDANT BEEN ARRESTED ON COMPLAINT? YES NO

IF NO, A NEW WARRANT IS REQUIRED

OFFENSE:

_____ COUNT ONE THROUGH FIVE: Title 29, United States Code, Section 666,
Violating OSHA Regulation and Causing Death.

LOCATION OF OFFENSE (COUNTY/STATE): Clear Creek County, Colorado.

PENALTY: COUNT ONE THROUGH FIVE: NMT 6 months imprisonment for each count;
NMT \$250,000 fine for each count, or both; \$100 Special assessment fee

AGENT: Michael Lynham, OSHA

AUTHORIZED BY: John Haried
Assistant U.S. Attorney

ESTIMATED TIME OF TRIAL:

five days or less over five days other

THE GOVERNMENT

will seek detention in this case will **not** seek detention in this case

The statutory presumption of detention **is** or **is not** applicable to this defendant. (Circle one)

OCDEF CASE: Yes No

Mr. FRUMIN. Thank you.

The corporate executives at Xcel fear no more than the ones at Cintas do that they will lose their freedom. They are not subject to the penalties—to the criminal sanctions under the current regime.

It is time to fix these disparities once and for all, between the OSH Act and the environmental statutes. And we need to address the state-plan problems as well. The recent problems that—the recent example in Wyoming shows that the states are simply not going to fix these problems and address the penalty structures—penalty weaknesses.

Finally, I would just like to close by responding to one of the things that Mr. Snare says in his testimony. He said that the effort to change the OSH Act is driven by a few outlier employers. Is Cintas an outlier employer? They are the industry leader. Is McWane an outlier employer? They are the industry leader. Is BP or Xcel an outlier employer? They are major members of the Chamber of Commerce; and their conduct is reprehensible.

We are not dealing with outlier employers. We are dealing with a law and a legal regimen which is simply not up to the task of dealing with and preventing these kinds of outrageous abuses by major American corporations.

Thank you very much. I would like my full statement entered into the record.

[The statement of Mr. Frumin follows:]

**Prepared Statement of Eric Frumin, Health and Safety Coordinator,
Change to Win**

Chairman Woolsey, Ranking Member McMorris Rodgers, and members of the Subcommittee, thank you for the opportunity to testify today.

I am Eric Frumin. I serve as the Health and Safety Coordinator for Change to Win, and have worked in this field for 36 years. Change to Win is a partnership of five unions and 5.5 million workers, in a wide variety of industries, building a new movement of working people equipped to meet the challenges of the global economy in the 21st century and restore the American Dream: a paycheck that can support a family, affordable health care, a secure retirement and dignity on the job. The five partner unions are: International Brotherhood of Teamsters, Laborers' International Union of North America, Service Employees International Union, United Farm Workers of America, and United Food and Commercial Workers International Union.

On behalf of Change to Win, we greatly appreciate the leadership of Chairman Miller, Chairman Woolsey and this Subcommittee in holding this hearing, and for your determined interest in the serious problems confronting workers, ethical employers, OSHA and others concerned with the severe gaps in OSHA's enforcement powers, including specifically the question of outdated penalties.¹ These shortcomings endanger workers' lives, and Congress has the power to close the gaps and strengthen the protections that workers deserve. We strongly support the Protecting America's Workers Act's PAWA (HR 2067).

We also support the changes which we now understand the Committee is considering to further improve the bill you introduced last year. These include the improvements in Title II to protect workers whose employers would rather ruthlessly retaliate against employees who complain about hazards or violations—instead of holding themselves accountable for violating the law and endangering their employees. These improvements provide the protections that have served workers well under other laws, and fixes a severe problem which has hindered OSHA enforcement for decades.

In addition, we support other related legislation introduced by your Committee to close the loopholes in the OSHAct, such as HR 2113, to improve the reporting practices of large corporations regarding their violations and their employees injuries on the job, and HR 2199 to better and more quickly protect workers facing imminent dangers of severe hazards.

Let's first recognize that the OSHAct has made a substantial difference for workers and employers. For 2008, BLS has reported that 5,071 workers died from injuries on the job, an average of 14 workers every day. While still completely unacceptable, it is down from significantly from the 6,632 that BLS reported in 1994.² (An estimated 50,000 more workers lost their lives due to occupational diseases, which necessitates long-overdue action to reduce and wherever possible eliminate the widespread hazards from toxic materials in the workplace.)

And for 2008, the BLS tells us that employers reported 3.7 million work-related injuries and illnesses.³ We know's and the Labor Department and others have conceded—that this number does not reflect the full extent of job injuries.^{4,5} And we believe the real number is estimated to be substantially greater. But it is also unquestionable that the actual numbers and rates of non-fatal injuries and illnesses has declined substantially since 1970's particularly in highly hazardous industries and occupations.

But 40 years on, the OSHAct's enforcement program is too weak in many respects. Over the years OSHA's ability to effectively conduct enforcement programs has been greatly diminished.⁶ Even with the very important additional resources which President Obama and Secretary Solis have added, the number of inspectors has still not nearly kept pace with the growth of the American workforce. We certainly welcome these additional resources, as well as the many enforcement initiatives adopted by Secretary Solis and the other new leaders within the Labor Department. However, we also recognize that no Secretary, Assistant Secretary or Labor Solicitor can overcome the basic and severe limits of the Act itself.

The Administration's improvements in OSHA's enforcement and penalty policies could and should help strengthen enforcement's as soon as possible. And they will need to be supported by Congressional action to provide the necessary resources, especially if the new penalty provisions are adopted.

But many of the deficiencies in enforcement rest with the OSHAct itself and must be addressed through Congressional action. The OSHAct's enforcement program is too weak's especially the maximum and minimum penalties's to deter misconduct, particularly in comparison with environmental and other safety laws.

For example, the penalties for serious violations are absurdly low. Serious violations of the OSH Act are violations capable of causing "death or serious physical harm's" hazards that can very seriously injure, sicken or even kill workers.

For such violations, the current law allows a maximum penalty of \$7,000. However, OSHA's own data shows that the average penalty issued by Federal inspectors for such serious violations in FY 2009 was only \$970. Excluding California, where the law already calls for higher penalties, the average serious penalty assessed by state plans is only 65 percent of the federal OSHA average.⁷

Aside from OSHA, every other federal enforcement agency—except the IRS—is covered by the Federal Civil Penalties Inflation Adjustment Act, which requires increases in penalties for inflation. The last time that the Congress adjusted these penalties was in 1990's the only time in 40 years that Congress has increased the penalties since it passed the Act in 1970. Thus, the real effect of OSHA penalties has been reduced by about 40% since 1990. The penalty provisions of PAWA would do so by increasing the maximum penalties for Serious and Other violations from \$7,000 to \$12,000, and for Willful and Repeat violations from \$70,000 to \$120,000. It is high time to correct this terrible disparity.

Grossly inadequate deterrence

The current penalties do not provide a serious deterrent to serious misbehavior by employers. OSHA continues to find and cite repeated violations as well as so-called "failure-to-abate" penalties where employers don't even fix the violations for which OSHA has cited them at the same worksites. Cases involving willful and repeated violations commonly trigger the additional detailed investigations and higher penalties in subsequent inspections. But why should negligent managers feel free to engage in such negligence in the first place? Stronger sanctions are clearly necessary to make them fix these dangerous conditions the first time rather than see workers suffer needless additional injury.

The problem of recidivist behavior is not limited to small employers. Major employers in particular fail to get the message. OSHA recently announced a record \$87 million penalty at BP, after a previous citations with record penalties of \$21 million. Of that \$87 million, nearly \$57 million was to penalize BP for failing to keep its previous promises to OSHA, its employees, its shareholders and the community to stop these abusive practices and to abate serious hazards which OSHA had already identified.

In 2005, OSHA cited the Cintas Corp. for failing to guard its heavy-duty automated laundry equipment's despite a near fatal incident the year before on a similar piece of equipment, and common knowledge in the industry about this hazard. OSHA only imposed a penalty of \$2125, which itself was later reduced. Shortly thereafter, Eleazar Torres Gomez was killed after being thrown into an industrial dryer while trying to clear a large conveyor, and another employee was severely injured in Washington state. Eventually, multiple Cintas plants in eight states across the country were found to have repeatedly violated the same or similar applicable standards. Only many months later, after these multiple worker complaints, OSHA inspections and a nearly \$3 million penalty, did Cintas finally agree to fix all its 106 locations in 36 states across the country with similar hazards.

It should not have required Mr. Torres Gomez's gruesome death in an industrial dryer, and the significant sanctions that OSHA later imposed, to force Cintas to take seriously its simple legal obligation to guard hazardous machines and protect its hardworking and loyal employees. The first citation and penalty in 2005, for a deadly hazard that was already well-known to the employer, should have been suffi-

cient to trigger action across the company's particularly in a company whose own policies require local management compliance with corporate directives.

In other cases, where there are no willful or repeat violations, OSHA is confronting a fatality and potential violations for the first time. In these cases, the deterrence is even worse. The current penalties for common serious violations, in cases of worker deaths, are completely unacceptable.

When WalMart's managers in Valley Stream, NY completely failed to plan for the huge crowds at their major store on the Thanksgiving Friday, 2008, and a store employee was literally trampled to death as a result of that poor planning, the only sanction WalMart suffered was a \$7000 penalty. And despite this negligible sanction, WalMart is still vigorously challenging that penalty on appeal.

In 2008, Raul Figueroa, a mechanic at Waste Management, Inc. (WMI) in South Florida was killed by the hydraulic arm of the garbage truck he was repairing. The ultimate penalty was only \$6,300.⁸ Waste Management is one of the largest companies in the solid waste industry. What difference does a \$6,300 penalty make to a giant corporation?

As revealed by the 2008 study by the Majority Staff for the Senate Committee on Health, Education, Labor and Pensions, among all federal OSHA fatality investigations conducted in FY 2007, the median initial penalty was just \$5,900.⁹ Worse, after negotiation and settlement, the median final penalty for workplace fatalities was reduced to only \$3,675. For willful violations in fatality cases, the median final penalty was \$29,400, less than half the statutory maximum of \$70,000 for such violations.

The message to employers, workers, their communities and corporate shareholders is pretty clear: workers' lives don't mean much, and corporate executives have little to fear from the Secretary of Labor under the current law.

Where employers use contract labor for especially hazardous tasks, the potential sanctions are non-existent for the corporations and executives who control the workplace.

In many cases, such as that of Xcel Energy, Inc., the employer hires others to do the most hazardous jobs, in part because the employer is fully aware of the dangers of doing the work with its own employees. Having hired a disreputable painting contractor with a history of OSHA violations to paint the inside of a large hydroelectric tunnel,¹⁰ the Xcel Corp. ignored its own confined space policy and allowed the contractor's work to proceed under very hazardous conditions. Shortly thereafter, five men died when a fire started among the chemicals they were handling in the tunnel. Under the current OSHA statute, with the exception of the construction industry, only the contractor business itself as well as its officers, could be held accountable for allowing those conditions to exist in the first place. The huge corporations which hire these disreputable contractors are exempt from liability for OSHA violations and subsequent prosecution.

Fortunately, the US Attorney in Denver decided to take a more creative approach, and secured an indictment of not just the contractor and its officers, but also against Xcel Corp. for "aiding and abetting" the contractor.¹¹ But the corporate executives at Xcel Corp. still faced no more of a threat than did the ones at Cintas's since it was only the corporation itself that was charged. It remains to be seen now whether or not the Xcel executives take the steps to fully protect their employees. But it is certain that none of them will suffer any personal loss of freedom or penalties for the horrific consequences of their company's abysmal failures.

A better model exists under environmental and other criminal law

The negligible penalties commonly provided under the OSHAct's and the lack of deterrence they exact—contrasts very strongly with the comparable provisions under other Federal laws on human and environmental health and safety. Whether we look at financial penalties, the severity of the available criminal sanctions, the degree of harm required to impose serious sanctions, or other measures, the OSHAct shows a blatant disregard for the lives and health of American workers.

Environmental laws have explicit criminal sanctions with jail terms of up to 15 years for knowing violations of environmental protection regulations and knowing endangerment of workers. There is no need under these laws to demonstrate that anyone was actually harmed, much less actually killed.

For nearly 20 years, EPA's enforcement policies have also placed deterrence as its top priority in enforcement proceedings ahead of "Fair and Equitable Treatment of the Regulated Community" or "Swift Resolution of Environmental Problems."¹² And EPA has used its criminal authority vigorously and frequently at least in comparison to the lackluster track record on criminal sanctions by the Labor and Justice Departments under the OSHAct. As the previous Assistant Attorney General Ron-

ald Tenpas said recently in his comments on their prosecutions of employers with both environmental and worker safety violations:

“There are obviously plenty of good corporate citizens out there who want to do right by their workers and want to do the right thing, but there are always going to be some for whom it’s important that they know there’s the threat of prosecution and there’s the threat of going to jail and there’s the threat that their company bottom line is going to be hit and hit significantly if they don’t comply with the law.”

“At the end of the day, we work with the penalties that Congress has decided over time are the appropriate ones to provide. In some of those cases, McWane being an example, we have found there may be violations related to worker safety, but there are also more serious violations related to the environment where penalties are typically much more significant: maximum five years, 10 years, jail time. So we’ve tried to make sure we’re using the full-range of enforcement options we have, including the environmental statutes for those situations.”¹³

It is time to fix this disparity, once and for all.

Criminal sanctions and prosecutions

Finally, only a small handful of OSHA cases with willful violations, and only those involving fatalities, are prosecuted for criminal violations. With hundreds of fatality investigations annually, only a literal handful are referred to the Justice Department for prosecution, and some of those are never pursued. One reason so few cases are treated this way is that the worst penalty these criminals face is a six-month sentence, a mere misdemeanor. Given the average caseload of an Assistant U.S. Attorney, it is no surprise that such cases fail to attract the prosecutorial zeal that is required to investigate complicated, non-routine cases involving issues that federal prosecutors rarely see in their careers.

Contrast that with the average of 360 cases referred annually by EPA to DOJ for criminal prosecutions during the last 7 years of the Bush Administration alone. In 2009, the prosecutions yielded 176 defendants receiving in 57 years of jail time and \$64 million in penalties, more cases, fines and jail time in one year than during OSHA’s entire history.¹⁴

Why are these cases treated so differently? One reason is that, as the Committee heard last year, the environmental laws carry maximum penalties of three to five years per substantive count, and 15 years for crimes involving knowing endangerment (regardless of whether any injury occurs).¹⁵

The OSH Act should be amended to provide similar penalties. PAWA goes part of the way by raising the maximum sentence to 5 years for the first offense, and 10 years for a second offense, far less than the 15 years available to prosecutors under environmental law, but, as felonies, a substantial improvement over the mere six-month misdemeanor under current the current OSHAct.

To make matters worse, the criminal sanctions only apply to cases where the willful violations actually kill a worker. Short of that, no matter how badly the worker was injured or diseased, and no matter how egregious the employer’s behavior, there is not even the threat of criminal prosecution.

Again, PAWA fixes this serious gap by applying the criminal sanctions to not only those willful violations that kill workers, but also to the same kinds of violations that seriously injury or sicken them. Again, this is considerably less jail time than would be the case if the same hazard were prohibited under our environmental laws.¹⁶ But it is vast improvement over the virtual immunity which negligent employers now enjoy from criminal prosecution when they willfully endanger the safety of their employees.

Finally, we understand that the Committee is considering applying such penalties to cases of “knowing” violations, rather than the “willful” violations under current OSHA law, a category which does not exist elsewhere in environmental or other criminal law. As the Committee heard last year,¹⁷ this is a much better grounds for prosecution, since it is already familiar to prosecutors, and denies employers the defense that they were ignorant of the law. We strongly support this change, and urge the Committee to assure that it is included in any final legislation.

The disparity in criminal sanctions is evident: as long as it is only a misdemeanor to kill a worker or lie to an OSHA inspector, many such cases will linger and die while cases under other laws promising greater deterrence will get the attention of prosecutors. Simply put, under the OSHAct, there is nothing resembling justice for the families and co-workers of those who suffer or die at the hands of negligent employers.

State Plan inadequacies

Notwithstanding the strengths and weaknesses of the current Federal OSHA enforcement program, state plans have greatly different approaches to fatality inves-

tigations and sanctions, in addition to the much weaker practices on penalties mentioned above. These variations include not only the level of penalty,¹⁸ but also whether to classify violations as serious in the first place,¹⁹ as well as the nature of the follow-up enforcement involving other locations of the same company. Thus, our problems with the absence of strong deterrence through higher penalties is magnified further for the millions of workers in the 23 states where the enforcement is administered by state authorities.

Under the current OSHAct, the Secretary of Labor has had exceptional difficulty forcing states to conform their enforcement programs to the performance levels of federal OSHA. However, at a minimum, PAWA would force states to increase their penalties and criminal sanctions as well.

Recently, the Wyoming Governor's Worker Fatality Prevention Task Force recommended that the state legislature adopt the same penalties that you have proposed in PAWA to help stop the fatalities in the state's construction and oil/gas drilling industries, deaths that have kept Wyoming's place as having the highest rate of worker deaths in the entire country. Outrageously, after both bi-partisan sponsorship as well as an overwhelming vote for passage by the state's House, the Wyoming Senate voted it down two weeks ago in a tie vote. And this was after the state's oil/gas industry, publicly, at least—supported this legislation.

As the Wyoming example makes clear, even where governors or legislators recognize the same faults with the penalties under their own OSHA laws as you have recognized with federal law, the challenge of fixing that problem is a practical impossibility. Other than California, no state has increased its penalties above the federal minimums, and we should not expect the states to do so short of action by the Congress in passing PAWA. Only action by the US Congress is going to close this gap.

Conclusion

The penalties proposed by PAWA are very modest. The new criminal sanctions are equally modest. Even with these improvements, we all recognize that if passed, PAWA will not put the OSHAct on an even par with the sanctions that negligent employers have already faced for years under our environmental laws.

However, these updated penalties and criminal sanctions will begin to give government inspectors and civil and criminal prosecutors the essential tools they need to more effectively deter abusive employer conduct, tools that their counterparts in many other federal agencies already routinely use to enforce similar laws on environmental protection. Indeed, Congress has increased the penalties under other laws, while allowing OSHA's penalties to linger in their weakened state. Honest, responsible employers will survive, and indeed even thrive, with a safer, secure and more productive workforce if you give OSHA the same powers. And until then, dishonest and irresponsible employers will continue to injure and kill workers with virtual impunity.

We respectfully call upon Congress to modernize and strengthen OSHAct's penalties, as soon as possible. In this way, our nation can better strive to deliver the promise the Congress made when it passed OSHA 40 years ago: "* * * to assure safe and healthful working conditions for each working man and woman and * * * by providing an effective enforcement program."

I will be happy to answer any questions.

ENDNOTES

¹ We will not attempt to repeat all the relevant testimony offered at the other recent hearings that the Committee and the Subcommittee have held on the issues covered by PAWA, including those on March 12, April 23, June 18 and June 24, 2008, and April 28, April 30 and October 28, 2009.

² US Bureau of Labor Statistics, Census of Fatal Occupational Injuries.

³ US Bureau of Labor Statistics, Annual Survey of Occupational Injuries and Illnesses.

⁴ HIDDEN TRAGEDY—Underreporting of Workplace Injuries and Illnesses: A Report By the Majority Staff Of The Committee On Education And Labor U.S. House Of Representatives; June 2008.

⁵ Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data, US Government Accountability Office, GAO 10-10, October 15, 2010.

⁶ Testimony of Ms. Margaret Seminario, House Committee on Education and Labor, April 28, 2009, p. 13.

⁷ Data supplied by the Occupational Safety and Health Administration, from its Integrated Management Information System.

⁸ OSHA Inspection # 311088033

⁹ Discounting Death: OSHA's Failure to Punish Safety Violations That Kill Workers, Report of the Majority Staff of the Committee on Health, Education, Labor and Pensions, U. S. Senate, April 29, 2008.

¹⁰M. McPhee, Xcel, contractor fined \$1 million in Georgetown tunnel deaths,, Denver Post, March 24, 2008; <http://www.denverpost.com/search/ci—8679504>

¹¹Indictment: United States v. Xcel Energy Corp and others, Case 1:09-cr-00389-WYD, District Court, Middle District of Colorado, Aug. 27, 2009.

¹²EPA Civil Penalty Policy GM-21, 1984.

¹³Interview of Ronald Tenpas, Frontline: A Dangerous Business Revisted, Dec. 13, 2007; <http://www.pbs.org/wgbh/pages/frontline/mcwane/interviews/tenpas.html>

¹⁴Testimony of Ms. Margaret Seminario, House Committee on Education and Labor, April 28, 2009, p. 9.

¹⁵Testimony of Mr. David Uhlmann, House Committee on Education and Labor, April 28, 2009, p. 2.

¹⁶Ibid, p. 5.

¹⁷Ibid, p. 12.

¹⁸Testimony of Ms. Margaret Seminario, House Committee on Education and Labor, April 28, 2009, p. 14-15.

¹⁹Statement of Chairman George Miller, House Committee on Education and Labor, Oct. 29, 2009: “only 29 percent of Nevada’s citations were classified as ‘serious.’ Compare that to 44 percent for other state plans and 77 percent for federal OSHA.”

Chairwoman WOOLSEY. Without objection.
Mr. Snare?

STATEMENT OF JONATHAN SNARE, PARTNER, MORGAN, LEWIS & BOCKIUS LLP, ON BEHALF OF THE CHAMBER OF COMMERCE

Mr. SNARE. Good morning, Chairman Woolsey, Ranking Member McMorris Rodgers—

Chairwoman WOOLSEY. Your microphone is not on, sir.

Mr. SNARE. I am sorry.

Chairwoman WOOLSEY. Okay.

Mr. SNARE [continuing]. And members of the subcommittee.

I appreciate the opportunity to appear before you to address a number of these very important issues raised by the Protecting America Workers Act, and the changes under consideration today.

I am testifying on behalf of the U.S. Chamber of Commerce.

At the outset, I would like to provide you, the subcommittee, a brief overview of my background and experience, to allow you to appreciate and understand the relevance of my testimony, and my perspective on these very important issues.

As mentioned, I am a partner with Morgan Lewis Law Firm, having joined the law firm last February 2009. And my practice is involved in the area of labor and employment and, specifically, workplace safety issues.

Prior to the time I joined Morgan Lewis, I had the privilege of serving, for over 5 years, in several positions at the U.S. Department of Labor. I served as the deputy assistant secretary for OSHA from December 2004 through July 2006, as well as served as the acting assistant secretary for OSHA for most of that period from January 2005 through April 2006. I then served as the deputy solicitor of labor from July 2006 through January 2009. And I also served as the acting solicitor for most of 2007.

While serving in those positions, I believe I have an understanding on the many different strategies and tools that OSHA has used to implement its very important mission. I believe the goals behind get Protecting America Workers Act are laudable. This legislation is intended to enhance OSHA on its mission to assure a safe and health workplace environment, and reduce the number of injuries and fatalities. I do believe, however, that the revisions to PAWA under consideration, as well as the legislation itself, would

have unintended consequences, and may not achieve the intent behind the bill.

Penalties alone will not solve the problem. Remember—penalties are imposed after an injury or a fatality. The critical mission of OSHA is to assist employers to make sure that injuries and fatalities never occur in the first place. It is also important to note, as part of this discussion, the Bureau of Labor Statistics—according to the Bureau of Labor Statistics, workplace injuries and illnesses and fatalities have declined over the last decade, and the most recent available statistics for fiscal year 2008—injuries and fatalities were at the lowest level ever recorded.

While even one workplace fatality is one too many, progress has been made. At the core, PAWA can be described under the old adage, “Bad facts make bad law.” This is an effort to change the OSH Act within enforcement-only sanctions appears to be driven by the conduct, as Mr. Frumin mentioned, by a few outlier employers who fail in their workplace safety and health obligations.

The proposed penalty increases and other sanctions will do nothing to assist employers to understand their obligations for workplace safety and health, such as the small-business owner who is trying to understand how to comply with the applicable requirements. How will increasing penalties help her design a more effective workplace-safety program when she knows she is unlikely to see an inspection unless there is an accident or a fatality?

This employer is obviously better served with more outreach and compliance-assistance materials than increased penalties. Again, the goal here is compliance and prevention, not sanction.

We have a few following concerns with the provisions of PAWA and the revisions under consideration. The abatement of hazards pending contests of citations—this proposal will reduce and eliminate the ability of the employer to challenge a citation through OSHRC by requiring immediate abatement. Immediate abatement, as you have already heard in panel one, is already available through the emergency-shutdown mechanism that Mr. Fairfax described for you.

The signaled modification would substitute an employer’s ability to suspend abatement while contesting a citation, to allow him to have the right to have his citation adjudicated by substituting a higher burden of proof akin to securing a temporary injunction. The civil-penalty changes under PAWA—while some of the changes proposed for the failure to abate in the “other than serious” are laudable in the proposed modifications, the civil penalties themselves raise the issues I already mentioned.

Penalties themselves do not solve the problem.

The criminal penalties in the sanctions under PAWA—the change from “willful” to “knowing”—would upend a decade of OSHA law, introduce tremendous uncertainty, and furthering a huge increase in contested cases.

The issue of adding a responsible corporate officer, as originally in PAWA, as well as now the revision to officer or director, will also result, in my judgment, in a witch hunt, for officers and directors responsible. Those terms are undefined, confusing; will cause a lot of problems on the job site; will cause problems for safety director

and other employees trying to manage safety and health on the job site.

The whistleblower provisions are also problematic, as mentioned in my written statement.

And, again, I think it is important for the subcommittee to understand the unintended consequence and the impact of higher penalties imposed under this act. And that will clog and delay the judicial process under OSHRC, and result in significant delays and adjudication for OSHA penalties, and will cause a diminution and reduction in workplace safety and health.

I would ask the committee to enter my written statement into the record. And I will be happy to address any questions you may have.

Thank you, Madam Chairman.

[The statement of Mr. Snare follows:]

**Prepared Statement of Jonathan L. Snare, Partner,
Morgan Lewis & Bockius LLP, on Behalf of the Chamber of Commerce**

Good morning Chairwoman Woolsey, Ranking Member McMorris Rodgers and Members of the Subcommittee. My name is Jonathan Snare. I am an attorney and I am currently a partner with the DC office of Morgan Lewis & Bockius LLP law firm. I appreciate the opportunity to appear before you at this hearing to address a number of the important issues raised by the Protecting America's Workers Act legislation (HR 2067; S 1580). I am testifying today on behalf of the U.S. Chamber of Commerce, the world's largest business federation with over three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. Importantly for the purposes of this hearing, over 96 percent of the Chamber's members are small businesses employing 100 or fewer employees. I am a member of the Chamber's Labor Relations Committee and serve on the OSHA Subcommittee. My testimony and comments are not intended to represent the views of Morgan Lewis & Bockius LLP or any of our clients.

Background

At the outset, I would like to provide you and the Subcommittee with a brief overview of my background and experience to allow you to appreciate and understand the relevance of my testimony and my perspective on these very important issues.

I have been a practicing attorney for close to twenty-five years, and I am a graduate of the University of Virginia and Washington & Lee University School of Law.

As I mentioned, I am a partner with Morgan Lewis & Bockius LLP, having joined the firm in February 2009. My practice is focused on advising clients in the labor and employment field, largely in areas of workplace safety and health, as well as whistleblower matters, regulatory issues, government prevailing wage requirements, wage and hour/FLSA, and other related matters. The focus of my practice is to provide advice and counsel to a wide variety of clients in the area of workplace safety and health—ranging from assisting clients with investigations from government agencies such as the Chemical Safety Board, to representing clients in enforcement proceedings brought by OSHA and its state plan state partners, as well as to assisting clients with safety and health compliance issues, recordkeeping questions, workplace audits, and the like. On this compliance side of the practice, I have been working with my law firm colleagues (several of whom have over 30 years of experience in this field) to advise clients large and small with a variety of matters to assist them in complying with all applicable OSHA workplace safety and health requirements.

Prior to the time I joined the Morgan Lewis law firm last year, I had the privilege of serving for over five years in several positions at the U.S. Department of Labor. Most relevant for the purposes of this hearing, I served as the Deputy Assistant Secretary for the Occupational Safety and Health Administration (OSHA) from December 2004 through July 2006, as well as serving as the Acting Assistant Secretary for OSHA for most of that period, from January 2005 through April 2006. I then served as the Deputy Solicitor of Labor from July 2006 through January 2009 and I served as the Acting Solicitor of Labor for most of 2007. I also served as the Senior Advisor to the Solicitor in 2003 to 2004.

Having had the privilege of running two of the Department of Labor's largest agencies, OSHA and the Solicitor's Office, I once had the responsibility of overseeing

OSHA's critically important mission of assuring a safe and healthy workplace for every working American, and of the Solicitor's Office crucial role of providing legal support to OSHA to assist the agency in implementing the goals of its mission. In so doing, I believe I developed an understanding and insight on the many different strategies and tools that OSHA has available to implement these important goals.

We share the common goals of the Protecting America's Workers Act

I believe that the goals behind the Protecting America's Workers Act are laudable—this legislation is intended to enhance OSHA in its mission to assure a safe and healthy workplace environment and to reduce the number of workplace injuries/illnesses and fatalities. I do believe, however, that the revisions to PAWA under consideration today as well as legislation itself may have unintended consequences and may not achieve the intent behind this bill. Penalties alone will not solve the problem—remember, penalties are imposed after the fact of an injury or fatality. The critical mission of OSHA is to assist employers to make sure these injuries and fatalities never occur in the first place. To understand my concerns, I think it would be helpful for the Subcommittee to hear about the recent activities of OSHA as well as its record in achieving its mission.

Overview of OSHA's record over the last decade

During the last Administration, I believe that OSHA demonstrated that its "balanced approach" of using enforcement, compliance assistance and cooperative programs, and outreach and training to respond to the challenge of workplace safety and health was successful in its continuing mission of improving workplace safety and health.

On the enforcement side, OSHA endeavored to focus its resources on those employers who demonstrated a complete disregard for their obligations under the OSH Act and the many standards and regulations promulgated there under. As part of that effort, OSHA conducted on average approximately 38,000 inspections every year; focused the agency's resources and enforcement on employers who had failed to value the lives and safety/health of their employees; expanded the use of procedures for the agency to seek intervention by a federal court of appeals to take action against employers when necessary; increased the number of referrals to the Department of Justice for possible criminal prosecution from an average of 6 per year in the 1990s to approximately 12 per year; utilized the available tools of egregious citations when necessary, and OSHA took steps to clarify through rulemaking the application of the egregious policy to respond to a court decision which had created confusion as the use of that policy; and issued a number of significant citation penalties including the largest citation penalty in OSHA's history up to that time.

For the vast majority of employers who understand the value of their most precious resources—their employees—and who want to do the right thing and comply with workplace safety and health requirements, OSHA offered the assistance to enable them to better understand and comply with their obligations. The agency did this through our expanded compliance assistance programs including the expansion of the VPP program which I believe had a significant positive impact on workplace safety over the past decade. OSHA also continued with outreach efforts and expanded training programs in many different and innovative ways to provide employees, employee groups, community groups and employers resources to better understand the safety requirements and to learn better ways to improve safety on the job-site. One of the initiatives of which I am most proud were the efforts to focus on the challenge of reaching the non-English speaking and immigrant workforce through a variety of programs including projects designed to outreach to Hispanic workers through an OSHA task force as well as working with a number of governments and consulates from Mexico as well as Central America to produce materials and guidance in Spanish.

The record on workplace injuries, illnesses and fatalities over the past decade shows continued improvement. As has been reported by the Bureau of Labor Statistics (BLS), workplace injuries and illnesses declined throughout the decade and the most recent available statistics, for FY 2008 are at the lowest levels ever recorded. Nonfatal workplace injuries and illnesses among private industry employers in 2008 occurred at a rate of 3.9 cases per 100 equivalent full-time workers—a decline from 4.2 cases in 2007. Workplace fatalities have likewise declined over the past decade, and the most recent available statistics, show that fatalities are at the lowest levels ever recorded. For FY 2008, 5,071 workplace fatalities were recorded, down from a total of 5,657 fatal work injuries reported for 2007. While the 2008 results are preliminary, this figure represents the smallest annual preliminary total since the Census of Fatal Occupational Injuries (CFOI) program was first conducted in 1992. Based on these preliminary counts, the rate of fatal injury for U.S. workers in 2008

was 3.6 fatal work injuries per 100,000 full-time equivalent (FTE) workers, down from the final rate of 4.0 in 2007. While even one workplace fatality is one too many, and tragic to every family who suffers such a loss (which I can attest to since my family lost a member to a workplace accident), the facts are clear that OSHA has achieved significant success in reducing these injuries and fatalities throughout its history including these record low numbers of fatalities and injuries in the last decade.

By every available factual and statistical measure, OSHA has been successful in its mission. Something must have been working for these results to have been achieved. In my judgment, the way to achieve these types of results is for OSHA to use the wide variety of resources available to assist employers who have the ultimate responsibility under our system for workplace safety and health, which includes motivating employers in some cases through enforcement or the risk of enforcement, as well as offering outreach and compliance assistance to employers to enable them to understand and comply with their obligations. This balanced approach to workplace safety makes sense particularly given the structure of the OSH Act and the reality of agency funding, and the nature of OSHA's responsibilities for workplace safety.

All in all, I am proud of the record of OSHA and the efforts of its dedicated employees over the past decade. I believe these efforts contributed to achieving the lowest number of workplace fatalities and injuries ever recorded.

I understand that there are those who disagree, some vigorously, with the approach of the last Administration. These types of debates concerning the best way for OSHA to achieve its mission and the varying combinations and emphasis of the available tools for OSHA given the current funding structure—whether it be enforcement, regulatory requirements, compliance assistance, cooperative programs, training and who should be the beneficiary of training programs—have been around since the passage of the OSH Act and inception of the agency, and will continue in the future. I think these types of debates are healthy—they show that stakeholders from all sides are looking for the best approach to improving workplace safety.

OSHA's mission and structure, and employers' responsibility for workplace safety and health

The OSH Act tasked OSHA with the mission to assure workplace safety and health but it has always been the responsibility of the employers, not OSHA itself, to ensure safety and health on the jobsite. OSHA has never had the resources, even when the agency had its largest number of employees, to inspect the 6 million worksites now within its jurisdiction. When you take into account that federal OSHA conducts approximately 38,000 inspections it would take the agency over 90 to 100 years to inspect every worksite. Clearly, enforcement alone will never be able to reach every workplace or serve as an effective deterrent. OSHA does not have the funds, and will never have the funds, to hire the staff large enough to reach each worksite on a regular basis through enforcement. The only way to leverage OSHA's resources to reach the greatest number of worksites and have the most positive impact on workplace safety and health is to use these other programs like compliance assistance, outreach, and training.

Underlying OSHA's enforcement efforts is the employer's responsibility to comply with all applicable workplace safety and health obligations. This system, then, depends on employers taking it upon themselves to implement the necessary steps and programs. The goal here is to prevent workplace fatalities as well as injuries and illnesses from happening in the first place. Enforcement and penalties do not prevent workplace fatalities and injuries; they are imposed after workplace fatalities and injuries have occurred. Simply put, the best approach to workplace safety and health under this existing system and structure is a proactive approach that reaches employers before there is a problem and provides them with the support and guidance they need to protect their employees.

My experience in government service, as well as in private law practice, is that most employers want to do the right thing in terms of workplace safety and health, as most employers care about their most valuable resource, their employees. For most employers, workplace safety and health makes sense for business and economic reasons, as those with safe worksites are often the most productive and efficient, with the lowest overhead and workers' compensation rates, and it makes sense because it is the right thing to do.

OSHA already has sufficient available enforcement tools and penalties to impose sanctions against employers where the circumstances warrant

I want to make clear that the U.S. Chamber of Commerce does not condone those employers who have intentionally flouted their obligations to protect their employees and fail to comply with their workplace safety and health obligations. Those employers—a small minority of employers—deserve the full range of enforcement sanctions by OSHA depending on the particular facts of the violation in question.

There are already sufficient penalties and enforcement tools to take action against those employers. Under the OSH Act, there are currently five general categories of civil penalties available to OSHA to impose on employers: Willful; Repeat; Failure to Abate; Serious; and Other than Serious. Under the current structure, penalties for willful violations can be imposed up to \$70,000 for each willful violation of an OSHA standard or the General Duty Clause. While not defined in the statute, a willful violation has come to mean one where the employer is established to have been aware of and intentionally violated these requirements or acted with reckless disregard or plain indifference to workplace safety. OSHA can also impose a civil penalty of up to \$70,000 for each repeat violation which is a violation of the same or substantially similar requirement by the same employer at the same or different facility. Additionally, OSHA has the ability to impose instance by instance penalties (the egregious policy) under certain circumstances so that the agency could impose willful violations for each instance of conduct, for example it could impose a willful penalty for each employee affected. In other words, the agency already has the prosecutorial authority to impose penalties in large amounts (sometimes in the multiple of millions of dollars) in these cases, as we have seen.

For those violations which are serious, the agency can impose a civil penalty of \$7000. The agency can also impose a civil penalty of \$7000 per day for a failure to abate violation for each day beyond the required abatement date that the particular condition or hazard remains unabated.

As to potential and available criminal sanctions, the OSH Act provides that an employer can be subject to a criminal fine of up to \$250,000 and six months in jail for the first willful violation resulting in the death of an employee, and a criminal fine of up to \$500,000 and twelve months in jail for the second willful violation resulting in an employee fatality. And as I already noted in my testimony, OSHA did not hesitate during the previous administration to refer cases that met this criteria to the Department of Justice for review and consideration for criminal prosecution.

Problems with the Protecting America's Workers Act and the revisions under consideration

The proposed changes to the OSH Act by the PAWA legislation and the revisions to PAWA under discussion at today's hearing will simply not achieve the desired results in terms of improving workplace safety and health. Further, many provisions of this legislation and these revisions will result in adverse consequences to OSHA in terms of the administration of its enforcement, and to the Solicitor's Office which is charged with the responsibility of litigating contested cases. The revisions to PAWA under consideration at today's hearing (I reviewed the summary available late last week and the legislative language which I received only yesterday) will also not improve this bill's ability to improve workplace safety. I have not had the chance to conduct a thorough review of the legislative language under consideration, and I would like to reserve the right to offer the Subcommittee any further comments after I have had the full opportunity to conduct a more careful review of that language.

In general, the proposals to increase civil and criminal penalties; dramatically revise the whistleblower structure under the OSH Act; require immediate abatement; and expand victim's rights, will cause delays in the ultimate resolution of contested enforcement cases, and unduly strain the resources of OSHA and the Solicitor's Office. Data on MSHA and the increase in penalties over the last few years, and other increases in sanctions to employers, which resulted in huge increases in contested cases, delays in resolving cases, as well as challenging burdens on the Solicitor's Office and which were the subject of a hearing in this committee earlier this year demonstrated the unintended and negative consequences of these approaches.

At its core, PAWA can be described under the old adage "bad facts make bad law." This effort to change the OSH Act with enforcement-only sanctions appears to be driven by the conduct of the few outlier employers who fail in their workplace safety and health obligations. These proposed penalty increases and other sanctions will do nothing to assist employers to understand their obligations for workplace safety and health, such as the small business owner who is trying to understand how to comply with applicable requirements. How will increasing penalties help her design a more effective workplace safety program when she knows she is unlikely to see

an inspection unless there is an accident or fatality? This employer is obviously better served with more outreach and compliance assistance materials than increased penalties. Again, the goal here is compliance and prevention, not sanction. This approach benefits employers but more importantly it benefits employees.

Specifically, we have the following concerns with these provisions of PAWA and the revisions under consideration at today's hearing:

Abatements of hazards pending contests of citations: This provision will reduce or eliminate the ability of an employer to challenge a citation through the OSHRC administrative process by requiring immediate abatement. Immediate abatement is already available through the emergency shutdown mechanism when OSHA identifies an imminent hazard. This provision will also eliminate one source of leverage that OSHA and the Solicitor's Office can use to resolve cases by settling appropriate cases with the requirement of immediate abatement imposed.

The signaled modification to this mandatory abatement provision which would substitute an employer's ability to suspend abatement while contesting the citation with a higher burden of proof akin to what is required for securing a temporary injunction is simply unjustified and an outrageous trampling of due process rights. Abatement is more than just protecting against a hazard; it is part of accepting responsibility for the violation. Mandating abatement before allowing the employer to exhaust their adjudicative process would be like asking a criminal or civil defendant to pay a fine or serve a sentence before the trial is held.

In addition, this provision will eliminate OSHA and the Solicitor's Office prosecutorial discretion in handling these contested cases. This provision strikes me as unduly punitive and makes it much more difficult for employers, particularly smaller employers who lack resources, to challenge certain citations which they may believe in good faith are incorrect or improperly imposed by the agency in the first place. By making it harder to settle cases this will increase the rate of contest cases.

Expanding Victims' Rights: The signaled modification to this provision of PAWA would allow an employee who has sustained a work-related injury or a family member if that employee was killed or unable to exercise their rights, to make a statement before an Administrative Law Judge at OSHRC for those cases which have been contested. Under PAWA these employees or their family members are permitted to make a presentation to the meet with the Secretary or the designated representative and to be kept informed of the investigation and any citations that may be issued. Further, PAWA also provides these employees, or their representatives, the opportunity to learn of any modifications to the citations or settlement negotiations, and to object to such modifications or settlements. Given the legal nature of these proceedings, there does not appear to be much value to this presentation other than to sensationalize presumably already emotional and sensitive matters.

Civil Penalties: The signaled change to PAWA's expansion of civil penalties, the elimination of the \$50,000 penalty for fatalities under "other than serious" violations is appropriate, not because it reduces the penalty amount, but because of the lower level of violation involved. Similarly the signaled elimination of the penalty for failure to abate sounds sensible.

However, the remaining increases in civil penalties under PAWA raise the issues already mentioned about the impact of increasing penalties, the unintended consequences, and the flaw in thinking that merely increasing penalties will result in improved workplace safety.

Criminal Penalties: The signaled modifications to PAWA's increase in criminal penalties would change the level of intent necessary for criminal penalties from the current "willful" to "knowing." Such a change would upend decades of OSHA law—dating to the passage of the act in 1970 and introduce tremendous uncertainty, further guaranteeing substantial increases in contested cases. While the "knowing" standard is used in EPA law, it has not been the standard for OSHA criminal culpability. As there is no further definition in the bill of this standard, employers (and OSHA inspectors) will be left to guess what this means and when it should apply. This is a prescription for utter confusion and legal challenges that will be costly to both the employer and the agency.

Changing "any responsible corporate officer" to "an officer or director" will result in a witch hunt to hold officers or directors responsible. Even the original "any responsible corporate officer" term in PAWA would be problematic, but expanding this to any officer or director will make corporate personnel unduly subject to prosecution when they generally have no involvement in day to day operations. All of these definitions are vague and ambiguous as to who would fall within these categories. These definitions are also vague as to how they would be applied in the legal process; do they apply only to the corporate entity or other legal entities such as partnerships? Does this mean that any limited partner or director would now be subject to potential criminal prosecution? None of these changes will improve workplace

safety and health, and actually, this new requirement, if adopted, could result in adverse impact as corporate employees would now fear that any decision they could make on the jobsite could subject them to prosecution. Imagine that a safety director or E, H & S employee—they would be faced with the reality that every one of their decisions would be micromanaged, potentially by employees who have little or no expertise in safety and health. This would result in a chilling effect on these employees in trying to simply do their job. This could create uncertainty on the jobsite with a net reduction of workplace safety and health.

New whistleblower requirements: The signaled changes to PAWA's whistleblower expansions are described as "align[ing] OSHA whistleblower provisions with other modern whistleblower laws" which is ironic since most whistleblower provisions in other laws are modeled after OSHA's provision, and there is no evidence that expansion of whistleblower protections is appropriate. Although I have not had the opportunity to give these revisions under consideration a thorough review, as I just received the legislative language yesterday, the original PAWA language expanding whistleblower protections raises some difficulties.

The initial language in PAWA concerning the underlying justification for whistleblower status—that the employee has a "reasonable apprehension" that a particular job duty would result in a serious injury—and protect that employee who then refuses to perform that job function is itself a significant departure from other whistleblower statutes and would potentially create significant confusion and disruption in the workplace. While we understand the need for employees to avoid putting themselves at risk, we are concerned by the potential for disruption and the absence of any objective criteria governing this decision. This language is simply too vague and ambiguous to apply in a practical workplace context.

We also note that the new whistleblower provisions being discussed today allow employees to recover, against the employer, their attorneys' fees and costs if they are successful in getting an order for relief from either the Secretary or a court. Similarly, allowing small businesses that successfully defend themselves against an OSHA citation to recover their attorneys' fees has long been one of our key goals. Bills to permit this have passed the House with bipartisan support in previous Congresses. While inclusion of this idea would not cure the problems we see with these whistleblower provisions, we believe allowing small businesses the same opportunity as employees to recover attorney's fees is only fair.

Adverse impact of OSHA contested caseloads and adverse impact on administration of OSHA litigation: "justice delayed is justice denied"

The net result of the proposed increase in penalties and sanctions is that employers will contest cases at a higher rate, which will impose an adverse impact on OSHA and the Solicitor's Office resources and will greatly delay the administrative litigation process and delay the resolution of OSHA contested cases.

We do not need to look any further than the recent example of MSHA to see the difficulties and challenges. Indeed, the full Education and Labor held a hearing on this subject on February 23. In the case of MSHA, the increased penalties under the Miner Act, combined with the aggressive use of existing tools, such as the Pattern of Violation mechanism, resulted in a dramatic increase in contest cases. For example, the percentage of contest MSHA violations went from just over 5 percent in 2005 (the year prior to the Miner Act), jumping to over 20 percent by 2007, and over 25 percent in 2008 and 2009.

From personal experience I can attest to the challenges these increases posed for the Solicitor's Office and MSHA. During this same period, I was the Acting Solicitor and Deputy Solicitor and we devoted significant time and effort to manage the impact of these higher contest rates. We had to shift resources within the Solicitor's Office, and take other often difficult steps, to assist with this dramatic increase in the workload. Due to the risk of the Pattern of Violations and the significantly higher penalties, it was much more difficult to settle cases, further adding to the problem. The MSHRC also faced problems in that they simply did not have enough ALJs to hear all of the cases. Funding increases partially solved this problem but it still remains a huge problem and the resolution of many cases has been delayed for months, if not years. The current backlog of cases is 16,000 and the caseload docket increased from 2,700 cases in FY 2006 to more than 14,000 cases in FY 2009.

I think it is important for this Subcommittee to carefully consider the practical real world impact of any of these proposed changes to the penalty structure which will have a significant impact on the administration of the OSHA contested caseload.

Conclusion

The Protecting America's Workers Act would radically restructure the OSHA civil and criminal penalty regime, as well as make other significant changes to how OSHA proceeds with its enforcement functions. Unfortunately, nothing in this bill, nor the revisions under consideration today, will do anything to actually help employers, and most importantly small businesses, improve safety in their workplaces. The goal is to prevent workplace fatalities and injuries from occurring, not merely punishing the employer after they occur. As recent data makes clear, the best way to achieve continuous improvements in workplace safety and health is to utilize a proactive approach with enforcement when appropriate, and offer outreach, training, and compliance assistance to that vast majority of employers who want to do the right thing and comply with their workplace safety and health obligations.

Thank you for this opportunity to speak to you on these important issues, and I would now be happy to respond to any questions that you may have.

Chairwoman WOOLSEY. Without objection.

Mr. Frumin, in the BP situation—now, contractors are employers, because every size contractor—I mean, every size employer is covered by the OSH laws. So why would the contractor send their employee into an unsafe situation, without being held liable for that?

I mean, how do we bridge that without it getting—“You said,” “I said,” “I didn't know”—I mean, isn't the contractor supposed to know whether it is safe or not when they send their employer to work?

Mr. FRUMIN. Well—

Chairwoman WOOLSEY. Employee to work. I am sorry.

Mr. FRUMIN. You know, contractors can be, you know, two-person operations. They can be larger companies. They should know. One would hope they would know. What is terrifying about the case of the Xcel Energy plant in Colorado was that, here, you have an extremely sophisticated company hiring a contractor with repeated instances of very severe violations in other states, including in California, on the Bay Bridge. Workers died. And—

Chairwoman WOOLSEY. Excuse me. The contractor had the repeated—

Mr. FRUMIN. Yes. Yes, the—

Chairwoman WOOLSEY [continuing]. Violation?

Mr. FRUMIN. And Xcel hires them to do a highly hazardous job.

A high-school student could get on OSHA's Website and find those violations. This was years before this—this incident in Colorado. And then, to make matters worse, Xcel discusses with them how to protect not only the contractor employees, but Xcel's employees, and then leaves it all up to the contractor—doesn't—doesn't impose Xcel's own supervision that might have potentially prevented this outrage.

We can't count on contractors being, in fact, the knowledgeable party. And, instead, what we are seeing in this industry and others is big companies—

Chairwoman WOOLSEY. All right, so what would you do to fix this disparity? Do you have some recommendations to us? What we are doing in PAWA—will that help?

Mr. FRUMIN. Well, it will certainly help by forcing the contractors themselves to take their own future security more seriously, because they, themselves, could end up in—facing criminal provisions. And with the additional severe violations that we see here

for obstruction of justice and so forth, for lying to inspectors, we would make it much more difficult for companies like Xcel to collaborate in the way they did in this terrible incident.

What it will not do, unfortunately, is impose upon Xcel the same liability that they would have to—if it were a construction site. We have multi-employer liability in construction. So it is one more example of how modest—how very modest this legislation is. There are many loopholes that still remain. We hope that, if it passes, it will force employers to behave differently. But it is still a very modest piece of legislation.

Chairwoman WOOLSEY. Thank you.

Mr. Snare, when you talked about the—that there are sufficient penalties already available for enforcement tools—well, since it appears, with the Water—the Clean Water Act and the Clean Air Act—that we must certainly prefer and appreciate our fish and birds and—a lot more than we do our workers—don't you think we should have kept up with inflation at least, from—since the last time we raised the penalties?

Mr. SNARE. Well, again, as your—I think your question, earlier, to Dr. Michaels—I would echo what he indicated in the sense that it is hard—I don't know what the intent of Congress was under those particular environmental statutes. I understand what they say.

Again, on the workplace safety and health, it is my position, and the position of the Chamber, that the penalties are already sufficient. And if you look at some of the examples in my written statement about the tools that OSHA already has—for example, the Egregious Policy, where the agency can issue an instance-by-instance violation on very, you know, particular circumstances. They can have penalties in the millions of dollars. There were a number of cases that I reviewed and approved during my tenure at the Department of Labor that were multi-million-dollar citations, using that particular policy to impose against particular employers.

But the general proposition, which we all are here for, is to improve workplace safety and health, reduce injury and illnesses across every job site in America. And in my judgment and the judgment and the judgment of the Chamber of Commerce, it is better served with a balanced approach—compliance programs, outreach to allow a small-business owner to understand how to comply with in OSHA standards, which may be unclear.

Chairwoman WOOLSEY. Well, my time is just about up.

But in 2009, the average OSHA penalty for a serious violation—the average—was \$970. It must have taken an awful lot of those suits to add up to millions and millions of dollars. I don't see how that all comes together.

I would like to yield to Ranking Member McMorris Rodgers.

Mrs. MCMORRIS RODGERS. Thank you, Madam Chairwoman, and I thank you for holding this hearing today. And we do have a shared goal of ensuring that our workplace is safe.

I think that we have to be careful about picking one or two examples, and then passing sweeping legislation that could, potentially, add more burdensome and complicated rules on employers that really are trying—and it is their goal to have—provide a safe workplace.

Mr. Snare, I wanted to ask: What do you believe are the public-policy implications of changing the standard of criminal penalties from “willful” to “knowing”?

Mr. SNARE. Again, as I mentioned briefly in my opening remarks, and elaborated more in my written statement, it is—you are changing and upending an entire 40-year period of law that has developed under the OSHA standard under “willful.” In my judgment, it is going to create significant confusion in litigation and adjudication of cases.

And you can see the difficulties by the example of MSHA over the last few years, and the increase of penalties, and what has that done to the entire litigation process, and the delays that everyone has suffered by delays in resolution of cases. That situation, as you have described—changing that provision from “willful” to “knowing” would cause a lot of those same problems and difficulties, and would create problems for the entire system, in my judgment.

Mrs. MCMORRIS RODGERS. Thank you.

You know, Madam Chairwoman, I just think we have to be very careful about not creating an adversarial relationship within the workplace. And you look over the last 10 years, and we have—and we have seen some good cooperation take place—providing more assistance to both employers and employees—particularly small businesses. And, during that same period, there has been a decline in workplace-fatality rates, as well as injury and illness rates.

Such, Mr. Snare, I would like to ask what you think about—I am concerned—about moving back to more of a “Got you” mentality on the part of OSHA, rather than continuing some of these positive trends?

Mr. SNARE. I would echo your concern, Ranking Member McMorris Rodgers.

I mean, the reality is, over the last decade, if you look at the statistics and look at the numbers, workplace injuries and illnesses and fatalities have been at record lows. They have been declining for most of the decade. And you have got to look at—those are the facts. And what was the agency doing during most of that time period? Using a mixture and a balanced approach—enforcement where necessary.

Against the companies in some of the examples that Mr. Frumin and others have mentioned, enforcement is, obviously, necessary. But at the same time, for—most employers want to do the right thing. You want to provide them with the materials, the outreach, the compliance, to allow them to comply and understand, because there are 6 million job sites. And the agency is never going to be able to reach all of them. It is more effective to leverage those resources and do it with the way of a balanced approach, which—all the things I described—that leads to safer job sites in America.

Mrs. MCMORRIS RODGERS. So what should be the measurement for improvement in workplace safety and health? An increase in the level of written violations? More money collected from penalties or a decrease in the number of fatalities and injuries?

Mr. SNARE. I think it is the latter. It is the reduction in injuries and fatalities. Penalties, as I mentioned in my opening statement, are imposed after the fact. The goal here is to be proactive and prevent injuries and illnesses from occurring in the first place.

Mrs. MCMORRIS RODGERS. Does OSHA already have the power to shut down a company in imminent danger or that is in an imminent-danger situation, and force abatement?

Mr. SNARE. Yes, they do. And you heard some testimony or—actually, you were not here, Ranking Member. I am sorry.

But Richard Fairfax, the director of enforcement at OSHA talked about the provision. It is under Section 13 of the OSH Act. And it does provide for an imminent shutdown of an employer's facility in the event of an imminent danger. And there is procedures by which you post a notice, ask the employer to shut down. If not, you have the right to go to court.

We had several of those situations occur when I was in the Labor Department. And we took action accordingly, under the existing provisions in the OSH Act to effectuate a shutdown and an abatement.

Mrs. MCMORRIS RODGERS. What do you believe Congress could do to clarify OSHA's standards, and help employers comply with workplace regulations?

Mr. SNARE. Again, I think, generally speaking, the system is working. I think it is important for the agency to make sure it provides the resources available for employers, to allow them to understand and comply, and to work through—in improving workplace safety and health.

Most employers want to do the right thing. A lot of them already are doing the right thing. And to those small-business owners, it is incumbent on the agency to help them learn to do the right thing, prevent those injuries and illnesses from occurring.

But, again, when there is an employer in certain situations who has a disregard for their obligations, that is when enforcement is necessary. And there are already tools, in my judgment, to achieve that.

Mrs. MCMORRIS RODGERS. Thank you.

Chairwoman WOOLSEY. Congressman Payne?

Mr. PAYNE. Thank you very much.

Mr. Snare, you mentioned that enforcement, in your opinion—enforcement and penalties did not prevent workplace fatalities and injuries. They are imposed after fatalities and injuries have occurred. But isn't it the case that OSHA levies penalties during complaint and programmed inspections, and that these actions help prevent accidents? Isn't that the reason that OSHA leveled a \$87 million penalty against BP in Texas City—in order to prevent future explosions?

I mean, you say it is totally unrelated—it is all after-the-fact; therefore, it can't have much worth. But, of course, it can't do anything about what happened. But what about the future? You feel it has no impact?

Mr. SNARE. I think, Congressman Payne, what I mentioned is that the issue of penalties being imposed after the fact—I am talking about that generally. Under OSHA enforcement, there are a variety of ways the agency can enforce—under programmed inspections, using the site-specific targeting program, as well as coming in for a complaint or an imminent danger, or an incident like what happened in a refinery explosion or BP, or whatever example you can cite.

The agency is coming in and handling enforcement. I think my point is, generally, if penalties are imposed after the fact—they are not proactive. They do nothing to improve workplace safety and health from a general standpoint. But yet, when there is an employer who has violated their obligations under the OSH Act, and under the applicable standards, it is appropriate. I am not saying it is not. I am saying it is appropriate for the agency to come in and enforce. And there are sufficient tools under the act now for them to do so.

And, again, when I was—during my tenure at the Labor Department, we had a very strong enforcement program. And when there were employers who had violated their obligations, we took aggressive steps where necessary—and where the facts and circumstances warranted it—against those employers.

Mr. PAYNE. What is your opinion on that, Mr. Frumin?

Mr. FRUMIN. Thank you, Mr. Payne.

Well, I am a little shocked to hear Mr. Snare's description of the act, because it is really counter to the reality. And, after all, he was there, so he must know the reality.

The reality is that the vast majority of instances in which OSHA imposes a penalty is not in reaction to injuries or fatalities, but because a compliance officer, for one reason or another, is in a workplace, finds violations—and thank goodness the Congress required first-instance penalties—imposes a penalty.

If we were only imposing penalties after fatalities, I think the math would require us to have four or five times number of fatalities than we have now. I mean, it is nonsensical what he is saying.

So that is simply a misstatement. And the vast number of times that OSHA imposes penalties, and the vast majority of the penalties that OSHA imposes are not in response to injuries and fatalities.

And the other thing I would quickly add is that one of the things that—one of the improvements in OSHA's enforcement program was in collaboration with the Justice Department, in recognition of—as the Justice Department pointed out today—in recognition of the severe weaknesses in the OSH Act. And, of course, that was during Mr. Snare's term.

Mr. PAYNE. As a matter of fact, Mr. Snare, I was looking at—as you cited in your opening remarks—the fact that you were with the Department of Labor, and even the solicitor general, which, really, is the important issue of bringing cases before.

And your testimony—you state that there is no evidence that expanding whistle-blowing protection is appropriate. According to OSHA data, however, only 6.7 percent of all meritorious whistleblower claims under OSHA are ever prosecuted by the solicitor. And some 60 percent are simply discarded, leaving workers with no recourse under the law.

To me, you know, I mean, in all due respect, this is sort of disgraceful. And, as the former solicitor for labor, it seems like it should be a source of embarrassment, to be honest.

And maybe you could explain why giving workers a chance to have their anti-discrimination claims heard before an administrative law judge is unwarranted. Isn't giving someone—as an attorney—someone due process—the American way? And I do recall,

even at the beginning of the 2000 administration, I guess, of President Bush, there was a move to actually change OSHA, where it was being proposed that OSHA inspectors be paid by the company, and that the results would not be made public—that it would only be given to the company, and they should, therefore, work for it.

I recall, during the time, I guess, that you served—that there was, to me, sort of an assault on occupational safety. So I just wondered if maybe you can clarify your record as solicitor general, and your work with the Department of Labor at that time.

I mean, those were the days when we saw the move to do away with overtime. We had this whole business of flex time, where you work overtime, but then you would give time at some other period. And, therefore, overtime was not work. It seemed to me that that was really an assault on workers' rights. Maybe you can—

Mr. SNARE. I would be happy to, Congressman Payne.

As to your statistic about the whistleblowers getting to the ALJ—I mean the one thing you need to—everyone needs to understand, in the committee—there are a number of variety of whistleblower statutes—I think it may be up to 14 now—that OSHA investigates. And the procedures under those—each of those statutes—is different in some—in a number of cases.

As a first step, OSHA will conduct an investigation and determine whether there is any merit to the complaint. And in a certain percentage—and it varies by statute—they will find a no-merit finding and issue a letter accordingly. And, then, there are a variety of other steps by which the complainant—and if there is a merit finding, then they go on. The case can, in some cases—goes to a contested-case proceeding—and the complainant is either represented by private counsel or, in some cases, the solicitor's office.

And then the process will continue. A lot of these cases will settle along the way. So the 6 percent figure you are citing—it, frankly, may not be completely clear as to the number of whistleblowers that, ultimately, are getting the right to have the case adjudicated. A lot of them are settling the cases in advance; or, separately, OSHA has issued a no-merit finding based on OSHA, and the career officials and employees of OSHA that are conducting the investigation are finding that there is no merit to that particular complaint.

The proposal that you mentioned about the investigators paid by private employers—I am not familiar with that at all. I have no understanding of whether that was—what proposal that was, or who offered it.

And as to the other issues you mentioned, including overtime—as I mentioned in my written statement, I am proud of the record we had of the department at OSHA. And if you look at the overtime statistics, frankly, there is an increase in employees getting overtime under the reforms in 2004.

Chairwoman WOOLSEY. Okay. Thank you.

I have two questions for Mr. Frumin—or two subjects I would like you to comment on.

One, I would like to hear your perspective on “knowing” versus “willful,” and I would like to hear your perspective regarding “adversarial” versus “safe,” or “adversarial” versus “leveling the playing field” for the—most of the employers who are good at—employ-

ers—versus those who would consider fines—especially these low fines—as a cost of doing business.

Mr. FRUMIN. Thank you, Ms. Woolsey.

With regard to the question of “knowing” versus “willful,” I would defer to the Justice Department’s testimony about the importance of adopting the “knowing” definition. But a commonsense understanding tells us that if a prosecutor has to prove that you were actually—that you knew that you were actually violating the law—that requires a much higher degree of proof than simply proving that you were aware of the dangerous conditions themselves.

And if it is good enough for the Justice Department and good enough for the Supreme Court, and it is widely used in every other statute—or comparable statutes—then, I think, Mr. Snare’s concern about introducing confusion is actually quite misplaced.

What is confusing is when prosecutors are handed a standard of proof, like “willful,” now—and, frankly, they have no experience with it—and it makes it quite difficult for them.

So I think we need to move to clarity.

And then on a—quickly, on the other point—I am sorry. I have forgotten what it was.

Chairwoman WOOLSEY. “Adversarial” versus “leveling the playing”——

Mr. FRUMIN. Oh, yes.

Listen, there are plenty of examples of employers and their employees getting along, and working well on safety. And we could provide examples of those for the record. But there is no substitute for a strict enforcement program. And that is true not only with worker safety—and with environmental safety and so forth.

We need to have the incentives and deterrent built into this law so that what happened in the Cintas Company never happens again—when an employer knows about the problem, knows where it is, because it is its own equipment, and fails to do anything about it. And if we allow companies to think that they can just get away with it, because there is no strict enforcement. You know what? Too many of them will, and will continue with, you know, horrendous conditions that we see erupting in different workplaces. Thank you.

Chairwoman WOOLSEY. Okay. Thank you.

Congressman Payne?

Mr. PAYNE. Yes.

Mr. Snare, in your testimony, you stated that, in your opinion, eliminating the loophole in OSHA which allows employers to postpone abatement of serious violations pending litigation of their case is unjustified and outrageously tampering of due-process right. This appears to be contradicted by the provisions of the Mine Act. Are you familiar with that?

Mr. SNARE. Yes, I am, generally, Congressman Payne.

I mean, again——

Mr. PAYNE. Yes, do you feel that—you know, that it is contradictory?

Mr. SNARE. Again, what I would say in response to the question is the position that I outlined. Changing the OSH Act to require immediate abatement—as I mentioned in my written statement—it causes employers concerns.

It is an adverse impact on their due-process rights. Again, you have got to look at—the OSH Act covers a wide range of industries, with a wide range of procedures and processes. Some of them involve performance-oriented standards, like process safety management, which are very different from the application of MSHA and the Mine Act, which have much more limited set of circumstances.

And the employer, under the OSH Act, has the right to adjudicate and contest a citation if they believe in their own honest judgment that the agency has improperly issued a citation. And this gives them the right to do so without having to abate a hazard. It is like asking them to admit and confess to a crime before they have even had their rights adjudicated.

Now, again, in certain circumstances where there is an imminent danger or a problem on the job site, there already is a mechanism under Section 13 of the OSH Act to come in and—for the agency to come in and put a shutdown order because there is imminent danger. And that would reduce the danger to employees.

You heard Mr. Fairfax talk about that. We did it several times when I was at the agency. I had a number of discussions with Mr. Fairfax about it at the time.

So there already is a power and authority to do that under the OSH Act, currently.

Mr. PAYNE. Mr. Frumin? Yes?

Mr. FRUMIN. Mr. Payne, if I might, I think there is a bit of bait-and-switch going on here. Mr. Snare is equating the administrative-law provisions of OSHA enforcement with a criminal proceeding. And it—it is simply not appropriate to do that.

To say that an employer who has been cited by OSHA for violating a standard in a civil proceeding, where OSHA feels they have the facts—these are serious violations—they could hurt someone—could even kill someone—to say that, for that employer to have to fix that while they are challenging the penalty is like “accepting a sentence in a criminal proceeding”—I mean, this is completely inappropriate.

The fact is that workers continue to be exposed after OSHA inspectors go on-site, develop a case, run it by their supervisors. The overwhelming number of OSHA violations every single year, whether employers contest them or not, end up being—staying on the books. And to put this on its head and say—as if employers have—you know, are—by and large, they walk off scot-free—OSHA gets it wrong. This is simply untrue.

OSHA inspectors are professionals. Most of the overwhelming number of violations stay on the books—even the ones that employers challenge. And workers are the ones who are paying the price by continuing to be exposed because of this loophole in the abatement process.

Mr. PAYNE. Thank you very much.

Mr. Snare, during the time of the two tragic mine accidents in—I think it was 2005 and 2006—were you with the department of—what was your position then?

Mr. SNARE. You are referring to—there were three tragedies in early 2006; one starting on January 2nd at Sago Mine. And there was Americoma and Darby, I believe, throughout the spring of 2006. And, then, there was a subsequent tragedy out in Utah, in

2007, at Crandall Canyon. During the early 2006 timeframe, I was the head of OSHA. And, then, starting the summer of 2006, I was the deputy solicitor. And in 2007, I was actually the solicitor, and was involved in a number of those matters and investigations.

Mr. PAYNE. Well, since that time, as you know, we have passed legislation that, in my opinion—the things that we had to—you know, people say, “Government is best which governs least.” But when those in charge tend not to try to work on behalf of the worker—some of the things that we imposed with the Miner Act seemed like they were things that should have been already procedures in the mines.

And do you think that it—we were unjust by coming down hard on the mine owners—the mine industry, when we came up with the new regulations?

Mr. SNARE. I am not sure—I guess, for your general proposition, it is hard for me to comment on that. I don’t necessarily think it was unjust. The Miner Act was passed in the judgment of Congress, and signed into law, by the president. And, again, there was strong enforcement in MSHA, I believe, before those accidents occurred. And there was certainly strong enforcement at MSHA after those accidents occurred.

And there were—even in the year or two prior to those three accidents, mine fatalities were, I believe, at their lowest level ever—either in 2004 or 2005. So, again, things were working. There were accidents. The Congress, in their judgment, passed an act, and the president signed it into law, and then we enforced it. And, there were also a number of things that were going on at MSHA during the last administration, including utilizing a 30-year-old provision under “pattern of violation” that, again, was strong enforcement. The record is clear under the facts. The agency had a strong enforcement program at the time.

Mr. PAYNE. My time has expired.

Chairwoman WOOLSEY. For concluding remarks, Ranking Member McMorris Rodgers.

Mrs. MCMORRIS RODGERS. Thank you, Madam Chairwoman.

You know, from a committee standpoint, there is no greater asset than an employee. And we should all be committed to ensuring that our employees are working in the safest environment possible. The statistics reveal that the workplace safety is improving. The fatality rate has dropped 14% since 2001. And injury and illnesses has steadily dropped 21% over the same timeframe.

It seems a cooperative approach is the best approach. And I speak from a Washington state perspective where, by and large, we have taken a more collaborative approach. And it has resulted in an effective relationship between our state plans administered through labor and industries, the employers, and labor.

As we have heard here today, I think we have to be careful not to create a hostile environment between OSHA and employers, which doesn’t make a safer workplace. Instead, let us foster an atmosphere that ensures a proactive approach that makes employers welcome OSHA and the agency’s experience to improve safety and health.

If we decide to legislate in this area, I hope that that will be taken into consideration.

At this time, I would also like to introduce the following statements for the record—one from Coalition for Workplace Safety, and another from the Associated Builders and Contractors.

Chairwoman WOOLSEY. Without objection.
[The information follows:]

Prepared Statement of the Coalition for Workplace Safety (CWS)

The Coalition for Workplace Safety (CWS) is a broad coalition comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability. The Coalition believes that workplace safety is everyone's concern. Improving safety can only happen when all parties—employers, employees, and OSHA—have a strong working relationship. We thank you for this opportunity to express our views on the Protecting America's Workers Act (PAWA), and, specifically, the proposed changes being discussed here today.

Workplace Safety Is Improving

Workplace safety has steadily improved over the last 40 years and BLS data shows that workplaces are safer than now than they have ever been. Workplace fatalities have declined 23 percent since 1994. This drop occurred even as the workforce expanded, with the economy adding 23 million new jobs over the same time period. Workplace injury and illness rates have shown a similar drop. Since 1994, the total case rate has declined by 50 percent and the lost days from work rate has declined by 44 percent. While the government's reporting system may not capture every workplace injury or illness, the data undeniably reveals the trend of declining workplace injury and illness rates.

This decline is the product of various factors, including employers, employees, OSHA, insurers, safety experts and business and professional associations working together to increase understanding about safe work practices and their importance and how employers and employees can reduce workplace accidents. The advent of modern communications and the internet have also facilitated sharing information and safety related guidance.

CWS applauds OSHA for its role in decreasing injuries, illnesses and fatalities, in particular its work in the last 15 years to promote workplace safety through outreach and education. Since its inception, OSHA has established standards employers must meet through its regulations and enforcement activities. For the first 25 years, the agency did not, however, focus on assisting employers and employees to understand OSHA standards and related safe work practices. Beginning in the Clinton Administration, this changed and OSHA developed an array of approaches that focused on educating and working cooperatively with employers to improve workplace safety. The CWS is committed to supporting these approaches as they have contributed to the increase in workplace safety—as indicated by the BLS workplace injuries and illness rates.

PAWA Will Not Improve Workplace Safety

CWS is concerned about several of the provisions in the Protecting America's Workers Act (S. 1580/H.R. 2067).

PAWA is unnecessary and will not improve workplace safety. It focuses on increasing penalties and enforcement and does nothing to assist employers in their efforts to make workplaces safer. Increasing penalties on employers will only serve to increase litigation, drain OSHA and DOL resources and harm our economy and hinder job growth.

Experience with the Mine Safety and Health Administration (MSHA) reinforces this point. A hearing in the Education and Labor Committee on February 23, revealed that as a result of the increased penalties from the MINER Act passed in 2006 and MSHA's regulations taking effect in 2007, the backlog at the review commission is now 16,000 cases worth \$195 million, and expected to rise further as the current policy at MSHA is to not engage in settlements. This backlog has impacted safety in the mining industry by absorbing an unprecedented amount of MSHA resources which would otherwise be devoted to field and other activities. Increasing OSHA's penalty regimes in a similar way will neither increase safety in the workplace nor give employers the tools necessary to create solutions towards workplace safety. Our concerns with some of the specific aspects of PAWA that are being discussed today are set forth below in more detail.

Abatement of Hazards Pending Contest

The change to Title III, Abatement of Hazards Pending Contest, eliminates the employers' right to use the administrative appeals process to thoroughly investigate its obligation to abate serious hazards. This is a dangerous diminishment, if not outright elimination, of due process protections for employers. Mandating abatement before a review process can be completed is like asking a defendant in a court case to pay a fine or serve a sentence before the completion of the trial. Additionally, requiring abatement prior to a full investigation may lead to inaccurate changes to be made, which can lead to unnecessary costs for employers. Conversely, allowing due process to proceed in the normal order will allow employers—especially small businesses—the time and resources needed to find solutions to any workplace safety issues. This is the best way to keep workers safe on the job. OSHA already has the ability to seek injunction in cases where there is an imminent danger and the employer refuses to abate the hazard.

Penalty Changes

The proposed changes to criminal penalties under Title III would alter the mental state requirements for criminal penalties from “willful” to “knowing.” While we agree those who intentionally violate the law should be held accountable, this is a significant change to 40 years of settled law that will cause uncertainty among employers, employees, compliance officers, prosecutors and adjudicators. The uncertainty about potential liability would cause employers to engage in a more defensive posture with OSHA and on workplace safety issues. Not only will this inevitability result in increased litigation, but would severely disrupt the cooperative approach towards workplace safety that has been so successful over the past 15 years.

Furthermore, the language changes the definition of employer in the currently proposed PAWA from “any responsible corporate officer” to “an officer or director.” The original PAWA language will create unprecedented confusion and disincentives to being a corporate officer, but this new language is a startlingly vague change that will result in a further focus on litigation avoidance and not workplace safety. This proposed change would have a chilling effect on how employers dedicate staff and resources that maintain safety programs. These changes do nothing to give employers—especially small businesses—the tools to stay well-informed of safety concerns in the workplace. Increasing penalties and lawsuits does not get to the heart of the problem necessary to find solutions in the workplace.

The bill would also increase civil penalties dramatically which will also lead to more contested cases with the associated impacts already noted above.

Conclusion

The Coalition on Workplace Safety continues to stand ready to work with OSHA and Congress to enhance workplace safety. However, PAWA—and the changes presented here—undermine efforts to promote cooperative engagement between employers and the agency, and will not assist employers in making workplaces safer. We will continue to work towards the goal of increasing workplace safety by working together through cooperation, assistance, transparency, clarity, and accountability.

ASSOCIATED BUILDERS AND CONTRACTORS,
March 16, 2010.

Hon. LYNN WOOLSEY, *Chair*; Hon. CATHY McMORRIS RODGERS, *Ranking Member, Subcommittee on Workforce Protections, 112 Cannon House Office Building, Washington, DC 20515*

DEAR CHAIRWOMAN WOOLSEY AND RANKING MEMBER McMORRIS RODGERS: On behalf of Associated Builders and Contractors (ABC), a national association with 77 chapters representing 25,000 merit shop construction and construction—related firms with 2 million employees, we appreciate the opportunity to submit this statement as part of today's Subcommittee hearing entitled, “Protecting America's Worker Act: Modernizing OSHA Penalties.” ABC and its members are ardent advocates of workplace safety, which is demonstrated through our proven record of cooperation and collaboration with OSHA and dedication to workplace safety education and training. ABC, however, strongly opposes H.R. 2067, Protecting America's Workers Act (PAWA). We believe, if enacted, the PAWA will increase litigation, create a disincentive for cooperation between employers, associations and OSHA, while failing to improve workplace safety and health.

Over the years, ABC and its 77 chapters nationwide have had the privilege of building excellent working relationships with OSHA's national, regional and area offices. OSHA staff members have addressed ABC members at our annual Construc-

tion Education Conference, worked with our chapters to conduct safety training courses throughout the country. Communication between both OSHA and ABC members has increased understanding of workplace safety, which has contributed to the decrease in the number of fatalities and injuries in the construction industry since 1994.

The PAWA changes to OSH Act's penalty scheme, in particular change in mens rea requirements for criminal liability from "willful" to "knowing" and the broadening to the definition of employers from "any responsible corporate officer" to "officer or director," would create uncertainty that will lead to increased litigation and create a more combative relationship between OSHA and employers. This will likely negatively impact cooperative programs, which have been effective in promoting workplace safety.

We also oppose the PAWA's provision requiring immediate abatement and the limits the provision imposes on an employer's ability to challenge a citation. This denies employers due process rights and OSHA already has the authority to seek an injunction if a hazard poses an imminent threat.

The construction industry is already strained with job loss, with unemployment at 27.1 percent—nearly three times the national average, and adding more bureaucratic layers to an already burdened industry is not conducive to expedient economic recovery. Jobsite safety and health is a top priority for ABC, whose objective is to have "zero accident" worksites.

ABC supports legislation that seeks to protect our members' most important asset—their employees. This must be achieved through legislation and regulations, which provide consistent enforcement, incentive programs to increase compliance, and education efforts, rather than efforts that will increase litigation, stifle cooperative programs and deny employer due process rights. We look forward to working with the Committee to address our concerns with this legislation.

Mrs. MCMORRIS RODGERS. Thank you, and I yield back.

Chairwoman WOOLSEY. Thank you very much.

Thank you all for attending this legislative hearing on the penalty provisions of Protecting America's Workers Act, PAWA.

As our witnesses have testified, it has been 40 years since the OSH Act was amended. And in those 40 years, we have learned a lot about what is working and what needs changing. PAWA modernizes the OSH Act, and gives OSHA the tools it needs to keep workers safe and healthy.

I am looking forward to this bill proceeding through the committee and to the floor for a vote.

Before we adjourn, or I turn—well, before we adjourn, without objection, I would like to place the following documents into the record: H.R. 2067, the Protecting America Workers Act; number two, summary of proposed changes in H.R. 2067, and clarification of the standards; three, March 9, 2010 discussion draft; four, table comparing civil and criminal penalties under the current Occupational Safety and Health Act and H.R. 2067; five, April 29, 2008 report by the Senate Health, Education, Labor and Pensions Committee, "Discounting Death: OSHA's Failure to Punish Safety Violations That Kill Workers;" six, letter from the governor of Wyoming in support of the penalty increases in H.R. 2067; seven, statement of Peg Seminario, health and safety director, AFL-CIO; eight, letter from the American Industrial Hygiene Association; nine, statement of Thomasina Rogers, chair of the Occupational Safe and Health Review Commission; ten, letter from Tonya Ford concerning the death of her uncle Robert Fitch, with attachments; and, eleven, tables showing current maximum civil penalties adjusted for inflation, 2000 to 2010.

[The information follows:]

111TH CONGRESS
1ST SESSION

H. R. 2067

To amend the Occupational Safety and Health Act of 1970 to expand coverage under the Act, to increase protections for whistleblowers, to increase penalties for certain violators, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

April 23, 2009

MS. WOOLSEY (for herself, Mr. Abercrombie, Ms. Berkley, Mr. Brady of Pennsylvania, Mr. Cohen, Mr. Hare, Mr. Hinchey, Ms. Hirono, Mr. Holt, Mrs. Maloney, Mr. George Miller of California, Mr. Payne, Mr. Rothman of New Jersey, Ms. Schakowsky, Ms. Shea-Porter, Mr. Yarmuth, and Mr. McGovern) introduced the following bill; which was referred to the Committee on Education and Labor

A BILL

To amend the Occupational Safety and Health Act of 1970 to expand coverage under the Act, to increase protections for whistleblowers, to increase penalties for certain violators, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Protecting America’s Workers Act”.

SEC. 2. REFERENCES.

Except as otherwise expressly provided, wherever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.).

TITLE I—COVERAGE AND APPLICATION OF ACT

SEC. 101. COVERAGE OF PUBLIC EMPLOYEES.

(a) In General.—Section 3(5) (29 U.S.C. 652(5)) is amended by striking “but does not include” and all that follows through the period at the end and inserting “including the United States, a State, or a political subdivision of a State.”.

(b) Construction.—Nothing in this Act shall be construed to affect the application of section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667).

SEC. 102. APPLICATION OF ACT.

Section 4(b) (29 U.S.C. 653(b)(1)) is amended—

(1) by redesignating paragraphs (2), (3), and (4) as paragraphs (5), (6), and (7), respectively; and

(2) by striking paragraph (1) and inserting the following:

“(1) If a Federal agency has promulgated and is enforcing a standard or regulation affecting occupational safety or health of some or all of the employees within that agency’s regulatory jurisdiction, and the Secretary determines that such a standard or regulation as promulgated and the manner in which the standard or regulation is being enforced provides protection to those employees that is at least as effective as the protection provided to those employees by this Act and the Secretary’s en-

forcement of this Act, the Secretary may publish a certification notice in the Federal Register. The notice shall set forth that determination and the reasons for the determination and certify that the Secretary has ceded jurisdiction to that Federal agency with respect to the specified standard or regulation affecting occupational safety or health. In determining whether to cede jurisdiction to a Federal agency, the Secretary shall seek to avoid duplication of, and conflicts between, health and safety requirements. Such certification shall remain in effect unless and until rescinded by the Secretary.

“(2) The Secretary shall, by regulation, establish procedures by which any person who may be adversely affected by a decision of the Secretary certifying that the Secretary has ceded jurisdiction to another Federal agency pursuant to paragraph (1) may petition the Secretary to rescind a certification notice under paragraph (1). Upon receipt of such a petition, the Secretary shall investigate the matter involved and shall, within 90 days after receipt of the petition, publish a decision with respect to the petition in the Federal Register.

“(3) Any person who may be adversely affected by—

“(A) a decision of the Secretary certifying that the Secretary has ceded jurisdiction to another Federal agency pursuant to paragraph (1); or

“(B) a decision of the Secretary denying a petition to rescind such a certification notice under paragraph (1),

may, not later than 60 days after such decision is published in the Federal Register, file a petition challenging such decision with the United States court of appeals for the circuit in which such person resides or such person has a principal place of business, for judicial review of such decision. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary’s decision shall be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

“(4) Nothing in this Act shall apply to working conditions covered by the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.).”.

TITLE II—INCREASING PROTECTIONS FOR WHISTLE BLOWERS

SEC. 201. EMPLOYEE ACTIONS.

Section 11(c)(1) (29 U.S.C. 660(c)(1)) is amended by inserting before the period at the end the following: “, including reporting any injury, illness, or unsafe condition to the employer, agent of the employer, safety and health committee involved, or employee safety and health representative involved”.

SEC. 202. PROHIBITION OF DISCRIMINATION.

Section 11(c) (29 U.S.C. 660(c)) is amended by striking paragraph (2) and inserting the following:

“(2) No person shall discharge or in any manner discriminate against an employee for refusing to perform the employee’s duties if the employee has a reasonable apprehension that performing such duties would result in serious injury to, or serious impairment of the health of, the employee or other employees. The circumstances causing the employee’s apprehension of serious injury or serious impairment of health shall be of such a nature that a reasonable person, under the circumstances confronting the employee, would conclude that there is a bona fide danger of a serious injury, or serious impairment of health, resulting from the circumstances. In order to qualify for protection under this paragraph, the employee, when practicable, shall have sought from the employee’s employer, and have been unable to obtain, a correction of the circumstances causing the refusal to perform the employee’s duties.”.

SEC. 203. PROCEDURE.

Section 11(c) (29 U.S.C. 660(c)) is amended by striking paragraph (3) and inserting the following:

“(3) Any employee who believes that the employee has been discharged, disciplined, or otherwise discriminated against by any person in violation of paragraph (1) or (2) may, within 180 days after such alleged violation occurs, file (or have filed by any person on the employee’s behalf) a complaint with the Secretary alleging that such discharge or discrimination violates paragraph (1) or (2). Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint (referred to in this subsection as the ‘respondent’) of the filing of the complaint.

“(4)(A)(i) Not later than 60 days after the receipt of a complaint filed under paragraph (3), the Secretary shall conduct an investigation and determine whether there

is reasonable cause to believe that the complaint has merit. During the investigation, the Secretary shall notify the respondent of the charges made in the complaint, and shall provide such person with an opportunity to meet with the inspector conducting the investigation, to submit a response to such charges, and to present witnesses to rebut such charges. The Secretary shall also consider the result of any grievance proceeding provided for in a collective bargaining agreement, that may have been held with respect to such charges. Upon completion of the investigation, the Secretary shall issue findings and notify the complainant and the respondent of the Secretary's findings. If the Secretary has concluded that there is reasonable cause to believe that a violation has occurred, the Secretary's findings shall be accompanied by a preliminary order providing the relief prescribed by subparagraph (B).

“(ii)(I) Not later than 30 days after the Secretary has issued findings under clause (i), either the respondent or the complainant may file objections to the findings or preliminary order, and request a hearing on the record, except that the filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order.

“(II) If a hearing described in subclause (I) is not requested in the 30-day period described in such subclause with respect to a preliminary order, the order shall be deemed to be a final order and not subject to judicial review.

“(iii) If the Secretary does not issue findings under clause (i) with respect to a complaint within 90 days after the receipt of the complaint, the complainant may request a hearing on the record on the complaint.

“(iv) The Secretary shall expeditiously conduct a hearing requested under clause (ii) or (iii). Upon the conclusion of such hearing, the Secretary shall issue a final order within 120 days. Until the issuance of a final order, such hearing may be terminated at any time on the basis of a settlement agreement entered into by the Secretary, the complainant, and the respondent.

“(B)(i) If, in response to a complaint filed under paragraph (3), the Secretary determines that a violation of paragraph (1) or (2) has occurred, in issuing an order under subparagraph (A)(iv), the Secretary shall require—

“(I) the respondent who committed such violation to correct the violation;

“(II) such respondent to reinstate the complainant to the complainant's former position together with the compensation (including backpay), terms, conditions, and privileges of the complainant's employment; and

“(III) such respondent to pay compensatory damages.

“(ii) On issuing an order requiring a remedy described in clause (i), the Secretary, at the request of the complainant, may assess against the respondent against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with a complaint upon which the order was issued.

“(5)(A) Any person adversely affected or aggrieved by an order issued after a hearing conducted under paragraph (4)(A) may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred, or the circuit in which such person resided on the date of such violation. The petition for review shall be filed within 60 days after the issuance of the Secretary's order. Such review shall be conducted in accordance with the provisions of chapter 7 of title 5, United States Code. The court shall conduct the review and issue a decision expeditiously.

“(B) If a respondent fails to comply with an order issued under paragraph (4)(A), the Secretary shall file a civil action in the United States district court for the district in which the violation was found to occur in order to enforce such order. In actions brought under this subparagraph, the district court shall have jurisdiction to grant all appropriate relief, including injunctive relief, reinstatement, and compensatory damages.

“(6) The legal burdens of proof set forth in section 1221(e) of title 5, United States Code, shall govern adjudication of violations under this subsection.”.

SEC. 204. RELATION TO ENFORCEMENT.

Section 17(j) (29 U.S.C. 666(j)) is amended by inserting before the period the following: “, including the history of violations, under section 11(c)”.

TITLE III—INCREASING PENALTIES FOR VIOLATORS

SEC. 301. POSTING OF EMPLOYEE RIGHTS.

Section 8(c)(1) (29 U.S.C. 657(c)(1)) is amended by adding at the end the following new sentence: “Such regulations shall include provisions requiring employers to post for employees information on the protections afforded under section 11(c).”.

SEC. 302. PROHIBITION ON DISCOURAGING EMPLOYEE REPORTS OF INJURY OR ILLNESS.

Section 8(c)(2) (29 U.S.C. 657(c)(2)) is amended by adding at the end the following new sentence: “Such regulations shall prohibit the adoption or implementation of policies or practices by the employer that discourage the reporting of work-related injuries or illnesses by any employee or in any manner discriminate or provide for adverse action against any employee for reporting a work-related injury or illness.”

SEC. 303. NO LOSS OF EMPLOYEE PAY FOR INSPECTIONS.

Section 8(e) (29 U.S.C. 657) is amended by inserting after the first sentence the following: “Time spent by an employee participating in or aiding any such inspection shall be deemed to be hours worked and no employee shall suffer any loss of wages, benefits, or other terms and conditions of employment for having participated in or aided any such inspection.”.

SEC. 304. INVESTIGATIONS OF FATALITIES AND SERIOUS INCIDENTS.

Section 8 (29 U.S.C. 657) is amended by adding at the end the following new subsection:

“(i)(1) The Secretary shall investigate any incident resulting in death or serious incident, that occurs in a place of employment covered by this Act.

“(2) If an incident resulting in death or serious incident occurs in a place of employment covered by this Act, the employer shall notify the Secretary of the incident involved and shall take appropriate measures to prevent the destruction or alteration of any evidence that would assist in investigating the incident. The appropriate measures required by this paragraph do not prevent an employer from taking action on a worksite to prevent injury to employees or substantial damage to property. If an employer takes such action, the employer shall notify the Secretary of the action in a timely fashion.

“(3) In this subsection:

“(A) Incident resulting in death.—The term ‘incident resulting in death’ means an incident that results in the death of an employee.

“(B) Serious incident.—The term ‘serious incident’ means an incident that results in the hospitalization of 2 or more employees.”.

SEC. 305. PROHIBITION ON UNCLASSIFIED CITATIONS.

Section 9 (29 U.S.C. 658) is amended by adding at the end the following:

“(d) The Secretary may not designate a citation issued under this section as an unclassified citation.”.

SEC. 306. VICTIMS’ RIGHTS.

The Act is amended by inserting after section 9 (29 U.S.C. 658) the following:

“SEC. 9A. VICTIM’S RIGHTS.

“(a) Definition.—In this section, the term ‘victim’ means—

“(1) an employee who has sustained a work-related injury or illness that is the subject of an inspection or investigation conducted under section 8, or

“(2) a family member of an employee, if—

“(A) the employee is killed as a result of a work-related injury or illness that is the subject of an inspection or investigation conducted under section 8; or

“(B) the employee sustains a work-related injury or illness that is the subject of an inspection or investigation conducted under section 8, and the employee cannot reasonably exercise the employee’s rights under this section.

“(b) Rights.—On request, a victim or the representative of a victim, shall be afforded the right, with respect to a work-related injury or illness (including a death resulting from a work-related injury or illness) involving an employee, to—

“(1) meet with the Secretary, or an authorized representative of the Secretary, regarding the inspection or investigation conducted under section 8 concerning the employee’s injury or illness before the Secretary’s decision to issue a citation or take no action; and

“(2)(A) receive, at no cost, a copy of any citation or report, issued as a result of such inspection or investigation, on the later of the date the citation or report is issued and the date of the request;

“(B) be informed of any notice of contest filed under section 10; and

“(C) be provided an explanation of the rights of employee and employee representatives to participate in proceedings conducted under section 10.

“(c) Modification of Citation.—Before entering into an agreement to withdraw or modify a citation issued as a result of an inspection or investigation of an incident resulting in death or serious incident under section 8, the Secretary, on request, shall provide an opportunity to the victim or the representative of a victim to appear and make a statement before the parties conducting settlement negotiations.

“(d) Notification and Review.—The Secretary shall establish procedures—

“(1) to inform victims of their rights under this section; and

“(2) for the informal review of any claim of a denial of such a right.”.

SEC. 307. RIGHT TO CONTEST CITATIONS AND PENALTIES.

The first sentence of section 10(c) (29 U.S.C. 659(c)) is amended—

(1) by inserting after “the issuance of a citation” the following: “(including a modification of a citation issued)”;

(2) by inserting after “files a notice with the Secretary alleging” the following: “that the citation fails properly to designate the violation as serious, willful, or repeated, that the proposed penalty is not adequate, or”.

SEC. 308. ABATEMENT OF SERIOUS HAZARDS DURING EMPLOYER CONTESTS TO A CITATION.

(a) Citations and Enforcement.—Section 10(b) (29 U.S.C. 659(b)) is amended—

(1) by inserting after “which period” the following: “for other than serious violations”;

(2) by adding at the end the following: “In lieu of providing the notification required by this subsection, where a notice of contest to a citation is pending before the Commission, the Secretary may by appropriate motion in that proceeding assert that the employer has failed to abate the violation within the time period fixed in the citation.”.

(b) Employer Contest.—Section 10(c) (29 U.S.C. 659) is amended by inserting after the first sentence the following: “The pendency of a contest before the Commission shall not bar the Secretary from inspecting a place of employment or from issuing a citation under section 9.”.

SEC. 309. OBJECTIONS TO MODIFICATION OF CITATIONS.

Section 10 (29 U.S.C. 659) is amended by adding at the end the following new subsection:

“(d)(1) If the Secretary intends to withdraw or to modify a citation issued under section 9(a) as a result of any agreement with the cited employer, the Secretary shall provide (in accordance with rules of procedure prescribed by the Commission) prompt notice to affected employees or representatives of affected employees, and that notice shall include the terms of the proposed agreement.

“(2) Not later than 15 working days after the receipt of a notice provided in accordance with paragraph (1), any employee or representative of employees, regardless of whether such employee or representative has previously elected to participate in the proceedings involved, shall have the right to file a notice with the Secretary alleging that the proposed agreement fails to effectuate the purposes of this Act and stating the respects in which the agreement fails to effectuate the purposes.

“(3) Upon receipt of a notice filed under paragraph (2), the Secretary shall consider the statements presented in the notice, and if the Secretary determines to proceed with the proposed agreement, the Secretary shall respond with particularity to the statements presented in the notice.

“(4) Not later than 15 working days following the Secretary’s response provided pursuant to paragraph (3), the employee or representative of employees shall, on making a request to the Commission, be entitled to a hearing before the Commission as to whether adoption of the proposed agreement would effectuate the purposes of this Act, including a determination as to whether the proposed agreement would adequately abate the alleged violations alleged in the citation.

“(5) If the Commission determines that the proposed agreement fails to effectuate the purposes of this Act, the proposed agreement shall not be entered as an order of the Commission and the citation shall not be withdrawn or modified in accordance with the proposed agreement.”.

SEC. 310. CIVIL PENALTIES.

(a) In General.—Section 17 (29 U.S.C. 666) is amended—

(1) in subsection (a)—

(A) by striking “\$70,000” and inserting “\$120,000”;
 (B) by striking “\$5,000” and inserting “\$8,000”; and
 (C) by adding at the end the following: “If such a violation causes the death of an employee, such civil penalty amounts shall be increased to not more than \$250,000 for such violation, but not less than \$50,000 for such violation, except that for an employer with 25 or fewer employees such penalty shall not be less than \$25,000 for such violation.”;

(2) in subsection (b)—

(A) by striking “\$7,000” and inserting “\$12,000”; and
 (B) by adding at the end the following: “If such a violation causes the death of an employee, such civil penalty amounts shall be increased to not more than \$50,000 for such violation, but not less than \$20,000 for such violation, except that for an employer with 25 or fewer employees such penalty shall not be less than \$10,000 for such violation.”;

(3) in subsection (c)—

(A) by striking “\$7,000” and inserting “\$12,000”; and
 (B) by adding at the end the following: “If such a violation causes the death of an employee, such civil penalty amounts shall be increased to not more than \$50,000 for such violation, but not less than \$20,000 for such violation, except that for an employer with 25 or fewer employees such penalty shall not be less than \$10,000 for such violation.”;

(4) in subsection (d)—

(A) by striking “\$7,000” and inserting “\$12,000”; and
 (B) by adding at the end the following: “If such a violation causes the death of an employee, such civil penalty amounts shall be increased to not more than \$50,000 for such violation, but not less than \$20,000 for such violation, except that for an employer with 25 or fewer employees such penalty shall not be less than \$10,000 for such violation.”;

(5) by redesignating subsections (e) through (l) as subsections (f) through (m), respectively; and

(6) in subsection (j) (as redesignated in paragraph (5)), by striking “\$7,000” and inserting “\$12,000.”.

(b) Inflation Adjustment.—Section 17 (29 U.S.C. 666) (as amended by subsection (a)) is further amended by inserting after subsection (d) the following:

“(e) Amounts provided under this section for civil penalties shall be adjusted by the Secretary at least once during each 4-year period to account for the percentage increase or decrease in the Consumer Price Index for all urban consumers during such period.”.

SEC. 311. OSHA CRIMINAL PENALTIES.

(a) In General.—Section 17 (29 U.S.C. 666) (as amended by section 310) is further amended—

(1) by amending subsection (f) to read as follows:

“(f)(1) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 10 years, or both; except that if the conviction is for a violation committed after a first conviction of such person under this subsection or subsection (i), punishment shall be by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 20 years, or by both.

“(2) For the purpose of this subsection, the term ‘employer’ means, in addition to the definition contained in section 3 of this Act, any responsible corporate officer.”;

(2) in subsection (g), by striking “fine of not more than \$1,000 or by imprisonment for not more than six months,” and inserting “fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 2 years.”;

(3) in subsection (h), by striking “fine of not more than \$10,000, or by imprisonment for not more than six months,” and inserting “fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 5 years.”;

(4) by redesignating subsections (j) through (m) as subsections (k) through (n), respectively; and

(5) by inserting after subsection (i) the following:

“(j)(1) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6, or any regulation prescribed pursuant to this Act, and that violation causes serious bodily injury to any employee but does not cause death to any employee, shall, upon conviction, be punished by a fine in accordance with

section 3571 of title 18, United States Code, or by imprisonment for not more than 5 years, or by both, except that if the conviction is for a violation committed after a first conviction of such person under this subsection or subsection (e), punishment shall be by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 10 years, or by both.

“(2) For the purpose of this subsection, the term ‘employer’ means, in addition to the definition contained in section 3 of this Act, any responsible corporate officer.”.

(b) Definition.—Section 3 (29 U.S.C. 652) is amended by adding at the end the following:

“(15) The term ‘serious bodily injury’ means bodily injury that involves—

“(A) a substantial risk of death;

“(B) protracted unconsciousness;

“(C) protracted and obvious physical disfigurement; or

“(D) protracted loss or impairment, of the function of a bodily member, organ, or mental faculty.”.

(c) Jurisdiction for Prosecution Under State and Local Criminal Laws.—Section 17 (29 U.S.C. 666) (as amended by subsection (a)) is further amended by adding at the end the following:

“(o) Nothing in this Act shall preclude a State or local law enforcement agency from conducting criminal prosecutions in accordance with the laws of such State or locality.”.

TITLE IV—EFFECTIVE DATE

SEC. 401. EFFECTIVE DATE.

(a) General Rule.—Except as provided for in subsection (b), this Act and the amendments made by this Act shall take effect 90 days after the date of enactment of this Act.

(b) Exceptions for States and Political Subdivisions.—The following are exceptions to the effective date described in subsection (a):

(1) A State that has a State plan approved under section 18 (29 U.S.C. 667) shall amend its State plan to conform with the requirements of this Act and the amendments made by this Act not later than 12 months after the date of enactment of this Act. Such amendments to the State plan shall take effect not later than 90 days after the adoption of such amendments by such State.

(2) This Act and the amendments made by this Act shall take effect not later than 36 months after the date of the enactment of this Act in a State, or a political subdivision of a State, that does not have a State plan approved under section 18 (29 U.S.C. 667).

Summary of the Protecting America’s Workers Act (H.R. 2067)

The Protecting America’s Workers Act (PAWA) makes significant changes to the Occupational Safety and Health Act (OSH Act), which was passed in order to ensure that employees work in safe and healthy workplaces. PAWA strengthens the OSH Act, which has not been significantly altered since its original passage in 1970.

Specifically, PAWA expands the OSH Act’s coverage to include state and local public employees, federal government workers and millions of other workers who are inadequately covered by other laws. These include employees who work for airlines, railroads and Department of Energy contractors who fall between the cracks because their health and safety coverage is left to other government agencies that don’t treat worker safety as a priority.

PAWA raises civil penalties on employers for violations of the OSH Act, establishes mandatory minimum penalties for violations involving worker fatalities and indexes penalties to inflation. It authorizes felony criminal prosecutions against employers who commit willful violations that result in death or serious bodily injury and extends the reach of such penalties to responsible corporate officers.

PAWA improves upon current whistleblower protections, including codifying regulations that give workers the right to refuse to do hazardous work. It clarifies that employees cannot be discriminated against for reporting injuries, illnesses or unsafe conditions, and brings the procedures for investigating and adjudicating discrimination complaints into line with other safety and health and whistleblower laws.

The bill requires the Occupational Safety and Health Administration (OSHA), the health and safety arm of the Department of Labor, to investigate all cases of death and serious injuries (i.e. incidents that result in the hospitalization of 2 or more employees); it provides workers and employee representatives the right to contest

OSHA's failure to issue citations, the characterization of citations that are issued and proposed penalties; and it gives injured workers and the families of workers injured or who have died in work-related incidents the right to meet with investigators, to receive copies of citations and to have an opportunity to appear and make a statement before parties involved in any settlement negotiation.

In recent years, OSHA had reached settlement agreements with employers that, at the employer's request, have changed the designation of willful citations to an "unclassified" citation's meaning that the employer avoids the potential consequences of having a "willful" OSHA violation on its record. PAWA prohibits OSHA from designating a citation as an unclassified citation.

In addition, any worker or his or her representative can object to the modification or withdrawal of a citation due to a settlement with the employer on the grounds that the proposed agreement fails to "effectuate the purposes" of the OSH Act, and be entitled to a hearing before the Occupational Safety and Health Review Commission.

PAWA clarifies that the time spent by an employee accompanying an OSHA inspector during an investigation is considered "time worked," for which a worker must be compensated.

Since the passage of the OSH Act, much progress has been made. It has been reported that over 390,000 lives have been saved. Nonetheless, too many workers are still dying and millions of others are injured or become ill by working in unsafe and unhealthy conditions. The Protecting America's Workers Act strengthens and enhances the OSH Act so that it can fully meet its promise to ensure safe and healthy workplaces for all Americans.

Clarification of the Mens Rea Requirement

Another proposed change would alter the mens rea (mental state) requirements for a criminal case from "willful" to "knowing." Under the introduced PAWA, an employer cannot be convicted under the criminal law unless that employer has acted "willfully" and such willful act caused the death or serious injury to a worker. Courts interpreting the "willful" requirement under the OSH Act require proof that an employer has taken a "deliberate action with knowledge of the OSH Act's requirements or with plain indifference to those requirements."¹ Proof of malice is not required. In other criminal cases, the "willful" standard means that an actor knew his conduct was unlawful, or he acted with evil intent.²

Notwithstanding criminal mental state requirement under the OSH Act, the "willful" standard is not a familiar one in the criminal law context, and the norm is to require a "knowing" standard of proof in which an actor knows that his or her conduct was wrong. Under this standard, employers cannot escape liability by claiming that they did not know what the law required. Note: under either standard a prosecutor would still have to prove that an actor is guilty beyond a reasonable doubt.

[DISCUSSION DRAFT]

[AS OF MARCH 9, 2010]

[Modifications to HR 2067, Protecting America's Workers Act]

111TH CONGRESS
2D SESSION

H. R. _____

To amend the Occupational Safety and Health Act of 1970 to expand coverage under the Act, to increase protections for whistleblowers, to increase penalties for certain violators, and for other purposes.

¹Rabinowitz, Randy (editor), Occupational Safety and Health Law, 2d Edition, ABA Section of Labor and Employment Law (2002), p. 269.

²Testimony of David Uhlmann before the U.S. House of Representatives, Committee on Education and Labor (April 28, 2009).

IN THE HOUSE OF REPRESENTATIVES

Ms. WOOLSEY introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Occupational Safety and Health Act of 1970 to expand coverage under the Act, to increase protections for whistleblowers, to increase penalties for certain violators, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Protecting America’s Workers Act”.

SEC. 2. REFERENCES.

Except as otherwise expressly provided, wherever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.).

**TITLE I—COVERAGE OF PUBLIC EMPLOYEES
AND APPLICATION OF ACT**

SEC. 101. COVERAGE OF PUBLIC EMPLOYEES.

(a) **IN GENERAL.**—Section 3(5) (29 U.S.C. 652(5)) is amended by striking “but does not include” and all that follows through the period at the end and inserting “including the United States, a State, or a political subdivision of a State.”.

(b) **CONSTRUCTION.**—Nothing in this Act shall be construed to affect the application of section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667).

SEC. 102. APPLICATION OF ACT.

Section 4(b) (29 U.S.C. 653(b)(1)) is amended—

(1) by redesignating paragraphs (2), (3), and (4) as paragraphs (5), (6), and (7), respectively; and

(2) by striking paragraph (1) and inserting the following:

“(1) If a Federal agency has promulgated and is enforcing a standard or regulation affecting occupational safety or health of some or all of the employees within that agency’s regulatory jurisdiction, and the Secretary determines that such a standard or regulation as promulgated and the manner in which the standard or regulation is being enforced provides protection to those employees that is at least as effective as the protection provided to those employees by this Act and the Secretary’s enforcement of this Act, the Secretary may publish a certification notice in the Federal Register. The notice shall set forth that determination and the reasons for the determination and certify that the Secretary has ceded jurisdiction to that Federal agency with respect to the specified standard or regulation affecting occupational safety or health. In determining whether to cede jurisdiction to a Federal agency, the Secretary shall seek to avoid duplication of, and conflicts between, health and safety requirements. Such certification shall remain in effect unless and until rescinded by the Secretary.

“(2) The Secretary shall, by regulation, establish procedures by which any person who may be adversely affected by a decision of the Secretary certifying that the Secretary has ceded jurisdiction to another Federal agency pursuant to paragraph (1) may petition the Secretary to rescind a certification notice under paragraph (1). Upon receipt of such a petition, the Secretary shall investigate the matter involved and shall, within 90 days after receipt of the petition, publish a decision with respect to the petition in the Federal Register.

“(3) Any person who may be adversely affected by—

“(A) a decision of the Secretary certifying that the Secretary has ceded jurisdiction to another Federal agency pursuant to paragraph (1); or

“(B) a decision of the Secretary denying a petition to rescind such a certification notice under paragraph (1), may, not later than 60 days after such decision is published in the Federal Register, file a petition challenging such decision with the United States court of appeals for the circuit in which such person resides or such person has a principal place of business, for judicial review of such decision. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary’s decision shall be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

“(4) Nothing in this Act shall apply to working conditions covered by the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.).”.

TITLE II—INCREASING PROTECTIONS FOR WHISTLEBLOWERS

SEC. 201. EMPLOYEE ACTIONS.

Section 11(c)(1) (29 U.S.C. 660(c)(1)) is amended by inserting before the period at the end the following: “, including the reporting of any injury, illness, or unsafe condition to the employer, agent of the employer, safety and health committee involved, or employee safety and health representative involved”.

SEC. 202. PROHIBITION OF DISCRIMINATION.

Section 11(c) (29 U.S.C. 660(c)) is amended by striking paragraph (2) and inserting the following:

“(2) No person shall discharge or in any manner discriminate against an employee for refusing to perform the employee’s duties if the employee has a reasonable apprehension that performing such duties would result in serious injury to, or serious impairment of the health of, the employee or other employees. The circumstances causing the employee’s apprehension of serious injury or serious impairment of health shall be of such a nature that a reasonable person, under the circumstances confronting the employee, would conclude that there is a bona fide danger of a serious injury, or serious impairment of health, resulting from the circumstances. In order to qualify for protection under this paragraph, the employee, when practicable, shall have sought from the employee’s employer, and have been unable to obtain, a correction of the circumstances causing the refusal to perform the employee’s duties.”.

SEC. 203. PROCEDURE.

Section 11(c) (29 U.S.C. 660(c)) is amended by striking paragraph (3) and inserting the following:

“(3) COMPLAINT.—Any employee who believes that the employee has been discharged, disciplined, or otherwise discriminated against by any person in violation of paragraph (1) or (2) may seek relief for such violation by filing a complaint with the Secretary under paragraph (5).

“(4) STATUTE OF LIMITATIONS.—

“(A) IN GENERAL.—An employee may take the action permitted by paragraph (3)(A) not later than 180 days after the later of—

“(i) the date on which an alleged violation of paragraph (1) or (2) occurs; or

“(ii) the date on which the employee knows or should reasonably have known that such alleged violation occurred.

“(B) REPEAT VIOLATION.—Except in cases when the employee has been discharged, a violation of paragraph (1) or (2) shall be considered to have occurred on the last date an alleged repeat violation occurred.

“(5) INVESTIGATION.—

“(A) IN GENERAL.—An employee may, within the time period required under paragraph (4)(B), file a complaint with the Secretary alleging a violation of paragraph (1) or (2). If the complaint alleges a prima facie case, the Secretary shall conduct an investigation of the allegations in the complaint, which—

“(i) shall include—

“(I) interviewing the complainant;

“(II) providing the respondent an opportunity to—

“(aa) submit to the Secretary a written response to the complaint; and

“(bb) meet with the Secretary to present statements from witnesses or provide evidence; and

“(III) providing the complainant an opportunity to—

“(aa) receive any statements or evidence provided to the Secretary;

“(bb) meet with the Secretary; and

“(cc) rebut any statements or evidence; and

“(ii) may include issuing subpoenas for the purposes of such investigation.

“(B) DECISION.—Not later than 90 days after the filing of the complaint, the Secretary shall—

“(i) issue a decision on whether to order relief; and

“(ii) notify, in writing, the complainant and the respondent named in the complaint of such decision.

“(6) PRELIMINARY ORDER FOLLOWING INVESTIGATION.—If, after completion of an investigation under paragraph (5)(A), the Secretary finds reasonable cause to believe that a violation of paragraph (1) or (2) has occurred, the Secretary shall issue a preliminary order providing relief authorized under paragraph (14) at the same time the Secretary issues a decision under paragraph (5)(B). If a de novo hearing is not requested within the time period required under paragraph (7)(A)(i), such preliminary order shall be deemed a final order of the Secretary and is not subject to judicial review.

“(7) HEARING.—

“(A) REQUEST FOR HEARING.—

“(i) IN GENERAL.—A de novo hearing on the record before an administrative law judge may be requested—

“(I) by the complainant or respondent within 30 days after receiving notification of a decision or preliminary order for relief issued under paragraph (5)(B) or (6), respectively;

“(II) by the complainant within 30 days after the date the complaint is dismissed without investigation by the Secretary under paragraph (5)(A); or

“(III) by the complainant within 120 days after the date of filing the complaint, if the Secretary has not issued a decision under paragraph (5)(B).

“(ii) REINSTATEMENT ORDER.—The request for a hearing shall not operate to stay any preliminary reinstatement order issued under paragraph (6).

“(B) PROCEDURES.—

“(i) IN GENERAL.—A hearing requested under this paragraph shall be conducted expeditiously and in accordance with rules established by the Secretary for hearings conducted by administrative law judges.

“(ii) SUBPOENAS; PRODUCTION OF EVIDENCE.—In conducting any such hearing, the administrative law judge may issue subpoenas. The respondent or complainant may request the issuance of subpoenas that require the deposition of, or the attendance and testimony of, witnesses and the production of any evidence (including any books, papers, documents, or recordings) relating to the matter under consideration.

“(iii) DECISION.—The administrative law judge shall issue a decision not later than 90 days after the date on which a hearing was requested under this paragraph and promptly notify, in writing, the parties and the Secretary of such decision, including the findings of fact and conclusions of law. If the administrative law judge finds that a violation of paragraph (1) or (2) has occurred, the judge shall issue an order for relief under paragraph (14). If review under paragraph (8) or (11) is not timely requested, such order shall be deemed a final order of the Secretary that is not subject to judicial review.

“(8) ADMINISTRATIVE APPEAL.—

“(A) IN GENERAL.—Not later than 30 days after the date of notification of a decision and order issued by an administrative law judge under paragraph (7), the complainant or respondent may file, with objections, an administrative appeal with the Secretary (or an administrative review body designated by the Secretary).

“(B) STANDARD OF REVIEW.—In reviewing the decision and order of the administrative law judge, the Secretary (or designated administrative review body) shall affirm the decision and order if it is determined that the factual findings set forth therein are supported by substantial evidence and the decision and order are made in accordance with applicable law.

“(C) DECISION.—If the Secretary grants the administrative appeal and finds that a violation of paragraph (1) or (2) has occurred, the Secretary

shall issue, within 60 days of receipt of the administrative appeal, a final decision and order providing relief authorized under paragraph (14), and such decision and order shall constitute a final agency action.

“(9) SETTLEMENT IN THE ADMINISTRATIVE PROCESS.—

“(A) IN GENERAL.—At any time before issuance of a final order, an investigation or proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by—

“(i) the Secretary or an administrative law judge conducting a hearing under this subsection;

“(ii) the complainant; and

“(iii) the respondent.

“(B) PUBLIC POLICY CONSIDERATIONS.—The Secretary or an administrative law judge conducting a hearing under this subsection may not accept a settlement that contains conditions conflicting with the rights protected under this Act or that are contrary to public policy, including a restriction on a complainant’s right to future employment with employers other than the specific employers named in a complaint.

“(10) INACTION BY THE SECRETARY OR ADMINISTRATIVE LAW JUDGE.—

“(A) IN GENERAL.—The complainant may bring a de novo action described in subparagraph (B) if—

“(i) an administrative law judge has not issued a decision and order within the 90-day time period required under paragraph (7)(B)(iii); or

“(ii) the Secretary has not issued a decision and order within the 60-day time period required under paragraph (8)(C).

“(B) DE NOVO ACTION.—Such de novo action may be brought at law or equity in the United States district court for the district where a violation of paragraph (1) or (2) allegedly occurred or where the complainant resided on the date of such alleged violation. The court shall have jurisdiction over such action without regard to the amount in controversy and to order appropriate relief under paragraph (14). Such action shall, at the request of either party to such action, be tried by the court with a jury.

“(11) JUDICIAL REVIEW.—

“(A) TIMELY APPEAL TO THE COURT OF APPEALS.—Any party adversely affected or aggrieved by a final decision and order issued under this subsection may obtain review of such decision and order in the United States Court of Appeals for the circuit where the violation, with respect to which such final decision and order was issued, allegedly occurred or where the complainant resided on the date of such alleged violation. To obtain such review, a party shall file a petition for review not later than 60 days after the final decision and order was issued. Such review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the final decision and order.

“(B) LIMITATION ON COLLATERAL ATTACK.—An order and decision with respect to which review may be obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

“(12) ENFORCEMENT OF ORDER.—If a respondent fails to comply with an order issued under this subsection, the Secretary or the complainant on whose behalf the order was issued may file a civil action for enforcement in the United States district court for the district in which the violation was found to occur to enforce such order. If both the Secretary and the complainant file such action, the action of the Secretary shall take precedence. The district court shall have jurisdiction to grant all appropriate relief including, injunctive relief, compensatory or exemplary damages, and reasonable attorneys’ fees and costs.

“(13) BURDENS OF PROOF.—

“(A) CRITERIA FOR DETERMINATION.—In adjudicating a complaint pursuant to this subsection, the Secretary or a court may determine that a violation of paragraph (1) or (2) has occurred only if the complainant demonstrates that any conduct described in paragraph (1) or (2) with respect to the complainant was a contributing factor in the adverse action alleged in the complaint.

“(B) PROHIBITION.—Notwithstanding subparagraph (A), a decision or order that is favorable to the complainant shall not be issued in any administrative or judicial action pursuant to this subsection if the respondent demonstrates by clear and convincing evidence that the respondent would have taken the same adverse action in the absence of such conduct.

“(14) RELIEF.—

“(A) ORDER FOR RELIEF.—If the Secretary or a court determines that a violation of paragraph (1) or (2) has occurred, the Secretary or court, respectively, shall have jurisdiction to order all appropriate relief, including injunctive relief, compensatory and exemplary damages, including—

“(i) affirmative action to abate the violation;

“(ii) reinstatement without loss of position or seniority, and restoration of the terms, rights, conditions, and privileges associated with the complainant’s employment, including opportunities for promotions to positions with equivalent or better compensation for which the complainant is qualified;

“(iii) compensatory and consequential damages sufficient to make the complainant whole, (including back pay, prejudgment interest, and other damages); and

“(iv) expungement of all warnings, reprimands, or derogatory references that have been placed in paper or electronic records or databases of any type relating to the actions by the complainant that gave rise to the unfavorable personnel action, and, at the complainant’s direction, transmission of a copy of the decision on the complaint to any person whom the complainant reasonably believes may have received such unfavorable information.

“(B) ATTORNEYS’ FEES AND COSTS.—If the Secretary or a court grants an order for relief under subparagraph (A), the Secretary or court, respectively, shall assess, at the request of the employee against the employer—

“(i) reasonable attorneys’ fees; and

“(ii) costs (including expert witness fees) reasonably incurred, as determined by the Secretary or court respectively, in connection with bringing the complaint upon which the order was issued.

“(15) PROCEDURAL RIGHTS.—The rights and remedies provided for in this subsection may not be waived by any agreement, policy, form, or condition of employment, including by any pre-dispute arbitration agreement or collective bargaining agreement.

“(16) SAVINGS.—Nothing in this section shall be construed to diminish the rights, privileges, or remedies of any employee who exercises rights under any Federal or State law or common law, or under any collective bargaining agreement.

“(17) ELECTION OF VENUE.—

“(A) IN GENERAL.—An employee of an employer who is located in a State that has a State plan approved under section 18 may file a complaint alleging a violation of paragraph (1) or (2) by such employer with—

“(i) the Secretary under paragraph (5); or

“(ii) a State plan administrator in such State.

“(B) REFERRALS.—If—

“(i) the Secretary receives a complaint pursuant to subparagraph (A)(i), the Secretary shall not refer such complaint to a State plan administrator for resolution; or

“(ii) a State plan administrator receives a complaint pursuant to subparagraph (A)(ii), the State plan administrator shall not refer such complaint to the Secretary for resolution.”.

SEC. 204. RELATION TO ENFORCEMENT.

Section 17(j) (29 U.S.C. 666(j)) is amended by inserting before the period the following: “, including the history of violations under section 11(c)”.

TITLE III—INCREASING PENALTIES FOR VIOLATORS

SEC. 301. POSTING OF EMPLOYEE RIGHTS.

Section 8(c)(1) (29 U.S.C. 657(c)(1)) is amended by adding at the end the following new sentence: “Such regulations shall include provisions requiring employers to post for employees information on the protections afforded under section 11(c)”.

SEC. 302. EMPLOYER REPORTING OF WORK-RELATED DEATHS AND HOSPITALIZATIONS AND PROHIBITION ON DISCOURAGING EMPLOYEE REPORTS OF INJURY OR ILLNESS.

Section 8(c)(2) (29 U.S.C. 657(c)(2)) is amended by adding at the end the following new sentences: “Such regulations shall require employers to promptly notify the Secretary of any work-related death or work-related injury or illness that results in the in-patient hospitalization of an employee for medical treatment. Such regula-

tions shall also prohibit the employer from adopting or implementing policies or practices by the employer that have the effect of discouraging accurate record-keeping and the reporting of work-related injuries or illnesses by any employee or in any manner discriminates or provides for adverse action against any employee for reporting a work-related injury or illness.”

SEC. 303. NO LOSS OF EMPLOYEE PAY FOR INSPECTIONS.

Section 8(e) (29 U.S.C. 657(e)) is amended by inserting after the first sentence the following: “Time spent by an employee participating in or aiding any such inspection shall be deemed to be hours worked and no employee shall suffer any loss of wages, benefits, or other terms and conditions of employment for having participated in or aided any such inspection.”

SEC. 304. INVESTIGATIONS OF FATALITIES AND SIGNIFICANT INCIDENTS.

Section 8 (29 U.S.C. 657) is amended by adding at the end the following new subsection:

“(i) INVESTIGATION OF FATALITIES AND SERIOUS INCIDENTS.—

“(1) IN GENERAL.—The Secretary shall investigate any significant incident or an incident resulting in death that occurs in a place of employment.

“(2) APPROPRIATE MEASURES.—If a significant incident or an incident resulting in death occurs in a place of employment, the employer shall promptly notify the Secretary of the incident involved and shall take appropriate measures to prevent the destruction or alteration of any evidence that would assist in investigating the incident. The appropriate measures required by this paragraph do not prevent an employer from taking action on a worksite to prevent injury to employees or substantial damage to property or to avoid disruption of essential services necessary to public safety. If an employer takes such action, the employer shall notify the Secretary of the action in a timely fashion.

“(3) DEFINITIONS.—In this subsection:

“(A) INCIDENT RESULTING IN DEATH.—The term ‘incident resulting in death’ means an incident that results in the death of an employee.

“(B) SIGNIFICANT INCIDENT.—The term ‘significant incident’ means an incident that results in the in-patient hospitalization of 2 or more employees for medical treatment.”

SEC. 305. PROHIBITION ON UNCLASSIFIED CITATIONS.

Section 9 (29 U.S.C. 658) is amended by adding at the end the following:

“(d) No citation for a violation of this Act may be issued, modified, or settled under this section without a designation enumerated in section 17 with respect to such violation.”

SEC. 306. VICTIMS’ RIGHTS.

The Act is amended by inserting after section 9 (29 U.S.C. 658) the following:

“SEC. 9A. VICTIM’S RIGHTS.

“(a) RIGHTS BEFORE THE SECRETARY.—A victim or the representative of a victim, shall be afforded the right, with respect to an inspection or investigation conducted under section 8 to—

“(1) meet with the Secretary regarding the inspection or investigation conducted under such section before the Secretary’s decision to issue a citation or take no action;

“(2) receive, at no cost, a copy of any citation or report, issued as a result of such inspection or investigation, at the same time as the employer receives such citation or report;

“(3) be informed of any notice of contest or addition of parties to the proceedings filed under section 10(c); and

“(4) be provided notification of the date and time of any proceedings, service of pleadings, and other relevant documents, and an explanation of the rights of the employer, employee and employee representative, and victim to participate in proceedings conducted under section 10(c).

“(b) RIGHTS BEFORE THE COMMISSION.—Upon request, a victim or representative of a victim shall be afforded the right with respect to a work-related bodily injury or death to—

“(1) be notified of the time and date of any proceeding before the Commission; and

“(2) receive pleadings and any decisions relating to the proceedings; and

“(3) be provided an opportunity to appear and make a statement in accordance with the rules prescribed by the Commission.

“(c) MODIFICATION OF CITATION.—Before entering into an agreement to withdraw or modify a citation issued as a result of an inspection or investigation of an

incident under section 8, the Secretary shall notify a victim or representative of a victim and provide the victim or representative of a victim with an opportunity to appear and make a statement before the parties conducting settlement negotiations. In lieu of an appearance, the victim or representative of the victim may elect to submit a letter to the Secretary and the parties.

“(d) SECRETARY PROCEDURES.—The Secretary shall establish procedures—

“(1) to inform victims of their rights under this section; and

“(2) for the informal review of any claim of a denial of such a right.

“(e) COMMISSION PROCEDURES.—The Commission shall establish procedures relating to the rights of victims to be heard in proceedings before the Commission.

“(f) DEFINITION.—In this section, the term ‘victim’ means—

“(1) an employee, including a former employee, who has sustained a work-related injury or illness that is the subject of an inspection or investigation conducted under section 8, or

“(2) a family member (as further defined by the Secretary) of a victim described in paragraph (1), if—

“(A) the victim dies as a result of an incident that is the subject of an inspection or investigation conducted under section 8; or

“(B) the victim sustains a work-related injury or illness that is the subject of an inspection or investigation conducted under section 8, and the victim because of incapacity cannot reasonably exercise the rights under this section.”.

SEC. 307. RIGHT TO CONTEST CITATIONS AND PENALTIES.

Section 10 (20 U.S.C. 659) is amended—

(1) in the first sentence of subsection (b)—

(A) by inserting “, with the exception of violations designated as serious, willful, or repeated,” after “(which period shall not begin to run”;

(2) in subsection (c)—

(A) in the first sentence—

(i) by inserting after “that he intends to contest a citation issued under section (9)” the following: “(or a modification of a citation issued under this section)”;

(ii) by inserting after “the issuance of a citation under section 9” the following: “(including a modification of a citation issued under such section)”;

(iii) by inserting after “files a notice with the Secretary alleging” the following: “that the citation fails properly to designate the violation as serious, willful, or repeated, that the proposed penalty is not adequate, or”;

(B) by inserting after the first sentence, the following: “The pendency of a contest before the Commission shall not bar the Secretary from inspecting a place of employment or from issuing a citation under section 9.”; and

(C) by amending the last sentence—

(i) by inserting “employers and” after “Commission shall provide”;

and

(ii) by inserting before the period at the end “, and notification of any modification of a citation”.

(3) by adding at the end the following:

“(d) CORRECTION OF SERIOUS, WILLFUL, OR REPEATED VIOLATIONS; ABATEMENT PENDING CONTEST AND PROCEDURES FOR A STAY.—

“(1) PERIOD PERMITTED FOR CORRECTION OF SERIOUS, WILLFUL, OR REPEATED VIOLATIONS.—For each violation which the Secretary designates as serious, willful, or repeated, the period permitted for the correction of the violation shall begin to run upon receipt of the citation.

“(2) FILING OF A MOTION OF CONTEST.—The filing of a notice of contest by an employer—

“(A) shall not operate as a stay of the period for correction of a violation designated as serious, willful, or repeated; and

“(B) may operate as a stay of the period for correction of a violation not designated by the Secretary as serious, willful, or repeated.

“(3) CRITERIA AND RULES OF PROCEDURE FOR STAYS.—

“(A) MOTION FOR A STAY.—An employer may file with the Commission a motion to stay a period for the correction of a violation designated as serious, willful, or repeated.

“(B) CRITERIA.—In determining whether a stay should be issued on the basis of a motion filed under subparagraph (A), the Commission shall consider whether—

“(i) the employer has demonstrated a substantial likelihood of success on its contest to the citation;

“(ii) the employer will suffer irreparable harm absent a stay; and

“(iii) a stay will adversely affect the health and safety of workers.

“(C) RULES OF PROCEDURE.—The Commission shall develop rules of procedure for conducting a hearing on a motion filed under subparagraph (A) on an expedited basis. At a minimum, such rules shall provide:

“(i) That a hearing before an administrative law judge shall occur not later than 15 days following the filing of the motion for a stay (unless extended at the request of the employer), and shall provide for a decision on the motion not later than 15 days following the hearing (unless extended at the request of the employer).

“(ii) That a decision of an administrative law judge on a motion for stay is rendered on a timely basis.

“(iii) That if a party is aggrieved by a decision issued by an administrative law judge regarding the stay, such party has the right to file an objection with the Commission not later than 5 days after receipt of the administrative law judge’s decision. Within 10 days after receipt of the objection, a Commissioner, if a quorum is seated pursuant to section 12(f), shall decide whether to grant review of the objection. If, within 10 days after receipt of the objection, no decision is made on whether to review the decision of the administrative law judge, the Commission declines to review such decision, or no quorum is seated, the decision of the administrative law judge shall become a final order of the Commission. If the Commission grants review of the objection, the Commission shall issue a decision regarding the stay not later than 30 days after receipt of the objection. If the Commission fails to issue such decision within 30 days, the decision of the administrative law judge shall become a final order of the Commission.

“(iv) For notification to employees or representatives of affected employees of requests for such hearings and shall provide affected employees or representatives of affected employees an opportunity to participate as parties to such hearings.”

SEC. 308. CONFORMING AMENDMENTS.

(a) SECTION 17.—Section 17(d) (29 U.S.C. 666(d)) is amended to read as follows:

“(d) Any employer who fails to correct a violation designated by the Secretary as serious, willful or repeated and for which a citation has been issued under section 9(a) within the period permitted for its correction (and a stay has not been issued by the Commission under section 10(d)) may be assessed a civil penalty of not more than \$7,000 for each day during which such failure or violation continues. Any employer who fails to correct any other violation for which a citation has been issued under section 9(a) of this title within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 10 initiated by the employer in good faith and not solely for delay of avoidance of penalties) may be assessed a civil penalty of not more than \$7,000 for each day during which such failure or violation continues.”

(b) SECTION 11(A).—The first sentence of section 11(a) (29 U.S.C. 660(a)) is amended by—

(1) by inserting “(or the failure of the Commission, including an administrative law judge, to make a timely decision on a request for a stay under section 10(d))” after “an order”;

(2) by striking “subsection (c)” and inserting “subsections (c) and (d)”; and

(3) by inserting “(or in the case of a petition from a final Commission order regarding a stay under section 10(d), 15 days)” after “sixty days”.

SEC. 309. CIVIL PENALTIES.

(a) IN GENERAL.—Section 17 (29 U.S.C. 666) is amended—

(1) in subsection (a)—

(A) by striking “\$70,000” and inserting “\$120,000”;

(B) by striking “\$5,000” and inserting “\$8,000”; and

(C) by adding at the end the following: “If such a violation causes the death of an employee, such civil penalty amounts shall be increased to not more than \$250,000 for each such violation, but not less than \$50,000 for each such violation, except that for an employer with 25 or fewer employees such penalty shall not be less than \$25,000 for each such violation.”;

(2) in subsection (b)—

(A) by striking “\$7,000” and inserting “\$12,000”; and

- (B) by adding at the end the following: “If such a violation causes the death of an employee, such civil penalty amounts shall be increased to not more than \$50,000 for each such violation, but not less than \$20,000 for each such violation, except that for an employer with 25 or fewer employees such penalty shall not be less than \$10,000 for each such violation.”;
- (3) in subsection (c), by striking “\$7,000” and inserting “\$12,000”;
- (4) in subsection (d), by striking “\$7,000” and inserting “\$12,000”;
- (5) by redesignating subsections (e) through (l) as subsections (f) through (m), respectively; and
- (6) in subsection (j) (as redesignated by paragraph (5)), by striking “\$7,000” and inserting “\$12,000”.

(b) INFLATION ADJUSTMENT.—Section 17 (29 U.S.C. 666) (as amended by subsection (a)) is further amended by inserting after subsection (d) the following:

“(e) Amounts provided under this section for civil penalties shall be adjusted by the Secretary at least once during each 4-year period to account for the percentage increase or decrease in the Consumer Price Index for all urban consumers during such period.”.

SEC. 310. OSHA CRIMINAL PENALTIES.

(a) IN GENERAL.—Section 17 (29 U.S.C. 666) (as amended by section 309) is further amended—

(1) by amending subsection (f) to read as follows:
 “(f)(1) Any employer who knowingly violates any standard, rule, or order promulgated under section 6 of this Act, or of any regulation prescribed under this Act, and that violation caused or contributed to death to any employee, shall, upon conviction, be punished by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 10 years, or both, except that if the conviction is for a violation committed after a first conviction of such person under this subsection or subsection (i), punishment shall be by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 20 years, or by both.

“(2) For the purpose of this subsection, the term ‘employer’ means, in addition to the definition contained in section 3 of this Act, any officer or director.”;

(2) in subsection (g), by striking “fine of not more than \$1,000 or by imprisonment for not more than six months,” and inserting “fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 2 years.”;

(3) in subsection (h), by striking “fine of not more than \$10,000, or by imprisonment for not more than six months,” and inserting “fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 5 years.”;

(4) by redesignating subsections (j) through (m) as subsections (k) through (n), respectively; and

(5) by inserting after subsection (i) the following:

“(j)(1) Any employer who knowingly violates any standard, rule, or order promulgated under section 6, or any regulation prescribed under this Act, and that violation causes or contributes to serious bodily harm to any employee but does not cause death to any employee, shall, upon conviction, be punished by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 5 years, or by both, except that if the conviction is for a violation committed after a first conviction of such person under this subsection or subsection (e), punishment shall be by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 10 years, or by both.

“(2) For the purpose of this subsection, the term ‘employer’ means, in addition to the definition contained in section 3 of this Act, any officer or director.

“(3) For purposes of this subsection, the term ‘serious bodily harm’ means any circumstance, deficiency, or shortfall that could result in an injury or illness including, risk of death, unconsciousness, physical disfigurement, or loss or impairment (whether permanent or temporary) of the function of a bodily member, organ, or mental facility.”.

(b) JURISDICTION FOR PROSECUTION UNDER STATE AND LOCAL CRIMINAL LAWS.—Section 17 (29 U.S.C. 666) (as amended by subsection (a)) is further amended by adding at the end the following:

“(o) Nothing in this Act shall preclude a State or local law enforcement agency from conducting criminal prosecutions in accordance with the laws of such State or locality.”.

TITLE IV—EFFECTIVE DATE**SEC. 401. EFFECTIVE DATE.**

(a) **GENERAL RULE.**—Except as provided for in subsection (b), this Act and the amendments made by this Act shall take effect not later than 90 days after the date of the enactment of this Act.

(b) **EXCEPTION FOR STATES AND POLITICAL SUBDIVISIONS.**—The following are exceptions to the effective date described in subsection (a):

(1) A State that has a State plan approved under section 18 (29 U.S.C. 667) shall amend its State plan to conform with the requirements of this Act and the amendments made by this Act not later than 12 months after the date of the enactment of this Act. The Secretary of Labor may extend the period for a State to make such amendments to its State plan by not more than 12 months, if the State's legislature is not in session during the 12-month period beginning with the date of the enactment of this Act. Such amendments to the State plan shall take effect not later than 90 days after the adoption of such amendments by such State.

(2) This Act and the amendments made by this Act shall take effect not later than 36 months after the date of the enactment of this Act in a State, or a political subdivision of a State, that does not have a State plan approved under section 18 (29 U.S.C. 667).

Changes to the Civil and Criminal Penalty Provisions of the OSH Act under PAWA

CIVIL PENALTIES				
Category of Violation	Current Penalty		Penalty under PAWA	
	Minimum	Maximum	Minimum	Maximum
Willful	\$5,000	\$70,000	\$8,000	\$120,000
Willful, resulting in a fatality	Not in law		\$50,000 (\$25,000 for a small business) ^a	\$250,000
Serious	\$0	\$7,000	\$0	\$12,000
Serious, resulting in a fatality	Not in law		\$20,000 (\$10,000 for a small business) ^a	\$50,000
Other than serious	\$0	\$7,000	\$0	\$12,000
Failure to correct (abate) a safety or health hazard	\$0	\$7,000/day	\$0	\$12,000/day
Failure to post	\$0	\$7,000	\$0	\$12,000
CRIMINAL PENALTIES				
Category of Violation	Current Maximum Penalty		Maximum Penalty under PAWA	
Willful, ^b resulting in a fatality	\$10,000; misdemeanor with a 6 mo max prison term		For an individual - \$250,000; felony with a 10 yr max prison term For an organization - \$500,000; felony	
Willful, ^b repeat, resulting in a fatality	\$20,000; misdemeanor with a 1 yr max prison term		For an individual - \$250,000; felony with a 20 yr max prison term For an organization - \$500,000; felony	
Willful resulting in a serious injury ^c	0		For an individual - \$250,000; felony with a maximum 5 year prison term For an organization - \$50,000; felony	
Willful, repeat, resulting in serious injury ^c	0		For an individual - \$250,000; felony with a maximum 10 year prison term For an organization - \$50,000; felony	
Advance notice of inspection	\$1,000; misdemeanor with a 6 mo max prison term		For an individual - \$250,000; felony with a 2 yr max prison term For an organization - \$500,000; felony	
False statements	\$10,000; misdemeanor with a 6 mo max prison term		For an individual - \$250,000; felony with a 5 yr max prison term For an organization - \$500,000; felony	

Notes:

^a A small business is defined as an employer with 25 or fewer employees.

^b Improvements to the bill would change criminal violations currently classified in the OSH Act as "willful" to "knowing."

^c PAWA allows OSHA to cite employers for criminal violations that result in a serious injury in addition to those that result in a fatality.

[The U.S. Senate, Committee on Health, Education, Labor, and Pensions Report, "Discounting Death," may be accessed at the following Internet address:]

<http://www.philaposh.org/pdf/2008KennedyReport.pdf>

OFFICE OF THE GOVERNOR,
STATE CAPITOL,
Cheyenne, WY, March 11, 2010.

Hon. GEORGE MILLER, *Chairman,*
Committee on Education and Labor, U.S. House of Representatives, Washington, DC
20515.

DEAR CHAIRMAN MILLER: In the spring of 2009, my office formed a Workplace Safety Task Force to determine root causes of why Wyoming ranked number 1 in the nation in workplace fatalities. We were fortunate to secure the assistance of two occupational epidemiologist from the National Institute of Occupational Health and Safety (NIOSH) of Anchorage, Alaska who made several trips to Wyoming to help the Task Force collect and analyze the data from a variety of sources.

The Task Force divided into four sub-committees made, Oil and Gas, Transportation, Construction and Data and each subcommittee made recommendations which were:

Oil and Gas, Construction: increase OSHA penalties consistent with HR 2067,

Transportation: raise penalty for violation of our secondary seatbelt law,

Data: engage the services of a full time occupational epidemiologist.

Wyoming HB 93, taken from HR-2067, SEC. 309, would have increased the civil penalties to the same level proposed by the Congressional Bill. Unfortunately the Wyoming Bill was defeated by the Wyoming Senate.

As Governor, I would support SEC. 309 of HR 2067 as proposed. It is my belief that with the increased OSHA Civil Penalties, it will strongly encourage businesses, particularly small employers, to seek courtesy inspections from OSHA, thereby ultimately reducing the number of workplace fatalities and injuries.

Should you need additional information, please do not hesitate to contact my office.

Best regards,

DAVE FREUDENTHAL, *Governor.*

**Prepared Statement of Peg Seminario, Director,
Safety and Health, AFL-CIO**

Chairman Woolsey, Ranking Member McMorris Rodgers and other members of the committee, I appreciate the opportunity to submit this statement on behalf of the AFL-CIO in strong support of the Protecting America's Workers Act—legislation to strengthen and improve the Occupational Safety and Health Act.

Nearly four decades ago, Congress enacted the Occupational Safety and Health Act (OSH Act) of 1970, promising America's workers the right to a safe job. While progress has been made since the OSH Act was passed, the toll of workplace injuries, illnesses and fatalities remains enormous. In 2008, 5,071 workers were killed on the job—an average of 14 deaths a day. An estimated 50,000 workers died from occupational diseases and millions more were injured. Major hazards including silica, toxic chemicals, infectious diseases and ergonomic hazards have not been addressed.

For many groups of workers, workplace conditions are particularly dangerous. Fatalities and injuries among immigrant and Latino workers are much greater than among other groups of workers due to their concentration in hazardous jobs, their vulnerability because of immigration status and their lack of union representation. Workers in the construction industry continue to be at especially high risk, with fatality rates much higher than those of workers in other industrial sectors.

Millions of workers still lack basic OSHA protections and rights. More than 8 million state and local public employees in 25 states are not covered by the OSH Act. Flight attendants, farm workers and other groups of workers are caught in a jurisdictional limbo with limited or no legal protection. And for federal workers, OSHA has no authority to enforce the correction of cited violations.

Penalties for serious and willful violations of the job safety law are weak, even in cases in which workers are killed or injured. The median OSHA penalty in cases involving a worker's death is less than \$4,000, which is clearly inadequate and provides no deterrence. Protections for workers who report hazards or job injuries are also weak. There is a growing trend among employers to attempt to shift the responsibility for safety and health onto workers, by adopting behavioral safety and injury discipline programs, instead of fixing workplace hazards. Workers' and

unions' rights to participate in OSHA enforcement actions are limited, resulting in settlements that fail to protect workers.

Under the Obama administration, OSHA is getting back to its mission of protecting workers. The agency is moving to issue new standards, to strengthen enforcement and to ensure workers' rights. But many of the deficiencies and weaknesses in OSHA protection can only be addressed through changes in the law.

The Protecting America's Workers Act (PAWA)—H.R. 2067, S. 1580—would address major weaknesses in the OSH Act and provide workers stronger job safety rights and protections. The legislation would extend coverage to millions of workers, including public sector workers, who currently lack protection. It would improve anti-discrimination protections so workers can raise job safety concerns without fear of retaliation, and strengthen worker and victim rights. And the legislation would provide stronger civil and criminal penalties for company that put workers in serious danger and repeatedly violate job safety standards.

The AFL-CIO strongly supports all the provisions of this legislation. This hearing and our testimony today will focus on PAWA's penalty provisions—why they are needed and how they will enhance the protection of workers' safety and health.

OSHA Enforcement and Penalties are 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 limited deterrence to employers who put workers in danger. OSHA inspections and oversight of workplaces are exceedingly rare. There are no mandatory inspections even for the most dangerous industries or workplaces. In FY 2009, there were approximately 2,200 federal and state OSHA inspectors combined. OSHA has the capacity and resources to inspect workplaces on average once every 94 years—once every 137 years in the federal OSHA states.

Over the years OSHA's oversight capacity was diminished, as the number of inspectors declined at the same time the workforce increased. The FY 2010 appropriations provided for an increase in OSHA's enforcement staff and an increase in funding for OSHA state plans, and returned federal enforcement staffing levels back to their FY 2001 levels. Even with this recent increase, the number of federal OSHA enforcement staff today is 450 fewer than it was in FY 1980, while the size of the workforce is 40 percent larger than it was at that time.

Since there is no regular oversight, strong enforcement when workplaces are inspected and violations are found is even more important. But the penalties provided 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 OSH Act 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 40%. For OSHA penalties to have the same value as they did in 1990, they would have to be increased to \$11,600 for a serious violation and to \$116,000 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. Since the MINER Act was passed, there has been a significant increase in MSHA penalties. In CY 2009, MSHA assessed \$141.2 million in penalties for violations, compared to \$35 million assessed in CY 2006, before the penalty provisions of the MINER Act went into effect.

The maximum civil penalties provided for under the OSH Act are rarely assessed. Indeed, just the opposite is the case. In FY 2009, the average penalty for a serious violation of the law was \$965 for federal OSHA and \$781 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. California had the highest average penalty for serious violations and South Carolina had the lowest. Both of these are

state plan states. California amended its OSHA law in 2000 to increase penalties, with the maximum penalty for a serious violation in that state set at \$25,000 compared to \$7,000 maximum penalty under federal OSHA and the other state plans.

For violations that are “other” than serious, which also carry a statutory maximum under the OSH Act of \$7,000, the average federal OSHA penalty was just \$234. Clearly, for most employers these levels of penalties are not sufficient to change employer behavior, improve workplace conditions or deter future violations.

OSHA penalties for violations that are willful or repeated also fall well below the maximum statutory penalties. For both willful and repeat violations, the OSH Act provides a maximum penalty of \$70,000 per violation. For violations that are willful, a \$5,000 mandatory minimum penalty is also prescribed. In FY 2009, the average federal OSHA penalty for a willful violation was \$34,271, and the average willful penalty for state plans was \$20,270. For repeat violations, the average federal OSHA penalty was only \$3,871 and for state plans the average was \$1,757, a fraction of the statutory maximum penalty for such 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 FY 2009 was just \$2,425 for federal OSHA and \$3,805 for the state plans combined. (The state plan average includes penalties for California which higher due to the higher statutory penalties provided for under the Cal/OSHA law). The average total penalty assessed in fatality cases was just \$7,668 nationally (\$8,152 for federal OSHA and \$7,032 for the OSHA state plans). These averages include open cases, which when finally resolved, will result in a reduction in these average penalty levels.

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 FY 2009, in the state of Colorado, the average penalty in worker fatality cases was \$25,309, but in the state of South Carolina the average penalty in such cases was only \$809, the lowest in the nation.

The overall average penalties for fatalities include a number of high penalty cases, which can greatly increase the average. For example, in Colorado in FY 2009, a proposed penalty of \$128,500 in a fatality case at a MillerCoors brewery, greatly increased the average penalty in fatality cases. The median penalty, which is the mid-point of penalties, is much more representative of the typical penalty in fatality cases, and is much lower.

In 2008 the Senate Committee on Health, Education, Labor and Pensions Majority staff conducted an in-depth investigation of OSHA enforcement in fatality cases. Their study—Discounting Death: OSHA’s Failure to Punish Safety Violations That Kill Workers—analyzed detailed enforcement data for thousands of fatality investigations and individual case files for hundreds of enforcement cases. It found that OSHA penalties in cases involving worker deaths were consistently low and routinely reduced in settlement negotiations. For all federal OSHA fatality investigations conducted in FY 2007, the median initial penalty was just \$5,900. But after negotiation and settlement, the median final penalty for workplace fatalities was reduced to only \$3,675. For willful violations in fatality cases, the final median penalty was \$29,400, less than half the statutory maximum of \$70,000 for such violations.

The following examples are typical of OSHA enforcement and penalties in many fatality cases:

In January 2009, a worker was killed in a trench cave-in in Freyburg, Ohio. The victim Andrew Keller was 22 years old. The company, Tumbusch Construction, was cited for 3 serious violations and penalized \$6,300. The penalties were reduced to \$4,500. Six months later, in June 2009, OSHA found similar violations at another jobsite of Tumbusch Construction. This time the company was cited for both serious and willful violations with a total of \$53,800 in penalties proposed. The company has contested the violations.

In July 2009, in Batesville, Texas, one worker was killed and two workers injured when natural gas was ignited during oxygen/acetylene cutting on a natural gas pipeline. The employer—L&J Roustabout, Inc. was cited for 3 serious violations with \$3,000 in penalties. The case was settled for \$1,500.

In August 2009, in Lamar, South Carolina, Andrea Taylor, 28, an employee of Affordable Electric was killed on the job. South Carolina OSHA cited the company for 5 serious violations of electrical and lock-out standards with a proposed penalty of \$6,600. In an October 2009 settlement, 3 of the violations were dropped and the penalties reduced to \$1,400.

In August 2009, at SMC, Inc. in Odessa, Texas, a worker was caught in the shaft of milling machine and killed. The company was cited for 1 serious violation. The \$2,500 proposed penalty was reduced at settlement to \$2,000.

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 that exploded. The case was settled for \$2,940.

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 OSH Act and OSHA Enforcement Policies Discount Penalties for Violations Even in Cases of Worker Death

So why are OSHA penalties for workplace fatalities and job safety violations so low? The problems are largely systemic and start with the OSH Act itself. The Act sets low maximum penalty levels, particularly for serious violations, which carry a maximum of \$7,000, clearly not a deterrent for many companies. For example, in 2008, a Walmart store employee in Valley Stream, New York was trampled to death, when the company failed to provide for crowd control at a post-Thanksgiving sale. The company was cited for one serious violation and penalized \$7,000, the maximum amount for a serious violation.

For a willful or repeat violation the maximum penalty is \$70,000. In assessing penalties, under the Act, employer size, good faith, history, and gravity of the violation are to be taken into consideration.

Throughout its history, OSHA procedures for considering these four factors have resulted in proposed penalties that are substantially below the maximum penalties. The agency starts with a gravity based penalty, which is then reduced by specified percentages for each of the other 3 factors (except in certain circumstances). Under OSHA's current penalty policy, for high gravity serious violations, except in rare cases, OSHA starts with a base of \$5,000, not \$7,000 to determine the penalty. This is true even for fatality cases, which under OSHA policy are supposed to be classified as high-gravity. In fatality cases, no reductions are allowed for good faith, but penalty reductions are still allowed for employer size and history.

Under the penalty policy, reductions for employer size range from 20 percent (for employers with 101-250 employees) to 60 percent (for employers with 1-25 employees), but a larger reduction of 80 percent reduction is provided for serious violations that are willful for employers with 10 or fewer employees. 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 90 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 was reduced, as Bush Administration appointees to the Occupational Safety and Health Review Commission (OSHRC) took an exceedingly restrictive view of the types of violations that may be cited on an instance-by-instance basis.

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.

Another way the impact of OSHA enforcement is minimized is through downgrading the classification of citations from willful to serious, which greatly reduces civil penalties and undermines the possibility of criminal prosecution under the OSH Act. In some cases OSHA has utilized a practice of changing the characterization of willful or repeat violations to "unclassified," even though the OSH Act makes no provision for the issuance of such citations. 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.

For example, in a fatality investigation of a worker death at McWane Inc. Atlantic States Cast 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. Within 6 months of these citations, 2 more workers were killed at other McWane facilities. The company was subsequently prosecuted for a series of violations at multiple facilities, with most of the criminal charges being brought under environmental laws due to weaknesses in the OSH Act.

In another case that involved a planned inspection at the Bayer Cropscience chemical plant in Institute, West Virginia, in 2005 OSHA originally cited the company for 2 willful violations and 8 serious violations of the process safety management (PSM) standard and related requirements and proposed \$135,000 in penalties. In a formal settlement the serious violations were deleted, and the 2 willful violations were changed to “unclassified” with a \$110,000 final penalty assessed.

In August 2008, there was a powerful explosion and fire at the Bayer facility that killed two plant operators and threatened the community. The explosion occurred when there was a runaway reaction during the restart of a methomyl unit. Methomyl is a highly toxic substance that is sold as a pesticide. In the preliminary report on its investigation of the explosion, the Chemical Safety Board found significant deficiencies in process safety management that according to the Board likely contributed to the accident. The CSB also found that the explosion could have been catastrophic. Within 80 feet of the site of the explosion, there is a 37,000 pound capacity tank of methyl isocyanate (MIC), the same chemical that caused the deaths of thousands in the toxic gas release in Bhopal, India in 1994. The CSB found explosion debris near the MIC unit, which if compromised could have led to a catastrophic outcome.

The OSHA investigation of the 2008 Bayer explosion found extensive violations of the process safety management standard. OSHA issued 11 serious and 2 repeat violations, but no willful violations, and proposed \$143,000 in penalties. The company contested all of the citations.

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 six months in jail, making these crimes a misdemeanor.

The criminal penalty provisions of the OSH Act 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. Unlike the OSH Act, 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 OSH Act 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 79 cases have been prosecuted under the Act, with defendants serving a total of 89 months in jail. During this time, there were more than 360,000 workplace fatalities according to National Safety Council and BLS data, about 20 percent of which were investigated by federal OSHA. In FY 2009, there were 11 cases referred by DOL for possible

criminal prosecution. The Department of Justice (DOJ) has declined to prosecute 2 of these cases; the other 9 are still under review by DOJ.

By comparison, according to EPA in FY 2009 there were 387 criminal enforcement cases initiated under federal environmental laws and 200 defendants charged resulting in 76 years of jail time and \$96 million in penalties—more cases, fines and jail time in one 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.

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 OSH Act.

In the BP Texas City refinery disaster, where 15 workers were killed and another 170 injured in 2005, 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. Instead, BP paid \$21 million in civil penalties in a settlement reached with OSHA. These civil penalties issued by OSHA were not sufficient to change BP's practices. In October, 2009, OSHA found that BP had failed to abate the hazardous conditions that caused the 2005 explosion. OSHA issued 270 notices of failure to abate previous hazards, cited the company for 439 new willful violations and proposed \$87.4 million in fines—the largest in OSHA's history. But under the OSH Act, OSHA has no authority to take criminal action against BP for these latest violations.

OSHA and the Congress Should Act to Strengthen Enforcement and Penalties for Job Safety Violations

Current OSHA enforcement and penalties are far too weak to provide meaningful incentives for employers to address job hazards or to deter violations. As a result, workers are exposed to serious hazards that put them in danger, and cause injury and death.

Under the Obama Administration, OSHA is taking action to make enforcement more effective and to enhance penalties for violations that put workers in serious danger and cause death and injury.

The agency is in the process of overhauling its penalty policy to more fully utilize its the full statutory authority to impose more meaningful penalties for serious, willful and repeat violations of the law, particularly in cases involving worker deaths.

The Enhanced Enforcement Program (EEP) is being changed and strengthened to provide for enhanced enforcement, stiffer penalties and follow-up for employers who persistently violate the law. The new Severe Violators Enforcement program is expected shortly.

Federal OSHA is also conducting in-depth reviews of the OSHA state plans, including the enforcement and penalty policies and practices in each of the state plan states.

These initiatives will improve and strengthen OSHA enforcement. But they are not enough and cannot address the deficiencies in the OSH Act itself. Congressional action is needed.

The Protecting America's Workers Act (H.R. 2067) introduced by Rep. Lynn Woolsey and Rep. George Miller would strengthen the enforcement provisions of the Occupational Safety and Health Act. It would increase civil and criminal penalties to provide more meaningful penalties for those who violate the law and provide a greater deterrent to prevent future violations that put workers in danger.

Specifically the bill would update the base penalties amounts in the OSH Act to adjust for inflationary increases since 1990 when the penalties were last raised. The bill would increase the penalties for serious violations to \$12,000 from \$7,000 and those for repeat and willful violations to \$120,000 from \$70,000, and provide for inflationary adjustments in the future.

To ensure that penalties for violations that result in worker deaths are more than a slap on the wrist, the bill sets higher penalties for such violations. For serious violations that result in a worker death a maximum penalty of \$50,000 and a minimum penalty of \$20,000 is provided, with a minimum of \$10,000 for smaller employers. For willful and repeat violations related to worker deaths, a maximum penalty of \$250,000 and minimum of \$50,000 is provided, with a minimum of \$25,000 for small employers.

These proposed penalties are modest in comparison to those in other safety and health and environmental statutes. For example, in 2006 the Congress adopted the MINER Act which set the penalty for serious mine safety violations at \$60,000 and penalties for flagrant violations at \$220,000.

The bill would prohibit the use of "unclassified" citations for violations of the law to ensure that the nature of a violation is specified, and the employer's record of past history is clear.

PAWA also properly strengthens the criminal provisions of the Occupational Safety and Health Act, which have not been modified since the Act's passage in 1970. The bill would make criminal violations a felony, instead of a misdemeanor as is now the case, making it more worthwhile for prosecutors to pursue these violations. PAWA also expands the criminal provisions to cases where violations cause serious injury to workers. And it expands the criminal provisions to apply to all responsible corporate officers, not just the top officer or corporation itself. These enhanced criminal provisions will provide a greater incentive for management officials to exercise management responsibility over job safety and health, and give OSHA and the Department of Justice the tools needed to prosecute corporations and officials who cause the injury or death of workers.

The Protecting America's Workers Act is a good, sound bill that should be enacted into law. The AFL-CIO urges the committee to move quickly to report this legislation.

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 death, injury and disease on the job.

Prepared Statement of the American Industrial Hygiene Association

CHAIRWOMAN WOOLSEY AND MEMBERS OF THE SUBCOMMITTEE: The American Industrial Hygiene Association (AIHA) is pleased to submit the following comments to the House Committee on Education and Labor—Subcommittee on Workforce Protections on today's hearing to discuss legislation that would revise penalties under the Occupational Safety and Health Act.

AIHA is the premier association serving the needs of professionals involved in occupational and environmental health and safety practicing industrial hygiene in industry, government, labor, academic institutions, and independent organizations. The AIHA mission is to promote healthy and safe environments by advancing the science, principles, practice, and value of industrial and occupational hygiene. AIHA is not only committed to protecting and improving worker health, but the health and well-being of adults and children in our communities. One of AIHA's goals is to bring "good science" and the benefits of our workplace experience to the public policy process directed at worker health and safety.

As the professionals entrusted to assist employees and employers in making the workplace healthier and safer, AIHA is particularly pleased to submit comments on the issue of civil and criminal penalties.

AIHA would also like to thank the Chairwoman and members of the Subcommittee on behalf of the millions of Americans, both employees and employers who desire a healthy and safe workplace, for your involvement in addressing this issue. Your leadership is critical to improving this country's record of workplace-related injury and illness impacting workers, their families, and our communities.

Over the course of the last ten years, there have been numerous bipartisan legislative proposals to amend the Occupational Safety and Health Act to increase the penalty provisions, both civil and criminal, for those who violate OSHA rules and regulations that result in serious injury or a workplace fatality. While few of these proposals have made their way into law, it goes without saying that the sponsors of these measures all had the same goal—to assure the health and safety of every worker. AIHA shares this goal.

In a position statement and white paper first adopted by AIHA more than ten years ago, AIHA stated that “OSHA penalties, including criminal penalties, are woefully inadequate and should be at least as stringent as penalties for violations of environmental laws”. AIHA’s position on this issue has not changed over the years.

With introduction of H.R. 2067, the Protecting America’s Worker Act, in this session of Congress, AIHA again reviewed the section addressing the issue of civil and criminal penalties and provided the following comments:

AIHA is supportive of efforts to increase penalties on those employers that willfully violate OSH laws resulting in a fatality. AIHA supports language that makes “corporate officers” responsible. AIHA is also supportive of making willful violations that result in a fatality a felony rather than a misdemeanor. OSHA penalties and enforcement should be enhanced to penalize violators who willfully put workers in serious danger and cause death and injury.

Employers and others who cause the death of an employee by deliberately violating the law should be held accountable with something more than a slap on the wrist. Amending the OSH Act to address the issue of civil and criminal penalties is long overdue. AIHA went on to say, however, that with increased penalties AIHA recommended there be additional emphasis on correctly identifying the person who was truly responsible for the willful violation. AIHA is concerned the health and safety professional will become the “fall guy” even if an investigation shows these individuals were making efforts to comply with federal law and their recommendations were overruled or ignored by those with more authority.

Proposed Changes to HR 2067 Penalty Provisions

AIHA understands the sponsors of HR 2067 intend to propose several changes to the original legislation regarding the civil and criminal penalty sections.

Civil Penalties

The proposed changes “would eliminate the \$50,000 penalty for fatalities associated with the “other than serious” category of violations—the lowest gravity violation under the Act. By definition “other than serious violations” are low gravity violations and not linked to fatalities. The proposal also would eliminate the \$50,000 penalty for fatalities associated with failure to abate. Failure to abate violations are assessed on a daily basis for each day the violation continues, and at a rate of \$12,000 per day, the \$50,000 could inadvertently serve as a ceiling after only 5 days of violations”.

AIHA offers our support for this proposed change.

Criminal Penalties

Proposed changes “would alter the mens rea (mental state) requirements for a criminal case from “willful” to “knowing.” Under the introduced PAWA, an employer cannot be convicted under the criminal law unless that employer has acted “willfully” and such willful act caused the death or serious injury to a worker. This requires proof that an employer knew not only that its actions were wrong, but that they were unlawful as well. This “willful” standard is not a familiar one in the criminal law context, and the norm is to require a “knowing” standard of proof in which an actor knows that his or her conduct was wrong. Under this standard, employers cannot escape liability by claiming that they did not know what the law required. Note: under either standard a prosecutor would still have to prove that an actor is guilty beyond a reasonable doubt.”

AIHA offers our support for this proposed change.

Another proposed change “would alter the definition of employer (who could be subject to criminal penalties) from “any responsible corporate officer” to an “officer or director.” Under current law, only a corporation or sole proprietor can be liable for criminal penalties. The introduced PAWA attempts to broaden this definition so high-level officials (individuals) who act criminally can be prosecuted. The change to “officer or director” simply clarified that the criminal penalties can reach up to the higher levels of a company, providing that an officer or director has engaged in criminal conduct that causes the death or serious injury of a worker.”

AIHA offers our support for this proposed change.

In AIHA’s original comments on HR 2067 we raised the concern that there be additional emphasis on correctly identifying the person who was truly responsible for

the willful violation. AIHA was concerned the health and safety professional would become the “fall guy” even if an investigation showed these individuals were making efforts to comply with federal law and their recommendations were overruled or ignored by those with more authority. AIHA is pleased the sponsors of HR 2067 have agreed this section was somewhat vague and language was needed to assure all individuals are responsible for workplace health and safety.

There continues to be much debate on whether or not criminal penalties are adequate to deter health and safety violations. While this debate will likely continue, AIHA supports efforts to take the next step in addressing this issue by raising both civil and criminal penalties.

There are also those who argue that OSHA has been much too lenient in allowing for penalties to be lowered for violations, but the fact is the agency has been forced to negotiate lower penalties for various reasons, including a lack of resources. It is the hope of AIHA that Congress recognizes this problem and provides adequate resources. AIHA still remains concerned that this lack of resources will force the agency to appropriate already scarce resources from other sectors within the agency in order to adequately investigate violations that are both civil and criminal.

Conclusion

AIHA is aware there may be many additional thoughts that have been, or will be, discussed when addressing specific sections of HR 2067. AIHA stands ready to assist you and Congress in every way possible in developing solutions that will best protect workers.

Prepared Statement of Hon. Thomasina V. Rogers, Chairman, Occupational Safety and Health Review Commission

Thank you for requesting a statement for the record on the subject of this hearing, the penalty provisions of H.R. 2067, “Protecting America’s Workers Act.” The Subcommittee has specifically requested a statement concerning the effect that the proposed increase in civil penalties contained in Section 310 would have on the workload of the Occupational Safety and Health Review Commission (“Review Commission”). In addition, I have included some brief comments on the potential impact on the Review Commission of recent proposed changes to H.R. 2067.

I. Background on the Review Commission

The Review Commission was established by the Occupational Safety and Health Act of 1970 as an adjudicatory agency that serves as an administrative court providing fair and expeditious resolution of disputes involving the Department of Labor’s Occupational Safety and Health Administration (OSHA), employers charged with violations of OSHA standards, and employees and/or their representatives. The Review Commission is an independent agency, separate from the Department of Labor and OSHA.

After an inspection or investigation, OSHA may issue an employer a citation alleging a workplace health or safety violation. If the employer disagrees with any part of the citation, including the proposed penalty, it must notify OSHA by filing a written notice of contest within 15 working days of receiving the citation. (An employee or representative of employees may also file a notice of contest alleging that the time period for abatement in the citation is unreasonable.) The Secretary of Labor transmits the notice of contest and all relevant documents to the Review Commission’s Executive Secretary for filing and docketing. After the case is docketed, it is forwarded to the Office of the Chief Administrative Law Judge (ALJ) for assignment to an ALJ. The case is generally assigned to an ALJ in the Review Commission office closest to where the alleged violation occurred. The Review Commission currently has twelve ALJs serving in three offices—Atlanta, Denver, and Washington. Thereafter, the ALJ has full responsibility for all pre-hearing procedures, and is charged with providing a fair and impartial hearing in an expeditious manner and promptly rendering a decision.

After the ALJ issues the decision, any party may file a Petition for Discretionary Review requesting review of the decision by the Commission, which is composed of three Members who are appointed by the President, by and with the advice and consent of the Senate. Each Commission member has the authority to direct a case for review by the full Commission. Absent such a direction for review, the ALJ’s decision becomes final by operation of law, but is subject to further appeal to a United States Court of Appeals. Once a case is directed for review, the Commission has authority to review all aspects of a case, including the ALJ’s findings of fact, conclusions of law, and penalty assessments. A final Commission decision may be also appealed to an appropriate United States Court of Appeals.

Although the Review Commission is charged with the same goals under the Act as OSHA, the advancement of worker safety, we play a different but complementary role. OSHA is the rulemaking, enforcement, and policy development agency, while the Review Commission is the neutral adjudicatory agency, calling balls and strikes. Thus, we do not take a position on the merits of the proposed legislation. Rather, we defer to the policy-making role of agencies such as the Department of Labor and the Department of Justice, and to the Congress. Our chief concern, therefore, is how any proposed legislation might affect the Review Commission's ability to fairly and expeditiously resolve disputes within our resource constraints. Needless to say, we will faithfully implement any new legislation that may be enacted to the best of our ability.

II. Caseload Trends Under Current Law

Before discussing the proposed legislation, I should note that the Review Commission has experienced a recent increase in the cases received at the ALJ level. For example, between October 1, 2008 and March 1, 2009, our ALJs received 790 cases. During the same period this fiscal year, October 1, 2009 and March 1, 2010, our ALJs received 981 cases, an increase of approximately 24 percent. This increase in cases so far this fiscal year may be part of a trend reflecting increased enforcement activity by OSHA. Indeed, based on this trend, the Review Commission expects to receive about 2,350 cases this fiscal year. In addition, we understand that OSHA may be considering administrative changes in its penalty proposal process and guidelines, which could increase the number of citations that are contested and, in turn, our caseload at the ALJ level and, over time, at the Commission level.

Looking further ahead, OSHA has projected an increase in inspections from 40,549 in fiscal year 2009 to an estimated 42,250 in fiscal year 2011, an increase of about four percent. In our fiscal year 2011 budget submission, we have projected an increase in new cases at the ALJ level from 2,058 in fiscal year 2009 to an estimated 2,450 in fiscal year 2011, an increase of approximately 19 percent.

III. The Proposed Legislation

The Subcommittee has asked me to address how the proposed increase in civil penalty levels would affect the Review Commission and its resource needs. Under the proposed legislation, the maximum penalty for a serious or non-serious violation would generally increase from \$7,000 to \$12,000, while the maximum penalty for a willful or repeat violation would generally increase from \$70,000 to \$120,000. The statutory minimum penalty for a willful violation would increase from \$5,000 to \$8,000. The maximum daily penalty for a failure to abate would increase from \$7,000 to \$12,000. In addition, there would be enhanced penalties where a violation causes the death of an employee. Finally, penalties would be subject to periodic adjustment by the Secretary of Labor based on inflation.

An increase in statutory penalty levels would likely lead to an increase in the penalty amounts proposed by OSHA for cited violations. In turn, employers may be more likely to challenge these higher proposed penalties, increasing the contest rate and our caseload. The increase in caseload would initially affect the ALJ level, and, over time, would likely affect the Commission level as well.

I am hopeful that the Review Commission can handle this potential increase in caseload with only minor adjustments and without a need for significantly increased resources. Our dedicated corps of ALJs and their use of innovative procedures has helped us successfully manage our caseload at the ALJ level. For example, the use of "simplified proceedings" has expedited the resolution of simpler cases and the use of "settlement part" procedures, including the use of settlement judges, has aided in the settlement of larger cases. We are continually evaluating these programs to improve their effectiveness and will continue to explore innovative dispute resolution techniques to help us address any caseload increase.

The Review Commission has been very successful over the years in meeting our performance goals under the Government Performance and Results Act (GPRA) at the ALJ level. (Unfortunately, at the Commission level we have been less successful in meeting our GPRA goals, largely due to turnover in membership, Commission vacancies, and an inventory of complex legacy cases, which we hope to resolve in the near future.) Indeed, in fiscal year 2009, the ALJs decided 98 percent of non-complex cases and 96 percent of complex cases within a year. Ninety-nine percent of complex cases were decided within 18 months. However, we are mindful of the Committee's recent hearing on the backlog of contested cases at our sister agency, the Federal Mine Safety and Health Review Commission (FMSHRC), and we would like to be able to responsibly anticipate to the extent possible what may happen to our resource needs down the road. Yet, as is evidenced by the situation at FMSHRC, it is hard to reliably predict the effects of a change in law on caseload. We are com-

mitted to exploring all available efficiencies before seeking new resources. But, if current trends escalate and/or new legislation results in a further increase in our caseload, and additional efficiencies prove unavailing, we may need to consider adding additional judges and staff.

IV. Potential Impact of Proposed Changes to the Legislation

I should note that certain proposed changes to H.R. 2067 would directly affect the Review Commission. I will briefly mention two such provisions and my concerns about how those provisions might work in practice at the Review Commission.

In particular, I understand one provision would establish a procedure before the Review Commission for employers to seek an expedited stay of abatement requirements. Any such procedure should allow our judges adequate time to schedule any necessary hearings and rule on the stay requests. We currently have 12 judges nationwide (located in three offices—Washington, Atlanta, and Denver) who may already have hearings on the merits of cases or settlement conferences scheduled months in advance. Unlike US District Court judges who are located throughout the country in fixed courthouses, our judges travel to their hearings and conferences, which are generally scheduled close to the locations of the parties and witnesses. These hearings and conferences are usually held in loaned space using public courthouses. These concerns might be ameliorated by a 60-day period for consideration of a stay request, with an option allowing the Chief Judge to extend that period in specific cases.

In addition, such a new procedure would have other resource implications for the Review Commission which are difficult to predict at the present time. But it is likely that the shorter the time period allowed for consideration of a stay request, the greater the resource implications would be, including the potential need to secure space for hearings on short notice. The volume of stay requests will also be a significant factor.

I am concerned about how the provision to contest modifications of citations would work in practice. Under our current rules, an election of party status to participate in a case must be made at least ten days before the hearing, unless good cause is shown. Allowing additional notices of contests with respect to a modified citation to be filed at any stage of a case, even after a hearing has been completed, could complicate and prolong case resolution.

I would be glad to elaborate further upon these concerns. Needless to say, I would welcome the opportunity to continue to work with the Subcommittee on our concerns during the legislative process.

I hope my comments have been helpful to the Subcommittee.

Prepared Statement of Tonya Ford, Lincoln, NE

My name is Tonya Ford and I am the proud niece of Robert Fitch or as I call him Uncle Bobby. He was killed in horrible, preventable work related accident at a local ADM Grain Milling plant located in Lincoln, NE on January 29, 2009.

I have to be the first to admit that I and many others are not aware of how many work related deaths and or injuries there are in the United States unless you have been in our shoes. But, please let me tell you there are approximately 16 deaths a day in the United States due to a work related accident.

I have read over the current Protect America's Workers Act and believe that these changes are in need, to protect the workers that make the United States what it is today, to honor the loved ones that we all have lost in the past due to a work related accident, and to respect the families that fight for their loved ones that want answers.

After much research I have discovered that deaths and injuries have decreased since the creation of OSHA, however so much more needs to be done to make sure that going to work is not a grave mistake.

I have been told many times that OSHA does not fine a company for the death of an employee. OSHA determines the cause of death and fines for what causes the death, the amount is not determined by the individual however by the rules and regulations of what killed the individual. In saying that how many chances does a company get when it comes to hazardous devices or structure, hazardous material that takes a life and or injures someone. We as family members and employees of companies believe that if a company knows that a device is considered hazardous and they did not remove and or update the device to meet updated guidelines then the company should be held accountable for this death and or injury. By raising civil penalties and indexes those penalties to inflation and by allowing felony prosecutions against employers who commit willful violations that result in death or serious

bodily injury, and extends such penalties to responsible corporate officers, all employers will be more aware of how to make their company safe and protect their employees when they know their are more consequences.

Other important facts in the current Protecting American's Worker Act is to require OSHA to investigate all cases of death and serious injuries. Currently it states that it must be reported to OSHA if there are three injuries that resulted in going to the hospital. One accident is enough, and should be used to know that something is wrong or unsafe. It should not take multiple accidents and or a death to make awareness to a safety issue. I believe also that OSHA should re-investigate a company unannounced within 6-18 months from the death, when there is a death at a company. I have been told by many people that OSHA is under staffed and this is the reasoning for them not to re-investigate a company and or go and investigate a company if there are not 3 or more reported injuries. One of the ways is to expands OSHA coverage is to include state and local public employees and also federal government workers.

I would like to mention a big issue that is brought up in this act. Is improving Whistleblower Protections, this is very important as employees should feel safe at work and know that if they are to contact OSHA, because there is a safety issue at the company they can not lose their job. You will not believe in my research and fight to make a difference how many people contact me and state, "I can't talk, but I wish I could the economy is bad and I need my job."

Clarifying that employees cannot be discriminated against for reporting injuries, illnesses or unsafe conditions, and brings the procedures for investigating and adjudicating discrimination complaints into line with other safety and health and whistleblower laws, is very important and can prevent a death or injury.

As a family member that no longer has her Uncle, I would like to mention that my Uncle, Dad and Grandfather were or are employed by ADM currently today, in saying that many men and women work at places not because they want to or choose to but, because they have children at home, a roof to put over their heads, food to put in their stomach and clothes on there back. It is the hard work and the hands of people such as my Uncle, Dad and Grandfather that makes these companies what they are today; a success. It is the employers that must protect these workers or serve the consequences after all many of them make a billion dollars a year, and do nothing to protect and honor the people that made their company what it is today and will be tomorrow.

Please know that I am not just one person speaking about one family, I lost my Uncle but, I write you on behalf of all families that are standing in my shoes, that have lost their son, brother, mother, father, daughter * * * I write you because things must change and everything that is mentioned in the Protecting American Workers Act, is very important and us people that work day by day, paycheck to paycheck want to know and need to know that our children, friends and family will be protected and honored when they go to work. As stated before going to work should not be a grave mistake.

To read more about my story and fines that ADM did not incur for the cause of my Uncles death, please ready additional documentation.

I thank you again for your time and please know how important this is.

MAXIMUM PENALTIES ADJUSTED FOR INFLATION, 2000 TO 2010

Current Max Penalty for a Willful Violation	Penalty Adjusted for Inflation Using the CPI		Current Max Penalty for a Serious Violation	Penalty Adjusted for Inflation Using the CPI	
	Year	Amount		Year	Amount
\$70,000	2010	\$116,053	\$7,000	2010	\$11,605
	2009	\$114,901		2009	\$11,490
	2008	\$115,311		2008	\$11,531
	2007	\$111,048		2007	\$11,105
	2006	\$107,972		2006	\$10,797
	2005	\$104,598		2005	\$10,460
	2004	\$101,171		2004	\$10,117
	2003	\$98,546		2003	\$9,855
	2002	\$96,350		2002	\$9,635
	2001	\$94,851		2001	\$9,485
	2000	\$92,226		2000	\$9,223

Mr. FRUMIN, Madam Chair—and I would ask that—I had a document I wanted to enter into the record as well. This was the indictment of the Xcel Corporation in Colorado.
Chairwoman WOOLSEY. Without objection.
[Additional submissions of Mr. Frumin follow:]

United States Courts
Southern District of Texas
FILED

OCT 22 2007

Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA,)
)
 v.)
)
 BP PRODUCTS NORTH AMERICA INC.,)
)
 Defendant.)

Criminal No. **H 07 434**

UNDER SEAL

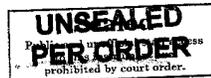
CRIMINAL INFORMATION

The United States Attorney Charges:

COUNT 1

BP Texas City Refinery Operations

1. At all relevant times, BP Products North America Inc. ("BP Products"), a subsidiary of BP plc, owned and operated an oil refinery located in Texas City, Texas (hereinafter "Texas City refinery"), within the Southern District of Texas.
2. Prior to December 1998, the Texas City refinery was owned by Amoco. In December 1998, BP plc merged with Amoco. As a result of the merger, BP Products' predecessor acquired the Texas City refinery. As of March 23, 2005, the Texas City refinery was the largest refinery owned by BP Products in the United States. The Texas City refinery covered more than 1200 acres, employed approximately 1800 permanent BP Products staff and approximately 2000 contract workers.
3. Within the BP Products Texas City refinery, there were 29 different refining units and four chemical units that had the capacity to process 460,000 barrels of crude oil per day into components including gasoline, jet fuel, diesel fuel, and chemical feed stocks.



4. During operations at the BP Products Texas City refinery, it was a common and accepted practice for contractor employees and personnel to work out of temporary trailers throughout the facility.
5. During operations at the BP Products Texas City refinery, if it was necessary to release hydrocarbon vapors to the open air, the refining units used three methods: a "flare system," a "blowdown stack" or direct atmospheric vents.
6. A flare system allowed hydrocarbon vapors to be released through the top of a tall pipe structure, where a flame burned off the hydrocarbon vapor in order to combust hazardous air pollutants emitted into the air, and to ensure that the hydrocarbons did not reach an ignition source away from the flare. Most of the BP Products Texas City refinery's refining units used a flare system for releasing hydrocarbon vapor during an emergency or upset.
7. A blowdown stack employed a large drum to receive hydrocarbon vapors and liquids. In a properly designed and functioning blowdown system, hydrocarbon liquids were received in the blowdown drum and sent to a closed sewer system, and hydrocarbon vapors were released up through the blowdown stack, a large pipe directly above the drum, and then directly to the open air. The blowdown stack did not use a flame at the top to burn hydrocarbon vapors and instead released vapors containing hazardous air pollutants directly to the open air. If not properly designed and maintained, in some circumstances, hydrocarbon vapor and liquids released from the blowdown stack had the potential to reach a ground level ignition source and explode.

The Clean Air Act

8. The Clean Air Act ("CAA"), Title 42, United States Code, Section 7401 et seq., is the Nation's comprehensive air pollution control statute. As part of the 1990 CAA amendments, Congress promulgated Section 112(r)(7), Title 42, United States Code, Section 7412(r)(7), to "prevent accidental releases of regulated substances" from facilities such as the BP Products Texas City refinery. Section 112(r)(7) in turn authorizes the Administrator of the Environmental Protection Agency ("EPA") to promulgate "release prevention, detection and correction requirements" to prevent accidental releases. Title 42, United States Code, Section 7412(r)(7)(A). The regulations are known as Risk Management Plan ("RMP") regulations and are set forth at Title 40, Code of Federal Regulations ("C.F.R."), Part 68.
9. Under the RMP regulations, BP Products was required to implement prevention, detection and correction requirements set forth in 40 C.F.R. Part 68, in order to prevent explosions from accidental releases of hazardous air pollutants. 40 C.F.R. § 68.12(d)(3).
10. Pursuant to Section 113(c)(1) of the Clean Air Act, 42 U.S.C. Section 7413(c)(1), it is a criminal violation to knowingly violate RMP regulations promulgated under Section 112(r)(7) of the Clean Air Act.

BP Products Texas City Refinery Isomerization Unit, Blowdown Drum and Stack

11. One of the refining units at the BP Products Texas City refinery used for processing gasoline components was the Isomerization Unit ("ISOM unit"). Within the ISOM unit was a process component known as the Raffinate Splitter. "Raffinate" was a term used to describe gasoline components in the ISOM unit that were in the process of or had been refined. The Raffinate Splitter's main function was to separate raffinate into "light" and "heavy" raffinate.

The light raffinate was normally processed in the ISOM unit and the heavy raffinate was normally blended into gasoline. The Raffinate Splitter was a single tower with a height of 164 feet and an approximate volume of 3700 barrels. Raffinate was referred to as a "light end hydrocarbon," that could easily ignite.

12. The Raffinate Splitter was equipped with relief valves and headers, which were required to be designed and maintained to ensure that releases of hydrocarbon vapors to the open air were only the result of an unplanned process upset or emergency.

13. The Raffinate Splitter relief valves and headers were connected by a piping system to a blowdown stack, known as "F-20." The F-20 stack also received hydrocarbon vapors and liquids from other components in the ISOM unit. BP Products was required to design and maintain all the relief valves and headers in the ISOM unit, so that releases of hydrocarbons were sent to the blowdown stack only in the case of an unplanned process upset or emergency.

14. The blowdown drum and stack structure was designed to operate with a "quench system," where water could be injected into the blowdown drum to cool the hydrocarbon vapors and change some of the hydrocarbon from vapors to liquids, which were sent to a closed sewer system. Remaining hydrocarbon vapors were sent through the stack and released directly to the open air.

Explosion of March 23, 2005

15. In the month prior to March 23, 2005, the ISOM unit was undergoing a non-cycle ending "turnaround" where the unit was shut down and scheduled maintenance and necessary repairs were performed on different components in the unit. On March 23, 2005, the Raffinate Splitter was in turn undergoing a "startup," where after having been shut down for a month, it was being

re-started for operation to enhance raffinate feedstocks. The start-up process required sending up to 22,000 gallons of product to the Raffinate Splitter, the interior of which was subjected to pressures up to 40 pounds per square inch (psi) and temperatures as high as 300 degrees Fahrenheit. The Raffinate Splitter was viewed by the BP Products Texas City refinery workers as one of the more basic units at the refinery to start up and operate. The start up procedure of the Raffinate Splitter was also recognized as the most difficult or dangerous phase of the unit's operation, due to the re-introduction of high temperatures, feedstock and increased pressure.

16. The startup procedure for the Raffinate Splitter involved the work of several operators and supervisory personnel. BP Products was required by federal regulations to ensure that supervisors and operators followed specific written instructions to ensure safe startups at the Raffinate Splitter. BP Products also was required to ensure that alarm systems and process safety components in the ISOM unit were operating correctly to enable supervisors and operators to perform startups at the Raffinate Splitter in a safe manner.

17. At approximately 1:15 pm on March 23, 2005, after excessive liquid pressure and temperature had built up inside the Raffinate Splitter for several hours, hydrocarbon vapors and liquids were released through relief valves and headers from the Raffinate Splitter to the F-20 blowdown stack. The volume of the hydrocarbon liquid was so great that it exceeded the capacity of the F-20 blowdown stack and released directly out the top of blowdown stack into the open air. The hydrocarbons released from the stack formed a vapor cloud at ground level and reached an ignition source, which resulted in a catastrophic explosion.

18. The explosion caused the deaths of 15 contractor employees at the BP Products Texas City refinery, who were located in two temporary trailers approximately 150 feet from where the

hydrocarbons had been released to the open air. Their names were: Glenn Bolton, Lorena Cruz-Alexander, Rafael Herrera, Daniel Hogan, Jimmy Hunnings, Morris King, Larry Linsenhardt, Arthur Ramos, Ryan Rodriguez, James Rowe, Linda Rowe, Kimberly Smith, Susan Taylor, Larry Thomas, and Eugene White. The explosion also caused the injuries of at least 170 other workers at the Texas City refinery.

19. The release of the hydrocarbons out of the blowdown stack and the explosion were preceded by several events:

a. BP Products failed to notify non-essential contractor employees and all non-essential BP Products employees located in temporary trailers in close proximity to the Raffinate Splitter that the startup was going to take place.

b. The Raffinate Splitter bottoms area was filled above the level that was permitted under written procedures for startups, though this had become a routine practice for startups of the Raffinate Splitter.

c. The ISOM unit control board operator had filled the Raffinate Splitter tower with feed, but raffinate was not being emptied from the Raffinate Splitter. A level instrument on the control board indicated to the operator that the level in the tower was decreasing when in fact it was increasing. Other information reflected the rising level of raffinate feed in the Raffinate Splitter. The control board panel did not automatically calculate and display to the operator that the mass balance was changing.

d. Alarms in the Raffinate Splitter and in the blowdown stack failed to function or were ignored.

c. Excess pressure was relieved by sending hydrocarbons through the 8" chain valve to the F-20 blowdown stack instead of to the 3-pound vent system that led to a flare. Although this had not been authorized, it had also become a common practice for startups of the Raffinate Splitter for several years.

f. BP Products was releasing hydrocarbons into the open air through the F-20 blowdown stack during startups although BP Products had repeatedly failed to provide advance notice to the Texas Commission on Environmental Quality ("TCEQ") that it would be releasing the hydrocarbons during the startups.

g. BP Products did not believe that an overflow of the Raffinate Splitter was a credible threat and chose not to perform a "what-if" scenario for an overflow of the Raffinate Splitter or the F-20 blowdown stack.

h. BP Products had failed since at least 1999 to perform a relief valve study on the ISOM unit to determine whether the F-20 blowdown stack had the capacity to safely release excess hydrocarbons.

Knowing Violations of Risk Management Practices.

20. Between in or about January 1999 and on or about March 23, 2005, in Texas City, Texas, within the Southern District of Texas, the defendant, BP PRODUCTS NORTH AMERICA INC., did knowingly violate a requirement promulgated pursuant to the Clean Air Act, Title 42, United States Code, Section 7412(r)(7); specifically, defendant BP PRODUCTS NORTH AMERICA INC. knowingly failed to do the following:

- a. Establish and implement written procedures to maintain the ongoing mechanical integrity of process equipment, in violation of Title 40, Code of Federal Regulations, Section 68.73(b).
- b. Inform contract owners and operators of the known potential fire, explosion, or toxic release hazards related to the contractors occupation of temporary trailers in the vicinity of the ISOM Unit, in violation of Title 40, Code of Federal Regulations, Section 68.87(b)(2).

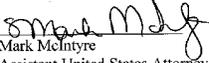
All in violation of Title 42, United States Code, Section 7413(c)(1).

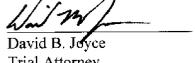
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Senior Trial Attorney
Environmental Crimes Section

By: 
Mark McIntyre
Assistant United States Attorney
Southern District of Texas

By: 
David B. Joyce
Trial Attorney
Environmental Crimes Section

http://www.osha.gov/pls/imis/establishment.inspection_detail?id=310470059

Inspection: 310470059 - Public Service Co. Of Colorado DbA Xcel Energy

Inspection Information - Office: Denver			
Nr: 310470059	Report ID:0830500	Open Date: 10/02/2007	
Public Service Co. Of Colorado DbA Xcel Energy			
Cabin Creek Hydro Generation Station			
Georgetown, CO 80444		Union Status: Union	
SIC: 4911/Electric Services			
NAICS: 221111/Hydroelectric Power Generation			
Mailing: 1225 17th Street #900, Denver, CO 80202			
Inspection Type:	Unprog Rel	Advanced Notice:	N
Scope:	Partial	Close Conference:	03/19/2008
Ownership:	Private	Emphasis:	N:Lead,S:Electrical,S:Fall From Height,S:Lead
Safety/Health:	Safety	Close Case:	
Optional Information:			
Type	ID	Value	
N	1	310470059	
N	10	IMMLANG-N	
Related Activity:			
Type	ID	Safety	Health
	Accident 101574846		
	Referral 201579117	Yes	

Violation Summary					
	Serious	Willful	Repeat	Other/Unclass	Total
Initial Violations	19	2			21
Current Violations	19	2			21
Initial Penalty	63900	126000			189900
Current Penalty	63900	126000			189900
FTA Amount					

Violation Items										
#	ID	Type	Standard	Issuance	Abate	Curr\$	Init\$	Fta\$	Contest	LastEvent
1.	01001	Serious	19100023 C01	03/21/2008	03/31/2008	\$1800	\$1800	\$0	04/14/2008	-
2.	01002	Serious	19100023 D01	03/21/2008	03/31/2008	\$1800	\$1800	\$0	04/14/2008	-
3.	01003	Serious	19100132 A	03/21/2008	03/31/2008	\$4500	\$4500	\$0	04/14/2008	-
4.	01004	Serious	19100146 C02	03/21/2008	03/31/2008	\$4500	\$4500	\$0	04/14/2008	-
5.	01005	Serious	19100146 C08 I	03/21/2008	03/31/2008	\$4500	\$4500	\$0	04/14/2008	-
6.	01006	Serious	19100146 D05 I	03/21/2008	03/31/2008	\$4500	\$4500	\$0	04/14/2008	-
7.	01007	Serious	19100146 D13	03/21/2008	03/31/2008	\$4500	\$4500	\$0	04/14/2008	-
8.	01008	Serious	19100146 E01	03/21/2008	03/31/2008	\$4500	\$4500	\$0	04/14/2008	-

9.	01009	Serious	19100253 B02 II	03/21/2008	03/31/2008	\$1800	\$1800	\$0	04/14/2008	-
10.	01010	Serious	19100253 B04 III	03/21/2008	03/31/2008	\$2250	\$2250	\$0	04/14/2008	-
11.	01011	Serious	19100303 C03 I	03/21/2008	03/31/2008	\$2250	\$2250	\$0	04/14/2008	-
12.	01012A	Serious	19100303 E01 I	03/21/2008	03/31/2008	\$2250	\$2250	\$0	04/14/2008	-
13.	01012B	Serious	19100303 E01 II	03/21/2008	03/31/2008	\$0	\$0	\$0	04/14/2008	-
14.	01013	Serious	19100303 F02	03/21/2008	03/31/2008	\$1800	\$1800	\$0	04/14/2008	-
15.	01014	Serious	19100303 G02 I	03/21/2008	03/31/2008	\$4500	\$4500	\$0	04/14/2008	-
16.	01015	Serious	19100304 F01 I	03/21/2008	03/31/2008	\$4500	\$4500	\$0	04/14/2008	-
17.	01016A	Serious	19100305 A02 X	03/21/2008	03/31/2008	\$4500	\$4500	\$0	04/14/2008	-
18.	01016B	Serious	19100334 A02 I	03/21/2008	03/31/2008	\$0	\$0	\$0	04/14/2008	-
19.	01017	Serious	19100305 G02 III	03/21/2008	03/31/2008	\$4500	\$4500	\$0	04/14/2008	-
20.	01018	Serious	19100307 C	03/21/2008	03/31/2008	\$1800	\$1800	\$0	04/14/2008	-
21.	01019A	Serious	19100333 A02	03/17/2008	03/27/2008	\$3150	\$3150	\$0	04/07/2008	-
22.	01019B	Serious	19100335 A01 I	03/17/2008	03/27/2008	\$0	\$0	\$0	04/07/2008	-
23.	02001	WillFul	19100146 D11	03/21/2008	03/31/2008	\$63000	\$63000	\$0	04/14/2008	-
24.	02002A	WillFul	19100146 K01 I	03/21/2008	03/31/2008	\$63000	\$63000	\$0	04/14/2008	-
25.	02002B	WillFul	19100146 K01 II	03/21/2008	03/31/2008	\$0	\$0	\$0	04/14/2008	-

Standard Cited:19100023 C01 Guarding floor and wall openings and holes.

Violation Items			
Nr: 310470059	Citation: 01001	Issuance: 03/21/2008	ReportingID: 0830500
Viol Type:	Serious	NrInstances: 1	Contest Date: 04/14/2008
Abatement Date:	03/31/2008	Nr Exposed: 25	Final Order:
Initial Penalty:	1800.00	REC:	Emphasis:
Current Penalty:	1800.00	Gravity: 02	Haz Category:

Standard Cited:19100023 D01 Guarding floor and wall openings and holes.

Violation Items			
Nr: 310470059	Citation: 01002	Issuance: 03/21/2008	ReportingID: 0830500
Viol Type:	Serious	NrInstances: 1	Contest Date: 04/14/2008
Abatement Date:	03/31/2008	Nr Exposed: 25	Final Order:
Initial Penalty:	1800.00	REC:	Emphasis:
Current Penalty:	1800.00	Gravity: 02	Haz Category:

Standard Cited:19100132 A General requirements.

Violation Items			
Nr: 310470059	Citation: 01003	Issuance: 03/21/2008	ReportingID: 0830500
Viol Type:	Serious	NrInstances: 3	Contest Date: 04/14/2008

Abatement Date:	03/31/2008	Nr Exposed:	5	Final Order:
Initial Penalty:	4500.00	REC:		Emphasis:
Current Penalty:	4500.00	Gravity:	10	Haz Category:

Standard Cited:19100146 C02 *Permit-required confined spaces*

Violation Items							
Nr:	310470059	Citation:	01004	Issuance:	03/21/2008	ReportingID:	0830500
Viol Type:	Serious	NrInstances:	1	Contest Date:	04/14/2008		
Abatement Date:	03/31/2008	Nr Exposed:	8	Final Order:			
Initial Penalty:	4500.00	REC:		Emphasis:			
Current Penalty:	4500.00	Gravity:	10	Haz Category:			

Standard Cited:19100146 C08 I *Permit-required confined spaces*

Violation Items							
Nr:	310470059	Citation:	01005	Issuance:	03/21/2008	ReportingID:	0830500
Viol Type:	Serious	NrInstances:	1	Contest Date:	04/14/2008		
Abatement Date:	03/31/2008	Nr Exposed:	18	Final Order:			
Initial Penalty:	4500.00	REC:		Emphasis:			
Current Penalty:	4500.00	Gravity:	10	Haz Category:			

Standard Cited:19100146 D05 I *Permit-required confined spaces*

Violation Items							
Nr:	310470059	Citation:	01006	Issuance:	03/21/2008	ReportingID:	0830500
Viol Type:	Serious	NrInstances:	1	Contest Date:	04/14/2008		
Abatement Date:	03/31/2008	Nr Exposed:	8	Final Order:			
Initial Penalty:	4500.00	REC:		Emphasis:			
Current Penalty:	4500.00	Gravity:	10	Haz Category:			

Standard Cited:19100146 D13 *Permit-required confined spaces*

Violation Items							
Nr:	310470059	Citation:	01007	Issuance:	03/21/2008	ReportingID:	0830500
Viol Type:	Serious	NrInstances:	1	Contest Date:	04/14/2008		
Abatement Date:	03/31/2008	Nr Exposed:	8	Final Order:			
Initial Penalty:	4500.00	REC:		Emphasis:			
Current Penalty:	4500.00	Gravity:	10	Haz Category:			

Standard Cited:19100146 E01 *Permit-required confined spaces*

Violation Items			
Nr: 310470059	Citation: 01008	Issuance: 03/21/2008	ReportingID: 0830500
Viol Type:	Serious	NrInstances: 1	Contest Date: 04/14/2008
Abatement Date:	03/31/2008	Nr Exposed: 26	Final Order:
Initial Penalty:	4500.00	REC:	Emphasis:
Current Penalty:	4500.00	Gravity: 10	Haz Category:

Standard Cited:19100253 B02 II *Oxygen-fuel gas welding and cutting.*

Violation Items			
Nr: 310470059	Citation: 01009	Issuance: 03/21/2008	ReportingID: 0830500
Viol Type:	Serious	NrInstances: 2	Contest Date: 04/14/2008
Abatement Date:	03/31/2008	Nr Exposed: 25	Final Order:
Initial Penalty:	1800.00	REC:	Emphasis:
Current Penalty:	1800.00	Gravity: 02	Haz Category:

Standard Cited:19100253 B04 III *Oxygen-fuel gas welding and cutting.*

Violation Items			
Nr: 310470059	Citation: 01010	Issuance: 03/21/2008	ReportingID: 0830500
Viol Type:	Serious	NrInstances: 2	Contest Date: 04/14/2008
Abatement Date:	03/31/2008	Nr Exposed: 25	Final Order:
Initial Penalty:	2250.00	REC:	Emphasis:
Current Penalty:	2250.00	Gravity: 03	Haz Category:

Standard Cited:19100303 C03 I *General requirements.*

Violation Items			
Nr: 310470059	Citation: 01011	Issuance: 03/21/2008	ReportingID: 0830500
Viol Type:	Serious	NrInstances: 1	Contest Date: 04/14/2008
Abatement Date:	03/31/2008	Nr Exposed: 7	Final Order:
Initial Penalty:	2250.00	REC:	Emphasis:
Current Penalty:	2250.00	Gravity: 03	Haz Category:

Standard Cited:19100303 E01 I *General requirements.*

Violation Items			
Nr: 310470059	Citation: 01012A	Issuance: 03/21/2008	ReportingID: 0830500

Viol Type:	Serious	NrInstances:	1	Contest Date:	04/14/2008
Abatement Date:	03/31/2008	Nr Exposed:	7	Final Order:	
Initial Penalty:	2250.00	REC:		Emphasis:	
Current Penalty:	2250.00	Gravity:	03	Haz Category:	

Standard Cited:19100303 E01 II *General requirements.*

Violation Items					
Nr:	310470059	Citation:	01012B	Issuance:	03/21/2008
				ReportingID:	0830500
Viol Type:	Serious	NrInstances:	1	Contest Date:	04/14/2008
Abatement Date:	03/31/2008	Nr Exposed:	7	Final Order:	
Initial Penalty:		REC:		Emphasis:	
Current Penalty:		Gravity:	03	Haz Category:	

Standard Cited:19100303 F02 *General requirements.*

Violation Items					
Nr:	310470059	Citation:	01013	Issuance:	03/21/2008
				ReportingID:	0830500
Viol Type:	Serious	NrInstances:	1	Contest Date:	04/14/2008
Abatement Date:	03/31/2008	Nr Exposed:	7	Final Order:	
Initial Penalty:	1800.00	REC:		Emphasis:	
Current Penalty:	1800.00	Gravity:	02	Haz Category:	

Standard Cited:19100303 G02 I *General requirements.*

Violation Items					
Nr:	310470059	Citation:	01014	Issuance:	03/21/2008
				ReportingID:	0830500
Viol Type:	Serious	NrInstances:	1	Contest Date:	04/14/2008
Abatement Date:	03/31/2008	Nr Exposed:	7	Final Order:	
Initial Penalty:	4500.00	REC:		Emphasis:	
Current Penalty:	4500.00	Gravity:	10	Haz Category:	

Standard Cited:19100304 F01 I *Wiring design and protection.*

Violation Items					
Nr:	310470059	Citation:	01015	Issuance:	03/21/2008
				ReportingID:	0830500
Viol Type:	Serious	NrInstances:	1	Contest Date:	04/14/2008
Abatement Date:	03/31/2008	Nr Exposed:	7	Final Order:	
Initial Penalty:	4500.00	REC:		Emphasis:	
Current Penalty:	4500.00	Gravity:	10	Haz Category:	

Standard Cited:19100305 A02 X *Wiring methods, components, and equipment for general use.*

Violation Items			
Nr: 310470059	Citation: 01016A	Issuance: 03/21/2008	ReportingID: 0830500
Viol Type:	Serious	NrInstances: 1	Contest Date: 04/14/2008
Abatement Date:	03/31/2008	Nr Exposed: 7	Final Order:
Initial Penalty:	4500.00	REC:	Emphasis:
Current Penalty:	4500.00	Gravity: 10	Haz Category:

Standard Cited:19100334 A02 I *Use of equipment.*

Violation Items			
Nr: 310470059	Citation: 01016B	Issuance: 03/21/2008	ReportingID: 0830500
Viol Type:	Serious	NrInstances: 1	Contest Date: 04/14/2008
Abatement Date:	03/31/2008	Nr Exposed: 7	Final Order:
Initial Penalty:	4500.00	REC:	Emphasis:
Current Penalty:	4500.00	Gravity: 10	Haz Category:

Standard Cited:19100305 G02 III *Wiring methods, components, and equipment for general use.*

Violation Items			
Nr: 310470059	Citation: 01017	Issuance: 03/21/2008	ReportingID: 0830500
Viol Type:	Serious	NrInstances: 1	Contest Date: 04/14/2008
Abatement Date:	03/31/2008	Nr Exposed: 7	Final Order:
Initial Penalty:	4500.00	REC:	Emphasis:
Current Penalty:	4500.00	Gravity: 10	Haz Category:

Standard Cited:19100307 C *Hazardous (classified) locations.*

Violation Items			
Nr: 310470059	Citation: 01018	Issuance: 03/21/2008	ReportingID: 0830500
Viol Type:	Serious	NrInstances: 2	Contest Date: 04/14/2008
Abatement Date:	03/31/2008	Nr Exposed: 22	Final Order:
Initial Penalty:	1800.00	REC:	Emphasis:
Current Penalty:	1800.00	Gravity: 02	Haz Category:

Standard Cited:19100333 A02 *Selection and use of work practices*

Violation Items			
Nr: 310470059	Citation: 01019A	Issuance: 03/17/2008	ReportingID: 0830500

Viol Type:	Serious	NrInstances:	1	Contest Date:	04/07/2008
Abatement Date:	03/27/2008	Nr Exposed:	7	Final Order:	
Initial Penalty:	3150.00	REC:		Emphasis:	
Current Penalty:	3150.00	Gravity:	05	Haz Category:	

Standard Cited:19100335 A01 I *Safeguards for personnel protection.*

Violation Items					
Nr:	310470059	Citation:	01019B	Issuance:	03/17/2008
				ReportingID:	0830500
Viol Type:	Serious	NrInstances:	1	Contest Date:	04/07/2008
Abatement Date:	03/27/2008	Nr Exposed:	7	Final Order:	
Initial Penalty:		REC:		Emphasis:	
Current Penalty:		Gravity:	05	Haz Category:	

Standard Cited:19100146 D11 *Permit-required confined spaces*

Violation Items					
Nr:	310470059	Citation:	02001	Issuance:	03/21/2008
				ReportingID:	0830500
Viol Type:	Willful	NrInstances:	1	Contest Date:	04/14/2008
Abatement Date:	03/31/2008	Nr Exposed:	26	Final Order:	
Initial Penalty:	63000.00	REC:		Emphasis:	
Current Penalty:	63000.00	Gravity:	10	Haz Category:	

Standard Cited:19100146 K01 I *Permit-required confined spaces*

Violation Items					
Nr:	310470059	Citation:	02002A	Issuance:	03/21/2008
				ReportingID:	0830500
Viol Type:	Willful	NrInstances:	1	Contest Date:	04/14/2008
Abatement Date:	03/31/2008	Nr Exposed:	26	Final Order:	
Initial Penalty:	63000.00	REC:	A	Emphasis:	
Current Penalty:	63000.00	Gravity:	10	Haz Category:	

Standard Cited:19100146 K01 II *Permit-required confined spaces*

Violation Items					
Nr:	310470059	Citation:	02002B	Issuance:	03/21/2008
				ReportingID:	0830500
Viol Type:	Willful	NrInstances:	1	Contest Date:	04/14/2008
Abatement Date:	03/31/2008	Nr Exposed:	26	Final Order:	
Initial Penalty:		REC:		Emphasis:	
Current Penalty:		Gravity:	10	Haz Category:	

Chairwoman WOOLSEY. So with that as—this meeting is almost adjourned. But, first, as previously ordered, members will have 14 days to submit additional materials for the hearing record. And any member who wishes to submit follow-up questions in writing, to the witnesses, should coordinate with majority staff within 14 days.

Without objection, this hearing is adjourned.
[The statement of Mr. Miller follows:]

**Prepared Statement of Hon. George Miller, Chairman,
Committee on Education and Labor**

I want to commend Chairwoman Woolsey for her leadership in moving forward with legislative hearings as part our efforts to ensure that America's workers are protected while on the job.

As Congresswoman Woolsey noted, there has been significant progress made over the past four decades in improving worker safety.

Through our many hearings over the last three years, we found that there are employers who comply with worker safety laws and care about protecting their workers.

However, we have also learned that there are still a number employers who knowingly and repeatedly fail to protect their workers from death or serious bodily injury on the job.

For these employers, current law does not provide that credible deterrent. Some, in fact, consider OSHA's weak penalties the cost of doing business.

That is why we must update the law and provide a credible deterrent.

A few states that run their own health and safety program have tried to take the lead in modernizing penalties.

In 2000, California increased its maximum penalty for a serious violation from 7,000 to \$25,000, and increased penalties for criminal violations

And more recently, Wyoming is attempting to improve its highest-in-the-nation workplace fatality rate by strengthening their penalties.

Wyoming's governor is pushing reform that mirrors the civil penalties in the bill before us today.

He wrote the committee last week urging us to adopt the higher penalty structure in the bill before us today.

However, states cannot do it alone because of significant political pressure.

Every worker in this country deserves to have the same basic protections while on the job.

The Protecting America's Workers Act will bring our nation's health and safety laws into the 21st century. It gives OSHA the tools to enforce safe and healthy workplaces for all American workers.

I am encouraged that the Obama administration is returning to OSHA's mission of protecting workers by working on new standards and strengthening enforcement activities.

But, OSHA will need additional help through improvements to the law.

Again, Chairwoman Woolsey, thank you for your leadership on this important issue.

[Submission of Ms. Titus follows:]

111TH CONGRESS
2^D SESSION

H. R. 4864

To require a heightened review process by the Secretary of Labor of State occupational safety and health plans, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

March 16, 2010

Ms. Titus (for herself and Ms. Woolsey) introduced the following bill; which was referred to the Committee on Education and Labor

A BILL

To require a heightened review process by the Secretary of Labor of State occupational safety and health plans, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Ensuring Worker Safety Act”.

SEC. 2. REVIEW OF STATE OCCUPATIONAL SAFETY AND HEALTH PLANS.

Section 18 of the Occupational Safety and Health Act (29 U.S.C. 668) is amended—

(1) by amending subsection (f) to read as follows:

“(f)(1) The Secretary shall, on the basis of reports submitted by the State agency and the Secretary’s own inspections, make a continuing evaluation of the manner in which each State that has a plan approved under this section is carrying out such plan. Such evaluation shall include an assessment of whether the State continues to meet the requirements of subsection (c) of this section and any other criteria or indices of effectiveness specified by the Secretary in regulations. Whenever the Secretary finds, on the basis of such evaluation, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), the Secretary shall make an initial determination of whether the failure is of such a nature that the plan should be withdrawn or whether the failure is of such a nature that the State should be given the opportunity to remedy the deficiencies, and provide notice of the Secretary’s findings and initial determination.

“(2) If the Secretary makes an initial determination to reassert and exercise concurrent enforcement authority while the State is given an opportunity to remedy the deficiencies, the Secretary shall afford the State an opportunity for a public hearing within 15 days of such request, provided that such request is made not later than 10 days after Secretary’s notice to the State. The Secretary shall review and consider the testimony, evidence, or written comments, and not later than 30 days following such hearing, make a determination to affirm, reverse, or modify the Secretary’s initial determination to reassert and exercise concurrent enforcement authority under sections 8, 9, 10, 13, and 17 with respect to standards promulgated under section 6 and obligations under section 5(a). Following such a determination by the Secretary, or in the event that the State does not request a hearing within the time frame set forth in this paragraph, the Secretary may reassert and exercise such concurrent enforcement authority, while a final determination is pending under paragraph (3) or until the Secretary has determined that the State has remedied the deficiencies as provided under paragraph (4). Such determination shall be published in the Federal Register. The procedures set forth in section 18(g) shall not apply to a determination by the Secretary to reassert and exercise such concurrent enforcement authority.

“(3) If the Secretary makes an initial determination that the plan should be withdrawn, the Secretary shall provide due notice and the opportunity for a hearing. If based on the evaluation, comments, and evidence, the Secretary makes a final determination that there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of the withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

“(4) If the Secretary makes a determination that the State should be provided the opportunity to remedy the deficiencies, the Secretary shall provide the State an opportunity to respond to the Secretary’s findings and the opportunity to remedy such deficiencies within a time period established by the Secretary, not to exceed 1 year. The Secretary may extend and revise the time period to remedy such deficiencies, if the State’s legislature is not in session during this 1 year time period, or if the State demonstrates that it is not feasible to correct the deficiencies in the time period set by the Secretary, and the State has a plan to correct the deficiencies within a reasonable time period. If the Secretary finds that the State agency has failed to remedy such deficiencies within the time period specified by the Secretary and that the State plan continues to fail to comply substantially with a provision of the State plan, the Secretary shall withdraw the State plan as provided for in paragraph (3).”; and

(2) by adding at the end the following new subsection:

“(i) Not later than 18 months after the date of enactment of this subsection, and every 5 years thereafter, the Comptroller General shall complete and issue a review of the effectiveness of State plans to develop and enforce safety and health standards to determine if they are at least as effective as the Federal program and to

evaluate whether the Secretary's oversight of State plans is effective. The Comptroller General's evaluation shall assess—

“(1) the effectiveness of the Secretary's oversight of State plans, including the indices of effectiveness used by the Secretary;

“(2) whether the Secretary's investigations in response to Complaints About State Plan Administration (CASPA) are adequate, whether significant policy issues have been identified by headquarters and corrective actions are fully implemented by each State;

“(3) whether the formula for the distribution of funds described in section 23(g) to State programs is fair and adequate;

“(4) whether State plans are as effective as the Federal program in preventing occupational injuries, illnesses and deaths, and investigating discrimination complaints, through an evaluation of at least 20 percent of approved State plans, and which shall cover—

“(A) enforcement effectiveness, including handling of fatalities, serious incidents and complaints, compliance with inspection procedures, hazard recognition, verification of abatement, violation classification, citation and penalty issuance, including appropriate use of willful and repeat citations, and employee involvement;

“(B) inspections, the number of programmed health and safety inspections at private and public sector establishments, and whether the State targets the highest hazard private sector work sites and facilities in that State;

“(C) budget and staffing, including whether the State is providing adequate budget resources to hire, train and retain sufficient numbers of qualified staff, including timely filling of vacancies;

“(D) administrative review, including the quality of decisions, consistency with Federal precedence, transparency of proceedings, decisions and records are available to the public, adequacy of State defense, and whether the State appropriately appeals adverse decisions;

“(E) antidiscrimination, including whether discrimination complaints are processed in a timely manner, whether supervisors and investigators are properly trained to investigate discrimination complaints, whether a case file review indicates merit cases are properly identified consistent with Federal policy and procedure, whether employees are notified of their rights, and whether there is an effective process for employees to appeal the dismissal of a complaint;

“(F) program administration, including whether the State's standards and policies are at least as effective as the Federal program and are updated in a timely manner, and whether National Emphasis Programs that are applicable in such States are adopted and implemented in a manner that is at least as effective as the Federal program;

“(G) whether the State plan satisfies the requirements for approval set forth in this section and its implementing regulations; and

“(H) other such factors identified by the Comptroller General, or as requested by the Committee on Education and Labor of the House of Representatives or the Committee on Health, Education, Labor, and Pensions of the Senate.”.

[Questions submitted to witnesses for the record and their responses follow:]

[VIA FACSIMILE AND EMAIL],
U.S. CONGRESS,
Washington, DC, March 19, 2010.

Hon. JOHN CRUDEN, *Deputy Assistant Attorney General,
Environment and Natural Resources Division, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001.*

DEAR DEPUTY ASSISTANT ATTORNEY GENERAL CRUDEN: Thank you for testifying at the Subcommittee's hearing, "Protecting America's Workers Act: Modernizing OSHA Penalties" held on Tuesday, March 16, 2010.

Committee Members had additional questions for which they would like written responses from you for the hearing record.

Representative Lynn Woolsey (D-CA) asks the following questions:

(1) Your testimony says that there is little incentive for prosecutors to take Occupational Safety and Health Administration (OSHA) misdemeanor referrals because the Department of Justice (DOJ) must reserve limited resources for crimes designated as felonies. Over the past 5 years, what percentage of OSHA criminal referrals did the DOJ or US Attorney reject because OSHA criminal penalties were classified as misdemeanors? Would DOJ's posture towards OSHA criminal cases change, if OSHA criminal violations were classified as felonies?

(2) What is the state of mind necessary to prove a criminal violation under the “knowing” standard? How does this differ from the mens rea provision in the current Section 17 of OSHA which uses a “willful” standard? Does DOJ have a view regarding which standard should be used in our efforts to modernize the OSHA act?

(3) Under the March 9, 2010, discussion draft, what elements have to be proven to establish a criminal violation? Will employers be subject to a criminal prosecution every time an employee is killed on the job, and OSHA finds a violation linked to it?

(4) Who should be held liable in a criminal prosecution under the OSHA Act? Individual workers or corporate managers and directors?

(5) Is mere negligence sufficient to establish a criminal violation? What about recklessness?

(6) Mr. Frumin’s testimony states that where employers use contract labor for especially hazardous tasks, the potential criminal sanctions are non-existent under OSHA for the corporations and executives who control the workplace. In your view, should this problem be corrected in PAWA? How should it be changed?

Please send an electronic version of your written response to the questions in Microsoft Word format to Lynn Dondis and Richard Miller of the Committee staff at lynn.dondis@mail.house.gov and richard.miller@mail.house.gov by close of business Tuesday, March 30, 2010, the date on which the hearing record will close. If you have any questions, please do not hesitate to contact Ms. Dondis or Mr. Miller at 202-225-3275.

Sincerely,

GEORGE MILLER, *Chairman.*



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 21, 2010

The Honorable George Miller
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed are the responses for the record of John C. Cruden, Deputy Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, to written questions received following the March 16, 2010, hearing held by the Committee entitled, "Protecting America's Workers Act: Modernizing OSHA Penalties."

We hope this information is helpful to you. If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald Weich".

Ronald Weich
Assistant Attorney General

Enclosures

cc: The Honorable John Kline
Ranking Member

**Responses to Questions for the Record for
John C. Cruden, Deputy Assistant Attorney General
for the Environment and Natural Resources Division,
U.S. Department of Justice**

**From United States House of Representatives
Committee on Education and Labor
Subcommittee on Workforce Protection
Hearing Entitled
“Protecting America’s Workers Act: Modernizing OSHA Penalties”**

Questions from Subcommittee Chairwoman Lynn Woolsey (D-CA):

1. *Your testimony says that there is little incentive for prosecutors to take Occupational Safety and Health Administration (OSHA) misdemeanor referrals because the Department of Justice (DOJ) must reserve limited resources for crimes designated as felonies. Over the past 5 years, what percentage of OSHA criminal referrals did the DOJ or US Attorney reject because OSHA criminal penalties were classified as misdemeanors? Would DOJ’s posture towards OSHA criminal cases change, if OSHA criminal violations were classified as felonies?*

Answer:

The Department of Justice (DOJ) carefully reviews and prosecutes violations of criminal activity. In my written testimony, I highlighted two prosecutions involving violations of section 17 of the Occupational Safety and Health (OSH) Act (codified at 29 U.S.C. § 666). Further, as I testified, the fact that OSHA refers a case to DOJ as an OSH Act violation, and we ultimately do not charge pursuant to that statute, does not mean that we do not prosecute the underlying offense. Indeed, in my testimony I pointed out several cases involving worker deaths that were prosecuted using other statutes which provided more appropriate penalties given the severity of the circumstances. It is clear, however, that if Congress were to classify OSH Act criminal violations as felonies, and made the penalties appropriate to such crimes, OSH Act charges would be more likely to be included in any prosecution.

2. *What is the state of mind necessary to prove a criminal violation under the “knowing” standard? How does this differ from the mens rea provision in the current Section 17 of OSHA which uses a “willful” standard? Does DOJ have a view regarding which standard should be used in our efforts to modernize the OSHA act?*

Answer:

As I testified, the leading Supreme Court decision on these questions is *United States v. Bryan*, 524 U.S. 183 (1998), a copy of which is attached for your reference. In *Bryan*, the Supreme Court examined whether the term “willfully” in a federal firearms statute required proof that the defendant convicted of dealing in firearms without a federal license knew his conduct was unlawful, or whether it also required proof that he knew of the requirement to

obtain a federal license. The Court held that, “while disregard of a known legal obligation is certainly sufficient to establish a willful violation, it is not necessary.” *Id.* at 198-99. In reaching this conclusion, the Court reviewed a variety of cases involving “willful” and “knowing” violations of federal law and provided guidance regarding the meaning of and distinction between the two terms. The Court explained that, generally speaking, the term “willful” means an act undertaken with a bad purpose, *i.e.*, that the defendant knew his conduct was unlawful. *Id.* at 191-92. In contrast, the term “knowing,” as used in the criminal law, means “factual knowledge as distinguished from knowledge of the law.” *Id.* at 192 (quoting *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 345 (1952) (Jackson, J., dissenting)).

Most environmental statutes, and the felony provisions of most federal statutes, contain a “knowing” mens rea standard. *E.g.*, 42 U.S.C. § 6928 (Resource Conservation and Recovery Act); 33 U.S.C. § 1319(c)(2) & (3) (Clean Water Act); 42 U.S.C. § 7413(c)(5) (Clean Air Act). Under the “knowing” standard, the government must prove that the defendant had knowledge of the facts that constitute the offense – *i.e.*, that the conduct at issue was not accidental or a mistake. In contrast, the OSH Act requires proof of willfulness, which courts have interpreted as knowledge of the facts combined with knowledge that the conduct at issue was wrong. Consistent with the Supreme Court’s decision in *Bryan*, the willfulness mens rea standard requires proof of an additional component – *i.e.*, that the defendant acted with a “bad purpose.” The government, however, need not prove that a defendant intended to cause the consequence of the violation – *i.e.*, the risk of (or actual) death or injury that resulted from the violation – in order to demonstrate willfulness. Willfulness also does not require knowledge of the particular statute or regulation that is violated. *See Bryan*, 524 U.S. at 198-99; *United States v. Overholt*, 307 F.3d 1231, 1244 (10th Cir. 2002) (the term “willful” did not require specific knowledge of the provision of the law which the defendant violated, but only that he acted with a bad purpose, knowing his conduct was generally unlawful).

The Department supports the Committee’s efforts to bring the criminal provisions of the OSH Act into the mainstream of federal criminal laws by changing the mens rea standard from willful to knowing.

3. *Under the March 9, 2010, discussion draft, what elements have to be proven to establish a criminal violation? Will employers be subject to a criminal prosecution every time an employee is killed on the job and OSHA finds a violation linked to it?*

Answer:

Although there are three criminal provisions in the current OSH Act (death, advance notice of inspection, and false statements), 29 U.S.C. § 666(e)-(g), this question focuses on the provision involving worker death in the March 9, 2010, discussion draft. Under that draft, the government would have to prove beyond a reasonable doubt that (1) an employer (2) knowingly violated an OSHA standard, rule, order, or regulation (3) and thereby caused or contributed to the death (4) of an employee. The change in the March 9, 2010, draft from a willful to a knowing mens rea standard would not result in criminal prosecutions predicated on the mere coincidence of a death and a regulatory infraction. Rather, under that standard, the government still must prove that an employer knew of the facts underlying the violation of the OSHA

standard – *i.e.*, that the violation was not a mistake or an accident. In addition, the government must prove a nexus between the violation and the death. Accordingly, an employer would not be subject to criminal prosecution in every case in which there is a fatality, but only in those situations in which the employer has violated the criminal statute.

4. *Who should be held liable in a criminal prosecution under the OSHA Act? Individual workers or corporate managers and directors?*

Answer:

The current OSH Act definition of “employer” is “a person engaged in a business affecting commerce who has employees, but does not include the United States . . . or any State or political subdivision of a State.” 29 U.S.C. § 652(5). The pending legislation (H.R. 2067) would amend this definition of employer to include “responsible corporate officers.”

The term “responsible corporate officer” is contained in other federal statutes. Both the Clean Water Act (CWA) and the Clean Air Act (CAA) expressly include “responsible corporate officer” in their definitions of persons to whom the statutes apply. 33 U.S.C. § 1319(c)(6) (CWA); 42 U.S.C. § 7413(c)(6) (CAA). The term is often defined as a person who is in a position to stop the conduct and has knowledge of the facts, but does nothing to stop the conduct. For example, in a CWA case involving sewer discharges, the court approved a jury instruction stating that the defendant could be liable as a “responsible corporate officer” if he: (1) had knowledge of the fact that pollutants were being discharged into the sewer system by employees of his company; (2) had the authority and capacity to prevent that activity; and (3) failed to prevent the discharge. *United States v. Iverson*, 162 F.3d 1015, 1022-1025 (9th Cir. 1998). The court of appeals rejected arguments that a corporate officer is “responsible” only when he or she in fact exercises control over the unlawful activity or has an express corporate duty to oversee the activity. *Id.* at 1022. To the contrary, “[t]here is no requirement that the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity.” *Id.* at 1025. See also *United States v. Hong*, 242 F.3d 528 (4th Cir. 2001).

5. *Is mere negligence sufficient to establish a criminal violation? What about recklessness?*

Answer:

Negligence or recklessness does not establish a criminal violation under the current OSH Act, H.R. 2067, or the March 9, 2010, discussion draft. Some federal criminal statutes contain a negligence or recklessness standard for certain crimes. For example, the Clean Air Act creates a misdemeanor for negligent endangerment, 42 U.S.C. § 7413(c)(4), and the Clean Water Act includes a misdemeanor provision for certain negligent violations of water quality standards, 33 U.S.C. § 1319(c)(1). We are not aware of any felony statutes that have a negligence or recklessness standard.

6. *Mr. Frumin’s testimony states that where employers use contract labor for especially hazardous tasks, the potential criminal sanctions are non-existent under OSHA for the corporations and executives who control the workplace. In your view, should this problem be corrected in PAWA? How should it be changed?*

Answer:

In our experience prosecuting environmental crimes, employers who contract out the most dangerous tasks to unqualified or disreputable contractors typically do so to save the costs of doing a job properly and legally. Oftentimes these employers are much more aware of the hazards than are the contractors. Such employers, however, cannot escape liability under environmental statutes. For example, the Clean Air Act applies to any "person" and includes "owners" and "operators," defined as those who exercise supervisory control over and responsibility for the project. 42 U.S.C. §§ 7412(9); 7413(c)(1); see *United States v. Pearson*, 274 F.3d 1225, 1229–1233 (9th Cir. 2001).

As described in my response to question 4, the current OSH Act allows criminal sanctions only for "employers," defined as "a person engaged in a business affecting commerce who has employees, but does not include the United States . . . or any State or political subdivision of a State." 29 U.S.C. § 652(5). We note that the limited scope of the OSH Act does not mean that other individuals, including contract labor, can escape prosecution under other laws, such as environmental statutes or Title 18 provisions. To allow comparable prosecutions under the OSH Act would require a change in the scope of the statute to encompass any actor who did the prohibited act, caused the prohibited act to happen, or could have stopped the prohibited act from happening but did not do so.

demonstrates, it certainly suggests. To say that only willful violation of a certain law is criminal, but that knowledge of the existence of that law is presumed, fairly reflects, I think, a leg presumption that willful violation requires knowledge of the law violated.

If one had to choose, therefore, I think a presumption of statutory intent that is the opposite of the one the Court applies would be more reasonable. I would not, however, decide this case on the basis of any presumption at all. It is common ground that the statutory context here requires some awareness of the law for a § 924(a)(1)(D) conviction, but the statute is simply ambiguous, or silent, as to the precise contours of that *mens rea* requirement. In the face of that ambiguity, I would invoke the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S., at 847, 92 S.Ct., at 522, quoting *Revis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971).

"The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *United States v. Willberger*, 5 Wheat. 75, 55, 5 L.Ed. 37 (1820).

In our era of multiplying new federal crimes, there is more reason than ever to give this ancient canon of construction consistent application: by fostering uniformity in the interpretation of criminal statutes, it will reduce the occasions on which this Court will have to produce judicial havoc by resolving in defendants' favor a Circuit conflict regarding the substantive elements of a federal crime, see, e.g., *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998).

I respectfully dissent.



524 U.S. 206, 141 L.Ed.2d 215

LE PENNSYLVANIA DEPARTMENT OF CORRECTIONS, et al., Petitioners,

v.

Ronald R. YESKEY.

No. 97-634.

Argued April 28, 1998.

Decided June 15, 1998.

State prison inmate, who was denied admission to prison boot camp program due to history of hypertension, sued Pennsylvania Department of Corrections and several officials under the Americans With Disabilities Act (ADA). The United States District Court for the Middle District of Pennsylvania, William W. Caldwell, J., dismissed for failure to state a claim, and inmate appealed. The Court of Appeals for the Third Circuit, 118 F.3d 168, reversed and remanded. Certiorari was granted. The Supreme Court, Justice Scalia, held that Title II of the ADA, prohibiting "public entity" from discriminating against "qualified individual with a disability" on account of that individual's disability, applied to inmates in state prisons.

Court of Appeals affirmed.

1. Civil Rights 6-135

ADA's Title II, prohibiting "public entity" from discriminating against "qualified individual with a disability" on account of that individual's disability, covered inmates in state prisons, thus allowing state inmate to maintain ADA claim based on his exclusion, for health reasons, from prison boot camp program, the successful completion of which would have led to his early release; text of ADA was not ambiguous, and it unmistakably included state prisons and prisoners within its coverage. Americans with Disabilities Act of 1990, §§ 201(1)(B), 202, 42 U.S.C.A. §§ 12131(1)(B), 12132; 61 P.S. § 1123.

March 30, 2010.

Hon. GEORGE MILLER, *Chairman*,
House Committee on Education and Labor, U. S. House of Representatives, Washington, DC 20515.

DEAR CHAIRMAN MILLER: Thank you again for allowing me the opportunity to testify before the Subcommittee on March 16, concerning OSHA penalties. The following are my responses to the questions you sent me on March 19, from Ms. Woolsey.

Examples of employers for whom higher penalties would have made a difference in deterring employer violations

There are several examples of cases where initial penalties should have made a difference, but failed to do so. For instance, in the report of the Senate HELP Committee Majority Staff on fatality inspections (reference #9 in my prepared testimony), the Staff identified several employers with repeated fatalities involving simi-

lar hazards and violations. Among the most notorious is the Patterson-UTI drilling contractor in the oil/gas drilling industry. The Senate report described Patterson-UTI as follows:

OSHA's history with Patterson-UTI Drilling Company, one of the worst violators of workplace safety laws, provides a sobering and instructive example of the agency's complete failure to check reckless and outrageous conduct. Since 2003, 13 workers have been killed at Patterson jobsites in the state of Texas alone. OSHA's attempts to stop Patterson from gambling with workers' lives are a study in weakness. (p. 24).

The report then details repeated instances of multiple cases. Between November 2003 and April 2007, when OSHA conducted inspections, imposed penalties—often for repeated violations—and subsequently reduced those penalties.

Another example is that of Waste Management, Inc. (WMI) As the Subcommittee heard in its hearing on OSHA's EEP program on April 30, 2009, WMI was identified by the DOL Inspector General in his review of OSHA "Enhanced Enforcement Program." As the IG noted, WMI was one of nearly 30 employers whose workers were killed on the job, and where, as the IG stated:

[the company] had related serious violations and/or qualifying prior history, and should have been designated as EEP [as employers who were indifferent to their compliance obligations under the OSHAct].

Another example is the Cintas Corp. As I mentioned in my testimony, and as the Subcommittee heard at its hearing on April 23, 2008, prior to the death of Eleazar Torres Gomez on March 6, 2007, Cintas was aware of the high risk of death from the unguarded equipment in its laundry operations. After OSHA cited the company for a serious violation (when OSHA was unfortunately unaware of the company's detailed prior knowledge), the penalty of \$2250 was simply too low to serve as an effective deterrent.

Finally, in the case of BP, even a record \$21 million penalty in 2007 following the horrific explosion in Texas City, TX that killed 15 employees and injured 170 more was not enough to convince the employer to fully comply with the law. For that reason, OSHA has now had to impose a 4-fold higher penalty of \$87 million, the majority of which was for failure to abate the violations identified in the settlement agreement accompanying the \$21 million penalty.

And it appears that even the \$87 million penalty was not enough to convince the company to comply. Again, on March 8, OSHA has imposed a \$3 million penalty on a BP joint venture in Toledo, OH, for dozens of willful violations. As OSHA itself described the citation and penalty:

"OSHA has found that BP often ignored or severely delayed fixing known hazards in its refineries," said Secretary of Labor Hilda L. Solis. "There is no excuse for taking chances with people's lives. BP must fix the hazards now." OSHA began its inspection at the refinery located near Toledo, Ohio, in September 2009 as part of the agency's Refinery National Emphasis Program and as a follow-up to a 2006 inspection and a 2007 settlement agreement between OSHA and BP at this location. Although the 2009 inspection found that BP had complied with the settlement agreement, OSHA found numerous violations at the plant not previously covered by the agreement.

Clearly, the deterrent function of the Act has failed to convince employers to comply with the law. A more powerful penalty structure is sorely needed. But civil penalties alone will not be sufficient, especially when dealing with employers like Cintas, Waste Management and BP, for whom millions of dollars in civil penalties are at worst a nuisance, and have little impact on the profits or share prices by which executives are routinely judged by Boards of Directors and stockholders. For these reasons, it is critical that Congress give OSHA the authority to impose effective criminal sanctions as well.

Limitations on multi-employer liability

My testimony stated that:

Under the current OSHA statute, with the exception of the construction industry, only the contractor business itself as well as its officers, could be held accountable for allowing those conditions to exist in the first place. The huge corporations which hire these disreputable contractors are exempt from liability for OSHA violations and subsequent prosecution.

I regret that this testimony is in error, and wish to correct the record. In fact, OSHA has the authority to cite employers outside of the construction industry for hazards and violations which affect the employees of their contractors. OSHA has indeed issued citations for violations by "controlling" employers, irrespective of industry. Furthermore, it has expressed that policy in OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy, December 10, 1999, as well as its Field Oper-

ations Manual. That policy has been upheld by several Courts of Appeals, most recently in by the Eighth Circuit Court of Appeals in *Solis v. Summit Contractors*, Feb. 26, 2009.

The policy reads as follows:

Multi-employer Worksite Policy. The following is the multi-employer citation policy:

A. Multi-employer Worksites. On multi-employer worksites (in all industry sectors), more than one employer may be citable for a hazardous condition that violates an OSHA standard. A two-step process must be followed in determining whether more than one employer is to be cited.

1. Step One. The first step is to determine whether the employer is a creating, exposing, correcting, or controlling employer. The definitions in paragraphs (B)—(E) below explain and give examples of each. Remember that an employer may have multiple roles (see paragraph H). Once you determine the role of the employer, go to Step Two to determine if a citation is appropriate (NOTE: only exposing employers can be cited for General Duty Clause violations).

2. Step Two. If the employer falls into one of these categories, it has obligations with respect to OSHA requirements. Step Two is to determine if the employer's actions were sufficient to meet those obligations. The extent of the actions required of employers varies based on which category applies. Note that the extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is less than what is required of an employer with respect to protecting its own employees.

However, as has also been clear, OSHA's application of this policy has not deterred subcontractor employers from repeatedly committing violations that have resulted in the death of employees—even when OSHA's own standards requiring the controlling employer to affirmatively act to prevent such abuses by their contractors. The recent example cited in my testimony of Xcel Energy is a graphic version of these abuses. During my testimony, I submitted a copy of the indictment secured by the US Attorney for the Middle District of Colorado, accusing Xcel Energy of "aiding and abetting" the employer of the employees trapped in Xcel's hydroelectric tunnel when the chemicals they used caught fire and killed them. To further underscore the severity of Xcel's own involvement, attached are the citations issued by OSHA against Xcel itself, noting the specific failures by Xcel that OSHA found regarding the adoption and implementation of "confined Space" hazards for contractor employees. Note Willful violation #1 and Serious Violation #5 concerning the actions which Xcel should have taken to assure the safety of its own as well as its contractor employees.

Sadly, despite these apparent failures by Xcel, neither Xcel nor its executives were ever charged with violations leading to the death of the contractor employees. Xcel's only crime was aiding and abetting the contractor.

The application of the policy has also faced serious limits in requiring the controlling employer to deal effectively with the underlying conditions that threaten the contractor's workers. In the meatpacking industry, cleaning contractors are routinely used by host employers to "do the dirty work" of the daily cleaning of processing equipment. One such contractor—DCS Sanitation—has literally become a "textbook case" of lockout violations. OSHA offers such a case from a 1993 fatality at an IBP, Inc. plant on OSHA's web training materials for willful violations of the lockout standard:

<http://www.osha.gov/dts/osta/lototraining/caselaw/cl-overvw.html>.

In 1998, however, the District of Columbia Circuit Court of Appeals absolved IBP itself of any liability for the violations surrounding this horrible death, in a decision written by Judge Silberman on behalf of himself and Judges Edwards and Ginsburg. Without debating further the details of the IBP case, suffice it to say that OSHA will continue to face challenges when its leverage over such employers is so weak.

However, that hasn't stopped DCS from continuing to commit serious violations. In April, 2008, OSHA cited DCS for multiple serious as well as a willful and repeat violation following the death of one of its employees at a chicken processing plant in Missouri.

A similar scenario has apparently occurred at the notorious BP refinery in Texas. In this case, BP instead of the contractor was clearly involved in creating the conditions which killed the employees. But despite BP's multitude of violations leading to the conditions which killed 15 contractor employees, BP was never held criminally accountable for the workers' deaths under the OSHAct. The indictment (attached) only charged BP with knowing violations of the Clean Air Act. As David Senko, one of the supervisors of the deceased workers, recently remarked at a 5-year anniversary of the tragedy about the consequences for BP executives:

“Not one, none, have been disciplined, fined, terminated, indicted, tried, incarcerated or held accountable in any way for their very preventable, criminal, almost murderous, event that took place five years ago.”

In sum, OSHA needs additional tools and authority to clearly hold all host employers responsible for assuring safe conditions when they contract with other employers to assign workers to dangerous tasks, and a clear path to holding host employers accountable when they fail to do so. We see no other effective way to assure that all workers are protected, irrespective of which employer is actually creating or controlling the hazards. With the increasing use of contractors, this is a critical next step for modernizing OSHA penalties.

Mr. Snare’s mischaracterization of alleged “witch hunts”.

I completely reject the notion that any expansion of criminal liability to “corporate officer and director” will necessarily lead to a “witch hunt.” As Deputy Assistant Attorney General Cruden made amply clear in his testimony, such authority has existing in our environmental laws for decades. Mr. Snare was also the Solicitor of Labor at the time that both the Department of Labor and the Justice Department were engaging in successful prosecutions of employers who violated these laws, and the Departments were seeking such punishments.

Have these prosecutions led to “witch hunts”? If so, who are the victims? Where are the corporate executives who were unfairly charged, mercilessly abused in the courtroom, and ultimately vindicated or jailed? Neither Mr. Snare, nor the Chamber of Commerce, has offered any such examples. Nor do we believe that they can.

Either Mr. Snare or the Chamber of Commerce will have to explain why they have engaged in such inflammatory rhetoric to attack a modest proposal which simply seeks to equalize the government’s authority across various similar laws.

We believe that such testimony is inappropriate for a legislative hearing where the Committee is attempting to seriously examine the proposed legislation, and find solutions to the problems that confront ethical, responsible employers when irresponsible employers can flout the law.

In addition to higher penalties, what other provisions of PAWA support increased deterrence?

We believe that the new procedures and authority to protect whistleblowers, under Title II, will help OSHA and workers to work together to better identify otherwise recidivist employers and compel them to correct violations before the most severe sanctions become necessary. OSHA has known for years that when informed workers file knowledgeable complaints about serious hazards and violations, OSHA can do its job much more easily. Unfortunately, the current law provides little effective protection for workers who complain to their own employers, or whose complaints to OSHA become known to employers. Employers can easily identify such workers when the workers actively participate in workplace committees or otherwise discuss such problems with other employees, not to mention any active participation in an inspection.

We also believe that the provisions of Section 308, requiring abatement of violations during employer appeals, will help discourage employers from needlessly challenging violations when they are primarily interested in resolving disputes about penalties. Early action on hazards will thereby resolve these hazards quickly, eliminating a potential source of future violations.

Finally, we believe that the provisions allowing both employees and victims’ families to more actively participate in the appeals process will help discourage inappropriate settlements that reduce penalties to levels which no longer serve a deterrent function.

What other provisions should be included in PAWA to deter violations at multi-site employers?

One of the serious gaps in the OSHAct is OSHA’s inability to determine quickly and conveniently whether or not the same violations are occurring at other sites within the same company. As the Subcommittee has already seen at the Cintas Corp., as well as at McWane, BP and other large employers, large companies with active corporate functions can create the same hazards in multiple locations. They can likewise assure that these multi-site violations can be fixed, too.

However, there is no obligation on these large employers to determine whether or not the violations exist elsewhere. As a result, what appears to be a “routine” violation may already exist in many places and it is only the occurrence of a preventable fatality or serious injury which brings this pattern to light. This is largely the basis of the EEP program—soon to be called the Severe Violators Enforcement Program.

Mr. Hare’s legislation (HR 2113) would create an important expansion of the current reporting requirements for such large employers, requiring them to report the injury rates and cited violations at multiple locations. That is a good beginning.

However, it still does not require employers to fix uncited violations in multiple locations, even if the employer is well aware of those violations.

It should not require OSHA inspectors to continually visit multiple sites before a large, sophisticated, wealthy corporation finally takes action to fix known violations. The Committee should consider other requirements, such as a “find and fix” requirement: when a multi-site employer commits the kinds of violations that OSHA itself uses as a criteria for urgent further investigation. These could be severely dangerous hazards that have emerged in individual OSHA inspections, as well as hazards that are already well known throughout an industry (such as those identified in OSHA’s National Emphasis Programs).

Were the Committee to adopt such a proactive approach, then responsible employers would no longer face the costs arising from their own commitment to comprehensive compliance actions, while their irresponsible competitors simply ignore their violations and await the rare visit from an inspector. We believe that a combination of improved corporate-wide reporting, as well as a corporate-wide “find and fix” obligation, would both encourage much greater voluntary compliance as well as lay the foundation for the severe sorts of penalties that PAWA would finally authorize. Such a combination would constitute, for the first time, a true deterrent function that would help protect millions of workers in hazardous jobs and industries, while adding only marginally to OSHA’s own investigative burdens.

Thank you again for providing me with the opportunity to testify.

Sincerely,

ERIC FRUMIN, HEALTH AND SAFETY COORDINATOR,
Change to Win.

[VIA FACSIMILE AND EMAIL],
U.S. CONGRESS,
Washington, DC, March 19, 2010.

Hon. DAVID MICHAELS, *Assistant Secretary of Labor,*
Occupation Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20510.

DEAR ASSISTANT SECRETARY MICHAELS: Thank you for testifying before the Subcommittee on Workforce Protections at the hearing on, “Protecting America’s Workers Act: Modernizing OSHA Penalties” held on Tuesday, March 16, 2010.

Committee Members had additional questions for which they would like written responses from you for the hearing record.

Representative Lynn Woolsey (D-CA) asks the following questions:

1. Do you believe that Occupational Safety and Health Act (OSHAct) penalties should be allowed to be eroded through inflation?

2. Your testimony supports provisions that would expand the rights of workers and their representatives to contest OSHA citations and modifications. In which states are these rights already provided in an OSHA state plan? Please explain why expanding contest rights under Section 10(c) of the OSHAct for workers is important?

3. Mr. Snare’s testimony on behalf of the Chamber of Commerce states that the victim’s rights provisions in the Protecting America’s Workers Act (PAWA) which allow families to discuss investigations with the Secretary of Labor, express views on settlements, and present their views to Administrative Law Judges will provide little value “other than to sensationalize presumably already emotional and sensitive matters.”

a. Do you agree with the views of the Chamber of Commerce in this matter?

b. Are there benefits to OSHA from having families of victims involved with the investigation, or in the settlement or adjudicative processes? What are these benefits?

c. Should there be limits on victim’s families in providing information to investigators, or involving victim’s families in the settlement or adjudicative process? If so, what should those limits be?

d. Does OSHA have any data on the extent to which OSHA complies with its existing Field Operations Manual on interviewing family members and maintaining contact through the investigation?

e. Would OSHA support Congress establishing a legal right for victim’s families to participate in proceedings before the OSHA Review Commission, and to provide information from the case file to the family so they can meaningfully participate?

4. Mr. Snare’s testimony on behalf of the Chamber of Commerce says that “Enforcement and penalties do not prevent workplace fatalities and injuries; they are imposed after fatalities and injuries have occurred.” Isn’t it the case that OSHA also

levies penalties following complaint inspections and programmed inspections, and that these actions help prevent accidents? What percentage of OSHA's penalties are assessed after fatalities and injuries have occurred? What percent follow programmed inspections or complaints? Please provide percentages for the past two years.

5. In amending the criminal provisions to the OSHAct, does DOL support changing the current mens rea standard from "willful" to "knowing"?

6. Currently Section 17(a) of the OSHAct provides for a minimum penalty for "willful" violations. Does OSHA support a minimum civil penalty for a "serious" violation or "other than serious"? If so, at what dollar level? If not, please explain why.

7. Robert Fitch was killed at the Archer Daniels Midland (ADM) plant in Lincoln, Nebraska in January 2009. OSHA issued 2 citations and proposed penalties of \$10,000 related to violations of the standard governing manlifts (29 CFR 1910.68). These two citations were deleted as part of an informal settlement agreement which also zeroed out the penalties.

a. Were there recognized falling hazards pertaining to the manlifts at the ADM facility?

b. Was abatement of the hazard feasible? If so, what were the feasible hazard abatement methods?

c. Did OSHA investigate whether there was history at this facility where employees had fallen off the same or similar type of manlifts and been hurt or killed? If not, why didn't OSHA make this inquiry?

d. Would OSHA compliance directives have allowed OSHA to use the general duty clause under Section 5(a)(1) of the Act to cite the employer for falling hazards leading to the death of this worker? If so, why wasn't it used?

e. Was a \$10,000 penalty the maximum penalty available to OSHA for a fatality? Is this sufficient to deter future non compliance?

f. Was the deletion of these two citations justified on the grounds that 29 CFR 1910.68 grandfathered this belt driven manlift? What specific provisions in this standard grandfathered equipment that lacked fall protection and non-slip surfaces?

g. Was there a sound legal basis for deleting these two citations totaling \$10,000 in an informal settlement? If so, what was the legal basis?

h. Is it the case that the family learned about the settlement from the news media? Is this consistent with OSHA policy?

8. OSHA has launched a National Emphasis Program (NEP) on underreporting of injuries and illnesses. How many inspections have been initiated as of March 22, 2010, and of those inspections, please provide statistics on the number of violations by NAICS code?

9. Would OSHA's ability to protect worker safety in cases where there was an imminent danger be facilitated if OSHA had the ability to issue imminent danger shutdown orders without having to first secure an injunction from a federal court judge?

10. How many imminent danger orders were secured each year between the beginning of FY 2005 and the end of FY 2009 under the OSHAct? Please provide a timeline for each imminent danger proceeding, showing the date and time of inspection, the date and time of recognition of the imminency of the danger, the date and time when DOL first sought an order, and the date and time when the Court order was delivered to the employer.

11. The PAWA discussion draft of March 9, 2010, makes "any officer and director" liable under the criminal provisions of the OSHAct, in addition to employers as defined under Section 3 of the OSHAct. Does OSHA support criminal liability for "any officer or director"?

12. Mr. Frumin testified that where employers use contract labor for especially hazardous tasks, the potential sanctions are non-existent for the corporations and executives who own or control the workplace. In your view, how should this multi employer liability problem be corrected? Does it require a legislative change?

13. The March 9, 2010 discussion draft allows employers to seek a temporary stay of the abatement order. In issuing a stay, the OSHA Review Commission must consider whether the employer had demonstrated a substantial likelihood of success on its contest to the citation, whether the employer will suffer irreparable harm absent a stay, and whether a stay will adversely affect the health and safety of the workers. Mr. Snare's testimony on behalf of the Chamber of Commerce states that requiring abatement of serious violations pending contest of a citation case is "unjustified" and "an outrageous trampling of due process rights."

a. Does OSHA agree with Mr. Snare that the requirement for abatement pending contest of serious violations coupled with the due process rights set forth in the discussion draft represents an "outrageous trampling of due process rights?"

b. Are the due process rights for employers who object to an abatement order for a serious violation under PAWA comparable to the due process rights for mine operators who object to an abatement order in the Mine Act?

c. Does Oregon OSHA require abatement of serious violations pending contest? Has the adoption of the requirement for abatement of serious hazards pending contest been challenged on due process grounds? If so, has it been overturned by the Courts in that state?

Please send an electronic version of your written response to the questions in Microsoft Word format to Lynn Dondis and Richard Miller of the Committee staff at lynn.dondis@mail.house.gov and richard.miller@mail.house.gov by close of business Tuesday, March 30, 2010, the date on which the hearing record will close. If you have any questions, please do not hesitate to contact Ms. Dondis or Mr. Miller at 202-225-3275.

Sincerely,

GEORGE MILLER, *Chairman.*

OSHA Responses to Additional Questions for the Hearing Record

Question 1: Do you believe that Occupational Safety and Health Act (OSH Act) penalties should be allowed to be eroded through inflation?

Answer: No. Monetary penalties for violations of the OSH Act have been increased only once in 40 years despite disproportionately greater inflation during that period. OSHA's current civil penalties are not large enough to provide adequate deterrents to unscrupulous employers that often consider it more cost effective to pay the minimal OSHA penalty and continue to operate an unsafe workplace than to correct the underlying health and safety problem. Serious violations—those that pose a substantial probability of death or serious physical harm to workers—are subject to a maximum civil penalty of only \$7,000. Willful and repeated violations carry a maximum penalty of only \$70,000 and willful violations a minimum of \$5,000.

Currently, the average OSHA penalty is only around \$1,000. The median initial penalty proposed for all investigations conducted in FY 2007 in cases where a worker was killed was only \$5,900. Clearly, OSHA can never put a price on a worker's life, nor is that the purpose of penalties—even in fatality cases. However, in cases where a life is needlessly lost, OSHA must be empowered to send a message stronger than that which a \$5,900 penalty sends.

This is apparent when compared to penalties that other agencies are allowed to assess. For example, the Department of Agriculture is authorized to impose fines of up to \$140,000 on milk processors for willful violations of the Fluid Milk Promotion Act, which include refusal to pay fees and assessments to help advertise and research fluid milk products. The Federal Communications Commission can fine a TV or radio station up to \$325,000 for indecent content. The Environmental Protection Agency can impose a penalty of \$270,000 for violations of the Clean Air Act and a penalty of \$1 million for attempting to tamper with a public water system. Yet, the maximum civil penalty OSHA may impose when a hard-working man or woman is killed on the job—even when the death is caused by a willful violation of an OSHA requirement—is \$70,000.

PAWA makes much needed increases in both civil and criminal penalties for every type of violation of the OSH Act and would increase penalties for willful or repeat violations that involve a fatality to as much as \$250,000. These increases are not inappropriately large. In fact, for most violations, they raise penalties only to the level where they will have the same value, accounting for inflation, as they had in 1990.

In order to ensure that the effect of the newly increased penalties does not degrade in the same way, PAWA also provides for inflation adjustments for civil penalties based on increases or decreases in the Consumer Price Index (CPI). The legislation would be made even stronger if the adjustments occurred automatically. Unlike most other Federal enforcement agencies, the OSH Act has been 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. PAWA's penalty increases are necessary to create at least the same deterrent that Congress originally intended when it passed the OSH Act almost 40 years ago. Simply put, OSHA penalties must be increased to provide a real disincentive for employers not to accept injuries and worker deaths as a cost of doing business.

Question 2: Your testimony supports provisions that would expand the rights of workers and their representatives to contest OSHA citations and modifications. In which states are these rights already provided in an OSHA state plan? Please ex-

plain why expanding contest rights under Section 10(c) of the OSH Act for workers is important?

Answer: Seven of the 27 States that operate OSHA-approved State Plans have statutory provisions that give employees expanded contest rights. In Kentucky, Minnesota, South Carolina, and Tennessee, in addition to contesting the period set for abatement, employees may also contest the citations and penalties. In Michigan, which has a two-step contest process, employees initially may contest only the abatement period, but may appeal the agency's proposed decision on the abatement period, classification of violation classifications and penalties to the Appeals Board. In New York and New Jersey, whose approved State Plans are limited to State and local government employees only, employees may contest the abatement period, citation and penalty.

In discussions with those State Plans which already offer these rights, we understand that employees rarely exercise these additional rights, but that when they do, it does not negatively impact the contest process.

Question 3: Mr. Snare's testimony on behalf of the Chamber of Commerce states that the victim's rights provisions in the Protecting America's Workers Act (PAWA), which allows families to discuss investigations with the Secretary of Labor, express views on settlements, and present their views to Administrative Law Judges, will provide little value "other than to sensationalize presumably already emotional and sensitive matters."

- a. Do you agree with the views of the Chamber of Commerce in this matter?
- b. Are there benefits to OSHA from having families of victims involved with the investigation, or in the settlement or adjudicative process? What are these benefits?
- c. Should there be limits on victim's families in providing information to investigators or involving victim's families in the settlement or adjudicative process? If so, what should those limits be?
- d. Does OSHA have any data on the extent to which OSHA complies with its Field Operations Manual on interviewing family members and maintaining contact through the investigation?
- e. Would OSHA support Congress in establishing a legal right for victim's families to participate in proceedings before the OSHA Review Commission, and to provide information from the case file to the family so they can meaningfully participate?

Answer:

a. No, OSHA does not agree with the views of the Chamber of Commerce on this matter. Family members and co-workers are sincerely interested in learning how the incident occurred, finding out if anything could have been done to prevent it, and knowing what steps the employers and employees will take in the future to ensure that someone else is not similarly injured or killed. Moreover, accident victims and those close to them can often provide useful information to investigators. Family members' interest aids in advancing safety and health in the workplace while providing closure for family. In contrast, when an affected party, such as a family member, is left out of the investigation and the settlement process is not transparent, family members often are traumatized. This lack of information and transparency often makes family members unhappy and discontented. OSHA Directives establishing procedures for fatality investigations provide that victims and their families should be informed about citation procedures and about settlements, and require investigators to talk with families during the investigation process. PAWA would ensure this policy is strengthened and made permanent, as well as increase the ability of victims and family members to more actively participate in the process. No one is affected more by a workplace tragedy than workers and their families, so we fully recognize and appreciate their desire to be more involved in the remedial process.

b. Yes, having family members involved in the investigation does have benefits. Involving family members can help the inspector and the Agency better understand the work activity performed by the deceased. Employees frequently discuss work activities and co-workers with family members during non-work hours. After a fatality has occurred, speaking with family members sometimes reveals concerns related to the incident that the worker mentioned at home (such as the failure of the employer to provide the right equipment or equipment being in a state of disrepair). Family members may also be able to provide the names of coworkers with whom the victim frequently worked, which in turn may allow for a better understanding of how a work activity or task is normally performed. After an accident, coworkers may also share information with a victim's family that they might not share with an OSHA inspector or the employer. These examples demonstrate why it is important to involve family members in the investigation process.

c. We see no reason to limit the ability of families to provide information to OSHA during an investigation; however, some clarification might be useful in regard to the procedures for participation in settlement discussions and adjudicative proceedings.

d. OSHA does not specifically track data associated with interviewing family members and maintaining contact during the investigation; however, several additional measures are taken to ensure field staff comply with procedures found in the Field Operations Manual (FOM) and OSHA's fatality investigation procedures. For example, many area offices designate a fatality liaison that is responsible for reviewing fatality-related actions and inspection information prior to notifying the Regional and National office. Further, area offices often develop fatality/catastrophe checklists to ensure all required steps are taken during the course of an investigation. Compliance staff also utilize the case file diary sheet to note key activities throughout the course of an investigation, which may include meetings, interviews, and phone calls with family members. Upon completion of a fatality investigation by a compliance officer, the team leader and area leader thoroughly review the file. Finally, in furtherance of accountability, OSHA, through its Regional offices, conducts periodic audits of area offices to review key program areas and a representative number of inspection files for compliance with OSHA policy and procedures. A number of fatality investigations would be included as part of the area office audit.

e. No one is affected more by a workplace tragedy than workers and their families, so we fully recognize and appreciate their desire to be more involved in the remedial process. OSHA supports the PAWA provisions that would enable workers and families to provide information to OSHA during an investigation; however, it is not appropriate for OSHA to comment on the OSHA Review Commission's proceedings.

Question 4: Mr. Snare's testimony on behalf of the Chamber of Commerce says that "Enforcement and penalties do not prevent workplace fatalities and injuries: they are imposed after fatalities and injuries have occurred." Isn't it the case that OSHA also levies penalties following complaint inspections and programmed inspections, and that these actions help prevent accidents? What percentage of OSHA's penalties are assessed after fatalities and injuries have occurred? What percent follow programmed inspections or complaints? Please provide percentages for the past two years.

Answer: Yes, OSHA does levy penalties following complaint inspections and programmed inspections. In fact, OSHA can levy penalties as the result of any inspection, regardless of what prompted it. The Agency believes that the issuance of citations, and the required abatement of hazards and associated penalties, does prevent accidents. In fiscal year 2009, OSHA issued almost \$92 million in penalties. Approximately eight percent of those penalties were assessed as the result of fatality/catastrophe investigation. Approximately 71 percent followed programmed inspections or complaint inspections. Please see detailed information for the previous two fiscal years provided in the table below.

FY 2008 AND FY 2009 FEDERAL OSHA CURRENT* PENALTY DATA

Data criteria	FY 2008	FY 2009
Total Current Penalties	\$92,710,026	\$91,828,697
Total Current Penalties for Fatality/Catastrophe Inspections	\$12,919,213	\$7,730,912
(Percent of Total Current Penalties)	(14%)	(8%)
Total Current Penalties for Programmed Inspections	\$42,388,847	\$46,419,204
(Percent of Total Current Penalties)	(46%)	(51%)
Total Current Penalties for Complaint Inspections	\$16,330,975	\$18,685,114
(Percent of Total Current Penalties)	(18%)	(20%)

Data source: IMIS INSP6 Reports dated 3/23/2010.

*Current penalty—reflects penalty figures from open and closed inspections.

Question 5: In amending the criminal provisions to the OSHA Act, does OSHA support changing the current mens rea standard from "willful" to "knowing"?

Answer: Yes, most federal statutes, including most environmental statutes, contain a "knowing" mens rea standard rather than a "willful" standard.

DOL supports the efforts to amend the criminal provisions of the OSH Act by changing the mens rea standard from "willful" to "knowing." Doing so would bring those provisions into the mainstream of federal criminal laws.

Congress has consistently used the “knowing” standard in criminal provisions in public welfare statutes and in other contexts where, as in the workplace, activities are highly regulated. It is reasonable to assume that anyone involved in such areas is aware of that high degree of regulation. Indeed, in such contexts, courts have recognized a presumption of knowledge of the law. Cf. *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558 (1971) (explaining that when dangerous or harmful devices or products, or obnoxious waste materials, are involved, “the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation”). The justification for this presumption has been described as follows: “[t]o admit the excuse at all would be to encourage ignorance where the lawmaker has determined to make men know and obey.” Holmes, *The Common Law* (Howe ed. 1963). Use of the knowing standard in OSHA’s criminal penalty provision would be consistent with this rationale, as employers can hardly be surprised to learn of the existence of standards, rules, and orders pertaining to workplace safety, and the knowing standard places an appropriate and fair burden on them to “know and obey” these standards, rules, and orders.

Question 6: Currently Section 17(a) of the OSH Act provides for a minimum penalty for “willful” violations. Does OSHA support a minimum civil penalty for a “serious” violation or “other than serious”? If so, at what dollar level? If not, please explain why?

Answer: It is important to note that OSHA has administratively set minimum penalties for serious violations. The current minimum penalty for a serious violation is \$100; when the proposed penalty would amount to less than \$100, a \$100 penalty is still proposed. Under the proposed administrative changes to OSHA’s penalty policies, the minimum penalty will increase to \$500. The Agency supports any penalty policy that provides an adequate deterrent effect. While discussion of statutorily establishing a minimum penalty amount for serious and other-than-serious has not occurred, OSHA is in the early stages of considering whether violations directly related to fatalities should have increased penalty amounts.

Question 7: Robert Fitch was killed at the Archer Daniels Midland (ADM) plant in Lincoln, Nebraska in January 2009. OSHA issued 2 citations and proposed penalties of \$10,000 related to violations of the standard governing manlifts (29 CFR 1910.68). These two citations were deleted as part of an informal settlement agreement which also zeroed out the penalties.

a. Were there recognized falling hazards pertaining to the manlifts at the ADM facility?

b. Was abatement of the hazard feasible? If so, what were the feasible hazard abatement methods?

c. Did OSHA investigate whether there was history at this facility where employees had fallen off the same or similar type of manlifts and been hurt or killed? If not, why didn’t OSHA make this inquiry?

d. Would OSHA compliance directives have allowed OSHA to use the general duty clause under Section 5(a)(1) of the act to cite the employer for falling hazards leading to the death of this worker? If so, why wasn’t it used?

e. Was a \$10,000 penalty the maximum penalty available to OSHA for a fatality? Is this sufficient to deter future non compliance?

f. Was the deletion of these two citations justified on the grounds that 29 CFR 1910.68 grandfathered this belt driven manlift? What specific provisions in this standard grandfathered equipment that lacked fall protection and non-slip surfaces?

g. Was there a sound legal basis for deleting these two citations totaling \$10,000 in an informal settlement? If so, what was the legal basis?

h. Is it the case that the family learned about the settlement from the news media? Is this consistent with OSHA policy?

Answer:

a. Yes, falls from and around manlifts are recognized hazards.

b. Continuous belt manlifts, such as the one involved in this incident, are dangerous pieces of equipment. The hazard could have been, and eventually was, abated by the installation of personnel lifts (elevators) to replace the manlifts.

c. Yes, an establishment search of the company was conducted via the OSHA website during the inspection. There was no information obtained from this search, or during the inspection, about any injuries or fatalities associated with the manlift. OSHA also conducted management and employee interviews and did not learn of any previous incidents.

d. Continuous belt manlifts present a unique challenge to OSHA; as previously stated, they are dangerous pieces of equipment. The OSHA compliance directive on

manlifts provides that a General Duty Clause violation may be issued where the hazardous condition is easily identifiable. In this case, no such condition was found.

e. OSHA penalties are determined based on the number of violations, as well as the gravity of the violation. A violation that results in a fatality incurs the maximum penalty permitted based on the hazards being cited. In some cases, this may not be sufficient to deter employers from violating the standards.

f. The deletion of the two citations was not based on grandfathered provisions for belt driven manlifts. In the negotiated settlement agreement, ADM agreed to install a manufactured personnel elevator in exchange for deleting both citations. The installation of a personnel elevator was far more protective than repair of the existing manlift.

g. OSHA's Field Operations Manual grants an Area Director the authority to conduct informal conferences and make appropriate changes to citations. Specifically, Area Directors may amend abatement dates, reclassify violations (for example, willful to serious, serious to other-than-serious), and modify or withdraw a penalty, citation, or citation item, where evidence presented during the informal conference establishes that the changes are justified.

An informal conference was conducted in this case and the decision was made to delete the citations in exchange for the employer installing a personnel elevator. The settlement with ADM vastly improved the safety of its employees. The legal basis for grandfathering certain manlifts was not considered because the informal settlement was reached. However, that issue is currently being reviewed for use as guidance in future cases.

h. OSHA's Field Operations Manual discusses notifying individual(s) listed as emergency contact in the victim's employment records (if available), and/or the otherwise determined next-of-kin. The Agency's policy is to send the next-of-kin an inspection information letter, normally within five working days of determining the victim's identity and verifying the proper address to send communication.

In this case, the victim's employment record identified his son and daughter as next-of-kin, and both individuals were notified by letter of the inspection and citation information in accordance with OSHA policy. It is my understanding that the victim's niece, who was not designated next-of-kin and did not receive the inspection and citation information, learned of the OSHA settlement agreement from the news media. The Omaha Area Office's first contact with the victim's niece was on January 14, 2010, when she requested information. She certainly would have been provided with the citation information in March 2009 if she had requested it at that time, or was designated as next-of-kin in the victim's emergency contact information.

OSHA has decided that informing the next-of-kin of citations or settlements by letter is not adequate and the Agency is in the process of formally changing its procedures so that families are notified by personal meeting or phone call.

Question 8: OSHA has launched a National Emphasis Program (NEP) on under-reporting of injuries and illnesses. How many inspections have been initiated as of March 22, 2010, and of those inspections, please provide statistics on the number of violations by NAICS code?

Answer: As of March 22, 2010, 63 recordkeeping NEP inspections have been initiated. The majority of these inspections are still open, but thus far, five involve recordkeeping citations (part 1904).

Question 9: Would OSHA's ability to protect worker safety in cases where there was an imminent danger be facilitated if OSHA had the ability to issue imminent danger shutdown orders without having to first secure an injunction from a federal court judge?

Answer: OSHA's ability to protect worker safety in cases where there is an imminent danger would be enhanced if it had the ability to issue imminent danger shutdown orders without first having to secure an injunction from a federal court judge. When a Compliance Safety and Health Officer identifies an imminent danger and the employer will not voluntarily eliminate it, the CSHO immediately consults with the Area Director and obtains permission to post a Notice of Alleged Imminent Danger. The Area Director then contacts the Regional Administrator and determines whether to consult with the Regional Solicitor's Office to obtain a temporary restraining order. The Regional Solicitor's Office assesses the situation and, if warranted, will make arrangements for the expedited initiation of court action. However, imminent danger situations are often reported in locations that require considerable travel time for the Agency to reach. In such cases, it would be advantageous for the Agency to have the authority to call the employer in question and order that work be stopped until an investigator arrives on the scene.

Question 10: How many imminent danger orders were secured each year between the beginning of FY 2005 and the end of FY 2009 under the OSH Act? Please pro-

vide a timeline for each imminent danger proceeding, showing the date and time of inspection, the date and time of recognition of the imminency of the danger, the date and time when DOL first sought an order, and the date and time when the Court order was delivered to the employer.

Answer: During this time period, there were no judicial imminent danger orders secured by federal OSHA.

Question 11: The PAWA discussion draft of March 9, 2010, makes “any officer and director” liable under the criminal provisions of the OSH Act, in addition to employers as defined under Section 3 of the OSH Act. Does OSHA support criminal liability for “any officer or director”?

Answer: This proposed amendment would bring OSH Act criminal provisions more in line with those of certain Federal environmental statutes, which include “responsible corporate officer” in their definitions of persons to whom the statutes apply. The case law under those statutes indicates that this statutory term will strengthen the criminal liability provisions of the Act, and accordingly OSHA supports the amendment.

Question 12: Mr. Frumin testified that where employers use contract labor for especially hazardous tasks, the potential sanctions are non-existent for the corporations and executives who own or control the workplaces. In your view, how should this multi employer liability problem be corrected? Does it require a legislative change?

Answer: OSHA does not agree that corporations and their executives may escape liability under the Act by using contract labor to perform hazardous tasks. Corporate owners may be found liable for hazards to contract workers in several circumstances. First, the nature of the relationship between the corporation and the hired workers may be such that the corporation is the employer for purposes of the Act. The test for determining an employment relationship looks to the hiring party’s actual control over the performance of the work and the working conditions; labels such as “independent contractor” are not controlling. Second, in multi-employer worksites in all industry sectors, an employer that creates or controls a hazardous condition may be cited even if the only employees exposed to the hazard are those of another contractor. This means that a corporation may be liable if it has general supervisory authority over the worksite, including the power to correct safety and health violations by others, and fails to exercise reasonable care to detect and prevent violations on the site. Finally OSHA standards may impose duties on the corporate owner with respect to hazards affecting contract workers on the site. For example, the construction asbestos standard requires building or facility owners to determine the presence, location and quantity of asbestos containing material at the worksite and notify prospective employers bidding for work whose employees can reasonably be expected to work near such material. OSHA does not believe that a legislative change is required at this time.

Question 13: The March 9, 2010 discussion draft allows employers to seek a temporary stay of the abatement order. In issuing a stay, the OSHA Review Commission must consider whether the employer had demonstrated a substantial likelihood of success on its contest to the citation, whether the employer will suffer irreparable harm absent a stay, and whether a stay will adversely affect the health and safety of workers. Mr. Snare’s testimony on behalf of the Chamber of Commerce states that requiring abatement of serious violations pending contest of a citation case is “unjustified” and “an outrageous trampling of due process rights.”

a. Does OSHA agree with Mr. Snare that the requirement for abatement pending contest of serious violations coupled with the due process rights set forth in the discussion draft presents an “outrageous trampling of due process rights?”

b. Are the due process rights for employers who object to an abatement order for a serious violation under PAWA comparable to the due process rights for mine operators who object to an abatement order in the Mine Act?

c. Does Oregon OSHA require abatement of serious violations pending contest? Has the adoption of the requirement for abatement of serious hazards pending contest been challenged on due process grounds? If so, has it been overturned by the Courts in that state?

Answer:

a. Under the proposed provisions in the PAWA, the applicant must satisfy the traditional criteria for seeking a stay; these stay criteria are similar to those that apply under a wide variety of state and federal laws. In addition, PAWA calls for the Commission to develop expedited procedures for processing such applications. Thus, the PAWA provisions fall well short of being “an outrageous trampling of due process rights.”

Under the present OSH Act, abatement ordinarily is stayed while the case is within the jurisdiction of the Commission, but after a petition for judicial review has been filed, an employer must request a stay from the court of appeals under 29 USC 660(a). The burden placed on the employer to obtain a stay pending judicial review in the court of appeals is not severe. It is OSHA's experience that employers rarely seek such a stay when appealing a Commission order.

b. Yes, the proposed provisions of PAWA appear similar to the comparable provisions of the Mine Safety and Health Act, at Sections 106(a)(2) and 106(a)(3).

c. Yes. Oregon's occupational safety and health statute (at ORS 654.078) delays abatement pending contest for nonserious violations but requires abatement during contest for serious violations.

Although attorneys have objected, in State legislative hearings, to the required abatement of serious violations during contest provision on due process grounds, attempts to repeal this provision in the Oregon legislature have been unsuccessful. There have been no Court challenges of this provision.

[Whereupon, at 11:40 a.m., the subcommittee was adjourned.]

