LEGISLATION TO IMPROVE SAFETY AND SECURITY IN THE DEPARTMENT OF ENERGY

HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND POWER

OF THE

COMMITTEE ON COMMERCE

HOUSE OF REPRESENTATIVES

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LEGISLATION TO IMPROVE SAFETY AND SECURITY IN THE DEPARTMENT OF ENERGY

WEDNESDAY, MARCH 22, 2000

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON ENERGY AND POWER,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:30 a.m., in room 2322, Rayburn House Office Building, Hon. Joe Barton, (chairman) presiding.

Members present: Representatives Barton, Bilirakis, Stearns, Largent, Whitfield, Rogan, Shimkus, Wilson, Bryant, Ehrlich, McCarthy, Sawyer, Boucher, Wynn, and Strickland.

Staff present: Kevin Cook, science advisor; Elizabeth Brennan, legislative clerk; Tom DiLenge, majority counsel; and Edith Holleman, minority counsel.

Mr. BARTON. The Subcommittee of Energy and Power of the Commerce Committee, hearing on legislation to improve the safety and security of the Department of Energy will come to order.

The purpose of today's hearing is to consider legislation to improve safety and security in the Department of Energy. The three bills before us would provide a financial incentive for the Department of Energy's nonprofit contractors to take safety more seriously; would strengthen the Department's internal oversight of security, and would bring about external regulation of nuclear safety and worker safety.

I introduced the first of these three bills, H.R. 3833, to address what I view as an obvious inequity in how safety rules are enforced in the Department. Under the Price-Anderson provisions of the Atomic Energy Act, the Department can assess civil penalties against its contractors that violate DOE rules, regulations, and orders on nuclear safety. However, the Atomic Energy Act contains an explicit provision that exempts the Department's nonprofit contractors from paying any such fines when they commit a nuclear safety violation. If civil penalties are an effective tool to improve the safety and performance of the for-profit contractors, the same tool should be applied to the nonprofits as well. This particular problem was discussed in some detail at an Oversight and Investigations hearing last June on Department of Energy Worker Safety.

The second bill is H.R. 3906, which was introduced last week by Chairman Bliley. I join the Chairman and several of my colleagues from the committee in cosponsoring H.R. 3906. This bill will establish, in statute, an independent office to oversee security through-

out the entire Department of Energy complex. This is the same office that Secretary Richardson has already instituted at DOE headquarters, and it would function the same way that it does today.

The only change—and it is an important change—made by the bill is to establish a direct reporting line from the Independent Security Oversight Office to the Congress, so that the Congress has timely, uncensored information on security problems in the field. Security oversight has been the topic of numerous hearings, most recently the one held just last week in cooperation with the Oversight and Investigations Subcommittee of this committee.

The third bill, H.R. 3907, was introduced last week by Chairman Bliley and several of our colleagues on the committee, and also on the Science Committee. H.R. 3907 would put an end to the Department trying to regulate itself when it comes to safety manners.

Effective October 1, 2001, the Nuclear Regulatory Commission would assume regulatory and enforcement responsibility for nuclear safety throughout the Department of Energy complex, and OSHA will do the same for worker safety. The existing Defense Nuclear Facility Safety Board would be abolished and its staff resources made available to the Nuclear Regulatory Commission. I recognize that this is an ambitious undertaking, and an ambitious schedule, but the alternative of continuing to let the Department regulate itself is, in my opinion, much worse.

These bills are meant to address some of the most obvious safety and security problems in the Department of Energy. I consider these changes to be long overdue in the DOE complex.

The Department keeps offering us reassurances that their safety and security problems are always in the past and are now under control. That particular line holds true until the next headline. Just last week, for example, several workers at the Los Alamos Laboratory were exposed to plutonium.

In the face of that kind of accident, it's hard to argue that the Department of Energy is doing a fine job on safety and should continue to be left to its own devices in terms of regulating its safety programs.

I want to issue two challenges today: The first is to my fellow members on this subcommittee from both sides of the aisle. Mr. Upton, the subcommittee chairman of the Oversight and Investigations Subcommittee, pointed out at last week's joint hearing on safety and security that the Commerce Committee knows better than any other committee in the Congress, the extent of the Department's problems in these areas. The committee's concerns with the Department of Energy's safety and security systems go back years, even decades, and have been the subject of numerous hearings.

It is time that we take our extensive base of accumulated knowledge about the Department's safety and security problems and do something constructive to solve the problems. This has always been an area of bipartisan concern for the members of this committee, and I intend to keep it that way. I'm more than happy to work with all members of the subcommittee to address particular concerns to improve the bills that are before us. None of us want to read any more headlines about safety and security fiascos in the Depart-

ment, knowing that we, this subcommittee, holds the power to reduce those risks and to prevent future problems.

Second, I want to challenge our witnesses who are here today to help us improve the legislation. The three bills before are only starting points for discussion.

No doubt, there is substantial room for improvement in all three bills. I would expect that there will be significant changes to these bills before we take them to markup, but I do intend to go to markup and hope that we can go to markup before the House breaks for the Easter recess. That's not that far away in terms of legislative days. Please take advantage of today's hearing and work with us on the committee on both sides of the aisle over the next several weeks to make these bills better than they are today. We're serious about solving the problems, but we do want to do it right.

I want to welcome our witnesses today, and I look forward to hearing their thoughts on these bills. I'd like to point out, before I recognize Mr. Boucher for an opening statement, and then Mr. Sawyer and Mr. Rogan, that there are several bills on the floor today that originated in this subcommittee.

We have a nuclear waste bill, and we have an energy policy bill that came out of the Foreign Relations Committee, and members on this subcommittee are going to want to be involved in those bills on the floor, so we're going to have to have a tag-team system for us that want to hear the witnesses before us, and also want to participate in the floor debate. I don't want our witnesses to feel unloved, if we're shuttling back and forth several times.

With that, I would welcome our ranking member, the Honorable Rick Boucher of Virginia, for his opening statement.

Mr. BOUCHER. Thank you very much, Mr. Chairman. This morning we examine legislation which addresses the historical concerns of this committee regarding security and safety accountability at the Department of Energy.

The committee has taken steps over more than a decade to address this concern. This committee was responsible for the establishment of an Independent Oversight Office for Security at DOE, and was responsible for the creation of the Defense Facilities Nuclear Safety Board in lieu of external regulation.

Over the years, the committee has revealed in hearings, the most recent of which was conducted last year, the accountability problems caused by permitting the non-profit weapons laboratories to be exempt from fines and penalties for their safety violations.

I'm pleased that some of the legislation we're considering this morning addresses that concern. The fact that all of the agencies before us today essentially want to leave everything as it is, should not prevent us from looking more closely at legislative changes.

However, Mr. Chairman, I think we also need to be careful not to propose significant increases in agency responsibilities without providing those agencies with the necessary resources to accomplish the missions that we set forth in the legislative changes.

I look forward to hearing from these witnesses as we continue our review of these matters.

Mr. BARTON. I thank the gentleman and compliment him on the brevity of his opening statement. That is definitely an improvement over Congressman Hall.

Mr. BOUCHER. Good.

Mr. BARTON. It took him 5 minutes just to say hello. The gentleman from California, Mr. Rogan, do you wish to give an opening statement?

Mr. ROGAN. Mr. Chairman, you will compliment me also. I thank you for calling this hearing, and I expect that it will be very informative, and I don't have any further opening statement.

Mr. BARTON. The gentleman from Ohio, Mr. Sawyer, for an opening statement.

Mr. SAWYER. Thank you, Mr. Chairman, thank you for your leadership in calling this hearing, and in the measures that you have brought before us for our consideration.

Last August, the Department of Energy revealed that the Portsmouth gaseous diffusion plant in Piketon, Ohio, received plutonium-laced uranium for about 25 years, from the 1950's to the 1970's.

The employees at the plant were unaware that they were exposed to highly radioactive plutonium. It's a familiar scenario. It's an experience that's not isolated to Ohio.

The well-publicized problems in Paducah, Kentucky, Portsmouth's sister plant, are almost identical in its experience.

Plutonium first emerged as a clear threat to public health and safety in Piketon in 1993 when contaminated sediment was discovered in Little Beaver Creek, just off the plant's grounds.

In 1996, the Ohio EPA again found plutonium contamination in a three-acre plot on the east side of the plant grounds. It's unfortunate that the early findings in 1993 and again in 1996 did not receive a much stronger reaction from DOE, responsible as it is for internal oversight.

I particularly want to call attention to the work that our colleague and friend on this committee undertook in the work that Ted Strickland did in fighting for workers at the Portsmouth site, in finding Federal money for health screening and cleanup efforts.

I also very much appreciate Secretary Richardson's efforts to put the cleanup on a high-order agenda.

It took media pressure in the summer of 1999 to launch investigations, apologize to workers, and pledge compensation, 6 years after the contamination was found.

Congress missed the mark last year, I believe, by focusing too narrowly on the control of weapons information, as important as that may have been, failing to take into account an even larger national security threat, the possibility of an environmental disaster in America's back yard.

I believe Congress should consider all facets of public interest, environmental, health and safety, as well as security when considering DOE restructuring proposals.

And it is for that reason that I agree with the premise, Mr. Chairman, of the three bills being considered. We should make contractors liable. We should strengthen internal oversight, and we should expand external safety and environmental oversight as well.

I agree with you that there are some details of these proposals that need our careful attention, but I think we're on the right track with these reforms, and I look forward to our witnesses' comments

on how we can improve and strengthen accountability and oversight.

Again, Mr. Chairman, thank you.

Mr. BARTON. I thank the gentleman for that statement. Seeing no other members present to give an opening statement in person, the Chair would ask unanimous consent that all members not present have the requisite number of days to enter their openings statement in the record at the appropriate point. Is there an objection to such a unanimous consent request?

[No response.]

Mr. BARTON. Hearing none, so ordered.

[Additional statement submitted for the record follows:]

PREPARED STATEMENT OF HON. TOM BLILEY, CHAIRMAN, COMMITTEE ON COMMERCE

Thank you, Mr. Chairman. Today marks a very important step for this Committee. We have held countless hearings in past years on safety and security failures in the Department of Energy. Our Members have worked hard behind the scenes to improve the oversight of these important matters within the Department, and we have worked with other Committees to improve related legislation moving through the Congress.

Those efforts, while useful, have been mere "Band-Aids" that help to stop the bleeding at DOE but do not really cure the underlying problems. As retired Senator Rudman observed last year, the unique culture in the Department of Energy is extremely resistant to change. The three bills before the Subcommittee today make a giant stride toward changing that culture and getting at the root causes of some of these safety and security failures.

H.R. 3833 will correct a perverse system in which the non-profit DOE contractors do not pay any fines when they commit nuclear safety violations. H.R. 3906 will codify in law that same system of independent security oversight that Secretary Richardson has already put in place in DOE, and will provide for direct reporting to the Congress. And H.R. 3907 will bring to an end DOE's attempt to regulate itself. Instead, the Nuclear Regulatory Commission and the Occupational Safety and Health Administration will become responsible for safety regulation of the DOE complex. All three of these bills are meant to provide DOE and its contractors with the right set of incentives to take safety and security more seriously.

No doubt the DOE bureaucracy will resist these changes. Correcting failures is always difficult, and is always resisted by those invested in preserving the status quo. But the Nation cannot afford to keep relying in blind faith on the failed promises of DOE that things will get better. Taxpayers are going to have to spend hundreds of billions to clean up environmental contamination throughout the DOE complex and to compensate the workers harmed by DOE's careless safety practices. Americans now have worry that slipshod security measures may have allowed a foreign power to steal valuable nuclear weapons designs. It is time to bring about a fundamental change in the culture at DOE. We must ensure that these failures are never repeated in the future.

I commend Chairman Barton for his aggressive action on these bills, and I hope he can bring them to Subcommittee markup in the very near future.

Mr. BARTON. We want to welcome our first panel. Your statements are in the record in their entirety. We're going to start with the General Counsel at the Department of Energy. Then we will recognize the Chairman of the Nuclear Regulatory Commission, Mr. Meserve, and then we will recognize Mr. Conway—no, actually, Mr. Mande is more to the right, so we'll recognize him and then Mr. Conway.

The subcommittee also wants to express its condolences to Commissioner McGaffigan on the passing of your wife. We understand that that was a very traumatic event, and I personally have a great degree of sympathy for you since I have a brother who has liver cancer that's been diagnosed as incurable. So you have our prayers on that.

Ms. Sullivan, we're going to recognize you for 7 minutes. We do thank you for getting your testimony in on time, barely, but you did get it in on time. And so that's a good way to start this hearing. Ms. Sullivan?

STATEMENTS OF MARY ANNE SULLIVAN, GENERAL COUNSEL, U.S. DEPARTMENT OF ENERGY; HON. RICHARD A. MESERVE, CHAIRMAN; ACCOMPANIED BY HON. GRETA JOY DICUS, COMMISSIONER; HON. NILS J. DIAZ, COMMISSIONER; HON. EDWARD McGAFFIGAN, JR., COMMISSIONER; HON. JEFFREY S. MERRIFIELD, COMMISSIONER,NUCLEAR REGULATORY COMMISSION; HON. JEROLD R. MANDE, DEPUTY ASSISTANT SECRETARY FOR LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; AND HON. JOHN T. CONWAY, CHAIRMAN, DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Ms. SULLIVAN. Thank you, Mr. Chairman and members of the committee for the opportunity to discuss with you, H.R. 3907, concerning external safety regulation; H.R. 3383, concerning civil penalties for DOE nonprofit contractors; and H.R. 3906, concerning internal security oversight at the Department.

I'd like to begin with external regulation. During the 1990's, the Department engaged in a systematic evaluation of the advisability of external safety regulation. The culmination of this effort was a joint pilot program by the Department and the NRC to determine the cost and benefits associated with NRC regulation.

Unlike previous studies, the joint pilot program involved real-time simulation of external regulation. The findings of the joint pilot program were quite informative, and led to the decision by the Secretary not to seek external regulation by NRC.

Secretary Richardson pointed to three key elements in concluding that DOE should not proceed with NRC regulation: The potential difficulties in implementation, the potential costs, and the absence of a clear benefit to safety.

Implementation of NRC regulation would involve a number of difficult, unresolved issues. I'll offer just a few examples:

NRC regulations and standards were developed for commercial facilities. They were not developed with DOE's complex and diverse activities in mind.

Application of NRC regulations to DOE activities would require a substantial effort to accommodate the unique hazards, operations, and security considerations at DOE.

NRC does not have experience in regulating certain kinds of activities at DOE, such as accelerators. In addition, the pilot program did not even consider defense nuclear facilities for which there is no corresponding activity in the commercial sector.

The joint pilot program could not reach consensus on whether the licensee for a DOE activity should be the Department, its contractor or both. On balance, DOE believed it was essential for it to be the licensee, because DOE is ultimately responsible for the facilities. NRC could not accept this fundamental proposition.

Many DOE facilities are old. They have physical layouts and equipment that cannot be readily changed. Backfit and other legacy issues could be an especially difficult and costly problem for facilities with relatively short remaining lives.

The Commission has specific requirements relating to the schedule for deactivation and decommissioning. These are intended to ensure that licensees complete their license responsibilities while they still have a secure financial base. This rationale carries considerably less weight when applied to a Federal agency. More compelling funding priorities typically account for delay in D&D activities, and external regulation doesn't solve the funding problem.

Turning to the cost impacts, the joint pilot program did not attempt to estimate incremental costs of external regulation DOE-wide; rather, it focused only on the costs of NRC regulation of the particular pilots that were analyzed.

Even so, some of the Department's estimates were substantially higher than NRC's. The variation resulted from uncertainty in the range of regulatory approaches that the NRC might actually use for the many DOE activities that have no current counterpart in the NRC regulatory regime.

The essential learning was that virtually every DOE activity would have to be separately reviewed to determine the regulatory regime, and the associated costs cannot be predicted with any certainty.

We do know from our experience with NRC's certification of the gaseous diffusion plants, the license transfer for Ft. St. Vrain, and the licensing of the Idaho Spent Fuel Facility, that initial cost estimates tend to be considerably lower than actual costs.

The final, but, it seems to me, critical point is that the joint pilot program did not demonstrate that NRC regulation would result in more protection of workers, members of the public, or the environment.

This is because of the tremendous strides, certainly not yet complete, that the Department has made to improve safety. This improvement results from, among other things, from the creation of the Office of Enforcement and Investigation, adoption of integrated safety management requirements in DOE contracts, and independent oversight by the Defense Nuclear Facilities Safety Board.

In light of the numerous unresolved issues associated with transition to NRC, and the increasing success of initiatives to improve safety at DOE, the Department cannot support H.R. 3907.

We believe that the substantial resources that would be required to prepare for a shift to NRC regulation would be better spent on cleanup and on ensuring compliance with existing safety requirements.

Let me turn now to the issue of civil penalties for DOE nonprofit contractors: DOE supports subjecting its nonprofit contractors to civil penalties, limited to the amount of fee the nonprofits receive under their contracts.

H.R. 3383 would subject nonprofits to civil penalties, but it doesn't limit the amount of the penalties to the fee provided for in the contract. The risk with that approach is that the nonprofits may be unwilling to contract with the Department because of fears of putting their endowments at risk.

Alternatively, they may insist on fee increases, disproportionate to the additional risk the civil penalties represent. These higher fees would divert funds away from fundamental DOE research.

Accordingly, the Department would like to work with the committee on a provision to limit the penalties for nonprofits to the amount of fee.

Finally, on the issue of internal security oversight, H.R. 3906 would require the Secretary to maintain an Office of Independent Security Oversight, specify that Office's jurisdiction, and impose certain specific reporting requirements on both the Secretary and the Director of the Office.

Among the Secretary's responses to concerns over security last year, was the creation of just such an office, as the Chairman recognized. This new office had its origin in the Office of Oversight, reporting to the Assistant Secretary for Environment, Safety, and Health.

The new office provides independent analysis of the performance of safeguards and security functions across the Department, but does so directly under the Secretary.

Since it was created, the office has successfully applied the full range of its appraisal skills to the Department, and as the Director testified last week, it will continue to do so with regard to the NNSA.

The Department's threshold concern about H.R. 3906 is that it proposes to rigidly define the structure of an office that already exists. The office was created as a timely response to significant security concerns.

The Department of Energy Organization Act gives the Secretary broad reorganization powers to respond to such circumstances. The Secretary wisely exercised those powers by restructuring and refocusing an existing office, giving it substantially new and important functions, and requiring it to report to him.

When the Congress institutionalizes the structure and mission of an organization like that, it deprives the Department and future Secretaries of the ability to adapt to changing circumstances in the future.

This concern is aggravated by other provisions of the bill. Section 1 would mandate that the Director is not subject to supervision by anyone other than the Secretary. This undermines the Secretary's authority to decide internal reporting matters.

Section 2 would require the Secretary and the Director to report to the Congress, areas where they have differences of opinion. These required revelations would impair the Secretary's ability to receive frank and candid advice from his subordinates.

In addition, they improperly subject to Congressional refereeing, any of the Secretary's management decisions with which the Director might disagree.

In short, we are concerned that H.R. 3906 would, through legislative mandate, threaten the success of a positive management response to real problems.

Mr. BARTON. Ms. Sullivan, you're 2 minutes over your 7 minutes. Is that it?

Ms. SULLIVAN. I'm concluded. Thank you very much for the opportunity to address these important matters.

[The prepared statement of Mary Anne Sullivan follows:]

PREPARED STATEMENT OF MARY ANNE SULLIVAN, GENERAL COUNSEL, U.S. DEPARTMENT OF ENERGY

Thank you, Mr. Chairman and members of the Committee, for the opportunity to discuss: H.R. 3907, concerning external safety regulation of the Department of Energy (DOE) by the Nuclear Regulatory Commission (NRC) and by the Occupational Safety and Health Administration (OSHA); H.R. 3383, concerning civil penalties for safety violations by non-profit DOE contractors; and H.R. 3906, concerning internal security oversight within the Department.

EXTERNAL REGULATION

I will begin with the issue of external safety regulation of the Department. During the 1990's, the Department engaged in a thorough and systematic evaluation of the advisability of external safety regulation of the Department. Options considered included broadening the scope of oversight through the existing Defense Nuclear Safety Board, and transferring responsibility to the Commission. The culmination of this effort was a joint pilot program by the Department and the Commission to determine the costs and benefits that would be associated with the transition to external regulation under the Commission. Unlike previous studies and analyses of the issue of external safety regulation, the joint pilot program involved real-time simulation of external regulation activities. Specifically, representatives of the Department and the Commission worked together closely to determine what could be expected if the Commission assumed regulatory responsibility for Lawrence Berkeley National Laboratory (LBNL), the Receiving Basin for Offsite Fuel (RBOF) at Savannah River, and the Radiochemical Engineering Development Center (REDC) at Oak Ridge National Laboratory.

In addition to the joint pilot program, the Department has actual experience with NRC licensing of facilities involving commercial nuclear materials which are subject to NRC licensing under the Energy Reorganization Act. DOE applied for and was granted a transfer of the NRC materials license for the Fort St. Vrain Independent Spent Fuel Storage Installation. DOE has also received a license for the dry storage of core debris from the Three Mile Island Unit Two (TMI-2) reactor at the Independent Spent Fuel Storage Installation at Idaho. The Department also has experience with the Commission in the certification of the gaseous diffusion plants (GDPs).

The findings of the joint pilot program were quite informative and led to the decision by the Department not to seek a greater level of external safety regulation of the Department than currently exists. In his February 19, 1999, letters to Congress, Secretary of Energy, Bill Richardson, characterized the insights gleaned from the joint pilot program as follows:

> These pilots have highlighted a number of significant, unresolved issues including: ascertaining whether DOE or its contractors should most appropriately hold a license; the difficulties in assessing facility design under NRC standards in some older facilities because we lack original construction plans; the extent to which older facilities can be "retrofitted" or upgraded to meet NRC standards; applicable standards for safeguards and security; deactivation and decommissioning; and cost. Our analysis to date also indicates that many of the potential benefits that we expected to see from external regulation have not been demonstrated, and appear to be outweighed by associated costs and difficulties raised in the pilot projects.

I will elaborate on (1) the potential difficulties in implementing external safety regulation, (2) the potential costs of external safety regulation, and (3) the expected benefits for safety.

Implementation Issues

Implementation of external safety regulation would involve the following unresolved issues:

- There are no "standard" DOE facilities. Most DOE activities would have to be separately reviewed to determine the individual elements of work that have no obvious counterpart in the NRC regulatory regime. Thus the full complement of requirements to effect external regulation of each of these activities cannot be predicted with certainty.
- NRC regulations and standards were developed for commercial facilities, many of which have a high degree of similarity to one another. They were not developed with the complex and diverse activities that are found in the DOE complex in mind. Application of NRC regulations and standards to DOE activities would require substantial effort to accommodate the unique hazards, operations, and security considerations associated with the DOE complex. NRC members of the

joint pilot program team suggested that existing NRC regulations and standards could be made to fit through exemptions or through the flexibility of a "risk-informed, performance-based" approach to licensing. However, securing an exemption can require considerable time and effort and "risk-informed, performance-based" licensing is still a work in progress. In many cases, the Commission might need to adopt new regulations and standards for DOE activities or go through an administrative process to adopt existing DOE standards.

- The Commission does not have experience in regulating certain DOE activities. For example, accelerators do not typically involve source, special nuclear, or by-product materials and thus do not come within the Commission's jurisdiction. In fact, commercial accelerators have long been regulated by State authorities. Similarly, many of the kinds of research activities involving source and by-product materisals that occur at Lawrence Berkeley National Laboratory are regulated by States under Agreement State authority when these research activities take place at non-federal facilities such as educational and commercial laboratories. It should also be noted that the joint pilot program did not consider external regulation of DOE defense nuclear facilities. These defense facilities conduct many unique activities for which there is no corresponding activity in the commercial sector and thus for which the Commission has no experience.
- NRC requirements, especially those relating to material control and accountability (MC&A), reflect safeguard and security considerations for commercial activities. The safeguard and security considerations for DOE activities are somewhat different. These differences do not relate to safety concerns.
- The joint pilot program identified numerous impacts that would arise from regulation by the Commission of some activities at a DOE site but not other activities at the same site. These impacts would relate primarily to the treatment of collocated workers and of shared-site resources. At many DOE sites, it might not be possible for the Commission to regulate DOE non-defense activities without also regulating DOE defense nuclear facilities.
- The joint pilot program could not reach consensus on whether the licensee for a DOE activity should be the Department, its contractor, or both. A strong argument can be made that the Department should be the licensee because it is responsible for the safety of its activities and provides the funding to the contractor. On the other hand, the contractor is the entity responsible for actually operating the facility, and thus for implementing license requirements. On balance, the Department concluded it should be the licensee in all such cases.
- Many DOE facilities were constructed many years ago and possess physical layouts and equipment that cannot be readily changed. If the Commission were to assume regulatory responsibility for these facilities, it would be necessary to deal with backfit and other legacy issues that do not relate specifically to safety, but rather to technical compliance with existing NRC requirements. This would be an especially difficult and potentially very costly problem for facilities with a relatively short remaining life.
- The Commission has many requirements relating to the schedule on which certain activities must be undertaken. In many cases, especially with respect to deactivation and decommissioning, these schedule requirements are intended to ensure that the licensee (often a private entity) completes its responsibilities under the license while it still has a secure financial base. That same rationale carries considerably less weight when applied to an agency of the federal government. NRC was offered that to impose these same requirements on DOE unilaterally was not likely, but it could not guarantee immediate relief without a legislative fix..

Cost Impacts

At the outset, it should be emphasized that the joint pilot program did not attempt estimate incremental costs of external regulation, DOE-wide. Rather, it focused on estimating the costs that would be associated with the assumption by the NRC of regulation of LBNL, RBOF, and REDC. The estimated costs can be summarized as follows:

- With respect to LBNL, the estimated costs to the Department were $700,000 of transition costs and $500,000 of annual costs. The estimated costs to the Commission were $430,000 of transition costs (primarily to support a rulemaking on the regulation of accelerators) and $30,000 of annual costs.
- With respect to RBOF, the estimated costs to the Department were $6 to $13.5 million of transition costs and $1.5 to $3.2 million of annual costs. The estimated costs to the Commission were $678,000 of transition costs and $347,000 of annual costs.

- With respect to REDC, the estimated costs to the Department were $900,000 to $5 million of transition costs and $1.1 million of annual costs. The estimated costs to the Commission were $1.1 million of transition costs and $347,000 of annual costs.

Some of the Department's estimates are substantially higher than the lower limit estimates provided by NRC staff. The variation in estimates results from uncertainty in the range of approaches that the NRC staff would actually use in resolving specific issues, based on the NRC staff practices that have been used in recent years. For example, the REDC regulatory pilot indicated two possible outcomes for regulating materials (such as americium-252) central to the operation of REDC. One outcome could be that the Commission would be willing and able to reach a conclusion that DOE contractor's practices provided equivalence with NRC's safety requirements, and that minimal costs impacts could be obtained through a combination of waivers, adoption of DOE safety requirements, and risk-informed, performance based regulation. The other outcome could be that intervenors, or the NRC staff, would cause the Commission to promulgate new sets of requirements, and then demand compliance with the newly promulgated and prescriptive requirements. It may well be that the lower range of cost impacts would be obtained for all types of DOE activities, but it would be a mistake to believe that such an outcome is guaranteed.

There are many DOE activities that have no direct counterpart in the NRC regulatory regime, and therefore, the cost impacts would depend on whether analogs to present regulatory practices were possible and practical, or whether new approaches would have to be developed. The joint pilot program has shown that, in some cases, it is possible to use analogs, to assume that a broad regulation (such as 10 CFR Part 70) is applicable, and to separate the components of that regulation into elements of a fact-based cost estimate. However, the Department believes that virtually every element of each DOE activity would have to be separately reviewed. to determine whether it could be regulated under the existing NRC regulatory regime or whether the Commission would have to modify existing requirements or develop new requirements. Where there is no direct counterpart in the NRC regulatory regime, the costs associated with NRC regulation of the work cannot be predicted in advance with any certainty.

Any attempt to extrapolate the estimated costs to the DOE complex as a whole must take into account that the estimates developed as part of the joint pilot program assumed favorable regulatory treatment of many issues by the Commission and that LBNL, RBOF, and REDC represent relatively simple facilities from the viewpoint of regulation by the Commission. In addition, experience with the license transfer for Fort St Vrain, the licensing of the spent fuel facility in Idaho, and the certification of the GDPs indicates that initial estimates of the costs associated with regulation by the Commission tend to be considerably lower than the actual costs.

In the case of the Fort St. Vrain ISFSI, the Department applied for and was granted a transfer of the NRC materials license. This facility is perhaps the best possible and most straight forward application of NRC regulations to a DOE activity. The facility was built and operated under NRC regulation and the regulations were drafted with this specific type of facility and activity in mind: dry storage of commercial spent nuclear fuel. However, it took 3 years to effect the license transfer. This was primarily a result of the Department's needing to provide additional documentation about its management making minor modifications to strictly adhere to specific details of NRC requirements and NRC staff's unfamiliarity with the Department's management approach and safety requirements. Another significant cost involved with the transfer was the cost of creating and instituting a quality assurance program that would meet NRC standards because the Department's approach to obtaining a high level of quality is entirely different than that of the Commission.

The Department has also licensed the Independent Spent Fuel Storage Installation at Idaho for the dry storage of TMI-2 core debris. A significant difference existed in the seismic design standards between the Department and the Commission for low to moderate risk facilities such as this one. The Department's Idaho Operations Office applied for and was granted an exemption to the NRC seismic requirements. Had the Department not been granted this regulatory exemption, it was estimated that the facility would have cost as much as an additional $7 million to build. To meet milestones for completing construction and moving fuel into the dry storage facility contained in existing legal agreements with the State of Idaho, the Department found it necessary (and accordingly notified the Commission in writing) to proceed at risk by releasing construction of facility equipment prior to design approval by the Commission. Although the Commission did eventually approve the design and no milestones were missed, the implications of this event to future licensing activities are apparent: there is no reason to doubt the Commission's ability and will-

ingness to grant appropriate exemptions, but there is a risk that needed and appropriate exemptions would not be immediately forthcoming.

In the case of the GDPs, the transition costs were estimated initially to be approximately $60 million. Thus far, the actual transition costs have exceeded $300 million. Concurrently, the transition period increased from an estimate of 2 years to 3 1/2 years. It should be noted that the initial cost estimate was based on DOE's general knowledge of NRC fuel facility requirements (10 CFR 70) as well as initial interaction with NRC staff. The Commission, however, had limited standards to regulate the GDPs due to the unique nature of the facilities and operations. An extensive rulemaking process was needed to develop new regulatory standards.

Improvements in Safety

The joint pilot program did not demonstrate that external safety regulation could be expected to result in more protection of workers, members of the public, or the environment. This results from: (1) DOE's emphasis on the identification and implementation of appropriate nuclear safety requirements; (2) creation of the Office of Enforcement and Investigations and increased use of field offices to enforce nuclear safety; (3) contract reform, including the adoption of integrated safety management requirements in DOE contracts; (4) continued independent oversight of nuclear safety matters by the Office of Environment, Safety and Health as well as the Defense Nuclear Facilities Safety Board and action on formal plans to address nuclear safety issues, and (5) public participation in decisions concerning the safety of DOE nuclear activities.

- The Department has improved the quality of the safety requirements applicable to its nuclear activities in several ways. It streamlined the nuclear safety orders and related documents in the DOE directives system to reduce unnecessary and redundant requirements. At the same time, where appropriate, the Department adopted certain requirements as regulations through the rulemaking process, including: (1) procedural requirements for DOE nuclear activities, including procedures for investigating possible violations of nuclear safety requirements and assessing civil penalties where such violations occur; (2) radiological protection requirements for workers and other persons involved in the conduct of DOE nuclear activities; (3) quality assurance requirements; (4) requirements on workplace substance abuse programs at DOE sites; and (5) whistleblower protection requirements. The Department currently is completing additional regulatory requirements on safety management and on radiological protection of the public and the environment. In addition, the Department engaged in a comprehensive exercise to ensure that the requirements used in connection with a particular activity are sufficient to assure adequate protection of workers, members of the public and the environment in a manner commensurate with the type and complexity of the activity and the associated hazards.
- The Department established the Office of Enforcement and Investigations, which reports to the Assistant Secretary for Environment, Safety and Health, to investigate possible violations of the nuclear safety requirements and, where appropriate, to impose civil penalties and other remedies and corrective actions. DOE field office and program personnel assist in investigations and enforcement and provide regular oversight of contractor activities.
- The Department has undertaken an extensive reform of its contracting process to improve the management of work and safety throughout the DOE complex. Specifically, it has revised the Department of Energy Acquisition Regulation (DEAR) to include provisions on performance-based contracting, competition, award fees, property management, record-keeping, insurance, litigation, claims, accountability provisions, and the conditional fee policy. The most significant contract reform affecting nuclear safety is the adoption of DEAR clauses that mandate: (1) the use of integrated safety management systems and (2) the identification of laws, regulations, and DOE directives to be applied to activities under DOE contracts.
- The DEAR clause on the *Integration of Environment, Safety and Health into Work Planning and Execution* establishes a standard prescribed contract clause on how contractors must perform work in a manner that ensures adequate protection for employees, the public, and the environment. It provides for: (1) defining the scope of work; (2) identifying and analyzing hazards associated with the work; (3) developing and implementing hazard controls; (4) performing work within controls; and (5) providing feedback on adequacy of controls and continuing to improve safety management. The clause establishes the principles that: (1) line managers must be given responsibility and held accountable for implementing health and safety requirements; (2) clear lines of authority and responsibility must be established; (3) workers and managers must have competence to assess and deal with the hazards; (4) resources must be effectively allocated; (5) hazards must be evaluated and an agreed-upon set of standards and requirements must be established before work is

performed; (6) administrative and engineering controls must be tailored to the work and associated hazards; and (7) conditions and authorization authorities must be agreed upon. The clause specifically requires each contractor to submit a safety management system description for approval by the Department that explains how the contractor will implement the system to establish performance objectives, measures and commitments; integrate work planning, hazards assessment, hazard controls, budget and resource planning and continuous improvement.

• The DEAR clause on *Laws, Regulations and DOE Directives* is an integral part of the safety management system. This clause requires clear identification of requirements, including nuclear safety requirements, to be implemented in connection with nuclear activities under a contract. In general, the clause requires a contractor either to incorporate all applicable requirements in DOE Orders and regulations or to use a tailoring process to develop a set of environment, health and safety requirements that is commensurate with the complexities and hazards associated with the work to be performed under the contract.

• Since its creation in 1988, the Defense Nuclear Facilities Safety Board has provided independent oversight of DOE defense nuclear facilities and made many valuable recommendations on nuclear safety issues. Implementing these recommendations has been and continues to be an impetus for enhancing safety throughout the DOE complex. Indeed, DOE has never rejected a Defense Board recommendation.

• The Department has adopted and implemented a Public Participation Policy to foster improvements in nuclear safety by ensuring decisions benefit from the perspective of those interested in and affected by DOE activities, such as workers and those who live in communities where DOE activities take place. In furtherance of this policy, the Department has established citizens advisory boards (CABs) at all its major sites to establish open, ongoing, two-way communication, both formal and informal, between the Department and its stakeholders. This process provides a diverse collection of opinions, perspectives, and values and enables each party to learn about and better understand each other's views and positions. As a result of such communication, the Department can make better, more informed decisions.

Through these initiatives, the Department has substantially improved its ability to provide a safe and healthy workplace, protect the communities near our facilities, and preserve the environment. We now have a strong safety structure under which: work and hazards are evaluated; appropriate safety requirements are identified and imposed on our contractors; integrated safety management operates to make compliance with these requirements an integral part of how work is performed; safety performance is an important part of determining contract fees; the Office of Enforcement investigates possible violations of safety requirements and imposes civil penalties where appropriate; and the Defense Board and our Independent Oversight Office verify how well the structure is working and make recommendations for improvements.

H.R. 3907

In light of the numerous unresolved issues associated with a transition to external safety regulation, the potential costs of such a transition, and the ongoing success of the initiatives to improve safety throughout the DOE complex, the Department cannot support legislation to mandate external safety regulation by NRC of the Department. The substantial funds that would be required to prepare DOE facilities for a shift to external regulation would be better spent on achieving the Department's cleanup and mission goals. The manpower that would be required to implement a transition to external regulation would be better used in overseeing compliance with the Department's existing safety requirements.

With respect to H.R. 3907, I note that the bill does not address in a meaningful manner the implementation issues identified by the joint pilot program and does not provide funding for the increased costs to both the Department and the Commission. In addition, the bill would abolish the Defense Board and extend external safety regulation to DOE defense nuclear facilities without any examination of the potential effects of such action on the Department's national security missions.

CIVIL PENALTIES FOR NONPROFIT DOE CONTRACTORS

In its *Report to Congress on the Price-Anderson Act* (DOE Price-Anderson Report), the Department indicated that it supported continuation of the Congressional decision in the 1988 Price-Anderson Act Amendments not to apply civil penalties to nonprofit contractors. This decision reflected the belief of the Department that major universities and other nonprofits would be unwilling to put their educational endowments at risk for contract-related expenses such as civil penalties and that the increase in fees they would insist upon to protect against even the slim possibility of such a result would outweigh the benefit of being able to assess penalties.

The Department also indicated that all nonprofit contractors, nonprofit subcontractors and nonprofit suppliers should be treated the same with respect to the applicability of civil penalties. Accordingly, it suggested eliminating the statutory exemption for specific named contractors and their subcontractors and suppliers and replacing it with a generic exemption to cover all nonprofit contractors, nonprofit subcontractors and nonprofit suppliers. This change would eliminate the need to identify particular entities by name in the statute and also eliminate the distinction between "educational" nonprofits and other nonprofit entities. As part of such a change, the exemption of for-profit subcontractors and suppliers to nonprofit contractors exempt by statute would be eliminated.

Subsequent to the submission of the DOE Price-Anderson Report to Congress, several DOE nonprofit contractors indicated they could accept civil penalties if the amount of the civil penalties were limited to the amount of the fee they received under their contracts with the Department. Recently, S. 2162 has been introduced in the Senate to extend the Price-Anderson Act. This Senate bill contains a provision that would make a nonprofit DOE contractor subject to civil penalties up to the amount of the fee provided for in its contract with the Department. The Department supports this approach.

H.R. 3383

H.R. 3383 would likewise make nonprofit DOE contractors subject to civil penalties, but it contains no provision that would tie the amount of a civil penalty imposed on a nonprofit DOE contractor to the fee provided for in its contract with the Department. The Department supports subjecting non-profit contractors to civil penalties up to the amount of the fee, but would need to consider further the implications of allowing for such penalties to exceed the amount of fee provided for in the contract.

INTERNAL SECURITY OVERSIGHT

Now I will turn to H.R. 3906, which proposes to specify for DOE the internal mechanisms and authorities to independently assess the effectiveness of its policy and site performance in the areas of safeguards and security and cyber security. This bill would require the Secretary of Energy to maintain an "Office of Independent Security Oversight," specify that Office's jurisdiction, and impose peculiar statutory reporting requirements on both the Secretary and the Directory of the Office.

First, to put my comments in context, I would like to describe the creation and functions of the Department's existing Office of Independent Oversight and Performance Assurance. In response to numerous concerns over security last year, Secretary Richardson announced his Security Reform Package on May 11, 1999, a significant feature of which was the creation of the Office of Independent Oversight and Performance Assurance reporting directly to the Secretary.

This new office had its origin in the Office of Oversight under the Assistant Secretary for Environment, Safety and Health, which had been responsible for the performance of safety and security reviews. The new Office provides independent analysis of the performance of safeguards and security and other critical functions from across the Department, but does so directly under the Secretary.

Since it was created in May, the Office of Independent Oversight has been headed by Mr. Glenn S. Podonsky. The office is staffed by highly qualified and experienced personnel, many of whom are recognized as national experts in their individual security disciplines. The personnel are trained inspectors, skilled at determining, on a practical level, the adequacy of protection programs. The Office successfully has applied the full range of its appraisal skills to the Department, and as Mr. Podonsky testified before the House Commerce Committee on March 14, 2000, it will continue to do so with regard to the NNSA.

My threshold objection to HR 3906 is that it proposes rigidly to define the structure of an office which already exists within the Department. The office was created by Secretary Richardson pursuant to his management authorities under the Department of Energy Organization Act as a timely response to significant security concerns facing the Department. The Department of Energy Organization Act gives the Secretary broad reassignment powers and appropriate reorganization ability to respond to changing circumstances. The Secretary wisely exercised those powers to respond to the Departmental security concerns by restructuring and refocusing an existing office, giving it substantially new and important functions, and requiring it to report directly to him.

When the Congress institutionalizes the structure and missions of an organization like the existing Office of Independent Oversight, which was created by the Sec-

retary to address a particular concern at a particular time, it deprives the Department and future Secretaries of the ability to adapt to changing circumstances and to craft appropriate future responses, as the Secretary did in the case of the existing Office of Independent Oversight and Performance Assurance. The result is a significant erosion of the Secretary's management authority. Rather than acknowledging the appropriateness of the Secretary's action in creating the Office, HR 3906 potentially would hamstring the Department in the future by institutionalizing an existing function rather than permitting the Secretary to retain needed flexibility to respond appropriately to changing circumstances.

This threshold concern is aggravated by other specific provisions of the bill. The provision in Section 1(a) that would mandate that the Director report directly to the Secretary and is not subject to supervision by any other office within DOE is further evidence of the bill's objectionable erosion of the Secretary's internal management authority. The Secretary must retain the authority to decide the internal reporting chain.

Section 2 contains additional objectionable features. Section 2(8) would require that the Office of Independent Security Oversight to transmit to the Congress and the Secretary annual reports, that include a description of any significant security policy decision with which the Office Director is in disagreement. Section 2(b) would also require the Secretary to transmit to the Congress a report which includes an identification of each significant problem, deficiency, or recommendation in the Office's annual report with which the Secretary is in disagreement, and an explanation of the reasons for any failure on the part of DOE to complete corrective actions. Read together these two subsections would require the Secretary and the Director to report to the Congress areas where they have a difference of opinion. These required revelations to the Congress by Departmental subordinates impairs the Secretary's ability to receive frank and candid advice from his subordinates. In addition, these peculiar reporting requirements also improperly subject to Congressional refereeing any of the Secretary's management decisions with which the Director might disagree. Disagreements regarding execution of the law are proper subjects of decisions by the President and his immediate subordinates, not by elements of the legislative branch. On a practical level, these concurrent reporting requirements would potentially undermine the kind of positive working relationship between the Secretary and the Director that has enabled the office to function so effectively since its creation.

Section 2(d) contains a similar requirement for special reports. The Director would be required to report immediately to the Secretary and the Congress whenever the Director becomes aware of particularly serious or flagrant problems or deficiencies. The Secretary then, within seven days after receiving such a report, would be required to report to the Congress on the corrective actions taken to address such problems. This concurrent reporting requirement would again inappropriately insinuate the Congress into the executive decisionmaking process and execution of laws. Concurrent reporting requirements may breach the separation of powers by disrupting the chain of command within the executive branch. Here they would impede the Secretary in exercising his responsibility to supervise and control departmental subordinates. Moreover, this provision would infringe the Secretary's authority, as the President's immediate subordinate and as the head of an executive agency, to determine the executive branch's views that are presented to Congress.

Finally, I have similar concerns about sections 2(e) and 2(f), which inappropriately would prohibit the Secretary from altering, modifying, or otherwise changing the substance of certain reports to the Congress or testimony by his subordinate Office Director. The Congress must determine what laws the President and Cabinet officers are to enforce, but the Congress may not impair the President's ability—through the Secretary—to determine the nature of official communications to the Congress. Nor the Congress should dictate how the Executive Branch is to execute the law. Efforts such as those contained in this bill which seek to determine the precise organizational structure of an executive branch department and the chain of command with respect to internal management decisions serious threaten the Secretary's ability to effectively and efficiently fulfill his responsibilities to execute the law.

Mr. BARTON. Thank you. We're going to recognize the Chairman of the NRC, Mr. Meserve. I'm going to run and vote. Congresswoman Wilson is going to take the Chair, and I will rush back. We're going to try to continue the hearing without having to suspend for the vote.

You are recognized for 7 minutes.

STATEMENT OF HON. RICHARD A. MESERVE

Mr. MESERVE. Good morning. It is a pleasure to appear before you today to discuss the proposal for external regulation of facilities owned or operated by the Department of Energy and in particular to explain the Commission's views in the recently introduced bill, H.R. 3907, External Regulation of the Department of Energy Act.

I am joined by my fellow Commissioners Greta Dicus, Nils Diaz, Edward McGaffigan, Jr., and Jeffrey Merrifield.

As the Commission has previously testified, the Commission believes that the NRC could be the sole regulator of DOE's nuclear and radiological safety if the Congress determined that such regulation was in the best interests of the nation. The Commission also testified that we believe that a majority of the technical, policy and regulatory issues identified during the NRC-DOE pilot program at three DOE facilities can be adequately resolved in the existing NRC regulatory framework.

We see a path to resolving the issues and we continue to stand by our previous testimony.

Today we are testifying on a significantly different approach than that discussed in our previous testimony. H.R. 3907 would require the NRC to assume regulatory jurisdiction over the entirety of DOE's activities, both defense and nondefense at one time. The Commission strongly prefers a multiphased approach.

Our concern is that a one-phase approach could divert significant agency resources from important ongoing regulatory initiatives relating to current NRC licensees. These initiatives, which include license renewal, license transfers, a new reactor oversight process, a more effective license amendment process, and dry cask storage for spent nuclear fuel, have been urged by Congress and require significant agency resources to bring to fruition. NRC previously testified that it could initially regulate the relatively less complex, less costly facilities of DOE's Office of Energy Research, now the Office of Science, and the Office of Nuclear Energy, which is now the Office of Nuclear Energy, Science and Technology and that, subject to receiving adequate resources, the NRC could then gradually phase in the more complex, more costly facilities of DOE's Office of Environmental Management and the National Nuclear Security Administration over a period of years.

Assuming responsibility for all DOE nuclear facilities at one time could overwhelm the agency and place at risk the critical regulatory initiatives currently underway, thus the Commission does not believe that the approach described in H.R. 3907 is feasible, even if significant resources were made available. Indeed, we would have a very hard time estimating the necessary NRC resources without further study.

Let me give you an example of the cost associated with a very complex facility. The NRC now provides regulatory advice to the DOE concerning DOE's Hanford Tank Waste Remediation Systems Project. This effort includes a resident inspector who is onsite full-time and requires significant involvement both by our Headquarters Staff and our Center for Nuclear Waste Regulatory Analyses in Texas.

There is no prospect for an NRC regulatory role until at least 2015 under DOE's current program, yet NRC's current assistance is costing about $2.4 million each year. The Hanford Project is extraordinarily complex. Nonetheless there are many complex DOE/EM and NNSA facilities presenting many challenges both from a technical and a programmatic perspective.

The immediate assumption of authority over potentially hundreds of such complex DOE/EM and NNSA facilities would likely overwhelm our staff and put at risk the progress we have made in regulatory initiatives affecting our current licensees.

Accordingly the Commission respectfully urges the committee to consider the phased approach to external regulation of DOE advocated in 1996 by DOE's own Working Group on External Regulation. We would see an overall gain in public health and safety only if NRC regulation of DOE were undertaken in a manner that does not risk diverting the Commission's attention from NRC's primary mission of ensuring the safety and security of civilian nuclear facilities.

As I stated at the outset, we believe that a majority of the technical, policy and regulatory issues identified during the NRC-DOE pilot program can be adequately resolved within the existing NRC regulatory framework. Others will require clarification in statute. We would be pleased to work with the committee on these provisions.

In conclusion, we appreciate the confidence that this subcommittee has demonstrated in NRC by introducing H.R. 3907. We support the bill in spirit but strongly believe that a phased approach focusing on the less complex and less costly DOE facilities should be the first step. We stand ready to work with the committee to identify an appropriately phased approach. Thank you.

[The prepared statement of Hon. Richard A. Meserve follows:]

PREPARED STATEMENT OF RICHARD A. MESERVE, CHAIRMAN, U.S. NUCLEAR REGULATORY COMMISSION

Mr. Chairman and Members of the Subcommittee: It is a pleasure to appear before you today to discuss the proposal for external regulation of facilities owned or operated by the Department of Energy, and in particular to explain the Commission's views on the recently introduced bill, H.R. 3907, "External Regulation of the Department of Energy Act." As the Commission previously testified before the House Science Committee's Subcommittee on Energy and Environment on July 22, 1999, and before the House Commerce Committee's Subcommittee on Energy and Power on May 20, 1998, the Commission believes that NRC could be the sole external regulator of DOE nuclear and radiological safety, if the Congress determined that such regulation was in the best interests of the Nation. The Commission also testified that we believe that a majority of the technical, policy, and regulatory issues identified during the NRC/DOE pilot program at three DOE facilities can be adequately resolved within the existing NRC regulatory framework. We see a path to resolving the remaining issues and we continue to stand by our previous testimony.

Today we are testifying on a significantly different approach than that discussed in previous Commission testimony. H.R. 3907 would require the NRC to assume regulatory jurisdiction over the entirety of DOE's activities—both defense and nondefense—at one time. The Commission strongly prefers a multi-phased approach, as former Chairman Dicus testified to the House Science Committee in July of last year. Exactly such a multi-phased approach was contemplated by the House Science Committee last fall in Section 15 of H.R. 1656.

Our concern is that a one-phase approach could divert significant agency resources from important ongoing regulatory initiatives relating to current NRC licensees. These initiatives, in areas such as license renewal, license transfers, a new

reactor oversight process, a more effective license amendment process, and dry cask storage for spent nuclear fuel, have been urged by Congress and require significant agency resources to bring to fruition. NRC previously testified that it could initially regulate the relatively less complex, less costly facilities of DOE's Office of Energy Research, now the Office of Science (SC), and Office of Nuclear Energy, now the Office of Nuclear Energy, Science, and Technology (NE)—and that, subject to receiving adequate resources, it could then gradually phase in the more complex, more costly facilities of DOE's Office of Environmental Management (EM) and the National Nuclear Security Administration (NNSA) over a period of several years. Assuming responsibility for all DOE nuclear facilities at one time could overwhelm the agency and place at risk the critical regulatory initiatives currently underway. Thus, the Commission does not believe that the approach described in H.R. 3907 is feasible, even if significant resources were made available. Indeed, aside from the SC and NE facilities, at this point we would have a very hard time estimating the necessary NRC resources without further study.

Let me give you an example of the cost associated with a very complex facility. The NRC now provides regulatory advice to the DOE concerning DOE's Hanford Tank Waste Remediation Systems project. This effort includes a resident inspector, who is on site full time, and significant involvement both by our Headquarters staff and our Center for Nuclear Waste Regulatory Analyses in Texas. There is no prospect for an NRC regulatory role until at least 2015 under DOE's current program, yet NRC's current assistance is costing about $2.4 million each year. The Hanford project is extraordinarily complex. Nonetheless, there are *many* complex DOE EM and NNSA facilities presenting many challenges, both from a technical and programmatic perspective. Without a transition period and phased approach, we would have great difficulty estimating the likely NRC resources required. The immediate assumption of authority over potentially hundreds of such complex DOE EM and NNSA facilities would likely overwhelm our staff and put at risk the progress we have made in regulatory initiatives affecting our current licensees.

The Commission respectfully urges the Committee to consider the phased approach to external regulation of DOE advocated in 1996 by DOE's Working Group on External Regulation. We would see an overall gain in public health and safety only if NRC regulation of DOE were undertaken in a manner that does not risk diverting the Commission's attention from the NRC's primary mission of ensuring the safety and security of civilian nuclear facilities.

Another issue which is not addressed in the bill is NRC's authority to regulate safeguards—that is, physical protection and material control and accounting. We believe that these matters are so integrally linked to safety issues that it is important for the effectiveness of NRC's regulatory oversight that safeguards authority be explicitly included.

As I stated at the outset, we believe that a majority of the technical, policy, and regulatory issues identified during the NRC/DOE pilot program can be adequately resolved within the existing NRC regulatory framework. Others will require clarification in statute. We would be pleased to work with the Committee on these provisions.

In conclusion, we appreciate the confidence that this Committee has demonstrated in NRC by introducing H.R. 3907. We support the bill in spirit, but strongly believe that a phased approach focusing on the less complex and less costly DOE SC and NE facilities should be the first step. We stand ready to work with the Committee to identify an appropriately phased approach.

Thank you Mr. Chairman. We would be pleased to answer any questions that you and Members of the Subcommittee may have.

Mrs. WILSON [presiding]. Thank you. I understand the other Commissioners are here for answering of questions and so we will turn to the Honorable Jerold Mande, Deputy Assistant Secretary for Labor Occupational Safety and Health Administration—can you fit that on a business card?

Mr. MANDE. No. It's tough. It's hard to read then.

Mrs. WILSON. Thank you.

STATEMENT OF HON. JEROLD R. MANDE

Mr. MANDE. Madam Chairman, members of the subcommittee, thank you for the opportunity to testify this morning on the important issue of external regulation of worker health and safety for

private sector employees at work sites owned or operated by the Department of Energy.

This issue is of great interest and importance to OSHA in keeping with our mission to assure that every working man and woman in the Nation is provided with safe and healthful working conditions. We appreciate your keen interest in this matter.

OSHA has undertaken a number of cooperative projects with DOE to better understand the effect of external regulation on worker safety. OSHA has completed two recent major pilot projects at DOE sites. In the summer of 1998 OSHA conducted a large scale pilot at Oak Ridge, Tennessee, and in January 1999 OSHA conducted a pilot project at the Lawrence Berkeley National Laboratory in California as part of an ongoing NRC pilot project at the Berkeley site.

OSHA had three objectives for the pilot projects—one, to better assess the nature and severity of the site hazards as well as assess the adequacy of OSHA's standards, training and staff expertise to address them; two, to assess the potential impacts of external regulation on the agencies involved and approximate what would occur on an actual OSHA visit under external regulatory authority; and three, to provide a forum for OSHA and NRC to evaluate regulatory interface issues at the DOE sites.

At both sites OSHA conducted simulated inspections that included opening and closing conferences with employers and employees, physical walk-throughs of the work sites to identify hazards and the preparation and simulation of citations and proposed penalties. OSHA prepared simulated citations and proposed penalties for the University of California, the site contractor and for DOE, the facility owner, even though OSHA does not currently have legislative authority to enforce penalties against state or Federal entities. It has been OSHA's experience however that worker safety and health are best protected when OSHA has the ability to fine both the facility owner, who controls the work site, and the contractors working at the site.

So what did OSHA learn from its pilot activities? Our overall conclusion is that there are a number of legislative policy, logistical, and resource issues that must be addressed for external regulation to be accomplished in an orderly manner. However, OSHA believes none of the problems and issues is insurmountable and with careful and coordinated planning within the Administration and with Congress external regulation of DOE sites for occupational safety and health is in our opinion an achievable objective.

The pilot projects demonstrated clearly to OSHA that external regulation would have a significant impact on DOE's current operating practices. Today DOE identifies hazards, often only takes appropriate interim measures and then attempts to obtain funding to address the hazard's permanence. When the funding does not materialize, it results in a growing backlog of unabated hazards.

The OSHA-simulated inspections identified 75 violations at Oak Ridge and 62 at Berkeley. This number of violations is slightly higher than average. Injury and illness rates were also above the national average at these sites. OSHA's review of the site safety and health programs revealed that DOE and its contractors have implemented generally good worker safety and health programs, al-

though the pilots did not find the level of employee involvement in safety and health issues that OSHA would expect to find in an excellent safety and health program.

Madam Chairman, you have asked for comments on three bills—H.R. 3383, H.R. 3906, and H.R. 3907. We have no comment on H.R. 3383 and 3906, because neither bill appears to impact OSHA's program.

H.R. 3907, on the other hand, would significantly impact OSHA. It would transfer to OSHA from DOE regulatory and enforcement responsibilities relating to matters covered by the Occupational Safety and Health Act with regard to all facilities owned or operated by DOE. OSHA and NRC would be required to enter into a Memorandum of Understanding that would govern the exercise of our respective authorities over nuclear safety and occupational health and safety at DOE owned or operated facilities and transmit that memorandum to Congress by January 1, 2001. The overall effective date for the transfer of authority to OSHA from DOE would be October 1, 2001.

OSHA believes that external regulation proposals should be evaluated based on their likely impact on worker safety. As I have presented in my testimony, we have been working with DOE and NRC through pilot projects and other activities to gain a better understanding about the implications of external regulation on worker safety and on OSHA's existing programs and resources.

At this time in light of the numerous unresolved issues associated with the transition to external safety regulation, we are not yet prepared to take a position on H.R. 3907.

In closing, Madam Chairman, it is our view that OSHA regulation of occupational safety and health at DOE sites should be authorized only if such action would lead to better protection for workers. A number of studies and advisory groups have in fact concluded that employees would benefit from external regulation of occupational safety and health.

The recent pilot projects have reinforced our position that external regulation is an achievable objective, but OSHA is not seeking the additional responsibility for enforcement at DOE sites. The agency has for several years undertaken a variety of cooperative projects and activities with DOE to prepare for external regulation. We must reiterate our caution, however, that if the transition is to be successful, it must be conducted in an orderly way with reasonable timeframes to avoid unnecessary disruption to OSHA's other important ongoing programs and resource requirements, a need to be carefully assessed. Thank you.

[The prepared statement of Hon. Jerold R. Mande follows:]

PREPARED STATEMENT OF JEROLD R. MANDE, DEPUTY ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH

Mr. Chairman, Members of the Subcommittee: Thank you for the opportunity to testify this morning on the important issue of external regulation of worker safety and health for private-sector employees at facilities owned or operated by the Department of Energy. This issue is of great interest and importance to the Occupational Safety and Health Administration in view of the Department of Labor's mission to assure that every working man and woman in the Nation is provided with safe and healthful working conditions. We therefore appreciate your keen interest in this matter.

OSHA has undertaken a number of cooperative projects with DOE to better understand the effect of external regulation on worker safety. Before I discuss those with you, however, I want to briefly describe OSHA's legislative authority at DOE facilities, and to summarize some of major events and reports on external regulation.

OSHA Jurisdiction at DOE Sites

Section 4(b)(1) of the Occupational Safety and Health Act of 1970 (OSH Act) removes from OSHA's coverage working conditions for which another Federal agency (or State agency acting under the Atomic Energy Act) has prescribed or enforced safety and health regulation. This exemption is designed to prevent the duplication of Federal effort. The section 4(b)(1) exemption currently applies to DOE.

Most of the workers at DOE sites are employees of private-sector companies with which DOE contracts or subcontracts. These private employers are exempt from OSHA enforcement, because DOE has chosen to prescribe its own safety and health requirements. This was also the case with DOE's predecessor agencies, the Atomic Energy Commission and the Energy Research and Development Administration.

In any discussion of external regulation, OSHA is particularly concerned to ensure that the level of protection we would provide is equal to or greater than that now provided under DOE coverage. DOE has adopted most of OSHA's regulations as the foundation for its own regulatory programs, so many of the substantive safety and health requirements for DOE contractors are the same as they would be under OSHA. However, in addition to adopting OSHA regulations, DOE has developed some occupational safety and health regulations of its own, such as more up-to-date radiation and chemical exposure standards, as well as firearm and explosives safety standards. If OSHA were to assume authority at DOE facilities, we would need to adopt similar requirements so that employee protection would not be diminished. It is important to understand that even if OSHA becomes the external regulator of worker safety and health at DOE sites, that does not make OSHA the manager of safety and health at the DOE sites. Under the OSH Act, the primary compliance responsibility still rests with the contractors and subcontractors, and, to some extent, with DOE as the site owner, to provide safe and healthful workplaces and to comply with OSHA's regulations and standards.

Background on External Regulation

OSHA's interaction with DOE has increased since the early 1990s, when OSHA was engaged in a number of so-called "Tiger Team" reviews of DOE sites. In 1995, the DOE Advisory Committee on External Regulation of Department of Energy Nuclear Safety issued its report entitled "Improving Regulation of Safety at DOE Nuclear Facilities." The report concluded that, although DOE could regulate its own operations, it was not viewed by the public as credible, and therefore recommended the creation of a system of external regulation. Specifically, the Advisory Committee noted that OSHA should regulate all worker protection issues at DOE nuclear facilities, except when that regulation would significantly interfere with maintaining facility safety (e.g., if a nuclear chain reaction was possible.) In such cases, the Advisory Committee recommended that the designated nuclear facility safety agency, such as the Nuclear Regulatory Commission (NRC) or the Defense Nuclear Facilities Safety Board, should regulate worker safety and health issues under the Atomic Energy Act (AEA).

A subsequent DOE working group reviewed the Advisory Committee's recommendations and concurred with their findings on a number of issues, including those regarding OSHA. Another report, issued in 1997 by the National Academy of Public Administration, also concluded that OSHA should have jurisdiction for occupational safety and health, and made recommendations on a host of policy and implementation issues that would need to be addressed to effect this transfer.

The Department of Labor and OSHA have previously stated that external regulation, if authorized, needs to be done in an orderly way with reasonable time frames. Transition must be implemented without disruption to OSHA's ongoing programs, and the resource requirements to address this responsibility need to be assessed.

OSHA/DOE Pilot Projects

OSHA has completed three major pilot projects at DOE sites. In 1996, we completed a pilot project at Argonne National Laboratory. More recently, in 1998, OSHA conducted a large scale pilot at Oak Ridge, Tennessee, which included both the Oak Ridge National Laboratory and the East Tennessee Technology Park, formerly known as the K-25 site.

In January, 1999, OSHA conducted a pilot project at the Lawrence Berkeley National Laboratory in California. The OSHA activities under the Berkeley pilot project were incorporated into an ongoing N RC pilot project that had been under-

way at the Berkeley site for approximately one year. Representatives of Cal-OSHA, the OSHA-approved California state occupational safety and health program, also participated in the Berkeley pilot project.

OSHA had three objectives for the recent pilot projects:

1. to gain first hand information about both sites, in order to better assess the nature and severity of the hazards, as well as assess the adequacy of OSHA's standards, training, and staff expertise to address them;
2. to assess the potential impacts of external regulation on the agencies involved and approximate what would occur on an actual OSHA visit under external regulatory authority; and
3. to provide a forum for OSHA and NRC to evaluate regulatory interface issues at DOE sites, since both agencies have a potential role in radiation safety at the sites.

OSHA inspected only 16 individual facilities at Oak Ridge and Berkeley. The two pilot sites were far too large for OSHA to attempt wall-to-wall inspections of all the individual buildings and facilities at the two sites. Thus, we selected a representative mix of operations to inspect.

At both Oak Ridge and Berkeley, OSHA conducted simulated inspections to study the potential impacts of external regulation. These simulated inspections, like actual OSHA inspections, included:

- opening and closing conferences with employers and employees,
- physical walk-throughs of the work sites to identify hazards, and
- the preparation of simulated citations and penalties.

OSHA also conducted post-inspection informal conferences with DOE contractor employers and workers to discuss cited hazards, simulated citations and penalties, abatement methods and time frames, and other items regarding the inspection.

OSHA prepared simulated citations and proposed penalties for the University of California, the site contractor, even though OSHA does not currently have legislative authority to enforce penalties against State governments and their subdivisions. OSHA also prepared simulated citations and proposed penalties for DOE, the facility owner, even though OSHA does not currently have legislative authority to enforce penalties against federal agencies such as DOE. I would note, Mr. Chairman, that it has been OSHA's experience that worker's safety and health are best protected when OSHA has the ability to fine both the facility owner who controls the worksite and contractors working at the site.

OSHA also evaluated the safety and health programs at the two sites. A site's safety and health program is a good measure of management's commitment and employees' involvement in safety and health matters at the site. These evaluations were designed to determine whether DOE contractors have effective systems in place to identify and control hazards, record safety and health problems, and train employees.

So, what did OSHA learn from its participation in these pilot activities? Our overall conclusion from both the Oak Ridge and Berkeley pilots is that there are a number of legislative policy, logistical, and resource issues that must be addressed for external regulation to be accomplished in an orderly manner. However, none of the problems or issues is viewed as insurmountable; and with careful and coordinated planning within the Administration and with Congress, external regulation of DOE sites for occupational safety and health is an achievable objective.

The pilot projects demonstrated clearly to OSHA that external regulation would have a significant impact on DOE's current operating practices due to the existence of legacy hazards. Legacy hazards are site hazards that have been self-identified by DOE, but not corrected because of budget constraints. Limitations on available budgetary resources lead DOE to prioritize its treatment of identified hazards based on their potential severity and likelihood of occurrence. When DOE first identifies hazards, it may not be able to correct them right away. Rather, it will prioritize the hazards, take appropriate interim measures, and then attempt to obtain full funding to fully address the hazards permanently. Until DOE eliminates such hazards, they are known as "legacy hazards."

Any move toward external regulation must include a careful assessment of these legacy hazards, and a plan for abating them. The cost of correcting legacy hazards is likely to be significant, but it is important to recognize that these hazards need to be addressed independent of external regulation and thus should not be considered a cost of external regulation by OSHA.

The pilot projects also highlighted the fact that OSHA and DOE evaluate the seriousness of safety and health hazards differently. OSHA found a number of hazards that DOE would consider a low priority, but which OSHA would classify as serious. OSHA places greater weight on the severity of a possible injury or illness in assess-

ing its seriousness. For example, OSHA considers an electrocution hazard as serious even if there is a very small chance it would occur. In assessing the same hazard, however, DOE factors in an estimate of the probability that an event would occur, assigning lower priority to hazards that it believes are less likely to occur.

The OSHA-simulated inspections identified 75 violations at Oak Ridge and 62 at Berkeley. This number of violations is slightly higher than average for an OSHA inspection. OSHA classified many of the violations as serious.

OSHA also evaluated the adequacy of its own standards. The majority of hazards found at DOE sites are addressed by existing OSHA standards and requirements. A principal exception is the OSHA standard for ionizing radiation, which needs to be upgraded. Another area where OSHA may need to work on a new standard for DOE sites is Firearms and Explosives, which are not specifically addressed by current OSHA regulations.

OSHA's review of the sites' safety and health programs revealed that DOE and its contractors have implemented generally good worker safety and health programs. However, both pilot sites could be improved. For example, based on OSHA's abbreviated analysis, we do not believe either site would be eligible for participation in OSHA's Voluntary Protection Program. VPP participants are a select group of facilities that have designed and implemented outstanding health and safety programs.

Key to an excellent safety and health program is employee participation. The pilots did not find the level of employee involvement in safety and health issues at these research-related facilities that OSHA would expect to find in an excellent safety and health program. Workers were engaged to a degree, but in general, occupational safety and health is not as integral a part of the site work as OSHA would require under VPP.

Other areas OSHA identified as needing improvement include: record keeping discrepancies and the increased integration of subcontractors into the safety and health program at Oak Ridge, and the need for a stronger, more visible industrial hygiene program at Berkeley. Injury and illness rates at Oak Ridge and Berkeley were also above the national average.

Funding for Pilot Projects and Other Activities

As you know Mr. Chairman, in Fiscal Year 1999, Congress provided for DOE to transfer $1 million to OSHA to conduct pilot programs and other activities at DOE facilities. OSHA spent a small portion of these funds to undertake the pilot project at Berkeley in January, 1999. In the absence of additional pilot projects for the remainder of the fiscal year, however, OSHA and DOE mutually agreed to utilize the remaining funds to undertake other activities that would assist us in preparing for external regulation.

OSHA used the funds for three projects: development of training materials for OSHA compliance officers; a study of background information on ionizing radiation; and a comparison of OSHA's Voluntary Protection Program (VPP) to that implemented by DOE. We are working with a contractor to develop materials that will prepare our compliance staff to effectively deal with issues they will confront if we assume responsibility for DOE sites. For example, we would like to enhance the skills and knowledge of the agency's industrial hygienists regarding radiation.

In addition, OSHA has funded a study of ionizing radiation that the agency could use to update our radiation safety and health standard. OSHA's ionizing radiation standard is out of date and needs to be revised. As an interim measure, OSHA has proposed that any plan for external regulation needs to include legislation that would allow OSHA to implement the current DOE or NRC rule at DOE sites as an interim final standard while OSHA proceeds with rulemaking on a final standard. This would ensure that workers at DOE sites under OSHA coverage would not be subject to less stringent radiation regulations under external regulation by OSHA, until the agency is able to produce a final rule.

OSHA also funded an analysis of the DOE VPP program. The analysis is expected to highlight the unique aspects of the DOE program and provide OSHA a basis for developing a policy on the possible acceptance of DOE VPP sites into the OSHA VPP program under external regulation.

Congress also provided for DOE to transfer $1 million in Fiscal Year 2000 funds to OSHA. We are currently discussing its use with DOE. OSHA has proposed to use the funds for full-time positions in the field and the National Office to deal with enforcement and related issues at non-Atomic Energy Act DOE sites for which OSHA currently has jurisdiction, and to evaluate privatized facilities for potential OSHA regulation.

On July 13, 1999, Assistant Secretary Jeffress sent a letter to Dr. Michaels at DOE clarifying OSHA's position on safety and health jurisdiction at DOE-owned

sites that are not regulated under the Atomic Energy Act. OSHA has agreed with DOE that we have jurisdiction for safety and health enforcement at these facilities. DOE estimates that more than 9,000 Federal and contract employees at dozens of sites are covered.

Legislation

Mr. Chairman, you have asked for comments on three bills: H.R. 3383, which would eliminate the exemption from civil penalties for nuclear safety violations by non-profit DOE contractors; H.R. 3906, which seeks to strengthen internal security oversight within the Department; and H.R. 3907, which would establish external safety regulation over DOE facilities. We have no comment on H.R. 3906, because it does not appear to impact OSHA's program. Based on our preliminary review, we also have no comment on H.R. 3383, since it applies to enforcement under the Atomic Energy Act. OSHA conducts its enforcement activity under the authority of the Occupational Safety and Health Act of 1970.

H.R. 3907, on the other hand, would significantly impact OSHA. It would transfer to OSHA from DOE regulatory and enforcement responsibilities relating to matters covered by the Occupational Health and Safety Act of 1970 with regard to all facilities owned or operated by DOE. OSHA would share these responsibilities with NRC for workplace hazards that include radiological components. OSHA and NRC would be required to enter into a memorandum of understanding that would govern the exercise of our respective authorities over nuclear safety and occupational health and safety at DOE owned or operated facilities, and transmit the memorandum to Congress by January 1, 2001. The overall effective date for the transfer of authority to OSHA from DOE would be October 1, 2001.

OSHA has not taken a position regarding the desirability of external regulation. Rather, the agency has engaged in pilot projects and other activities to gain a better understanding about the implications of external regulation on OSHA's program and resources. At this time, in light of the numerous unresolved issues associated with a transition to external safety regulation, the potential costs of such a transition to OSHA, and the short amount of time we have had to examine H.R. 3907, we are not yet prepared to take a position on the bill.

One issue that requires careful review by all parties involved is resources. In the past OSHA has produced resource estimates for the assumption of safety and health jurisdiction for the DOE complex. These estimates need to be updated and refined based on current information indicating exactly what sites would be transferred. The coverage of defense-related activities on these sites also needs to be examined, in light of the broad scope of H.R. 3907. Beyond resource issues, there are security issues and other matters that need to be addressed.

Finally, we note that H.R. 3907 refers to section 211 of the Energy Reorganization Act of 1974. On March 14, 2000, the Department of Labor and the Nuclear Regulatory Commission jointly transmitted proposed legislation to the Congress recommending that the worker protections in section 211 be strengthened. A copy of that transmittal is attached to this testimony.

Conclusion

In closing, Mr. Chairman, it is our view that OSHA's regulation of occupational safety and health at DOE sites should be authorized only if such action would lead to better protection for workers. A number of studies and advisory groups have in fact concluded that employees would benefit from external regulation of occupational safety and health.

The recent pilot projects have reinforced our position that external regulation is achievable. While OSHA is not seeking the additional responsibility for enforcement at DOE sites, the agency has for several years undertaken a variety of cooperative projects and activities with DOE to prepare for external regulation, including the recent pilot projects. We must reiterate our caution, however, that if the transition is to be successful, it must be conducted in an orderly way, with reasonable time frames to avoid unnecessary disruption to OSHA's other important ongoing programs, and resource requirements need to be assessed.

Thank you.

Mrs. WILSON. Thank you—and the Honorable John T. Conway, the Chairman of the Defense Nuclear Facilities Safety Board.

STATEMENT OF HON. JOHN T. CONWAY

Mr. CONWAY. Mrs. Wilson and Chairman Barton and other members of your committee, my pleasure in being with you here this

morning is somewhat tempered with the fact that one of the bills you propose to make into law would do away with the organization I represent. So, I would call your attention to the fact that, I and other members of the board that are here with me today, the submission that we are making with regard to the bill and with regard to other matters that this committee is taking into consideration is the unanimous position of the board. I am a spokesperson for the board and the other members are here with me—Dr. Eggenberger, who is the Vice Chairman, Mr. Joe DiNunno, and Mrs. Jessie Hill-Roberson are here with me. One other member of our board is on travel previously arranged prior to the notice to appear here with you.

Mr. Chairman, as I mentioned in my opening statement, my pleasure with being with you here this morning is somewhat tempered by the fact that your bill would do away with my organization——

Mr. BARTON. There is good news and bad news.

Mr. CONWAY. Let me say this. In 1998, November 1998, on the request of the Congress, our board submitted to the Congress a very detailed report on the matter that is now before your committee, and that has to do with the so-called "regulation" of DOE's defense nuclear facilities.

You mentioned earlier in your opening remarks that you will be considering modifications, changes to the bill as it is now proposed. I would direct your attention to the report that the board submitted to the Congress, and copies of which have been made available to your committee. I would suggest that it will be helpful, I believe, to your staff and to the members as you consider what, I think, is a very important matter before you.

The statement that I presented to your committee this morning is pretty much of a summary of the detailed report that was submitted to the Congress in November 1998. I would ask that the summary, which has been made available to the committee, and the detailed report be accepted as part of the record.

The analysis and what we have submitted in writing to your committee yesterday, in effect, reviews and summarizes the duties of the board and the improvements that have taken place within the DOE in the 10 years that our board has been in existence. We put in our report what we understand both DOE has estimated and what NRC has estimated the costs would be to have full regulation of DOE by NRC. As Chairman Meserve also mentioned this morning to you, I would suggest you take costs into consideration and that you, hopefully, would work with other Members of the Congress and particularly Appropriations committees in recognizing what the full costs will be both from the point of view of OSHA and/or the NRC to whatever extent you decide regulation is appropriate.

As I pointed out in our submission yesterday, we have put together—we, the members of the board, have put together what we believe to be an elite group of technical experts. Twenty-six percent of our technical staff have Ph.D. degrees in technical fields and of our technical staff, an additional 67 percent have a Master's Degree. We have put together what we consider to be a very elite group.

I and our staff—I feel that we are somewhat like the Marine Corps. We have an elite group. Periodically there are discussions or recommendations to put the Marines into the Department of the Army, and for the last 4 or 5 years we have heard various suggestions of taking our staff and putting them into the NRC. So, as I say, we feel a little somewhat like the Marine Corps, and we believe we are doing an excellent job.

Improvements can still be made. In the testimony by the Department of Energy, they acknowledge the improvements that they believe have been credited to our board. In any event, our final position has not changed since our report in 1998. We do not believe that the argument has been sufficiently made, taking into consideration the various costs and the potential effect on our national security, but at least we'll let our report stand for itself and in view of the short time available to the members here today, I will make myself available obviously to respond to questions. Thank you, sir.

[The prepared statement of Hon. John T. Conway follows:]

PREPARED STATEMENT OF JOHN T. CONWAY, CHAIRMAN, A.J. EGGENBERGER, VICE CHAIRMAN, JOSEPH J. DINUNNO, MEMBER, JOHN E. MANSFIELD, MEMBER, AND JESSIE HILL ROBERSON, MEMBER, DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Good morning, Mr. Chairman and Members of the Subcommittee. My name is John Conway. I am Chairman of the Defense Nuclear Facilities Safety Board.

In your letter inviting me to testify today, several legislative proposals that may impact the Department of Energy's (DOE) current mode of operation were referenced. As an independent Executive Branch establishment, the Board provides advice and recommendations to the President and Secretary of Energy regarding public health and safety issues at DOE defense nuclear facilities. Therefore, I will focus my testimony today on legislative proposal HR 3907 to establish external regulation of DOE defense nuclear facilities.

BOARD OVERSIGHT AUTHORITY

For those who may be unfamiliar with the statute establishing the Defense Nuclear Facilities Safety Board (Board) in 1988, a few words about its nuclear safety duties and responsibilities are in order.

Broadly speaking, the Board reviews operations, practices, and occurrences at DOE's defense nuclear facilities and makes recommendations to the Secretary of Energy as necessary to protect public health and safety. Upon receipt of the Recommendation, the Secretary must accept or reject it, in whole or in part, and then must prepare an implementation plan for those portions which are accepted. The public has a statutory right to comment upon Board recommendations and upon DOE's responses and implementation plans.

To date, the Board has issued 41 sets of recommendations, containing 194 individual specific health and safety sub-recommendations. The Secretary has accepted the first 40 sets of the Board's safety recommendations thus far, with the exception of two sub-recommendations which currently are under reevaluation by the Board. The latest Board recommendation delivered to the Secretary of Energy on March 8, 2000, is under active consideration by DOE. The Board recommendations detailed in Annual Reports to Congress range from such topics as the need to identify and implement adequate health and safety standards at all DOE sites, major safety improvements needed in the management of high-level waste tanks at the Hanford Site in the State of Washington, to classified safety management issues at the Pantex Nuclear Weapons Plant, Texas.

If, as a result of its reviews, the Board determines that an imminent or severe threat to public health or safety exists, the Board is required to transmit its Recommendations directly to the President, as well as to the Secretaries of Energy and Defense. The Board also assesses safety management and personnel effectiveness both within DOE and the various operation and management (O&M) contractor organizations.

The Board has assembled a small technical staff with extensive backgrounds in science and engineering disciplines such as nuclear-chemical processing, conduct of operations, general nuclear safety analysis, conventional and nuclear explosive technology and safety, nuclear weapons safety, storage of nuclear materials and nuclear

criticality safety, and waste management. As an indication of the Board's technical talent, 26 percent of the technical staff hold degrees at the Ph.D. level and an additional 67 percent have masters degrees. All technical staff members except interns, possess practical nuclear experience gained from duty in the U.S. Navy's nuclear propulsion program, the nuclear weapons field, or the civilian reactor industry.

The Board's enabling statute requires the Board to review and evaluate the content and implementation of health and safety standards, including DOE's Orders, Rules, and other safety requirements, relating to the design, construction, operation, and decommissioning of DOE's defense nuclear facilities. The Board must then recommend to the Secretary of Energy any specific measures, such as changes in the content and implementation of those standards, that the Board believes should be adopted to ensure that the public health and safety are adequately protected. The Board is also required to review the design of new defense nuclear facilities before construction begins, as well as modifications to older facilities, and to recommend changes necessary to protect health and safety. Board review and advisory responsibilities continue throughout the construction, testing, and operation of new facilities. In 1991, Congress specified that the Board's jurisdiction also includes safety oversight of the assembly, disassembly, and testing of nuclear weapons.

Under the Atomic Energy Act, the Board is authorized to conduct investigations, issue subpoenas, hold public hearings, gather information, conduct studies, establish reporting requirements for DOE, and take other actions in furtherance of its review of health and safety issues at defense nuclear facilities. These powers of the Board and its staff all relate to the accomplishment of the Board's mandate to identify safety problems and recommend corrective actions, and then to ensure that DOE corrects those problems at defense nuclear facilities. The Secretary of Energy and contractors at defense nuclear facilities are required by statute to cooperate fully with the Board.

The following excerpt from a report of the Senate Armed Services Committee summarizes the rationale for creating an oversight Board:

> The committee does not believe that a safety board is a panacea for all DOE safety problems, or that it can in any way absolve the Secretary or the Department's contractors of their fundamental safety responsibilities. In fact, many witnesses testified that DOE's shortcomings largely reside within the Department's line management, and that there can be no substitute for capable and committed line management. What the Board can do is provide critical expertise, technical vigor, and a sense of vigilance within the Department at all levels . . . Above all, the Board must have a primary mission to identify the nature and consequences of any significant potential threats to public health and safety, to elevate such issues to the highest levels of authority, and to inform the public.

For the past 10 years, this Board has been dedicated to fulfilling the above stated mission.

IMPROVEMENTS IN DOE HEALTH AND SAFETY POSTURE

Interpreting the Board's statutory authority, the Court of Appeals for the District of Columbia stated that the Board is an agency with action forcing powers.

> The Board does considerably more than merely offer advice. It conducts investigations, which "has long been recognized as an incident to legislative power" delegated to agencies by Congress. It has at its disposal the full panoply of investigative powers commonly held by other agencies of government. The Board formally evaluates the Energy Department's standards relating to defense nuclear facilities, and forces public decisions about health and safety.

Each year the Board reports to Congress on its activities and DOE's progress in improving safety at defense nuclear facilities. In our Tenth Annual Report to Congress issued in February 2000, the Board noted significant progress by the DOE in upgrading its safety management program and practices at defense nuclear facilities. The record of Board accomplishments in assisting DOE in its safety practices attests to the efficiency of the Board's structure as legislated in 1988. Using its action forcing powers, the Board has been able to help reorient DOE's safety program and to set it on a course that:

- Places more reliance on standards that define good practices and less reliance upon expert-based safety management;
- Makes work planning and safety planning an integrated process;
- Treats public, worker, and environmental protection as an integrated process;
- Treats radioactive and nonradioactive hazards in an integrated fashion in establishing controls; and
- Tailors safety measures to the hazards involved.

In accordance with its statutory mandate, the Board has focused on enhanced safety management of defense nuclear activities. DOE has recognized the benefits of such enhancements for all of its hazardous activities and is extending the enhancement principles and functions complex-wide. This is being done without the potentially litigious and confrontational processes that frequently characterize adjudicatory proceedings under regulatory regimes.

EXTERNAL REGULATION OF DOE AND H.R. 3907

While many reports have been written about external regulation, pilots conducted at non-defense facilities, and opinions offered on this subject, I must emphasize that the Board is the only external, independent organization that has actually conducted full-time technical oversight of public and worker health and safety at DOE defense nuclear facilities. Consequently, the Board frequently has been called upon by both the legislative and executive branches to share its collective knowledge gained from 10 years of oversight experience in DOE's defense nuclear facilities. In fact, the National Defense Authorization Act for Fiscal Year 1998 directed the Board to prepare a written report making recommendations to the Congress and answering specific questions on the pros and cons of external regulation of DOE defense nuclear facilities as compared to the Board's current independent oversight authority. We have copies of the report with us today and ask that the report be made part of the hearing record.

As stated in the report, the Board found no creditable arguments, either on the grounds of improved safety or cost effectiveness, to subject the defense nuclear facilities to additional external regulation. On the other hand, the Board did advise of the potential for external regulation of nuclear safety adversely impacting our Nation's national security program. There is nothing that has developed since our 1998 report to cause the Board to modify its earlier findings.

THE NEED FOR ADDITIONAL REGULATION?

What advantages might accrue from imposing additional regulation on DOE? One of the previously-used arguments favoring an external regulator asserts that such a scheme will prevent DOE from repeating the environmental, safety, and health problems that occurred as a result of early defense nuclear production programs during the Cold War era. In fact, many of DOE's present environmental remediation projects resulted from activities that predated the Federal Facilities Compliance Act and regulation under a comprehensive body of environmental laws vigorously enforced by Federal and State agencies.

We believe that an adequate system of checks and balances, both internal to DOE operations and external to DOE, has been implemented during the past 15 years which will effectively prevent the recurrence of past environmental abuses. The Department of Energy today is required to comply with rules and regulations issued by State and Federal Environmental Protection Agencies and others including the Occupational Health and Safety Administration, the Bureau of Mines, and the Department of Transportation.

Justification for additional regulation is also based on two suppositions, both of which we believe to be fatally flawed:

1. That it will enhance DOE credibility with the public, and
2. That it will improve safety.

ENHANCE DOE CREDIBILITY?

We suggest the public's trust in DOE will not increase by setting up another Federal government agency here in Washington, D.C. to regulate its activities, whether the agency be the Defense Nuclear Facilities Safety Board or the U.S. Nuclear Regulatory Commission (NRC) or some combination of the two operating in a formal regulatory manner. Rather than by having more external regulation imposed upon it, DOE's credibility will improve by performing its responsibilities in an efficient and creditable manner. We believe DOE has made notable progress in upgrading its safety management programs and in cooperation and openness, particularly in the formation and utilization of local citizen advisory boards. Trust and credibility are developed at the local levels, not by layering government agencies.

One must keep in mind that the actual work carried out by the Government in its nuclear weapons activities is done by contractor employees, not by federal employees of the DOE. It is DOE's responsibility to assure that the work is done safely, efficiently and with full compliance with the environmental laws of the Nation and its States. In effect, for all intents and purposes and from a practical point of view, the DOE "regulates" the individual contractors doing the work. DOE has the author-

ity and power to force a site, a facility or particular job to be curtailed or be shut down.

Do we need to add additional government employees of another government agency such as the NRC to assure that DOE government employees are properly enforcing government laws, safety rules and regulations on contractor management and workers? If so, at what additional cost?

THE COST OF EXTERNAL REGULATION

In 1995, the Advisory Committee on External Regulation of DOE Nuclear Safety issued a report (generally referred to as the Ahearne Report) acknowledging that regulation would require additional startup costs, but asserted that savings will result from having fewer DOE employees assigned to environmental safety and health issues. In that report, the NRC advised that if it is to assume regulatory responsibility for DOE, the Commission would need an additional 1,100 to 1,600 full-time employees and an increase of $150 million to $200 million per year in its budget.

How much of that addition in personnel and dollars cost would DOE save? I know of no organization, in government or in private industry, that reduces personnel or response costs when additional regulatory authorities are imposed on it. The opposite occurs. The Ahearne Report did not set forth how savings will accrue from its recommendation, nor did it specify what safety improvements will occur and how.

While there have been many external regulation scenarios studied during the past six years, the subject of cost to effect an external regulation scheme keeps surfacing as a significant issue. For example, the December 1996 Report of the Department of Energy Working Group on External Regulation contains an estimated cost of the following external regulation proposal:

> All DOE nuclear facilities would transition into full regulation by the Nuclear Regulatory Commission in a little over 10 years. In years 1-5, all Nuclear Energy and Energy Research nuclear facilities and selected Defense Program and Environmental Management nuclear facilities would become regulated by the Nuclear Regulatory Commission. This transition would begin immediately after enabling legislation is passed. Except for the selected facilities regulated by the Commission, Defense Program and Environmental Management nuclear facilities would continue to be regulated by the Department with oversight by the Defense Nuclear Facilities Safety Board in this first phase. In years 6-10, all Environmental Management nuclear facilities would become regulated by the Commission and the Board would maintain oversight only of Defense Program facilities. After 10 years, all DOE facilities would be regulated by the Commission. Remaining Board staff would merge into the NRC.

DOE's estimated costs to implement this external regulation plan are shown in the following table.

Table 1—DOE's Costs to Implement External Regulation

[Data as of December 1996—In billions of dollars]

Cost to Implement	Best Case	Upper Case
Cost during the first 5 years	$1.4	$1.8
Cost for year 6 thru 10	$1.3	$2.5
Cost beyond 10 years	$1.2	$3.1
Total Cost	$3.9	$7.4

Both of the DOE cost scenarios offered above reflect the magnitude of the effort and associated resources needed to implement NRC external regulation over all DOE nuclear facilities. The economic reality of a multi-billion dollar venture for this type of external regulation must be considered in any valid cost/benefit study. We believe that in an era of shrinking dollars to perform DOE's major missions—weapons maintenance/ stewardship and cleanup—it would not be prudent to transfer safety-related responsibilities into a more costly regulatory structure for questionable fringe benefits.

SAFETY MANAGEMENT STATUS TODAY

Under its enabling statute, 42 U.S.C. § 2286 et seq., the Board has been providing independent oversight of all nuclear activities impacting public and worker health and safety within DOE's defense nuclear facilities (i.e., nuclear weapons) complex since October 1989. While this oversight is not regulation per se, the Board has

been holding DOE nuclear safety to exacting standards under the authority of the Atomic Energy Act through the advisory and formal recommendation process governed by statute.

Through a combination of Board actions and the Department's own upgrade initiatives, the DOE has structured and is administering a much more effective safety management program than the historical program so frequently cited as cause for added external regulation. Board recommendations that have contributed to this outcome include:

- Recommendation 90-2, *Design, Construction, Operation and Decommissioning Standards at Certain Priority DOE Facilities.* This recommendation caused DOE to critically evaluate its set of safety-related standards and embark upon an aggressive program to improve those standards, bringing them into close alignment with the applicable industry requirements. Thus far, DOE has issued a comprehensive set of Policy Statements, Rules, Orders, Guides, and Technical Standards defining expectations, generally applicable safety requirements and acceptable safety practices.
- Recommendation 93-3, *Improving DOE Technical Capability in Defense Nuclear Facilities Programs.* This recommendation addressed the technical competence of DOE in critical safety positions. DOE's implementation plan in this case created the first ever DOE-wide technical qualification program. DOE has established qualification requirements for key personnel, and acquired new "Excepted Service" hiring authority from Congress to recruit exceptional individuals outside the regular civil service framework. DOE has formed a Federal Capability Review Panel, reporting to the Deputy Secretary, for stimulating recruitment of highly competent individuals and championing technical excellence in the staff throughout the Department.
- Recommendation 95-2, *Safety Management.* This recommendation encouraged DOE to build on the successes gained in the other two efforts and develop safety management programs for its defense nuclear facilities that integrated public protection, worker safety, and environmental protection into the work process. An implementation plan set forth by the Department in 1996 has been steadily and effectively pursued. All contractors performing high hazard nuclear activities for the Department are required by regulations and contract terms to establish and operate to such a safety management system. The system is marked by:
  - Site-wide nuclear safety requirements, mutually agreed upon by DOE and contractor(s) as applicable to the work performed.
  - The establishment by the contractors of manuals of practices reflecting the requirements established.
  - Safety planning as an integral part of work planning.
  - Safety and hazards analysis with safety measures tailored to the hazards of the operations involved.
  - Qualification and training of personnel commensurate to safety responsibilities assigned.
  - Assessments and feedback for improvements performed.
- Recommendation 98-1, *Integrated Safety Management.* This recommendation is directed at closing the loop on these safety programs by strengthening DOE's ability to find and resolve safety problems through its independent oversight function. A formal process has been established with clear lines of responsibility defined for addressing safety issues identified by DOE's Office of Independent Oversight. The status of corrective actions is periodically reviewed by the Chief Operating Officer and responsible Program Secretarial Offices.
- Departmental initiatives to upgrade safety management have included the following:
  - The issuance of Policy 450.5, *Line Environment, Safety and Health Oversight,* making self-assessments by the line organizations a mainline safety responsibility and Policy 450.4, *Safety Management System Policy*, a complex-wide commitment to the functions and principles of Integrated Safety Management.
  - Issuance of DOE N411.1-1A Safety Management Functions, Responsibilities, Authorities Manual (FRAM), addressing management's expectations of staff assigned safety responsibilities.
  - The establishment of a Secretarial level Safety Council headed by the Deputy Secretary with membership of three Secretarial Officers (EM, DP and Science) to support the Deputy Secretary in establishing safety policies and resolving inter-program safety-related issues and to develop performance standards to be used to hold federal personnel accountable for effective and timely implementation of ISM.

- The establishment of the Field Management Council to ensure consistent implementation of DOE policy in ES&H, safeguards and security, and business management.
- The establishment of a Safety Management Integration Team (SMIT), reporting to the Deputy Secretary, for coordinating and driving the implementation of Integrated Safety Management throughout the complex.
- The reorganization and augmentation of the enforcement functions of both the independent EH Secretarial Office and the Contracting Officers.
- Independent management assessments.
- The revision of Department of Energy Acquisition Regulations (DEAR) to require every contractor for a major acquisition involving nuclear materials to describe and commit to Integrated Safety Management (ISM) in performing the work. Further, the fee awards for that work are to be tied to safety performance.

The Board acknowledges that even with these upgrades to the DOE regulatory structure for safety management, DOE contractors have experienced some recent mishaps that have placed workers at risk. The commercial industry is not accident free, either. On the whole, however, the Department's safety record, complex-wide, compares well with other hazardous industries.

OVERSIGHT OF THE NATIONAL NUCLEAR SECURITY ADMINISTRATION

The suggestion has also been made that the new, semi autonomous National Nuclear Security Administration (NNSA) may insulate the DOE defense nuclear facilities from scrutiny by environmental, safety, and health officials at DOE and elsewhere. As to the Defense Nuclear Facilities Safety Board, let me assure you that after a careful review of the NNSA's enabling legislation and legislative history, the Board's power and authority have neither been repealed nor displaced by the NNSA. Moreover, discussions between the Board and NNSA officials fully support the continued statutory jurisdiction of the Board.

It has also been suggested that the existing environmental, safety and health oversight office within DOE no longer has oversight over NNSA activities. In September of 1998, the Board issued Recommendation 98-1, concerning the effectiveness of the Department of Energy process to address and resolve the safety issues identified by its internal, independent oversight organization at the DOE's defense nuclear facilities. Specifically, the recommendation identification of specific weaknesses in addressing oversight functions and recommended that the Department make improvements to identify roles and responsibilities, issue/dispute resolution, senior management involvement, content of corrective action plans, tracking reporting, and verification approaches.

The central safety issue identified by the recommendation was that the Department needed a clearer, comprehensive, and systematic process to address and resolve environment, safety and health issues identified by the DOE's internal Office of Oversight. To implement this recommendation, the Secretary of Energy committed to take the following actions:

- Establish a consistent, disciplined process and clear roles, responsibilities, and authorities for developing and implementing responses to identified safety issues.
- Establish clear directions on the process for elevating identified safety issues to higher authority for resolution, up to the Office of the Secretary if necessary.
- Establish effective tracking and reporting of corrective action progress.

The Secretary's commitments under this Implementation Plan and all others remain in full force and effect. Again, let me emphasize that neither the Secretary's commitment to implement internal oversight findings nor the Board's continuing oversight of the DOE's defense nuclear facilities have been repealed or displaced by the legislation creating NNSA. We are still very much in business.

IMPACT OF REGULATION ON NATIONAL SECURITY

The most serious problem with any external nuclear regulation of DOE's defense program would be a potential for adverse effects on national security.

To regulate, with or without licensing or permitting authority, is to control, direct, or govern, coupled with the authority to enforce or penalize for violation. Regulatory control by an external agency of the nuclear health and safety aspects of DOE's performance of its defense mission could permit the regulator to shut down vital facilities, thereby diminishing the declared primacy of national security by relieving DOE of a significant portion of its responsibility for the nuclear weapons program.

In establishing the form and authority of the Board, Congress deliberated on the matter of oversight versus regulation. While wishing to ensure better environmental, health, and safety protection than historically provided in weapons produc-

tion, Congress elected the non-regulatory option. National security was an important consideration. Although there are those who are opposed to the nuclear weapons program and are concerned about proliferation, Congress and the Administration still consider our nuclear weapons program as essential to the national security of this Country and our allies. It is essential that its deterrent objective not be put into question.

This was ably and successfully explained by government lawyers in the case of the Natural Resources Defense Council versus the Secretary of Energy, in the Federal District Court for the District of Columbia (NRDC v. Pena, 972 F. Supp. 9 (D.D.C. 1997)). Together with emphasizing the critical importance of the nuclear weapons program to national security, the court cited "credibility" as an important ingredient of national security, stating that the existence of the nuclear deterrent had to be believable and that credibility "depends in large part on the effective and successful" conduct of the weapons program. The court stressed that even a brief disruption of the program would create a vulnerability and that "any such vulnerability—and any future reduction in the credibility of our nuclear deterrent for even a brief period of time—would be unacceptable . . . Any doubt over the credibility of our nuclear deterrent would create unacceptable risks in the event of a future crisis . . ." The court also contended that any delay in the conduct of DOE's weapons program "could have serious national security implications."

Delay is a commonly encountered consequence of the regulatory process. The Atomic Energy Act and the Administrative Procedure Act require a nuclear regulatory agency to adhere to a formalized process that can result in adversarial hearings, administrative reviews, and an opportunity for judicial appeals such that private and special interest intervener are accommodated. Licensing arenas are often battlegrounds over legal processes rather than substantive nuclear health and safety issues, and often result in extensive delays.

Note that the Board is not a regulatory body. It cannot control, direct, or govern any function, or interfere with the paramount national security mission. In creating the Board, Congress specifically chose not to establish another regulatory agency. The choice of oversight rather than regulation reflected a careful balancing by Congress of national security interests with the various methods for promoting improvements in safety at DOE facilities. This is fully consistent with preserving the semi-autonomous nature of NNSA by preserving the responsibilities of the Secretary of Energy under the Atomic Energy Act

The usual enforcement powers of regulators, e.g., denial of license and fines, are not appropriate for DOE defense activities. Denial of licenses would stop critical national security activities, and fining DOE would merely transfer appropriations away from the safety activities the public is concerned about, thereby making operations potentially more risky and cleanup activities further delayed.

Regulating agencies in general were intentionally chartered to have no stake in the success of the regulated enterprise. In fact, they can and do use the threat of shutting down the enterprise to enforce their goals. But the nuclear weapons program is an inherently governmental function. The notion that in contentious adversarial proceedings an external regulator could decide whether DOE may have a license or certificate to build or operate a nuclear weapons facility gives the regulator a ready tool to overrule the President and Congress on an issue of national security.

CONCLUSION

As a direct result of DOE's improved self regulation, coupled with the Board's independent external oversight, DOE's safety and environmental protection programs at defense nuclear facilities during the past decade have been marked by considerable improvement, increased effectiveness, and minimal disruption to national security missions. The priority that may have been accorded to mission objectives in the past has given way to a DOE management philosophy that stresses doing work safely while competently.

Sections 2 and 3 of H.R., 3907 would deprive the Department of Energy of its enforcement authority with respect to nuclear safety which would be assumed by a regulator, the Nuclear Regulatory Commission, an agency with no responsibility for the security mission. Regulation by itself cannot assure safety is a maxim long known by those experienced in hazardous occupations. No outside authority or organization can be an effective substitute for a competent and dedicated internal safety organization.

Based on available information and the individual experiences of Board Members, we conclude that Congress made the correct decision in 1988 when it adopted the recommendation of the Senate Committee on Armed Services for national security reasons to maintain responsibility for nuclear safety of DOE defense activities with

the Secretary of Energy and to establish the Defense Nuclear Facilities Safety Board as an independent advisory agency and not as a regulator.

Mr. BARTON. Thank you. Thank you, Mr. Conway.

The Chair will now recognize—Mr. Mande, did you get to give your testimony?

Mr. MANDE. Yes, I did.

Mr. BARTON. And Mr. Meserve, you got to give your testimony?

Mr. MESERVE. Yes.

Mr. BARTON. Okay. The Chair recognizes himself now for questions.

My first question is to Mr. Mande. Am I saying that right, by the way?

Mr. MANDE. The "e" is actually silent; it is Mr. Mande.

Mr. BARTON. Mande.

Mr. MANDE. Thank you.

Mr. BARTON. Well, that is even easier for me. One syllable words are much easier than two.

I want to thank you for your constructive testimony. While my friends at DOE and the policy board talk about the insurmountable problems, you are pretty straightforward that you think you could do it, and I want to appreciate your positiveness.

Could you elaborate a little bit on the experience that OSHA has had with the pilot projects where you believe that you could have significant gains in terms of protecting worker safety if we had external regulation of DOE?

Mr. MANDE. Certainly, Mr. Chairman. As you know, we have done three pilots over 5 years, two of them recently.

In those pilots we were not able to do the full wall-to-wall inspection of the site that we normally do because of the site size, but we were able to look at a considerable part of these sites and look at the activities that were taking place.

One concern that we identified is that today when DOE identifies a problem, it does what it can under its existing resources to see that that problem has some type of interim fix, but often the final fix to the problem must be put off until DOE is able to seek and get additional funds. If those funds are not forthcoming, which has happened in many instances, the hazards become backlogged and abatement does not occur.

Under OSHA rules, when there is a hazard and workers' health and safety is put at danger that hazard needs to be addressed and fixed within a very short timeframe so that workers are protected. That is one of the major examples of what would be different between how we work and how DOE works and it would improve worker safety.

Mr. BARTON. Good. Chairman Meserve, you were not quite as positive in your testimony, but you did think it could be done if we took a phased approach. Could you elaborate a little bit on that and how soon you think the NRC could implement some of the external regulation at certain DOE facilities?

Mr. MESERVE. The NRC does feel that it is prepared to undertake this task if the Congress were to indicate that we should do it. We certainly have the competence and capability in our organization to be of assistance in this way.

The problem, as I indicated in my testimony, is that we have a lot on our plate now in dealing with our civilian nuclear licensees. These are very important initiatives that we need to continue to maintain the momentum of our activities. So this would be the problem with if, at one time, we were to undertake the entirety of regulation of DOE.

DOE has an immense operation and it would be an immense burden on the NRC to undertake a regulatory role all at one time, so we have suggested a phased-in approach. What I would think might be a sensible way to proceed would be if the NRC were initially to gradually undertake the regulation of the Office of Science and NE part of DOE, which is what had originally been envisioned for us.

It might take 5 years to bring that part of system fully up to speed—and then after 5 years we might take on some of the environmental management part of DOE and then after, perhaps at the end of a second 5-year period, start to look at the defense facilities.

This is something I think that would require a lot of effort and planning——

Mr. BARTON. If I heard you right, you want to phase it in over a 10-year period?

Mr. MESERVE. That is correct, sir.

Mr. BARTON. You don't think your people are a little bit more open-minded than that, that they could not grasp things, all these high-powered educated, gung-ho, patriotic people on your staff? It would take them 10 years?

Mr. MESERVE. Well, let me say——

Mr. BARTON. Even Congressmen can learn faster than that.

Mr. MESERVE. As I am sure you are aware, DOE has an immense enterprise, and it is a very complicated enterprise.

Mr. BARTON. That is one of the problems at DOE.

Mr. MESERVE. And it is a problem for us in doing it quickly.

Let me just say by way of example that we did undertake the regulatory responsibility over the gaseous diffusion plants. Congress at that time basically allowed roughly a 5-year period for us to develop our capacity and regulatory system to be able to deal with those plants, to work with the licensee, the certificate-holder in that case, and develop the trained, capable people to be able to do the job. That went smoothly but it was because it was a lot of work and planning was undertaken to enable that to go smoothly.

Our problem is that that was just one of the DOE facilities and having to undertake possibly the large number of other facilities all at one time would pose an enormous challenge to us.

Mr. BARTON. Well, I believe you are more challenge-acceptive than you give your agency credit for, but I appreciate your testimony.

Mr. MESERVE. I appreciate the compliment.

Mr. BARTON. I want to ask one final question to Ms. Sullivan before we recognize Mr. Whitfield. On H.R. 3906, which would have the Security Office report, in addition to the Secretary of Energy, directly also report to the Congress, your agency, your Department opposes that, and as far as staff can tell, the only reason that you oppose it appears to be because it also does report directly to the Congress.

Is that right?

Ms. SULLIVAN. I think our fundamental concern about that provision is that under basic separation of powers notions, the President and his immediate subordinates, the members of the Cabinet, determine what communications should be made to the Congress and this provision is in tension with that.

On a practical level it creates a potentially adversarial relationship between the Director of the Office and the Secretary and the success of that Office has been that the Director believes that he has the full confidence and the direct ear of the Secretary to bring problems to his attention when they are identified.

Mr. BARTON. But if we showed you in law all the instances where there is a dual reporting, would that alleviate the Department's concern?

Ms. SULLIVAN. I am sure there are many instances of——

Mr. BARTON. Because we have numerous——

Ms. SULLIVAN. [continuing] of dual reporting. It is the notion of dual——

Mr. BARTON. It is the same office——

Ms. SULLIVAN. [continuing] reporting focus on differences of view——

Mr. BARTON. We are taking what you did and putting it in law and the only addition that we really substantively have is that we require a dual report to the Congress. That—I cannot believe that Secretary Richardson has a problem with that.

Ms. SULLIVAN. The fundamental concern is that the Department of Energy Organization Act gave the Secretary ample authority to respond promptly without legislative action to an immediate need to have improved oversight of security.

Mr. BARTON. And so if a future Secretary wanted to bury the Safety Office somewhere back down in the bureaucracy like it used to be, that is okay with the Clinton Administration?

Ms. SULLIVAN. I think the concern is that, if a changed circumstance required some change that we can't now presently foresee because we do not know what the circumstance is, that by having a legislative mandate that locks one particular form in place that makes sense now, we would lack the flexibility to respond to a new and different circumstance.

Mr. BARTON. So you object to the Congress wanting to place an emphasis on safety and being given timely reports? That is your objection. You want to keep us in the dark.

Ms. SULLIVAN. No.

Mr. BARTON. Keep the Secretary in the light but keep the Congress in the dark, so that is why you are objecting to the bill.

Ms. SULLIVAN. I think the Congress has ample authority to obtain information directly from anybody it wants. What we are concerned about is locking into place a system that is——

Mr. BARTON. With an emphasis on safety.

Ms. SULLIVAN. [continuing] working. The Office of Oversight focuses on security. In fact, their safety functions have been left in the Office of Environment, Safety and Health. The system is working well now and it is working well because the Secretary was able to create a system that he thinks he needs to meet the circumstances that exist now, and we believe it would be desirable to

leave him that flexibility in the future to respond to changed circumstances.

Mr. BARTON. All right. Well, thank you for that.

Mr. Whitfield, and then we will go to Mr. Sawyer.

Mr. WHITFIELD. Thank you, Mr. Chairman. Ms. Sullivan, first of all, I apologize to all of you for coming in late. I missed most of your testimony.

What is the position of the Department of Energy? Do they have an official position on H.R. 3907 at this time?

Ms. SULLIVAN. Our position on H.R. 3907 is that we do not support NRC regulation of DOE facilities. The OSHA portion of it, our concern is the same concern that Mr. Mande identified, of ensuring an orderly transition.

We believe that orderly transition is already underway. There are a number of DOE facilities that are already subject to OSHA jurisdiction, and we are adopting OSHA standards wherever they apply to the hazards we have at our facilities, and we are working closely with OSHA already.

Mr. WHITFIELD. And why does the Department oppose the transfer of jurisdiction to NRC?

Ms. SULLIVAN. After an exhaustive study through a joint pilot program, we identified a number of difficult implementation problems. The costs were far out of proportion to the benefits we could identify, and we are concerned that the phased approach that Chairman Meserve referenced, the costs of transitioning to the NRC for the simple facilities would take away from the focus on improving safety at our more difficult facilities.

Mr. WHITFIELD. Okay, so cost is one issue that you're concerned about.

Ms. SULLIVAN. Cost is certainly an issue.

Mr. WHITFIELD. You know, the Washington Post has been writing a series of articles almost nonstop about the Paducah gaseous diffusion plant. And it's occupied a lot of our time, those of us who represent Paducah. And Ted Strickland represents Portsmouth, Ohio, the gaseous diffusion plant there.

And in Paducah alone, the Department of Energy, through its subcontractors, has spent over $400 million on environment cleanup. The environmental aspects of that site are so horrendous, that the impression is that very little, if anything, has been accomplished there.

And it's difficult for me to understand how you can spend $400 million and accomplish almost nothing from an objective standpoint on cleaning up all of the problems there, but still defend self-regulation in that area.

Ms. SULLIVAN. Gaseous diffusion plants are under NRC regulation now. We spent $300 million moving two facilities to NRC regulation.

Mr. WHITFIELD. The production is under NRC regulation, but I'm talking about the site.

Ms. SULLIVAN. The legacy problems are clearly problems that need to be addressed. I think the Secretary, through his request for supplemental appropriations, has indicated the importance he places on addressing the newly discovered environmental problems.

I'm not sure that we would agree that nothing has been accomplished to date. We've been working closely with EPA and with the Kentucky Environment Department on the cleanup of those sites.

We are accelerating some of those activities in light of some of the newly discovered problems.

Mr. WHITFIELD. I will say that Secretary Richardson has been responsive. DOE, over a number of years, was responsible for the production, as well as the offsite environmental issues until it was privatized a few years ago.

Not only in Paducah—I mean, you could talk about Savannah River, Hanford, and a lot of other sites around the country, all of which face some of these same issues.

At Paducah alone, we have over 50,000 drums of contaminated material just sitting out there. We have Drum Mountain. We have water levels that are contaminated. We have worker health problems there.

And the sense is that—and I'm not saying Secretary Richardson, necessarily, or this Administration, because he has just come into office, but in the past, the Department has not been particularly effective through its subcontractors, at taking care of this issue.

Now, I recognize that it's going to cost a lot of money, but I think we have to seriously consider other alternatives in dealing with this issue.

Ms. SULLIVAN. Mr. Whitfield, on the environmental issues, the Department has been subject to external regulation for in excess of 10 years. And the problems you're identifying indicate that external regulation doesn't solve the very serious problems the Department has to deal with.

We are making progress, but simply changing the jurisdiction of the regulator doesn't solve the problem. It take money, it takes technology, it takes sustained attention, which we are attempting to devote to the problems now.

Mr. BARTON. The gentleman's time has expired. If you want to make a concluding statement——

Mr. WHITFIELD. That's okay, Mr. Chairman, I'll let Mr. Sawyer go ahead.

Mr. BARTON. The gentleman from Ohio is recognized for 5 minutes.

Mr. SAWYER. Thank you very much, Mr. Chairman. It must be a shocking transition to go from jury duty on the one hand, to be sitting here as a witness on the other, and I hope not to add to the difficulty of that transition.

Let me go back, though. I think it's probably fair to say that everybody agrees that the DOE facilities are old, they are extraordinary in their hazards, and that there are operational and security considerations that pose some difficulty.

But if for a moment we recognize and accept the bifurcation of time periods in terms of when DOE was responsible and now in places like Paducah and Portsmouth, in forward-looking oversight and regulation, that the NRC has successfully applied its regulations and standards to the operations of the U.S. Enrichment Corporation.

Can you tell me why this works at those two places, but wouldn't work anywhere else?

Ms. SULLIVAN. If we had all the money in the world, I think we would all agree that any regulatory system would work. Our concern is devoting the very substantial management and financial resources that would be required to develop a whole new regulatory system for NRC, because they don't have regulations in place that apply to the kind of facilities we have.

So they either have to adopt our standards through a long administrative process, or create a whole new set of standards. NRC, when it took over regulation of the gaseous diffusion plants, observed that it felt that they had generally been operated safely.

So, our concern is devoting enormous resources and not getting a substantial improvement in safety by simply changing who's regulating.

Mr. SAWYER. Do you have a sense that the phased-in approach suggested by the NRC has promise for the future, or is your discomfort unabated?

Ms. SULLIVAN. My principal concern about the phased-in approach is that the costs associated with phasing in NRC regulation at very simple facilities, the ones that the NRC is prepared to take on now, would divert resources from the more complex, more hazardous facilities that DOE would remain responsible for during the transition phase.

We have tried over the last decade to focus our attention on a risk-informed basis to address the most serious risks first. If, instead, we devote all our attention to the easy ones—the facilities that NRC is proposing to take on first don't present safety hazards today.

Mr. SAWYER. Mr. Meserve, can you comment on that?

Mr. MESERVE. Well, let me say that as Ms. Sullivan has indicated, there is an enormous range of activities that DOE undertakes. Some are simple, some are complicated.

We have some experience in regulating DOE facilities in that we have been involved in regulating spent fuel storage, for example, various involvements with uranium mill tailings and the like.

We've been an advisor to DOE in some very difficult problems they've had at Hanford with regard to their tanks.

We have a different view than the DOE has of the costs associated with the pilot program. There was a report that we had prepared on the lessons to be learned from the pilot program, and I would like to submit it for the record.

Mr. SAWYER. Would that include a detailed description of how you get from here to there in terms of a 10-year phase-in?

Mr. MESERVE. No, sir. We had a pilot program where we looked at cooperating with DOE at a time when DOE was anxious to have external regulation. The Advisory Committee had told DOE that they should have external regulation.

It was a pilot program involving three facilities. And we——

Mr. SAWYER. Well, let me ask you, is each facility so unique that each requires its own plan, or what do we learn from the pilot experience?

Mr. MESERVE. The pilot experience on the facilities we examined was that the issues associated with them were manageable, that they could be resolved.

There are some differences in views as to what appropriately are costs associated with the dual regulation and what are costs that would have been required in the DOE system to bring the plants up to snuff with DOE orders, let alone NRC requirements.

But basically the conclusion of the pilot program was, that for the facilities we examined, that this was a doable task.

Mr. SAWYER. Thank you, Mr. Chairman. I see my time has expired.

Mr. BARTON. Thank you, Congressman Sawyer. Congresswoman Wilson?

Mrs. WILSON. Thank you, Mr. Chairman. Mr. Conway, I don't know whether you've answered this question, but I wanted to ask it to you anyway. Can you compare or give us some kind of sense of the health and safety record of the nuclear reactors and the nuclear programs in the Department of Energy, compared to other scientific and nuclear operations in either government or industry?

Mr. CONWAY. Well, if you talk about the nuclear reactors under the Department of Energy, you'd have to take into consideration, the more than 100 Naval ones. The nuclear Navy has a dual hat. The head of the Navy Nuclear Program also holds a position in DOE, and they have had an excellent record, obviously.

Then if you take into consideration, the reactors that have been operated up at Hanford and also at Savannah River, they were for production, producing plutonium. And the purpose is not to produce electricity, although at one of them, up at Hanford, there was one dual purpose reactor that did produce electricity that went into the Bonneville Grid.

But when you look at them from a safety point of view, there have been problems, as the commercial industry has had, but we have had no deaths whatsoever in the nuclear reactors operated by the DOE.

Under the old AEC, we had one reactor experiment up at Idaho Falls in which three individuals were killed, one of whom had been a sailor assigned to a military reactor, not a nuclear Navy one; it was an Army reactor program.

But I think when you study the history of the reactor program in the United States, it has been an excellent, excellent safety program, notwithstanding Three Mile Island, in which no one was injured, including the workers. No injured worker at Three Mile Island, even though it was a meltdown.

So I think this country has an excellent record under the DOE, and also under its predecessors, including the Atomic Energy Commission.

Mrs. WILSON. Thank you. I have a question for you, and it's really based on—without any disrespect to your peers, you kind of have a unique perspective on this, now being with the NRCC, but previously having spent a great deal of time looking at the Department of Energy and particularly at the nuclear weapons complex.

I wonder, from your perspective, your unique perspective——

Mr. BARTON. I think you meant NRC, not NRCC. NRCC is the campaign committee, and I don't think he's on that.

Mrs. WILSON. Did I say NRCC? I'm sorry. I apologize.

Mr. BARTON. Let's correct the record. She meant NRC. There's a big difference.

Mrs. WILSON. I didn't want to judge you by the company you keep.

From your perspective, what improvements in safety or health do you think would result or savings in costs, even, not for the early change in regulation of things that are very similar to what the NRC does now, but for some of the more unique Department of Energy operations? What's the advantage here?

Mr. MCGAFFIGAN. I think the fundamental advantage comes from the openness of our process, and the credibility I think it would bring with the public.

I think that Mr. Conway——

Mrs. WILSON. I'm not talking about public credibility. I'm talking about health, safety, and cost. What's the advantage to making this huge organizational shift?

Mr. MCGAFFIGAN. The facilities, as they are operated today, are generally okay, but they continue to have problems. People electrocute themselves at Los Alamos and things like that. That happened just before I came to the Commission.

I think things are tolerated in the DOE system that would not be tolerated in an NRC system or an OSHA system. DOE has a tendency to postpone things.

When the gaseous diffusion plants were certified—you heard the DOE General Counsel say that it cost $300 million. We sharply disagree with that. But there was a large amount of money spent, most of it to get the plants to where DOE said they should have been under the DOE order system.

So the question is, do you want external oversight of DOE. DOE was in favor of external regulation 4 years ago. Tom Grumbly used to see a tremendous benefit in having the DOE facilities treated as if they were private sector facilities and held to the same sort of standards as private sector facilities.

Now, that will cost money, and we can't do it all immediately in terms of the complex defense facilities. We can't do that any time soon, and we'd have to have a transition.

At the end, I think you'd have a system that would have greater credibility because the rules would be enforced as they existed and as the public understood them. It wouldn't be orders. It wouldn't be contract provisions; there would be rules on the books, arrived at by this long process that the General Counsel talked about, and then enforced by a capable staff, working directly with the contractors.

One of the issues I think you'll hear from Chuck Shank about later, the licensee, for the most part, would have to be the contractor. DOE would have to step back and allow the contractor to be the licensee. It could simply have contract clauses telling the contractor that they had to stay in NRC's good graces. I think you'd have a much more professional DOE complex if that were the case.

Mrs. WILSON. Thank you. One last question, if I may, to Mr. Mande.

Does OSHA currently oversee your inspector, have jurisdiction over any special access programs?

Mr. MANDE. By special access?

Mrs. WILSON. I mean, highly classified programs.

Mr. MANDE. Let me check. I'll have to get back to you on that. But I think one of the issues we looked at at Oak Ridge, for example, was trying to inspect in a classified environment.

[The following was received for the record:]

Yes, we have done inspections of sites that required Q-security clearance, which is equivalent to top-security clearance. However, we have not inspected any special access programs, which are established for safeguarding information over and above what would be required for a Q-claerance area.

Mr. MANDE. In the pilot, it worked fine. But because in the pilot, DOE knew the inspections were coming, all the arrangements could be made ahead of time.

One of the concerns that we have, one of the issues that needs to be worked out is that OSHA's effectiveness depends on unannounced inspections.

Mr. CONWAY. Mr. Chairman, if I may, possibly before Mr. Mande's time, when Admiral Watkins headed up DOE, he entered into a memorandum of understanding with OSHA. And myself and the other Board members and our staff interfaced with them, particularly at Rocky Flats.

Now, that, compared with many other facilities, is what we would call a "dirty," facility, with buildings highly radioactive. There are some rooms you cannot go in whatsoever.

And when we were out at Rocky Flats, I remember very clearly working with the OSHA people who were out there, under this memorandum agreement. They were very worried. They did not know the nuclear area, and they indicated to the Board members and my staff that they were not very keen about going into some of those places, and I don't blame them. They had not been trained in that area.

And subsequently, another Board member and myself, Joe DiNunno, we visited with OSHA representatives here in Washington to talk about it.

They would tell us they were having a difficult time doing the commercial work that they were responsible for, because they did not have sufficient staff and not enough money from the appropriations.

Mr. BARTON. Congresswoman Wilson's question, I think, is more about security of classified information.

Mr. CONWAY. And this involved also——

Mr. BARTON. As opposed to the dirtiness or the radioactivity.

Mr. CONWAY. But also they did not get into any of the classified work out at Rocky Flats or elsewhere, to the best of my knowledge.

Mr. BARTON. But, Mr. Mande, before we go to Mr. Wynn, you don't have any doubt that there are staff people in your organization that can pass a security background check by the FBI; do you?

Mr. MANDE. No, many of us have done that.

Mr. BARTON. You can handle classified material, if you are vetted properly?

Mr. MANDE. Yes.

Mr. BARTON. Congressman Wynn for 5 minutes.

Mr. WYNN. Thank you, Mr. Chairman. I apologize that I did not get the opportunity to hear the testimony, and I may be asking questions that you've covered. If so, please indulge me because I just have a couple.

It's my understanding that there has been a dramatic drop in the number of security inspections. This was reported in the GAO study.

I guess my first question is, is that, in fact, an accurate description of what has happened, and if so, why?

Ms. SULLIVAN. I don't believe that that is accurate. If you're referring to security clearances or inspections of facilities——

Mr. WYNN. Oversight inspections. So I presume that encompasses both.

Ms. SULLIVAN. In fact, the Office of Oversight has been extremely active since it was reformulated by the Secretary last year.

I'm not aware of any drop in its inspection activities.

Mr. WYNN. So you say that the GAO report would be incorrect?

Ms. SULLIVAN. I'm unfamiliar with the particular GAO report you're referring to. I'd want to look at it and see if we're thinking about different things.

Mr. WYNN. Security oversight inspections is what's referred to in our notes here. Beyond that, I'm sorry I cannot say more. It kind of caught my aware.

Ms. SULLIVAN. I'm unaware of any drop. The information that I have——

Mr. WYNN. Office of Independent Oversight——

Ms. SULLIVAN. Has been very active. It has been focused primarily on the weapons labs over the last several months since the security concerns of last year.

Mr. WYNN. Prior to that, though, had there been a dropoff, if we go, say, over a 5-year period?

Ms. SULLIVAN. I don't know the answer to that. The Office of Oversight previously had both safety—environment, safety, and security issues all within its jurisdiction.

And so it may have focused in recent years more on the safety side than on the security side. As reformulated, it's now focusing exclusively on the security side.

Mr. WYNN. And this reformulation occurred when?

Ms. SULLIVAN. Last year.

Mr. WYNN. Just when the problems occurred?

Ms. SULLIVAN. That's correct.

Mr. WYNN. Okay. I understand that the officers in the security staff have been reduced significantly; is that correct?

Ms. SULLIVAN. Not that I'm aware of.

Mr. WYNN. All right, I will——

Ms. SULLIVAN. In the Office of Independent Oversight? I'll be happy to check and get back to you.

[The following was received for the record:]

During the mid to late 1990s, the number of Headquarters personnel that focused on independent oversight of safeguards and security was gradually reduced from approximately 32 to 17 during various cost reduction efforts. When the Secretary established the Office of Independent Oversight and Performance Assurance (OA) in May 1999 as an independent office focusing solely on safeguards and security and emergency management, DOE recognized that the number of staff needed to be increased. To ensure that OA would have the capability to perform its mission effectively, the DOE took appropriate action to add staff. At the time it was formed, OA had 17 safeguards and security professionals, including cyber security. OA currently has 42 Federal personnel assigned, 22 performing independent oversight functions in nuclear material safeguards and security. The remaining personnel perform inde-

pendent oversight in the areas of cyber security and emergency management and make up the OA management and administrative support staff.

Mr. WYNN. Yes, would you check.

Ms. SULLIVAN. But I would be very surprised.

Mr. WYNN. I guess, generally speaking, there is a concern about the degree of oversight and whether or not this office has basically been buried with conflicting missions, which lead to inadequate oversight.

And that is certainly the suggestion, and if that's not the case, I would like, you know, kind of a full explanation of what, in fact, did happen with respect to this office.

Because that's the subject of one the bills, 3906, which I understand you oppose; is that correct?

Ms. SULLIVAN. We are opposed to it because we believe the office that the bill provides for exists, has been created by the Secretary in response to the recent security concerns.

And we don't favor a legislative mandate for that, because we think the function is already there and working well.

Mr. WYNN. What about the mandate to report to Congress, the results of oversight inspections?

Ms. SULLIVAN. Our concern about that is that it has the potential to establish an adversarial relationship between the Director of the Office and the Secretary by requiring the Director to identify points of disagreement he has with respect to the Secretary's management of the Department, and we don't believe that's a desirable reporting format.

Mr. WYNN. I'm concerned by that response, I have to tell you. If there are, in fact, problems with the management that this office, which is supposed to be independent, uncovers, it seems appropriate that they would report that to Congress.

That doesn't necessarily have to be adversarial, but I obviously see how it could be. But the bottom line is, Congress has a right to have information about potential problems in this area.

So if we're not going to have independent oversight, then we ought not have the office. I think we ought to have the office and so I think we ought to have the right to get the results of that office's findings.

Ms. SULLIVAN. Certainly the Congress has the right to ask the Director of that office to come and report to the Congress at any time. In fact, Mr. Podonsky, the current Director of that office, has been before this committee, I believe, as recently as last week.

I think he believes the strength of the office as it's presently formatted, is that the has direct access to the Secretary and that he can bring to the Secretary, the one who by law is responsible for the management of the Department most directly, the problems that he thinks need to be addressed. And he has been doing that and had very favorable supportive response from the Secretary.

Mr. WYNN. Thank you. Mr. Chairman, I don't have any further questions.

Mr. BARTON. Thank you. We plan to try to keep the hearing going. Mr. Ehrlich?

Mr. EHRLICH. I will pass, but with one caveat. I just want to adopt the concerns expressed by my colleague from Maryland.

Mr. BARTON. The gentlelady from Missouri, Congresswoman McCarthy?

Ms. MCCARTHY. Thank you very much, Mr. Chairman. My major DOE contractor, Allied Signal, wants to move faster to address safety concerns and to achieve adequate oversight.

How does the legislation we're discussing today improve upon the process? Anyone?

Mr. MESERVE. Well, I can comment from the perspective of the NRC on this. Let me say that this is not a task that we have asked for, but if Congress were to ask us to undertake it, we would do so.

I think that as Mr. McGaffigan indicated in response to an earlier question, one of the benefits which I think caused DOE's own advisory committee to recommend that the NRC undertake an independent regulatory role in the Department is that it enable a focused examination of safety issues that would be undertaken independently of the other pressures that exist for operations. NRC offers basically a structured, capable system to monitor the safety of operations and assure that they continue.

I would anticipate that, if the NRC were to undertake the responsibility at these sites, there would also be an open process that we would follow, just as we do at all of our civilian nuclear sites, so that the public would be fully involved, the stakeholders would be fully involved. Hopefully out of that would come increasing confidence that the operations were safe, that decisions were being made appropriately and that would end up basically enhancing the credibility of the entire activity.

Mr. BARTON. If the gentlelady would suspend, we have two votes on the floor instead of one, so unfortunately we are going to have to recess the hearing.

I would like to get the first round of questioning done and be able to release this panel, so if there are members here that have one final question.

Ms. SULLIVAN. Could I just add in response to Congresswoman McCarthy's question, that is not a nuclear facility at Kansas City. NRC would not regulate that facility. We are already applying OSHA standards to much of the work that goes on at Kansas City.

Ms. MCCARTHY. So this bill will not affect them at all?

Ms. SULLIVAN. It would not change much at all at Kansas City.

Ms. MCCARTHY. Would not change much. Okay. We'll talk. Thanks.

Ms. SULLIVAN. Thank you.

Mr. BARTON. Is that all your questions? Does Mr. Ehrlich or Mrs. Wilson or Mr. Sawyer have a final question for this panel?

[No response.]

Mr. BARTON. Okay. We are going to release you. There will be written questions in addition to the oral questions that you have been given.

The subcommittee plans to aggressively pursue changes to the legislation so that we can go to markup within the next month, so have your staffs be available for input on that.

Thank you for your participation. This panel is released.

We are going to take a very brief recess. We are going to reconvene as soon as these series of votes are over with our second

panel. My guess is that is going to be approximately at 12:15, so I would encourage all the panel members on the second panel to be available, because when I do return I am going to reconvene with the panel members that are here, so we are in recess until approximately 12:15.

[Brief recess.]

Mr. BARTON. The subcommittee will come to order.

We have a motion on the floor right now by Congressman Gibbons of Nevada on the point of order on the nuclear waste legislation. There will be a vote in about 20 minutes, so we want to start this panel and hopefully get most of your testimony before we have to go vote.

We want to welcome Mrs. Jones, Associate Director, The Energy, Resources, and Science Issues in the GAO. We have Dr. Charles Shank, who is the Director of Lawrence Berkeley National Laboratory. We have Mr. Robert Van Ness, who is the Assistant Vice President for Laboratory Administration at the University of California. We have Ms. Maureen Eldredge, who is the Program Director for the Alliance for Nuclear Accountability. We have Dr. David Adelman, who is the Project Attorney for the Nuclear Program in the Natural Resources Defense Council. I don't see Mr. Miller.

Mr. COOK. Mr. Chairman, Mr. Miller is over on the Senate side.

Mr. BARTON. Ah—but he is on his way. He is a policy analyst for the PACE International Union, so we are going to start with Mrs. Jones.

Your testimony is in the record. We will recognize you for 7 minutes to summarize it and then we will just go right down the line, then we will have questions.

STATEMENTS OF GARY L. JONES, ASSOCIATE DIRECTOR, ENERGY, RESOURCES, AND SCIENCE ISSUES, GENERAL ACCOUNTING OFFICE; CHARLES V. SHANK, DIRECTOR, LAWRENCE BERKELEY NATIONAL LABORATORY; ROBERT L. VAN NESS, ASSISTANT VICE PRESIDENT FOR LABORATORY ADMINISTRATION, UNIVERSITY OF CALIFORNIA; MAUREEN ELDREDGE, PROGRAM DIRECTOR, ALLIANCE FOR NUCLEAR ACCOUNTABILITY; AND DAVID E. ADELMAN, PROJECT ATTORNEY, NUCLEAR PROGRAM, NATURAL RESOURCES DEFENSE COUNCIL

Ms. JONES. Thank you, Mr. Chairman. We are pleased to be here today to provide our views on three bills designed to improve worker and nuclear facility safety as well as enhance security for the Department of Energy.

H.R. 3383 would amend the Atomic Energy Act by eliminating the exemption that allows nonprofit contractors to avoid paying civil penalties for violations of nuclear safety rules. DOE argues that the exemption for nonprofit contractors should be continued. We disagree. DOE said that nonprofit contractors would be unwilling to put their assets at risk to pay civil penalties. However, nearly all of these contractors now have the opportunity to earn a fee, which they generally use to fund research that they want to do. The fee could also be used to pay civil penalties.

DOE also said that contract provisions are better mechanisms than civil penalties for holding nonprofit contractors accountable.

However, DOE has not taken full advantage of existing contracting mechanisms.

For example, the University of California received 96 percent of its $6.4 million available fee for managing Lawrence Livermore in fiscal year 1998, even though it had significant nuclear safety deficiencies resulting in enforcement actions. This bill directly addresses our suggestion to the Congress that it eliminate both the statutory and administrative exemptions from paying civil penalties for violating nuclear safety rules.

H.R. 3906 legislatively establishes an office independent of line management that oversees security at DOE facilities and that reports directly to the Secretary. This office exists now and currently reports to the Secretary. Then why do we need legislation?

The simple answer is so that the office and structure will be permanent and not dependent on the importance future Secretaries place on security. This has been a problem in the past. For example, the office was several layers down in the Environment, Safety and Health organization prior to May 1999 and at one time was in Defense programs.

I also wanted to clarify a point about our report on safety in the discussion between Mr. Wynn and Ms. Sullivan on the last panel. Our report noted that over a 5-year period prior to May 1999, there were at least 3 years for one facility where the oversight office did not do an oversight investigation. Since May 1999 with the changes the Secretary initiated they have been doing more regular inspections.

Legislatively establishing that office insulates it from organizational change and programmatic conflicts and, along with the annual report to the Congress, helps to ensure prompt corrective action is taken.

H.R. 3907 would eliminate self-regulation of health and safety activities at DOE by authorizing NRC to regulate and enforce nuclear safety and OSHA to regulate and enforce occupational health and safety for all DOE facilities. This bill provides a sound basis for continuing the process of moving DOE in the direction of external regulation.

We, along with others, have reported on DOE's weaknesses in its self-regulation of environment, safety and health at its facilities. The results of the pilot program as well as the extensive interactions between DOE, NRC, and OSHA over the years showed that external regulation offers benefits and that external regulators have the flexibility to adjust to unique DOE facility conditions.

However, the timeframe allowed in the bill for transition to full external regulation may not be achievable. NRC and OSHA have experience with some DOE facilities and have studied others through the pilots. External regulation of these facilities, which includes small, less complex facilities and nondefense research laboratories, could be on a faster track. However, defense facilities were not included as part of the pilot and they are far more complex than the facilities studied. Therefore, more time would be needed to study issues such as the need to maintain security, regulatory costs, resource and skill needs, and transition methods.

Mr. Chairman, while all three bills have the potential to improve some aspects of health, safety, and security at DOE facilities, legis-

lation could only take change so far. In the final analysis it will require a long-term commitment by DOE, and quite frankly, DOE has not demonstrated the will nor has the culture in place to make lasting changes. DOE needs to focus on aspects of its culture that are barriers to effectively carrying out its missions in a safe, environmentally sound, and secure way.

Over the years our work has noted such things as a complicated organizational structure, poor accountability, weak oversight of contractors, lack of technically skilled staff, and resistance to change. Without focusing on these issues, DOE will not be able to break out of the culture or mindset that permeates it. Therefore, even with the changes brought about by these legislative proposals, problems inherent in DOE may continue.

Mr. Chairman, we look forward to working with you as you move to mark up these bills.

[The prepared statement of Gary L. Jones follows:]

PREPARED STATEMENT OF GARY L. JONES, ASSOCIATE DIRECTOR, ENERGY, RESOURCES, AND SCIENCE ISSUES, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE

Mr. Chairman and Members of the Subcommittee: We are pleased to be here today to provide our views on three bills designed to improve worker and nuclear facility safety and health as well as to enhance security for the Department of Energy (DOE). Our testimony is based on our past work on safety, health, and security issues on a wide variety of DOE programs and activities.[1] Let me summarize our views on the three bills:

- H.R. 3383 would amend the Atomic Energy Act by eliminating the exemption that currently allows certain nonprofit contractors to avoid paying civil penalties if they violate DOE's nuclear safety rules. Last year, we reported and testified on a number of problems with DOE's enforcement of its nuclear safety regulations. We suggested that the Congress consider eliminating both the statutory and administrative exemptions from paying civil penalties for violations of nuclear safety rules. This bill directly addresses our concerns.
- H.R. 3906 would legislatively establish an office of independent security oversight within DOE that reports directly to the Secretary. We believe that legislatively establishing an office, independent from line management, that oversees safeguards and security across the Department and reports to the Secretary would insulate it from organizational change and programmatic conflicts. Since May 1999, DOE's security oversight office has reported to the Secretary. However, prior to May 1999, it was several layers down in the organization and, as a result, oversight findings were not always raised to top management. The legislation would also require an annual report to the Congress from that office on the status of its findings. Requiring an annual report would make the office's findings more visible and help to ensure prompt corrective actions are taken.
- H.R. 3907 would eliminate self-regulation of health and safety activities at DOE by authorizing the Nuclear Regulatory Commission (NRC) to regulate and enforce nuclear safety and the Occupational Safety and Health Administration (OSHA) to regulate and enforce occupational health and safety for all DOE facilities. This bill provides a sound basis for continuing the process of moving DOE in the direction of external regulation. However, the time frame allowed in the bill for the transition to full external regulation may not be achievable. NRC and OSHA have experience with some DOE facilities—smaller, less complex facilities and nondefense research laboratories. The transition to NRC and OSHA regulation of these facilities could be achieved relatively quickly. However, issues associated with regulating larger defense facilities are more com-

[1] See *Department of Energy: DOE's Nuclear Safety Enforcement Program Should Be Strengthened,* GAO/RCED-99-146, Jun. 10, 1999). *Nuclear Security: Improvements Needed in DOE's Safeguards and Security Oversight,* (GAO/RCED-00-62, Feb. 24, 2000). *Department of Energy: Uncertain Future for External Regulation of Worker and Nuclear Facility Safety,* (GAO/T-RCED-99-255, Jul. 22, 1999). *Department of Energy: Clear Strategy on External Regulation Needed for Worker and Nuclear Facility Safety,* (GAO/T-RCED-98-163, May 21, 1998).

plex, such as the need for experience with unique activities at weapons facilities, and would take longer to evaluate and may require special consideration.

Mr. Chairman, while all three bills have the potential to improve some aspects of health, safety, and security at DOE facilities, legislation can only take change so far. In the final analysis, it will require a long-term commitment by DOE, and quite frankly, DOE has not demonstrated the will nor does it have the culture in place to make lasting changes. DOE needs to focus on aspects of its culture that are barriers to effectively carrying out its missions in a safe, environmentally sound, and secure way. Over the years, our work has noted culture barriers such as a complicated, dysfunctional organizational structure; an unclear chain of command; poor accountability for program management; weak oversight of contractors; lack of technically skilled staff; and resistance to change.

DOE has made changes and has activities under way that address some of these issues. However, it must continue to look at human capital issues, such as hiring and training to improve the skills of its employees, the performance measures and incentives systems for contractors and federal employees to ensure that they reward the correct behaviors, and clear definition of roles and responsibilities to eliminate duplication and inefficiencies. Without identifying and focusing on the barriers to change, DOE will not be able to break out of the culture or mindset that permeates it. Therefore, even with the changes brought about by these legislative proposals, problems inherent in DOE may continue.

Background

Since its creation in 1977, DOE has conducted technically complex and hazardous activities at its facilities across the country. These activities include developing, producing, maintaining, storing, and dismantling nuclear weapons; managing nuclear fuel storage and disposal sites; operating nuclear reactors; performing research and development to enhance energy efficiency and to develop innovative nuclear, renewable, and other energy sources; and cleaning up environmental contamination from its past weapons production. Besides being potentially dangerous, some of these activities are highly classified and require sophisticated security measures. However, in conducting these activities, DOE has a long history of safety, managerial and security problems.

DOE is essentially exempt from regulation by NRC for nuclear safety and by OSHA for worker protection. These exemptions originated from concerns about national security that characterized DOE's historical role in nuclear weapons production. The facilities that this legislation would subject to external regulation are substantial. DOE maintains 3,500 nuclear facilities at 34 sites in 13 states, covering, in all, more than 85 million square feet of building space.

Civil Penalties for Nonprofit Contractors

H.R. 3383 would amend the Atomic Energy Act by eliminating the exemption that allows certain contractors to avoid paying civil penalties if they violate DOE's nuclear safety rules. The Congress first authorized civil monetary penalties for violations of nuclear safety rules in 1988. This gave DOE the authority to impose civil monetary penalties on its contractors, and on their subcontractors and suppliers, for violating enforceable nuclear safety rules. However, for certain contractors, the Congress provided an exemption from having to pay the monetary penalties, primarily because the contractors operating DOE laboratories at the time received no fees in addition to their reimbursable costs and, therefore, had no contract-generated funds available to pay any penalties assessed. There was concern that these contractors might leave the research field rather than put the assets of their organizations at risk if they were subject to paying the monetary penalties. If DOE identifies violations of nuclear safety rules at any of the seven contractors and laboratories specifically named in the law, or their subcontractors and suppliers, DOE cannot collect the civil monetary penalty.

The exemption from civil penalties has been extended to institutions that, like other contractors in the business of handling nuclear materials, receive financial protection or indemnification from the damages to people and property that may be harmed in a nuclear accident. The Secretary also was given the authority to determine whether other contractors that are nonprofit educational institutions should receive a similar exemption. In 1993, DOE specified by rule that all nonprofit educational institutions would receive an automatic exemption from paying the penalties.

In a March 1999 report to the Congress concerning the reauthorization of the Price Anderson Act, DOE argued that the exemption for named contractors and non-

profit educational institutions should be continued.[2] Our analysis of DOE's reasoning, however, raised several questions about the merits of continuing the exemption:

- DOE argued that universities and other nonprofit contractors working at DOE facilities would be unwilling to put their assets at risk for contract-related expenses such as civil penalties. However, nearly all of the contractors that manage and operate DOE facilities now have the opportunity to earn a fee. This fee, which is in addition to reimbursed costs, is used by the nonprofit contractors to cover certain nonreimbursable contract costs and to conduct other laboratory research. The fee could also be used to pay civil penalties if they were imposed on the contractor.
- DOE said that contract provisions are a better mechanism than civil penalties for holding nonprofit contractors accountable for safe nuclear practices. However, DOE has not taken full advantage of the existing contracting mechanisms to emphasize nuclear safety. For example, at the Lawrence Livermore National Laboratory in California, DOE's main contractor—the University of California—received 96 percent of its $6.4 million available performance fee in fiscal year 1998, even though it had significant nuclear safety deficiencies resulting in enforcement actions. At best, only about 4 percent of its performance fee for 1999 was at risk if it did not perform satisfactorily in the health and safety area.
- DOE said that its current approach of exempting nonprofit institutions is consistent with NRC's treatment of nonprofit organizations because DOE issues notices of violation to nonprofit contractors without collecting penalties but can apply financial incentives or disincentives through the contract. However, NRC can and does impose monetary penalties for violations of safety requirements, without regard to the profit-making status of the organization. NRC sets lower penalty amounts for nonprofit organizations than for-profit organizations. The Secretary could do the same, but does not currently take this approach. Furthermore, both NRC and other regulatory agencies have assessed and collected penalties or additional administrative costs from some of the same organizations that DOE exempts from payment. For example, the state of California assessed and collected $88,000 in "administrative costs" from the University of California for violating state environmental laws at the Lawrence Livermore and Lawrence Berkeley National Laboratories.

Our June 1999 report on DOE's nuclear safety enforcement program recommended that the Secretary of Energy eliminate the administrative exemption from paying civil penalties for violations of nuclear safety rules that DOE granted to nonprofit educational institutions. The Department did not implement the recommendation, instead commenting that the issue of exemption from civil penalties was ultimately one for the Congress to decide. We also suggested that the Congress consider eliminating both the statutory and administrative exemptions from paying civil penalties for violating nuclear safety rules. H.R. 3383 directly addresses our recommendation.

Independent Security Oversight

H.R. 3906 would legislatively establish an independent security oversight office within DOE that reports directly to the Secretary of Energy. We believe that legislatively establishing an office, independent from line management, that oversees safeguards and security across the Department would insulate it from organizational change and programmatic conflicts. It would also provide the office with the visibility in the organization and the authority it needs to ensure that security problems it identifies are corrected. Since May 1999, DOE's independent security office has reported to the Secretary. However, the director of the independent security oversight office has not always reported to the Secretary. Prior to May 1999, the independent security oversight office reported to the Office of Oversight, which in turn reported to the Assistant Secretary for Environment, Safety, and Health, who reported to the Secretary. At one time, the oversight office was organizationally placed in Defense Programs, a line-management program office. As a result of these organizational placements, oversight findings and recommendations were not always raised to top DOE management and were sometimes ignored by the contractors operating DOE's facilities.

The bill also proposes, among other things, that the independent security oversight office conduct evaluations every 18 months and conduct follow-up reviews to ensure that corrective actions for security problems are effective. These provisions

[2] The Price Anderson Act established a source of funds to compensate personal injury and property damage from a nuclear accident and limits liability of private industry for such accidents.

of the bill focus on several issues discussed in our February 2000 report on security oversight. For example, our report disclosed that during the mid-1990s, as many as 3 years elapsed between the independent security oversight office's inspections at DOE's nuclear weapons laboratories. In addition, we recommended that the oversight office work with the laboratories in developing corrective actions to ensure that security problems identified during its inspections were properly corrected. In recent months, the independent security oversight office has taken actions on these issues. However, in the past, the emphasis on security within DOE has varied greatly, and recent improvements may not be permanent fixes. Required periodic evaluations, follow-up reviews, and the annual report to the Congress on the status of security at DOE facilities, as would be required under H.R. 3906, would help to prevent future backsliding.

External Regulation of DOE Facilities

H.R. 3907 would authorize NRC to regulate and enforce nuclear safety and OSHA to regulate and enforce occupational health and safety at DOE facilities. The bill would require that such regulation be effective by October 1, 2001. By placing DOE facilities under NRC and OSHA jurisdiction, the bill would continue the process of moving DOE in the direction of external regulation.

The process of eliminating self-regulation began in 1984 when DOE facilities first came under federal environmental laws that are carried out and enforced by the Environmental Protection Agency and the states. In addition, NRC has worked with DOE to license, certify, and consult on many different DOE facilities. For example, NRC granted a license to DOE for operating the TMI-2 Independent Spent Fuel Debris Facility at the Department's Idaho National Engineering and Environmental Laboratory. It is also conducting prelicensing consultations with DOE in other areas, including the high-level waste repository at Yucca Mountain, Nevada, and a proposed facility for making mixed-oxide fuel. NRC and OSHA have also conducted simulated inspections at DOE facilities during recent pilot projects. Aside from these individual cases, the vast majority of DOE's facilities are not regulated for health and safety by independent regulators.

We, along with others, have often reported on weaknesses in DOE's self-regulation of the environmental, safety, and health responsibilities at its facilities. These weaknesses prompted then-Secretary of Energy Hazel O'Leary to seek external regulation for worker safety in 1993. In 1994, legislation was proposed and hearings were held on external regulation of DOE nuclear safety. In 1995, DOE created an advisory committee that concluded, "Widespread environmental contamination at DOE facilities and the immense costs associated with their cleanup provide clear evidence that self-regulation has failed."[3] In 1996, a subsequent DOE working group of senior managers concluded that external regulation could improve safety, eliminate the inherent conflict of interest from self-regulation, gain consistency with current domestic and international safety management practices, and improve credibility and public trust. The advisers recommended that safety and health at DOE facilities be externally regulated.

In 1997, then-Secretary Frederico Pena took a more cautious approach to external regulation by launching a pilot program with NRC and OSHA. The pilot program was limited to DOE's nondefense facilities. The purpose of the pilot program was to test regulatory approaches and gain insight about the costs of external regulation based on actual experience. The pilot program began in January 1998 at the Lawrence Berkeley National Laboratory in California and was completed in June 1998. (OSHA completed an earlier pilot at the Argonne National Laboratory in Illinois in 1996.) The other NRC pilot program facilities were at Oak Ridge in Tennessee and Savannah River in South Carolina. The results of the pilot program, as well as the extensive interactions between DOE, NRC, and OSHA over the years, show that external regulation offers many potential benefits, and that external regulators have the flexibility to adjust to the unique conditions at DOE facilities.

The current Secretary believes external regulation is not worth pursuing, contending that costs would likely outweigh the value of external regulation. His position contrasts sharply with DOE's previous positions promoting external regulation. His position also conflicts with the Department's own pilot program results and is inconsistent with conclusions reached by NRC and OSHA. The results of the pilot program and the extensive practical experience gained with NRC and OSHA show that external regulation for the class of facilities studied improves safety and accountability and is not likely to be prohibitively expensive.

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[3] See *Improving Regulation of Safety at DOE Nuclear Facilities,* Advisory Committee on External Regulation of Department of Energy Nuclear Safety (Dec. 22, 1995).

While the pilot program revealed no major barriers to regulating the class of DOE facilities studied, none of the pilot sites contained defense facilities. The pilot did not include DOE's three largest laboratories—Lawrence Livermore, Los Alamos, and Sandia—which operate significant defense facilities. DOE's defense facilities are far more complex than the pilot sites and would likely require more time to study issues such as the need to maintain security, regulatory costs, resource and skill needs, and transition methods. For the much simpler pilot sites, nearly a year was spent planning, conducting and reporting on the pilot results. DOE's Working Group on External Regulation recommended several years of experience be gained before bringing in defense sites under outside regulatory control. Also, complicating any transition to outside regulatory control is the examination of the role of the Defense Nuclear Facilities Safety Board, which currently oversees nuclear safety at DOE's facilities.

Given these complexities, we believe the October 1, 2001, start up schedule contained in H.R. 3907 for full implementation of external regulation may not be achievable for DOE's defense facilities. Transitioning to NRC and OSHA regulation of classes of DOE facilities in which experience has already been gained, such as nondefense research laboratories, seems more workable. Then, phasing in NRC and OSHA regulation of DOE defense facilities could occur over a longer period of time.

Mr. Chairman, as I discussed initially, all three bills have the potential to improve some aspect of health, safety, and security at DOE facilities. However, legislation can only take change so far. In the final analysis, it will require a long-term commitment by DOE. This concludes my testimony. We would be happy to respond to any questions that you or Members of the Subcommittee may have.

Mr. BARTON. Thank you, Mrs. Jones. We now would like to hear from you, Dr. Shank, for 7 minutes. Your statement is in the record in its entirety.

STATEMENT OF CHARLES V. SHANK

Mr. SHANK. Mr. Chairman and members of the subcommittee, it is my pleasure to be here today to give my perspective on the three bills dealing with environment, health, safety in the Department of Energy complex.

Our laboratory is located in the hills above the University of California at Berkeley campus. We are often, because of our name of Lawrence, confused with our larger sister to the south. I have more than one bus with visitors arrive looking out, seeing the San Francisco Bay and asking could we see the Bay from Livermore?

We are not the Livermore Laboratory. We are a much simpler laboratory. We have a budget of about $415 million and our primary mission responsibility is fundamental science with supporting missions in the environment and energy efficiency.

The regulatory framework for national laboratories is an important part of their scientific productivity and important for the employees and important for our ability to protect the environment. Providing a safe and healthy environment is a critical responsibility for me as a Lab Director of a national laboratory.

I am going to confine my remarks today on the H.R. 3907, which would provide for external regulation of nuclear safety and occupational health safety at DOE laboratories. I would like to talk about our experience with both the Nuclear Regulatory Commission and the Occupational Health and Safety Commission pilots and then give you some of my more general views about the proposed legislation.

As you know, we are located right next to the Berkeley campus and for many years it has mystified me as to why identical activities carried on at the campus in the laboratory are regulated by different entities with different standards. As a consequence, when

NRC proposed a pilot project for external regulation of DOE facilities I quickly volunteered our institution.

My dream is for a world where work is regulated with uniform standards independent of the entity that performs the work. Scientists could be trained with a single set of expectations for environment, health and safety considerations throughout the country.

Our NRC pilot took place in October 1997 and in January 1998 with two planning visits and two 1-week simulated regulation visits. The results of the pilot were encouraging. NRC found that there were no significant safety findings to report. The laboratory had an adequate plan to protect the health and safety for the public, employees and the environment. The NRC indicated that they would be willing to issue our laboratory a broad scope license for operation and that they could carry out their responsibility for our site with approximately .1 FTE or approximately one person month per year.

There are, however, serious concerns.

First, would external regulation be layered on top of DOE, current DOE orders? We fear a world of overlapping and redundant responsibilities that would make it difficult for us to do our work.

Who would hold the license? The DOE report on our pilot indicates that additional people would have to be hired if DOE held the license. Direct connection between the contractor and the regulatory agencies I think would be essential for us to be able to do this properly.

And then who would be responsible for legacy issues? We at Berkeley have a large facility, the Bevatron, which needs to undergo a cleanup, and funds have not been allotted for that cleanup, and in the process of changing regulations it is very important for us that issues and legacy issues be very carefully considered.

Finally, who would regulate x-ray units, accelerators, and other naturally occurring radioactive materials? These would be new responsibilities that would somehow have to be added to the NRC capability. Based on our experience with NRC and the private sector of ES&H staff, we volunteered for a similar pilot with OSHA.

That effort took place in December 1998 and January 1999. It again involved two planning conference calls, an 8-day visit, and all hands meeting with the laboratory staff and our local labor unions. The visiting team included NRC, DOE, OSHA and Cal OSHA, and the California Department of Health Services and the EPA. They reviewed all of our facilities.

The overall conclusion was that the OSHA regulatory framework could be applied to the Berkeley Lab and that the laboratory's integrated safety management program is consistent with OSHA's voluntary protection program, and I would like to say a very positive word about the Department of Energy moving to integrated safety management, because I think it has made us more effective in managing our responsibilities for environmental health and safety in our laboratories.

As the result of these pilot studies, I believe that external regulation of the Berkeley Lab is not only possible but also desirable—however, with a very important caveat, that this be done with very clear lines of authority and priority given to risk-aware implementation. This would mean that the contractors would deal directly

with regulatory agencies and that much of the DOE ES&H infrastructure would be reassigned to DOE's core mission.

Let me be very clear about this. A layered, redundant oversight subjecting the laboratories to regulatory oversight by both DOE, NRC and OSHA would result in a more expensive, confusing and I believe less effective environmental health and safety program.

Finally, I would like to make a point that needs to be made here. The results of the pilot at our laboratory should not be used to generalize this approach to work performed at all DOE facilities. Our laboratory is probably the simplest and easiest of the DOE facilities on which one could do a pilot, and it may well be that external regulation may not be desirable on broader sites because of the specialized expertise necessary for managing the risks and the unique facilities and security considerations. Thank you.

[The prepared statement of Charles V. Shank follows:]

PREPARED STATEMENT OF CHARLES V. SHANK, DIRECTOR, LAWRENCE BERKELEY NATIONAL LABORATORY

Mr. Chairman and Members of the Subcommittee: It is my pleasure to be here today to provide my perspective on three bills dealing with the environment, health and safety of the Department of Energy complex.

Just to reacquaint you, Berkeley Lab is the oldest of the DOE national laboratories, founded in 1931 and located next door to the University of California, Berkeley campus. Today we operate on a budget of approximately $415 million performing research for the Department of Energy (DOE), other Federal agencies and the private sector. Before becoming Director of the Lawrence Berkeley National Laboratory in 1989, I spent 20 years at the AT&T Bell Laboratories, ultimately directing the Electronics Research Laboratory in Holmdel, New Jersey. In addition, I now serve as Professor in three Departments at the University of California at Berkeley, in Physics, Chemistry and Electrical Engineering and Computing Sciences.

The regulatory framework for the national laboratories is important for their scientific productivity, the safety of our employees, and the protection of the environment. Providing a safe and healthy environment is a critical management responsibility of the Laboratory Directors.

The first bill, H.R. 3383, would eliminate the exemption for non-profit contractors from paying fines and penalties levied under the Price-Anderson Act. As the University of California official responsible for managing my laboratory, I take compliance with the Price-Anderson Act very seriously. I am proud of the fact that we have an outstanding record of operating safely and of demonstrating the utmost concern for the environment.

The University operates the Lawrence Berkeley National Laboratory, along with the Livermore and Los Alamos laboratories, as a public service without the desire for financial gain, and has instituted numerous mechanisms to insure compliance with Price-Anderson and all Federal and state statutes. The fees paid to the University for their management activities are derived from support for the laboratories' scientific programs. Therefore, any additional fees that might be paid as fines and penalties would be additional "taxes" on our research programs, while not increasing our outstanding level of compliance.

The second piece of legislation, H.R. 3906, would establish a new Office of Independent Security Oversight within the Department, along with additional procedures for safeguards and security evaluations. I want to point out that Lawrence Berkeley National Laboratory performs no classified research on its site and has no ability to store classified information on site. We do, however, operate DOE's largest civilian supercomputing facility, along with managing DOE's Internet operation, so we do take seriously cyber security and other security measures appropriate for our site.

My concern with the measures proposed in H.R. 3906 is that it imposes yet another new layer of bureaucratic management and oversight. A successful security program requires line management accountability and employee support. This bill will apply yet another burden on the scientific programs performed at the laboratories.

Finally, let me turn to H.R. 3907, which would provide for external regulation of nuclear safety and occupational health and safety at DOE facilities. I would like

first to talk about our experience with external regulation pilot studies with both the Nuclear Regulatory Commission (NRC) and the Occupational Health and Safety Commission (OSHA), and then turn to some more general comments about the legislation.

As you may know, Berkeley Lab is located adjacent to the University of California, Berkeley campus, and we share many faculty and students. For many years, it has mystified me that identical activities carried out on the campus and at the laboratory are regulated by different entities, and with different standards. As a consequence, when NRC proposed a pilot project for external regulation of DOE facilities, I quickly volunteered our institution. My dream is for a world where similar work is regulated with uniform standards independent of the entity that performs the work. Scientists could then be trained with a single set of expectations for environment, health and safety considerations throughout the country.

The NRC pilot took place between October 1997 and January 1998, with two planning visits to the laboratory, two one-week simulated regulation visits, and a public meeting to seek community input and comments. The results of the pilot were encouraging. NRC found that there were no significant safety findings to report, and that the laboratory had an adequate program to protect the health and safety of employees, the public and the environment. The NRC indicated that they would be willing at that time to issue the laboratory a broad scope license for their operation, and indicated that they could carry out their responsibility for our site with 0.1 FTE, or approximately one person-month per year.

There are, however, a number of serious concerns. Would external regulation be layered on top of current DOE orders? We fear a world of overlapping and redundant responsibilities that would make it difficult for us to do our work. Who will hold the NRC license? The DOE report on our pilot indicates that additional people would have to be hired if DOE held the license. Who will be responsible for legacy issues? We at Berkeley Lab have old facilities for which clean-up funds have not been allotted. Who will regulate x-ray units, accelerators and naturally occurring radioactive materials?

Based on our experience with the NRC pilot, and the private sector experience of our ES&H staff, we volunteered to conduct a similar pilot with OSHA. This effort took place between December, 1998 and January 1999. It involved two planning conference calls, one eight-day site visit, an all-hands meeting with laboratory staff and meetings with our local labor unions. The visiting team included representatives from NRC, DOE, OSHA, Cal-OSHA, the California Department of Health Services and the EPA. They reviewed all our facilities and programs applying the concept of simulated regulation and inspection, with comprehensive safety and health inspections and simulated citations for alleged violations.

The overall conclusion was that the OSHA regulatory framework could be applied to Berkeley Lab, and that the laboratory's Integrated Safety Management program is consistent with OSHA's Voluntary Protection Program. OSHA did identify 63 simulated citations, for a total simulated penalty of $57,700 or an average of $916.00 per violation. They also had a number of issues that would need further attention, but none of them could be considered significant enough to prevent their efficient regulation of the site.

As a result of these pilot studies, I believe that external regulation of Berkeley Lab is not only possible but also desirable, with the caveat that this is done with clear lines of authority and priority is given to efficient, risk-aware implementation. This would mean that contractors would deal directly with regulatory agencies, and that much of the existing DOE ES&H infrastructure would be reassigned to the Department's core mission. Let me be perfectly clear on this point: a layered, redundant oversight, subjecting the laboratories to regulatory oversight by both the DOE and NRC and OSHA, would result in a more expensive and confusing ES&H climate.

Finally, I am very concerned that the results of these pilots not be used to generalize this approach to all the work performed at DOE facilities. In some cases, such as at weapons laboratories and production facilities, external regulation may not be desirable owing to the specialized expertise necessary for managing risks in unique facilities and security concerns.

Mr. BARTON. Thank you, Dr. Shank. We would now like to hear from Mr. Van Ness on behalf of the University of California.

STATEMENT OF ROBERT L. VAN NESS

Mr. VAN NESS. Mr. Chairman, I appreciate the opportunity to come before the subcommittee to discuss proposed legislation end-

ing the exemption of nonprofit institutions from civil fines and penalties for Price-Anderson Act violations.

I have submitted a written statement to the subcommittee that addresses this, but I would like to spend a few moments on some key points covered in that statement.

When I appeared before the Subcommittee on Oversight and Investigations last June, I outlined the measures the University had taken to implement nuclear safety programs at the DOE laboratories and the reasons the University is motivated to protect worker and public safety regardless of whether there is a financial penalty for failing to do so. All these things remain true.

Nevertheless, during the hearings last June the University agreed that the existence of the Annual Performance Management Fee, a revenue source that did not exist at the time that the statutory exemption was placed in the Price-Anderson Act, made it possible to remove the exemption if it were replaced by a suitably tailored provision that recognized the fiduciary responsibilities of nonprofit institutions such as the University.

Our understanding of the discussion at the June hearing was that the committee was willing to limit any civil penalties for nuclear safety rule violations to the availability of annual fee to be used for that purpose. Now our reading of the proposed legislation is that there would be no limit placed on the potential financial penalties.

We stand by our commitment of last summer, to be financially accountable consistent with nonprofit purposes, but we urge that legislation that reflects the financial needs of nonprofit contractors be set forward.

There is similar legislation before the Senate that does establish a ceiling on the amount of financial risk for nuclear safety violations. That would be preferable to the legislation being considered by the committee, but the Senate language is critically flawed in that it fails to recognize that nonprofit contractors have significant existing unreimbursed costs in addition to those penalties that are currently being considered.

This flaw would be remedied by the addition of the words "the available annual" to the phrase "performance fee"—such language would assure that the sum of unreimbursed costs from all sources is limited to the nonprofit contractors' annual performance fee.

The primary reason we seek the limitation for nonprofit contractors is to meet our fiduciary responsibilities to the state of California, its citizens, our students and donors. It is also important to recognize that performance fee paid to the University or any other DOE contractor in reality diminishes the scientific effort funded. DOE programs are provided appropriations that are distributed to fund effort at the national laboratories. Fee is an element of overhead costs that is charged to the local program at a laboratory to recover general and administrative costs of the laboratory.

It is for this reason and not to avoid accountability that the University has sought to minimize the nature and amount of federally mandated unreimbursed costs.

The Congress is faced with balancing of interests. How do you maximize the scientific effort obtained with any appropriation while encouraging good stewardship on the contractors who operate

the national laboratories? There is no perfect answer. The University's own solution today is a mix of idealism and pragmatism. The University takes a fee that it believes is prudent to assure that it can meet its fiduciary obligations and then returns the unexpended balance to fund research at or for DOE laboratories.

We acknowledge the need to be accountable for worker and public safety. In spite of our commitment to safety, we have yet to reach perfection. As you mentioned in your opening remarks, this past Thursday we had a plutonium exposure incident at Los Alamos involving eight employees. Four of the eight required treatment. All eight have returned to work. The DOE is conducting an investigation and the University and the Laboratory are cooperating fully. We will ensure full support to the exposed employees as well as prompt implementation of all corrective actions.

Congress has a difficult task in balancing the interests of funding science and holding cost-type contractors accountable as financial accountability is a driver in the amount of fee. The University strongly encourages the committee to consider a penalty amount ceiling as recommended in this testimony as a means of making it possible for nonprofit entities to continue to be operators of these important national research facilities.

I thank you for your attention to this matter and I look forward to answering any questions.

[The prepared statement of Robert L. Van Ness follows:]

PREPARED STATEMENT OF ROBERT L. VAN NESS, ASSISTANT VICE PRESIDENT FOR LABORATORY ADMINISTRATION, UNIVERSITY OF CALIFORNIA

Mr. Chairman and Members of the Committee, I am Robert L. Van Ness, Assistant Vice President for Laboratory Administration for the University of California (UC). The University operates three Department of Energy (DOE) laboratories—the Los Alamos National Laboratory (LANL), the Lawrence Livermore National Laboratory (LLNL), and the Lawrence Berkeley National Laboratory (LBNL). My responsibilities include administering the performance-based management aspects of our contracts with the Department of Energy and conducting oversight of the administrative and operational activities of the laboratories. I want to thank the Committee for the opportunity to appear and to testify on an issue similar to the testimony I provided before the Subcommittee on Oversight and Investigations last June. I have included a copy of this previous testimony for the record.

The University is indemnified against public liability under the Price-Anderson Amendments Act (PAAA), and, as such, is subject to DOE nuclear safety regulations at the three laboratories. The University is also one of the entities currently exempt from the civil fines and penalties under Section 234A (d) of the Act. My testimony will address the proposed legislation (H.R. 3383) that would eliminate that exemption.

The University has historically opposed assumption of risk in the operation of federally-funded research and development centers (FFRDCs), including non-reimbursement of fines and penalties. Non-profit governmental entities such as UC do not have the statutory authority nor financial resources necessary to assume substantial risk for operating FFRDCs. Indeed, Congress originally included the Price Anderson exemption for non-profits in recognition that the federal government would lose access to important non-profit partners in the management of the national laboratories without some risk allowance. As federal procurement policy related to FFRDCs evolved in the past 15 years, more costs associated with the maintenance and operation of these facilities have become unallowable costs. Accordingly, the Department of Energy recognized the need to address this issue through the introduction of an annual performance-based management fee to federal contractors. The UC contract to manage the three national laboratories was re-negotiated in 1992 and included an annual performance management fee. The introduction of the fee structure addressed the risk issues and enabled the University to continue the public service of managing three national laboratories.

During the Subcommittee on Oversight and Investigations hearings last June, the University agreed that the performance management fee, an annual revenue source that did not exist at the time the statutory exemption was adopted, provided a mechanism by which the exemption for non-profits could be modified. The availability of a management fee provides an annual revenue source from which financial penalties can be exacted for specified misconduct. At the hearing UC also urged the Committee to limit penalty provisions to the availability of the annual performance management fee. Expanding a liability provision, such as that proposed in the current legislation, beyond the availability of annual fee once again subjects a non-profit to more risk than its officeholders (e.g., the UC Regents) would find permissible. Absent such a limitation the University would be unable to meet its fiduciary obligations to those that support its non-DOE laboratory operations—the California state taxpayers, students, and donors.

We recommend the Committee consider similar legislative language currently being considered by the Senate in S. 2162:

SEC. 8. CIVIL PENALTIES.

(a) REPEAL OF AUTOMATIC REMISSION—Section 234A b.(2) of the Atomic Energy of 1954 (42 U.S.C. 2282a(b)(2)) is amended by striking the last sentence.

(b) LIMITATION FOR NONPROFIT INSTITUTIONS—Section 234A of the Atomic Energy Act of 1954 (42 U.S.C. 2282a) is further amended by striking subsection d. and inserting the following:

'd. Notwithstanding subsection a., no contractor, subcontractor, or supplier considered to be nonprofit under the Internal Revenue Code of 1954 shall be subject to a civil penalty under this section in excess of the amount of any performance fee paid by the Secretary to such contractor, subcontractor, or supplier under the contract under which the violation or violations; occur.'

While the Senate language places a ceiling on the amount of penalties, it does not provide absolute assurance that sufficient funds are on hand from annual contract revenues to pay the penalties because non-profits are exposed to numerous other types of unreimbursed costs. Consequently, we recommend modifying the language to limit penalties to the amount of any available annual performance fee. Like all DOE cost-type contractors, the University is subject to federal reimbursement limitations for a variety of costs including: environmental and security penalties; accounting deficiencies; defense costs in certain actions brought by state and local governments and federal agencies; defense costs in certain employee grievances; certain liabilities to third parties; property and other losses under certain conditions; community relationships, and certain employee compensation expenses. Federal policies in many of these areas encourage better practices by contractors, but losses are not totally controllable by the prompt actions of contractors. For example, federal agencies have interpreted the Major Fraud Act to preclude 100% federal reimbursement to government contractors even in cases where the contractor is completely exonerated.

It is also important to recognize that any annual performance fee paid to the University or any other DOE contractor, comes at the expense of funding for the primary scientific mission of the laboratory. The performance management fee is an element of overhead cost that is charged to the local research programs at a laboratory to recover general and administrative costs of the laboratory. Since the mission of the national laboratories is the conduct of their federally-funded research programs, the University has sought to minimize the nature and amount of federally mandated unreimbursable costs associated with FFRDC operations.

We believe Congress is faced with balancing mutually important interests. How do you maximize the scientific effort obtained with any appropriation while encouraging good stewardship from the contractors who operate the national laboratories? There is no perfect answer. The University's own solution to date is a mix of idealism and pragmatism. The University receives an annual fee that it believes is prudent to protect the non-profit institution against risk and meet its fiduciary obligations, then returns the unexpended balance to fund research at or for the UCDOE laboratories.

Last June I testified about the important non-financial factors that motivate the University and the safety of our nuclear operations as well as the existing contract tools already available to DOE to ensure contractor compliance and performance improvement. Our approach to the amount and use of fee reflects our commitment to the core motivations of the institution—to expand the base of human knowledge, to confer knowledge from one generation to the next, to make our country secure through the application of ideas and science. We are prepared to continue our record of outstanding service to the nation and make alterations in the rules surrounding that service so long as we can meet our core objectives and our fiduciary obligations.

We remain committed to the safety of our workers and the public, notwithstanding the occasional setback. In that last regard I am obliged to tell the Committee of an incident last week in which eight workers were exposed to small levels of air-borne plutonium-238 at Los Alamos National Laboratory. Four of the eight employees required treatment. All eight have returned to work. We are working very closely with DOE and others to take immediate and effective corrective action. We will ensure full support to the exposed employees.

In summary, we embrace the need to be accountable for worker and public safety. We applaud the interest of this Committee in balancing the interests of science with the needs of employees and the general public to be safe from nuclear and environmental hazards. We recognize the difficulty you face in achieving a satisfactory level of accountability from non-profit contractors and understand the intent behind the proposed legislation. The University strongly encourages the Committee to consider a penalty ceiling, as recommended in this testimony, as a means of ensuring that non-profit entities can continue to be partners with the federal government in the operation of FFRDCs. Thank you for the opportunity to appear before you.

Mr. BARTON. Thank you, Mr. Van Ness. We would now like to hear from Ms. Eldredge for 7 minutes. Your statement is in the record in its entirety.

STATEMENT OF MAUREEN ELDREDGE

Ms. ELDREDGE. Chairman Barton, members of the committee, thank you for allowing me to testify.

Before I get into the details of my testimony, I just have to give you the very, very short summary, which is in the past week and a half there has been no less than five articles on nuclear safety problems and disasters at DOE sites, and yet the General Counsel sits here and says they have made tremendous strides in safety. They have not, and the shortest version of my testimony that I can give you is we could have OSHA now and we should do it. We have some concerns about the other things, but there are pieces that we could move forward with right now.

The Alliance for Nuclear Accountability is a network of 32 organizations. We have a long history of working at DOE nuclear weapons sites doing watchdog and oversight, and we have concluded along with numerous external panels and independent advisory committees that DOE cannot regulate itself and we are very pleased that this committee is taking steps to address this problem and hope that we can move forward with at least part of it this year.

I want to touch briefly on some problems that came up in legislation last year that made the problem worse. That is the passage of Title 32 of the Defense Authorization Act which set up the National Nuclear Security Administration. I will just highlight two problems with that.

One is the problem of sovereign immunity. I know that the Attorney Generals have been before you at another hearing talking about that so I will not spend too much time on it, but there is some language in that Act that creates some ambiguity about whether the waivers of sovereign immunity that exist now at the DOE weapons sites still apply to the NNSA sites, and we urge you to address that.

Additionally, there is a problem with Price-Anderson Act enforcement of the nuclear safety rules with regards to the NNSA facilities. There is a consequence of the Act that now the Assistant Secretary of Environment, Safety and Health cannot issue notices of violation or fines directly to the offending NNSA facility. They have

to go through the Administrator of the NNSA, so essentially the line program that has committed the violation has to fine itself. This is sort of self-regulation and it needs to stop, and we urge you to pass legislation that will both clarify the sovereign immunity issue and ensure that the Office of Environment, Safety and Health has authority over all aspects of DOE including the new National Nuclear Security Administration.

NNSA is not the sole source of the problem however. There have been and there remain serious problems within the weapons complex. Last week five workers at the Los Alamos Lab, as was mentioned, were exposed to plutonium. Rocky Flats workers and managements were reported to have been violating safety procedures that prevent criticalities. There have been explosions at the Y-12 plant in Oak Ridge. The list goes on and on.

The frequency and severity of some of these accidents astounds me. After 50 years of nuclear weapons work DOE still doesn't seem to realize that it is handling some of the most deadly material known to man.

The case for external regulation has been built over 50 years and it cannot be stated more bluntly: DOE cannot regulate itself.

We hope the committee will not fall prey to partisan disputes—I am disappointed that none of the minority is here—and can overcome political roadblocks to this much-needed reform.

Mr. BARTON. I'll let them know your testimony, I promise.

Ms. ELDREDGE. Thank you.

With regards to H.R. 3907 we greatly support the concept of moving to external regulation and we strongly support OSHA as the regulator, but we do have some concerns about the Nuclear Regulatory Commission as a regulator which I will touch on later.

OSHA can be brought in to regulate protection for all workers with the caveat that it needs sufficient resources, both funding and personnel, and time to do the job right, and it is close to criminal that there is little enforcement system for worker safety rules at DOE that are not part of the Price-Anderson Act Nuclear Safety Rule Enforcement Program but are equally vital. This includes the new beryllium rule, which is a nice rule but it doesn't have any enforcement procedures attached to it.

For regulation of facility safety we are concerned about NRC as the regulator and concerned about shifting the responsibility from one dubious entity to another. The 1995 Advisory Committee, the independent committee that looked at external regulation, also had difficulties reaching conclusions on who should be the regulator for nuclear facility safety.

NRC has shown a remarkable ability to push the nuclear industry interests at the expense of public health. For example, they have licensed uranium mines in New Mexico even while acknowledging that the results of these mining operations would be contamination of the sole drinking water supply for 15,000 people, mostly Native Americans, and currently they are shifting to a risk-informed regulatory approach which 60 percent of its own staff believe will reduce the margins of safety at nuclear plants so we have some concerns there.

For our network of 32 organizations, NRC is not the white hat that will come riding in and save the day. However, this should not

stop us from moving forward with phasing in external regulation at DOE and looking at pilot projects for who would be a good regulator and exploring some changes to NRC to make that a better regulator.

Some specific recommendations for this year: Institute OSHA regulation for all worker safety requirements. It is simple, there is precedent and it makes sense. I do not see hardly see why there is anything more to say about it.

We also recommend amending the Atomic Energy Act to harmonize it with other environmental statutes. This in particular refers to citizen suit provisions. They have been the provisions that have provided access for citizens and the states to make their regulators accountable and we recommend that we look at setting up citizen suit provisions for both NRC and for DOE.

At DOE, the problem is even worse. There are no citizen suit provisions with regard to the orders, and even within DOE they said they needed 11 rules to have a good Price-Anderson Act enforcement program. They have only put out two of them to date.

Finally, administrative changes that could be made right away and wouldn't even require legislation, and that is requiring DOE to meet OSHA reporting standards. They have the data. They have it on data base, but they will not put it out for the public to access. They could do it easily and they should.

In conclusion, we urge you to move forward with this effort at external regulations, whichever pieces that you can. Fundamentally, DOE as a self-regulating entity cannot persist without seriously compromising safety and health. After 50 years of environment and safety disasters, it is time to bring DOE into the future. Thank you.

[The prepared statement of Maureen Eldredge follows:]

PREPARED STATEMENT OF MAUREEN ELDREDGE, PROGRAM DIRECTOR, ALLIANCE FOR NUCLEAR ACCOUNTABILITY

Chairman Barton, Representative Boucher, and members of the Committee, the Alliance for Nuclear Accountability appreciates the opportunity to once again testify on badly needed efforts to improve the environment and safety culture at the Department of Energy (DOE).

The Alliance for Nuclear Accountability is a national network of 32 organizations working on nuclear weapons complex issues. For over a decade we have decried the shoddy environmental and safety practices at DOE. This disregard for environmental rules resulted in the widespread contamination around the complex. We have pressed for DOE to be subject to the same environmental laws and requirements as the rest of us, and we concluded that neither DOE nor any other agency could be an effective regulator of itself. The federally appointed Advisory Committee on External Regulation of DOE Nuclear Safety, also concluded that, "Every major aspect of safety at DOE nuclear facilities—facility safety, worker protection, public and environmental protection—should be externally regulated . . ." [1]

We are very pleased that the committee is taking steps to address this problem. We hope that if the entire legislative package is not possible all at once, that at least some crucial elements will be addressed in legislation this year. We need to move towards a more sane regulatory structure for DOE, and take steps now to start the process.

PROBLEMS WITH THE NATIONAL NUCLEAR SECURITY AGENCY

The passage of Title 32 of the Defense Authorization Act for Fiscal Year 2000, which set up the National Nuclear Security Administration (NNSA), was a disaster

[1] Advisory Committee on External Regulation. *Improving Regulation of Safety at DOE Nuclear Facilities,* December 1995.

for environment, safety, and health programs. Rather than move us towards better regulatory oversight of DOE's nuclear weapons program, it shifted, either through intent or ambiguous legislative language, to a situation that more closely resembles the bad old days of the Atomic Energy Commission, than a modern and environmentally sound approach to operations.

I would like to highlight two major problems with the NNSA structure. These are the ambiguity regarding DOE's waiver of sovereign immunity and the oversight role of the office of Environment, Safety, and Health (EH) in the new Administration.

Sovereign Immunity

The federal government faces an enormous liability in the cleanup of the nuclear weapons complex. DOE estimates that it has contaminated over 600 billion gallons of groundwater and over 33 million cubic meters of soil. This contamination came from decades of abuse, in which there was no external regulation, and DOE and its predecessor agencies claimed that they had "sovereign immunity" from compliance with environmental laws enforced by States. In 1992 Congress passed the Federal Facilities Compliance Act, which originated in this committee, to clarify that DOE was, in fact, required to comply with State enforcement and regulations.

Sections 3261 of S. 1059 includes qualifying language which casts doubt on the applicability of the current waivers of sovereign immunity with respect to the NNSA. It states:

> The Administer shall ensure that the Administration complies with all *applicable* environmental, safety, and health statues and *substantive* requirements. (emphasis added)

This qualifying language has raised concerns in State Attorney General's offices across the country with regards to the sovereign immunity issues, and we concur with their analysis. We urge the Congress to amend the NNSA legislation to clarify that State regulatory authority over NNSA remains intact, and that the waivers of sovereign immunity in place before the creation of the NNSA also apply to it. Relying on a record of legislative intent it not sufficient.

Price-Anderson Act Enforcement

In addition to the sovereign immunity problem, there is serious concern with regards to the application of EH requirements to the new Administration. A consequence of the NNSA legislation was to effectively pull the teeth of the already weak efforts at regulation of safety and health issues from within DOE. The Assistant Secretary of the Office of Environment, Safety, and Health can no longer directly issue notices of violations and impose fines under the Price-Anderson Act for nuclear safety rule violations, to NNSA facilities. The Assistant Secretary must develop a recommendation to submit to the Administrator of the NNSA, who then decides upon imposing fines. This situation arises out of language in Title 32, which prevents non-NNSA personnel from directing NNSA personnel.[2] This is self-regulation at its worse, as even the limited independent enforcement authority within DOE is eliminated. The line program, the very program that has committed the violation, will be asked to fine itself. Only continual pressure from the outside, including media and public interest groups, will ensure enforcement. Nuclear safety enforcement by continual scandal is not effective. This is a massive step backwards and must be corrected.

In addition, several of the labs have already indicated that they no longer feel they must comply with EH rules and requirements, despite DOE's "duel-hatting" of the Assistant Secretary for EH. We believe it was the intent of the drafters of this legislation to ensure the autonomy of the NNSA. However, we strongly oppose the idea of recreating a new office of EH within the NNSA, which would be at a lower status and report to the Administrator instead of to the Secretary of Energy. There is already a problem with DOE being self-regulated, subsuming the EH functions within the NNSA would further compound this problem. There is one clear solution—the Office of Environment, Safety, and Health should have authority over all parts of DOE, including the NNSA.

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[2] Section 3213 (a) STATUS OF ADMINISTRATION PERSONNEL. "Each officer or employee of the Administration, in carrying out any function of the Administration"

(2) shall not be responsible to, or subject to the authority, direction, or control of, any other officer, employee, or agent of the Department of Energy.

(b) STATUS OF CONTRACTOR PERSONNEL. "Each officer or employee of a contractor of the Administration, in carrying out any function of the Administration, shall not be responsible to, or subject to the authority, direction, or control of, any officer, employee, or agent of the Department of Energy who is not an employee of the Administration, except for the Secretary of Energy consistent with section 202(c)(3) of the Department of Energy Organization Act.

The solutions to the EH problems that have been offered to date are not enough. Exhortations in the legislation to "ensure that all operations and activities of the Administration are consistent with the principles of protecting the environment and safeguarding the safety and health of the public and of the workforce (Section 3211(c))", provide no guarantee of compliance with regulations and orders. Legislating Secretarial authority to delegate is not sufficient. Such an action still leaves the crucial environment, safety, and health compliance of the entire agency up to the decision of one person, who may or may not be in place for very long. These issues are too important to leave in such an uncertain state, dependent on the will of one person.

We urge you to pass amending legislation that clarifies that the Office of Environment, Safety, and Health's has full authority over the NNSA with regards to environment, safety, and health oversight and enforcement, and that the Price-Anderson Act enforcement program is fully enforceable by EH on NNSA facilities.

PROBLEMS EXIST THROUGHOUT THE DEPARTMENT

Even before the NNSA came into being there were, and there remain, serious problems in the weapons complex which result in injuries to workers and contamination of the environment, seemingly beyond the ability of DOE to correct. Since I last testified on this subject, the list of accidents and violations has continued unabated. Just last week five workers at the Los Alamos lab in New Mexico were exposed to airborne, particulate plutonium, a known carcinogen. On Monday the Boulder, Colorado, newspaper reported that Rocky Flats workers and managers violated safety procedures, which increased the risk of nuclear explosions (criticalities).[3] On March 8th, DOE levied $110,000 in fines against Westinghouse Savannah River for recurring violations of safety procedures on equipment design, construction, and installation. In December of 1999, there was an explosion at the Y-12 plant at Oak Ridge, which injured 11 workers. Not only did DOE find that there were "failures at every level of . . . (the) management chain", but it also determined that injuries could have been lessened had proper protective equipment been available for the personnel.[4] In April of 1999, Lockheed Martin, DOE, and Fluor Daniel were all fined at the Hanford site for inadequate monitoring of high level waste tanks. Finally, on March 6, DOE publicly announced what site managers had known for over 9 months—that the Ogallala aquifer was contaminated with trichloroethylene from the burning grounds at Pantex.

The list of violations in just one year could fill a textbook. The frequency and severity of some of these accidents continues to astound me. After over 50 years of nuclear weapons work, DOE and its contractors still fail to realize that they are dealing with some of the most dangerous materials on earth, and treat safety procedures as optional.

The case for external regulation of DOE has been built over 50 years, and at this point seems, to the general member of the public, beyond obvious. It cannot be stated more bluntly: DOE cannot regulate itself. The record of such self-regulation is astounding in its failure. Political obstacles have prevented the common-sense move towards external regulation for decades, and we see them developing again in this Congress. We sincerely hope that this committee will not fall prey to partisan disputes, and can overcome the political roadblocks to this much-needed reform. We ask, how many more accidents, injured workers, and contaminated groundwater is needed before this effort can move forward?

CRITIQUE OF HR 3907 AND SPECIFIC CONCERNS

In general, the Alliance for Nuclear Accountability greatly supports the concept of HR 3907 in moving DOE into external regulation. In 1995, the independent advisory committee recommended that DOE be externally regulated, and supported OSHA as the regulator for worker safety. However, it did not reach consensus on who the regulator should be for nuclear safety. Unfortunately, with regards to nuclear safety and regulatory enforcement, neither can we.

Occupational Safety and Health Administration

At a minimum, the Occupational Safety and Health Administration (OSHA) should be brought in as the regulator for all protection of workers, with the caveat that it needs sufficient resources—both funding and personnel, to do the job right. It is close to criminal that there is little enforcement system for the worker safety

[3] Katy Human. *Reports: Flats Broke Safety Rules.* Boulder Daily Camera, March 20, 2000.

[4] Dr. David Michaels, Assistant Secretary for Environment, Safety, and Health. DOE News Release, February 24, 2000.

rules at DOE that are not nuclear safety rules, but are equally vital. These include the new beryllium rule, which is intended to protect workers from berylliosis, a crippling lung disease, or protection from the many chemical hazards that exist at DOE facilities. OSHA has the statutory authority to enforce these rules, however DOE exercises its exemption under 4 (b)(1) of the Occupational Safety and Health (OSH) Act. This exemption was intended to allow agencies to enforce the rules themselves. Given DOE's abysmal record of this, combined with the new NNSA's reluctance to take orders from anyone, it is time to remove this exemption for DOE and return OSHA's authority.

However, to do this requires both time and money. It is not sufficient to say that OSHA will regulate a facility, and then have the nearest OSHA office be hundreds of miles away, with an extremely limited capacity for effective oversight. DOE will require sufficient resources to come into compliance. A time frame must be developed for transitioning to OSHA regulation and for bringing DOE into compliance. An effective time frame should be on the order of two years, with sufficient incentives for DOE to actually begin work on compliance now.

Nuclear Regulatory Commission

For regulation of facility safety, we are concerned about the Nuclear Regulatory Commission (NRC) as the choice of regulator. Faced with the choice of DOE or NRC as a regulator is a bit like being faced with death by hanging or death by firing squad. Neither is particularly attractive and shifting responsibility from one dubious entity to another is not much of a solution. The 1995 Advisory Committee recommended looking at either NRC or the Defense Nuclear Facilities Safety Board (DNFSB). Both of these entities have problems and would need some major structural changes to be acceptable.

NRC has shown a remarkable ability to push nuclear industry interests at the expense of public health. It proposed a "below regulatory concern" (BRC) category for nuclear waste, which would allow such waste to be treated as if it were not nuclear. Only strong opposition from the public prevented this step, but NRC generally still supports it. Given the ongoing trend in radiation standard setting, which finds that previous standards were not stringent enough, this position is alarming. NRC has licensed uranium mines in New Mexico even while acknowledging that the result of the mining operation would be contamination of the sole drinking water supply for 15,000 people, mostly Native Americans. Currently NRC is shifting to "risk-informed" regulation, which 60% of its own staff believes will *reduce* the margins of safety at nuclear power plants. It is also trying to shift to informal rulemaking, which will reduce the public's access to information and ability to intervene in the process.

For our network of 32 organizations, NRC is not the "white hat" that will come in to save the day at DOE. However, that does not mean that we support giving up on the effort to find an external regulator. We should move forward, begin phasing in external regulation under OSHA, and develop tools to evaluate the performance of both NRC and the Defense Nuclear Facilities Safety Board (DNFSB) as possible regulators. External regulation will not come overnight, but the challenges we face should not dissuade us from doing what is right. Both NRC and DNFSB would need some changes to its operations to be acceptable as a regulator. The DNFSB would need to curtail its activities to safety issues, rather than commenting on equipment choices and preferred technology issues, which are unrelated to safety. NRC would need to be subject to citizen suit provisions and operate from a basis that emphasizes public and worker safety, rather than growth of the nuclear industry. Exploration of both options for a regulator should continue, with an eye towards reforms.

RECOMMENDATIONS

The Alliance for Nuclear Accountability urges the committee to move forward now on a number of actions that may not be the complete legislative package that we all want, but will be important steps in the right direction.

Legislative Changes

A. Institute OSHA Regulation for all Worker Safety Requirements.—Currently, even within the non-NNSA parts of DOE, compliance with EH requirements in areas other than nuclear safety, such as OSHA requirements, chemical safety rules, and the new beryllium rule, is entirely voluntary. There are no penalty provisions for these rules, as exist for nuclear safety rules under the Price-Anderson Act. This is absolutely unacceptable. If the legislative challenges facing HR 3907 prove too steep, we urge the committee to excerpt section 4 as an amendment on its own. Some modifications include providing for baseline reviews of DOE compliance and

a two-year time frame to move into OSHA enforcement. There is precedent for this in the transfer of enforcement authority to EPA for CERCLA and RCRA programs in 1985. In addition, the OSH Act has authority for radiological hazards already, and could be to cover combined radiological and non-radiological hazards in the absence of a second external regulator.

B. Amend the Atomic Energy Act to Harmonize it with Other Environmental Statutes.—The lack of citizen suit provisions in the AEA eliminates one of the most effective tools available to States and the public for ensuring agency accountability. The 1995 Advisory Committee on External Regulation recommended that citizens be allowed to sue DOE and its contractors to comply with applicable statutes and regulations. We recommend that the citizen suit provision also be extended to the NRC. The ability of citizens and States to bring suit under the Clean Water Act and other statutes has been responsible for ensuring much of the compliance within agencies and corporations we see today (example of State suing, particularly Texas?). It allows states to enforce regulations and protect its citizens by challenging the regulators when it sees the need. Setting up the same type of citizen suit provisions on the NRC would go a long way towards making it a more acceptable and accountable regulator.

Within DOE, the problem is even worse. Not only are there no citizen suit provisions with regards to DOE orders, many of those orders are not even enforceable under DOE's own rulemaking procedures. In fact, DOE hasn't even issued all the safety rules that would provide additional enforcement authority under Price-Anderson. It has finalized only two of the 11 rules it said it needed, and USA Today on March 20 explores the possibility that industry pressure has prevented the rules from proceeding.[5] Until DOE is externally regulated, one positive step that can be taken now would be to require DOE to issue all orders pursuant to the Administrative Procedures Act notice and comment. This would allow citizen suits to proceed under the requirement that the agency must follow its own orders. This would not address the issue of making contractors more accountable, as they would not be subject to citizen suits under this law. However, even this small step forward would be welcome.

Administrative Changes

A. Require DOE to Meet OSHA Reporting Standards.—At OSHA, one can log onto a web site and see a list of violations at a facility, and their ultimate disposition. OSHA also requires a log of on the job injuries and illnesses. There is no reason this can't happen at DOE. Already DOE has the Operation Reporting Program System (ORPS), in which incidents and events are shared with DOE for significant safety and health items. In addition it has the Computerized Accident and Incident Reporting System (CAIRS), which is similar to the OSHA log of on the job injuries and illnesses. I have included with my testimony a copy of the OSHA web site page, and the results of a search for accidents involving trichloroethylene. OSHA provides the ability to search by a variety of terms, and lists all accidents that match, as well as providing detailed information about the accident and fines imposed.[6] By contrast, most DOE sites do not provide easy public access to its ORPS reports. Only at the Los Alamos National Lab (LANL), due to the persistence of determined individuals, are ORPS reports posted on a database, and even that is not easy to find on their web site unless you know it is there. It is buried six screens deep under Environment, Safety, and Health "services" rather than in the "databases" section. Information from the CAIRS reports, which is relevant to OSHA, is not available to the public. Other accident and incident data exists in databases that are not only closed to the public, but closed to many workers as well.[7] The basic infrastructure is in place for DOE to report accidents, which could easily be converted to OSHA-style reports and open to public access. This is important information for both the public and the workforce, and should be made available as a tool to further contractor and agency accountability. It would not require a legislative change to make this happen, just a decision by DOE to be more open about its mistakes.

B. Clarify and Invest the Environmental Protection Agency with Standard Setting Authority.—Protracted fighting between EPA and NRC over standard setting for nuclear issues, such as Yucca Mountain, and reactor decommissioning, have resulted in few, inconsistent, standards. This is untenable. EPA is the agency charged with

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[5] Peter Eisler. *Safety Over a Barrel.* USA Today, March 20, 2000.

[6] To conduct an accident search, go to http://www.osha.gov/oshstats/ and click on Accident Investigation Search.

[7] To access LANL's ORPS reports, go to http://drambuie.lanl.gov/esh7/Finals/. LANL's homepage is www.lanl.gov.

protecting public health and the environment, and should be given the sole responsibility for standard setting. While we are often not happy with EPA's standards, and consider them too weak, they are a far cry from NRC. For example, NRC's standard for exposure to the general public would result in a lifetime risk of premature cancer death of one out of every 300 people[8]. That is shocking and shameful. The nuclear industry should be subject to the same standards and risk levels as other industries, and EPA should be the regulator in that regard.

C. Set Up Limited NRC Regulation as a Test.—There are several possible activities within DOE sites that could be considered as test cases for NRC regulation and licensing, beyond the pilot projects already conducted. These include the Low Level Waste Dumps at DOE sites, and possibly reactors like the Fast Flux Test Facility (FFTF) at the Hanford site. Currently, DOE's LLW landfills do not even approach NRC's standards, and are a clear threat to the groundwater at many sites. There are already a clear set of standards and infrastructure in place, including delegated state programs. Finally, many of DOE's LLW dumps are de facto illegal hazardous waste/Resource Conservation and Recovery Act (RCRA) dumps, due to DOE's inability to properly track and characterize its waste. If the FFTF were restarted, it should be licensed and regulated by NRC, and meet modern safety standards. Specific facilities at DOE should be reviewed and considered for NRC regulation. However, NRC should be prevented from going to informal rulemaking that could subvert the intent of better, more accountable, regulation.

CONCLUSION

In conclusion, the Alliance for Nuclear Accountability strongly urges the committee to move forward with at least some parts of an external regulation program for DOE as soon as possible. The creation of the National Nuclear Security Administration has resulted in a number of problems for the protection of the environment, worker safety, and public health. These can be partially addressed by legislative remedies and amendments to the NNSA act. Fundamentally, DOE or NNSA as self-regulated entities cannot persist without seriously compromising safety and health. After 50 years of environmental and safety disasters, it is time to bring DOE into the future.

ADDENDUM:

The Committee asked for input on two other bills, HR 3383 and HR 3906. With regards to HR 3383, we strongly endorse this bill and urge you to proceed with it without delay. It strains credulity that the sole enforcement mechanism available to DOE for nuclear safety violations cannot be used against the University of California (UC), one of the largest contractors in the weapons complex. UC has the contracts for the weapons laboratories, which are the source of many serious accidents and will be the source of many future problems. These labs are in ongoing operations with some of the most hazardous material known to humanity. They are now subject to fines and penalties for security program violations. Surely the protection of the American public and nuclear workers from radiation hazards deserves as much.

We have no opinion on HR 3906 at this time.

[8] GAO. *Nuclear Health and Safety: Consensus on Acceptable Radiation Risk to the Public is Lacking.* GAO/RCED-94-190. September 1994.

OSHA Occupational Safety & Health Administration U.S. Department of Labor

Details for the accident summaries listed below may be obtained in two ways. The first method is simply following the accident summary number link. The second method is marking the check boxes for selected summaries and pressing the *Get Detail* button. Information relevent to the selected accidents will be returned and may then be browsed or printed.

Search Options				
SIC	Date Range		RID	Limits
	1972-07-01	2010-12-31	All	100/2500

Get Detail | + | All | Reset

#7 -- Found 11 -- Processed 11 -- Selected 8 -- Displayed 8

	Summary Nr	Event Date	Report ID	Fat	SIC	Event Description	
1	170064851	02/09/1994	0950411		3931	Employee Is Overcome By Vapors in Confined Space	E
2	000913384	07/16/1992	0552625	X	3714	One Employee Dies, Five Injured When Overcome By Toxic Fumes	E
3	014492391	02/13/1992	0214500	X	7694	Employee Dies From Overexposure to Trichloroethylene	E
4	000674044	12/03/1987	0454510		3494	Employee Injured When Exposed to Trichloroethylene Vapors	X
5	014464309	04/05/1986	0551800	X	3322	Employee Died From Inhalation of Cleaning Solvent	X
6	014542427	04/03/1986	0418100		3312	Overcome By Trichloroethylene Vapors; Burned	X
7	014312169	03/17/1986	0213900		3357	9 Employees Hospitalized Because of Exposure to Toxic Fumes	X
8	014371660	01/24/1985	0522000		3679	Inhalation of Trichloethylene Vapors	X

OSHA Occupational Safety & Health Administration U.S. Department of Labor

Establishment Search Inspection Detail -- OSHA View

Definitions

Inspection: 109866210 - Reliable Technologies, Inc.

Inspection Information - Office: Hasbrouck Heights
Nr: 109866210 Report ID: 0214500 Open: 02/14/1992
Reliable Technologies, Inc. 19-21 California Avenue Paterson , NJ 07503 Union Status: NonUnion SIC: 7694/Armature Rewinding Shops
Inspection Type: Accident Scope: Partial Advance Notice: N Ownership: Private Safety/Health: Health Close Conference: 05/18/1992 Close Case: 08/26/1994
Optional Information: Type ID Value N 12 222484549
Related Activity: Type ID Date Safety Health Accident 360660898 02/13/1992

	Violation Summary					
	Serious	Willful	Repeat	Other	Unclass	Total
Nr Violations	18			4		22
Penalty Amount	6825.00					6825.00
FTA Amount						

Violation Items

	ID	Type	Standard	Issuance	Abate	CurrS	InitS	FtaS	Contest	LastEvent
1	01001A	Serious	19100036 B04	07/15/1992	07/20/1992	300.00	600.00	0.00		I-Informal Settlement
2	01001B	Serious	19100037 H01	07/15/1992	07/20/1992	0.00	0.00	0.00		I-Informal Settlement
3	01002	Serious	19100106 E02 IVD	07/15/1992	09/16/1992	375.00	750.00	0.00		I-Informal Settlement
4	01003	Serious	19100106 E06 I	07/15/1992	09/16/1992	300.00	600.00	0.00		I-Informal Settlement
5	01004A	Serious	19100108 B01	07/15/1992	01/14/1993	375.00	750.00	0.00		I-Informal Settlement
6	01004B	Serious	19100108 C05	07/15/1992	01/14/1993	0.00	0.00	0.00		-
7	01004C	Serious	19100108 D	07/15/1992	09/16/1992	0.00	0.00	0.00		I-Informal Settlement
8	01004D	Serious	19100108 E01 I	07/15/1992	01/14/1993	0.00	0.00	0.00		-
9	01004E	Serious	19100108 E02	07/15/1992	01/14/1993	0.00	0.00	0.00		-
10	01005	Serious	19100120 Q01	07/15/1992	10/16/1992	225.00	450.00	0.00		I-Informal Settlement
11	01006	Serious	19100147 C04 I	07/15/1992	03/31/1993	375.00	750.00	0.00		P-Petition to Mod Abate
12	01007	Serious	19100147 C07 IV	07/15/1992	03/31/1993	375.00	750.00	0.00		P-Petition to Mod Abate

13	01008	Serious	19100151 C	07/15/1992	09/16/1992	225.00	450.00	0.00	I-Informal Settlement
14	01009	Serious	19100157 G01	07/15/1992	10/16/1992	225.00	450.00	0.00	I-Informal Settlement
15	01010A	Serious	19100179 J02 III	07/15/1992	11/16/1992	300.00	600.00	0.00	I-Informal Settlement
16	01010B	Serious	19100179 J02 IV	07/15/1992	11/16/1992	0.00	0.00	0.00	I-Informal Settlement
17	01010C	Serious	19100184 E03 I	07/15/1992	11/16/1992	0.00	0.00	0.00	I-Informal Settlement
18	01010D	Serious	19100184 E04	07/15/1992	01/16/1993	0.00	0.00	0.00	P-Petition to Mod Abate
19	01011A	Serious	19100215 A02	07/15/1992	07/20/1992	300.00	600.00	0.00	I-Informal Settlement
20	01011B	Serious	19100215 A04	07/15/1992	07/20/1992	0.00	0.00	0.00	I-Informal Settlement
21	01011C	Serious	19100215 B09	07/15/1992	07/20/1992	0.00	0.00	0.00	I-Informal Settlement
22	01012	Serious	19100243 C01	07/15/1992	09/16/1992	300.00	600.00	0.00	I-Informal Settlement
23	01013	Serious	19100303 G02 I	07/15/1992	10/16/1992	750.00	1500.00	0.00	I-Informal Settlement
24	01014A	Serious	19101000 A03	07/15/1992	07/20/1992	750.00	1500.00	0.00	I-Informal Settlement
25	01014B	Serious	19101000 F02 I	07/15/1992	07/20/1992	0.00	0.00	0.00	-
26	01015A	Serious	19101200 E01	07/15/1992	01/16/1993	300.00	600.00	0.00	P-Petition to Mod Abate
27	01015B	Serious	19101200 E01 I	07/15/1992	01/16/1993	0.00	0.00	0.00	P-Petition to Mod Abate
28	01015C	Serious	19101200 E01 II	07/15/1992	01/16/1993	0.00	0.00	0.00	P-Petition to Mod Abate
29	01016A	Serious	19101200 F05 I	07/15/1992	01/16/1993	300.00	600.00	0.00	P-Petition to Mod Abate
30	01016B	Serious	19101200 F05 II	07/15/1992	01/16/1993	0.00	0.00	0.00	P-Petition to Mod Abate
31	01017	Serious	19101200 G01	07/15/1992	11/16/1992	300.00	600.00	0.00	I-Informal Settlement
32	01018	Serious	19101200 H	07/15/1992	01/16/1993	750.00	1500.00	0.00	P-Petition to Mod Abate
33	02001	Other	19040002 A	07/15/1992	07/20/1992	0.00	0.00	0.00	-
34	02002	Other	19040004	07/15/1992	07/20/1992	0.00	0.00	0.00	-
35	02003	Other	19100037 Q01	07/15/1992	07/20/1992	0.00	0.00	0.00	-
36	02004	Other	19100332 B01	07/15/1992	10/16/1992	0.00	0.00	0.00	-

Accident Investigation Summary

Summary Nr: 014492391 Event: 02/13/1992 Employee Dies From Overexposure to Trichloroethylene

On February 14, 1992, Employee #1 was attempting to clean a spray booth by spraying trichloroethylene onto its walls. He was working alone without a respirator. He was found unconscious by coworkers. It appeared that when Employee #1 collapsed, he knocked over the container of trichloroethylene, thereby soaking his clothing. The autopsy indicated excessive amounts of trichloroethylene in Employee #1's brain.

Review: E Keywords: overexposure,trichlorethylene,cleaning,respirator,venting,work rules,brain,spray booth,ppe

Inspection	Age	Sex	Degree	Nature	Occupation
109866210	24	M	Fatality	Poisoning(Systemic)	

* Note that more than one inspection number is shown when multiple inspections are performed during the investigation. Additional inspections will be indicated as a link.

Mr. BARTON. Thank you, and I want to say in defense of the minority that is not here, we do have a pending bill on the floor that is a subcommittee bill, so that many of the subcommittee members on the minority side would be here if it were not for the fact that they were engaged in the debate on the floor.

I would now like to hear from Dr. Adelman for 7 minutes. Your testimony is in the record in its entirety.

STATEMENT OF DAVID E. ADELMAN

Mr. Adelman. Thank you, Chairman Barton and members of the subcommittee for giving me the opportunity to testify today.

My remarks will focus on external regulation of the Department of Energy. I want to commend Chairman Barton and the other subcommittee members for introducing H.R. 3907, which represents an important step toward reforming the DOE regulatory system.

And I urge you to continue to work toward developing a comprehensive bill that will fully address the many complex issues raised by shifting to external regulatory oversight of DOE.

As this subcommittee is well aware, self-regulation is unique to DOE and has been an unqualified failure. DOE's deficient self-regulation has resulted in the largest environmental cleanup in history, over 10,000 individual sites at which toxic or radioactive substances were improperly abandoned or released directly into the environment, millions of cubic meters of contaminated soil and groundwater, at a total remediation cost of almost $200 billion.

Moreover, chronic lapses in compliance with environmental, safety, and health regulations continue at DOE sites as evidence by the recent revelations of failed regulatory compliance at DOE's Paducah, Kentucky facility, which has led to a major DOE investigation and Congressional hearings; major accidents, including two fatalities and more than $2 million in environmental and safety fines at DOE's Idaho site; and recent findings of inadequate safety standards at Los Alamos, Livermore, and Savannah River by the Defense Nuclear Facilities Safety Board.

Clearly, DOE's self-regulation is not working. After reviewing DOE's regulatory record, it is no wonder that its Advisory Committee on External Regulation, which was composed of government, nuclear industry, and NGO representatives, found that the severe problems with DOE's approach to safety have their roots in DOE's unique regulatory history and current regulatory framework, and that essentially all aspects of safety at DOE's nuclear facilities and sites should be externally regulated.

This subcommittee's efforts to develop legislation to end DOE's self-regulation is therefore extremely important, particularly in light of Secretary Richardson's untimely and regressive decision in February 1999 to abandon external regulation of DOE facilities.

There are, however, several critical issues that should be addressed before the proposed legislation proceeds: First, public participation, including citizens suits, should be integral to external regulation of DOE.

Citizen suits have been important for over two decades. It was a citizen suit in 1984 that required DOE to comply with environmental, health, and safety regulations, and more recently it was a

citizen suit brought by several workers at Paducah that exposed the problems at DOE's Paducah facility.

Public scrutiny enforcement is essential to agency accountability, particularly where, as here, state and Federal agencies will be enforcing laws against another government entity. Furthermore, making itself fully accountable to the public is the only way that DOE will restore its credibility.

Second, the National Nuclear Security Administration must be subject to external regulation. As the DOE's own advisory committee found, the only area of DOE operations that arguably should be exempt from external regulation is nuclear explosive safety.

Indeed, virtually all of the information that is relevant to the safe operation of DOE facilities will not be classified. In any event, the NRC has well established procedures and experience with handling classified information.

Therefore, there is no basis upon which to treat NNSA facilities differently than other sites in the nuclear weapons complex.

Third, with some 34 sites containing 3500 nuclear facilities, the transition to external regulation will take time. Consultations with each of the agencies and review of existing reports and pilot projects will be essential to identifying a reasonable transfer period.

However, establishing a deadline or series of deadlines for transferring regulatory authority will be essential to ensuring that it is successful and timely.

The importance of external regulation of DOE cannot be overemphasized. As DOE itself concluded in 1996, external regulation is an essential element of completing the move from DOE's historical self-regulated status, which has been variable, costly, and inconsistent, to a stable, efficient, and predictable safety environment.

I appreciate your giving me the opportunity to testify today, and would be pleased to answer any questions.

Mr. LARGENT [presiding]. Thank you, Dr. Adelman. We understand our last witness is still tied up in a Senate hearing, and with unanimous consent, we will allow Mr. Miller to submit his testimony for the record.

[The prepared statement of David E. Adelman follows:]

PREPARED STATEMENT OF DAVID E. ADELMAN, PROJECT ATTORNEY, NATURAL RESOURCES DEFENSE COUNCIL, INC.

Chairman Barton, ranking minority member Hall, and members of the Subcommittee, my name is David Adelman. I am a project attorney with the Natural Resources Defense Council ("NRDC"), a national non-profit environmental organization with over 400,000 members and a staff of about 190 scientists, attorneys, resource specialists, and support staff. I am the project attorney for NRDC's nuclear program, which for over twenty-five years has actively worked to address serious environmental, health, and safety problems at the Department of Energy's ("DOE") nuclear weapons production complex.

Thank you for allowing me to address the issues related to external regulation of environment, health, and safety at DOE's facilities. There are three central issues I will address in my testimony. First, DOE's self-regulation of environment, safety, and health, continues—after more than fifty years—to be plagued by deficiencies, chronic violations, and accidents. Second, fundamental regulatory reform is necessary to ensure that the environment, worker health and safety, and public health and safety are adequately protected and that public confidence in DOE is restored. Third, for a new regulatory regime to be effective and credible, citizen participation—particularly citizen suits—must be at the heart of the new regime.

The bill, H.R. 3907, that the Committee members have introduced is a clear step in the right direction in reforming the DOE regulatory system, and I urge you to continue to work towards developing a comprehensive bill that will fully address the many complex issues raised by transitioning from the current state of DOE self-regulation to external regulation by the Occupation Safety and Health Administration ("OSHA"), the Nuclear Regulatory Commission ("NRC"), and the Environmental Protection Agency ("EPA"). Such legislative action by Congress is all the more important in light of Secretary Richardson's *reversal* of the Department's December 1996 decision to submit legislation to Congress on external regulation. There are, however, several critical issues that must be addressed before the proposed legislation proceeds, including:

(1) ensuring that there is adequate funding—DOE estimates it spends about $1.5 billion annually on safety and health regulation; [1]
(2) developing plans to ensure that the external regulators have the personnel necessary to provide competent oversight;
(3) adding a provision to the legislation granting citizens the right to bring enforcement actions;
(4) making it explicit that the National Nuclear Security Administration is also subject to external regulation; and
(5) affording adequate time for a smooth and efficient transition from DOE self-regulation to external regulatory oversight.

I. THE FAILURE OF SELF-REGULATION AT DOE FACILITIES

Under current law, DOE is a largely self-regulating agency pursuant to the Atomic Energy Act. That is, as a general rule, the DOE is not subject to regulation and oversight by any external administrative entity. Instead, it is responsible for regulating its own activities in regard to worker and public health and safety and in regard to most types of environmental discharges of radioactive materials. The relatively new Defense Nuclear Facilities Safety Board can make recommendations to DOE on safety issues; but these recommendations are non-binding, and the Board has no regulatory power over DOE's activities.

This self-regulation scheme is utterly unique to the Department of Energy. The American legal system has, in every other context I can think of, soundly rejected the concept of self-regulation. Except as regards the DOE, our legal system correctly rejects the notion that an entity with a mandate for production can effectively ensure, without outside assistance, that this production mandate will not overwhelm or supersede the need to protect the environment and human health and safety. The exceptional nature of the DOE regulatory system is all the more astonishing in that the production of nuclear weapons involves producing, handling, managing, and disposing of some of the most dangerous substance known to humankind.

If we view the DOE experience as an experiment in whether self regulation can work, it is clear that the experiment has been an unqualified failure. The statistics are stark. Nuclear weapons production at DOE facilities has resulted in the largest environmental cleanup in the world, involving more than 100 facilities located in more than 25 states, an annual budget of almost $6 billion, and conservative estimates of total cleanup costs of approximately $200 billion.

To date, DOE has identified over 10,000 individual sites at these facilities where toxic or radioactive substances have been improperly abandoned or released directly into soil, groundwater, or surface waters. Under current estimates, nuclear weapons production in the United States has resulted in the contamination of more than 79 million cubic meters (21 billion gallons) of soil and 1.8 billion cubic meters (475 billion gallons) of groundwater—in comparison, the Exxon Valdez spill involved the release of 11 million gallons of oil. In addition, DOE manages more than 24 million cubic meters (6.4 billion gallons) of hazardous or radioactive wastes generated by past and ongoing nuclear weapons production.

Moreover, despite efforts to improve the regulation of activities at DOE sites, serious incidents and lapses in health and safety regulation continue to occur. At DOE's Paducah, Kentucky, uranium enrichment plant, evidence was recently uncovered of alleged illegal disposal of radioactive and hazardous wastes and chronic failure to comply with basic environmental and safety regulations, such as inadequate employee monitoring, widespread contamination in the plant cafeterias, and failure to identify and cordon off hazardous areas. Compounding these problems, in 1998 DOE determined that the Paducah contractor had illegally retaliated against a worker who had raised significant safety concerns.

[1] Department of Energy, Report of Department of Energy Working Group on External Regulation 3-11 (1996) (hereinafter "DOE Working Group Report").

Similar lapses and violations are pandemic at many other DOE facilities. At DOE's site in Oak Ridge, Tennessee, an explosion in December 1998 involving hazardous materials injured 11 workers and was blamed on weak safety standards. In July 1998, DOE's Oak Ridge contractor was fined more than $400,000 for illegal dumping of radioactive and hazardous wastes in a local landfill and widespread mislabeling of wastes. And in 1995, DOE's Oak Ridge contractor was found to have withheld information about significant radiation exposures of workers and to have falsely claimed that numerous test results of radiation exposure for workers were negative.

At DOE's Idaho National Engineering and Environmental Laboratory, DOE fined its own contractor $22,000 in August 1999 for problems with waste containers, unreliable emergency notification systems, and failure to correct adequately prior safety violations. Weak environmental and safety programs at DOE's Idaho site have led to three major accidents, including two fatalities, and more than $2 million in fines for missing cleanup deadlines, hazardous waste violations, and accidents that exposed workers to unsafe levels of radiation. These violations have included falsifying safety records, such as in October 1997 when DOE fined its Idaho contractor $55,000 for falsifying records that testing of nuclear reactor safety systems had been conducted when in fact these crucial tests had not been performed.

DOE's Hanford, Washington, facility, which is the site of the most costly, dangerous, and technically challenging cleanup actions, also continues to suffer from poor environment, health, and safety oversight. In April 1999, for example, DOE and its contractors were fined for inadequate monitoring of several Hanford storage tanks containing high-level nuclear wastes, which store some of the most hazardous materials found in the DOE complex. Indeed, the long-standing deficiencies of self-regulation are a tradition at Hanford, where in 1959 DOE identified significant leaks in single-shell high-level waste tanks, but because of production pressures continued to build them until 1964 and to introduce wastes into them until 1980—causing millions of cubic meters of groundwater and soil to become contaminated.

The major production and research sites, *i.e.*, Los Alamos, Livermore, and Savannah River, are no different. In 1999 the Defense Nuclear Facilities Safety Board found health and safety regulation at these facilities to be seriously deficient—last summer, for example, a major fire occurred at Los Alamos involving plutonium. Putting this in a broader context, in a 1993 internal Department review found that "DOE facilities . . . have been averaging around 64,00 reportable items of non-compliance with OSHA standards per year over the past two years."[2] It is therefore clear that DOE self-regulation continues to fail to protect the environment, worker health and safety, and the public.

In its December 1995 report, DOE's Advisory Committee on External Regulation, which was composed of a broad range of government officials, nuclear industry representatives, and stakeholders, identified the same kinds of "symptoms" that DOE environment, health, and safety regulation have been and are seriously flawed:

- Poor safety practices have and continue to cause major problems, such as extensive contamination of sites throughout the DOE complex and historical exposure of workers and local populations to large releases of radioactive materials.
- The public and government officials believe that fiscal and personnel resources are not being effectively used in undertaking the stabilization, decommissioning, and cleanup of DOE facilities.
- The public and government officials fundamentally distrust DOE.
- DOE's workers are profoundly frustrated by the "regulatory morass that often impedes rather than aids" their efforts.
- DOE activities continue to be plagued by non-compliance with safety requirements.[3]

The Advisory Committee concluded that the root causes of these problems were the following:

- the built-in conflict of interest between safety and mission under self-regulation;
- a legacy of secrecy that has historically shielded DOE's operations and activities from outside view;
- lack of stability in safety management and policy;
- lack of management accountability and inadequately coordinated regulatory and oversight functions;
- redundant, confusing safety requirements; and

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[2] Advisory Committee on External Regulation of U.S. Department of Energy Nuclear Safety, Improving Regulation of Safety at DOE Nuclear Facilities 12 (1995) (hereinafter "Advisory Committee Report").

[3] Advisory Committee Report at 14.

• lack of balance in addressing hazards.[4]

In concluding, the Advisory Committee found that "[t]he severe problems the Committee has identified with DOE's approach to safety have their roots in DOE's unique regulatory history and current regulatory framework." Advisory Committee Report at 15. It was with these factors in mind that the Advisory Committee concluded that "*essentially all aspects of safety at DOE's nuclear facilities and sites should be externally regulated*." *Id*. at 2.

In NRDC's view, the profound problems of radioactive and toxic contamination and failed worker health and safety protection throughout the nuclear weapons complex provide all the evidence necessary to conclude that self-regulation has failed. We must ensure that this does not occur again, and we must start by rejecting the self-regulation system that allowed it to occur. As DOE itself concluded in 1996, "[e]xternal regulation is an essential element of completing the move from DOE's historical self-regulated status, which has been variable, costly, and inconsistent, to a stable, efficient, and predictable safety environment. DOE Working Group Report at 1-1.

II. SELF-REGULATION UNDERMINES DOE'S CREDIBILITY

The environment and human health and safety were not the only casualties of DOE's self-regulation. DOE's credibility with the American public has suffered nearly as much damage as the soil and groundwater polluted by the nuclear weapons complex. Many DOE administrators have acknowledged this loss, observing in one case that DOE's credibility could not be sold if it were listed as a blue-chip stock on Wall Street.

Public confidence in DOE continues to be extraordinarily low. Many of the sources of this credibility crisis lie in DOE's scheme of self-regulation. For years the Department told the public that its operations were safe and clean, that it was taking care of the environment and human health and safety, and that there was nothing to worry about. The truth, of course, turned out to be much different than that, and as a result the public feels betrayed and lied to. It is unreasonable to expect the public to trust the DOE to police itself effectively when its operations have caused such profound harm and its operations continue to be plagued by environment, health, and safety incidents and violations.

At a November 1993 speech on risk management at the National Academy of Sciences, then Assistant Secretary Thomas Grumbly expressed the point aptly when he said: "Sometimes credibility means giving up control." This is one of those cases. For the public to have confidence in the safety and effectiveness of DOE's activities, DOE must release regulatory control to an independent body. As DOE recently acknowledged, "DOE's credibility will be enhanced by the open process inherent in external regulation and the public perception that DOE will be complying with generally applicable and widely accepted requirements." DOE Working Group Report at 1-2. In short, external regulation is a necessary and essential step DOE must take to overcome its legacy of environmental mismanagement and failed protection of human health and safety.

III. CITIZEN PARTICIPATION IS A NECESSARY COMPONENT OF EFFECTIVE EXTERNAL REGULATION

DOE's Advisory Committee on External Regulation concluded that in order to have a credible and effective regulatory system, citizens must have the right to active involvement in its implementation. DOE Advisory Committee Report at 6, 27-29. Citizen participation takes different forms at each stage of the regulatory process, but the most critical component is the right to bring citizen suits. Similarly, states must also have a central role in the new regulatory scheme, including the right to enforce DOE's obligations under external regulation. *Id*. at 29-30. Further, it is essential that any external regulator of DOE be given the power to impose administrative penalties, such that challenges to such penalties would have to go through an administrative process at OSHA or NRC before being resolved by the Department of Justice—and citizens and states would have opportunities to intervene in these adjudications.

An effective regulatory system must perform at least three conceptually distinct functions. First, it must set standards and requirements under which the regulated entity will operate and under which licensing decisions will be made. Second, it must administer the licensing system. Third, it must enforce the obligations that are imposed on licensees either as conditions attached to licenses or under generally applicable regulations. Certain principles must apply across these three regulatory

[4] Advisory Committee Report at 14-15.

activities; in particular, the external regulator must operate independently of the regulated entity and the regulatory regime must be transparent to the maximum extent practicable. And the public must be provided with not just the conclusions reached ("yes, the facility is safe") but also with the basic information and analyses supporting such determinations. The long-standing closed structure of the DOE regulatory regime is a major reason why the public views it with such distrust.

Accordingly, any legislation mandating external regulation should make it clear that under established principles of administrative law, citizens will have the right to participate in the notice-and-comment rulemaking process and to seek judicial review of the adequacy of standards once they have been promulgated. Citizens should also have the right to participate fully in all licensing proceedings and to seek judicial review of all licensing decisions. Finally—and most importantly—for external regulation to be effective and credible, the public must have the right to bring citizen suits in federal court to enforce applicable regulations.

As this Subcommittee no doubt knows, citizen suits have a long and effective history as a method of enforcing federal law. Their most familiar and obvious role is in the body of federal environmental laws enacted since 1970, which rely in significant part on citizen suits as an enforcement mechanism. But citizen suits have a long pedigree in the Anglo-American legal system, dating back 600 years and including such actions as the citizens informers' action and *qui tam* action. They are critical because federal agencies with authority to enforce laws often lack the fiscal resources or the political will to rein in violators. Experience has shown that it can be particularly difficult for state and federal agencies to enforce laws against other government agencies. Moreover, citizen suits often achieve the desired enforcement objective without the need for a full, drawn-out lawsuit.

In addition to their unique effectiveness, full public participation and citizen suits should be integral to the external regulation of DOE in order to address DOE's lack of credibility with the public. By opening the doors of the regulatory process to citizens, DOE would be in a position to win back an important measure of credibility it has lost. Much credibility would flow from the DOE demonstrating to citizens that it is prepared to be held accountable by citizens for its obligations under the law.

IV. LEGISLATING THE TRANSITION TO EXTERNAL REGULATION OF DOE FACILITIES

For more than a decade, NRDC has been a strong proponent of external regulation for the Department of Energy. However, making the transition from self-regulation to regulation by several external entities must be done carefully. The DOE nuclear weapons complex is comprised of 16 major sites and more than a hundred smaller ones containing 3,500 nuclear facilities and extending over 2.1 million acres. The NRC has estimated that it could need as many as 1100 to 1600 more staff members and $150-200 million annually to regulate nuclear safety at DOE facilities. Advisory Committee Report at 41. DOE estimates that its current annual expenditures on safety and health are $1.5 billion, which suggests that NRC's cost estimates are likely not unreasonable. Accordingly, it will be essential to provide both adequate funding to the NRC and OSHA to take over responsibility for regulating DOE and sufficient time for the transition from DOE self-regulation to NRC, OSHA, and EPA external regulation. Further, given that DOE has projected that such a transfer could take more than five years, complete transfer of regulatory authority to OSHA and NRC by October 1, 2001, is almost certainly too ambitious.

There are two issues that are of critical importance to the proposed legislation. The first is that the Atomic Energy Act should be amended to afford adequate public involvement—particularly citizen suits—which I have discussed in the preceding section. The second is that it should be made explicit in the legislation transferring regulatory authority that both DOE and the National Nuclear Security Administration ("NNSA") will be subject to external regulation. The only area of DOE operations that the DOE Advisory Committee determined should not be subject to external regulation was "nuclear explosives safety." Advisory Committee Report at 34. Specifically, external regulation should not apply to the safety of the nuclear explosive device itself. "However, all aspects of operations with nuclear explosives other than nuclear explosives safety . . . should be subject to external regulation, and the regulator would have access to the information necessary to determine whether nuclear explosives operations conformed to safety standards." *Id.*

Most of the information that is relevant to the safe operation of a facility, including safety systems and siting plans, will likely be unclassified. And, in any event, the NRC has both experience with and procedures for handling classified information. See 10 C.F.R. Parts 10, 11, 73, and 95. Indeed, the NRC has licensed facilities with important national security functions, including the naval reactor fuel facility at Erwin, Tennessee. Therefore there is no reason to exclude NNSA facilities from

the external regulation being proposed for DOE; to the contrary, the long history of failed self-regulation mandates that external regulation of activities within the nuclear weapons complex include all NNSA facilities.

In a closely related matter, it is also critical that the legislation from last session creating the NNSA be amended to protect existing state authority to impose and enforce environmental regulations at NNSA facilities. Specifically, Sections 3261 and 3296 of Title XXXII of the Fiscal Year 2000 Department of Defense Authorization Bill should be clarified. NRDC is concerned that the language "all applicable environmental, safety, and health statutes and subsequent requirements" and "all provisions of law and regulations in effect immediately before the effective date of this title" could be interpreted as referring only to federal laws and regulations. However, the Federal Facilities Compliance Act of 1992 explicitly waived federal sovereign immunity and required the federal government to adhere to state environmental regulations when cleaning up hazardous, radioactive, and mixed hazardous and radioactive wastes at federal facilities. Like all other federal facilities, NNSA sites should subject to state laws governing the cleanup of hazardous and radioactive wastes. As the National Governors' Association, National Conference of State Legislatures, and others have recognized, it is essential that this ambiguity in the NNSA legislation be rectified.

There are several additional changes in the proposed legislation that should be considered. First, NRC regulatory authority is currently limited to hazards from source, special, and byproduct material, but does not include other sources of radiation (*i.e.*, accelerator-produced radiation or materials and naturally occurring radioactive materials) or non-radiological hazards, all of which are regulated by DOE under Section 161(i)(3) of the Atomic Energy Act. Such gaps in NRC regulatory authority under the Atomic Energy Act should be closed as part of any legislation to transfer regulatory authority to the NRC. Second, external regulation of nuclear safety and worker health and safety should not be limited to OSHA and NRC; rather, where a state can demonstrate that it has the capacity to regulate DOE operations, regulatory authority should be delegated to the state in which the facility is located. Third, to minimize jurisdictional conflicts, NRDC strongly endorses the use of a cooperative approach by the regulatory agencies based on designation of a "Lead Agency," just as occurs under the Superfund Act, for specific elements of decommissioning and cleanup activities. *See* Advisory Committee Report at 26.

V. CONCLUSION

As I hope my testimony demonstrates, the question of external regulation of the Department of Energy is of profound importance. We at NRDC believe that the DOE will be unable to make further progress on any of the daunting issues facing it until the Department fixes the systematic and corrosive problems caused by an inadequate, insular, secretive regulatory regime. The public simply will not trust DOE claims that it has corrected the deficiencies in its regulatory oversight—which have led to countless violations and accidents and resulted in the largest and most costly environmental cleanup in the world—until DOE is made an accountable agency. The sponsors of this legislation deserve significant credit for proposing a bill that, while needing several critical modifications, moves in the right direction by seeking to end the era of DOE self-regulation.

Fortunately, considerable thought and effort have been dedicated to addressing how to make the transition from DOE self-regulation to external regulation by NRC, OSHA, and EPA. The 1995 report of DOE Advisory Committee on External Regulation is particularly useful, as well as the 1996 DOE Working Group Report. In addition, prior to Secretary Richardson's untimely rejection of external regulation in February 1999, both OSHA and the NRC were working with DOE to develop concrete plans for making the transition to external regulation, which also provided important information on and insight into how to structure the transition to external regulation. These pilot projects should be revived and a dialogue reopened with Secretary Richardson to revitalize DOE's efforts to move towards external regulation.

Thank you again for giving me the opportunity to testify today. I would be pleased to answer any questions.

Mr. LARGENT. Ms. Jones, I'd like to ask you a question, first, if I could. Do you believe that the security oversight in the Department of Energy will be improved or at least protected from future erosion if the Office of Independent Oversight is established in statute?

Ms. JONES. I think here that your term, protected from future erosion, is a good way of putting it. I think our testimony notes that one of the benefits of legislatively establishing this office is so that there isn't backsliding by the Department.

We have noted that this office was several layers down within ES&H in 1999, and it was even part of a programming division earlier than that.

So I think that's the one benefit of this legislation is that it will elevate it and keep that elevation.

Mr. LARGENT. Okay. Dr. Adelman, I was looking at your testimony, and you talked about the necessity of having an independent oversight of DOE. And it said—hold on here just a second—you made a point in your testimony that for DOE to regain public confidence, it must give up regulatory control to an independent body.

But your statement is really at odds of that of Mr. Conway who claimed that external regulation will have no effect on DOE's credibility with the public.

How do you explain such a difference of opinion there between yourself and Mr. Conway?

Mr. ADELMAN. Well, I'm not sure that I can explain his opinion, but certain from the perspective of public interest groups that have worked on these issues for a long time, transferring regulatory oversight, making it more transparent, allowing fuller public participation is an essential ingredient to DOE regaining its confidence with the public.

And this is something that NRDC and many other groups have been promoting for over a decade now. And DOE, until relatively recently, was very supportive of it.

Mr. LARGENT. Why do you think DOE has changed tactics in terms of being opposed to this now?

Mr. ADELMAN. It's a question that we have. They're claiming right now that there are a number of institutional barriers that could potentially make the transfer more difficult. However, it's hard to imagine that those sorts of considerations like harmonizing NRC's regulations with DOE's, having to integrate current DOE safety and health regulations weren't something the Department was aware of in 1996 when it chose to undertake significant movement toward external regulation.

So, as far as we're concerned, we haven't heard any substantive reasons for them to reject external regulation at this time.

Mr. LARGENT. But they are rejecting external regulation.

Mr. ADELMAN. Apparently.

Mr. LARGENT. Yes. Ms. Eldredge, I wanted to ask you a question about the Defense Board, and the question is, do you have any concerns or do you believe that the Defense Board may have become too close to the national security mission it's trying to regulate?

Ms. ELDREDGE. The problem with the two options for regulators that were put out in the 1995 committee and in other reports is that it has looked at the NRC and the Defense Board, both of which have problems. You might say NRC is too close to the nuclear industry which it regulates, and I think the Defense Board suffers from the same problems in terms of its relationship to DOE.

That being said, it also has a tremendous amount of expertise that NRC lacks with regards to some of the weapons programs. So,

we haven't really made a conclusive decision on which way we'd rather go with them.

It's been our problem to date, but we do think that what ever happens, both need to maintain and support the technical expertise of the Defense Board, and perhaps one of the thoughts had been moving them somehow into the NRC structure. Also do some reforms on NRC or the Board, whichever the direction went, in terms of their openness to the public, their citizen suit provisions, and their behavior as a regulator to make them more accountable.

Mr. LARGENT. Dr. Shank, I wanted to ask you a question. You talked about H.R. 3906 imposing yet another new layer of bureaucratic management and oversight.

Since the Office of Independent Oversight already exists at DOE, isn't your lab already subject to the oversight of that office?

Mr. SHANK. Yes.

Mr. LARGENT. So how would H.R. 3906 impose, "yet another new layer of bureaucratic management and oversight?"

Mr. SHANK. I think the question that I'm concerned about is that it applies to all entities of the DOE. In a laboratory like ours, in which we do not perform classified work, this entity does apply to that.

I feel that it is an additional burden that our science programs must bear, and anytime I have a chance to speak out against that, I will.

Mr. LARGENT. And do you feel like the cost, regulatory cost, exceeds the benefit?

Mr. SHANK. Well, if you do not have an issue with national security, adding a burden on science performed in DOE laboratories, especially laboratories like ours which are open to the world, it is an additional cost with no benefit whatsoever, as far as I can see.

Mr. LARGENT. Well, I guess the only issue that I would like to raise is that it seems to me that we've transferred a lot of technology to China, for example, some of it openly, some of it clandestinely, that on the face of it, didn't seem to have national security implications.

But, in fact, the application of that technology was transferred to where it is a national security risk.

So how can you say that one particular type of research would not potentially, if transferred and into the wrong hands, have risks to our national security?

Mr. SHANK. I think there are different ways of looking at this. The nature and character of work that goes on at our laboratory is very similar to the type of work that goes on at universities across the country, at other businesses across the country.

We have to weigh our openness in science with the benefits that we gain. We support about 2 percent of the world's science. We cannot operate and be effective in the world, unless we have the ability to interact.

We benefit more than we lose by interacting with the world's scientific community.

A third of the people at our laboratory are not American citizens. They provide an enormous positive input to our scientific programs, in building businesses in the United States.

I think that if we focus and look inward and cut ourselves off from the scientific community with excessive zeal, we will no longer be the partners of international scientific consortia, and we will have less to learn from the rest of the world.

Mr. LARGENT. I guess what we're trying to seek to find here is some sort of balance.

And, of course, I believe that's the key to life, is finding some sort of balance, as opposed to swinging from one extreme to another.

And the issue really is, how can we provide—you mentioned in your response that there are a lot of ways to look at this.

And I think that one of the ways that this committee and this subcommittee has to look at it, first and foremost, at the highest priority, has to be from a national security perspective. That's the way we have to look at it.

I think that's the fundamental responsibility of the Federal Government, is to provide for the safety and security of our constituents.

And so the question is, how do we do that in the least intrusive way, the least regulatory way, and still allow for the communication that is necessary for scientists to be able to communicate with one another to forward their projects and research, and at the same time, ensure that we're protecting the national security interests that we have?

Unfortunately, so often here at the Federal level, we are forced into a one-size-fits-all mandate that doesn't fit the research that's being conducted at your facility very well, but actually helps protect us in other facilities.

I'm just wondering if you have ideas or thoughts on ways that we can build this legislation in such a way that we are protecting national interests and security, in the least regulatory and burdensome way?

Mr. SHANK. I think the focus should be on the work. It should not be on who does the work.

I think that if the work is done in universities and at laboratories, that's where the focus ought to be, on what it is, what the topic of the work is.

I think that placing a burden on science at DOE laboratories, and disconnecting us from the scientific community, will inevitably put us in such a position that we will not have anything to secure.

Mr. LARGENT. At this time, I will yield to my colleague from Florida, Mr. Stearns.

Mr. STEARNS. The Federal witnesses claimed 1 year is not enough time to transition to external regulations. And the NRC asked for ten, so I guess what's the difference and what's the discrepancy and what do you think? Ms. Eldredge?

Ms. ELDREDGE. I do think 1 year is too short. It's a rather big task to shift this over.

In talking to some of the DOE people I have spoken to around the laboratories, they thought for a transition to OSHA, a 2-year timeframe was reasonable and certainly could be accomplished, and that was at the Defense labs.

In the case of NRC, I think 10 years is rather excessive. You can almost graduate from high school in that amount of time.

And I think a better timeframe might be five, but that's just off the top of my head. I think that what most needs to happen is that there has to be a time line and some requirements to be met, so that they don't turn around in 5 years and say, oh, well, we haven't quite started yet, and give us another 5 years.

Mr. STEARNS. If they want 10 years, they might want more.

Ms. ELDREDGE. Right, they might want 20 Mr. STEARNS. Yes, 20, yes. Ms. Jones?

Ms. JONES. Mr. Stearns, from our testimony, while I can't give you a magic number in terms of how long it's going to take, we did feel it would take longer than the time period provided in the legislation.

And the one point on that was that we were concerned about the defense facilities. They were not part of the pilot program, so while NRC and OSHA do have some interest and understanding of them, we believe that more study was needed.

And one way that you might want to go, as you move forward in having NRC and OSHA regulate the non-Defense facilities, is to pilot one of the large Defense facilities to give you more information about some of the issues like national security concerns, costs, those kinds of things.

Mr. STEARNS. Anyone else like to comment? Dr. Adelman?

Mr. ADELMAN. I would agree that 1 year is a very short time period within which to transfer full regulatory authority over to NRC, and even OSHA.

I think that there are a few things to keep in mind: The importance of a timeline is obviously essential, but also focusing on different stages of the transfer.

One of the things that I think we view as most significant here is that if you shift regulatory authority over to NRC, it doesn't mean that the key date is when that regulatory authority actually transfers. A lot is going to happen prior to that, and a lot of improvements, we hope.

So, establishing a time line with clear goals and an open process is really what should be focused on.

Mr. STEARNS. Yes, sir, Dr. Shank?

Mr. SHANK. As I pointed out in my testimony, even at a simple facility like the Lawrence Berkeley National Laboratory, there are many open issues that need to be resolved that are not resolved in this legislation in terms of who holds the license, whether there is going to be duplicative regulatory oversight; whether legacy issues are addressed and how they can be funded and who will be responsible in the future for those legacy issues.

There is enormous complexity, even for a simple facility like ours to go forward with this.

Mr. STEARNS. Do you think 5 years is sufficient?

Mr. SHANK. I would take the judgment of the NRC.

Mr. STEARNS. Which is 10 years.

Mr. SHANK. I have no way—they talked about a three-step program, each one taking 5 years, if I recall in the testimony.

Mr. STEARNS. That would give you 15, a three-step program at 5 years apiece.

Mr. SHANK. Yes.

Mr. STEARNS. Anyone else? Mr. Van Ness?

Mr. VAN NESS. I'd like to focus on the two defense laboratories with respect to this matter. The regulatory climate for the two defense labs has changed considerably for the better in the years since they supported external regulation before the DOE Advisory Committee on External Regulation, chaired by John Ahearne.

The factors that drove support for that concept revolved around the issue of disparate, multiple, and oftentimes conflicting regulatory directions from DOE, which was causing confusion, high cost, and a dangerous lack of focus regarding improvement of ES&H.

Since then, two major initiatives have been implemented which are now embedded in our organizations, as well as in our contracts, and these are work-smart standards, a process for determining what standards should be used to govern our work from an ES&H perspective, and integrated safety management, an approach that incorporates ES&H into the work, using a set of key principles and functions.

The work-smart standards process engaged the DOE in the laboratories in collectively identifying the work, the associated hazards, and appropriate controls in a manner that many of the conflicting regulatory directions derived from the standards were and are being resolved.

The applicable standards are now more clearly defined, more clearly identified, and agreed to by both DOE and the labs. The work-smart standards sets are now being effectively managed by a formal change control process at the laboratories.

Integrated safety management has, in fact, taken hold at the laboratories, and is proving to be an excellent vehicle for doing work safely. It's been embraced by our workforce, because it's rational, it's flexible and it's site-specific.

The results of ISM are evident in the significant performance improvements of the labs over the past few years, and in the success of integrated safety management verification teams that have been conducted by DOE during this past year.

In fact, a very important issue now is that we sustain the initiatives and improvements that have taken hold since the mid-1990's so that critical cultural changes brought on by ISM continue. It is essential that the momentum that now exists around ISM be sustained and that approach be allowed to mature. Changing at this juncture to yet another regulatory approach could put that at serious hazard.

It is important also to note that none of the external regulation pilot projects——

Mr. STEARNS. Mr. Van Ness——

Mr. VAN NESS. Yes?

Mr. STEARNS. Are you answering the question?

Mr. VAN NESS. Yes, I believe I am.

Mr. STEARNS. The question is——

Mr. VAN NESS. I am telling you that for weapons laboratories I don't think at any time the external regulation——

Mr. STEARNS. So you favor 10 years? You favor 10 years?

Mr. VAN NESS. I don't think that you should address applying external regulation to the weapons laboratories. I think the changes that have occurred——

Mr. STEARNS. So you don't want to apply anything to that?

Mr. VAN NESS. [continuing] at DOE are very effective.

Mr. STEARNS. You don't want to apply anything to them? In other words, are you advocating a 5-year, 2-year, 10-year or——

Mr. VAN NESS. No, I am advocating that you not apply external regulation to the weapons laboratories because the system that have been put in place since the mid-nineties are in fact working and we are seeing an improved safety situation at those laboratories——

Mr. STEARNS. So you cannot, you cannot transition to external regulation in that case?

Mr. VAN NESS. I am saying that would be an unwise thing to do.

Mr. STEARNS. No matter what time was provided?

Mr. VAN NESS. Yes.

Mr. STEARNS. All right. Thank you, Mr. Chairman.

Mr. LARGENT [presiding]. At this time I would like to ask unanimous consent to enter the attached report by CRS into the record. This report addresses direct reporting from Executive agencies to Congress and also at this time recognize the gentleman from Ohio, Mr. Strickland, for questions.

[The information referred to follows:]

Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive

Morton Rosenberg*

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> In republican government the legislative authority, necessarily, predominates."
>
> J. Madison, *The Federalist No.* 51[1]

I. Introduction

By the end of 1982 it became readily apparent to the Reagan administration that its anti-government, deregulatory agenda could not be accomplished through legislative means[2] and that increased reliance on an aggressive administrative strategy was essential to securing its ideological goals. Fundamental to this scheme was the establishment of a highly centralized bureaucratic structure of government that would ensure that ultimate control of decisionmaking in all executive branch agencies, including independent regulatory

1. THE FEDERALIST No. 51, at 350 (J. Madison) (J. Cooke ed. 1961).

2. The Reagan administration's significant early triumphs in the area of economic revitalization, highlighted in the summer of 1981 by the passage of the massive Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981) (codified in scattered sections of 5-50 U.S.C.), and the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981) (codified in scattered sections of 26 U.S.C. and 42 U.S.C.), were not followed by any notable legislative successes with respect to substantive regulatory reform. *See e.g.*, Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982) (codified in scattered sections of 11 U.S.C., 12 U.S.C., and 15 U.S.C.), and the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (1982) (codified in scattered sections of 15 U.S.C., 26 U.S.C., and 39 U.S.C.), both relatively minor adjusting measures. By late 1982 the high expectations of the administration's regulatory relief program had foundered. In fact, worsening economic conditions and the addition of 26 House seats for the Democratic majority in the November 1982 mid-term elections fueled an already intensifying congressional hostility. Administration initiatives to overhaul the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982), and the Clean Water Act, 33 U.S.C. §§ 1251-1487 (1982), up for reauthorization in 1981, were never sustained. In December 1982, H.R. 746, H.R. REP. No. 435, 97th Cong., 2d Sess. (1982), an omnibus regulatory reform proposal, died in the House when it failed to survive a vote in the House Rules Committee. The Senate counterpart, S. 1080, 128 CONG. REC. 5297 (1982), which would have institutionalized broad central rules oversight authority in the Office of Management and Budget, imposed a generic legislative veto on all agency rulemaking, required regulatory impact analysis for agency rulemaking, and mandated enhanced judicial review of a challenged rule, was passed in March 1982 by a vote of 94-0. Neither measure ever again received floor consideration. In the spring of 1983, intense congressional oversight forced the resignation of EPA Administrator Ann Burford and 20 of her 21 top management associates. The EPA housecleaning was followed by the removal of Raymond Peck, the controversial head of the National Highway Safety Administration. And in the summer of 1983, Interior Secretary James Watt, perhaps the most controversial administration deregulator, resigned under pressure. *See generally* LITAN & NORDHAUS, REFORMING REGULATION 116-19 (1983); Foreman, *Congress and Social Regulation in The Reagan Era*, in THE REAGAN REGULATORY STRATEGY: AN ASSESSMENT (1984); Olson, *Where's the Reform?*, REGULATION, Mar.-Apr. 1984, at 30-32, 40; Salamon & Abramson, *Governance: The Politics of Retrenchment*, in THE REAGAN RECORD: AN ASSESSMENT OF AMERICA'S CHANGING DOMESTIC PRIORITIES (1984).

agencies, would rest in the hands of the President or his delegate.[3] In support of this end, the administration and its supporters articulated a constitutionally based theory of a unitary executive and took a variety of actions to make that idea an operative fact. These included centralizing control of agency rulemaking in the Office of Management and Budget by executive orders;[4] challenging the constitutional validity of independent regulatory agencies;[5] asserting the inability of Congress to vest discretionary authority in

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3. *See* Salamon & Abramson, *supra* note 2, at 40-44, 47-48.

4. Exec. Order No. 12,498, 3 C.F.R. 323 (1985); Exec. Order No. 12,291, 3 C.F.R. 127 (1981). The orders have been seen as effecting significant inhibitions on the rule development process, particularly in agencies with environmental, safety, and health missions, which have been targeted for intense scrutiny. *See, e.g.*, S. REP. No. 156, 99th Cong., 2d Sess. (1986); STAFF OF THE SUBCOMM. ON OVERSIGHT AND INVESTIGATION OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 1ST SESS., EPA'S ASBESTOS REGULATIONS: REPORT ON A CASE STUDY IN OMB INTERFERENCE IN AGENCY RULEMAKING (Comm. Print 1985); OMB WATCH, OMB CONTROL OF RULEMAKING: THE END OF PUBLIC ACCESS (August 1985); Cooper & West, *Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules*, 50 J. OF POL. 864 (1988); Morrison, *OMB Interference With Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986); Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1 (1984); Comment, *OMB Involvement In FDA Drug Regulations: Regulating The Regulators*, 38 CATH. U.L. REV. 175 (Fall 1988). The Executive Order 12,291 model, whose centerpiece is the requirement that agencies justify proposed rules in Regulatory Impact Analyses which demonstrate that the benefits to society of such rules exceed their costs, is now being utilized to effect centralized monitoring of agency actions in other areas of administration concern. *See, e.g.*, Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988) (requiring that any proposed agency regulatory action potentially effecting a taking of private property be reported, together with a statement as to "the merits of those actions," to the OMB); Exec. Order No. 12,612, 3 C.F.R. 252 (1987) (requiring that regulations preempting state law be submitted to the OMB with a "Federalism Assessment" justifying such action); Exec. Order No. 12,606, 3 C.F.R. 241 (1987) (empowering the OMB to assure that executive agencies identify proposed regulatory and statutory provisions that may have significant potential impact on family well being and to provide justification for such proposals).

5. Address by the Honorable Edwin Meese III, Attorney General of the United States, Federal Bar Association (Sept. 13, 1985) ("[F]ederal agencies performing executive functions are themselves properly agents of the executive. They are not 'quasi' this or 'quasi' that. In the tripartite scheme of government a body with enforcement powers is part of the executive branch of government. Power granted by Congress should properly be understood as power granted to the Executive.") (copy on file at the *George Washington Law Review*). Challenges to the constitutional legitimacy of independent regulatory agencies were uniformly rebuffed by lower federal courts prior to the Supreme Court's decision in Morrison v. Olson, 108 S. Ct 2597 (1988). *See, e.g.*, FTC v. American Nat'l Cellular, Inc., 810 F.2d 1511 (9th Cir. 1987) (holding that prosecutorial authority was properly vested in the FTC); SEC v. Warner, 652 F. Supp. 647 (S.D Fla. 1987) (holding that prosecutorial authority was properly vested in the SEC); FTC v. Engage-A-Car Serv., No. 86-3758 (D.N.J. Dec. 18, 1986) (holding that the claim that FTC enforcement authority is unconstitutional is "devoid of merit"); *see also* Ticor Title Ins. Co. v. FTC, 814 F.2d 731 (D.C. Cir. 1987) (dismissing challenge to the enforcement role of the FTC as unripe); Hospital Corp. of Am. v. the FTC, 807 F.2d 1381 (7th Cir. 1986) (rejecting a challenge to FTC enforcement authority as inadequately briefed), *cert. denied*, 107 S. Ct. 1975 (1987). The first post-*Morrison* ruling continues the line of authority unbroken. SEC v. Blinder, Robinson & Co., 855 F.2d 677, 682 (10th Cir. 1988) ("Congress can, without violating Article II, authorize an independent agency to bring

subordinate executive officials who are free from presidential supervision and control;[6] refusing to implement congressional enactments it deemed unconstitutional;[7] questioning the authority of Congress to vest the appointment of an executive officer with prosecutorial powers in the courts and to provide for removal of that officer only for cause;[8] and denying the authority of Congress to empower an agency to issue statutorily prescribed unilateral compliance orders to sister agencies found in violation of laws and regulations applicable to them or to resort to court action to force compliance with such orders.[9]

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civil law enforcement actions where the President's removal power was restricted to inefficiency, neglect of duty, or malfeasance in office."). Interestingly, the Justice Department's penultimate draft of its legal opinion supporting the President's authority to issue Executive Order No. 12,291, 3 C.F.R. 127 (1981), indicates that it was the administration's intention to include independent regulatory agencies within its purview. The opinion concluded that such independent bodies could be covered "under the best view of the law," but conceded that "an attempt to exercise supervision of these agencies through techniques such as those in the proposed Order would be lawful only if the Supreme Court is prepared to repudiate certain expansive dicta in the leading case on the subject." *Proposed Executive Order on Federal Regulation in Role of OMB In Regulation: Hearing before Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce,* 97th Cong., 1st Sess. 158 (1981).

6. Public Citizen v. Burke, 655 F. Supp. 318 (D.D.C. 1987), *aff'd,* 843 F.2d 1473 (D.C. Cir. 1988); H.R. REP. No. 961, 99th Cong., 2d Sess. (1986).

7. *See* Ameron, Inc. v. United States Army Corps of Eng'rs, 809 F.2d 979, 991 n.8 (3d Cir. 1986), *cert. dismissed,* 109 S. Ct. 297 (1988).

8. On August 31, 1987, the Department of Justice officially took a position against the constitutionality of the provisions of the Ethics in Government Act, 28 U.S.C. §§ 49, 591-598 (1982 & Supp. IV 1986), establishing the mechanism for appointing independent counsels, in an amicus brief filed in *In re* Sealed Case, 838 F.2d 476 (D.C. Cir.) (Nos. 87-5261, 87-5264, and 87-5265), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988). The argument relied heavily on the theory of a unitary executive:

> The vesting of the "executive power" in the President and his duty to "take Care that the Laws be faithfully executed" (Art. II, Sec. 3), give substance to the Framers' agreement that there must be a unitary, vigorous, and independent Executive responsible directly to the people. . . . Unity in the execution of the laws was deemed by the Framers to be a "leading character in the definition of good government." . . . [A]bsence of unity in the Executive would, in the eyes of the Framers, create a lack of responsibility and accountability. . . . The Ethics Act . . . contravenes the Constitution by eliminating or strictly limiting the power of the Executive Branch to appoint, control, and remove an Officer charged with the quintessential executive duty of criminal law enforcement. Such a key officer must serve under the direct supervision of the Executive. If the doctrines of separation of powers and the unitary Executive are to have meaning, Officers charged with these law enforcement responsibilities must function within the Executive Branch.

Id. at 7-8, 10-11 (citations omitted). This position was presaged by testimony of Department officials before various congressional committees. *See, e.g., Oversight of the Independent Counsel Statute: Hearings before Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs,* 100th Cong., 1st Sess. 12,117 (1987) (testimony of Assistant Attorney General John R. Bolton, arguing "that there are very grave doubts about the constitutionality of the appointment process [for independent counsel]," and that the President "must retain the unfettered ability to direct and supervise all executive officials").

9. The administration argued that:

> [E]ven where statutory order authority exists, the exercise by EPA of unilateral order authority would be clearly inconsistent with existing Executive Branch dispute resolution mechanisms, and would raise substantial constitutional questions. This Department has consistently taken the position that under our constitutional scheme, disputes of a legal nature between two or more Executive Branch agencies whose heads serve at the pleasure of the

The cumulative impact of these and other executive actions evidenced to some observers a growing, open contempt for Congress's policymaking prerogatives and the rule of law.[10] The principal sources of encouragement for proponents of a hierarchical executive were the broad dicta in the landmark 1926 removal case of *Myers v. United States*[11] and recent separation of powers rulings by the Supreme Court[12] that were generously interpreted as supportive of the notion of a unitary executive branch. The judicial high water marks were reached first, in early 1986, when a three-judge panel of the district court for the first time questioned whether the concept of agency independence could be reconciled with the President's removal power under Article II,[13] and then in 1988 with the split ruling of a panel of the Court of Appeals for the District of Columbia Circuit holding that the independent counsel provisions of the Ethics in Government Act[14] were unconstitutional.[15] Although the principal basis stated for the independent counsel decision rested upon its interpretation of the Appointments Clause, the panel majority also propounded as an alternative ground of decision the idea of a unitary executive. The appeals court's decision represented the first judicial application of the unitary executive theory to the merits of a controversy and the initial instance of a judicial recognition of a substantive content to the "take care" clause.[16] That is, for the first time a court acknowledged a constitutionally based supervening

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President are properly resolved by the President or by someone with authority delegated from the President.

Environmental Compliance By Federal Agencies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 100th Cong., 1st Sess. 206 (1987) (statement of Assistant Attorney General F. Henry Habicht) [hereinafter Habicht Testimony]. The EPA's authority to issue administrative orders to other federal agencies and to take court action against them is contained in section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a), (h) (Supp. IV 1986) and section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9606(a) (1982).

10. This hierarchical mindset is seen as underlying the events chronicled in the Iran/Contra hearings. *See, e.g.*, Caplan, *Annals of the Law: The Tenth Justice*, NEW YORKER, Aug. 10, 1987, at 29-30; Drew, *Letter From Washington*, NEW YORKER, June 22, 1987, at 75-76.

11. 272 U.S. 52, 161 (1926).

12. *E.g.*, Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Buckley v. Valeo, 424 U.S. 1 (1976). Also influential was the D.C. Circuit's expansive view of executive authority in the context of a dispute over presidential ex parte contacts in an informal rulemaking proceeding. Sierra Club v. Costle, 657 F.2d 298, 404-08 (D.C. Cir 1981).

13. Synar v. United States, 626 F. Supp. 1374, 1397-1400 (D.D.C.), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986).

14. Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591-598 (1982 & Supp. III 1985).

15. *In re* Sealed Case, 838 F.2d 476 (D.C. Cir.), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988).

16. U.S. CONST. art. II, § 3.

power i. .e President to direct the actions of subordinate executive officials contrary to the expressed intent of a congressional enactment.[17]

However, any doubts raised by these appeals court decisions were emphatically allayed by the Supreme Court's decisions in *Morrison v. Olson*,[18] upholding the validity of the appointment and removal conditions for independent counsel under the Ethics in Government Act, and in *Mistretta v. United States*,[19] sustaining the constitutionality of the composition, location, and powers of the United States Sentencing Commission. In opinions remarkable for their breadth and near unanimity,[20] the High Court unequivocally dealt with the notion of a unitary executive. Addressing the argument of dissenting Justice Scalia in *Morrison* that "the language of Article II vesting the executive power of the United States in the President requires that every officer of the United States exercising any part of that power must serve at the pleasure of the President," Chief Justice Rehnquist held that "[t]his rigid demarcation—a demarcation incapable of being altered by law in the slightest degree, and applicable to tens of thousands of holders of offices neither known nor foreseen by the framers—depends upon an extrapolation from general constitutional language which we think is more than the text will bear."[21] In *Mistretta*, Justice Blackmun, rejecting the contention that Congress was without authority to locate an agency with no judicial powers in the judicial branch, determined that the separation doctrine was not violated by structural arrangements that are either innovative or seemingly anomalous.[22]

In both decisions the Court expressed unequivocal approbation of a very far reaching, though not limitless, power in Congress over agency structure, location, and relationships that may properly have as its principal object the desire to limit the President's influence over the development and implementation of administration policy. The Court underlined its intended deference to the congressional

17. *See also* Public Citizen v. Burke, 843 F.2d 1473, 1477-78 (D.C. Cir. 1988). In *Public Citizen*, the author of the independent counsel decision, Judge Laurence Silberman, upheld a lower court ruling forbidding the Archivist of the United States from complying with a Justice Department directive that, contrary to statute, he acquiesce in any claim of executive privilege by former President Nixon. Judge Silberman reserved judgment on whether the same would hold true if the claim were made by an incumbent President. He declared:

> Of the Executive Branch officers, the President, of course, embodies the ultimate political legitimacy and therefore his views as to the manner by which his appointees will interpret a statute may not be lightly disregarded . . . . Since the incumbent President, by virtue of Article II's command that he take care that the laws be faithfully executed, quite legitimately guides his subordinates' interpretation of statutes, it seems anomalous for the Judiciary to refuse deference merely on the grounds that it can be shown that the agency's interpretation was one pressed by the President upon reluctant subordinates.

Id.

18. 108 S. Ct. 2597 (1988).
19. 109 S. Ct. 647 (1989).
20. Only Justice Scalia dissented in both cases.
21. *Morrison*, 108 S. Ct at 2618 n.29.
22. *Mistretta*, 109 S. Ct at 661.

prerogative in this area by adopting the pragmatic, balancing approach first enunciated in *Nixon v. Administrator of General Services*[23] for such agency relationship-type cases. This approach has yet to produce even a single limitation on the exercise of legislative power in separation litigation.

In the face of such apparently preemptive rulings, a decorous and graceful retreat by the executive from this field of battle would have seemed predictable and wise. That evidently is not to be. On October 26, 1988, President Reagan pocket vetoed S. 508, the Whistleblower Protection Act of 1988.[24] Among other objections to the legislation, the President asserted that certain provisions establishing an independent Office of Special Counsel "raised serious constitutional concerns." In particular, he questioned the constitutionality of insulating the special counsel from presidential removal except "for inefficiency, neglect of duty, or malfeasance in office"; of prohibiting prior executive review of reports or testimony by the special counsel or his employees when requested by a congressional committee; and of authorizing the special counsel to seek judicial review of decisions of the Merit Systems Protection Board in which he is a party.

Then, in January 1989, the Department of Justice submitted a supplemental brief on behalf of the government for an en banc rehearing ordered by the Ninth Circuit Court of Appeals in *Lear Siegler, Inc. v. Ball.*[25] Although ostensibly limited by the court to the question of the propriety of the panel's award of attorneys' fees to Lear Siegler based upon its finding that the executive had acted in bad faith by willfully and deliberately refusing to comply with a presumptively valid law, the Justice Department's brief presents a broad ranging argument to establish that the "President has the authority to decline, in the absence of a judicial resolution of the matter, to implement a statute that is patently unconstitutional or that he reasonably believes undermines his powers under the Constitution."[26]

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23. 433 U.S. 425, 443 (1977). The balancing approach "focuses on the extent to which [an action] prevents the Executive Branch from accomplishing its consitutionally assigned functions." Then there may be a determination whether a potentially disruptive "impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Id.*

24. 24 WEEKLY COMP. PRES. DOC. 1377 (Oct. 31, 1988). Senate Bill 508 was reintroduced in the 101st Congress as H.R. 25, 135 CONG. REC. H37 (daily ed. Jan. 3, 1989) and S. 20, 135 CONG. REC. S279 (daily ed. Jan. 25, 1989), and was passed as amended and signed into law on April 10, 1989, Pub. L. No. 101-12, 103 Stat. 13. *See infra* note 419.

25. Supplemental Brief for the Appellants, Lear Siegler, Inc. v. Ball, 863 F.2d 693 (9th Cir.) (Nos. 86-6496, 87-5670, and 87-5698), *ordering reh'g en banc of* Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988) [hereinafter Supplemental Brief] .

26. *Id.* at 21.

This dispensing authority is argued to find its source in the President's duty to "take care"[27] that the laws are faithfully executed, his oath of office to "protect and defend the Constitution of the United States,"[28] and the vesting of "executive Power" in him by the opening clause of Article II, all of which are said to deny that he is to be "a mindless governmental robot, enforcing statutes no matter how inconsistent with constitutional guarantees."[29]

Neither the pocket veto message nor the Justice Department brief reflects any degree of recognition or acceptance of the teachings of *Morrison* and *Mistretta*.[30] Both documents have the imprimatur of the Bush administration's Attorney General, Dick Thornburgh. They indicate a lengthy period of legal trench warfare over at least the peripheral exercises of the legislative prerogative, as to such issues as direct reporting requirements or authorizations of litigation between executive agencies, and perhaps another attempt to present the idea of a unitary executive to the Court in a more sympathetic context. The whistleblower statute and the *Lear Siegler* situation present paradigm case studies of what may lie ahead.

The thesis of this Article is that the theory of the unitary executive is and has always been a myth concocted by the Reagan administration to provide a semblance of legal respectability for an aggressive administrative strategy designed to accomplish what its failed legislative agenda could not. The theory has no substantial basis in either our nation's administrative history or constitutional jurisprudence and subverts our delicately balanced scheme of separated but shared powers. It is Congress that was meant to be the dominant policymaking body in our constitutional scheme and its principal tool to ensure that its will would be carried out is its virtually plenary power to create the administrative bureaucracy and to shape the powers, duties, and tenure of the offices and officers of that infrastructure in a manner best suited to accomplish legislative ends. Section II details the development and current formulation of the standard of review in separation of powers cases. Section III traces the administrative and legal history of congressional control of agency decisionmaking. Section IV tests the constitutional rationale of President Reagan's pocket veto of the whistleblower bill by the standards established by *Morrison* and *Mistretta*. Section V discusses the anomalies and dangers of the dispensing power claimed by the President in the *Lear Siegler* case. The concluding section assesses the current scope of congressional power over the structuring of agency arrangements.

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27. U.S. CONST. art. II, § 3.
28. *Id.* § 1, cl. 8.
29. Supplemental Brief, *supra* note 25, at 25.
30. The *Lear Siegler* brief cites each case once, but neither reference is for any relevant substantive proposition. *See id.* at 31.

II. Controlling the Bureaucracy in a System of Separated Powers: The Standard of Review

For more than half a century, much discussion on the nature and place of the administrative bureaucracy in our constitutional scheme has been misdirected by the colorful but legally inaccurate appellation attached to independent regulatory agencies by the Brownlow Report, a 1937 study that recommended that the executive branch be reorganized to create an integrated, hierarchical structure over which the President would preside as an active manager.[31] In particular, the Report urged that the President's role be expanded by placing some 100 independent agencies, administrations, boards, and commissions within the executive department. These independent agencies, the Report argued, constituted a "headless 'fourth branch' " acting "under conditions of virtual irresponsibility," thereby frustrating the President's role as the general manager of the United States.[32] Contemporary scholars raised constitutional objections to this notion of the President as "general manager,"[33] and Congress did not enact the Report's proposals. But the rubric of the headless fourth branch has persisted,[34] acting as a useful rhetorical pejorative despite prevailing judicial and scholarly opinion that it is a "constitutional impossibility."[35] In this regard the seminal Supreme Court ruling in *Humphrey's Executor v. United States*,[36] establishing the non-removability except for cause of members of independent commissions, stated:

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies . . . and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in contemplation of the statute must be free from executive control.[37]

The Court was quick to note that in recognizing that Congress could insulate such officers from presidential control in this manner, it was being faithful to the tripartite constitutional scheme:

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31. U.S. PRESIDENT'S COMM. ON ADMIN. MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES (1937).

32. *Id.* at 40-41.

33. Jaffee, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1238-42 (1939).

34. *See, e.g.*, Synar v. United States, 626 F. Supp. 1374, 1398 (D.D.C.), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986).

35. J. ROHR, TO RUN A CONSTITUTION 152-53 (1986) (criticizing the rhetorical excesses of the Brownlow Report); Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492-96 (1987); Verkuil, *The Status of Independent Agencies After* Bowsher v. Synar, 1986 DUKE L.J. 779, 798.

36. 295 U.S. 602 (1935).

37. *Id.* at 628.

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality.[38]

Subsequent Supreme Court rulings have made it abundantly clear that persons exercising significant authority pursuant to law must find their place within the tripartite design.[39] Moreover, as the Court's opinion in *Bowsher v. Synar* observed: " 'Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him that he must fear, and, in the performance of his functions, obey.' "[40] For that reason, in *Bowsher* the Court identified the provision governing the removal of the Comptroller General as "[t]he critical factor" defining the status of his office.[41] In that case, the Comptroller General, although appointed by the President, was by virtue of his removability by Congress by joint resolution deemed to be "an officer of the Legislative Branch."[42]

Thus, the constitutional constraint that is to be dealt with by the courts in cases involving officer insulation from at-will removal, or the vesting of unreviewable discretion in an official subordinate to the President, is the separation of powers. The discrete question is how far Congress may go in insulating the roles of the agencies and officers of the government from presidential authority.

Here it must be understood at the outset that the Constitution did not establish a division of three branches, each vested with a discrete portion of governmental power and no more. Rather, the Framers established three constitutional divisions: the President, the Congress, and the Judiciary. The document does not talk about the executive, the legislative and the judicial branches. Nor did it create the infrastructure of government. That task it left to the exclusive domain of the Congress. What the Framers were concerned about was the maintenance of a balance of political power between the President and Congress. That is what the separation of powers speaks to. The Framers were also concerned about the means of control to be afforded the branches over the agencies of government. This is what the checks and balances are meant to facilitate. In turn, the checks and balances are to be evaluated in terms of their effect on the nature and degree of control one branch has over the agencies and the impact that effect will have on the relative balance

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38. *Id.* at 629-30.

39. *E.g.*, Bowsher v. Synar, 478 U.S. 714, 721-24 (1986); Buckley v. Valeo, 424 U.S. 1 (1976).

40. 478 U.S. at 726 (quoting Synar v. United States, 626 F. Supp. 1374, 1401 (D.D.C. 1986)).

41. *Id.* at 727.

42. *Id.* at 731.

between Congress and the President.[43]

This schema is consistent with the Supreme Court's current standard for treatment of separation of powers questions. Thus in *Nixon v. Administrator of General Services*[44] the Court rejected the " 'archaic view of the separation of powers as requiring three airtight departments of government.' "[45] In determining whether a statute disrupts the balance between the coordinate branches, the proper inquiry focuses on the extent to which the act "prevents the Executive Branch from accomplishing its constitutionally assigned functions."[46] The "Court thus has been mindful that the boundaries between each branch should be fixed 'according to common sense and the inherent necessities of the governmental coordination.' "[47] It has also noted that a "hermetic sealing off of the three branches of Government from one another would preclude establishment of a Nation capable of governing itself effectively."[48] "Rather, as Justice Jackson wrote: 'While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.' "[49]

The Court's rejection of the "archaic view" tracks the pronouncements of the Framers. If the three branches of government were rigidly compartmentalized, checking and balancing would be impossible. When the idea of a rigidly pure separation was suggested to the Framers and debated by them, they consciously rejected it as impractical and unreasonable.[50] Recent commentators have emphasized that "[b]y the time of the Philadelphia Convention the doctrine of separated powers had been modified to allow for checks and balances."[51] Rather, "the *whole* power of one department [should not be] exercised by the same hands which possess the *whole* power of another department."[52]

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43. *See generally* Banks, *When They Get Close to the Truth: Challenging the Special Prosecutors*, 38 SYRACUSE L. REV. 623 (1987); Strauss, *supra* note 35; Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

44. 433 U.S. 425 (1977).

45. *Id.* at 443 (quoting Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 342 (D.D.C. 1976)).

46. *Id.*

47. INS v. Chadha, 462 U.S. 919, 962 (1983) (Powell, J., concurring) (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928)).

48. Buckley v. Valeo, 424 U.S. 1, 121 (1976).

49. *Chadha*, 462 U.S. at 962 (Powell, J., concurring) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

50. THE FEDERALIST NOS. 47, 51 (J. Madison).

51. L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 14 (1985); Banks, *supra* note 43, at 632-33.

52. THE FEDERALIST NO. 47, at 325-26 (J. Madison) (J. Cooke ed. 1961) (quoting Montesquieu).

The approach announced by the Court in *Nixon v. Administrator of General Services* for adjudicating separation of powers challenges dictates a two-step functional analysis. The Court first asks whether the action of the challenged branch threatens to prevent another "from accomplishing its constitutionally assigned functions," and second, where there is a "potential for disruption," it determines "whether that impact is justified by an overriding need to promote objectives within the constitutional authority" of the moving branch.[53] Application of the test, however, has engendered some confusion and led to the suggestion that the Court had created contradictory lines of separation of powers rulings[54] that juxtapose irreconcilably constitutional formalism[55] with pragmatic functionalism.[56] The apparent conflict lent temporary encouragement to proponents of the unitary executive theory, but in the end has forced the Court to clarify its position in a manner that leaves little support for the theory.

The major recent decision seen as buttressing a hierarchical view of the executive is *INS v. Chadha*,[57] in which the Supreme Court rejected the legislative veto as a violation of the constitutionally prescribed process for legislative action. It reasoned that since the exercise of the legislative veto is essentially legislative in purpose, it is subject to the Article I requirements of bicameral passage and presentment to the President. The majority argued that the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."[58] The Court, taking a formalistic view of the separation doctrine, emphasized the separateness of the legislative, executive, and judicial powers by insisting that each branch of government "confine itself to its assigned responsibility."[59] While conceding that the branches were not meant to be "hermetically" sealed from one another, it insisted that "the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution delegated to it."[60] Thus, express constitutional provisions providing for the involvement by one branch in the affairs of another are meant to be exclusive and bar such involvement where it is not affirmatively

53. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977); Nixon v. Fitzgerald, 457 U.S. 731, 753-54 (1982).

54. *See, e.g.*, Krent, *Separating the Strands in Separation Controversies*, 74 VA. L. REV. 1253 (1988); Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?*, 72 CONN. L. REV. 488 (1987); Comment, *Constitutional Law: The Independent Counsel and the Supreme Court's Separation of Powers Jurisprudence*, 40 U. FLA. L. REV. 563, 572-82 (1988).

55. Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Buckley v. Valeo, 424 U.S. 1 (1976); Myers v. United States, 272 U.S. 52 (1926).

56. Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568 (1985); Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977); Wiener v. United States, 357 U.S. 349 (1958); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

57. 462 U.S. 919 (1983).

58. *Id.* at 951.

59. *Id.*

60. *Id.*

authorized.[61]

For some, including the Justice Department, the meaning of the legislative veto case was apparent: the strict view of the separation of powers enunciated by *Chadha* was incompatible with the rationale and result of *Humphrey's Executor* and thus signalled a return to the expansive view of executive power contained in *Myers*. There the Court had opined that the President's Article II duty to see that the laws are faithfully executed necessarily recognizes the President's authority to exert "general administrative control of those executing the laws."[62] The President, as head of the Executive branch, must "supervise and guide" executive officers in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone."[63] As a consequence, the focus of constitutional removal power with respect to all executive officials must return to the President and the legitimacy of agency independence withdrawn.

This view was pressed in a variety of litigation contexts and, for the first time, received a hospitable judicial reception in *Synar v. United States*.[64] There a three-judge panel of the district court dealt with a challenge to the constitutionality of the triggering mechanism of the Balanced Budget and Emergency Deficit Control Act of 1985, more popularly known as the Gramm-Rudman-Hollings Act.[65] In an unsigned per curiam opinion the court held that by vesting responsibility for executing the Act in the hands of the Comptroller General—an officer who is subject to removal only by Congress itself—Congress had effectively retained control over the execution of the law and thereby unconstitutionally intruded into the executive function. This narrow holding, however, was prefaced by a lengthy obiter dicta attack on *Humphrey's Executor* and the continued viability of independent agencies. The court characterized

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61. *Id.* at 955-56. The Court also took a compartmentalized view of the separation doctrine in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). There the majority rejected as unconstitutional the creation by Congress of special bankruptcy judges who are not part of the judicial branch as created by Article III. These judges had powers similar to those of judges in state courts generally, and their decisions were reviewable in federal courts. However, they did not have Article III tenure and salary protection. The Court's opinion centered on an attempt to classify the kinds of decisions that were inherently judicial and, with a few exceptions provided for in the Constitution, agreed that adjudicatory decisions could only be rendered by traditional Article III courts.

62. Myers v. United States, 272 U.S. 52, 164 (1926).

63. *Id.* at 135.

64. 626 F. Supp. 1374 (D.D.C.), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986).

65. Pub. L. No. 99-177, 99 Stat. 1037 (1985) (codified at scattered sections of 2 U.S.C., 31 U.S.C., and 42 U.S.C. (Supp. IV 1986)).

Humphrey's Executor as an aberration of New Deal jurisprudence and administrative theory that "is stamped with some of the political science preconceptions characteristic of its era and not of the present day," and questioned the efficacy of the concept of independent agencies:

> It is not as obvious today as it seemed in the 1930's that there can be such things as genuinely "independent" regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable; or, indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process. Moreover, "quasi-legislative" and "quasi-judicial" functions can no longer be regarded as extraordinary or even unusual activities of executive agencies.[66]

The court then questioned whether *Humphrey's Executor* was ever reconcilable with the separation doctrine. "It has in any event always been difficult to reconcile *Humphrey's Executor's* 'headless fourth branch' with a constitutional text and tradition establishing three branches of government. . . ."[67] It then noted with approval that "[s]ome knowledgeable observers . . . think that abandonment of the *Humphrey's Executor* analysis has been presaged by the Supreme Court's 1983 decision in *INS v. Chadha*."[68] The court commented:

> Assuredly some of the language of the majority opinion in *Chadha* does not lie comfortably beside the central revelation of *Humphrey's Executor* that an officer such as a Federal Trade Commissioner "occupies no place in the executive department," and that an agency which exercises only "quasi-legislative or quasi-judicial powers" is "an agency of the legislative or judicial departments of the government."[69]

The *Synar* court, however, conceded that "[t]he Supreme Court's signals are not sufficiently clear . . . to justify our disregarding the rationale of *Humphrey's Executor*,"[70] and proceeded with an analysis of the duties conferred on the Comptroller General that led it to its ultimately narrow conclusion that executive powers could not be exercised by officers removable by Congress. But the questions raised by the court's obiter dicta were carried forward to the Supreme

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66. *Synar*, 626 F. Supp. at 1398.

67. *Id.*

68. *Id.* The opinion approvingly cites an article by Professor Peter Strauss. *See supra* note 43. However, the substance and style of the opinion's argument tracks closely the position articulated by Justice (then Judge) Antonin Scalia in an article published in 1985. *See* Scalia, *Historical Anomalies in Administrative Law*, YEARBOOK 1985, SUPREME COURT HISTORICAL SOCIETY 106-10. Scalia was a member of the three-judge *Synar* panel.

69. *Synar*, 626 F. Supp. at 1399 (quoting *Humphrey's Ex'r*, 295 U.S. at 628). The court here referenced the explanation in *Chadha* that the fact that executive branch officers perform what might be characterized as "quasi-legislative" or "quasi-judicial" functions does not mean that they are exercising something other than executive power within the meaning of Article II. *See* INS v. Chadha, 462 U.S. 919, 953 n.16 (1983).

70. *Synar*, 626 F. Supp. at 1399.

Court in the Justice Department's brief in support of the lower court's ruling.[71]

The potential breadth of the Solicitor General's arguments in his brief in *Bowsher*, and particularly their negative effect on independent officers and agencies, caused such concern (before they were effectively disavowed) that, as the Supreme Court's transcript of the oral argument reflects, Justice O'Connor exclaimed to the Solicitor General, "I'll confess, you scared me with it."[72] The Court's majority opinion quickly reassured that the issue at question in the case did not cast doubt on the status of the independent agencies: "Appellants therefore are wide of the mark in arguing that an affirmance in this case requires casting doubt on the status of 'independent' agencies because no issues involving such agencies are presented here."[73] The Court then went on to quote approvingly from *Humphrey's Executor* and cited the later removal case of *Wiener v. United States*.[74]

But the Court continued to use the language of formalism, reiterating its observation in *Chadha* that " '[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial,' " [75] and declaring that "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."[76] Relying expressly on *Myers* and *Chadha*, the Court concluded that Congress could not reserve for itself the power to remove an officer charged with the execution of the laws, except by means of impeachment, without realizing "[t]he dangers of congressional usurpation of Executive Branch functions."[77]

The *Bowsher* opinion was plainly sending mixed signals. On the one hand, reaffirming the continued viability of *Humphrey's Executor* and, thereby, the independent agency format, was a substantial setback for unitary executive advocates. But on the other hand, the continued adherence in word and fact to a seemingly rigid, compartmentalist view of the separation doctrine, could do little to cool the

71. *See* Brief for the United States at 44, Bowsher v. Synar, 478 U.S. 714 (1986) (Nos. 85-1377, 85-1378, and 85-1379) (arguing that apart from the defect of congressional removal, the Comptroller General's "duties . . . are so central to the administration of the Executive Branch and the responsibilities of the President that they may be performed only by the President or by an Officer of the United States serving at the pleasure of the President.").

72. Transcript of argument, Apr. 23, 1986, at 51, Bowsher v. Synar, 478 U.S. 714 (1986) (Nos. 85-1377, 85-1378, and 85-1379).

73. Bowsher v. Synar, 478 U.S. 714, 725 n.4 (1986).

74. *Id.* at 724-26.

75. *Id.* at 721 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

76. *Id.* at 722.

77. *Id.* at 726-27.

ardor of adherents of a hierarchical executive. Clarification of the Court's confusing message, however, was soon in coming. Indeed, it was issued the same day, in *Commodity Futures Trading Commission v. Schor.*[78]

In *Schor* the question before the Court was whether the grant of statutory authority to the Commodity Futures Trading Commission (CFTC)—an independent regulatory agency—to entertain state law counterclaims in reparation proceedings violated Article III of the Constitution. The Court held it did not, in language and reasoning that rationalizes the mode of analysis for separation cases and lends strong implicit support for Congress's power to structure the bureaucracy generally and for the independent agency form in particular. It rejected the adoption of "formalistic and unbending rules" in determining whether the congressional assignment of Article III adjudicatory business to a non-Article III tribunal raised separation of powers problems. "Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers."[79] The Court noted that it weighed a variety of factors in coming to its conclusion, "with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."[80] In this case the Court held that "any intrusion . . . can only be deemed *de minimis.*"[81] The congressional addition to the CFTC's adjudicatory powers made a departure from "the traditional agency model" only with respect to its jurisdiction over common law counterclaims, thus giving it "little practical reason to find that this single deviation from the agency model is fatal to the congressional scheme."[82] Finally, the Court took note of its decision that day in *Bowsher,* distinguishing it as follows:

> Unlike *Bowsher,* this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this litigation is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch. In any case, we have, consistent with *Bowsher,* looked to a number of factors in evaluating extent to which the congressional scheme endangers the separation of powers principles under the circumstances presented, but have found no genuine threat to those principles to be present in this litigation.[83]

Schor, then, appears to contain a number of possible lessons.

78. 478 U.S. 833 (1986).
79. *Id.* at 851.
80. *Id.* (citing Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 590 (1985)).
81. *Id.* at 856.
82. *Id.* at 852.
83. *Id.* at 856-57.

First, the gentle, even flexible treatment of the "traditional [independent] agency model," and the deference to congressional necessities in establishing workable administrative schemes to carry out its Article I powers, did not bespeak an imminent High Court threat to the viability of independent agencies. Second, the utilization of a "de minimis" standard in a separation of powers analysis, on the same day that the Court had issued an opinion that is highly formalistic in tone and structure, may indicate that, to understand its real import, we are to look at what *Bowsher* did rather than what it said. That is, *Bowsher* may be read to stand for the unexceptionable proposition that Congress may not fire officers of the United States and nothing more. If so, then no threat to the constitutionality of independent agencies remained.

A third, and perhaps more important, lesson to be derived from *Schor* is that there is a rational basis for reconciling the Court's seemingly contradictory lines of separation of powers decisions. Justice O'Connor's opinion clearly suggests the distinction that the formalist line of cases, each involving direct confrontations between the key constitutional actors—the President, Congress, or the Judiciary—raises questions of congressional aggrandizement of power at the expense of a coordinate branch, while the functionalist line only indirectly involves the key actors through the administrative entities through which the will of the political actors is exercised. In both lines of cases the separation of powers analysis is generally couched in terms of the impact the challenged arrangement has on the balance of power among the three named heads of our government. But when the President, Congress, and the Judiciary are arrayed against one another, Court analysis becomes rigid, tending to center on one dominant feature of the relationship. When an agency is involved, however, the analysis is more far-reaching, delving into the whole range of relationships within the agency and between the agencies, the President, Congress, and the Judiciary, and the impact the challenged arrangement will have on the balance of power between the key constitutional actors and the performance of the core functions of each. In other words, a far broader, more lenient review is to be accorded in agency-specific situations.

One possible explanation for this dichotomous standard goes far in rationalizing past decisions and lending confidence in predicting the outcome of litigation involving a variety of congressional controls of agency decisionmaking. Where the constitutional actors are in direct opposition it would appear that the Court views the situation as a zero-sum game: whether it chooses to validate or deny the arrangement under scrutiny, one (or two) of the actors has a degree of its power diminished, the other augmented. Where the Court

feels impelled to make the decision,[84] the use of the formalist approach is essentially a tactical device. A formal approach, while it may limit flexibility in the future in the area concerned, has the advantage of simplifying planning; e.g., Congress may not appoint or discharge officers of the United States *(Buckley, Bowsher)*, or take actions that affect the rights and duties of persons outside the legislative branch without complying with the constitutionally mandated legislative process *(Chadha)*. Moreover, the rationale propounded by the Court in such cases is cast to march inexorably from the words or spirit of the Constitution, thus diminishing the sense that it is the judges themselves, rather than the law, that are responsible for the decision. Such an approach thereby encourages acceptance and discourages retaliation.

But where the question of agency functioning is involved, the issue of aggrandizement is seen as essentially irrelevant. Congress's plenary authority to create agencies and vest them with the necessary executive, legislative, and judicial tools to carry out their assigned tasks unquestionably subtracts from each actor's powers. That authority is accepted as a given fact of life in the modern administrative state. The key question in disputes over agency arrangements is whether so much has been taken from the functioning of one constitutional actor as to impair its core function. Thus functional analysis comes into play. The Court sees its task in these cases as assuring that the essential lines of authority from the constitutional actors to the agencies remain intact. If Congress can repeal or revise the statute, appropriate or withhold needed resources, and engage in effective oversight; if the President can appoint, remove (however indirectly), consult and influence agency officials; and the courts can engage in meaningful review; the Court will be satisfied that there has been no constitutional disruption. The review of the impact on the respective relationships is thus not concerned with aggrandizement but with maintaining the relative functional balance between the constitutional actors and the agencies. In this light, then, the most recent judicial rulings respecting congressional attempts to insulate a variety of decisions and decisionmakers from presidential control in varying degrees may be seen as consistent applications of this understanding of the theory and application of the separation doctrine.

The portents of *Schor* were emphatically delineated in *Morrison v. Olson*.[85] In *Morrison*, the appellees argued that since an independent counsel is removable by the executive, through the Attorney General, only for "good cause," such statutory limitation on the President's at-will removal authority of an officer who is exercising purely executive functions unduly interferes with the President's constitutional duties and prerogatives and thereby violates separation of

84. *Cf.* Goldwater v. Carter, 444 U.S. 996 (1979) (Utilizing a number of canons of judicial restraint, a split court declined to decide whether the President could act alone to terminate a treaty.).

85. 108 S. Ct. 2597 (1988).

powers principles. In rejecting this contention, the Court for the first time explicitly distinguished between its formalist and functionalist lines of separation jurisprudence, and at the same time put to rest any hopes of any expansion of presidential power over agencies.

The Court held that the validity of insulating an inferior officer from at-will removal by the President will no longer turn on whether such an officer is performing "purely executive" or "quasi legislative" or "quasi judicial" functions.[86] The issue raised by a "good cause" removal limitation, the majority opinion explained, is whether it interferes with the President's ability to perform his constitutional duty.[87] It is in that light that the function of the official in question must be analyzed. The Court noted that the independent counsel's prosecutorial powers are executive in that they have "typically" been performed by executive branch officials.[88] But, the Court held, the exercise of prosecutorial discretion is in no way "central" to the functioning of the executive branch.[89] Further, since the independent counsel could be removed by the Attorney General, this is sufficient to ensure that she is performing her statutory duties, which is all that is required by the "take care" clause.[90] Finally, the limited ability of the President to remove the independent counsel, through the Attorney General, was also seen as leaving enough control in his hands to reject the argument that the scheme of the Ethics in Government Act impermissibly undermines executive powers or disrupts the proper constitutional balance by preventing the executive from performing his functions.[91] Although the Court did not define with particularity what would constitute sufficient "cause" for removal, it did indicate that it would at least encompass misconduct in office.[92]

In sum, then, *Morrison* appears to vitiate the essential supporting legal rationale of the unitary executive theory, i.e., that the President must have the absolute discretion to discharge at will subordinate officials whose functions include purely executive tasks. *Morrison* teaches that there are no rigid categories of officials who may or may not be removed at will. The question that arises in such cases is whether for-cause insulation, together with other prescribed duties of the officer in question, impermissibly undermines executive powers or would disrupt the proper balance between the coordinate branches by preventing the executive from performing his

86. *Id.* at 2617.
87. *Id.* at 2617-19.
88. *Id.* at 2619.
89. *Id.*
90. *Id.* at 2619-20.
91. *Id.* at 2621-22.
92. *Id.* at 2619-20.

assigned functions. Resolution of such agency arrangements cases will be determined by the pragmatic, functional analysis approach exemplified by *Nixon v. Administrator of General Services*[93] and *CFTC v. Schor*.[94] Absent the issue of aggrandizement,[95] a court need only satisfy itself that the relative balance between the constitutional actors and the agencies has been maintained,[96] a test that normally will not be difficult to meet.[97]

Confirmation of the Court's support of a broad congressional authority over agency structure, and the flexible standard by which it will test such exercises of power, is further evidenced in its 8-1 ruling in *Mistretta v. United States*,[98] rejecting a broad ranging separation of powers challenge to the United States Sentencing Commission. Petitioners argued that the Commission, an independent agency in the judicial branch vested with power to promulgate binding sentencing guidelines, violated the separation doctrine by its placement in the judicial branch, by requiring federal judges to serve on the Commission and to share their authority with nonjudges, and by empowering the President to appoint Commission members but limiting his power to remove them only for cause.

At the outset of its opinion the Court reiterated its understanding

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93. 433 U.S. 425, 443 (1977).

94. 478 U.S. 833, 851 (1986).

95. *Morrison* appears to deem aggrandizement a non-issue in agency-structure cases. *See Morrison*, 108 S. Ct. at 2620-21.

96. *See supra* note 84 and accompanying text.

97. Indeed, the first appellate court ruling dealing with such an issue clearly adopted the approach of *Morrison*, *Schor*, and *Nixon*. In SEC v. Blinder, Robinson & Co., 855 F.2d 677 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 1172 (1989), the Tenth Circuit rejected the argument that the power vested in the SEC to commence civil enforcement actions was a violation of the separation of powers doctrine in that the President's ability to "take care" that the laws are faithfully executed is impeded because he cannot remove members of the Commission at will—a contention premised on the idea that prosecutorial discretion is a core executive function from which the President cannot be divested. Relying on *Morrison*, the Court concluded:

> We note that *Morrison* is predicated in part upon *Humphrey*, which stands generally for the proposition that Congress can, without violating Article II, authorize an independent agency to bring civil law enforcement actions where the President's removal power was restricted to inefficiency, neglect of duty, or malfeasance in office. *Morrison* teaches that the real question to be answered is whether the removal restrictions impede the President's ability to perform his constitutional duty. It is a matter of fundamental law that the Constitution assigns to Congress the power to designate duties of particular officers. The President is not obligated under the Constitution to exercise absolute control over our government executives. The President is not required to execute laws; he is required to take care they be executed faithfully. The President has the power to appoint the commissioners; he has the power to choose the chairman of the SEC who has broad powers concerning the operation and administration of the commission; the chairman serves at the President's pleasure; and, the President has the power to remove a commissioner for inefficiency, neglect of duty, or malfeasance in office. We conclude these powers give the President sufficient control over the commissioners to insure the securities laws are faithfully executed and the removal restrictions do not impede the President's ability to perform his constitutional duty.

855 F.2d at 682. *Blinder, Robinson* is the first appellate court ruling to rely on *Morrison* to reject the unitary executive argument in the context of an independent regulatory agency.

98. 109 S. Ct. 647 (1989).

that the separation principle does not require a rigid compartmentalization of the branches but rather recognizes "that our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.' "[99] The function of the separation principle is to preserve this flexibility while guarding against "the accumulation of excessive authority in a single branch" through encroachment and aggrandizement by one branch against another.[100] The Court explained that "[i]t is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.' "[101] Reviewing its precedents, the Court noted those instances where it had "invalidated attempts by Congress to exercise the responsibilities of other Branches or to reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch,"[102] and contrasted them with cases in which the Court had "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment."[103] In these latter situations, which involve the congressional ordering of arrangements within or between agencies in areas of shared responsibility and in which congressional action does not contravene any express constitutional provision, the Court explained that it applies a pragmatic balancing test in which it determines whether the challenged arrangement " 'prevents the Executive Branch from accomplishing its assigned functions,' "[104] and, if so, " 'whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.' "[105]

Applying these principles, the Court found no constitutional infirmities in the Sentencing Commission. At the outset it underlined

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99. *Id.* at 659 (quoting Buckley v. Valeo, 424 U.S. 1, 121 (1976)).

100. *Id.*

101. *Id.* (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

102. *Id.* at 660 (citing Bowsher v. Synar, 478 U.S. 714 (1986) (holding that Congress may not retain removal power over an officer exercising executive functions); INS v. Chadha, 462 U.S. 919 (1983) (holding that Congress may not control the execution of laws except through Article I procedures); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (holding that Congress may not confer Article III power on Article I judges)).

103. *Id.* at 660 (citing Morrison v. Olson, 108 S. Ct. 2597 (1988) (upholding judicial appointment of independent counsel and limiting presidential removal for cause); and Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (upholding the agency's assumption of jurisdiction over state-law counterclaims)).

104. *Id.* (quoting Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1979)).

105. *Id.* at n.13 (quoting *Nixon*, 433 U.S. at 443).

Congress's broad authority to create and to fashion the responsibilities and functions of agencies. Brushing aside an argument that Congress could not locate an agency with no judicial powers in the judicial branch, the majority held:

> Our constitutional principles of separated powers are not violated, however, by mere anomaly or innovation. . . . Congress' decision to create an independent rulemaking body to promulgate sentencing guidelines and to locate that body within the Judicial Branch is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary.[106]

The Court found none. Rulemaking, it held, is not a uniquely executive function. "None of our cases indicate that rulemaking *per se* is a function that may not be performed by an entity within the Judicial Branch, either because rulemaking is inherently nonjudicial or because it is a function exclusively committed to the Executive Branch."[107]

Nor was the "significantly political nature of the Commission's work,"[108] i.e., that the promulgation of the sentencing guidelines involves making policy judgments and choices, a significant infirmity.

> Our separation-of-powers analysis does not turn on the labelling of an activity as "substantive" as opposed to "procedural," or "political" as opposed to "judicial." . . . Rather our inquiry is focused on the "unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III."[109]

Using this pragmatic approach, the Court noted that although the Commission is located in the judicial branch, its rulemaking powers are separate from those of the judiciary. The Commission is not a court and is not controlled by or accountable to members of the judiciary. Moreover, the Commission is an independent agency accountable to Congress, which can revoke any or all of the guidelines at any time, its members are subject to the President's limited removal powers, and its rules are subject to the notice and comment requirements of the Administrative Procedure Act. Thus, the Court concluded, "because Congress vested the power to promulgate sentencing guidelines in an independent agency, not a court, there can be no serious argument that Congress combined legislative and judicial power within the Judicial Branch."[110]

With respect to the question of active federal judges sitting on the Commission, the Court found no express textual prohibition against

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106. *Id.* at 661.
107. *Id.* at 662.
108. *Id.* at 665.
109. *Id.* (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 857 (1986)).
110. *Id.* at 661.

such service, and a lengthy historical practice of such nonjudicial activity. It concluded:

> The judges serve on the Sentencing Commission not pursuant to their status and authority as Article III judges, but solely because of their appointment by the President as the Act directs. Such power as these judges wield as commissioners is not judicial power; it is administrative power derived from the enabling legislation. . . . In other words, the Constitution, at least as a *per se* matter, does not forbid judges from wearing two hats; it merely forbids them from wearing both hats at the same time.[111]

Finally, with respect to the issue of presidential control over the judges through his appointment and removal powers under the Act, the Court deemed this to be a "negligible threat to judicial independence."[112] The potential for removal, for example, does not affect the judges as judges, and it has no effect on their tenure or compensation as Article III judges. Moreover, the President's removal power is limited and properly so: "Such congressional limitation on the President's removal power, like the removal provisions upheld in *Morrison v. Olson*, . . . and *Humphrey's Executor v. United States*, . . . are specifically crafted to prevent the President from exercising 'coercive influence' over independent agencies."[113]

The Court summarized its holdings as follows:

> We conclude that in creating the Sentencing Commission—an unusual hybrid in structure and authority—Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches. The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here. Nor does our system of checked and balanced authority prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges. Accordingly, we hold that the Act is constitutional.[114]

III. Historical Practice and Legal Precedent Respecting Congressional Direction and Control of Agency Officials

The theory of a unitary executive rests on a view of the executive branch as a highly centralized bureaucratic structure. This model of governance envisions a unified and hierarchical executive with the

111. *Id.* at 671.
112. *Id.* at 674.
113. *Id.* at 674-75.
114. *Id.* at 675.

President at the apex and all administrative agencies arrayed below him. It views the President, in his role as the only nationally elected official of the federal government, as the possessor of broad supervisory and managerial powers as well as an encompassing political presence in administrative agencies. The chief executive's constitutional duty to see that the laws are faithfully executed under Article II, section 2, is seen as providing both the responsibility and the authority to intervene in administrative decisions in order to set priorities, allocate limited resources, balance competing policy goals, resolve conflicting jurisdictions and responsibilities of agencies, and assure that programs are effectively and efficiently managed. Support for this proposition is founded in language in the Supreme Court's opinion in *Myers:*

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.[115]

On the other hand, Congress has historically based its ability to insulate and direct subordinate executive branch officials in the manner prescribed in Senate Bill 508 on its view that the executive power is not hierarchical in nature or uniquely vested in the President alone, just as the President's functions are not solely executive (e.g., the veto power). Article II has been seen as clearly anticipating the creation of an administrative bureaucracy by its mention of "Heads of Departments,"[116] and the Necessary and Proper Clause of Article I[117] makes it certain that it would be Congress alone that would do the creating. In this scheme, Congress can assign a "Head of Department" any executive power not textually reserved to the President in Article II. Moreover, Congress has understood that the "take care" clause has not been read by the courts to vest absolute power in the President over heads of departments and other subordinate officials. That clause has been held to require only that the President "shall take care that the laws be faithfully executed," regardless of who executes them, a duty quite different from the claim of a single-handed responsibility for executing all laws. A literal reading of the "take care" clause confirms the President's duty

115. Myers v. United States, 272 U.S. 52, 135 (1926); *see also In re* Sealed Case, 838 F.2d 476, 497 (D.C. Cir. 1988) (explaining that the President has the ability to channel an executive officer's course of action according to the President's own desired policy), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 55 (arguing that administrative government vests unparalleled power and discretion in the executive branch); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587 (1984) (noting that "the legal régime within which agencies function is highly unified under presidential direction").

116. U.S. CONST. art. II, § 2, cl. 2.

117. *Id.* art. I, § 8, cl. 18.

to ensure that officials obey Congress's instructions; it does not create a presidential power so great that it can be used to frustrate congressional intention. In the words of the Supreme Court, where a valid duty is imposed upon an executive official by Congress, "the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president."[118] In the past, similar claims of broad substantive authority deriving from the "take care" clause have been consistently rejected by the courts.[119] More recently, the Court of Appeals for the Ninth Circuit, in condemning reliance on the "take care" clause as a justification for ignoring the mandate of an act of Congress, stated: "To construe this duty to faithfully execute the laws as implying the power to forbid their execution perverts the clear language of the 'take care' clause."[120]

Judicial application of the standard of review identified in Section II will certainly be guided by historical practice and precedent.[121] A brief review of federal administrative practice and cognate judicial precedent appear to accord Congress virtually plenary power over the creation of the structure of the administrative bureaucracy and the power and tenure of the offices and officers who are to carry out the legislative will.[122] Congress, by practice and judicial acceptance, has been able to establish varying degrees of dependence on or independence from the President, depending on its view of the situational need and in light of applicable constitutional constraints. Thus, the Supreme Court has recognized since *Marbury v.*

118. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 610 (1838).

119. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (holding that the President does not have the power to take possession of private property in order to keep labor disputes from stopping steel production); *In re* Olson, 818 F.2d 34, 44 (D.C. Cir. 1987) (explaining that the "take care" clause does not require the President to execute the laws); National Treasury Employees Union v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974) (holding that the "take care" clause does not permit the President to refrain from executing duly enacted laws); Guadamuz v. Ash, 386 F. Supp. 1233, 1243 (D.D.C. 1973) (ruling that the executive branch does not have the inherent power to impound congressionally appropriated funds).

120. Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1124 (9th Cir.), *reh'g en banc ordered sub nom.* Lear Siegler, Inc. v. Ball, 863 F.2d 693 (9th Cir. 1988) (en banc).

121. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983) (using historical patterns to shed light on what the drafters of the First Amendment intended the Establishment Clause to mean but also how they thought that Clause applied to the chaplaincy practice authorized by First Congress); Melcher v. Federal Open Mkt. Comm., 644 F. Supp. 510, 521-27 (D.D.C. 1986) (holding constitutional the presence of five members on the Open Market Committee who are not appointed pursuant to Article II in view of the long history of independence on the part of national banking officials and political acceptance of that independence), *aff'd on other grounds*, 836 F.2d 561 (D.C. Cir. 1987).

122. *See generally* Froomkin, *In Defense of Agency Autonomy*, 96 YALE L. J. 743, 805-08 (1987) (explaining that Congress's power to create an office includes the corollary power to narrow the group from which the President may select civil officers); Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under E.O. 12,291*, 80 MICH. L. REV. 193, 202-05 (1981) (noting that Congress, not the President, should direct the operation of domestic agencies).

Madison[123] that executive officers perform a range of duties and that the President's right to control these duties varies depending upon their nature. Some officers serve as "the political or confidential agents of the executive, merely to execute the will of the president."[124] As the *Marbury* Court stated:

> By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.
>
> In such cases, their acts are his acts.[125]

The Court contrasted such political duties with another category of executive duties: "[W]hen the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law . . . ."[126]

The nature of an officer's duty controls the officer's relationship to the President in its performance. Because officers performing political duties for the President "act by his authority,"[127] the discharge of these duties "is under the direction of the president."[128] However, Congress may also impose upon an officer statutory duties that "grow out of and are subject to the control of the law, and not to the direction of the president."[129] In distinguishing between political duties and duties assigned by statute, the Court, in *Kendall v. United States ex rel. Stokes*,[130] rejected the "alarming" proposition "that every officer in every branch of [the executive] department is under the exclusive direction of the president. . . . Such a principle, we apprehend, is not, and certainly cannot be claimed by the president."[131]

The President has greatest control over officers who assist him in "exercis[ing] . . . executive power in the constitutional sense."[132] Chief among these functions are the Constitution's textual commitments to the President to "be Commander in Chief of the Army and Navy,"[133] to negotiate treaties,[134] and to "receive Ambassadors and

123. 5 U.S. (1 Cranch) 137 (1803).
124. *Id.* at 166.
125. *Id.* at 165-66.
126. *Id.* at 166.
127. *Id.*
128. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 610 (1838).
129. *Id.*
130. 37 U.S. (12 Pet.) 524 (1838).
131. *Id.* at 610.
132. Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935).
133. U.S. CONST. art. II, § 2, cl. 1.
134. *Id.* § 2, cl. 2.

other public Ministers."[135] In fulfilling his constitutional role in national defense and foreign relations, the President "is accountable only to his country in his political character, and to his own conscience."[136]

The establishment of the original departments of the executive branch by the first Congress, which "numbered among its leaders those who had been members of the [constitutional] convention,"[137] reflects the early understanding of the President's constitutional prerogative to control officers responsible for these areas.[138] When Congress established the Departments of Foreign Affairs and War, it charged each department's secretary to "perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States" and to "conduct the business of the said department in such manner, as the President of the United States shall from time to time order or instruct."[139] As Representative John Vining explained, "The Departments of Foreign Affairs and War are peculiarly within the powers of the President, and he must be responsible for them."[140]

But the first Congress's decisions regarding the organization of other executive duties reflect a far different view of the President's relation to the officers who performed them. When Congress contemporaneously created the Department of the Treasury, it assigned to the secretary specific statutory duties and omitted the open-ended requirement that the Treasury secretary perform duties at the direction of the President.[141] Madison explained the constitutional principle that underlay the legislative difference among the departments. The secretaries of War and Foreign Relations were placed under the complete control of the President because they "were merely to assist him in the performance of duties, which . . . he had an unquestionable right to do [himself] . . . if he were able."[142] However, regarding responsibilities of the Treasury Department, such as the comptroller's duty to adjust and settle claims, Madison stated "that the nature of this office differed" and "question[ed]

135. *Id.* § 3.

136. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

137. Myers v. United States, 272 U.S. 52, 136. (1926).

138. The Supreme Court has recently reiterated its view that the contemporary practice of the founding fathers is weighty evidence of what is acceptable within the framework of the doctrine of separation of powers. *See* Mistretta v. United States, 109 S. Ct. 647, 668 (1989); Bowsher v. Synar, 478 U.S. 714, 723-24 (1986).

139. Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50; Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29.

140. 1 ANNALS OF CONG. 512 (J. Gales ed. 1789); *accord* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

141. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66.

142. 1 ANNALS OF CONG. 614 (J. Gales ed. 1789).

very much whether [the President] can or ought to have any interference."[143] Moreover, the Treasury Department statute did not even mention the President: it required the Secretary to report to Congress "and generally to perform all such services relative to the finances, as he shall be directed to perform."[144] Such direction, the context makes clear, was to come from Congress, not the President.[145] Indeed, for a significant period in our early history, the President did not see departmental budget estimates before the Treasury Department transmitted them to Congress,[146] and the Secretary recommended tax policy directly to Congress.[147] Similarly, the Postmaster General was given detailed discretionary duties with no suggestion that he was to be under other than congressional direction in performing these tasks.[148] It was not until the passage of the Budget and Accounting Act of 1921[149] that agencies ceased the practice of negotiating their annual appropriations directly with Congress.

Instructive for present purposes is the history of the establishment of the independent office of Comptroller in the Treasury Department. Here the understanding of the Framers may be said to have been revealed most clearly when Madison discussed, in the first Congress, the structure for Treasury operations. It is well rehearsed that when Congress convened in New York in 1789, Madison argued successfully, as the living voice of the Philadelphia Convention two years earlier, that an officer such as the Secretary of Foreign Affairs should be responsible solely to the President's will, and hence subject to removal at will.[150] But when the first Congress took up the Treasury a week later, Madison distinguished the Comptroller's function as entirely different.[151] As the Supreme Court later noted:

> [W]hen . . . the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply.[152]

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143. *Id.*

144. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66.

145. *Id.* Pursuant to such mandates, Alexander Hamilton, the first Secretary of the Treasury, submitted seminal reports to the Congress at the direction of the House of Representatives. Each report begins with an acknowledgement of the order of the House which had directed him to report. 2 ANNALS OF CONG. 1991 (1790) (Report of Public Credit); *id.* at 2031 (Report on a National Bank); 3 ANNALS OF CONG. 971 (1791) (Report on Manufactures) (prefacing the report with: "The Secretary of the Treasury, in obedience to the order of the House of Representatives . . .").

146. L. WHITE, THE JACKSONIANS 78 (1954).

147. L. WHITE, THE FEDERALISTS 326 (1948).

148. Act of May 8, 1794, ch. 23, § 3, 1 Stat. 354, 357.

149. Ch. 18, § 201, 42 Stat. 20, 20-21 (1921).

150. *See* Meyers v. United States, 272 U.S. 52, 111-31 (1926).

151. 1 ANNALS OF CONG. 611-12 (J. Gales ed. 1789).

152. Humphrey's Ex'r v. United States, 295 U.S. 602, 631 (1935) (citing 1 ANNALS OF CONGRESS 611-12).

Specifically, Madison explained the need for "the independent officers of Comptroller and Auditor."[153] Madison elaborated respecting the tenure by which the Comptroller was to hold his office:

> It will be necessary, said he, to consider the nature of this office . . . [and] in analyzing its properties, we shall easily discover they are not purely of an Executive nature. It seems to me that they partake of a Judiciary quality as well as Executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character.[154]

Madison concluded from these functions that "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government."[155]

The Supreme Court confirmed distinctions like Madison's as a matter of fundamental constitutional law in *Marbury v. Madison*. That case concerned, of course, whether William Marbury could mandamus the Secretary of State to provide his commission as justice of the peace for the District of Columbia.[156] In that historic opinion, Chief Justice John Marshall noted, and agreed with, the first Congress's view regarding the Secretary of Foreign Affairs as a tool of the President's will.[157] Chief Justice Marshall recognized, in contrast, an entirely different status for Marbury: an officer who, although not an Article III judge (having only a five-year term), nevertheless had been appointed to an office with a fixed term and quasi-judicial functions. *Marbury v. Madison* elaborates regarding the non-removability of such an officer: "Mr. Marbury . . . was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country."[158]

There can be little doubt from the opinion that Chief Justice Marshall sought to emphasize the importance of the principle that a quasi-judicial officer with a fixed term could hold office and "not

153. 1 ANNALS OF CONG. at 393.

154. *Id.* at 611-12.

155. *Id.* at 612. The Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, gave the Comptroller power to countersign warrants. *Id.* § 3, 1 Stat. at 66. Without his signature, no monies could be paid out of the national treasury. In 1795, Congress fulfilled Madison's expectations by providing that the Comptroller's decisions would be "final and conclusive," thereby making him independent of presidential direction. Act of Mar. 3, 1795, ch. 48, § 4, 1 Stat. 441, 442 (1795).

156. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 143-54 (1803).

157. *Id.* at 165-66.

158. *Id.* at 162.

[be] removeable [sic] at the will of the executive."[159] After *Marbury*, Congress concluded that it could determine whether to confer protections against presidential removal upon officers with mixtures of judicial and quasi-legislative functions, such as the judges of legislative courts.[160] In *McAllister v. United States*,[161] the Court reviewed *Marbury v. Madison* and supported that view.[162]

Thereafter, lower courts and the Supreme Court in *Kendall*, confirmed that Congress could prescribe duties for officers to perform independent of the President's will.[163] *Kendall* is illuminating. There a statute directed the Postmaster General to pay a group of individuals, who had delivered the mail for a number of years an amount determined by the Solicitor. The Postmaster General, apparently at the express direction of the President, refused to pay the full amount that the solicitor had found owing.[164] The Supreme Court, viewing the Postmaster General's duty to pay the full amount as ministerial rather than discretionary, held that the President had no authority to direct the Postmaster General's performance of his statutory authority.[165]

Despite *Kendall*'s narrow holding, key passages of the opinion reflect the nineteenth-century notion that the President may not in all instances direct the manner in which executive officers carry out their discretionary functions. Where Congress has imposed upon an executive officer a valid duty, the *Kendall* Court declared, "the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."[166] Underlying the Court's rejection of the contention that the "take care" clause of the Constitution carries with it the power to control executive officials was a strong desire to avoid "clothing the President with a power entirely to control the legislation of congress."[167] Accordingly, early presidents and their attorneys general respected the final and conclusive nature of the independent decisions of the Comptroller.[168]

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159. *Id.*; *accord id.* at 167 (characterizing Marbury once again as being "not removable at the will of the President").

160. *See, e.g.*, Act of Mar. 2, 1867, ch. 154, 14 Stat. 430 (governing removal of "civil" officers).

161. 141 U.S. 174 (1891).

162. *Id.* at 180-91.

163. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 608-26 (1838); Gilchrist v. Collector of Charleston, 10 F. Cas. 355, 356, 363 (C.C.D.S.C. 1808) (No. 5,420); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342); *see* 2 G. HASKINS & H. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 298-304 (1981) (discussing *Gilchrist*); Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285, 309-21 (1950) (discussing *Kendall* and presidential power over administrative officers); Reinstein, *An Early View of Executive Powers and Privileges: The Trial of Smith and Ogden*, 2 HASTINGS CONST. L.Q. 309 (1975) (discussing "faithful execution" requirements and accounting the Smith case); *see also* Butterworth v. United States *ex rel.* Hoe, 112 U.S. 50, 67 (1884) (discussing the independence of quasi-judicial functions).

164. *Kendall*, 38 U.S. (12 Pet.) at 608-09.

165. *Id.* at 609-26.

166. *Id.* at 610.

167. *Id.* at 613.

168. Among the presidents who expressly foreswore control were James Polk and

In 1887, Congress established the first independent regulatory agency, the Interstate Commerce Commission,[169] which became the prototype for the establishment of the Federal Reserve Board (1913), the Federal Trade Commission (FTC) (1914), the United States Shipping Board (1916), the Federal Radio Commission (1927), and the Federal Power Commission (1930). Interestingly, the "independence" of these agencies did not become a matter of constitutional concern until the 1930s when the New Deal greatly expanded the number of such commissions and agencies, a matter of some significance in light of the narrow constitutional view of Congress's commerce powers that the so-called *Lochner*-era Supreme Court took during the period between 1895–1935. Indeed, although the Supreme Court was initially inhospitable to both the ICC and FTC in their formative years, drastically limiting their powers through crabbed statutory construction, ultimately the Court accommodated itself to a more expansive congressional intention.[170]

It should not be surprising, then, that as late as 1927 Professor W.F. Willoughby, a leading commentator on administrative law and

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Andrew Jackson, the latter who wrote on an 1833 report that "[t]he decision of the Second Comptroller is final, over whose decisions the President has no power." McGuire, *Legislative or Executive Control over Accounting for Federal Funds*, 20 ILL. L. REV. 455, 464 (1926); *see* H. MANSFIELD, THE COMPTROLLER GENERAL 99 n.18 (1939) (adding President Tyler to Jackson and Polk). Attorneys general agreed. 15 Op. Att'y Gen. 94 (1876); 13 Op. Att'y Gen. 28 (1869); 11 Op. Att'y Gen. 14 (1864); 5 Op. Att'y Gen. 680 (1852) (surveying prior opinions); 4 Op. Att'y Gen. 515 (1846); 2 Op. Att'y Gen. 507 (1832); *id.* at 544; *id.* at 480 (1831); 1 Op. Att'y Gen. 705 (1825); *id.* at 678 (1824); *id.* at 624 (1823). *Contra* 7 Op. Att'y Gen. 453 (1855) (This opinion was referred to as an "extreme" opinion by an early commentator, F. GOODNOW, THE PRINCIPLES OF ADMINISTRATIVE LAW OF THE UNITED STATES 81 (1905).).

169. Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383 (current version at 49 U.S.C. § 10301 (1982)). In fact, the Interstate Commerce Commission (ICC) actually began its existence as a bureau within the Department of Interior and first became "independent" in 1889 two days before the inauguration of Benjamin Harrison, a Republican railroad lawyer. "It is conceivable . . . that Democratic sponsors of the original legislation feared Harrison's impact on the fledgling agency, subordinate as it would be to one of the new President's cabinet officers. If that is so, then the concept of the independent commission arose from a desire by Congress to insulate the agency from Presidential influence." 5 SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION 28 (Comm. Print 1977) (footnote omitted); *see* R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 60-62 (1941). Moreover, a substantial argument may be made that the congressional practice of shielding the functions of particular agencies from presidential control may be dated far earlier than the creation of the ICC. Consider, for example, the creation of Second Bank of the United States, an entity that may be seen as "functionally identical to the modern practice of vesting such powers in independent agencies." Froomkin, *supra* note 122, at 807; *see also* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (upholding the Bank of the United States' immunity to state taxation); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1817) (same).

170. *See generally* Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).

practice, could analogize the relationship of Congress to the President as that of a board of directors to a general manager, and could describe the relationship between the President, Congress, and the heads of the executive departments at that time as follows:

> It has been pointed out that constitutionally, that is, as the result of direct constitutional grant, the President of the United States possesses no administrative authority. From the purely constitutional standpoint he, thus, is not head of the administration. Even the heads of the great executive departments constituting his cabinet are not his subordinates in the sense that he has legal authority to give orders to them in respect to the performance of their duties. From the legal standpoint his authority in respect to them is executive in that it consists merely of his right to take such steps as may be necessary to see that such orders as are given to them by law are duly enforced. Substantially the same condition exists in the individual states in respect to the constitutional status and powers of the governors. To state this condition in another way, the line of authority in both the national and state governments runs directly from the administrative services to the legislature, except where the latter has expressly provided otherwise.[171]

Although the link between meaningful independence of an executive official and tenure is evident, and was in its most emphatic form first established by law in 1887 with the creation of the ICC whose members could be removed only for cause, the Supreme Court only addressed the constitutional tie between duties and tenure for the first time in *Myers*, a case involving the removal of a postmaster contrary to a statute requiring Senate acquiescence in such presidential removals.[172] The Court recognized in *Myers* that "[t]he degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act,"[173] but it nevertheless held that this difference did not affect officers' amenability to discharge.[174] The Court believed that "[t]he imperative reasons requiring an unrestricted power to remove the most important of [the President's] subordinates in their most important duties must . . . control the interpretation of the Constitution as to all appointed by him."[175]

However, "[t]he assumption was short-lived that the . . . President [has] inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure."[176] Only nine years after *Myers* the Court unanimously repudiated the President's illimitable right of discharge and held that the nature of an officer's duties controls the

171. W. Willoughby, Principles of Public Administration 36-37 (1927).
172. *Id.* at 106-08.
173. *Id.* at 132.
174. *Id.* at 108-76.
175. *Id.* at 134.
176. Wiener v. United States, 357 U.S. 349, 352 (1958).

officer's constitutional status within the executive branch. As in *Myers,* the Court held in *Humphrey's Executor* that an officer who "exercises . . . executive power in the constitutional sense" and hence can "be characterized as an arm or an eye of the executive,"[177] is "inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is."[178] But for those officers who do not exercise "executive power in the Constitutional sense," the Constitution does not mandate that the President have an unrestricted right of discharge in all cases. The Court held that Congress's power to require officers to "act in discharge of their duties independently of executive control," which "cannot well be doubted," necessitates the ability "to forbid their removal except for cause."[179] Limiting presidential removal is, in the Court's words, "an appropriate incident"[180] of Congress's power to subject nonpolitical officers "to the control of the law, and not to the direction of the president,"[181] "[f]or it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."[182]

The Court reaffirmed *Humphrey's Executor* in *Wiener v. United States,* reiterating the distinctions it made in *Humphrey's Executor.* It found that Congress intended the War Claims Commission to be protected from presidential review because it was an adjudicating body charged with deciding claims on the merits, entirely free of influence from any other branch of government.[183]

> And what is the essence of the decision in Humphrey's case? It drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body "to exercise its judgment without the leave or hindrance of any other official or any department of the government" . . . as to whom a power of removal exists only if Congress may fairly be said to have conferred it. This sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference.[184]

The *Wiener* Court also held that the President lacked authority to

177. *Humphrey's Ex'r v. United States,* 295 U.S. 602, 628 (1935).
178. *Id.* at 627.
179. *Id.* at 629.
180. *Id.*
181. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 610 (1838).
182. *Humphrey's Ex'r,* 295 U.S. at 629.
183. Wiener v. United States, 357 U.S. 349, 349-56 (1958).
184. *Id.* at 353 (citation omitted) (quoting *Humphrey's Ex'r,* 295 U.S. at 625-26).

remove a member of the Commission even though the enabling legislation contained no removal provision. Because the official performed adjudicative tasks more closely allied to the judicial than the executive power, the Court reasoned that Congress intended to deny the President the power of removal.[185] Justice Felix Frankfurter's opinion for a unanimous Court concluded as follows:

> If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.
>
> For such is this case. We have not a removal for cause involving the rectitude of a member of an adjudicatory body. . . . Judging the matter in all the nakedness in which it is presented, namely, the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a commission, we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it. The philosophy of *Humphrey's Executor*, in its explicit language as well as its implications, precludes such a claim.[186]

In 1976, the Court revisited the issue in *Buckley v. Valeo*,[187] and reaffirmed the ability of Congress to vest independent agencies with authority to perform their traditional functions and to shield their members from peremptory dismissal.

> All aspects of the Act are brought within the Commission's broad administrative powers: rulemaking, advisory opinion, and determinations of eligibility for funds and even for federal elective office itself. These functions . . . are of kinds usually performed by independent regulatory agencies or by some department . . . . [E]ach of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law. . . . [T]he president may not insist that such functions be delegated to an appointee of his removable at will, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). . . .[188]

Thus by 1981, on the basis of these judicial and historical practice precedents, Congress had ample justification to reject any theory envisioning an unfettered presidential authority as unsubstantiated, and could claim virtually plenary power to create offices and to structure their decisionmaking processes. That precedent offered substantial support for congressional establishment of so-called independent regulatory commissions headed by officials appointed by the President but not removable by him except for cause;[189] for creation of offices within executive departments whose incumbents are

185. *Id.* at 353-56.
186. *Id.* at 355-56.
187. 424 U.S. 1 (1976) (per curiam).
188. *Id.* at 140-41 (footnote omitted).
189. Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (involving the Federal

appointed by department heads or the courts but who are subject to removal only by the appointing authority and not the President;[190] for vesting in a subordinate official appointed by the President, and subject to his removal at will, discretionary decisionmaking authority which cannot be interfered with by him;[191] and for vesting in a legislative branch officer power which may influence the actions of executive officials.[192] Judicial precedent also seemed to strongly suggest that Congress could insulate such sub-cabinet officers as the administrator of the Environmental Protection Agency or the commissioner of the Food and Drug Administration from presidential removal except for cause.[193] Indeed, despite the most strenuous efforts of Reagan administration officials and its supporters, only the fortuity of Irangate produced what proved to be a short-lived substantive legal victory.[194]

It is perhaps delicious irony to some that *Morrison* and *Mistretta* not only confirmed the breadth of congressional prerogative over the administrative infrastructure, but forced the Court to "rationalize" its past precedents in the area so that little is left to support a full-blown unitary executive theory. *Myers*, the linchpin of the theory, is now relegated to stand for the limited proposition that " 'the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress.' "[195] The embarrassing vagueness of the "quasi" categories of *Humphrey's Executor* have been removed, together with its equally ephemeral and anachronistic "purely executive" verbiage, and replaced by a precept that presumes the legislative power to insulate

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Trade Commission). The Court took great pains to underscore the continued vitality of *Humphrey's Executor* in Bowsher v. Synar, 478 U.S. 714, 725 n.4, 739-40 (1986).

190. United States v. Perkins, 116 U.S. 483, 484-85 (1886) (upholding Congress's power to restrict the removal of a naval cadet engineer); United States v. Nixon, 418 U.S. 683, 694-97 (1974) (upholding the power of a Special Prosecutor, appointed and removable only by the Attorney General, to bring an action against the President).

191. Kendall v. United States *ex rel.* Stokes, 38 U.S. (12 Pet.) 524, 606-14 (1838) (upholding Congress's power to require the "solicitor of the Treasury" to reimburse claimants in spite of executive branch opposition); Public Citizen v. Burke, 843 F.2d 1473, 1478-80 (D.C. Cir. 1988) (stating that the archivist may reject claims of executive privilege by a former President).

192. Ameron, Inc. v. United States Army Corps of Eng'rs, 809 F.2d 979 (3d Cir. 1986) (holding that the Comptroller General may lengthen or shorten stays of agency procurement and issue recommendations on the merits of bid protests), *cert. dismissed*, 109 S. Ct. 297 (1988); *see also* City of Alexandria v. United States, 737 F.2d 1022, 1025-27 (Fed. Cir. 1984) (stating that successful congressional pressure is not tantamount to legislative veto).

193. *See* Verkuil, *The Status of Independent Agencies After* Bowsher v. Synar, 1986 DUKE L.J. 779, 794-95.

194. *See In re* Sealed Case, 838 F.2d 476 (D.C. Cir.), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988).

195. Morrison v. Olson, 108 S. Ct. 2597, 2617 & n.24 (1988) (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 626 (1935)).

any executive branch officer from at-will removal, subject to a showing that "the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[196] And the functional balancing standard of review to be applied to such tenure requirements and other agency structural arrangements that may be fashioned by Congress is sufficiently flexible to give the legislature wide latitude.[197] Together with its power of the purse and oversight and investigatory authority, Congress is in a position where perhaps the greatest danger to its control of the agencies will be a lack of prudent restraint. In any event, the evident impact of *Morrison* and *Mistretta* may be seen in the following analysis of the substantiality of the constitutional grounds for President Reagan's pocket veto of the whistleblower bill.

IV. Assessing the Potential Impact of the Whistleblower Bill on the President's Constitutional Role: A Separation of Powers Analysis in Light of Morrison *and* Mistretta

Although predicting the outcome of constitutional litigation, and particularly that involving closely contested questions between the political branches, is often a speculative venture, the foregoing review of relevant case law and administrative history indicates that these waters are now far from uncharted. Those guides allow us to engage in at least an informed analysis of the constitutionality of the proposal to insulate the special counsel of the Merit Systems Protection Board from at-will presidential removal, to vest him with power to litigate against sister agencies, and to prohibit prior presidential review of his communications with Congress. Arguably, the unitary executive theory receives its severest test in these situations since they involve presidential-agency relations at perhaps their most intimate point. Thus, if the executive cannot sustain its claim of ultimate power in these instances, it is difficult to see where it can be successful.

A. Background and Legislative Purpose of Senate Bill 508

Passage of the Civil Service Reform Act of 1978[198] (CSRA) marked the most comprehensive revision of the federal civil service system since the creation of the Civil Service Commission in 1883. The CSRA established the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) to investigate and adjudicate allegations of prohibited personnel practices or other merit systems violations. The MSPB consists of three members who are appointed by the President, with the advice and consent of the Senate, for seven year terms and who are removable from office only for

196. *Id.* at 2619.
197. *See supra* notes 78-113 and accompanying text.
198. Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended predominantly in scattered sections of 5 U.S.C.).

inefficiency, neglect of duty, or malfeasance.[199] The special counsel is appointed by the President, subject to Senate confirmation, for a five year term and, as with MSPB members, the President may remove the special counsel only for inefficiency, neglect of duty, or malfeasance in office.[200]

Under current law the MSPB has responsibility for hearing and adjudicating appeals by federal employees of adverse actions such as removals, suspensions, and demotions.[201] The MSPB may also hear cases involving reduction-in-force decisions and determinations by the Office of Personnel Management (OPM) on disability and other retirement claims.[202] Employees may take appeals with respect to such matters directly to the Board. Employees who are subject to less significant personnel actions, such as transfers or denials of promotion, may not appeal directly to the Board but may seek assistance from the OSC if these actions are based on prohibited reasons.[203] These prohibited reasons are defined by the CSRA and include taking reprisal for whistleblowing; taking reprisal for the exercise of appeal rights; engaging in discrimination; engaging in nepotism; willfully obstructing any person's right to compete for employment; and taking or failing to take a personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing or directly concerning merit system principles.[204] Personnel actions based on prohibited reasons are called "prohibited personnel practices."[205] Employees subjected to adverse actions based on only such prohibited reasons may simultaneously appeal to the MSPB[206] and seek assistance from the OSC.[207]

Final Board decisions may be appealed by employees to the United States Court of Appeals for the Federal Circuit.[208] OPM can also appeal if the Director of OPM determines that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and the Board's decision will have a substantial impact on a civil service law, rule, regulation or policy directive.[209] The OSC presently has no authority to appeal a Board decision.

The OSC is an independent investigative and prosecutorial component of the MSPB.[210] The special counsel conducts prohibited

199. 5 U.S.C.A § 1202 (West Supp. 1988).
200. 5 U.S.C. § 1204 (1982).
201. *Id.* § 7513(d).
202. *Id.* § 7701(a); 5 C.F.R. 351 (1987).
203. 5 U.S.C. § 1206(a) (1982).
204. *Id.* § 2302(b).
205. *Id.* § 2302(a).
206. *Id.* § 7701(c)(2)(B) (affirmative defense).
207. *Id.* § 1206(a)(1).
208. *Id.* § 7703(b)(1).
209. *Id.* § 7703(d).
210. *See id.* § 1204.

personnel practice investigations to determine whether employee complaints of improper management actions are valid. The Office may also conduct investigations in the absence of a complaint.[211] If an investigation indicates that a prohibited action has taken place the Special Counsel may seek corrective action from the agency and, if the agency fails to take action, he can take the complaint to the MSPB to seek enforcement of the recommendation.[212]

The special counsel may petition the MSPB for administrative injunctions or stays.[213] The stay restores an employee who alleges to be a victim of a prohibited personnel practice to his or her job while a corrective action is being prepared or considered.[214] The special counsel also prosecutes disciplinary action complaints against federal employers who engage in prohibited personnel practices, who violate orders of the MSPB, or who violate statutes related to the merit system, such as the Hatch Act.[215]

Finally, the Special Counsel has a duty, parallel to but independent from its defense of employees from retaliatory personnel actions, to screen whistleblowing disclosures and order agency investigations of the substance of allegations, under conditions of strict confidentiality to protect the employee.[216]

Statutory protection for employees against personnel actions in reprisal for disclosure of government wrongdoing or fraud, i.e., "whistleblowing," was a matter of particular concern and attention of the sponsors of the reform legislation. The CSRA established the first protection against such action by making it a prohibited personnel practice.[217] The general intent of Congress in enacting the whistleblowing protection provisions of the CSRA was to encourage the disclosure of illegality, waste, and corruption in government by protecting those employees who "blow the whistle" on such activity, and in so protecting and encouraging such disclosures, to ultimately increase the efficiency and effectiveness of the federal service. As stated in the Senate Report on the whistleblowing provisions of the civil service reform legislation:

> Often, the whistle blower's reward for dedication to the highest moral principles is harassment and abuse. Whistle blowers frequently encounter severe damage to their careers and substantial economic loss.
>
> Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and

211. *Id.* § 1206(a)(3).
212. *Id.* § 1206(c)(1).
213. *Id.* § 1208.
214. Id. § 1208(a)-(c).
215. *Id.* § 1206(e) (referencing the Hatch Act, 5 U.S.C. §§ 7321-7327 (1982 & Supp. IV 1986)).
216. *Id.* § 1206(b).
217. *Id.* § 2302(b)(8).

> who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.[218]

Evidence accumulated by the Senate Governmental Affairs Committee and the House Committee on Post Office and Civil Service indicates that the expectations of the Congress have not been met.[219] Two major sources of concern have been identified. First, the Office of Special Counsel has viewed its principal role to be that of protector of the merit system rather than as a guardian and safe haven for individual whistleblowers and other victims of prohibited personnel practices.[220] As a consequence, the Senate Governmental Affairs Committee concluded: "[T]his emphasis on protecting the 'system' is flawed because it sends a message that the interests of the individual participants in that system are not OSC's priority."[221] Senate and House committee studies also indicate that employee perception of OSC is in fact extremely negative and distrustful as a result of OSC actions and practices which are seen as either unsupportive or positively detrimental to employees seeking assistance.[222]

The second problem area identified concerns restrictive MSPB and federal court decisions that have made it extremely difficult for whistleblowers and other alleged victims of prohibited personnel practices to win redress. Under those rulings, for example, a whistleblower has the burden of demonstrating that his actions were a substantial, motivating, or predominant factor in the personnel action under question, a standard that essentially requires proof of subjective motivation.[223]

Senate Bill 508 was an attempt to address these perceived impediments to effective protection and encouragement of employee disclosure of government mismanagement and fraud. It sought to accomplish this by making OSC a separate, independent agency and by granting it limited litigating authority; by directing OSC to protect whistleblowers and specifying the instances in which the special

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218. S. REP. No. 969, 95th Cong., 2d Sess. 8 (1978).
219. *See generally* S. REP. No. 413, 100th Cong., 2d Sess. (1988) [hereinafter SENATE REPORT] (accompanying S. 508); H. REP. No. 274, 100th Cong., 1st Sess. (1988) [hereinafter HOUSE REPORT] (accompanying H.R. 25).
220. SENATE REPORT, *supra* note 219, at 7-10; HOUSE REPORT, *supra* note 219, at 20-25.
221. SENATE REPORT, *supra* note 219, at 8.
222. *See id.* at 7-11; HOUSE REPORT, *supra* note 219, at 19-21.
223. SENATE REPORT, *supra* note 219, at 11-16; HOUSE REPORT, *supra* note 219, at 25-29.

counsel may reveal either the identity of a person who discloses information to him or the information so disclosed; by allowing employees alleging reprisal for whistleblowing to seek a MSPB hearing on their own if the OSC does not agree to proceed with their case within a specified period; by authorizing the MSPB to grant protective orders to protect a witness or individual from harassment either during a proceeding pending before the Board or during an OSC investigation; by providing that a showing that whistleblowing was a factor in the personnel action establishes a prima facie case of reprisal for whistleblowing that may be overcome only if the agency demonstrates by clear and convincing evidence that it would have taken the same action in the absence of the disclosure; by changing the definition of whistleblowing to include threats as part of the prohibited personnel practice; and by providing for the payment of reasonable attorney fees in all types of proceedings before the MSPB or the courts where the employee prevails and the decision is based on the finding of a prohibited personnel practice.[224] With particular regard to the provisions objected to by the President, the following may be useful additional background for the legal analysis that follows.

1. Creation of an Independent Office of Special Counsel

When initially established under the CSRA, OSC was part of MSPB. A Government Accounting Office (GAO) report in 1980 criticized the arrangement on the ground the Board's and OSC's effectiveness were being diluted because of the confusion over each entity's responsibility and authority. Subsequently, the MSPB submitted a legislative proposal that would have separated OSC from MSPB and made it an independent agency. In the absence of legislation, the Board and OSC separated themselves administratively in 1984.[225] Section 1211 of Senate Bill 508,[226] as well as certain other provisions for independent action,[227] codified that separation.[228] Otherwise, the original provisions for appointment and tenure—

224. S. 508, 100th Cong. 2d Sess., 134 CONG. REC. S15,329-35 (daily ed. Oct. 7, 1988).

225. SENATE REPORT, *supra* note 219, at 18.

226. The amendments to U.S.C. title 5, were contained in S. 508, 100th Cong., 2d Sess. §§ 3(a), 4, 5(a), 6, 134 CONG. REC. S15,329-35, *as amended by* S. Con. Res. 160, 100th Cong., 2d Sess., 134 CONG. REC. S15,337 (daily ed. Oct. 7, 1988). For the sake of convenience the relevant code sections will be referred to as sections of S. 508.

227. Other indicia of separation and independence include the special counsel's power to issue and seek enforcement of subpoenas, S. 508, 100th Cong., 2d Sess. § 3(a) (§ 1212(b)(2)), 134 CONG. REC. S15,330 (daily ed. Oct. 7, 1988); to designate Office of Special Counsel (OSC) attorneys to represent the Office in civil litigation brought in connection with any function carried out by the Office, *id.* (§ 1212(c)), 134 CONG. REC. S15,331; to seek judicial review of Merit System Protection Board (MSPB) decisions, *id.* (§ 1212(d)(3)(A)); to appoint necessary support personnel, *id.* (§ 1212(e)(1)); and to make reports to or testify before Congress with respect to the functions, responsibilities, or other matters relating to the Office without clearance or approval by any other administrative authority, *id.* (§ 1217), 134 CONG. REC. S15,333.

228. *Id.* (§ 1211), 134 CONG. REC. S15,330.

presidential appointment, advice and consent, five-year term, and removability only for cause—would remain unchanged by the bill.

2. OSC Litigating Authority

As previously indicated, under current law the special counsel has no independent litigating authority. Senate Bill 508 would alter that situation as follows.

Section 1212(c) would allow attorneys designated by the special counsel to represent the OSC in any civil action brought in connection with OSC's functions.[229] Section 1212(d) would establish the rules under which the special counsel may intervene in proceedings before the MSPB.[230] Where the proceeding is an appeal from an adverse action under 5 U.S.C. § 7701, or an individual right of action created by newly added section 1221 of title 5, United States Code, the general rule would be that the special counsel could not intervene without the consent of the individual bringing the action.[231] An exception is provided under subsection 1212(d)(2)(B), which states that the special counsel may intervene in employee appeals before the MSPB where the employee has been charged with committing a prohibited personnel practice or where the special counsel has provided the agency with a waiver allowing that agency to take disciplinary action against an employee under special counsel investigation.[232]

Finally, under subsection 1212(d)(3), the special counsel would be authorized to obtain judicial review of any MSPB decision in which the special counsel is a party. This would include cases where the special counsel seeks disciplinary action against employees as well as where the special counsel seeks corrective action on behalf of employees.[233]

3. Requirement of OSC Reporting Without Clearance

Section 1217 of the bill provides that the special counsel or an employee designated by him "may transmit to the Congress on the request of any committee or subcommittee thereof, by report, testimony, or otherwise, information or views on functions, responsibilities, or other matters relating to the Office, without review clearance, or approval by any other administrative authority."[234] The same provision was included as part of the original CSRA,[235]

229. *Id.* (§ 1212(c)), 134 CONG. REC. S15,331.
230. *Id.* (§ 1212(d)).
231. *Id.* (§ 1221), 134 CONG. REC. S15,334.
232. *Id.* (§ 1212(d)(2)(B)), 134 CONG. REC. S15,331.
233. *Id.* (§ 1212(d)(3)).
234. *Id.* (§ 1217), 134 CONG. REC. S15,333.
235. 5 U.S.C. § 1209(a) (1982).

and is carried forward with respect to MSPB as section 1205 of the bill.[236] The President has raised no constitutional objection to the imposition of such a reporting requirement on the MSPB.

B. Congressional Authority to Create an Independent Office of Special Counsel

President Reagan's veto message raised constitutional objections to section 1211 of Senate Bill 508, which "creates an Office of Special Counsel and purports to insulate the Office from presidential supervision and to limit the power of the President to remove his subordinates from office," because it is "inconsistent with the President's constitutional authority and duty to faithfully execute the laws, [and to] supervise his subordinates in the Executive branch."[237] The President's assertion rested on a reading of three seminal removal decisions by the Supreme Court—*Myers, Humphrey's Executor,* and *Wiener*—to the effect that where an officer appointed by the President, with the advice and consent of the Senate, performs only purely executive functions and does not: (1) adjudicate cases concerning individual rights, (2) grant or deny claims of individuals, or (3) is not the head of a "quasi-legislative" or "quasi-judicial" agency, that officer must be subject to removal by the President without restriction.[238] This reading of Congress's ability to insulate executive branch officials from at-will presidential removal, however, is untenable after the Supreme Court's rulings in *Morrison.* As has been more fully detailed, the burden is now on the executive to demonstrate that the complained of congressional action has either reassigned one of its core functions to another branch or is an exercise of the function by the Congress itself.[239] Proof of encroachment or aggrandizement, normally shown as an incursion on a textually committed power, ends the inquiry without more. But if the matter involves the congressional ordering of arrangements within or between agencies of shared responsibility, the executive must demonstrate that the challenged arrangement, first, prevents him from carrying out his constitutionally assigned functions and then, if it does, that the congressional action is not justified by an overriding need to accomplish some legitimate legislative goal.

Application of this standard to the establishment of the Office of

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236. S. 508, 100th Cong. 2d, Sess. § 3(a) (§ 1205), 134 CONG. REC. S15,330 (daily ed. Oct. 7, 1988).

237. Memorandum of Disapproval for the Whistleblower Protection Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1377, 1378 (Oct. 31, 1988).

238. Variations of this argument have been made by the Department of Justice in a number of forums. *See, e.g., Hearing on Environmental Compliance by Federal Agencies Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce,* 100th Cong., 1st Sess. 206-13 (1987) (Environmental Enforcement Hearings) (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, Department of Justice); *Role of OMB In Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce,* 97th Cong., 1st Sess. 152-58 (1981) (memorandum for David Stockman, Director, Office of Management and Budget, regarding Proposed Executive Order on Federal Regulation); Brief of the United States at 44-46, Bowsher v. Synar, 474 U.S. 714 (1986) (Nos. 85-1377, 85-1378, 85-1379).

239. *See supra* notes 85-103 and accompanying text.

Special Counsel as an independent entity would appear to raise no constitutional doubts as to its validity. There can be no question of congressional "aggrandizement" of executive powers or functions. As with the independent counsel, Congress has retained for itself no powers of supervision or control over the special counsel. Congress's role under Senate Bill 508 is limited to receiving reports or other information and oversight of OSC's activities, which the *Morrison* Court noted are "functions that we have recognized generally as being incidental to the legislative function of Congress."[240]

Moreover, as with the independent counsel, the functions of the special counsel are unlikely to be found to undermine impermissibly the powers of the executive branch or to disrupt the proper balance between the coordinate branches by preventing the executive branch from accomplishing its constitutionally assigned functions. Although the President's ability to control and supervise the special counsel is reduced by the for-cause removal limitation, as *Morrison* noted it is not totally eliminated. "Good cause" certainly encompasses "misconduct,"[241] and in view of the carefully delineated manner in which the bill would confine the special counsel's discretion,[242] the grounds for a misconduct termination are readily evident and available.

In addition, unlike the independent counsel, the President has considerably more direct control over the special counsel. The initial selection of a special counsel is in the hands of the President, and OSC must secure its annual budget approval through the Office of Management and Budget review process.[243] Finally, also like the independent counsel, the special counsel "is an inferior officer . . . with limited jurisdiction and tenure and lacking policymaking or significant administrative authority."[244] The special counsel's charter is limited to the investigation of prohibited personnel practices and a confined litigating authority. Any substantive action based on its findings and recommendations must be gotten through MSPB, i.e., stays, corrective actions, or disciplinary actions. Its litigating authority under Senate Bill 508 is limited to seeking judicial review of MSPB decisions.

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240. Morisson v. Olson, 108 S. Ct. 2597, 2621 (1988) (citing McGrain v. Daugherty, 273 U.S. 135, 174 (1927)).

241. *Id.* at 2619-20.

242. Senate Bill 508, for example, defines when the special counsel can intervene in cases before the MSPB, S. 508, 100th Cong., 2d Sess. § 3(a) (section 1212(d)(2)), 134 CONG. REC. S15,331 (daily ed. Oct. 7, 1988), and limits his ability to disclose information obtained from employees, *id.* (§§ 1212(h), 1213), 134 CONG. REC. S15,331-32.

243. MSPB must simultaneously submit its annual budget request to Congress and OMB. 5 U.S.C. § 1205(j) (1982). OSC is not required to do so under S. 508, thus giving a somewhat greater measure of control to OMB over OSC.

244. *Morisson*, 108 S. Ct. at 2619.

Finally, Senate Bill 508 may be seen as integral to the long evolving scheme to ensure the integrity, honesty, and efficiency of governmental operations. Experience has demonstrated that government employees who feel free to testify truthfully at public fora are essential tools of government accountability.[245] Historically, Congress has acted decisively to eliminate obstacles that would prevent government employees from providing it with information. Around the turn of the century, Presidents Theodore Roosevelt and William Howard Taft imposed a series of gag orders on federal employees prohibiting them from communicating with Congress on grievances or other matters except through and with the consent of department heads.[246] Congress responded with passage of the Lloyd-LaFollette Act of 1912,[247] which provided: "The right of persons employed in the Civil Service of the United States, either individually or collectively, to petition Congress or any member thereof, or to furnish information to any House of Congress, or to any Committee or Member thereof, shall not be denied or interfered with."[248] In the Civil Service Reform Act of 1978, Congress again emphasized its need for a free flow of information from the executive branch by making it unlawful to take reprisals against whistleblowers.[249] The Senate Report declared: "Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth."[250] In addition to S. 508, the 100th Congress saw enactment of the Military Whistleblower Protection Act.[251]

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245. *See generally Classified Information Nondisclosure Agreements: Hearings Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. 157 (1987) (identifying problems of accountability, communication, and allegiance, and suggesting alternatives for encouraging reporting); STAFF OF SEN. PATRICK J. LEAHY, 95TH CONG., 2D SESS., THE WHISTLEBLOWERS: A REPORT ON FEDERAL EMPLOYEES WHO DISCLOSE ACTS OF GOVERNMENTAL WASTE, ABUSE AND CORRUPTION PREPARED FOR THE SENATE COMM. ON GOVERNMENTAL AFFAIRS 10-15 (Comm. Print 1978) (examining administrative requirement that federal employees holding security clearances sign lifelong nondisclosure agreements).

246. *See generally* S. SPERO, GOVERNMENT AS EMPLOYER 117-43 (1972). The Roosevelt gag orders prohibited employees of all agencies from communicating with Congress "either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence or attempt to influence in their own interest any other legislation." *Id.* at 123. President Taft supplemented the Roosevelt orders by extending the prohibition to cover "congressional action of any kind" and by adding a prohibition against employees "[r]espond[ing] to any request for information from either House of Congress, or any Committee of either House of Congress, or any committee of either House of Congress, or any Member of Congress except through, or as authorized by the head of his department." Exec. Order No. 1142 (Nov. 26, 1909), *reprinted in* 48 CONG. REC. 7513 (1912).

247. Act of Aug. 24, 1912, ch. 389, 37 Stat. 539.

248. *Id.* § 6, 37 Stat. at 555 (current version at 5 U.S.C. § 7211 (1982)).

249. 5 U.S.C. § 2302(b)(8) (1982).

250. S. REP. No. 969, 95th Cong., 2d Sess. 8 (1978).

251. National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 846(a), 102 Stat. 1918, 2027-30 (1988) (to be codified at 10 U.S.C. § 1034) (amending statutory protections for military employees who inform Congress to cover specifically disclosures of classified information).

It could not be seriously claimed that Congress would be acting outside the scope of its Article I powers in legislating with regard to the responsibilities and duties of officers and employees of the executive branch with respect to maintaining honesty and efficiency in governmental operations.[252] In view of the congressional findings that the scheme it set up in 1978 is flawed, the proposed remedies, which include insulation of the Special Counsel from presidential influence, would appear to be a legitimate legislative response to a pressing governmental need.

In sum, then, it would appear highly likely that the scheme proposed for the Office of Special Counsel under Senate Bill 508 would pass judicial muster under these precedents.

C. Direct Reporting to Congress

Section 1217 of S. 508 would allow the Special Counsel to inform a requesting congressional committee, by report, testimony, or otherwise, as to information he may have, or about his views, with respect to the functions, responsibilities, or other matters relating to OSC, "without review, clearance, or approval by any other administrative authority."[253] Presumably this could vitiate, at the discretion of the special counsel,[254] the budget review, legislative clearance, and rules oversight powers that the President, through the Office of Management and Budget (OMB), now enjoys. The President contends that this would effect an unconstitutional diminution of his authority to faithfully execute the laws, supervise his subordinates in the executive branch, and recommend such measures to the Congress as he judges necessary and expedient.

However, Congress's authority to impose direct reporting requirements on agency officials, while amply supported by the case law just reviewed in Section III, also rests independently on Congress's constitutional prerogative to inform itself in aid of its legislative functions. Here again both historical practice and judicial precedent support the validity of such provisions.

It is well settled that Congress in legislating pursuant to the powers granted it under Article I, section 8 of the Constitution, as well

252. *See* Bush v. Lucas, 462 U.S. 367, 381-90 (1983) (reviewing approvingly the elaborate remedial scheme for federal employees "that has been constructed step by step, with careful attention to conflicting policy considerations").

253. S. 508, 100th Cong., 2d Sess. § 3(a) (§ 1217), 134 CONG. REC. S15,333 (daily ed. Oct. 7, 1988).

254. The provision states that the special counsel "may transmit to the Congress on the request of any committee or subcommittee" the information requested, *id.*, and thus does not appear mandatory.

as powers granted in other parts of the Constitution, has the authority, under the Necessary and Proper Clause, to create the bureaucratic infrastructure of the executive branch and to determine the nature, scope, power, and duties of the offices so created.[255] Moreover, as a general matter, the Supreme Court has spoken very broadly of the legislative power over offices. Where Congress deals with the structure of an office—its creation, location, abolition, powers, duties, tenure, compensation, and other such incidents—its power is virtually plenary.[256] Only where the object of the exercise of the power is clearly seen in the particular situation as an attempt to effect an unconstitutional purpose, e.g., congressional appointment or removal of an officer,[257] have the courts felt constrained to intervene. More recently, the Court in *Morrison* reaffirmed Congress's authority to require the submission of reports and other information to it from officials, and the exercise of oversight over agencies, as "functions that we have recognized generally as being incidental to the legislative function of Congress."[258]

With particular regard to Congress's informing function, the Supreme Court in *Nixon v. Administrator of General Services* had occasion to note that "there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch" and that "[s]uch regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy."[259] There the Court cited with approval the Freedom of Information Act,[260] the Privacy Act of 1974,[261] the Government in the Sunshine Act,[262] the Federal Records Management Act,[263] and provisions concerned with census data[264] and tax returns[265] as appropriate instances of such regulation. In *Nixon v. Administrator of General Services,* the Court upheld the Presidential Recordings and Materials Preservation Act,[266] which protects, inter alia, public access to former President Nixon's presidential papers from presidential claims of violations of the doctrines of separation of powers and executive privilege.

Moreover, the statute books are replete with examples of Congress limiting review by OMB of budget requests, legislative proposals, proposed agency rules, and other required reports and documents. Thus, since 1973, Congress has mandated that the

255. Buckley v. Valeo, 424 U.S. 1, 138 (1976).
256. *See, e.g.,* Mistretta v. United States, 109 S. Ct. 647 (1989); Morrison v. Olson, 108 S. Ct. 2597 (1988); Crenshaw v. United States, 134 U.S. 99, 105-06 (1890).
257. *See* Bowsher v. Synar, 478 U.S. 714 (1986); Buckley v. Valeo, 424 U.S. 1 (1976).
258. *Morrison,* 108 S. Ct. at 2621 (citing McGrain v. Dougherty, 273 U.S. 135, 174 (1927)).
259. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 445 (1977).
260. 5 U.S.C. § 552 (1982).
261. *Id.* § 552(a) (1982).
262. *Id.* § 552(b)(1982).
263. 44 U.S.C. §§ 2101-2114 (1982).
264. 13 U.S.C. §§ 8-9 (1982).
265. 26 U.S.C. § 6103 (1982).
266. 44 U.S.C. § 2201 (1982).

budget requests of the U.S. Postal Service,[267] and the U.S. International Trade Commission,[268] be submitted to Congress without revision, and that the budget requests and legislative proposals of other agencies be submitted concurrently to OMB and Congress.[269] Also, Congress has exempted the Securities and Exchange Commission, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the National Credit Union Administration from OMB clearance of their legislative proposals and comments.[270] OMB also has been precluded from imposing Executive Order 12,291 review on Agricultural Marketing orders of the Department of Agriculture[271] or regulations of the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department.[272] OMB may review reports to Congress required of the Secretary of Health and Human Services but it may not revise them or delay their timely submissions.[273] Reports and documents required by Congress of the Inspector General of the Department of Energy need no clearance or approval beyond the Secretary of Energy or Federal Energy Regulatory Commission.[274] And no clearance is required for reports of the Chief Counsel of the Office of Advocacy of the Small Business

267. *See* Act of June 30, 1974, Pub. L. No. 93-328, § 3, 88 Stat. 287, 288 (codified at 39 U.S.C. § 2009 (1982)).

268. *See* Trade Act of 1974, Pub. L. No. 93-618, § 175(a)(1), 88 Stat. 1978, 2011 (1975) (codified at 19 U.S.C. § 2232 (1982)).

269. *See, e.g.*, Privacy Act of 1974, Pub. L. No. 93-579, § 5(a)(5), 88 Stat. 1896, 1906 (current version at 5 U.S.C. § 552(a) (1982)) (Privacy Protection Study Commission); Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 202(a), 92 Stat. 1121, 1125 (codified at 5 U.S.C. § 1205 (j) (1982)) (Merit Systems Protections Board); Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 101(a)(3)(9)(A), 88 Stat. 1389, 1389 (codified at 7 U.S.C. § 4a(h)(1)-(2) (1982)) (Commodity Futures Trading Commission); Consumer Product Safety Act, Pub. L. No. 92-573, § 27(k), 86 Stat. 1207, 1229 (1972) (codified at 15 U.S.C. § 2076(k) (1982)) (Consumer Product Safety Commission); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 311, 90 Stat. 31, 60 (codified at 31 U.S.C. § 1108(f) (1982)) (Interstate Commerce Commission); Department of Energy Act, Pub. L. No. 95-91, § 401(j), 91 Stat. 565, 582 (codified at 42 U.S.C. § 717(j) (1982)) (Federal Energy Regulatory Commission); AMTRAK Improvement Act of 1973, Pub. L. No. 93-146, § 12, 87 Stat. 546, 553 (codified at 45 U.S.C. § 601(d) (1976)) (National Railroad Passenger Corporation); Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 202, 87 Stat. 985, 990 (codified at 45 U.S.C. § 712(f) (1982)) (United States Railway Association); Hazardous Materials Transportation Act, Pub. L. No. 93-633, § 304(b)(7), 88 Stat. 2156, 2170-71 (1975) (codified at 49 U.S.C. § 1903(b)(7) (1982)) (National Transportation Safety Board).

270. Act of Oct. 28, 1974, Pub. L. No. 93-495, § 111, 88 Stat. 1500, 1506 (codified at 12 U.S.C. § 250 (1982)).

271. Executive Office Appropriations Act of 1987, Pub. L. No. 99-591, § 101(m), 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 311, 317.

272. Executive Office Appropriations Act of 1987, Pub. L. No. 99-500, § 101(m), 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 309, 317.

273. 42 U.S.C. § 242m(a)(3) (1982).

274. *Id.* § 7138(f) (1982).

Administration.[275]

In addition, statutory requirements that executive branch officials report directly to the Congress trace their roots to the very first Congress. The legislation establishing the Treasury Department required the Secretary to report to Congress "and generally to perform all such services relative to the finances, as he shall be directed to perform."[276] Pursuant to this mandate, Alexander Hamilton, the first Secretary of the Treasury, submitted seminal reports to the Congress at the direction of the House of Representatives. Each report began with an acknowledgement of the order of the house that had directed him to report.[277] Prior to the passage of the Budget and Accounting Act of 1921,[278] which established the President's authority over the agency budget process, each agency had submitted its annual budget request directly to Congress. Finding this process inefficient and unwieldy, Congress created the Bureau of the Budget (now the Office of Management and Budget)[279] to review the morass of agency budgetary information and to approve agency budget requests.[280] In addition to authority to review and approve agency budget requests, the Bureau was subsequently authorized to clear proposals for legislation or agency comments on proposed legislation.[281]

However, Congress's voluntary relinquishment of this authority has not been unequivocal. Either house may request an agency official to submit directly to it "an appropriations estimate or request, a request for an increase in that estimate or request, or a recommendation on meeting the financial needs of the Government."[282] Also, as has just been catalogued, Congress has selectively required simultaneous or unaltered submission of budget requests and legislative proposals and comments.

The Supreme Court has long recognized the validity of direct reporting requirements.[283] At the core of this aspect of congressional authority is the recognition of the legislature's need for reliable information in order to fulfill its constitutionally mandated functions. As a general proposition, it may be posited that, in the absence of a countervailing constitutional privilege or a self-imposed statutory

275. 15 U.S.C.A. § 634 (West Supp. 1988). Also, all independent regulatory agencies may override OMB's veto of their information collection requests under the Paperwork Reduction Act. 44 U.S.C. § 3507(c) (1982).

276. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66.

277. *See, e.g.*, 2 ANNALS OF CONG. 1991 (1790) (report on Public Credit); *id.* at 2031 (Report on a National Bank); 3 ANNALS OF CONG. 971 (1791) (Report on Manufactures) (noting that the "[t]he Secretary of the Treasury, in obedience to the order of the House of Representatives . . .").

278. Ch. 18, 42 Stat. 20 (1921) (amended 1974).

279. *See id.* § 207 (establishing the Bureau of the Budget), *amended by* Act of March 2, 1974, Pub. L. No. 93-250, 88 Stat. 11 (1974) (current version at 31 U.S.C. § 501 (1982)) (establishing the Office of Management and Budget).

280. *See generally* L. FISHER, PRESIDENTIAL SPENDING POWER, ch. 1 (1975).

281. *See* EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, LEGISLATIVE COORDINATION AND CLEARANCE: CIRCULAR NO. A-19, REVISED (Sept. 1979).

282. 31 U.S.C. § 1108(e) (1982).

283. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 935 n.9 (1987); Sibbach v. Wilson & Co., 312 U.S. 1, 15 (1941).

restriction upon its authority, the Congress (and its committees) has broad power to compel information needed to discharge its legislative function from executive agencies, private persons, and organizations. In addition, within certain constraints, the information so obtained may be made public. The fact that the executive has determined for its own internal purposes that a particular item generally should not be disclosed does not prevent either house of Congress, or its committees and subcommittees, from obtaining and publishing information that it considers essential for the proper performance of its functions. The case law delineating Congress's expansive oversight authority demonstrates its virtually plenary power in this area.

Thus, although there is no express provision of the Constitution which specifically authorizes the Congress to conduct investigations and take testimony for the purpose of performing its legitimate functions, the practice of the British Parliament and numerous decisions of the Supreme Court have firmly established that the investigatory power of Congress is so essential to the legislative function as to be implied from the general vesting of legislative power in Congress.[284] Chief Justice Warren speaking for the Court in *Watkins* described the power as follows:

> We start with several basic premises on which there is general agreement. The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possible needed statutes. It includes surveys of defects in our social, economic, or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste. But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.[285]

Legitimate legislative tasks encompassing the power have been defined as activities that are "an integral part of the deliberative and

284. *See, e.g.*, Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 505 (1975); Barenblatt v. United States, 360 U.S. 109, 116-23 (1959); Watkins v. United States, 354 U.S. 178, 187 (1957); McGrain v. Daugherty, 273 U.S. 135, 137 (1927); *see also* United States v. American Tel. & Tel. Co., 551 F.2d 384 (D.C. Cir. 1976).

285. *Watkins*, 354 U.S. at 187.

communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[286]

In *Eastland v. United States Servicemen's Fund*,[287] the Court reiterated its view that the power of effective congressional inquiry is an integral part of the legislative process:

> The power to investigate and to do so through compulsory process plainly falls within [the *Gravel* definition of legitimate legislative tasks]. This Court has often noted that the power to investigate is inherent in the power to make laws because "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."[288]

Issuance of subpoenas, such as the one in question in *Eastland*, has long been held to be a legitimate use by Congress of its power to investigate.

> [W]here the legislative body does not itself possess the requisite information [. . .]—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete[;] as some means of compulsion are essential to obtain what is needed.[289]

These broad principles of congressional investigatory authority apply a fortiori to the exercise of Congress's Article I power to create the agencies and offices necessary to carry out its policy directives.[290] Anticipation of a legislative need to know accurately what an agency official actually thinks with respect to his agency's budget or about changes in his agency's legislative authority, whether reflected in an identifiable document or in his personal knowledge, would appear well within the congressional prerogative. Reporting provisions such as the one in question in no way significantly circumscribe the President's duties to "take care" that the laws be faithfully executed or to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient."[291] These clauses are not a source of substantive presidential power and claims to that effect have been consistently rejected by the courts.[292]

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286. Gravel v. United States, 408 U.S. 606, 625 (1973).
287. 421 U.S. 491 (1975).
288. *Id.* at 504 (quoting McGrain v. Daugherty, 273 U.S. 135, 175 (1927)).
289. *Id.* at 504-05 (quoting McGrain v. Daugherty, 273 U.S. 135, 175 (1927)) (corrections by author).
290. Buckley v. Valeo, 424 U.S. 1, 138 (1976).
291. U.S. CONST. art. II, § 3.
292. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."); Myers v. United States, 272 U.S. 52, 177 (1926) ("The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him

In the face of this case law and statutory precedent, the efficacy of a claim that the separation of powers doctrine was violated as a result of S. 508's reporting requirements is problematic. As has already been noted, in determining whether a statute disrupts the balance between the coordinate branches, the Court first asks whether the action of the challenged branch threatens to prevent another "from accomplishing its constitutionally assigned functions," and, secondly, where there is a "potential for disruption," it determines "whether that impact is justified by the overriding need to promote objectives within the constitutional authority" of the moving branch.[293]

It would be difficult to argue that such requirements aggrandize congressional power in derogation of presidential power. The Chief Executive maintains his ability to communicate with the special counsel in order to influence his ultimate views. Moreover, the President's recommendatory duty under Article II is not circumscribed in any way by such a provision. A proposed presidential alternative, including the abandonment of a proposed course of action, is not precluded. The proposed legislation also does not prevent OMB from seeking budget cuts that might vitiate the efficacy of a particular aspect of OSC's functions. Thus, any intrusion on the ability of the President to exercise his executive functions is likely to be deemed de minimis.[294] Finally, no decided case has expanded the concept of executive privilege recognized in *United States v. Nixon*[295] to cloak the kind of communications implicated by the

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to achieve more than Congress sees fit to leave within his power."); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 522, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissable."); Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1124 (9th Cir. 1988) ("To construe this duty to faithfully execute the laws as implying the power to forbid their execution perverts the clear language of the 'take care' clause. . . ."), *reh'g en banc ordered sub nom.* Lear Seigler, Inc. v. Ball, 863 F.2d 693 (9th Cir. 1988) (en banc); National Treasury Employees Union v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974) ("That constitutional duty does not permit the President to refrain from executing laws duly enacted by the Congress as those laws are construed by the judiciary."); Guadamuz v. Ash, 368 F. Supp. 1233, 1243 (D.D.C. 1973) ("[N]owhere does our Constitution extol the virtue of efficiency and nowhere does it command that all our laws be fiscally wise. It does most clearly, however, state that laws, good or bad, be enacted by the Congress, and enforced by the President. '[I]f the power sought here were found valid, no barrier would remain to the executive ignoring any and all congressional authorizations if he deemed them, no matter how conscientiously, to be contrary to the needs of the nation.' ") (quoting Local 2677, Am. Fed'n of Gov't Employees v. Philips, 358 F. Supp. 60, 77 (D.D.C. 1973)).

293. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (citing United States v. Nixon, 418 U.S. 683, 711-12 (1974)); *accord* Mistretta v. United States, 109 S. Ct. 647, 660 (1989); Morrison v. Olson, 108 S. Ct. 2597, 2616, 2621 (1988); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851-52 (1986).

294. *See* Schor, 478 U.S. at 856; Ameron, Inc. v. United States Army Corps of Eng'rs, 809 F.2d 979, 997 (3d Cir. 1986), *cert. dismissed*, 109 S. Ct. 297 (1988).

295. 418 U.S. 683 (1974).

type of reporting provision involved here.

The potential for disruption of the President's ability to perform his constitutional function is not apparent on the face of the instant proposal. It must be argued that the particular type of presidential communication and control argued for here—a veto power over the transmission to Congress of non-sensitive documents or information—is so central to the President's ability to "take care" that the laws are being faithfully executed that he must have final say whether they are to be used or not. That argument, however, was severely undercut by *Morrison*. The Court found that the President's duty under the "take care" clause requires no more than that he have "sufficient" control over the functioning of the independent counsel to assure that she is carrying out her statutory duties. In that case, the President's ability, through the Attorney General, to remove an independent counsel "for cause" was deemed "sufficient" to ensure that he could perform his constitutional functions.[296] The *Morrison* decision would therefore seem to lend strong support to those court rulings that have precluded executive interference with the exercise of discretionary duties vested by Congress in subordinate executive branch officials.[297]

In light of the precedents and factors just reviewed, it would seem likely that a court reviewing the question would find that the very limited potential for disruption of executive functioning is justified and necessary to support Congress's legislative function and does not create a significant impediment to the President's execution of the law.

D. Justiciability of Suits Brought by the Special Counsel Against Sister Agencies

President Reagan's veto message questions the constitutionality of the special counsel's authority to seek judicial review of MSPB rulings when he has been a party to the proceedings on two grounds: that it is an inherent executive prerogative to resolve intrabranch disputes; and that intra-agency disputes are nonjusticiable controversies that may not be heard by Article III courts. He states:

> Section 1212 (d)(3)(A) of Title 5, as contained in the bill, purports to authorize the Special Counsel to obtain judicial review of most decisions of the Merit Systems Protection Board in proceedings to which the Special Counsel is a party. Implementation of this provision would place two Executive branch agencies before a Federal court to resolve a dispute between them. The litigation of intra-Executive branch disputes conflicts with the constitutional grant of the Executive power to the President, which includes the

296. For a discussion of *Morrison*, see *supra* notes 85-94 and accompanying text.

297. *See, e.g.*, Kendall v. U.S. *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 610 (1838); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803); *Ameron, Inc.*, 809 F.2d at 997; Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir.) *reh'g en banc ordered sub nom.* Lear Seigler, Inc. v. Ball, 863 F.2d 693 (9th Cir. 1988) (en banc); Public Citizen v. Burke, 655 F. Supp. 318 (D.D.C. 1987), *aff'd*, 843 F.2d 1473 (D.C. Cir. 1988); Gilchrist v. Collector of Customs, 10 F. Cas. 355, 356, 363 (C.C.D.S.C. 1808) (No. 5,420).

> authority to supervise and resolve disputes between his subordinates. In addition, permitting the Executive branch to litigate against itself conflicts with constitutional limitations on the exercise of the judicial power of the United States to actual cases or controversies between parties with concretely adverse interests.[298]

We treat the threshold issue of justiciability first and then turn, in subsection E, to an analysis of the separation of powers issue raised by the claim of exclusive constitutional authority to resolve controversies between agencies.

Where two executive branch agencies are on opposing sides of a lawsuit, a court must assure itself that it is not being asked to decide a question that is more properly addressed to the branch of government of which the agencies are a part. Thus in dealing with cases in which the government is apparently "suing itself," the courts have had to satisfy themselves that the controversy before them is "justiciable," that is, a genuine controversy between the parties to the suit, and that the controversy is appropriate for judicial resolution.[299] There must be a concrete adversity of interest between the opposing parties. A court cannot entertain a collusive action or render an advisory opinion.[300]

The Supreme Court has developed a fact-specific test to determine justiciability when the United States appears on both sides of a dispute. Courts are directed to look behind the names of the parties to determine the real party in interest. "The mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to defeat federal jurisdiction; justiciability does not depend upon a surface inquiry."[301] "[C]ourts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented."[302] Therefore, even though a case could be denominated *United States v. United States,* if the case "involves controversies of a type that are traditionally justiciable,"[303] if the setting of the dispute assures concrete adverseness, and if the suit is not barred by statute, the case may be decided by an Article III court.[304]

In applying this test, the courts have found justiciable intrabranch

298. Memorandum of Disapproval for the Whistleblower Protection Act, 24 WEEKLY COMP. PRES. DOC. 1377, 1378 (October 31, 1988).
299. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).
300. *See* Muskrat v. United States, 219 U.S. 346, 356 (1911).
301. United States v. Nixon, 418 U.S. 683, 693 (1974).
302. United States v. ICC, 337 U.S. 426, 430 (1949).
303. *Id.*
304. *See, e.g.*, United States v. Nixon, 418 U.S. at 697; United States v. Federal Maritime Comm'n, 694 F.2d 793, 810 (D.C. Cir. 1982).

suits between cabinet agencies and so-called independent regulatory agencies, cabinet agencies and subordinate officials of other departments, and the President and an independent executive officer. Thus in *United States v. ICC*,[305] the United States, as a shipper, filed a complaint with the ICC against railroads, claiming that the rates charged were unreasonable, unjustly discriminatory, and violative of the Interstate Commerce Act. The ICC found the conduct legal and dismissed the United States' complaint. The United States sought review of the order in a federal district court. The lower court dismissed the case on the theory that the government could not sue itself. The Supreme Court reversed, finding that although the government was nominally suing itself, the basic controversy was whether the railroads had illegally exacted money from the United States. The United States, as a shipper, was actually aggrieved by the independent regulatory agency's decision and order, and therefore, it found the controversy to be of a type "traditionally justiciable."[306]

The Court has since followed *ICC* in a variety of contexts. In *Udall v. Federal Power Commission*,[307] and *Secretary of Agriculture v. United States*,[308] the departments of Interior and Agriculture, respectively, sought review of adverse administrative orders after participating in the administrative proceedings of independent regulatory agencies. While neither decision directly addressed the justiciability question, both pointedly noted that Congress expressly authorized governmental intervention and participation in the administrative proceedings.[309]

In *United States v. Nixon*,[310] the special prosecutor sought to enforce a subpoena duces tecum against President Nixon. The President argued before the district court that the court lacked jurisdiction to issue the subpoena because the matter was an intrabranch dispute between a subordinate and superior officer of the executive branch and hence not subject to judicial resolution.[311] The contention was renewed before the Supreme Court, where the President further argued that the dispute was essentially a jurisdictional one within the executive branch, which was analogous to a dispute between congressional committees. As such, it was a matter in which the President should be the final arbiter since it involved the preservation of the confidentiality of presidential communications.[312] The Court ruled that although the dispute was between officials of the same branch of government, the issues before it—the production or nonproduction of specified evidence sought by one

305. 337 U.S. 426 (1949).
306. *Id.* at 430-31.
307. 387 U.S. 428 (1967).
308. 347 U.S. 645 (1954).
309. *Udall*, 387 U.S. at 433; *Secretary of Agric.*, 347 U.S. at 647.
310. 418 U.S. 683 (1974).
311. United States v. Mitchell, 377 F. Supp. 1326, 1329 (D.D.C.), *aff'd. sub nom.* United States v. Nixon, 418 U.S. 683 (1974).
312. *United States v. Nixon*, 418 U.S. at 692-93.

official of the executive branch within the scope of his express authority and resisted by the President on the ground of his duty to preserve the confidentiality of communications of the Chief Executive—were "of a type which are traditionally justiciable"[313] and were raised in a setting that assured the "concrete adverseness"[314] of the parties. It might also be noted that the *United States v. Nixon* Court cited with approval two cases decided just one month before in which the Court maintained jurisdiction over enforcement actions brought by the Antitrust Division of the Justice Department where the Comptroller of the Currency, an independent officer in the Treasury Department, exercised his statutory authority to approve bank mergers and participated in the litigation on the side of the defendants.[315]

In *United States v. Federal Maritime Commission*,[316] the Antitrust Division of the Justice Department brought suit to challenge the Federal Maritime Commission's approval of certain pooling agreements between shippers. The Antitrust Division had argued before the Commission that the agreements violated the antitrust laws but the Commission approved the agreements, thereby exempting the shippers from the requirements of the antitrust laws. In response to the intervenors' argument that the Article III "case or controversy" prerequisite for federal jurisdiction was not met because the "United States is suing itself," the appeals court, following the rationale of *United States v. Nixon*, held that the real parties in interest were the Justice Department and the Commission and that the dispute over the validity of the Commission's order is a matter courts normally resolve and that the setting assured the kind of adversarial confrontation that would allow for a proper presentation of the conflicting points of view. The appeals court explained:

> The Department of Justice is the authorized and traditional advocate of antitrust policies in agency litigation, . . . which policies are implicated by the "public interest" standard of section 15 of the Shipping Act, and the Commission obviously has a role before this court as an advocate of its own perception of the public interest. . . . This dispute over the validity of a Commission order raises issues that courts traditionally resolve and the setting assures the concrete adverseness on which sharpened presentation of the issues is thought to depend. The parties' controversy is justiciable.[317]

313. *Id.* at 697 (quoting United States v. ICC, 337 U.S. 426, 430 (1949)).

314. *Id.*

315. *Id.* at 693 (citing United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974), and United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974)).

316. 694 F.2d 793 (D.C. Cir. 1982).

317. *Id.* at 810.

Finally, the common, noncontroversial character of such intrabranch litigation is illustrated by a more recent case in which the justiciability question was not even raised. Thus, in *Confederated Tribes & Bands of the Yakima Indian Nation v. Federal Energy Regulatory Commission,*[318] the Department of Commerce, together with an Indian tribe and environmental group, sued the Federal Energy Regulatory Commission (FERC) successfully to force it to prepare an Environmental Impact Statement prior to the relicensing of a hydroelectric power dam. In the case, the Department of Commerce was represented by the Justice Department and FERC by its General Counsel.

On the other hand, some courts have held nonjusticiable suits between executive branch entities where the governmental interest on both sides was found to be the same. In an early case, *Defense Supplies Corp. v. United States Lines Co.,*[319] the court dismissed for lack of a case or controversy a property damage claim against both United States Lines Co. and the United States by the insurance subrogee of a shipper (Defense Supplies Corporation) which was wholly owned by the United States. The court reasoned that the dispute was merely "about the proper allocation of government funds between different parts of the government."[320] The court expressly avoided the question of whether such an action, if authorized by statute, would be justiciable.[321]

In *United States v. An Easement & Right of Way,*[322] the Tennessee Valley Authority brought a land condemnation action and attempted to join the Farmer's Home Administration, the holder of a mortgage on the land, as a defendant. The court, viewing the controversy as an intrabranch dispute over allocation of public property resources,[323] denied the motion, stating that

> there could not be any issue between the TVA and the FHA, both being the United States, which this Court could litigate or adjudicate. Any differences between these agencies would at most be interagency disputes which are not subject to settlement by adjudication. . . . The settlement of interagency problems within the United States Government is not a judicial function but rather an administrative function.[324]

The most recent decision in the area is illuminating for its reasoned application of the ICC test to a factual context. *United States v.*

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318. 746 F.2d 466 (9th Cir. 1984).

319. 148 F.2d 311 (2d Cir.), *cert. denied,* 326 U.S. 746 (1945).

320. *Id.* at 313 n.5.

321. *Id.*

322. 204 F. Supp. 837 (E.D. Tenn. 1962).

323. The court made clear its view of the nature of the dispute when it later reasoned hypothetically that if FHA had foreclosed prior to the action and had obtained a fee simple, no condemnation action could have been filed "as the United States could not condemn lands belonging to the United States, even though different agencies were claiming administrative rights to the property. The fact that FHA's interest is a security interest rather than a fee simple interest does not change the situation." *Id.* at 839.

324. *Id.*

Shell Oil Co.[325] was a CERCLA cost-recovery action brought by the United States. Shell moved to join the Army as a defendant, claiming, first, that if it remained the sole defendant, the United States might "saddle it with liability that rightfully should be borne by the Army;"[326] and, second, that if the Army was not joined, there could be an incomplete cost recovery that would injure the public's interest in a complete site cleanup. The court denied Shell's motion, viewing it as a self-serving effort "to reposition the parties to place the United States, as plaintiff, in the posture of suing the Army and Shell, as defendants."[327] Explicitly adopting the test established by *ICC, United States v. Nixon,* and *United States v. Federal Maritime Commission,*[328] the court first looked "behind the names that symbolize the parties"[329] and determined that in fact it was the Army that was the plaintiff in the case.

> When I look behind the "United States," the denominated plaintiff in this case, I find the Department of the Army. It is the Army that claims to have spent approximately $48,000,000 in responding to releases of hazardous chemicals at the Arsenal. It is the Army that continues to plan, in consultation with the Environmental Protection Agency, a comprehensive solution to the Arsenal contamination problem. It is the Army that is the designated trustee for natural resources at the Arsenal. If the Army were joined as a defendant, the Army would in actuality, as well as in name, be suing itself.[330]

Viewed in this light, there could be no justiciable intrabranch controversy. By statute, the Army is the public's trustee for the natural resources at the facility. As such, it has a fiduciary obligation to the citizens of the nation to see that the facility cleanup is completed and to accept responsibility, as it apparently had, for its share of the cleanup costs. To join the Army as a defendant would, in actuality, have had it suing itself. The Court explained:

> Here, however, there is no interagency dispute presented. The apparent paradox presented by the Army being both a responsible party and a plaintiff in this action arises because the Army *in the past* committed acts which contaminated the Arsenal but has since recognized the harm it caused and is *presently* taking action to remedy the problem. A "dispute" between the "new" Army and the "old" Army cannot be adjudicated. There is only one Army before this court. The Army is the plaintiff and the designated trustee for natural resources at the Arsenal. As such, it cannot sue

325. 605 F. Supp 1064 (D. Colo. 1985).
326. *Id.* at 1081.
327. *Id.*
328. 694 F.2d 793, 809-10 (D.C. Cir. 1982).
329. *Shell,* 605 F. Supp. at 1082 (quoting United States v. Nixon, 418 U.S. 683, 693 (1974)).
330. *Id.*

> itself, even though it may be a liable and responsible party under CERCLA § § 107(a) and 107(g), 42 U.S.C. § § 9607(a) and 9607(g).
>
> The case is not unlike a common comparative negligence case where a defendant asserts that the injured plaintiff's conduct caused some or all of his own injury. Procedurally, the plaintiff is not joined as a defendant; rather the court apportions responsibility for the damages.[331]

Finally, the court noted that while it would not join the Army as defendant, Shell's interests in seeing that the Army pay its proportionate share of the cleanup costs could be protected by the court in this case if Shell filed a counterclaim, or by the court in a suit brought by the State of Colorado (as co-trustee with the Army) in which the Army and Shell are co-defendants.[332]

In sum, then, the test established by *ICC* and its progeny grants a court jurisdiction to resolve an intrabranch controversy where the dispute is concrete, the issues involved are traditionally justiciable, and the action has not been barred by Congress. The decided cases have encompassed the gamut of potential intrabranch litigants, including officers of the United States who are removable at the pleasure of the President and those who are removable only for cause. No case has hinted at a distinction between litigation involving independent regulatory commissions on the one hand and executive officers subject to at-will removal on the other. In view of this current state of the law, OSC's statutory designation as the guardian of the public's interest that federal agencies refrain from engaging in reprisals against whistleblowing employees or other proscribed personnel practices, and the OCS's empowerment to fulfill that duty, makes it appear likely that a court would take jurisdiction to review an MSPB decision rejecting its contention of prohibited action by a sister agency. Such an appeal would involve a disputed matter traditionally disposed of by the courts, the parties would have an adversarial relation, and resolution would be in a forum that would ensure the concreteness of the issue and the adversarial posture of the parties.

E. Presidential Intrabranch Dispute Resolution Authority and the Separation of Powers

While the justiciability litigation just surveyed is analogous to and persuasive of the issue raised by the President's claim of exclusive

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331. *Id.* at 1083.
332. *Id.*

authority to settle intra-agency disputes,[333] none of the court opinions reviewed squarely confronted the separation of powers issue.[334] Thus, direct application of separation analysis by the courts may be expected. In the absence of a specific textual commitment, courts will evaluate separation of powers claims by applying a two-step test that first inquires whether the action of one branch threatens to prevent another from "accomplishing its constitutionally assigned functions."[335] When a potential for disruption is found to exist, the courts then attempt to determine through a balancing of interests whether the intrusion is justified.[336] The weighing process thus assumes some degree of intrusion,[337] and attempts to define the context of the dispute with respect to the competing objectives and authorities of the contending branches.

Although the executive's claim of constitutional right to determine disputes between agencies is couched in absolute terms, no constitutional provision expressly authorizes such a broad power nor have courts found it a necessary implication of any of the powers or duties assigned to the President.[338] Moreover, as has been recounted, the long history of congressional control of the administrative bureaucracy and the generally consistent approval given it by the courts argue against such an expansive power. Thus, the claim of constitutional authority must be, at best, a qualified one, deriving from some core executive responsibility that would be peculiarly intruded upon by the special counsel's limited authority to seek judicial review of MSPB decisions.

There are compelling reasons to argue that Congress is not acting outside the scope of its Article I powers in regulating the relationship between the executive branch and its employees generally or

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333. In the past, the Justice Department has argued that the two issues are inextricably related:

> Indeed, the question of the constitutionality of administrative order authority is a variation on the question of the constitutionality of EPA's authority to bring an enforcement action against a federal agency in court. Unilateral administrative orders, like lawsuits, are enforcement tools that interfere with the management of the Executive Branch by the President.

Habicht Testimony, *supra* note 9, at 210.

334. President Nixon raised the issue in *United States v. Nixon*, see *supra* notes 310-315 and accompanying text, but the Court chose not to resolve the justiciability issue raised there on those grounds.

335. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977).

336. *Id.*

337. *See id.; see also* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856, 858 (1986).

338. *See infra* notes 354-56 & 382-83 and accompanying text (discussing the opinions and "take care" clauses).

devising particularized means for uncovering and punishing corruption, maladministration, or inefficiency in the administrative bureaucracy.[339] Congress in the past has proscribed presidential "gag orders" forbidding federal employees from directly communicating with Congress without permission of their supervisors and guaranteed the right of civil servants to freely communicate with their elected representatives.[340] Over the years, Congress has repeatedly reconsidered "the conflicting interests involved in providing job security, protecting the right to speak freely, and maintaining discipline and efficiency in the federal work force" which has resulted in a variety of legislation refining the scheme of rights, duties, and obligations.[341] Its latest and most comprehensive reformation, the Civil Service Reform Act of 1978, shifted the adjudicative and investigative functions of the Civil Service Commission to an independent Merit Systems Protection Board and Office of Special Counsel. The Act also modified administrative appeals procedures and provided new protection for so-called "whistleblowers." Under S. 508, the special counsel would be removable as before by the President only for cause and would still have the same, though somewhat enhanced, investigative and prosecutorial prerogatives in the enforcement scheme that is within the confines of the executive branch. However, he would have limited litigation authority, which he did not have before, in, for example, the right to appeal to a federal circuit court any MSPB decision to which he was a party.

President Reagan did not object to the special counsel's investigative and prosecutorial role within the administrative process of the executive branch. The Chief Executive's claim must be that the special counsel's ability to go to a forum outside the executive branch to contest an executive agency decision unlawfully inhibits the fulfillment of his duty to see that the laws are faithfully executed and to intervene in administrative decisions to ensure the proper coordination in a given area of policy concern of the priorities, limited resources, competing policy goals, and conflicting jurisdictions and responsibilities of agencies throughout the federal government. To allow one agency among many in a policy area to make such administrative determinations without supervision or control disrupts this constitutionally imposed presidential function thereby violating the separation of powers doctrine.

Assuming the posited disruption, a number of factors support the argument that the threat posed is minimal and that any impact is justified by Congress's need to provide an effective scheme of enforcement of the national policy to ensure an efficient, effective, fair, and honest civil service system. First, the special counsel's proposed limited litigation authority may be seen as an integral part of

339. *See, e.g.*, Bush v. Lucas, 462 U.S. 367, 380-90 (1983); Arnett v. Kennedy, 416 U.S. 134 (1974); Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947); *Ex parte* Curtis, 106 U.S. 371 (1882).

340. 5 U.S.C. § 7211 (1982); *see also Bush*, 462 U.S. at 382-83.

341. *Bush*, 462 U.S. at 385; *see also id.* at 386 n.25.

a complex, evolving mechanism to ensure a civil service system that is fair, efficient, and responsive to Congress's and the public's expectations of probity. Under the CSRA, federal civil servants are protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors, and procedures—administrative and judicial—by which improper action may be redressed. Experience under this scheme has led Congress to perceive significant flaws that have undermined the goal of stemming governmental waste, fraud, and corruption through the encouragement of whistleblowing. Part of the problem was seen as resulting from OSC's improper view of its role, its less-than-vigorous attention to protecting whistleblowers, and a lack of sufficient legal authority to adequately shield reprisal victims when it did act. Other perceived flaws included the development of a standard of proof of reprisal by MSPB and the courts that made it very difficult for an aggrieved employee to establish a case. Taken together, these flaws discouraged employees from whistleblowing.[342]

Senate Bill 508, then, is arguably no more than a fine tuning of an already comprehensive plan. Thus, the members of MSPB and the special counsel would be no more insulated from presidential control than before. Further, divorcing the OSC from MSPB is simply the codification of an administrative action that had occurred in 1984. Also, the number of appeals the special counsel may bring is not likely to result in an appreciable impact on the MSPB or other agencies, and budgeting constraints on OSC resources are likely to limit the quantity of interventions and appeals the special counsel may take. Indeed, legislative additions that are unquestionably valid, such as the allowance of attorneys fees and the grant of an individual right of action to aggrieved employees, are likely to generate far more litigation before the Board and the courts than the special counsel's limited appeal authority. Finally, legislation authorizing one agency to sue another is far from unknown. In the closely analogous area of federal sector labor relations, the General Counsel of the Federal Labor Relations Authority is empowered to issue and prosecute administrative complaints of unfair labor practices against federal agencies and to enforce final Authority orders against such agencies in federal courts of appeals.[343] Also, federal agencies operating facilities determined to be in violation of Superfund Act requirements may be sued in federal court by the Environmental Protection Agency.[344] Under the Bank Merger Act

342. *See supra* notes 219-23 and accompanying text.
343. 5 U.S.C. §§ 7103, 7104(f)(2), 7118, 7123(b)(1982).
344. 42 U.S.C. §§ 9606, 9620 (1982 & Supp. IV 1986).

of 1966, Congress has authorized the Comptroller General to intervene in suits challenging mergers it has approved.[345] In sum, then, the special counsel's litigating authority arguably would not significantly depart from the "traditional [independent] agency model,"[346] is an acceptable exercise of "Congress' ability to take needed and innovative action pursuant to its Article I powers,"[347] and would, at best, effect an "intrusion . . . [on executive branch functioning that] can only be deemed *de minimis*."[348]

Second, it would appear that the President has in no way been deprived of his traditional means of pre-decisional influence over members of independent bodies by the grant of appeal authority to the special counsel. The President has the power to appoint the special counsel and thereby assure himself of a person respectful of presidential prerogatives and sympathetic to the President's policies and goals in this area. Through his Office of Management and Budget, the President can control OSC's budget and personnel ceiling—vital aspects of agency life. Further, the President may dismiss the special counsel for cause, a power the Supreme Court has indicated is sufficient to assure that he will perform his statutory functions, thus fulfilling the presidential duty to see that the laws are faithfully executed.[349] Finally, this situation does not appear to involve an attempt at congressional aggrandizement. Congress has retained no voice in OSC's day-to-day operations. Thus, the problem of control of administrative action present in *INS v. Chadha*,[350] is not implicated, nor does Congress hold a sword of Damocles threat of removal as in *Bowsher v. Synar*.[351] Therefore, no discernible attempt to effect a structural shift of constitutional power from the President to Congress is apparent.

In sum, then, in light of the factors just reviewed, it would seem likely that a court reviewing the question of the impact of the special counsel's proposed new litigating authority on presidential prerogatives would find that the limited potential disruptions identified are justified and necessary to carry out legitimate congressional objectives. Furthermore, they do not create a significant impediment to the President's duty to see that the laws are faithfully executed.

V. Congressional Control of Agency Decisionmaking and the Presidential Duty to Obey the Law

Recognition of Congress's substantial authority with respect to the bureaucratic infrastructure is, of course, far from denigrating or denying the powerful role the President plays in the policymaking

345. 12 U.S.C. § 1828(c)(7)(D) (1982); *see, e.g.*, United States v. Marine Bancorporation, 418 U.S. 602, 614 (1974).
346. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 852 (1986).
347. *Id.* at 851.
348. *Id.* at 856.
349. Morrison v. Olson, 108 S. Ct. 2597, 2619-20 (1988).
350. 462 U.S. 919 (1983) (finding the legislative veto unconstitutional).
351. 478 U.S. 714, 734 (1986) (holding retention of congressional removal power over officer performing executive functions unconstitutional).

and policy effectuation processes. The ability to recommend and veto legislation, to appoint and discharge his appointees, to influence (through his powers in the budget and resource allocation process) even those officials not subject to at-will removal, and to bring to bear the force of the office on the bureaucracy and the legislature, ensures the executive's co-equal role in the constitutional scheme. But it does underline the limits of the President's role and subjects the claim of a unitary executive to still further constitutional doubt.

Both literal and structural analysis of the constitutional text fails to suggest a hierarchical executive. The strongest support for full presidential control over the executive establishment rests on the provision that the President "shall take Care that the Laws be faithfully executed."[352] The Take Care Clause is not, however, among the major presidential powers set forth in section 2 of Article II, and seems at best a very modest grant power, and most likely a limitation on the office's power. Among the powers explicitly granted to the President is the power to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices."[353] "A broad reading of the Take Care Clause would have the effect of reducing the Opinions Clause—which appears among the grant of major presidential powers in section two—to surplusage. If the President was meant to have full control over the executive, including the power to discharge at will, why was the power to request written opinions put in the Constitution?

The Constitution has not been read to have such redundancy. A reasonable interpretation of the Opinions Clause is that it exists because it was not assumed, or at the very least not obvious, that the President had absolute power over heads of departments.[354] And

352. U.S. CONST. art. II, § 3.

353. *Id.* § 2, cl. 2.

354. Indeed, a brief review of the origins of the Opinions Clause appears to make reliance on it highly questionable. That clause is the modest constitutional residue of a number of efforts at the Constitutional Convention to surround the President with a Council of State. The Clause might have had significance in light of the rejection of a plural executive in favor of a single executive but for the ultimate adoption of the separation of powers and the particularized checks and balances. Important here are the provisions for sharing of the appointment power with the Senate, and the exclusive power of the Congress over the creation and abolition of offices and departments, and appropriations, which effectively vitiate any substantive content the Opinions Clause may be speculated to have. This is demonstrated by Convention deliberations and the actions of the first Congress. On August 6, 1787, the Committee of Five reported the draft of the Constitution that in art. X, § 2, provided for a single executive who "shall appoint officers in all cases not otherwise provided for by this Constitution." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 185 (1911). On August 20, proposals were submitted to the Committee of Five for a council of state consisting of the Chief Justice, the secretaries of domestic affairs, commerce and finance, foreign affairs, war, marine, and state. All the secretaries were to be appointed by the President and hold office during his pleasure. *Id.* at 335-37. That proposal was rejected because "it was

the Take Care Clause says only that the President "shall take Care that the Laws be faithfully executed,"[355] regardless of who executes them—arguably a duty quite different from the claim that the President has an encompassing responsibility for executing all the laws. A literal reading of the Take Care Clause confirms that it is the President's duty to ensure that officials obey Congress's instructions; the Clause does not create a presidential power so great that it can be used to frustrate statutory congressional intention. Repeating the words of the *Kendall* Court, where a valid duty is imposed upon an executive officer by the Congress, "the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."[356]

This understanding that the President is legally responsible for seeing that congressional enactments are carried out also diminishes the executive's related argument that since he is the only official elected by all the people, he must be accountable to the people for actions of all executive agencies.[357] The contention confuses political accountability with legal responsibility. The former reflects the notion of popular support as a basis of presidential political power.[358] It is a political concept and has been variously cited to imply a free-floating executive responsibility unfettered by legal standards, legal review, or legal consequences. This distinction was made early in our history during the intense struggle over the scope of presidential power between President Andrew Jackson and the Senate in 1834. Jackson sent a formal protest to the Senate in response to a resolution of that body censuring him for exercising powers that the Senate believed did not belong to the President. In that protest Jackson described himself as "the responsible head of the Executive Department."[359] Daniel Webster, in reply, disputed

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judged that the Presid[ent] by persuading his Council—to concur in his wrong measures, would acquire their protection." *Id.* at 542. All that ultimately survived of the proposal was the Opinions Clause. Two decisions of the first Congress, however, diminish its significance. First, Congress allowed the President the right of removal of officers he has appointed with the advice and consent of the Senate, a decision since accorded constitutional stature. Myers v. United States, 272 U.S. 52 (1926). Second, Congress made the Treasury Secretary, and later other domestic department heads, report directly to the Congress rather than the President. *See supra* notes 139-149 and accompanying text. Neither congressional action indicates a perception of any substantial content to the Opinions Clause, and indeed, appears to totally devalue it. If Congress had believed that the Opinions Clause had substantive content, there was no need to statutorily provide for removal. Similarly, if the requirement to report to the President had any real meaning, the congressional dictate to domestic agencies to report directly to it for over a century would surely have engendered some controversy.

355. U.S. CONST. art. III, § 3.

356. Kendall v United States *ex rel* Stokes, 37 U.S. (12 Pet). 524, 610 (1838).

357. *See, e.g.*, Habicht Testimony, *supra* note 9, at 179 (providing an example of the argument that the President must be accountable for the actions of all executive agencies).

358. *See, e.g.*, Rockman, *The Modern Presidency and Theories of Accountability: Old Wine and Old Bottles*, in 13 CONGRESS AND THE PRESIDENCY 135, 154 (1986) ("Accountability is foremost dependent upon politics, and the real power that presidents have stems from this. That power primarily rests with other elites, but its wellspring is popular sovereignty[.]").

359. J. ROHR, TO RUN A CONSTITUTION 144 (1986) (quoting Andrew Jackson).

that Jackson meant he was legally responsible because "legal responsibility signifies liability to punishment for misconduct or maladministration."[360] Rather, Webster argued, Jackson was referring to political responsiveness:

> Sir, it is merely responsibility to public opinion. It is a liability to be blamed, it is the chance of becoming unpopular, the danger of losing a re-election. Nothing else is meant in the world. It is the hazard of failing in any attempt or enterprise of ambition. This is all the responsibility to which the doctrines of Protest hold the President subject.[361]

In light of these understandings, the government's position in the *Lear Siegler, Inc. v. Ball*[362] appeal constitutes a breathtaking departure from mainstream notions of the scope of presidential prerogatives. The government's position represents the dark side of the theory of the unitary executive.

The en banc rehearing in *Lear Siegler* is the latest stage in the interbranch struggle over enforcement of the bid protest provisions of the Competition in Contracting Act.[363] The Act requires a contracting government agency to refrain from awarding a contract that has been timely protested to the Comptroller General until the Comptroller General has issued a nonbinding opinion concerning the validity of the protest.[364] However, in order to ensure that the consideration of bid protests does not interfere with the executive branch's ability to fulfill urgent procurement needs, Congress provided that the "head of the procuring activity . . . may authorize the award of the contract" despite any pending protests against it "upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General."[365]

In signing the bill into law on July 18, 1984, President Reagan objected to the stay provisions as an unconstitutional delegation of executive duties to a legislative branch official and instructed the Attorney General to inform all executive branch agencies as to how they should comply with the contested provisions. At the Attorney General's direction, the Office of Management and Budget ordered all agencies to disregard the stay provisions of CICA.[366] On April 18, 1985, in connection with the first of the litigation spawned by

360. *Id.* at 145 (quoting Daniel Webster).
361. *Id.*
362. Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir.), *reh'g en banc ordered sub nom.* Lear Seigler, Inc. v. Ball, 863 F.2d 693 (9th Cir. 1988) (en banc).
363. 31 U.S.C. §§ 3551-3556 (Supp. IV 1986).
364. The Comptroller General has 90 working days to issue the opinion. *Id.* § 3553(c)(1).
365. *Id.* § 3553(c)(2).
366. *Lear Siegler*, 842 F.2d at 1105.

the OMB directive, Attorney General Edwin Meese stated before the House Judiciary Committee that the executive branch would not comply with a district court order upholding CICA, nor even possibly a court of appeals decision.[367] The Attorney General's claim of broad power to declare statutes unconstitutional, absent court decisions or even in the face of them, drew swift and sharp reaction from Congress. Both the House Committee on Government Operations and the House Committee on the Judiciary published extensive reports addressing the issue and rejecting the claimed power. Both recommended, if necessary, the application of sanctions to the Department of Justice and OMB to curb the perceived usurpations of power.[368] Subsequently, the courts have unanimously upheld CICA against the executive's challenge.[369]

In *Lear Siegler,* the Navy awarded the contract at issue in the appeal (a contract for the procurement of external fuel tanks for F/A-18 Naval Strike Fighter aircraft) to a competitor of Lear Siegler's, even though the Navy knew of the pendency of Lear Siegler's bid protest. When Lear Siegler brought suit in the district court to seek immediate injunctive relief compelling the Navy to comply with CICA's stay provision, the Navy submitted a sworn affidavit from the Vice Admiral who was the head of the procuring activity attesting that there was an urgent and compelling need for the fuel tanks at the time the contract was awarded. The Navy affidavit was designed to track precisely the findings prescribed by the CICA escape provision, while failing to constitute a legally effective invocation of the provision. In this manner, the Navy effectively forced the court to determine the constitutionality of the stay provision.[370] The district court, after upholding the constitutionality of the provision, awarded Lear Siegler attorneys' fees under the Equal Access to Justice Act on the ground that the government's intentional refusal to abide by the stay provisions of the Act forced it to bear the expense of litigation to compel the government to follow the law.[371] The court of appeals upheld the ruling, rejecting arguments based upon the President's oath to uphold the Constitution[372] and his duty to faithfully

367. Ameron, Inc. v. United States Army Corps of Eng'rs, 787 F.2d 875, 889-90 (3d Cir. 1986).

368. H.R. REP. No. 138, 99th Cong., 1st Sess. 39, 40 (1985); H.R. REP. No. 113, 99th Cong., 1st Sess. 11 (1985). *See generally Constitutionality of GAO's Bid Protest Function: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations,* 99th Cong., 1st Sess. (1985) [hereinafter *CICA Hearings*].

369. Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988), *aff'g* No. CV 85-1125-Kn (C.D. Cal. Dec. 31, 1986); Parola v. Weinberger, 848 F.2d 956 (9th Cir. 1988), *aff'g* No. C-85-20303-WAI (N.D. Cal. Feb. 13, 1987); Ameron, Inc. v. United States Army Corps of Eng'rs, 809 F.2d 979 (3d Cir. 1986), *aff'g* 610 F. Supp. 750 (D.N.J. 1985), *cert. dismissed,* 109 S. Ct. 297 (1988); Universal Shipping Co. v. United States, 652 F. Supp. 668 (D.D.C. 1987), *vacated as moot,* No. 87-5120 (D.C. Cir. Jan. 9, 1989).

370. *Lear Siegler,* 842 F.2d at 1120-21.

371. *Id.* at 1125.

372. U.S. CONST. art. II, § 1, cl. 8.

execute the laws.[373] The court found that the government was effectively claiming an unconstitutional line item veto for the President.[374] The court of appeals concluded that the government's actions in the entire matter "are the constitutional equivalent of an abuse of the judicial process, which we have elsewhere identified as a 'hallmark of bad faith.' "[375]

On rehearing, the government has revived its contentions with a vengeance. The claim of presidential dispensing power is as stark as it is broad: "[T]he President has the authority to decline, in the absence of a judicial resolution of the matter, to implement a statute that is patently unconstitutional or that he reasonably believes undermines his powers under the Constitution."[376] The Take Care Clause, the presidential oath, and the vestment of "Executive Power," it is argued, demonstrate that the "President's responsibilities under the Constitution extend far beyond simply carrying out the grants of authority contained in statutes passed by Congress; he has significant independent constitutional powers *and* a separate obligation to preserve and defend the system of government established by the Constitution."[377]

The claimed executive power flies in the face of not only nearly two centuries of case law denying such an interpretation of the Faithful Execution Clause,[378] but also the origin of that directive, which mirrored the historic rejection of executive supremacy claims. "During the reign of absolute British monarchs, the notion that the Executive, at the time the King, could decide for himself, without a decision of the courts, which laws should be obeyed was put to the test."[379] When James II asserted that claim, the British Court's rejected it in 1688:

> Shortly thereafter, James II was forced into exile in the Glorious Revolution of 1689, and the English Bill of Rights was enacted. The first article of that historic charter of freedom declared "That the *pretended power of Suspending* of Laws, or the *Execution of Laws by Regal Authority*, without Consent of Parliament *is Illegal*." Scholars have concluded that the "faithful execution" clause of our Constitution is a mirror of the English Bill of Rights' "abolition of the suspending power," that is, the abolition of what the English Bill of Rights had called "the pretended (Royal) power of Suspending . . . the Execution of Laws."[380]

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373. *Id.* § 3.
374. *Lear Siegler*, 842 F.2d at 1121-24.
375. *Id.* at 1125-26.
376. Supplemental Brief, *supra* note 25, at 21.
377. *Id.* at 24.
378. *See supra* note 292 and accompanying text.
379. Ameron, Inc. v. United States Army Corps of Eng'rs, 610 F. Supp. 750, 755 (D.N.J. 1985), *aff'd as modified*, 787 F.2d 875 (3d Cir. 1986).
380. *CICA Hearings*, *supra* note 368, at 264; Reinstein, *An Early View of Executive Powers*

The Framers were well aware of the abuse of regal authority and at the Constitutional Convention expressly rejected any presidential power to suspend acts of Congress, binding the President instead to obedience with the Faithful Execution Clause.[381] Contrary claims of broad substantive authority deriving from the Take Care Clause have been consistently rejected by the courts throughout our history.[382] Indeed, it has been well recognized that the legal responsibility to carry out congressional enactments imposed by the Constitution on the President seems of a higher order. In this regard Professor Willoughby has commented:

> The President is an agent selected by the people, for the express purpose of seeing that the laws of the land are executed. If, upon his own judgment, he refuse to execute a law and thus nullifies it, he is arrogating to himself controlling legislative functions, and laws have but an advisory, recommendatory character, depending for power upon the good-will of the President. That there is danger that Congress may by a chance majority, or through the influence of sudden great passion, legislate unwisely or unconstitutionally, was foreseen by those who framed our form of government, and the provision was drawn that the President might at his discretion use a veto, but this was the entire extent to which he was allowed to go in the exercise of a check upon the legislation. It was expressly provided that if, after his veto, two-thirds of the legislature should again demand that the measure become a law, it should thus be, notwithstanding the objection of

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and Privilege: The Trial of Smith and Ogden, 2 HASTINGS CONST. L.Q. 309, 320 n. 50 (1975); Stewart, *The Trial of the Seven Bishops*, CAL. ST. B.J., Feb. 1980, at 70 (recounting the 1688 case).

381. *Ameron*, 610 F. Supp. at 755-56.

382. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."); Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting) ("The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.") *In re* Olson, 818 F.2d 34, 44 (D.C. Cir. 1987) (The Take Care Clause "does not require the President (or his delegate) to '*execute the laws.*' The President's responsibility may be satisfied by Congress entrusting the power of execution to some other officer while the President's obligation would be satisfied by the right of the President (or his delegate) to remove the individual officer for impropriety. . . ." (citing Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524 (1838)), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988); National Treasury Employees Union v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974) ("That constitutional duty does not permit the President to refrain from executing laws duly enacted by the Congress as those laws are construed by the judiciary."); Haring v. Blumenthal, 471 F. Supp. 1172, 1179 (D.D.C. 1979) (stating that the President is not permitted to "refrain from executing laws duly enacted by Congress), *cert. denied*, 452 U.S. 939 (1981); Guadamuz v. Ash, 368 F. Supp. 1233, 1243 (D.D.C. 1973) ("[N]owhere does our Constitution extol the virtue of efficiency and nowhere does it command that all our laws be fiscally wise. It does most clearly, however, state that laws, good or bad, be enacted by the Congress, and enforced by the President. '[I]f the power sought here were found valid, no barrier would remain to the executive ignoring any and all Congressional authorizations if he deemed them, no matter how conscientiously, to be contrary to the needs of the nation.' ") (footnote omitted) (quoting Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 77 (D.D.C. 1973)).

> the Chief Executive. Surely there is here left no further constitutional right on the part of the President to hinder the operation of a law.[383]

VI. Conclusion: The Limits of Congressional Authority

Congress's prerogative over the administrative bureaucracy, while not unlimited, is broad and far-reaching, encompassing the power to create, abolish, and locate agencies and to define the powers, duties, tenure, compensation, and other incidents of the offices within them. The Supreme Court's most recent pronouncements have indicated that in separation of powers cases where aggrandizement is not in issue, it will weigh the justifications for the congressional scheme in question, including the necessity to maintain "Congress' ability to take needed and innovative action pursuant to its Article I powers,"[384] against the degree of intrusion on the ability of the President to perform his assigned functions. De minimis disruptions are insufficient to block an otherwise legitimate congressional

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383. 3 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1503-04 (2d ed. 1929). Similarly encompassing claims of presidential power, this time in the sensitive area of control of national security information, were advanced in arguments to the Supreme Court in the appeal of National Federation of Employees v. United States, 688 F. Supp. 671, 685 (D.D.C. 1988), *cert. granted*, 109 S. Ct. 302 (1988). The case was on direct appeal from a district court decision holding unconstitutional on its face legislation prohibiting the implementation or enforcement of nondisclosure forms that executive branch employees are required to sign as a condition of obtaining access to classified information, or that otherwise obstructs the right of individuals to petition or communicate with members of Congress or limit Congress's ability to obtain information from the executive under secure conditions. *National Fed'n of Employees*, 688 F. Supp. at 685 ("The statute impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations."). Government appellees argued that "the President's role as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelliegence and other national security information in the Executive Branch." Brief for Appellees at 42, American Foreign Serv. Ass'n v. Garfinkel, 57 U.S.L.W. 4441 (U.S. Apr. 18, 1989) (No. 87-2127). They further argued that, "[j]ust as the President's role as Commander in Chief and representative of the Nation in its foreign relations bars Congress from erecting legislative impediments to his full assumption of personal authority for national security information," *id.* at 27, the President "must have direct and unimpeded control over the national security information whose confidentiality he deems necessary to the successful performance of his duties." *Id.* at 25. The government thus advanced a theory of executive perogative under which any congressional action that limits in any way the power of the President in the area of national security or foreign affairs is unconstitutional. The executive initially did not comply with the statutory directive in question. However, the incomplete state of the record on appeal, and subsequent executive actions apparently meeting the congressional objections to the forms moved the Court to vacate the lower court decision and to remand it for consideration of jurisdictional and statutory interpretation issues. American Foreign Serv. Ass'n. v. Garfinkel, 57 U.S.L.W. 4441 (U.S. Apr. 18, 1989).

384. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).

objective.[385] In *Morrison*, the Court broadly confirmed Congress's ability to insulate officers appointed by the President who perform "purely executive" functions from at-will removal and dealt a severe blow to the notion of a unitary executive. In *Mistretta*, the Court underlined the breadth of its rulings in *Schor* and *Morrison* by upholding the location in the judicial branch of an independent agency composed of judges and nonjudges whose sole function was the promulgation of binding policy with respect to sentences that may be imposed by judges. The emphatic nature of these decisions, as well as the long history of consistent congressional practice of controlling the ordering and arrangements of administrative agencies, make it likely that the constitutional objections of the President to the provisions of S. 508 respecting the independence of the special counsel, his litigating authority, and his ability to avoid prior executive review of his reports and testimony to Congress would not be sustained by a reviewing court either in that or in any similarly related context.

The limits on congressional authority over agencies are narrow. The textual commitment of foreign affairs and national defense responsibilities to the President effectively prevents insulation of the secretaries of State and Defense from presidential supervision and control. Similarly, Congress undoubtedly would be precluded from isolating from executive control a particular diplomatic or defense task, e.g., establishing an independent command for the Straits of Hormuz operation that would report directly to congressional committees. Beyond these areas, it is difficult to argue that any other cabinet official could not be subjected to a for-cause removal limitation. Could it be seriously contended that the tasks of the secretaries of Transportation or Interior or the newly established Secretary of Veterans Affairs are more crucial, in a constitutional sense, than were the functions of the now independent Postmaster General?[386] We have already seen that the early history of the Treasury and other original cabinet departments anticipated a close, direct congressional relationship.[387] The initial role assigned to the Attorney General in 1789 was merely to advise the President and the cabinet. Rather than create a justice department, which did not occur until 1870, Congress directed that prosecutions be undertaken by "district attorneys" or private lawyers who served various federal officials without central control.[388] Indeed, the Treasury Department's

385. *Id.* at 852.

386. Postal Service Reorganization Act, Pub. L. No. 91-375, § 201, 84 Stat. 719, 720 (1970) (codified at 39 U.S.C. § 201 (1982)); Beneficial Finance Co. v. Dallas, 571 F.2d 125, 128 (2d Cir. 1978) (stating that the congressional purpose in establishing the United States Postal Service was to allow the service to operate in a "business-like" fashion and to such end "Congress removed the USPS from the political sphere and authorized it to act as an 'independent establishment' ").

387. *See supra* notes 137-68, 276-80 and accompanying text; *see also* Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 233-42 (1989).

388. Tiefer, *The Constitutionality of Independent Officers As Checks On Abuses of Executive Power*, 63 B.U.L. REV. 59, 74 (1983).

Comptroller became the first designated government prosecutor when, by statutes in 1797 and 1817, the office was given revenue collecting litigation responsibilities. Later, those duties were transferred to a Solicitor of the Treasury, then to the Department of Justice when it was established in 1870.[389] Thus an executive official who was by statute somewhat independent of presidential control became the first custodian of a centralized power of prosecution. It should not be surprising, then, that after Watergate Congress seriously entertained a proposal to make the Justice Department an independent agency.[390]

The advisory aspects of such cabinet official's duties, however close or intimate they may be, cannot make the office invulnerable to congressional structuring. While the nature of the overall functions of these officers is executive, unlike those in the areas of foreign affairs and national defense, they do not consist of responsibilities constitutionally assigned to the President. Here again the anomaly of the unitary executive proponents' reliance on the Opinions Clause is laid bare. If simply creating a cabinet-level department establishes a constitutional subservience of its head to the President, why the need for an express textual provision empowering him to require the submission of written opinions?

Advocates of a hierarchical executive are likely to raise the specter of a congressional balkanization of the bureaucracy, a fragmentation of responsibility that will render administration ineffective, and may readily point to post-*Morrison* efforts in the 100th Congress to establish the National Park Service (NPS) as an independent agency within the Department of Interior[391] and to create an independent office of Special Environmental Counsel within the Environmental Protection Agency.[392] The argument, however, is one based on a purported need for efficiency that is not a separation of powers concern; it simply raises questions of legislative policy judgment.[393] Moreover, there is no evidence that Congress, in the actions in the

389. *Id.* at 75.

390. *See* S. 2803, 93d Cong., 1st Sess. (1973) (limiting removal of the Attorney General, the Deputy Attorney General, and the Solicitor General to "neglect of duty or malfeasance in office"); *see also Removing Politics from the Administration of Justice: Hearings on S. 2803 Before the Subcomm. On Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974) (containing commentary on the establishment of the Department of Justice as an independent agency in order to shield it from the influence of partisan politics). No action was taken on the bill.

391. H.R. 3964, 100th Cong., 2d Sess. (1988). Following debate, the House passed the Bill by a vote of 248-130. 134 CONG. REC. H5952-64 (daily ed. July 27, 1988). No Senate action was taken.

392. H.R. 3782, 100th Cong., 1st Sess. (1988). The bill was reported favorably out of the House Energy and Commerce Committee but received no floor action.

393. As Justice Brandeis observed, the separation doctrine was adopted "not to promote efficiency but to preclude the exercise of arbitrary power." Myers v. United States, 272 U.S. 52, 293 (1926)(Brandeis, J., dissent).

100th Congress or in prior handling of agency independence issues, is attempting to stymie workable government merely out of pique with assertions of presidential power. To the contrary, in the more than fifty years since *Humphrey's Executor,* Congress has given exceptionally close consideration to the issue of independence. This history of careful consideration establishes in the most concrete fashion that the rule enunciated in *Humphrey's Executor,* and now reaffirmed in *Morrison* and *Mistretta,* represents a vital and living principle in our government rather than, as its challengers would have it, a dated "political science preconception."[394]

Congress has given intense consideration to the issue of independence in at least five different waves of legislative scrutiny and action over the past fifty years. Each time it has reaffirmed the basic necessity for independence, while fine-tuning the details to allow presidents a measure of coordination. Soon after *Humphrey's Executor,* President Roosevelt named a Committee on Administrative Management, the Brownlow Committee, to examine, inter alia, the independence issue. Its proposal that all the independent commissions be abolished and their functions assigned to executive branch departments[395] was set before the Congress in the Executive Reorganization Bill of 1938, and debated extensively. Ultimately, Congress rejected the proposal as involving undue centralization of power in the Presidency,[396] but Congress did give the President's budget office authority to coordinate independent agency budget requests and legislative proposals.[397]

Extensive congressional consideration continued in the 1940s, 1950s, and 1960s. The first and second Hoover Commissions issued in 1949 and 1955, respectively, reports regarding the independent agencies.[398] Similarly, in 1960, James Landis, a leading scholar on administrative law, prepared for President-elect Kennedy a "Report on Regulatory Agencies," proposing to correct agencies' "fundamental problems" in part by closer coordination with the White House.[399] Each of these reports brought a new series of congressional hearings, reports, and legislation. Successive presidents moved to implement these studies by proposing reorganization

394. Synar v. United States, 626 F. Supp. 1374, 1398 (D.D.C. 1986) (per curiam).

395. SEPARATION OF POWERS AND THE INDEPENDENT AGENCIES: CASES AND SELECTED READINGS, S. Doc. No. 49, 91st Cong., 1st Sess. 371 (1970)(reprinting the report); L. FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE 153, 170-71 (1981); Bernstein, *Independent Regulatory Agencies: A Perspective on Their Reform,* 400 ANNALS OF CONGRESS 14, 15 (1971); SENATE COMM. ON GOV'TAL AFFAIRS, STUDY ON FED. REGULATION, VOLUME V, S. Doc. No. 26, 95th Cong., 1st Sess. 14 (1977)[hereinafter SENATE REGULATION STUDY].

396. The proposal was linked publicly with the ill-fated plan to "pack" the Supreme Court, contributing to the sense of excessive centralization of power. SENATE REGULATION STUDY, *supra* note 395, at 16. For a discussion of the debate, see D. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 188-97 (1966).

397. Reorganization Act of 1939, ch. 36, § 201, 53 Stat. 561, 565; SENATE REGULATION STUDY, *supra* note 395, at 16; L. FISHER, *supra* note 395, at 164.

398. L. FISHER, *supra* note 395, at 171; Bernstein, *supra* note 395, at 16-18.

399. S. Doc. No. 49, *supra* note 395, at 1311, 1390-93.

plans for the independent agencies. Congress responded by reaffirming the independence of the agencies from political control in general. Congress, however, authorized another measured degree of presidential coordination by permitting presidents to pick the agency chairmen, who would be removable from their chairmanships (but not from their positions on the commissions) at the President's pleasure, and, in turn, concentrating authority within the agencies in the chairmen.[400]

In the 1970s and 1980s came what has been, perhaps, the most extensive consideration of the issue. In 1971, the Ash Report issued criticizing agencies' "independence and remoteness in practice" from the President.[401] Congress chose not to accept regulatory reform proposals that would end independence. Instead, its own regulatory reform proposals suggested the development of a carefully measured relationship between independent agencies and presidential orders, and its enactments further fine-tuned agency independence by giving the President's budget office limited control over independent agency information-gathering.[402]

400. Congress selectively worked through a large number of reorganization plans, accepting some and rejecting others. Following the first Hoover Commission Report of 1949, numerous reorganization plans were offered. In 1950 alone, seven reorganization plans involving independent regulatory agencies were proposed; three of the seven were rejected. *See* Reorganization Plans of 1950, Nos. 7, 11, & 12, 96 CONG. REC. 7173, 7177, 6886 (rejecting plans for the ICC, the FCC, and the NLRB, respectively); 64 Stat. 1264-66 (1950) (accepting plans for the FTC, the SEC, the Federal Power Company, and the CAB); L. FISHER, *supra* note 395, at 162.

In the 1960s, following the Landis Report, President Kennedy submitted reorganization plans for seven agencies. Four were accepted, three were rejected. *See* Reoraganization Plans Nos. 1, 2, & 5, 107 CONG. REC. 11,003, 10,462, 13,078 (1961) (rejecting plans for the FCC, the SEC, and the NLRB, respectively); 75 Stat. 837-40 (1961) (accepting plans for the CAB, the FTC, the Federal Home Loan Bank Board, and the Federal Maritime Commission).

401. PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 4-5 (1971).

402. Until 1973, the requirement of OMB clearance of information-gathering requests extended to independent regulatory agencies. L. FISHER, *supra* note 395, at 167. The veto authority was removed as a consequence of Congress's perception that OMB had become a political instrument of the President. *Id.*, Pub. L. No. 93-153, § 409, 87 Stat. 576, 593 (repealed 1980). In 1974 Congress required, for the first time, Senate confirmation of OMB's Director and Deputy Director. Pub. L. No. 93-250, 88 Stat. 11 (1974). In 1980, Congress returned partial control over the independent regulatory agencies to OMB in the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501-3520 (1982 & Supp. IV 1986)). OMB may now veto collection requests by independent regulatory commissions, but the veto may be overridden by a majority vote of the subject commission. 44 U.S.C. § 3507(c) (1982). Regarding regulatory reform generally during this period, see, e.g., S. REP. No. 305, 97th Cong., 1st Sess. 65-67 (1981) (proposing a carefully measured relationship in light of "the independent agencies['] . . . strong concerns"), which represents only one of a lengthy series of hearings, reports, and floor debates on the matter. Regarding enactments, see Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812; Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980); L. FISHER, *supra* note 395, at 168. The literature reflecting the ferment in this area is enormous. For an

Congress also responded to pressures for deregulation at the end of the decade by abolishing one independent agency[403] and substantially modifying the regulatory mandate of another,[404] belying the notion that independence is an immutable condition.

Proposals considered during the 100th Congress follow in this tradition of tailored, situational responses. The National Park Service Bill[405] was a response to a long-simmering concern that NPS's mission to preserve and protect park resources against degradation had been undermined by increased politicization of the managerial decisionmaking process.[406] Under the bill, NPS would have been established as a functionally and legally separate and independent entity within the Interior Department. The Director, appointed by the President with Senate confirmation, would serve a five-year term subject to removal only for cause; all park system administrative functions and powers would be transferred to the Director; and the Director would be authorized to bypass secretarial and OMB budget and legislative clearance processes in its communications with Congress.[407]

Similarly, the EPA Special Environmental Counsel bill[408] emanated from concerns over growing evidence that hazardous waste laws applicable to federal facilities were not being enforced.[409] The bill would establish a special counsel appointed by the EPA Administrator for a five-year term who would be removable by the Administrator only for cause. The special counsel would have limited jurisdiction and enforcement authority. He could only seek compliance with the provisions of one environmental law, the Resource Conservation and Recovery Act,[410] and only if the Administrator and the head of the subject agency had not agreed to a consent order within a specified period after notification of noncompliance, or if the special counsel did not agree to the consent order. Thus the special counsel would act only if presently available settlement processes failed to operate successfully. Four enforcement options would be available: (1) assessment of a civil penalty not exceeding

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introduction, see, e.g., Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 Wis. L. Rev. 385.

403. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.) (abolishing the Civil Aeronautics Board).

404. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified in scattered sections of 49 U.S.C.) (affecting the Interstate Commerce Commission).

405. *See supra* note 391.

406. H.R. Rep. No. 742, 100th Cong., 2d Sess. 3-4 (1988); 134 Cong. Rec. H5953-54 (daily ed. Jul. 27, 1988).

407. The Justice Department raised constitutional objections essentially similar to those made with respect to S. 508. Relying on *Morrison*, the objections were rejected during the floor debate. 134 Cong. Rec. H5954 (daily ed. Jul. 27, 1988).

408. *See supra* note 392.

409. *See Environmental Compliance By Federal Agencies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1987); *Federal Facility Compliance With Hazardous Waste Laws: Hearing Before the Subcomm. on Superfund and Environmental Oversight of the Senate Comm. on Environment and Public Works*, 100th Cong., 2d Sess. (1988).

410. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified in scattered sections of 42 U.S.C.).

$25,000 per day; (2) issuance of an administrative compliance order to the offending agency; (3) a civil action to assess and collect a civil penalty; and (4) a civil action for injunctive relief against the agency.[411]

Both bills may be seen as limited, tempered and well-founded solutions to concrete situational needs. Neither may be viewed as an extreme response, and though each impinges to a modest degree on presidential supervisory authority in the areas covered, they are well within the scope of the congressional prerogative. Complementary to this measured approach was the Senate's vote to abolish the Nuclear Regulatory Commission (NRC) and to replace it with a single-headed independent body similar to the EPA.[412] Here a groundswell of criticism over management of safety at nuclear facilities has been building since the Three Mile Island accident in 1979, and NRC's reactions in the intervening years was seen as wholly deficient. The Senate Report concluded that the "Commission structure is poorly suited to the task of regulating the commercial nuclear power industry. As a means of formulating decisions, the Commission decisionmaking process is inefficient and, frequently, indecisive. . . . No single individual is responsible for a decision, once made."[413]

Under the bill as reported, the Administrator of the new Nuclear Safety Agency would be appointed by the President and serve at his pleasure. Fearful that presidential control would negate the administrative advantages of a single administrator, the bill provided two safeguards against potential politicization of the decisionmaking process. First, it created a Nuclear Reactor Safety Investigations Board consisting of three members, one appointed by the President, the others by the Administrator, who are removable only for cause. The Board would be responsible for investigating "significant nuclear events" and assessing the implications of such events for the public health and safety and reporting its findings and any recommendations for action to the Administrator, who must respond in writing to the Congress within 120 days. The response must be made public at the time of issuance. The Board could not undertake an investigation on its own without prior consultation with the Administrator and a written determination that the event is significant. Its recommendations would not be binding on the Administrator. However, if the Administrator adopts the recommendations, he is

411. The Justice Department presented a broad-based constitutional attack on the legislation. *See supra* note 9.

412. 134 CONG. REC. S11,049-71, 11,105-11 (daily ed. Aug. 8, 1988) (passing the Nuclear Regulation and Reform Act of 1988, S.2443, 100th Cong. 2d Sess.); *see also* S. REP. No. 364, 100th Cong., 2d Sess. (1988).

413. S. REP. No. 364, *supra* note 412, at 15.

obliged to undertake specified actions within certain time periods.[414] Second, the bill required that the Agency submit its budget and legislative recommendations concurrently to OMB and its jurisdictional committees. It also exempted the Agency from regulatory review requirements of the Paperwork Reduction Act and Executive Orders 12,291 and 12,498.[415]

The concurrent submission requirement and regulatory review exemption were eliminated on the floor. Instead, OMB's regulatory review role was strictly limited in time to prevent undue delay in rules processing, and safeguards against ex parte and conduit contacts and other undue influence were incorporated through requirements for a public docket containing all written communications, logging of all oral communications and meetings, and written explanations for significant changes made by the Agency as a consequence of OMB review.[416] The floor manager, Senator John Glenn, explained that exempting the Agency from all OMB review would leave the bill fatally flawed in that "it would place only one check on the new Administrator's authority to singularly set national policy on the licensing and operation of commercial nuclear reactors and the domestic uses of nuclear materials—the only check to that authority was that he or she could be fired by the President."[417]

The ultimate accommodation, abolishing an independent agency and subjecting its substitute to traditional, though circumscribed, presidential supervision, while at the same time providing for heightened, though not overly intrusive, congressional oversight through the Nuclear Reactor Safety Investigations Board, is rightly seen as "innovative"[418] and reflective of Congress's ability to take measured, restrained approaches in the exercise of its power to structure agency arrangements. It is, therefore, quite premature to raise danger signals of a runaway legislature. The evidence of post-*Morrison* actions in the 100th Congress is certainly to the contrary.[419]

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414. Constitutional objections to this provision by the Justice Department were explored and rejected by the Senate Committee on Environment and Public Works. *See* 134 CONG. REC. S11,061-65 (daily ed. Aug. 8, 1988).

415. *Id.* at S11,054.

416. *Id.* at S11,106.

417. *Id.* at S11,068.

418. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 275.

419. Repassage of a modestly revised Whistleblower Protection Act by the 101st Congress reflects the spirit of accommodation and tailored resolution noted in the text. S. 20, as amended, *see supra* note 24, passed both houses without a dissenting vote. 135 CONG. REC. S2779-93, 2804-12 (daily ed. Mar. 16, 1989); 134 CONG. REC. H740-54 (daily ed. Mar. 21, 1989), and was signed into law on April 10, 1989, Pub. L. No. 101-12, 103 Stat. 13. The Office of Special Counsel will be an independent entity legally and functionally apart from the MSPB. The special counsel will be subject to removal by the President only for cause during his five-year term. The special counsel will not be able to seek judicial review of MSPB rulings or enforce subpoenas in court, but, as a tradeoff, he will be prohibited from intervening against whistleblowers in cases before MSPB. Finally, the controverted direct-reporting requirement was altered to require the Special Counsel to submit reports, testimony, and other information to a requesting committee, and such submissions are to be concurrently transmitted to the President, a change from S. 508 that is without substance. 135 CONG. REC. S2779-80, 2805-11. The compromise had the approval of Attorney General Thornburgh, *see id.* at S2781. Senator Levin, floor

manager of S. 20, made it clear that the Senate entertained no constitutional doubts as to the power of Congress to authorize litigation between two agencies. *Id.* at S2780, 2782. The administration's retreat here, however, was a tactical one in the face of the certainty of an overwhelming vote for passage and the votes necessary for a veto override. The issues discussed in this Article will surface again soon in another context, most likely in connection with the bills seeking enforcement of environmental violations at federal facilities. *See* H.R. 1056, 101st Cong., 1st Sess. (1989) (statement of Rep. Eckart) (stating that the EPA is authorized to issue administrative orders against federal violators of RCRA); and H.R. 2135, 101st Cong., 1st Sess. (1989) (statement of Rep. Swift) (establishing a special environmental counsel in the EPA to enforce RCRA requirements at federal facilities).

Mr. STRICKLAND. Thank you very much.

Ms. Eldredge, you stated that several of the DOE labs believe they no longer have to comply with DOE environmental, health and safety rules because they are under a new security agency.

Could you talk more about why you——

Ms. ELDREDGE. It comes under the problem that has been talked about a lot of dual hatting that the Assistant Secretary for Environment, Safety and Health is now dual-hatted to be also for Environment, Safety and Health under the new National Nuclear Security Administration.

However, the laboratories are not comfortable with this, and some Members of Congress are not either, and one of the results that is very clearly out there, from a legal perspective, is the Price-Anderson Act enforcement of nuclear safety rules. Normally under the rest of the Department if the Office of ES&H finds a violation they issue a notice of violation and they subject the violating DOE entity to fines directly. They have that delegated authority from the Secretary.

Now they no longer have that delegated authority with regards to the NNSA, so if they find one of the weapons sites to be in violation they can put together their whole package but it is a recommendation, it is no longer a penalty, and make that recommendation to the Administrator of the NNSA, and then he or she would then have to impose a fine on the violator, so—and it creates a different kind of loop.

You no longer have that kind of independent oversight that they had in the past. That is one piece of it. The other piece of it is that the Office of Environment, Safety and Health also has a number of rules and recommendations with regards to other non-nuclear safety issues. Unfortunately there is no enforcement program for them like there is for Price-Anderson, but they are still important rules for workplace safety and worker safety.

This includes the new beryllium rule and there has been some indication—I do not have anything in terms of a real smoking gun on this—but there is some indication from some of the statements made in lab directors' testimony and some of what we are hearing from the labs. They do not believe that they need to take orders from the Office of Environment, Safety and Health, that they can create their own safety plans.

Mr. STRICKLAND. Well, Dr. Michaels has said to us recently that he no longer has the authority to issue notices of violations or to impose fines under Price-Anderson to the DOE weapons complex——

Ms. ELDREDGE. Correct.

Mr. STRICKLAND. [continuing] that he can only recommend, as you say. Under that scenario, do you think it is worthwhile to pass legislation that would cover the nonprofit contractors?

Ms. ELDREDGE. Regarding the fines for nonprofit contractors I definitely think the legislation is worth passing. It is sort of ridiculous that the contractor that has the contracts for the sites where we are going to have ongoing weapons work, it is going to continue into the foreseeable future, they are not cleaned up sites where people hope will be closed and walked away from in a couple decades, are not subject to the same kind of penalties and fines as all

the other sites are, so I think that piece definitely needs to be corrected and support the legislation this committee has to do so.

The piece about whether the Office of ES&H would get to enforce those fines once they were allowed I think needs to be also corrected in additional legislation.

I am not sure that the bill that you have right now would cover that problem.

Mr. STRICKLAND. Okay, and one final question. You say that you don't know who the external regulator for nuclear issues ought to be. Congress probably is not going to establish a new regulatory agency for DOE so would you give us your best recommendation?

Ms. ELDREDGE. That is a challenge. It is something we have been struggling with for a long time. Various advisory committees have also struggled with who would be the best regulator.

The two names that pop up most frequently are the NRC and the Defense Nuclear Facilities Safety Board. Neither of them is perfect.

As I mentioned earlier, if we were going to go with either of those, we would recommend reforms to those bodies, one of which would be citizen suit provisions so that we can hold whoever becomes the regulator accountable for their regulatory actions, and that would be both for the public and for the states, to be able to use that tool, which has been very effective with other environmental statutes.

With regards to my best recommendation, I think I will have to get back to you on that. We probably would be able to come up with some sort of merged entity of NRC and the Defense Board with a package of reforms that would be more acceptable than just a hand-off right now.

Mr. STRICKLAND. Okay, and a final question then, and if each of you would respond.

All of you seem to agree that there should be some phase-in of external regulation. You believe there should be external regulation. The proposed legislation would not allow for phase-in. Do you think an all-or-nothing approach is feasible and you could just give me a yes or no answer to that.

Ms. JONES. I think the NRC and OSHA said on the first panel that it would not be feasible to do in a year. That is one of the reasons that we said in our testimony that we felt a phase-in was more appropriate, so that there would be more experience on some of the issues that NRC and OSHA were not familiar with.

Mr. SHANK. As I have mentioned, I believe it is not feasible to do it without a phase-in. There are many issues of who holds licenses, what the legacy issues, how those things are corrected. There is enormous complexity.

We have had pilots at a simple facility like mine. I believe that more complex facilities will unravel even more difficulties, so the answer is no.

Mr. STRICKLAND. Thank you.

Mr. VAN NESS. I would agree that it is not feasible and as I said before I think there have been changes that one should take account of with regard to whether you do this at all.

Mr. STRICKLAND. Thank you.

Ms. ELDREDGE. I think we should give them more time in terms of phasing in and perhaps a two-step program with OSHA being able to move a little faster than the NRC parts of it.

However, I do think whatever legislation gets passed needs to have a date certain for that transfer, because if it is just a multistep process with pilot projects we might not ever get there, so we need to make sure that there is a date certain and then give them a step-wise way to get there.

Mr. ADELMAN. We would also support a phased-in approach. The approach that is part of the DOE working group that phases it in with facilities that are most similar to the types of facilities that NRC is already regulating certainly makes sense and we would support that.

In terms of a specific dateline I think that so long as the process is open and the public is involved in the transfer of authority from DOE to NRC and that there is a strict set of deadlines built into the legislation, that is certainly something we would support.

Mr. MILLER. I apologize, Mr. Strickland. I was just at the hearing you were at a little while ago. I apologize to Mr. Barton for being late.

I would just offer you this, that at the Portsmouth Gaseous Diffusion Plant in Paducah which both had takeover OSHA authority effective July 1, 1993, basically there was just a pre-assessment that was done by Martin Marietta at that time that identified the noncompliance events and we went to work on OSHA regulation immediately, so I don't see any need for any delay.

Ostensibly the Department of Energy is already supposed to be having its contractors comply with OSHA and since an order was issued in 1983 they have already had to be OSHA-compliant, so what is the difficult leap of turning on the switch in this Congress to commencing immediately OSHA regulation of DOE facilities?

There is no justification for a phase-in approach because they are already supposed to be there.

Now there may be some catch-up costs involved and I do not think anybody should think this is a cost-free transaction, and at Portsmouth and Paducah we saw roughly a $30 million shall we say retrofit to come into compliance with the orders DOE had already had in place but there is no need for phase-in on OSHA. That can start September 30 of this year if we pass legislation and OSHA had the money so that they were not stuck with an unfunded mandate, and so from our perspective the phase-in has to deal with the NRC and the certification and licensing, not OSHA.

I see no reason for any delay in moving forward on OSHA regulation.

Mr. STRICKLAND. Thank you, sir.

Mr. STEARNS [presiding]. I thank the gentleman.

Anyone on this side of the aisle who would like to ask questions?

[No response.]

Mr. STEARNS. Okay. Mr. Miller, we previously had by unanimous consent made your opening statement part of the record and the only question I was going to ask is just your phasing in of external regulations dealing with what you just talked about, with OSHA since they are already in place, so I think you answered that adequately.

I don't think without any further questions from members I think—we appreciate the panels' patience with us going back and forth to vote, and Chairman Barton is on the floor right now in debate so he could not be here, but again we appreciate your testimony.

The committee is adjourned.

[Whereupon, at 1:25 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

PREPARED STATEMENT OF RICHARD MILLER, PAPER ALLIED-INDUSTRIAL, CHEMICAL & ENERGY WORKERS UNION

I am Richard Miller, a Policy Analyst for the Paper, Allied-Industrial, Chemical & Energy Workers Union ("PACE"), which, amongst its membership of 320,000 at oil, paper, chemical, pharmaceutical and cement factories, includes 6,500 hourly workers at 11 Energy Department ("DOE") nuclear facilities, including Portsmouth, Paducah, Oak Ridge K-25, Mound, Hanford, INEEL, WIPP, Brookhaven, Grand Junction, Argonne-East and Argonne-West.

PACE, through it predecessor OCAW, was a member of the Advisory Committee on External Regulation and the NAPA Forum on OSHA-DOE Transition Issues. Outlined below are the key points in our testimony:

- DOE is the only federal agency whose facilities are exempt from regulation by the NRC for nuclear safety and by OSHA for worker protection. DOE has been justifiably criticized for lax enforcement of its regulations, and today lacks a robust program of self regulation. A prompt and orderly transition to OSHA regulation is feasible and can be accomplished this year.
  - The experience at Portsmouth and Paducah offers a key lesson: enforceable rules will require DOE to spend money on transition "catch up" costs.
- PACE supports external regulation, provided certain protections are put in place so that workers would not be worse off than they are today. These include:
  - requiring NRC (or the DNFSB with enforcement authority) to adopt OSHA's worker participation processes so that worker concerns can be better addressed;
  - retaining DOE's corporate health and safety oversight functions, so regulators don't end up as *de facto* safety managers;
  - requiring full time "site residents" for both OSHA and NRC inspectors at major DOE facilities and circuit riders at smaller sites;
- Eliminate the non profit exemption for fines and penalties under the Price Anderson Act;
- Clarify existing state legal authority over National Nuclear Security Agency (NNSA) facilities to assure full enforceability of environmental laws and compliance agreements.

1. DOE's Internal Oversight is Inadequate and There is no Prospect for Reform

Although DOE has a highly professional and competent health and safety staff in its Office of Environment Safety and Health (EH), decisions made at the top levels of the DOE have allowed its modest system of self-regulation to wither to the point of near invisibility. Three successive Energy Secretaries have eliminated the "independent" health and safety site representatives program. EH is noteworthy for its attention to after-the-fact investigations of fatalities, major near misses, and media attention to evident health and safety breaches. With the exception of recent work at Paducah and the other gaseous diffusion plants, DOE's system of self-regulation is more myth than reality.

After 12 years of trying, DOE's EH Office of Enforcement has only managed to adopt 2 of 11 nuclear safety regulations required under the Price Anderson Act Amendments of 1988 ("PAAA"). This poor performance is not due to a lack of trying by EH, nor due to a lack of Congressional oversight by this Committee. Rather it reflects a perverse system wherein the internal regulators at EH have to obtain the permission of the various line programs (Energy Research, Defense, Science, Nuclear Energy, and Environmental Management) and headquarters elements (General Counsel, Field Management) to carry out Congressional directives to regulate health and safety. DOE's practice of obtaining consensus from all Department elements on the content of rules further assures lowest common denominator decisions—or no decision at all. Finally, the revolving door between senior DOE managers and contractors has further undercut efforts to build a robust internal accountability system.

DOE's PAAA Enforcement Program—although limited by a staff of 6 inspectors to cover the entire DOE complex—demonstrates how safety is enhanced when a program is given even a few teeth. Recently, the prospect of Price Anderson enforcement action motivated one DOE contractor to stop radiation related work until continuous airborne radiation monitors were properly functioning. Absent an accountability device that would translate to the contractor's bottom line, worker protections would have been postponed until it was convenient. The PAAA staff size is not due to resource shortages or lack of FTEs. Rather its size reflects the length of the political leash it has been given by the DOE leadership, and the degree to which it's enforcement actions will be tolerated without contractors generating a major political backlash.

Most DOE field offices avoid oversight and rely upon contract provisions to drive accountability. This sounds appealing on its surface, however, DOE's understandable desire to get work done more quickly and at lower cost has resulted in competing priorities (productivity vs safety) which tends to make workers the victim. Reductions in award fees alone have not proven to be a powerful enough motivator to assure contractor compliance with nuclear safety rules, largely because there is no practical way to measure every action a contractor takes—or doesn't take—and translate it into a fee calculation.

DOE has placed its management and integrating contractors in the position of overseeing their fixed price subcontractors' health and safety programs at the same time they are driving them for ever greater costs savings. Where economic incentives are in potential conflict, the absence of an independent third party ensures that accountability suffers. DOE's panacea for safety woes—Integrated Safety Management—is simply a process to plan work up front. It is a complement to external regulation—not a substitute.

Lastly, the DNFSB has been largely absent from of Environmental Management sites except where criticality concerns prevail. Their role has been constrained and could be considerably expanded.

2. A Pathway to External Regulation

Numerous advisory panels have recommended that DOE should no longer self-regulate worker and nuclear facility safety. The only question is how to get it done.

Step one: immediately legislate OSHA regulation of all DOE and NNSA sites. This would not be a burdensome transition, because DOE has ostensibly required its contractors to be OSHA compliant under the terms of its contracts and Orders since 1983. As such, DOE would not be subjected to any new rules. OSHA would need to update some of its rules to cover occupational radiation protection, and perhaps firearms and explosives safety. Although DOE-OSHA pilots at Oak Ridge, Berkeley, Argonne East demonstrated that there were no major obstacles to shifting to OSHA regulation, all of the parties were also on their best behavior perhaps making it seem easier than it will be in reality.

Step two: require DOE and NRC (or DNFSB with enforcement capacity) to establish a plan, schedule and budget to assume control over nuclear activities (except nuclear explosives) at DOE facilities. Hazel O'Leary proposed NRC authority over new facilities and case-by-case decision making over which existing facilities would be covered. Congress needs to establish a schedule for decision making to assure a case-by-case approach would not result in interminable delays.

Key considerations before moving forward include:

- Dedicating a percentage of DOE's budget for OSHA staff and program costs, so that DOE regulation doesn't become an unfunded mandate on a small agency that is already underfunded.
- Having OSHA provide some transitional relief on facility upgrades and abatement actions
- Authorizing DOE to sign up for multi year abatement actions with OSHA or NRC
- Where there are mixed (radiation/non radiation) hazards and one regulator declines to take enforcement action, provide authority for the other regulator to assert its authority.
- In agreement states, federal OSHA presence is located many miles away and can only respond after the fact to accidents. For than reason, we recommend full time OSHA site residents at major DOE facilities (Hanford, INEEL, Oak Ridge, etc)

3. Several Lessons Learned from the External Regulation of the Gaseous Diffusion Plants

The 1992 Energy Policy Act mandated OSHA and NRC regulation of the DOE's uranium enrichment plants that were leased to the United States Enrichment Corporation ("USEC") in Portsmouth, Ohio and Paducah, Kentucky. The USEC oper-

ations are basically chemical plants that process a very corrosive chemical with radiological properties: uranium hexaflouride.

Prior to the commencement of OSHA regulation on July 1, 1993, USEC's M&O contractor, Martin Marietta, performed a self assessment of OSHA non compliance items, totaling approximately 12,000 items at Portsmouth and 4,000 items at Paducah. Repairs entailed installation of machine guards, providing fall protection by installing guard rails on working surfaces, updating electrical circuits, upgrading heat stress protections and providing mobile breathing air units [1]. Estimated cost for the upgrades was $40 million. These expenditures would, if funded, have been required under Admiral Watkin's order that all DOE facilities come into full compliance with all OSHA requirements.

A major dispute arose at Paducah over OSHA's enforcement authority for mixed radiation/chemical hazards. The dispute arose out of OSHA citations for uranium hexaflouride gas releases in 1993 related to violations of OSHA regulations governing emergency response, training and alarms. USEC and Martin Marietta maintained that OSHA had no jurisdiction over mixed chemical/radiation hazards. Rather, they argued that this responsibility rested with exclusively with DOE (and NRC once it took over) because the chemical release had radiological properties, and claimed that for OSHA to assert such jurisdiction amounted to dual regulation. The matter was ultimately settled, but the issue by no means disappeared.

The 1996 USEC Privatization Act required OSHA and NRC to enter into a Memorandum of Agreement delineating their respective jurisdictions. The MOA was modeled after the one OSHA and NRC executed for boiling water reactors. That MOA gave NRC responsibility for anything related to radiation, and left OSHA with jurisdiction over industrial and construction types of hazards. Regrettably, our concerns that OSHA retain some jurisdiction over mixed hazards were not heeded, and NRC assumed full responsibility for mixed hazards.

The OSHA-NRC jurisdiction question resurfaced in 1998 at the Portsmouth, Ohio plant when NRC failed to act on worker concerns that radiation dose records were not being properly counted and our local union turned to OSHA for assistance. As it turned out, management was administratively "assigning" radiation doses in hundreds of cases by pinning a dose badge on the wall, scanning it, and then arbitrarily assigning that dose to workers. OSHA issued a citation, but USEC maintained in settlement discussion that OSHA was exceeding its jurisdiction by goings into NRC's turf.

While the enforcement matter was ultimately settled (USEC agreed to reconstruct doses for a 3 year period), a major policy question needs to be resolved in any external regulation regimen: (a) will there be a primary regulator where there are mixed hazards, and (b) what happens if the primary regulator fails to enforce and the other regulator determines that there is a mixed hazard violation and issues a penalty? In our view, if one regulator fails to act, then the other regulator should have the discretion to exercise their authority (provided it is not inconsistent with the first regulator's license conditions). This question should be resolved in any legislation directing that OSHA and NRC enter into a new Memorandum of Agreement. What works for allocating responsibilities at boiling water reactors, may not work at DOE sites.

Adapting to NRC regulation has been a longer and more expensive process than OSHA transition. First, NRC had to certify the existing operations. NRC compliance costs were estimated to exceed $100 million at Paducah alone. Certification required a 2,300 page application, which was rejected by NRC the first time. The net result of this regulatory effort, however, was a more rigorous and arguably safer basis for operations. NRC also required the Paducah plant to make an estimated $21 million in seismic upgrades because of its location on a seismic fault. To its credit, NRC has accommodated USEC's seismic upgrade schedule by granting waivers because of unforseen obstacles.

4. NRC Needs to Implement the OSHA Procedures Related to Worker Involvement in Inspections and Enforcement Actions

NRC has not been "worker friendly" in its approach to oversight and regulation. NRC made it clear from day one at Paducah that their job is to interact with management and they are not in the business of taking concerns from workers and resolving them. NRC excludes workers from any role in walk around inspections, outbriefings, or enforcement actions.

When NRC started examining issues at Paducah this summer, they never consulted with the local union health and safety reps on issues that required scrutiny, nor did they include them in the investigation. Ironically, DOE's EH Oversight

[1] *UE OSHA Spending Plan,* Martin Marietta Utility Services, May 1994, UEO-1030

Team included the designated safety representative to be in the morning outbriefs, solicited comments on draft reports, and sought cooperation in identifying issues of concern.

While NRC has procedures to encourage stakeholder input at the national level, this is more related to public safety than worker safety.

The NRC's approach stands in contrast with OSHA which targets its resources to resolving legitimate worker safety and health concerns. OSHA solicits worker input during inspections, by including worker representatives in the entry briefing, walkaround inspections, and the exit briefing. Workers can participate in OSHA enforcement proceedings, and they are provided as a matter of course with copies of findings and, if issued, copies of citations.

NRC would be viewed more favorably as a worker safety regulator if it followed the OSHA procedures. As such, we recommend that legislation require NRC to follow the OSHA procedures outlined at 29 CFR Part 1903 when regulating at DOE facilities.

5. Non Profit Fines and Penalties

We support HR 3383. There is no reason that non-profit contractors who are receiving a fee should not be subjected to fines and penalties for nuclear safety violations under the Price Anderson Act Amendments. These same institutions are subject to fines and penalties from other environmental regulatory agencies, and if NRC were regulating these institutions, they would be similarly subject to fines and penalties. Indeed, when the OSHA-DOE pilots were underway at two non profit contractors, there was no discussion that this would take place on the condition that these non profits would be exempted from OSHA or NRC fines and penalties.

6. Assure that States Retain Authority at NNSA to Enforce Environmental Laws

The National Association of Attorneys General recently sought legislative clarification regarding states' authority to regulate and enforce against NNSA facilities. We support their request for legislative relief to preclude NNSA facilities from asserting sovereign immunity.

We would be pleased to answer any questions you may have.