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TO PROMOTE HEALTH AND SAFETY IN THE BUILD-
ING TRADES AND CONSTRUCTION INDUSTRY

GOVERNMENT
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HEARINGS

BEFORE THE

SELECT SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON EDUCATION AND LABOR

HOUSE OF REPRESENTATIVES

NINETY-FIRST CONGRESS

FIRST SESSION

ON

H.R. 3290

A BILL TO PROMOTE HEALTH AND SAFETY IN THE BUILDING
TRADES AND CONSTRUCTION INDUSTRY IN ALL FEDERAL
AND FEDERALLY FINANCED OR FEDERALLY ASSISTED CON-
STRUCTION PROJECTS

HEARINGS HELD IN WASHINGTON, D.C., MARCH 26, 27,
AND APRIL 21, 1969

Printed for the use of the Committee on Education and Labor

CARL D. PERKINS, *Chairman*



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TO PROMOTE HEALTH AND SAFETY IN THE BUILDING TRADES AND CONSTRUCTION INDUSTRY

WEDNESDAY, MARCH 26, 1969

HOUSE OF REPRESENTATIVES,
SELECT SUBCOMMITTEE ON LABOR OF THE
COMMITTEE ON EDUCATION AND LABOR,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2257, Rayburn House Office Building, Hon. Dominick V. Daniels presiding.

Present: Representatives Daniels, O'Hara, Meeds, Burton, Gaydos, Scherle, Steiger, Erlenborn, Collins.

Also present: Daniel H. Krivit, counsel, Loretta Bowen, clerk; and Martin LaVor, minority research assistant.

(The text of H.R. 3290 follows:)

[H.R. 3290, 91st Cong., first sess.]

A BILL To promote health and safety in the building trades and construction industry in all Federal and federally financed or federally assisted construction projects

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Contract Work Hours Standards Act is amended by adding at the end thereof the following:

"SEC. 107. (a) It shall be a condition of each contract entered into under legislation subject to Reorganization Plan No. 14 of 1950 (64 Stat. 1267) that no contractor or subcontractor contracting for any part of the contract work shall require any laborer or mechanic engaged in the performance of the contract to work in surroundings, or under working conditions, which are unsanitary, hazardous, or dangerous to his health or safety. In the event of a violation, as determined by the Secretary of Labor, of any such condition of a contract of a type described in clause (1) or (2) of section 103(a) of the Contract Work Hours Standards Act, the governmental agency for which the contract work is done shall have the right to cancel the contract, and to enter into other contracts for the completion of the contract work, charging any additional cost to the original contractor. In the event of a violation, as determined by the Secretary of Labor, of any such condition of a contract of a type described in clause (3) of section 103(a), the governmental agency by which financial, guarantee, assistance or insurance for the contract work is provided shall have the right to withhold any such assistance attributable to the performance of the contract.

"(b) (1) Sections 4 and 5 of the Act of June 30, 1936 (41 U.S.C. 38, 39) as amended shall govern the Secretary's authority to enforce this section, issue orders, hold hearings, and make decisions based on findings of fact, and take other appropriate action hereunder. Section 554 of title 5, United States Code, shall apply to any adjudication under this section.

"(2) All questions relating to the interpretation and application of the provisions of this section or the standards, regulations, rulings, interpretations, and procedures promulgated by the Secretary, shall be referred to the Secretary

for appropriate ruling or interpretation and such rulings and interpretations shall be final and binding upon all agencies of the United States except the courts of the United States.

"(3) Section 104 of this Act shall not apply to the enforcement of this section.

"(c) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of all persons or firms that the Federal agencies of the Secretary have found to have violated this section. Unless the Secretary otherwise recommends, no contract subject to this section shall be awarded to the persons or firms on this list or to any firm, corporation, partnership, or association in which such persons have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms."

SEC. 2. The first section and section 2 of the Act of August 13, 1962, are each amended by inserting "and Safety" after "Hours" each time it appears.

Mr. DANIELS. The Select Subcommittee on Labor will come to order.

We meet today to consider H.R. 3290, a bill to promote health and safety in the building trades and construction industry in all Federal and federally financed or federally assisted construction projects.

The legislation to be considered provides that no construction contractor or subcontractor may require an employee to work under any conditions that are unsanitary, hazardous, or dangerous to the worker's health or safety. The Secretary of Labor would have the power to determine violations of the Act. In the event of a violation, the Government agency for which the contract work is done shall have the right to cancel the contract.

Suppliers, service contractors, and construction contractors constitute the great bulk of Government contractors. In two of these three categories, safe and healthful working conditions must be provided for the employees. Only in the case of construction workers is the law silent on the question of safety in their working conditions. This bill would fill this anomalous gap.

By all indicators, accident rates in the construction industry are substantially higher than rates in other industries. According to one noted expert:

While impressive efforts of a few individual contractors can be cited, the typical construction safety program is still fairly limited. Because jobs are usually of short duration, there is a strong tendency to overlook hazardous conditions and to take dangerous risks.

In 1960, Congress passed the Maritime Safety Act. This law authorized the Secretary of Labor to establish rules and regulations and promote safety in the stevedoring and ship repairing industry. Opponents to that legislation took the view that that bill would cripple the industry. Facts have proved just the opposite.

As a matter of fact, between 1960 and 1966 there was a 31-percent reduction of injuries in longshoring and a 41-percent reduction of injuries in shipbuilding. As a result, the maritime people actually saved thousands of dollars in compensation rate reductions.

The legislation we are considering today will bring us into a new era for the construction industry—the protection of the health and safety of the millions of men who daily risk their lives in one of our Nation's most hazardous occupations.

Our first witness today is Mr. Walter Mason, director of legislation in the Building and Construction Trades Department of the AFL-CIO. Mr. Mason is testifying today in place of Mr. C. J. Haggerty, president of the Building and Construction Trades Department of the AFL-CIO.

Welcome, Mr. Mason. Will you introduce your colleagues who are sitting with you?

First, are you acquainted with the gentlemen who are sitting here at the head table with me? To my right is the next ranking member of this subcommittee who has done a yeoman's job in this field of labor and has been primarily responsible for much legislation already enacted into law. I refer to my colleague, Mr. James O'Hara of Michigan. To his right is the distinguished gentleman from the State of Washington, Mr. Lloyd Meeds, also a very hard worker in this field of labor legislation.

And, of course, to my left are counsel for the majority and minority sides of this subcommittee, Mr. Dan Krivit, who represents the majority, and Mr. Marty LaVor, for the minority.

Now, we do expect several other members of this subcommittee to appear here today. They are tied up at other hearings that are presently taking place, so you will see them appearing probably sometime during the course of your testimony, and when they appear, I will introduce them to you.

STATEMENT OF C. J. HAGGERTY, PRESIDENT, BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, READ BY WALTER MASON, DIRECTOR OF LEGISLATION, BUILDING AND CONSTRUCTION TRADES DEPARTMENT; ACCOMPANIED BY ALAN F. BURCH, DIRECTOR OF SAFETY, STANDING COMMITTEE ON SAFETY; V. E. WHITEHOUSE, SAFETY DIRECTOR, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; PAUL CONNELLEY, REPRESENTATIVE, UNITED CARPENTERS AND JOINERS OF AMERICA; JACK CURRAN, LEGISLATIVE DIRECTOR, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA; JAMES BAILEY, LEGISLATIVE REPRESENTATIVE, CARPENTERS; GEORGE RILEY, LEGISLATIVE REPRESENTATIVE, IRON WORKERS; MEL BOYLE, IBEW

Mr. MASON. Mr. Chairman, my name is Walter J. Mason. I am legislative director of the Building and Construction Trades Department, AFL-CIO. I am appearing here today on behalf of President Haggerty, who is unable to appear personally before the committee.

President Haggerty asked me to convey to you his deep regrets that he cannot be present, and he asked me to present to this committee his statement in support of H.R. 3290.

With the committee's permission, I will proceed in a moment with President Haggerty's statement.

Before doing so, however, I would like to introduce those officers and representatives of unions affiliated with the building and construction trades department who have accompanied me here today.

On my left is Alan Burch, representing the standing committee on safety of the building and construction trades department, and also the International Union of Operating Engineers; Jack Curran, legislative director, Laborers' International Union of North America.

On my right, Victor Whitehouse, safety director of International Brotherhood of Electrical Workers and next to him is Mr. Paul Connelley, representative of the United Carpenters and Joiners.

Now, with your permission, Mr. Chairman, I will read President Haggerty's statement into the record and any questions that you may have after I complete the testimony, I will be glad to answer.

The department is a federation of 17 national and international unions composed of 8,400 local unions throughout the United States. We greatly appreciate this opportunity to appear before this committee in support of H.R. 3290. We, in the building trades have an intense interest in the health and safety of our membership. To provide adequate protection against fatal accidents and disabling injuries has always been a major goal of our department.

The committee is to be highly commended for calling hearings early in this first session of the 91st Congress to reveal the facts which clearly demonstrate the immediate need to establish Federal safety standards and provide for enforcement of those standards on all Government and federally assisted construction projects.

The construction industry, as no other industry, reaches into every center of activity in this country. Its approximately 4 million workers are spread out in every State, city, county, and small town in this Nation. For all of its progressive greatness and its growing economic strength through the years, the construction industry has neglected its first obligation—the protection of the health and safety of its workers.

In 1967, when I appeared before this committee, I pointed out that thousands of construction workers had been killed and hundreds of thousands had been maimed and disabled. A year and a half has passed, and I am sad to report to the committee that another 2,800 construction workers were killed on the job and over another quarter of a million construction workers have been disabled by construction accidents.

The Congress at present is justifiably engaged in the consideration of stronger legislation for the safety and health of miners. There have been mine safety laws on the books for many years. However, the need for effective legislation did not capture the Nation's attention until 78 miners lost their lives in a single preventable accident recently.

My question to those that would oppose construction safety legislation is: How many construction workers must be killed at one time to see safety legislation enacted? We are now suffering as many deaths annually as the mining industry. Must we see large numbers killed at one time before the need for construction safety legislation is realized?

The Bureau of Labor Statistics has reported that in 1967, 42 million man-days were lost due to work stoppages. I think all will agree that 42 million man-days lost out of this Nation's work force is a serious concern. However, that same year, 1967, the construction industry alone suffered almost as many man-days lost, 33.5 million, due to disabling injuries as was lost by all industries due to work stoppages.

We have heard over the past years how safe the construction industry has been and how much over the years has been accomplished to reduce the number of deaths and injuries. The facts, however, do not support this as a truth.

Since 1959, never has there been less than 209,000 construction workers disabled per year; since 1959, there has never been less than 2,300 construction workers killed per year.

In fact, in 1968, no other industry in the United States suffered more deaths than the construction industry. There were 2,800 construction workers killed on the job in 1968. Yet the opponents of H.R. 3290 will probably appear before this committee and try to tell you what great strides are supposed to have been made in construction safety in recent years.

Gentlemen, to say that 2,800 deaths, 242,800 disabling injuries and 33.5 million man-days of lost work is making progress is absurd.

I want to emphasize that the figures I have given do not reflect the total injury and death experience of the construction industry, but rather they are based only on the experience of those companies who have elected to report their experience. The figures, therefore, represent only the experience base of a small group of companies.

In September 1968, Labor Commissioner Ricciuti of the State of Connecticut in commenting about that State's work injury experience had this to say about the construction industry:

The incidence of injury in the construction trades continues to be more than twice that of manufacturing. I am sorry to report that too many of our highly skilled construction workers are being injured at work. Construction is one of the most hazardous industries in Connecticut.

Most distressing is the fact that 1 in every 5 deaths occurs in construction and that 1 out of every 7 disabling injuries occurs to a construction worker. Yet, only 4 percent of the State's work force were in the construction industry.

I think the facts and figures I have just quoted on death and injuries in the construction industry are by themselves singularly sufficient motivation to enact the construction safety legislation.

However, for those opponents who care not to think in humanistic terms, let me present a few facts concerning money, which may convince them of the material need for this legislation.

In 1966, the building trades conservatively set the price tag on construction accidents at \$2.3 billion. During that period about \$75 billion was spent on new construction.

The Department of Commerce has recently set a \$91 billion value on new construction for 1969. This represents a \$16 billion increase since 1966. Given this increased construction expenditure, then we in the building trades estimate that work accidents which were costing \$2.3 billion in 1966 will rise to approximately \$3 billion in 1969.

Here is an industry with an annual economic dollar value equal to more than 10 percent of the gross national product causing an economic drain of \$3 billion due to preventable accidents. I cannot set a monetary value on the amount of pain, suffering, or "spinoff" effects an injured man and his family suffer, but if I were forced to declare such a dollar amount, I could only say it is at least equal to the \$3 billion in national measurement, or a total of \$6 billion.

In the past those that have opposed this safety legislation have presented programs, standards development actions and a whole host of other methodology on what the industry was doing to correct the admitted problem. The fact is, there is still no set of national safety and health standards for construction work.

Insofar as we in the building trades are able to determine the accomplishments they related to the committee have produced exactly nothing. If anything, and I will base my comments on the experience of the National Safety Council's construction safety statistics, they have done worse.

You may recall, Mr. Chairman, that the opponents of this legislation made a great to-do over statistics during the construction safety hearings held by this committee during the 90th Congress. They admitted to changing their methodology of computing their accident statistics, which prior to their testimony was running around a frequency rate of 28.

This, they said, was an unfair statistical computation, and that the true rate should be reported at about 12 instead of the 28 previously reported. The building trades did not choose to argue this statistical gerrymandering because we knew that if there was any honesty to the reporting system that the truth would in the long term be known.

We would not predict, however, that this statistical gerrymandering would become apparent so soon. When the construction industry made a decision to change how they would figure their reporting of the frequency of injuries, they were able to show a rate of 12. Now, all the gerrymandering notwithstanding, the National Safety Council's latest accident frequency report, even with the change, shows an increased frequency rate of more than 13. This is twice the national average for all industries.

I might note here that the Bureau of Labor Statistics accident rate which was not changed still shows as its latest computation an accident frequency rate still in the high twenties—26 to be exact.

Now the AGC has stated what a successful safety program their members enjoy. Yet they reported a 1967 frequency rate of 32.52 based on 5,699 member companies' reports. This is a higher rate than BLS or the NSC and is almost equal to the mining rate which is the highest.

My purpose on dwelling on the accident statistical measurement of what is happening in the construction industry is not to defame anyone; my purpose is rather to point out to the committee that no matter how you compute the accident experience, it is still a preventable national waste.

But we are not before this committee to play a game of statistics. We are here because a real problem does exist of which this committee has taken notice. The construction industry no matter how you wish to count the toll is still among the highest group of workers that are being injured. If you considered the industry solely on the economic impact, construction has the greatest toll to be remedied.

As I mentioned before, the value of new construction in 1969 has been set as \$91 billion or more than 10 percent of the gross national product. The construction industry employs directly approximately 4 million workers. In addition, another 20 million of this Nation's workforce look directly to the construction industry for its livelihood. We are, therefore, today talking about one-third of the Nation's workforce when we speak of the construction industry.

The facts that I have talked about only speak of the conditions and problems of today. I ask that the committee project its thoughts to the future. Every crucial problem that this Nation and this Congress is trying to cope with today centers around construction in one phase or another, whether it be military or civilian.

We are faced with rebuilding our cities, creating new cities and towns, building new roads, developing rapid transit, constructing new industrial complexes; no matter what the program for this Nation's renewal, construction is involved.

If then today we are talking about a 10-percent value of the gross national product for construction, what then of future years? We must look to the future of construction in the safety and health field as well. Is it asking too much that the Federal Government provide for the safety and health of construction workers on the job?

Surprisingly, few people appear to realize that there is no Federal authority at the present time to set safety and health standards in the construction industry, not to mention power to enforce them. Mr. Chairman, you will recall that when H.R. 2567, the construction safety bill reported by this committee last year, came to the House floor, questions were raised as to whether construction work was already covered under other safety legislation such as the Walsh-Healey Act or the Service Contracts Act. The answer was that construction was not covered by these acts or any other Federal law at that time, and this is still the case.

The Walsh-Healey Act and the Service Contracts Act cover two of the three major types of Government contractors. Walsh-Healey covers manufacturers and suppliers and requires that the prevailing wage be paid and that safe and healthful working conditions be maintained. The Service Contracts Act covers service contractors; that act also requires safe and healthful working conditions and compliance with the prevailing wage rates.

The third group of major Government contractors are the construction contractors. Unlike manufacturers, suppliers and service contractors, construction contractors are not subject to any Federal statute imposing safety or health requirements.

The Walsh-Healey Act is now 33 years old, and prior to leaving office, former Secretary of Labor Wirtz announced new and stricter industrial safety and health regulations under the act. Walsh-Healey health and safety standards have been updated several times, and this latest move by the Johnson administration can be seen as a recognition of a need to strengthen certain standards to further protect workers.

Yet, in the midst of this effort by the Federal Government to better the lot of employees of suppliers to the Government, nothing can be done administratively to help employees of construction contractors because the Department of Labor lacks such authority.

We are, therefore, greatly gratified, Mr. Chairman, that your committee is moving forward with the consideration of H.R. 3290 to correct this extremely serious oversight in the Federal statutes, and we feel this bill would provide a sound and workable approach to the problem.

The industry sometimes attempts to give the impression, as it did last year, that construction safety legislation, such as H.R. 3290, would duplicate to a considerable extent the present safety efforts being carried out by the various Federal contracting agencies. Nothing could be further from the truth.

Aside from the fairly good safety programs of the Corps of Engineers and the Bureau of Reclamation, we do not believe that the others are worthy of the name. Some of the other Federal contracting agencies may do a better or worse (usually worse) job on safety, but well-conceived and well-enforced safety standards are about as rare on Federal jobs as they are in the rest of the construction industry. And to the

best of our knowledge, such standards on federally financed and federally assisted work are almost completely nonexistent.

During testimony from a representative of the Associated General Contractors before this committee last year, it was stated that when a safety hazard exists, the Federal agency involved shuts down the project until the contractor corrects the situation. It would be interesting to question all the Federal agencies involved in construction as to how many jobs they shut down because of safety hazards and of that number, if any, what penalty the particular contractor was assessed for preventable job delay.

There have been statements to the effect that the existing State safety laws equitably protect the construction worker no matter in which State he works. This, we in the building trades know to be an untruth. Code comparison studies which are available from the Department of Labor's office of occupational safety graphically portray this falsehood.

The Department of Labor just recently published a "white paper" entitled, "Status of Safety Standards" which objectively reviews the condition of safety standards in the United States. I quote from that study:

Thus, it furthers both the Department's interest and its policy to adopt for regulatory purposes all consensus standards which meet the requirements imposed by its legal responsibilities.

Yet this year's analysis shows:

Nearly 60 percent of these consensus standards are five or more years old—the largest percentage 10 years plus.

Based on past performances only about one-fifth of these old standards may be revised or reaffirmed during 1968.

By 1969, 40 percent of all USASI standards will be 10 or more years old.

At least 50 areas where national standards either do not exist or are inadequate.

I might add that the whole United States of America Standards Institute construction standards under A-10 classification have been in the process of updating and/or development for many years now, and they still are not available for use.

In our discussion of the lack of safety standards, we have been talking here mainly about general contractors. A greater safety problem exists for employees of subcontractors. Only recently has there been any attempt by general contractors to bring subcontractors under contractual obligation to adhere to the "safe work procedures"—assuming there are any—adopted by the general contractor.

Most subcontractors do not—and I repeat, do not—have to observe the safety standards of the prime contractor, even if those standards are required by a contracting agency.

The prevalence of this lack of safety standards on the part of subcontractors has a great significance on the safety practices as regards a total job.

I should add, in defense to the general contractor, that the administrative difficulties which would arise in trying to enforce his safety standards on a subcontractor would be so great that it is no wonder most don't to it. That is why Government needs to step into the picture—to make certain subcontractors meet safety and health standards for their employees.

I would now like to take a moment to tell this committee how we feel H.R. 3290 would work in practice if enacted in its present form. H.R. 3290 would work in a manner similar to the Walsh-Healey Act as far as enforcement is concerned. As we understand the intent of the bill, it is to apply only to Federal, federally financed or federally assisted construction projects under programs subject to Reorganization Plan No. 14 of 1950. Reorganization Plan No. 14 relates to the enforcement of the prevailing wage provisions of the Davis-Bacon Act and other similar acts on Federal, federally financed or federally assisted construction projects. I have appended to my statement a list of the programs which would be covered by this legislation.

Under H.R. 3290, contractors and subcontractors would be required to meet the health and safety standards expressly provided for by the act or which are established under its authority by the Secretary of Labor. The Secretary's authority to enforce the act, to issue orders, hold hearings and make decisions based on findings of fact, and to take other appropriate action would be governed by the same law as Walsh-Healey—specifically, title 41 United States Code, sections 38 and 39.

Any interested person could file a report of violation. This includes employers, employees, unions, and trade associations. On the basis of a reported violation, or on his own motion, the Secretary of Labor can hold a hearing to determine whether a violation has occurred. Although the Secretary can promulgate detailed procedural relations, the safeguards of the Administrative Procedures Act would apply, and determinations by the Secretary would be subject to review by the courts.

Should the Secretary of Labor determine there has been a violation of the act, then in the case of contracts to which the United States or any agency or instrumentality, territory, or the District of Columbia is a party, or in the case of a contract made for or on behalf of the United States, any agency or instrumentality, or territory or the District of Columbia, the Government agency for which the contract work is being done would have the right to cancel the contract and to enter into other contracts for the completion of the contract work, charging any additional cost to the original contractor. It should be noted that the bill reads that the agency has the right to cancel the contract upon a violation determined by the Secretary of Labor; discretion is involved. The agency can cancel the contract at its discretion, but it is under no obligation to do so.

To provide for effective enforcement of the act, the bill also provides for a system of "blacklisting" such as is used under the Walsh-Healey Act, the Fair Labor Standards Act, the Service Contracts Act, and the Davis-Bacon Act.

The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of all persons or firms that the Secretary of Labor has found to have violated the act. Unless the Secretary recommends otherwise, no contract would be awarded to the persons or firms on the list, or to any firm, corporation, partnership, or association, in which such persons have a substantial interest, until 3 years have elapsed from the date of publication of the list by the Comptroller General.

I want to emphasize at this point that the "blacklisting" of a contractor or subcontractor would be discretionary with the Secretary

of Labor. If a contractor is found to have violated the act, he can appeal to the Secretary to be relieved of the "blacklisting" penalty.

To assert that "blacklisting" could occur by arbitrary action by the Secretary of Labor, results from the failure by critics to look at just what the bill says. Full safeguards are provided, and a petitioner could even go into court to have his name removed from the published list if he felt the Secretary acted wrongly.

The committee will no doubt hear testimony full of gloom and doom in opposition to this legislation. But we know from experience what can be accomplished through Federal safety laws. To give you a specific example, I would like to turn to the Department of Labor's maritime safety and health program.

Late in the second session of the 85th Congress, Public Law 85-742, commonly referred to as the Maritime Safety Act, was enacted. That law authorized the Secretary of Labor to establish rules and regulations, promote safety and train and educate those involved in the stevedoring and ship repairing employments.

The opposition to that legislation was basically the same as that leveled at the construction safety bill last year—critics claimed it would cripple the industry, put individual companies out of business and be ineffective to say the least. But history has proved these prophets of doom wrong.

The record of the Department of Labor in administering the Maritime Safety Act speaks for itself; 1960 was the first full year that the Department started administering the act. The injury frequency rate for longshoring at that time was 132, and in shipyards it was 39, according to reports submitted by employers to the Bureau of Labor Statistics. At the end of 1966, the employers in the longshore and shipyard business reported injury frequency rates of 81.4 and 23.6 respectively.

This represented a 39-percent reduction of injuries in longshoring and a 41-percent reduction of injuries in shipyard work in a 6-year period. We understand the figures are even lower today.

No one has shown me where any companies were put out of business during this period because of Federal safety laws. In fact, if the truth were known, the maritime people saved hundreds of thousands of dollars.

The maritime safety program shows what can be accomplished through Federal safety laws. The Building and Construction Trades Department feels that the same marked improvement in injury frequency rates and the severity of injuries as took place in the maritime industry can be projected for the construction industry by the enactment of H.R. 3290. It has been 10 years since the enactment of the Maritime Safety Act, and we believe action is long overdue for a similar safety program in the construction industry.

We in the building trades believe that this legislation would benefit not only the workers, but also the contractors and the Federal Government. As proven by similar safety and health legislation currently administered by the Department of Labor, H.R. 3290 can be expected to:

- (a) Reduce the number of serious accidents which delay project completion dates and consequently reduce the number of injuries to employees;

(b) Provide minimum national uniformity in safe work practices;

(c) Reduce employers injury compensation costs;

(d) Reduce contractor liability by meeting accepted safety standards;

(e) Reduce contract costs through improved operational efficiency;

(f) Improve competitive status of companies through reduced costs;

(g) Improve the safety skills throughout the industry by training workers on Federal projects who then move on to private construction projects;

(h) Assist States to upgrade their safety posture through improved national programing;

(i) Save the Government millions of dollars in construction costs.

Mr. Chairman, I would like to add something that is not contained in the report. It is a statement that was made in 1960 by Gov. John A. Volpe, of Massachusetts, who is now Secretary of Transportation.

In 1960 Secretary Volpe stated, and he is a very vocal advocate of safety, and I quote what was in a construction magazine as follows:

On invitation of bids and cost plus bids, insurance costs are a major factor when contracts are being considered.

The insurance factor has become even greater when consideration is given to the fact that premiums reflect a subsequent increase in medical costs since 1960. And to give another example, Mr. Chairman, of what actually can be done if we had adequate safety standards, here is a statement by the Dupont Co., which I would like to point out. It is in connection with their plant at Deepwater Point, N.J.

They mainly insure that the machinery is guarded, and that the scaffolding and ladders are in a safe condition, and an excellent house-keeping job was done.

The result was that the firm and its construction subcontractors worked 8,099,626 man-hours without one disabling injury. And as I pointed out, and want to emphasize further, that the Government would save millions and millions of dollars in its construction contracts because high accident frequency rates is a costly item in bidding on jobs.

In closing, I would like to quote some comments made by people involved in the construction industry with regard to safety. The first is a quote from a speech by Mr. H. S. Latham, chief safety engineer of Interior's Bureau of Reclamation:

If contractors managed or dismanaged other company business in the same manner as many do safety, they wouldn't be around to pick up their first monthly payment estimate.

Finally a quote from the report of the Associated General Contractors to its membership at their very recent national convention, only 2 weeks ago. I believe counsel for the committee has the report and here is what part of the report says:

With the make up and tenor of the Congress, coupled with President Nixon's public statement favoring a construction safety bill, this activity takes on a larger degree of importance. We cannot afford the risk or hope of defeating this type of legislation on mere technicalities again.

Gentlemen, by the Associated General Contractors own admission, action was stopped last year on construction safety legislation because of mere technicalities. Failure of the House to pass the legislation last year under suspension of the rules, was not due to any lack of need but was because of mere technicalities, which we feel have been eliminated in H.R. 3290.

We in the building trades implore the committee not to let this happen again. Give the construction worker the protection he so obviously needs, don't be deceived by mere technicalities. We feel the vital need for this legislation has been clearly established. I again commend the committee for taking up H.R. 3290 at this time, and I hope the committee will act promptly to favorably report this legislation to the House so that action can be completed on the bill at the earliest possible date.

Mr. DANIELS. Thank you, Mr. Mason, and I want to compliment you on a very fine presentation of your views on this bill, H.R. 3290, which I personally consider a very important bill.

As I said before, I will present the other members of the committee as they arrive. We have a very good attendance here this morning, and I want to congratulate my colleagues for coming here to give their attention to this piece of legislation because it is very, very important.

First, I would like to present Mr. Gaydos from the State of Pennsylvania; next the ranking minority member of this subcommittee, William J. Scherle; also seated right down in front of him is a very active member of this committee, a colleague who is always a pleasure to work with, Mr. William Steiger. Then we have a freshman member added to this committee, and I welcome him aboard, Mr. Collins of the State of Texas.

Mr. MASON. Now, Mr. Chairman, I also have a few statements of other unions affiliated with our department that I would like to submit to the committee for the record.

Mr. DANIELS. Associated organizations which endorse the legislation in question?

Mr. MASON. Yes; Mr. Chairman, I have one from Edward F. Carlough, president of the Sheet Metal Workers; one from John H. Lyons, general president of the Association of Bridge, Structural and Ornamental Ironworkers. There is one here from Peter Fosco, general president of Laborers' International Union.

I believe Alan Burch here, who is a representative on the safety committee of the Building and Construction Trades Department would like to present his statement to the committee.

Mr. DANIELS. I will say to you, Mr. Mason, that the record will be kept open for a period of 10 days for the receipt of statements whether in support or in opposition to the legislation in question. However, those statements will, if there is no objection by my colleagues, be entered in the record following the conclusion of your testimony here today.

My good friend and colleague, Mr. O'Hara, who was the prime supporter of this legislation in the last Congress has another committee meeting to attend, and I am going to yield to him for questions that he may desire to present to you.

You might note that in the last session of Congress, Mr. O'Hara handled a similar bill on the floor and due to certain parliamentary technicalities, a ruling could not be obtained, and it was brought up under suspension calendar.

So, while a majority vote was obtained on the House floor the bill failed to receive the necessary two-thirds vote required under the suspension procedure.

Again, I want to commend Mr. O'Hara for his work in this area. I am very happy that he is serving on this committee because I think he can give us a tremendous hand in this specific field.

Mr. O'HARA. Thank you, Mr. Chairman. I want to express my appreciation for the very vigorous way you are proceeding to undertake the business of this subcommittee, and I am sure this subcommittee will accomplish its work this year in a manner for all of us to be proud of under your leadership.

You mentioned, Mr. Mason, that you quoted from a report submitted evidently to the Associated General Contractors at their recent convention. Do you happen to have a copy of this report with you?

Mr. MASON. Yes, sir; I do.

Mr. O'HARA. Could I borrow that for a little while?

Mr. MASON. I would like to have it included in the record, Mr. Chairman. Mr. Chairman may I have unanimous consent that this report be entered in the record at this point.

Mr. DANIELS. Without objection, it will be so ordered.

(The report follows:)

SAFETY COMMITTEE—CHAIRMAN GEORGE A. MOORE, GEORGE A. MOORE & ASSOCIATES, INC., PORTLAND, OREG.

ACTIVITY REPORT

Federal Safety Legislation.—Both the Construction Safety Bill, H.R. 3290, and the Occupational Safety and Health Bill, H.R. 843, have been reintroduced in this session of Congress. (Note the new H.R. numbers.) Both bills are minor modifications of those introduced in the previous session of the Congress.

As directed, the Legislative and Safety Personnel of AGC have drafted a model construction safety bill, which has been reviewed by the appointed subcommittees. Their comments were considered in the redraft. With the makeup and tenor of the Congress, coupled with President Nixon's public statement favoring a construction safety bill, this activity takes on a larger degree of importance. *We cannot afford the risk or hope of defeating this type of legislation on mere technicalities again.*

"Man on the Job" Safety Materials

In accordance with committee and board direction the "Man on the Job" safety program was finalized and announced to the Membership and Chapters. All Chapters have been provided with samples of one segment of the program for discussion with their members. Due to mail delivery problems the sample mailing was duplicated.

Content of the program is:

(1) One entire year's supply of AGC safety materials in packaged units designed to cover one hundred (100) men.

Contents: 100 each of twelve different safety booklets, (8 pages, 2 colors, or a total of 1,200 booklets); 10 each of twenty-four 8½" x 11" posters, or a total of 240 posters; 10 each of twenty-four 17" x 22" posters, or a total of 240 posters; 100 each of twenty-four payroll enclosures, or a total of 2,400 enclosures; 2 each of twelve outdoor flags (18" x 18" with 48" staff), or a total of 24 flags; 2 each of twelve (8½" x 12½") decals, or a total of 24 decals; 5 each of twelve (2½" x 3½") decals, or a total of 60 decals; 100 each of twelve off-the-job safety booklets (6-8 page and 6-12 page booklets), or a total of 1,200 booklets.

(2) The entire package in a minimum quantity of 500 units, each designed to cover 100 men, is: \$360.00* per unit.

To date we have received 400 orders. A minimum of 500 orders is required to produce the materials at the price quoted. Lesser quantities would cause the prices to rise sharply.

DIT Results.—Substantial improvement in both frequency and severity is recorded in the 1967–68 fiscal DIT results as opposed to 1966–67:

Overall	Frequency	Severity
1966–67	46.04	2,542.0
1967–68	32.52	2,325.7

The same is true in divisional results:

	Frequency	Severity
Building:		
1966–67	60.86	2,001.0
1967–68	40.48	1,863.2
Highway:		
1966–67	45.27	3,278.4
1967–68	27.62	2,795.6
Heavy:		
1966–67	28.41	2,599.7
1967–68	27.61	2,439.2

Participation in the DIT program is numerically at the highest point in the history of the program with 5,699 member firms voluntarily reporting.

DIT Reporting Changes.—The changes in reporting procedure and revision of forms, in accord with the Boston meeting directives, are in process. These materials will be in the hands of the Chapters well in advance of the conversion to the calendar year basis beginning January, 1970. This includes expansion of the reporting form to cover four types of construction plus new forms for Chapter accumulation of data and transfer to a summary sheet. The summary sheet will be the sole document submitted to the AGC for ultimate processing by IBM–SBC. Original DIT reporting forms will be forwarded by the reporting Member to the Chapter where they will be used for transposition and retained in their file.

Safety Certification.—Certificates have been awarded as follows:

Period covered	1 year	5 year	10 year
July 1, 1961 to June 30, 1962	37		
July 1, 1962 to June 30, 1963	153		
July 1, 1963 to June 30, 1964	229		
July 1, 1964 to June 30, 1965	434		
July 1, 1965 to June 30, 1966	870		
July 1, 1966 to June 30, 1967 ¹	1,287	52	47
July 1, 1967 to June 30, 1968 ²	50	5	3

¹ 1st year for which 5- and 10-year awards were made.

² Applications are just beginning to flow from members for 1969.

AGC Exhibit Booth.—Since the Dallas meeting, with one brief exception, the AGC Exhibit Booth has been in constant use by the Chapters and in one case a member. Following repair and refinishing the booth was used at the Road Show (CONEXPO) from whence it was scheduled for a Northern Illinois Building Contractors Association, Inc. meeting.

Safety Sam Signs.—“Safety Sam” signs continue to be furnished gratis, one to each new AGC member. Additional copies are available through the National Office at cost plus handling (\$3.25 in units of 20, \$3.75 individually, new prices). The original supply was depleted and an order for 2,000 additional units placed.

*Price includes packaging, handling and shipping (storage is handled by the producer at no charge). (Imprinting of booklets bearing either firm or chapter name—\$4.50 per thousand in addition.)

Safety Training Course.—Better than 16,000 supervisors have completed the AGC Safety Training Course for Construction Supervisors in the conference type presentation.

Currently more than 1,000 men are enrolled in the correspondence version of the course. Additionally better than 500 have satisfactorily completed the fifteen unit program.

Safety Manual Revisions.—Those sections of the Manual which have had text revisions completed and approved are currently awaiting receipt of suitable illustrations before type can be set. This applies equally to those new sections completed and approved. Suitable photos or illustrations are the most difficult hurdle in bringing the document up to date. Allen C. Wolf volunteered his firm's photographic assistance at the Boston meeting. No doubt he will have a report of progress for the committee.

Agency Safety Clauses and Requirements.—The Safety and Heavy Divisions' review subcommittees are and have been busily engaged in review and recommendations concerning the following agency safety clauses and requirements:

1. Corps of Engineers (revisions and addenda).
2. NASA (safety clause only).
3. Washington Metropolitan Area Transit Authority (safety requirements—first of three supplements, balance to follow).

USASI.—AGC continues to serve in various capacities (both member and staff) on the USASI (ASA) *A10 Construction Safety Committee and Subcommittees*. In each instance careful liaison is maintained to assure full consideration of the contractors' interests.

AGC-NSC.—Chairman George A. Moore met with Gene Miller and Charles Popke of the National Safety Council in Chicago to apprise them of AGC's endorsement of the NSC "Off-the-Job" Safety Program.

Safety Awards Breakfast.—A similar format to that of immediately preceding years will again be utilized.

The suggested memento for award recipients in the form of a tisetack bearing a miniature AGC hard hat emblem has been implemented. The mementos will be presented to each individual accepting one of the awards at the breakfast on March 17, 1969.

National Advertising (Depicting Unsafe Acts or Conditions).—A subcommittee of safety engineers, Messrs. Wolf, Armstrong and Peterson, will have a report on proposed guidelines covering safe practices depiction for use by advertisers, manufacturers and others concerned with nationally appearing advertisements, in response to a CIMA request.

ARTHUR L. SCHMUHL, *Secretary.*

Mr. O'HARA. I note the quotation here. Apparently it is an activity report to the safety committee, George A. Moore and Associates of Portland, Oreg., the report being submitted by Arthur L. Schmuhl, secretary.

The quote that you referred to reads, "We cannot afford the risk or hope of defeating this type of legislation on mere technicalities again."

This confirms my feeling about some of the things that happened to last year's bill. This bill very closely parallels the bill we took up in the House last year. Is that correct?

Mr. MASON. Yes. Congressman O'Hara, we clarified the language to clear up these technicalities and spelled it out in the bill. These unfounded technicalities that were mentioned on the floor of the House when the bill was taken up last year. One of the questions was whether or not the bill was covered by the Administrative Procedures Act, I believe it was covered. Well, we spelled it out in this bill.

Another technicality that was brought up was to the extent of coverage. Will we clarify that by limiting the coverage to only those Federal and federally assisted projects covered by Reorganization Plan No. 14, and that is limited to only projects that the Davis-Bacon provisions apply to.

Mr. O'HARA. As I remember there was much confusion on those two subjects.

Mr. MASON. I think that was the reason it failed to pass.

Mr. O'HARA. Mr. Mason, I want to take up just one more point with you, and then I am going to yield my time, Mr. Chairman. I think that it is important to make this point that this is not in the nature of a general law. By this proposal we do not attempt to regulate all construction undertaken in the United States.

We are attempting to write a safety bill for Federal contract construction, period. All we are trying to say is that if a contractor wants to enter into a contract under these Federal or federally assisted programs, in other words, if he wants Uncle Sam's money for performing construction work, that he will be required to enter into an agreement which includes as a part of it his promise that he will undertake to conduct the work in a safe manner, in accordance with regulations prescribed under this act by the Secretary; isn't that right?

Mr. MASON. That is correct. And I would like to point out, too, that a manufacturing firm, although it may do \$50 million worth of business a year, and it bids on a Government contract that only involves maybe \$10,000, it also is required to meet the safety standards that are called for under the Walsh-Healey Act.

Mr. O'HARA. In this field we are like any other person who lets a contract. Anyone in that position, whether he be a small business, or General Motors, or whatever it might be, as a part of the contract, may insert any legitimate requirement that he pleases.

Whatever the legitimate provision is, if that is the way the fellow who lets the contract wants it to be, the contractor can make a choice as to whether or not he wants to abide by such a contractual provision, and if he doesn't want to, he doesn't have to enter into the contract, does he?

Mr. MASON. That is right.

Mr. O'HARA. This is the same thing with respect to these Federal contracts, right?

Mr. MASON. That is correct, Congressman O'Hara. I also wanted to point out that in my opinion this bill would be very helpful to the contractors. We try to encourage our construction workers to wear helmets, some of them do and some of them do not. There is no way that we can force them to wear helmets; there is no way the contractors can force them to wear helmets; and there is no way that the Federal Government can force them to wear helmets, unless we have some Federal standards requiring them to wear them on the job.

Mr. DANIELS. Will the gentleman yield?

As the law stands today, there are no Federal standards which are applicable to Federal jobs or Government financially assisted jobs. They are fragmented from agency to agency and what one agency prescribes may not be true with respect to another agency. So, the purpose of this legislation is to make the law uniform throughout the length and breadth of the 50 States of the Union where the Federal Government is involved or where there are federally assisted projects involved.

Mr. MASON. That is correct. Now, the Corps of Engineers has a good safety program they have worked up themselves, and the Bureau of Reclamation has a good program, and NASA has some type of a program, but some agencies don't have any program at all.

Of course, the contractors don't have any control over their subcontractors. They can't require them to meet standards even though they have been trying to work out standards themselves because they just bid on a contract, and unless they specify in the contract to the subcontractor that they would have to meet these certain safety requirements, this is not done.

I mean the record speaks for itself. I believe today that if we could get a report from all of the construction work that is performed throughout the country, the construction industry would have the highest accident frequency rate of any industry in the country. I would say three and four times the national average.

Mr. O'HARA. Mr. Mason, I am not going to continue any longer, but I do want to congratulate you on your statement and on behalf of your continuing work for the Building and Construction Trades Department, and their constituent unions for their work on safety, and also those with you this morning. I hope you will extend that same thanks to President Haggerty, who I am sorry could not be with us this morning.

Mr. MASON. Thank you, Congressman O'Hara.

Mr. DANIELS. Mr. Scherle.

Mr. SCHERLE. Thank you, Mr. Chairman. I also appreciate your statement. It was very interesting and informative.

I am sure we are all aware that President Nixon and the administration realize the value of the construction industry in this country.

We also are very well aware of the cost of injury and the amount of lost man-hours. By the same token, we must also be aware of additional legislation until it is adjusted and appraised to the extent that it will not cause hardships on the contractors or the employees.

Along this line, I make reference to the fact that all the necessary provisions should be included in the bill, making sure that we have definite guidelines in the standards and safeguards for the prime contractors; that contracts cannot be canceled without court review. Also a bill of this magnitude and this nature should not be based primarily on punitive measures.

I am sure that tomorrow, when the Secretary testifies and the Under Secretary testifies, I think we will all have the realization that these men are very interested in the very subject we are discussing here this morning, and I think you will be very well satisfied with the testimony that they will present.

Now, Mr. Mason, I just have about three questions here that I would like to ask, and one is, Do you think that application of a uniform national standard would better allow employers and contractors to assess their potential cost and liabilities?

Mr. MASON. Well, what I had in mind, Congressman Scherle, is that the Secretary of Labor would set up an advisory committee of representatives of contractors that know the industry and representatives of labor and work out standards that are going to be mutually agreed to on all sides.

We share your views in this regard, Congressman Scherle. I, too, don't want punitive measures as the sole remedy. We hope that we can work out an educational program where we can minimize to a large extent, the large number of accidents that are being caused each day of the year.

Mr. SCHERLE. In other words, you have reference to the compatibility between sides more than anything else?

Mr. MASON. Well, like the Secretary of Labor has on unemployment compensation. You have an advisory committee of both labor and management. On apprenticeship training programs, we have an advisory committee of both labor and management. On vocational rehabilitation, we have an advisory committee. I mean that the Secretaries of departments do that themselves. He could not arbitrarily set up standards if he doesn't know what the industry is all about. We would not want it that way either.

So, under that bill the Secretary could set up an advisory committee.

Mr. SCHERLE. He will have that jurisdiction.

Mr. MASON. Well, if he doesn't have it, I wouldn't mind putting it in the bill.

Mr. SCHERLE. Mr. Mason, to what extent do insurance companies take an interest in setting up safety standards before they will insure a construction project?

Mr. MASON. I didn't get that.

Mr. SCHERLE. To what extent do insurance companies take an interest in setting up safety standards before they will insure a construction project?

Mr. MASON. I am not a safety engineer, but I have three of them here with me. They are probably a lot closer to that than I am.

Mr. DANIELS. Mr. Mason, if any of your associates sitting with you at the table would like to answer a question presented by any member of the committee, you may yield to them.

Mr. MASON. Well, I yield to Mr. Burch who represents the department on our standards of safety.

Mr. BURCH. Yes, Mr. Chairman, the insurance companies are obviously in business to make money and they do in some cases a cursory job of inspection on construction sites, and one of the big difficulties of this is that the inspections are few and far between. If there are any after the initial one—and, of course, construction is characterized by constant change on the construction side.

Unfortunately, most contractors, other than the larger ones cannot afford to hire professional safety people, and they depend on insurance, and thereby they get a false sense of security.

Another aspect of that is that the worst performers in the industry are not penalized by the insurance companies in the premiums as would be thought to be completely fair. To some degree, the best performer pays fairly sizable proportions in many cases, part of the premium of the worst performer.

We don't think that the insurance companies have really a strong effect on achieving accident prevention in the industry.

Mr. MEEDS. Will the gentleman from Iowa yield?

Mr. SCHERLE. Yes.

Mr. MEEDS. Are we really dealing here with types of coverage by private insurance agencies when we are talking about the predominant number of accidents? Aren't we talking about accidents that are covered by industrial insurance and other types of insurance, primarily.

I know there are some insurance coverages that reach into the same area, but the contractor is generally not insuring himself against the type of accident we are talking about here except in industrial insurance, is he?

Mr. BURCH. Congressman, I am sure we are.

I think it is true that in some States there are State compensation boards and premiums are thereby paid into those compensation boards. However, I have been told—I cannot state the source, I have been sworn to secrecy on it—but I have been told that the average cost of liability and compensation insurance to the contractor in the United States is \$28 to \$100 per payroll, which is very high, which means that that is an average. It means the bad performer is paying two or three times that much.

Mr. MEEDS. I thank the gentleman.

Mr. SCHERLE. Doesn't it make good sense though for an insurance company to protect its interest and also make sure that the construction company is a sound one?

Mr. BURCH. It would seem that way, however, I think it must be borne in mind that insurance companies do make their money on premiums and absence of premiums would mean nothing to make money on. They make their money on volume. I am not putting any despicable motives to the insurance companies.

What the insurance company inspector says on the job when he reports to his company may be filtered up maybe through 18 or 20 levels of management, including all the cost accounting departments and so forth, and thereupon, the final results that come down may very well be changed.

Insurance companies notoriously are reluctant to involve themselves in any way in what they consider to be management decisions of those that they insure.

Mr. SCHERLE. Are you saying, in essence, then, that because of the voluminous amount of business they do, the law of averages in the end benefit them and therefore they can be a little more lenient in some other discretionary measures?

Mr. BURCH. Yes. I think that is implied in what I have said.

Mr. CONNELLEY. An insurance man who investigates a job—and I think they generally try to make a job as safe as they can, but what they really have to do is not to eliminate the risk, but to be sure that the premium they offer the contractor is high enough to cover that kind of a risk.

Mr. SCHERLE. Mr. Mason, what States have effective, workable construction codes?

Mr. MASON. Well, I have a chart here: New York State, I believe, has 174 safety inspectors, and 108 in construction. There are actually only four or five States that have safety inspectors on construction.

Mr. SCHERLE. Could you name those.

Mr. MASON. Those States are Illinois, which has a total of 64 inspectors and nine are on construction; New Jersey has 49 and 14 are on construction; New York has 174 and 108 on construction; and North Carolina has 26 and four are on construction.

Now, there are three other States that passed safety laws recently: Michigan, and I think two others. I just cannot recall them. In all there are no more than seven States that have construction inspection.

Mr. SCHERLE. I yield to the gentleman from Wisconsin.

Mr. STEIGER. What date is that, Mr. Mason?

Mr. MASON. This is 1965.

Mr. STEIGER. It is 1965, so you are talking about information that is 3 years out of date.

Mr. MASON. Well, there are no more than three more States that have construction inspectors.

Mr. STEIGER. You don't have Wisconsin listed in that breakdown.

Mr. DANIELS. Mr. Mason, could you supply the committee with an up-to-date statement as to those States that have, in your opinion, an effective safety and health clause that applies to construction projects.

Mr. STEIGER. If my colleague will yield.

The question Mr. Scherle asked you is whether there are States with effective safety codes, and you have answered by saying that there are some States that have no safety inspectors. I would expect that there may be States that have inspectors, some of whom do not do all of their work in construction, but may in fact do some in elevators, some in industrial safety, some in construction safety, but may not be broken down that way.

Mr. MASON. Elevator constructors are in the construction industry, too.

Mr. STEIGER. Well, I am talking about operation after installation.

Mr. CONNELLEY. I think you are making a fair point, that this does undertake to some degree the number of effective construction inspectors. For example, California isn't on the list because they don't classify anyone as 100 percent construction, you see; but on the whole, I think the general point holds up that out of the rather few effective inspectors in the whole country, and this is true for most States, that not very many are really doing the job in construction. I think this general point holds up.

Incidentally, this chart is the latest thing the Department of Labor has and it is updated on the basis of what little they do. So, I think this does not destroy the point, relatively viewing construction across the board.

Mr. SCHERLE. Mr. Mason, one more question.

To pursue this a little further, what are the ingredients and contents that make these codes ineffective?

Mr. BURCH. Insofar as they are ineffective, I would say that the ingredients that make the code itself effective are attention to the realities of construction and paying close attention to those things in which we can engineer the maximum amount of hazard out of it.

However, the codes are virtually totally useless except as guidelines which are far, far often more ignored than they are observed, unless there is some degree of enforcement. Unless there is at least the threat of enforcement, this carrot does not work without the stick.

If there is any lesson that has been brought home to us, it is this lesson, and that is why we are supporting it as conscientiously as we can in this bill.

Mr. SCHERLE. Have you found a general lack of enforcement in the States that usually have this type of a law but don't enforce it?

Mr. BURCH. Well, I wouldn't want to say a letdown. I think there has been a lack—and in some cases there has been a letdown, yes, primarily due to budgetary reasons, in some cases, but a lack.

Mr. DANIELS. The gentleman from the State of Washington.

Mr. MEEDS. First of all, I would like to compliment Mr. Mason on his testimony and Mr. Haggerty, although he is not here. I also compliment them on their longstanding efforts and attention and interest in the field of safety in construction.

I would like to pursue this line of questioning that has been going on here.

Let us assume that the States since 1965 have been more aggressive in adopting safety codes for construction. Let us assume that there are more safety inspectors. Let us assume that they are doing a better job. Let us assume all of these things that are inherent in these questions that have been asked. Are the injuries and deaths involved in construction down today over what they were in 1965? Are they?

Mr. MASON. They have increased.

Mr. MEEDS. They have increased, have they not?

Mr. MASON. That is correct.

Mr. MEEDS. And if they have done all of these things presumed in these questions, they have not been effective in reducing the number of accidents and injuries caused in construction, have they?

Mr. MASON. No, it has not, and some States do not have any safety codes at all, according to this chart, in 1965.

Mr. MEEDS. Again, unless I misunderstand the purpose, scope, and intent of this legislation, it is legislation which will place the Federal Government in the position of desiring that its contracts, without regard to what State they are in, its contracts be protected and require certain safety standards. We are acting as the Federal Government and not as what is transpiring in any specific State.

Mr. MASON. The same as they do on all other contracts.

Mr. MEEDS. This is a good point. You initially stated that a manufacturer could be doing a \$50 million contract, \$10,000 of which would be with the Federal Government. He would be required, would he not, under the Walsh-Healey Act, to provide certain safety standards in this manufacturing industry?

Mr. MASON. That is correct.

Mr. MEEDS. And isn't it true that the injuries in the manufacturing industries are substantially lower than they are in the construction industries, and yet we have no requirement in Government contracts for safety standards in construction contracts; isn't that true?

Mr. MASON. That is true.

Mr. MEEDS. And isn't it further true that if the Federal Government were going to bid on a service contract that this also would be covered by the Walsh-Healey Act and the contractor in that instance would be required under Federal law to measure up to certain minimal safety standards?

Mr. MASON. Under the Service Contracts Act, they also have safety standards, yes.

Mr. MEEDS. Right. Isn't it further true that the service industry is even less hazardous than the manufacturing industry which is less hazardous than the construction industry, and it is covered?

Mr. MASON. Congressman Meeds, I have some comments that I am going to submit to the committee which will clarify a lot of these points that have been mentioned here with respect to percentage of injuries in manufacturing, service contracts, and then the variation between that and construction, which may be helpful to the committee.

Mr. MEEDS. In any event, it is quite clear at this point that both manufacturing and service contracts which are covered under Walsh-Healey and other acts of Congress for minimal safety standards within the contracts have a lower degree of accident and injury than the construction industry does?

Mr. MASON. That is true.

Mr. MEEDS. One or two other quick points here. I don't know that Mr. Scherle, the gentleman from Iowa was asking a question, but he said we would not want to adopt legislation without adequate court review. Isn't it your testimony and also your understanding of the legislation before this committee at the present time, that it would be covered by the Administrative Procedures Act?

Mr. MASON. And also court review.

Mr. MEEDS. And this provides for court review, and so there cannot be an arbitrary decision with regard to penalties by the Secretary or anyone else for that matter. It is also subject to court review.

Mr. MASON. Let me follow up on that in that connection. In the question that Congressman Scherle made before with respect to punitive action, and blacklisting, let me point out that over the last 10 years, under the Walsh-Healey Act, the Service Contracts Act and Fair Labor Standards Act and all the acts that have safety standards, there have only been 40 companies that were blacklisted, and 20 of them were in the mining industry.

So, actually, it was only two a year, which is a very small number.

Mr. SCHERLE. Will my colleague yield for a short statement?

Mr. MEEDS. Yes.

Mr. SCHERLE. We do feel that this bill does need "tightening up" as far as this particular part of the bill is concerned, and we are in the process now of doing just that. I am sure that it will not prove injurious to anyone, and it will afford a little more protection, however, it will not be based on technicalities such as the bill was last year.

Mr. MASON. Thank you, Congressman Scherle.

Mr. MEEDS. Is there another avenue you would like to pursue here?

Mr. CONNELLEY. Yes.

Mr. MEEDS. I think you made an excellent point, which might be in the same theme, but the point you made was that the premiums for insurance were not so much predicated upon the banishment, or the lessening of the hazards as much as they were of considering the injuries that might ensue therefrom.

Mr. CONNELLEY. Making a proper appraisal of the hazards, a company might make more money on a dangerous one than on a safe one.

Mr. MEEDS. Exactly, and I think you bring up the point that runs throughout this entire act: individuals, industry, and individuals and

Government are paid right now vast sums of money, and your testimony very well brings this out. Perhaps \$6 billion a year for these injuries. For considerably less than \$6 billion a year—considerably less—we would prevent a large number of these accidents or a substantial number of these accidents.

And wouldn't it be better through adoption of legislation requiring safety standards to prevent accidents rather than pay for them afterward?

Mr. CONNELLEY. We sure think so.

Mr. MEEDS. Both from the financial standpoint and from the non-material things that we haven't discussed here very much?

Mr. CONNELLEY. I think so.

Mr. MEEDS. Isn't this the same of this legislation?

Mr. MASON. That is correct.

Mr. DANIELS. Thank you, Mr. Meeds, for your contribution.

Does the gentleman from Wisconsin, Mr. Steiger, have any questions?

Mr. STEIGER. Thank you, Mr. Chairman.

I join you in welcoming Mr. Mason and his colleagues here this morning.

I have three things to touch on, and as the members here know, I supported this bill last year.

What is your own judgment as to the quality and effectiveness of the Associated General Contractor's Code? Is this a code that you support? Mr. Burch.

Mr. BURCH. I firmly believe and am willing to substantiate by argument my belief in this—if the Associated General Contractors followed the code that they have laid down religiously, the frequency rate in the construction industry would be substantially reduced.

However, they look upon it as a set of guidelines and not as a code or regulation. It is a very weakly worded document. It has fairly broad coverage but it is weakly worded and it has some rather glaring omissions in it.

However, I would like to suggest that one of the things that would be possible for the Secretary of Labor to do if this bill passes would be to promulgate the Associated General Contractors manual for accident prevention in the construction industry as a set of mandatory regulations and then they would be only required to do what they say they are now doing.

Mr. STEIGER. Given that, and I appreciate your comment on that question, would it be objectionable to you to provide a mechanism similar to that which was made possible in the health and safety omnibus bill that was adopted by the committee but not by the House to allow the Secretary to promulgate that as a set of standards immediately?

Mr. BURCH. Yes, I believe so.

Mr. STEIGER. Second, Mr. Mason or Mr. Burch, would you support an amendment which would provide an advisory committee which would be responsible for any modifications or changes in the code adopted by the Secretary at the time the act was passed?

Mr. MASON. I support that.

Mr. STEIGER. Third, one of the charges that is leveled against this bill is that it would create a multitude of safety inspectors, Federal

and State and local, all of whom would have differing sets of rules and regulations, all of whom would be harassing contractors who would not know whether the State's height of the railing is this, or the Federal height of the railing is that; or which one they were supposed to do. How would you answer that charge, Mr. Mason? What kind of a comment would you have on that kind of criticism of the legislation?

Mr. MASON. Well, if you had uniform standards you would have no problem, and I think the bill is so limited it only covers those contracts where the Davis-Bacon provision applies, and the work hours division now does the enforcement. They have 11 regional offices.

Now, a contractor when he bids on a Government contract has to post prevailing wage determinations for each craft on the bulletin board. The same thing could apply if we had uniform safety standards on every Federal and federally assisted project.

And then the workers would know what the requirements are. I do not believe it would be very costly to administer that way.

Of course, I don't say that we have enough inspection as far as the prevailing wage provisions from those 11 regional offices, but work hours division just took it over recently, and I think we are getting a little more enforcement. I don't believe it would cost too much. Let me say that the Maritime Safety Act over the last 8-year period only cost \$8 million, and they did a wonderful job.

Mr. STEIGER. Am I correct if I were to say that this step on applying construction safety standards to Federal projects or federally assisted projects can be helpful in reducing or providing a safer place in which to work, but it is only a small step because the smaller contractors; for example, where perhaps the safety record is less, will not be covered unless they are in a Federal project or federally assisted project?

Mr. MASON. Let me point out, as I pointed out before, we have construction in every community throughout the country, every town, every village. And the same contractor that would bid on a private construction job would also bid on a Government job. So, if he has safety standards when he bids on Government contracts, he is certainly going to carry it over when he bids on a private construction project. So, I think it is going to encourage safety standards all through the industry. It is just a beginning.

Mr. STEIGER. I appreciate your answer.

Mr. CONNELLEY. Might I try to answer your question?

Mr. STEIGER. Sir, please do.

Mr. CONNELLEY. If you are looking for a standard in a given field in construction, it doesn't matter much whether you are working for the Federal Government or State or the Army Corps of Engineers or anyone else, you look for the best standards and when you look for the best standards, you are generally apt to come up with something from USASI, and you are looking for the best one, and when you pass that, you are going to end up with uniformity because the good standards are going to come to the same place.

If the States look for standards, they look for USASI standards and adopt them. So you are getting more uniformity and not less, and if the Army Corps of Engineers who have people working on

construction projects, if they find that there is something in USASI that is better, they put it into their standards. So would the Secretary of Labor, and so would an intelligent administrator.

You are not going to get a lack of uniformity; you are going to get more uniformity because you are going to get more people knowing what is the best is worth trying to get.

Mr. WHITEHOUSE. Mr. Steiger, it is too bad Mr. Meeds has gone because I would like to go to the Washington Construction Code, paragraph 2 or 3, in which it says:

Should any contractors' local or municipal, rule covering any point be more stringent, then the rule according the greatest deal of safety shall apply.

And if that is followed throughout, not only the Federal, but the State, and everything else, there is bound to be no trouble.

Mr. STEIGER. Thank you, Mr. Chairman.

Mr. DANIELS. The gentlemen from California, Mr. Burton.

Mr. BURTON. Thank you, Mr. Chairman, I would like to compliment you Mr. Bason, Mr. Connelley, and Mr. Whitehouse for your appearance and testimony today. I have hopes that, through the diligence of our chairman in calling up this legislation, the Congress will complete action this year.

As I interpret this, one of the beneficial aspects would be the point that you just made. It is conceivable that there are going to be somewhat varying standards, but if we have one uniform standard or we find those doing comparable work will be subject to similar standards, it will be a good deal easier for management to comply with that yardstick.

If I were management, I would be concerned with just such a proliferation of varying standards. If we had some amply understood common standards for construction, it would be easier for an employer in good faith to provide safe working conditions for his men.

Mr. DANIELS. Thank you.

The gentleman from Illinois, Mr. Erlenborn, was compelled to leave because of some prior appointment, but he did ask me to convey to you gentlemen his sincere thanks for your testimony this morning.

The gentleman from Texas.

Mr. COLLINS. I have learned a lot, in that we are all in favor of safety. I wonder if you could fill me in on who has the best code now among the States. In other words, some States have good codes, I presume, don't they? Are there any States that you would say are model and progressive, any three or four States that have really done a good job on this?

Mr. MASON. New York and California.

Mr. BURTON. Would you reverse that, please, Mr. Mason? I think if Mr. Haggerty were here, he would at least put that in alphabetical order.

Mr. MASON. I have a chart here which I will submit as an exhibit, which gives you the evaluation of State safety codes which may be helpful to the committee, and it is as late as 1967.

Mr. COLLINS. You just said that New York and California, as an example, would be the best.

Mr. MASON. Well, the States that have the black all the way across on the chart.

Mr. COLLINS. California seems to go all the way across.

Mr. CONNELLEY. I think my judgment would be subjective, and if we say anything, we are bound to make some Congressman mad.

Mr. COLLINS. Well, I was wondering if we had this kind of legislation in these States whether we can measure that in the way of safety. I don't know what we have in Texas, but it is probably pretty poor as far as your standards go.

Mr. WHITEHOUSE. It has just taken action but——

Mr. COLLINS. We haven't had any.

Mr. WHITEHOUSE. That is true.

Mr. COLLINS. What is the relationship between Texas and New York as regards man-hours lost through accidents?

Mr. WHITEHOUSE. Well, we are dealing in an industry in a non-industry State.

Mr. COLLINS. We are good on construction. If you will take our contracts and compare them I believe we are pretty good. I would like to know how it compares. Could you insert that?

Mr. MASON. Texas has only one standard.

Mr. COLLINS. I wonder how that affects us compared to New York, insofar as accidents are concerned. In other words, have we seen tangible proof from legislation that does actually achieve accident safety?

Mr. MASON. Well, I assume, and I am going to check for you on that, particularly with reference to the insurance companies, to find out if there is any difference. I feel they must have a very high premium to pay on construction work and practically on any type of work when they don't have any standards except in scaffolding.

Mr. COLLINS. Do States file the number of accidents? You talked about the number of people who were hurt in accidents. Does each State file a record each year of the number of accidents on construction trades, as such? Do you have those figures?

Mr. BURCH. I don't believe so, I don't believe that all States file them. However, in response to your question about evidence that regulations do have success, I don't know that we can really go to any of the States. However, it is a matter of record that the U.S. Army Corps and Bureau of Reclamation are simply two Government agencies that do have authority to set safety requirements as conditions of contract that have injury frequency rates in a general sense in injuries and deaths and accidents. It is something like only one-tenth of that of the rest of the industry. I think this is evidence of what regulations can do when the regulations are reasonable and are enforced.

Mr. DANIELS. Mr. Collins, I think Mr. Connelley would like to respond to your question as well.

Mr. CONNELLEY. I wanted to interject a caution here. One trouble was trying to differentiate between the good States and bad States of the frequency record. One of the things that a good States does is set up a good accident reporting system.

In California, for example, they might be relatively worse than you would expect because they are counting the accidents and the State that isn't doing anything isn't counting the accidents. It strikes my mind that at some time in the past I have seen something from the State of California in which they compare themselves with the national average or something along that line. I couldn't put my finger on it, but it seems to me that I have seen something.

Mr. BURCH. One of the difficulties is that all the States that do keep records do not keep them all on the same basis.

Generally, in the statistics that are published by the National Safety Council, frequency rates and severity rates are figured on a formula which is an American standard formula. Many States use a different formula, and they are very different to compare the figures.

Mr. BURTON. May I just interrupt at this point.

Another problem is that you have to look at the premiums paid as a percentage of payroll. Obviously, if you have a very high wage State, the total premiums may be higher than if you had the same number of employees, but receiving, let us say, 60 percent of the wages of the first State, so your measurement of cost is, one, premiums, and then, two, looking to see what is reserved, or set aside by the insurance companies that is over and above the premiums, and that oftentimes runs up to 37 to 40 percent.

That would give you the best measurement on cost and that in some turn should reflect that this probably is good business. At least the employers in our State believe that effective enforcement of strong health and safety standards is just simply good business—because a lot of times their own management won't understand this until they are goaded by effective enforcement.

But those looking at the profit and loss statements find that it is good business that they have these good standards which are effectively enforced.

Mr. COLLINS. I don't know what the answer is, but we have workmen's compensation, and I think it is relative in all States. I would like to see some kind of yardstick comparison because we are interested in safety in Texas and construction is big industry there.

Mr. BURCH. In addition, a State that has a higher rate of compensation premiums will also have an increase. There are a whole lot of factors that have to be taken into account in trying to make comparative statements, and as you know you get into the whole area of statistics and it is worse in safety than anything else. It is like the fandancers fan: It reveals what she wants it to reveal, and conceals what she wants it to conceal.

I would like to respond, if you are interested in construction. We get three different kinds of statistics that are placed on three different kinds of things.

Mr. DANIELS. Mr. Collins, would you yield to Mr. Scherle?

Mr. SCHERLE. One additional question. Could this be based on the State of New York or Texas or California? Could that be based on the amount of Federal dollars spent in construction in those two States, as far as your injury rate is concerned. That is, based on Federal dollars spent?

Mr. MASON. We may be able to obtain that information from the Commerce Department. I will try to obtain the information for the committee.

Mr. DANIELS. Thank you, Mr. Collins.

The gentleman from Pennsylvania, Mr. Gaydos. Any questions?

Mr. GAYDOS. No special questions, Mr. Chairman, but I would like to comment on the comprehensive nature of this statement as well as one fortified statistically. I would like to agree with the gentleman to

your left, Mr. Mason, that I think there is a great lack of uniformity among the States and I have a personal knowledge.

If anyone has an understanding or knowledge of the problem we are talking about in that area, he would have to admit that there is a crying need for it. I imagine the problem would resolve itself as to what the best approach would be.

There are some questions I would like to ask later of you gentlemen as far as this statement is concerned.

Mr. DANIELS. Thank you gentlemen.

Mr. MASON. Before we conclude here, I would like to submit for the record, Mr. Chairman, a comparison that we put together of last year's bill and the present bill.

Mr. DANIELS. Do you have additional copies of that for the benefit of the members of this subcommittee?

Mr. MASON. We can run them off.

Mr. DANIELS. It will be incorporated in the record, without objection.

Mr. MASON. I also have a list of all the federally assisted projects that would be covered by the bill.

Mr. DANIELS. Without objection, it will be incorporated in the record.

Mr. MASON. And a copy of Reorganizational Plan No. 14 which is the extent of coverage.

Mr. DANIELS. Without objection, it will be so ordered.

Mr. MASON. And a copy of Public Law 87-581 of the Contract Work Hours Standards Act.

Mr. DANIELS. Without objection, it will be so ordered.

(The documents referred to follow:)

MEMORANDUM

To: Honorable Dominick Daniels, Chairman, Select Subcommittee on Labor, House Education and Labor Committee.

From: Walter J. Mason, Director of Legislation, Building and Construction Trades Department, AFL-CIO.

Date: March 26, 1969.

Subject: Comparison of the construction safety legislation (H.R. 2567, 90th Congress) considered by the House during 1967-68 and H.R. 3290, 91st Congress, now pending before the Select Subcommittee on Labor.

In response to your request, I am happy to provide you with the following brief comparison of H.R. 2567 of the 90th Congress and H.R. 3290 of the 91st Congress.

(1) COVERAGE.—H.R. 2567 would have required safety and health standards for every contract entered into under section 103 of the Contract Work Hours Standards Act, Public Law 87-581. It was this requirement which appeared to cause difficulty in the House as to the question of who would be covered by the bill. It was asserted on the House floor that the language was broad enough to cover not only contractors and subcontractors but also manufacturers, or suppliers of materials used on construction projects.

Therefore, H.R. 3290 has been worded so as to not require safety and health standards for every contract entered into under section 103; rather, H.R. 3290 would require these standards to be a condition of each contract entered into under a program providing for federal, federally-financed or federally-assisted construction projects when such program is subject to Reorganization Plan No. 14 of 1950 (64 Stat. 1267). For your information I am attaching a list of programs subject to the Reorganization Plan; this list was compiled by the Department of Labor.

I want to call your attention to the fact that certain language from section one of H.R. 2567 has been removed with regard to references to plants, factories

and buildings, so as to eliminate any question that the bill might apply to manufacturers.

The language in H.R. 3290 thus limits application of the bill, and it should remove any question as to its coverage.

(2) ADMINISTRATIVE PROCEDURES ACT.—H.R. 2567 contained no references to the Administrative Procedures Act. Consequently a question was raised during the House debate as to whether the bill provided for the protections of the Act. It seems clear the Act did apply to H.R. 2567, although there was no specific language to that effect; as we understand the law, the Act is to apply to such legislation enacted by Congress unless the Congress in specific terms exempted the particular legislation from coverage by the Act. H.R. 2567 contained no such exemption.

To take care of this criticism, H.R. 3290 provides, on page 2, lines 23 through 25, that the Administrative procedures Act (section 554 of title 5, USC) should apply to any adjudication under the bill.

(3) JUDICIAL REVIEW.—H.R. 2567 did not expressly provide that determinations by the Secretary of Labor would be subject to review by the courts. It again appears certain that the bill would have been subject to such review, but to take care of this criticism, H.R. 3290 expressly provides on page 3, line 7, that the Secretary's decisions shall not be binding on the courts. The courts can review the Secretary's determinations as to violations under the bill as well as "blacklisting" decisions.

(4) OTHER NEW LANGUAGE.—Subsection (b) (2) of H.R. 3290 is entirely new and was not included in H.R. 2567. It is included in H.R. 3290 for clarification as to the authority of the Secretary of Labor.

Several other additions to language have been made in H.R. 3290, again for clarification purposes, and these additions are underscored in pen on the attached copy of H.R. 3290.

I am enclosing for your information a copy of H.R. 2567 as reported by the House Education and Labor Committee, a copy of H.R. 3290, a copy of Public Law 87-581, the Contract Work Hours Standards Act, and a copy of Reorganization Plan No. 14 of 1950.

FEDERALLY ASSISTED PROJECTS COVERED BY THE BILL

1. Elementary and Secondary Education Act of 1965 (79 Stat. 33, sec. 209, 79 Stat. 44, sec. 308; 79 Stat. 46, sec. 403 (4) (c)).
2. Appalachian Regional Development Act of 1965 (79 Stat. 21, sec. 402).
3. National Technical Institute for the Deaf Act (79 Stat. 126, P.L. 89-36).
4. Housing and Urban Development Act of 1965 (P.L. 89-117).
5. National Foundation on the Arts and the Humanities Act of 1965 (79 Stat. 845).
6. Public Works and Economic Development Act of 1965 (79 Stat. 552, P.L. 89-136).
7. High Speed Ground Transportation Study (P.L. 89-220).
8. Water Quality Act of 1965 (79 Stat. 903).
9. Heart Disease, Cancer and Stroke Amendments of 1965 (79 Stat. 926, P.L. 89-239).
10. Mental Retardation Facilities and Community Mental Health Centers Construction Act Amendments of 1965 (P.L. 89-105).
11. Vocational Rehabilitation Act Amendments of 1965 (79 Stat. 1282).
12. Clean Air and Solid Waste Disposal Acts (79 Stat. 997).
13. Medical Library Assistance Act of 1965 (79 Stat. 1095).
14. Veterans Nursing Home Care Act (78 Stat. 500).
15. United States Housing Act of 1937, as amended (42 U.S.C. 1416).
16. National Capital Transportation Act of 1965 (79 Stat. 663).
17. Alaska Centennial—1967 (80 Stat. 82).
18. Model Secondary School for the Deaf Act (80 Stat. 1028).
19. Allied Health Professions Personnel Training Act of 1966 (80 Stat. 1224).
20. Demonstration Cities and Metropolitan Development Act of 1966 (80 Stat. 1259).
21. Federal-Aid Highway Act of 1966 (80 Stat. 766).
22. Air Quality Act of 1967 (81 Stat. 485, P.L. 90-148).
23. Elementary and Secondary Education Amendments of 1967 (Title VII—Bilingual Education Act) (81 Stat. 783, P.L. 90-247).

24. Vocational Rehabilitation Amendments of 1967 (81 Stat. 250, P.L. 90-99).
25. National Visitor Center Facilities Act of 1968 (82 Stat. 43, P.L. 90-264).
26. Juvenile Delinquency Prevention and Control Act of 1968 (82 Stat. 462, P.L. 90-445).
27. Federal-Aid Highway Act of 1968 (P.L. 90-495).
28. Housing and Urban Development Act of 1968 (P.L. 90-448).
29. Health Manpower Act of 1968 (P.L. 90-490).
30. Vocational Rehabilitation Amendments of 1968 (82 Stat. 297, P.L. 90-391).
31. Public Health Service Act Amendment (Alcoholic and Narcotic Addict Rehabilitation Amendments of 1968) (P.L. 90-574, 42 U.S.C. 2681, et. seq.).
32. Vocational Education Amendments of 1968 (P.L. 90-576).

[H. Doc. No. 518, 81st Cong., second sess.]

REORGANIZATION PLAN NO. 14 OF 1950

To the Congress of the United States:

I transmit herewith Reorganization Plan No. 14 of 1950, prepared in accordance with the provisions of the Reorganization Act of 1949. For the purpose of coordinating the administration of labor standards under various statutes relating to Federal construction and public works or to construction with federally financed assistance or guaranties, the reorganization plan authorizes the Secretary of Labor to prescribe appropriate standards, regulations, and procedures with respect to these matters and to make such investigations concerning compliance with, and enforcement of, labor standards as he deems desirable. The purpose is to assure consistent and effective enforcement of such standards.

The plan is in general accord with the recommendations of the Commission on Organization of the Executive Branch of the Government. It constitutes a further step in rebuilding and strengthening the Department of Labor to make it the central agency of the Government for dealing with labor problems.

After investigation I have found and hereby declare that the reorganization contained in this plan is necessary to accomplish one or more of the purposes set forth in section 2(a) of the Reorganization Act of 1949.

There are several laws regulating wages and hours of workers employed on Federal contracts for public works or construction. The "eight hour laws" limit the employment of laborers and mechanics on such projects to 8 hours per day and permit their employment in excess of that limit only upon condition that time and one-half the basic-wage rate is paid for the excess hours. The Davis-Bacon Act provides that the minimum rates of pay for laborers and mechanics on certain Federal public-works contracts shall be those prevailing for the corresponding classes of workers in the locality as determined by the Secretary of Labor. The Copeland anti-kick-back law prohibits the exaction of rebates or kick-backs from workers employed on the construction of Federal public works or works financed by the Federal Government and authorizes the Secretary of Labor to make regulations for contractors engaged on such projects.

In addition to the above statutes, there are several acts which require the payment of prevailing-wage rates, as determined by the Secretary of Labor, to laborers and mechanics employed on construction financed in whole or in part by loans or grants from the Federal Government or by mortgages guaranteed by the Federal Government. These acts are: the National Housing Act, the Housing Act of 1949, the Federal Airport Act, and the Hospital Survey and Construction Act of 1946.

With the exception of the Department of Labor, the Federal agencies involved in the administration of the various acts are divided into two classes: (1) agencies which contract for Federal public works or construction and (2) agencies which lend or grant Federal funds, or act as guarantors of mortgages, to aid in the construction of projects to be built by State or local public agencies or private individuals and groups. The methods of enforcing labor standards necessarily differ between these two groups of agencies.

The methods adopted by the various agencies for the enforcement of labor standards vary widely in character and effectiveness. As a result, uniformity of enforcement is lacking and the degree of protection afforded workers varies from agency to agency.

In order to correct this situation, this plan authorizes the Secretary of Labor to coordinate the administration of legislation relating to wages and hours on federally financed or assisted projects by prescribing standards, regulations, and procedures to govern the enforcement activities of the various Federal agencies and by making such investigations as he deems desirable to assure consistent enforcement. The actual performance of enforcement activities, normally including the investigation of complaints of violations, will remain the duty of the respective agencies awarding the contracts or providing the Federal assistance.

Since the principal objective of the plan is more effective enforcement of labor standards, it is not probable that it will result in savings. But it will provide more uniform and more adequate protection for workers through the expenditures made for the enforcement of the existing legislation.

HARRY S. TRUMAN.

THE WHITE HOUSE, March 13, 1950.

REORGANIZATION PLAN No. 14 OF 1950

(Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949)

LABOR STANDARDS ENFORCEMENT

In order to assure coordination of administration and consistency of enforcement of the labor standards provisions of each of the following Acts by the Federal agencies responsible for the administration thereof, the Secretary of Labor shall prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies, and cause to be made by the Department of Labor such investigations, with respect to compliance with and enforcement of such labor standards, as he deems desirable, namely: (a) The Act of March 3, 1931 (46 Stat. 1494, ch. 411), as amended; (b) the Act of June 13, 1934 (48 Stat. 948, ch. 482); (c) the Act of August 1, 1892 (27 Stat. 340, ch. 352), as amended; (d) the Act of June 19, 1912 (37 Stat. 137, ch. 174), as amended; (e) the Act of June 3, 1939 (53 Stat. 804, ch. 175), as amended; (f) the Act of August 13, 1946 (60 Stat. 1040, ch. 958); (g) the Act of May 13, 1946 (60 Stat. 170, ch. 251), as amended; and (h) the Act of July 15, 1949 (ch. 338, Public Law 171, Eighty-first Congress, first session).

IMPORTS INTERPRETATION

Mission, namely: The Dept. is charged, among other things, with administering and enforcing statutes designed to advance the public interest by promoting the welfare of the wage earners of the U.S., improving their working conditions, and advancing their opportunities for profitable employment.

PUBLIC LAW 87-581, 87TH CONGRESS, H.R. 10786, AUGUST 13, 1962

AN ACT To establish standards for hours of work and overtime pay of laborers and mechanics employed on work done under contract for, or with the financial aid of, the United States, for any territory, or for the District of Columbia, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Work Hours Act of 1962" and title I may be cited as the "Contract Work Hours Standards Act."

SEC. 2. As used in this Act, the term "this Act" means the Work Hours Act of 1962 except in title I, where it means the Contract Work Hours Standards Act.

TITLE I—CONTRACT WORK HOURS STANDARDS ACT

SEC. 101. As used herein, the term "Secretary" means the Secretary of Labor, United States Department of Labor.

SEC. 102(a) Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor in his performance of work on any contract of the character specified in section 103 shall be computed on the basis of a standard workday of eight hours and a standard workweek of forty hours, and work in excess of such standard workday or workweek shall be permitted subject to the provisions of this section. For each workweek in which any such laborer mechanic is so employed, such wages shall include compensation, at a rate not less than one and one-half times the basic rate of pay, for all hours worked in excess of eight hours in any calendar day or in excess of forty hours in the workweek, as the case may be.

(b) The following provision shall be a condition of every contract of the character specified in section 103 and of any obligation of the United States, any territory, or the District of Columbia in connection therewith;

(1) No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic, in any workweek in which he is employed on such work, to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek except in accordance with the provisions of this Act; and

(2) In the event of violation of the provisions of paragraph (1), the contractor and any subcontractor responsible therefor shall be liable to such affected employee for his unpaid wages and shall, in addition, be liable to the United States (or, in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory) for liquidated damages as provided therein. Such liquidated damages shall be computed, with respect to each individual employed as a laborer or mechanic in violation of any provision of this Act, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by this Act. The governmental agency for which the contract work is done or by which financial assistance for the work is provided may withhold, or cause to be withheld, subject to the provisions of section 104, from any moneys payable on account of work performed by a contractor or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as herein provided.

SEC. 103. (a) The provisions of this Act shall apply, excepts as otherwise provided, to any contract which may require or involve the employment of laborers or mechanics upon a public work of the United States, of any territory, or of the District of Columbia, and to any other contract which may require or involve the employment of laborers or mechanics if such contract is one (1) to which the United States or any agency or instrumentality thereof, any territory, or the District of Columbia is a party, or (2) which is made for or on behalf of the United States, any agency or instrumentality thereof, any territory, or the District of Columbia, or (3) which is a contract for work financed in whole or in part by loans or grants from, or loans insured or guaranteed by, the United States or any agency or instrumentality thereof under any status of the United States providing wage standards for such work: *Provided*, That the provisions of section 102, shall not apply to work where the assistance from the United States or any agency or instrumentality as set forth above is only in that nature of a loan guarantee, or insurance. Except as otherwise expressly provided, the provisions of the Act shall apply to all laborers and mechanics, including watchmen and guards, employed by any contractor or subcontractor in the performance of any part of the work contemplated by any such contract, and for purposes of this Act, laborers and mechanics shall include workmen performing services in connection with dredging or rock excavation in any river or harbor of the United States or of any territory or of the District of Columbia, but shall not include any employee employed as a seaman.

(b) This Act shall not apply to contracts for transportation by land, air, or water, or for the transmission of intelligence, or for the purchase of supplies or materials or articles ordinarily available in the open market. This Act shall not apply with respect to any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat. 2036; 41 U.S.C. 35-45).

SEC. 104. (a) Any officer or person designated an inspector of the work to be performed under any contract of the character specified in section 103, or to aid

in the enforcement or fulfillment thereof shall, upon observation or investigation, forthwith report to the proper officer of the United States, of any territory or possession, or of the District of Columbia, all violations of the provisions of this Act occurring in the performance of such work, together with the name of each laborer or mechanic who was required or permitted to work in violation of such provisions and the day or days of such violation. The amount of unpaid wages and liquidated damages owing under the provisions of this Act shall be administratively determined and the officer or person whose duty it is to approve the payment of moneys by the United States, the territory, or the District of Columbia in connection with the performance of the contract work shall direct the amount of such liquidate damages to be withheld for the use and benefit of the United States, said territory, or said District, and shall direct the amount of such unpaid wages to be withheld for the use and benefit of the laborers and mechanics who were not compensated as required under the provisions of this Act. The Comptroller General of the United States is hereby authorized and directed to pay directly to such laborers and mechanics, from the sums withheld on account of underpayment of wages, the respective amounts administratively determined to be due, if the funds withheld are adequate, and, if not, an equitable proportion of such amounts.

(b) If the accrued payments withheld under the terms of the contracts, as aforesaid, are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages required pursuant to this Act, such laborers and mechanics shall, in the case of a department or agency of the Federal Government, have the rights of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

(c) Any contractor or subcontractor aggrieved by the withholding of a sum as liquidated damages as provided in this Act shall have the right, within sixty days thereafter, to appeal to the head of the agency of the United States or of the territory for which the contract work is done or by which financial assistance for the work is provided, or to the Commissioners of the District of Columbia in the case of liquidate damages withheld for the use and benefit of said District. Such agency head or Commissioners, as the case may be, shall have authority to review the administrative determination of liquidated damages and to issue a final order affirming such determination; or, if it is found that the sum determined is incorrect or that the contractor or subcontractor violated the provisions of this Act inadvertently notwithstanding the exercise of due care on his part and that of his agents, recommendations may be made to the Secretary that an appropriate adjustment in liquidated damages be made, or that the contractor or subcontractor be relieved of liability for such liquidated damages. The Secretary shall review all pertinent facts in the matter and may conduct such investigations as he deems necessary, so as to affirm or reject the recommendation. The decision of the Secretary shall be final. In all such cases in which a contractor or subcontractor may be aggrieved by a final order for the withholding of liquidated damages as hereinbefore provided, such contractor or subcontractor may, within sixty days after such final order, file a claim in the Court of Claims: *Provided, however,* That final orders of the agency head, the Commissioners of the District of Columbia or the Secretary, as the case may be, shall be conclusive with respect to findings of fact if such findings are supported by substantial evidence.

(d) Reorganization Plan Numbered 14 of 1950 (15 F.R. 3175; 64 Stat. 1267) shall be applicable with respect to the provisions of this Act, and section 2 of the Act of June 13, 1934, as amended (48 Stat. 948, 54 Stat. 1236, 63 Stat. 108; 40 U.S.C. 276c), shall be applicable with respect to those contractors and subcontractors referred to therein who are engaged in the performance of contracts subject to the provisions of this Act.

Sec. 105. The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment of the conduct of Government business.

Sec. 106. Any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed in the performance of any work contemplated by any contract to which this Act applies, who shall inten-

tionally violate any provision of this Act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine of not to exceed \$1,000 or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

TITLE II—MISCELLANEOUS AND EFFECTIVE DATE

SEC. 201. The proviso of section 23 of the Act of March 28, 1934 (48 Stat. 509, 522), as amended, is hereby amended to read as follows: "*Provided*, That the regular hours of labor are hereby established at not more than eight per day or forty per week, but work in excess of such hours shall be permitted when administratively determined to be in the public interest: *Provided further*, That overtime work in excess of eight hours per day or in excess of forty hours per week shall be compensated for at not less than time and one-half of the basic rate of compensation, except that employees subject to this section who are regularly required to remain at or within the confines of their post of duty in excess of eight hours per day in a standby or on-call status shall be paid overtime rates only for hours of duty, exclusive of eating and sleeping time, in excess of forty per week."

SEC. 202. (a) Section 1499 of title 28, United States Code, is hereby amended to read as follows:

"§ 1499. Liquidated damages withheld from contractors under Contract Work Hours Standards Act

"The Court of Claims shall have jurisdiction to render judgment upon any claim for liquidated damages withheld from a contractor or subcontractor under section 104 of the Contract Work Hours Standards Act."

(b) The Court of Claims shall continue to have jurisdiction to render judgment upon any claim for a penalty withheld from a contractor or subcontractor under section 324 of title 40, United States Code, in connection with any contract subject to said section existing on the effective date of this Act, or thereafter entered into pursuant to invitations for bids that are outstanding at the time of the enactment of this Act.

SEC. 203. The following statutes are hereby repealed: Sections 1 and 2 of the Act of August 1, 1892 (27 Stat. 340; 40 U.S.C. 321, 322), as amended by the Act of March 3, 1913 (37 Stat. 726); sections 892 and 893 of the Act of March 3, 1901 (31 Stat. 1334; D.C. Code, 1961 edition, secs. 22-3407, 3408); the Act of June 19, 1912 (37 Stat. 137; 40 U.S.C. 324, 325), as amended by the Act of June 25, 1948 (62 Stat. 989); that portion of the Naval Service Appropriation Act, 1918 (Act of March 4, 1917, 39 Stat. 1192), which is codified as section 326 of title 40 of the United States Code (1952 edition); and section 303 of the Second Supplemental Defense Appropriations Act, 1941 (54 Stat. 884; 40 U.S.C. 325a). The provisions of such statutes shall, notwithstanding, continue to apply with respect to contracts existing on the effective date of this Act or entered into pursuant to invitations for bids that are outstanding at the time of the enactment of this Act.

SEC. 204. This Act shall take effect sixty days after its enactment, but shall not affect any contract then existing or any contract that may thereafter be entered into pursuant to invitations for bids that are outstanding at the time of the enactment of this Act.

Approved August 13, 1962, 11 :46 a.m.

Mr. DANIELS. Thank you, gentlemen, it is a pleasure to have your testimony this morning, and give my regards to Mr. Haggerty.

Mr. MASON. Thank you, Mr. Chairman.

Mr. DANIELS. Without objection I will place in the record the statements of Messrs. Lyons, Carlaugh, and Fosco.

(The statements referred to follow:)

STATEMENT OF JOHN H. LYONS, GENERAL PRESIDENT, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS

For some six years or longer the problem of how to set construction safety standards and enforcement seems to have been resolved as something better to be done tomorrow than today.

Recently, it has taken the lives of 88 in West Virginia, once more to dilate the fact that safety is no accident and that safety must be worked on and at by all parties or it is likely to be but a minimum of safety and a maximum of danger.

I say this because I have observed how mere straws in the wind have been grasped by those who openly are unwilling to observe safety and who wish to use as many methods as possible to forestall enactment of meanful ways for reducing the loss of life and the maiming of those who are so sorely needed to carry on the job of building a new America.

Some of the excuses—and I use the word advisely—to fight the good cause of construction safety can be listed somewhat along the following lines:

1. We have a wonderful safety program. The only thing is it must be allowed to work without governmental interference and guidance.
2. The federal establishment must not tell the states what to do and how to do it.
3. If there is to be a safety bill, we will be for it. The job then really is to see to it that there will be no such bill.

Inasmuch as safety just doesn't make exciting headlines, the glamour of enacting safety legislation somehow is lacking. But the hard facts and figures are such that they need to be brought to light here and now.

Of the more than fifteen thousand wage-earners killed or injured on the job each year, I assure you the Iron Workers are represented. The story is only complete when we add the injuries and disabilities of these men highly skilled in their trade. This does not include the economic loss in a presently fully employed industry.

If we turn the pages back 60 years, we find that President Taft even in those days was trying to bring some sense into the jungle of unsafe working conditions. I will not say that nothing has happened since then but I will say that any changes have been few and greatly lacking in consequences. This, then, is why we are here today once more trying to get results. Somehow I am convinced that it is this Ninety-first Congress that will do something.

The bills before your committee are clear and uninvolved. Many are saying we have the votes for passage in both houses. This I believe.

In some states, there are far more game wardens than there are work safety inspectors. This has led some to observe that perhaps after all, safety is "for the birds." If such remark will be answered with the cry of "levity," let us look at the facts and figures straight-on.

I am including with my statement a chart showing just what the states really are doing or not doing in the wide range of safety. You will note construction safety inspectors are close to the vanishing point. Only four states have construction safety inspectors.

As recently as 1967 when reports were compiled and which included nine fields of employment, construction ranked highest with 71 accidental work deaths per 100,000. I am including the chart on this phase along with this statement.

Last year, this proposed legislation narrowly missed passage in the House. There were 260 votes for the bill, 137 in opposition. I think we can expect as many or more votes this time with reasonable expectation that a rule will be granted for House consideration.

Inasmuch as a two-thirds vote is required for suspension of the rules, the construction safety bill needed only four more votes for a two-thirds passage in 1968. Clearly a majority vote was present.

Now, before the Calendar is heavily loaded with a volume of reported bills is the appropriate time for conclusive action. In the Senate, Labor Chairman Yarborough and others personally inspected the catastrophe at Crystal City last year. I am convinced the Senate also is prepared to move this safety bill once the House has acted. Surely the story has been said and resaid.

Last October 21, as a reminder to those who may have missed it, there were some rather clear phases in the radio remarks of candidate Richard Nixon who talked of safety. His quotes on safety were:

"What can Labor expect from a Nixon Administration? . . .

" . . . Leadership by example. I believe better occupational safety laws are needed on both federal and state levels. A good place to begin would be proper and uniform safety standards on all federal projects."

It is evident from his own words that the President stands ready to redeem his pledge.

We cannot assert that because this legislation becomes law that absolute safety will result. Nor can anyone else. What we can say is that many here today will be here tomorrow and that is what this program we are endorsing is all about.

Just the other day, the first aquanaut died on the first submersion. It happened that a hose line sprang a leak or some other technical flaw was involved. But whatever it was, can anyone say it would have happened with proper safety precautions? Maybe the answer is to pass this bill and find out in advance, not postmortem, what happens and what can be prevented.

Safety is a broad term. Safety is an activity built into the Atomic Energy Act because hazard is a prime and present danger.

There is railroad safety, a federal enterprise. And there is drug safety. There are federal health standards, including food, safety boards in transportation in the air and elsewhere. All these and many others are based upon federal action. And still, construction safety is nowhere to be found in the list. It's like the weather—not much has been done about it.

As I look over the list of committee members, it is evident this bill will be reported. And with the showing last year on suspension of the rules, I regard the Rules Committee's action as evident.

The Iron Workers endorse this measure 100 percent and ask that it be given early action.

In order to make clear just what confronts construction workmen, including Iron Workers, even in a state where safety inspectors are on the job, I offer some brief facts and figures. Without adequate and timely inspection, the results can be anyone's guess.

Of 14 crafts listed by the New York State Department of Labor, the Iron Workers rank fourth in accident frequency and sixth in severity rate. I include that portion of the report.

INJURY FREQUENCY RATES BY TYPES OF CONTRACTOR, NEW YORK, 1964

Type	Frequency rate	Severity rate
Glazing, glasswork	18.0	256
Floor laying	18.4	2,175
Painting, decorating	20.0	2,890
Terrazzo, tile, marble	25.7	366
Excavating, foundation	26.0	1,966
Plumbing, heating	26.0	987
Electrical work	27.7	1,195
Carpentering	31.0	2,151
Masonry, stonework	33.5	2,280
Roofing	40.6	3,267
Structural, steel erection	41.1	2,238
Concrete work	43.1	5,070
Plastering, lathing	47.7	1,679
Demolition	60.4	8,955

STATEMENT OF GENERAL PRESIDENT EDWARD F. CARLOUGH, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION

My name is Edward F. Carlough, General President of the Sheet Metal Workers' International Association, representing approximately 140,000 members and 500 local unions throughout the United States of America. I wish to take this opportunity on behalf of my associates to go on record supporting the enactment of H.R. 3290, a bill designed to protect the construction workers on Federal job sites.

A great deal of testimony has been submitted regarding cost factors, percentages of man hours lost, slow down of production, deaths and disabilities resulting from accidents based predominantly on the total lack of effective safety precautions in the industry.

Neil J. Haggerty, President of the Building and Construction Trades Department, has submitted an exhaustive and thorough statement regarding a need for legislation in the building industry. I see no point in belabouring this august body with repetitious material and information. I do, however, wish to reiterate my position on behalf of the Sheet Metal Workers' International Association in support of H.R. 3290. I would strongly urge favorable action on this legislation.

STATEMENT OF PETER FOSCO, GENERAL PRESIDENT, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

Mr. Chairman: My name is Peter Fosco. I am President of the Laborers' International Union of North America, which has a membership of over a half of a million members, most of whom make their living in the building and construction trades industry.

I appreciate the opportunity of appearing before you to support H.R. 3290, the Construction Safety Bill. It has long been my priority position to work in the interest of health, safety and accident prevention programs. I wish to also commend the Subcommittee for calling these hearings to fully gather pertinent information concerning this proposed legislation, which in my opinion is a giant step forward in providing adequate protection against fatal accidents and disabling injuries in at least that portion of our construction industry in the Federal area or the Federally-assisted programs.

For years, we have had the experience of working with the Corps of Engineers on Federally-inspected programs and the Bureau of Reclamation. In those programs, we enjoy the experience of working under reasonable safety standards and effective enforcement. In both programs, we have found that the severity and frequency rate of accidents has gone down remarkably. This record speaks for itself in the interest of our people where they have had experience with standards and enforcement under the protection of the Federal Government.

In addition to the on-the-job safety program by the Federal Agencies and the enforcement of such reasonable rules and regulations, we also find representatives of these groups participating in safety conferences at the state and area basis, along with representatives of management and labor from the construction industry.

When it comes to describing our experience at the state and local level concerning accident prevention programs in the construction industry and the enforcement of such regulations, it is almost like describing day and night. In some areas, there are reasonable programs that are periodically reviewed and where enforcement is strengthened due to the cooperation of organized management and organized labor.

We must point out, however, that there are several areas where rules and regulations are few and far between and where enforcement is practically nonexistent. We also have found that a wide difference of attitude toward accident prevention exists among employers. We are proud and happy to be connected with many fine employers in this Country among the organized groups that are also affiliated with the National Safety Council. In such instances, we find programs of health, safety and accident prevention given equal priority and attention as management does to the quality and quantity of work. It is sad to report, however, that in many instances we find contractors who pay particular attention to the quantity of work, but have little regard to the quality and absolutely no concern for preventive accidents. They may think they are concerned, but they have no concrete program to reduce accident rates through their foreman or other appropriate personnel.

Admittedly, the construction industry is a hazardous one. But it need not be as hazardous and dangerous as the recent statistics on fatalities and disabling injuries reveal. Where the contracting authority demands a construction safety program and where these reasonable rules and regulations are enforced, we are confident that the tremendous annual toll in accidental deaths, injuries and sickness can be substantially reduced. This should be done, not only in the name of humanity, but also in consideration of millions of wasted dollars each year. This is why there must be uniform standards to provide for accident prevention and health protection for the men who work in this industry.

In several classifications of construction, the members of the Laborers' International Union suffer both as to the frequency and severity of accidents. This is why the International Union and I, as General President, assigned top priority to safety, health and accident prevention in all of our activities. We are increasing our abilities and resources at all institutional levels to increase correspondingly an educational program in the field of health, safety and accident prevention.

We are urging and insisting more local unions join the National Safety Council and urging them to use all mediums of communication to the membership in cooperating with all of the component parts of the construction industry for an overall safety program in each area.

We are currently spending thousands of dollars for medical research information on what is causing the ill health and premature deaths among our hard rock miners as it pertains to free air and compressed air tunnel construction. It will be our intention to place such information into the hands of such individuals and associations that have an interest in the well being of the people who are our members performing this type of construction. It is our ambition to give all possible protection and to increase safeguards and procedures when and how science makes this possible.

We have, in the past, and will continue to meet with the other component parts of the construction industry or contracting agencies and such interested authorities who can make contributions to the field of safety and accident prevention in this industry. We know that the severity and the frequency rate can and must be improved, but we do believe most sincerely that the industry needs assistance in really attacking the problem of accident prevention in construction. We further believe that this Bill, H.R. 3290, goes a long way towards this end.

Mr. DANIELS. Our next witness is Mr. Harry M. Philo, from Detroit, Mich.

I notice that you have a very voluminous statement here, and because of our limited time I will ask you sir, to submit this statement for the record, and give you the remaining time to summarize the views contained in your statement.

(The statement referred to follows:)

STATEMENT OF HARRY M. PHILO, DETROIT ATTORNEY AND CO-AUTHOR OF THE
SAFETY REFERENCE WORK LAWYERS DESK REFERENCE

Mr. Chairman and members of the Committee: I want to thank the committee for the opportunity to appear before the committee in support of all legislative attempts to lessen the tragic injury and death toll in construction.

1. The Dupont Company has proven in the last twenty-five years that construction can be undertaken in a way which will greatly minimize accidental injury and death.

2. If construction is to be done safely, then it must be made more expensive to proceed with the undertaking in an unsafe way.

3. The legislatures and the courts have historically given owners who are undertaking construction a legal license to kill construction workers.

4. The consequences of the resulting immunity are:

- (a) safety codes of a pathetically low level;
- (b) a paucity of trained construction safety engineers;
- (c) inadequate bid specifications;
- (d) sixty times the reasonably possible injury rates;
- (e) price fixing and conspiracies in restraint of trade by giant competitors in the construction field aimed at minimizing safety expenditures.

5. We need massive federal legislation in the following areas:

- (a) federal minimum workmen's compensation standards;
- (b) a federal declaration that hold harmless agreements between owners and contractors are against public policy;
- (c) a statutory bar to major safety requirements being part of the bid price. They must be cost plus items above the bid price.
- (d) a federal academy to train safety engineers on a crash basis;
- (e) a federal employers' liability act for construction workers.

I attach a definitive analysis of the state of the law and safety sources. These include:

Revoke the Legal License to Kill Construction Workers
Chapter XVIII of Lawyers Desk Reference 1969-1970, Construction and Demolition Injury Investigation

A condensed version of my address to the Construction section of the 1967 National Safety Congress—What's Wrong with Construction Safety in the United States?

Revoke the Legal License To Kill Construction Workers

INTRODUCTION

More than 2,700 construction workers are killed and 250,000 injured in the course of their employment annually in the United States.¹ This is a national disgrace and primarily caused by the failure of lawyers, judges and legislatures, as social architects, to meet their responsibility to fashion the law in such a way as to minimize the conflicts in construction and prevent the hazards which exist in this industry from causing injury or death.

The social responsibility for reducing the 2,700 deaths and 250,000 disabling injuries annually in construction lies not only with lawyers, judges and legislatures, but primarily with the plaintiff's trial bar. This tragic toll is mute testimony to its past inadequacies and failures.

There is no reason for serious construction injuries and deaths. The owners who undertake construction carefully through outside contractors can minimize the risks which inhere in the operation. The DuPont Corporation has had some two million construction workers on its projects in the last twenty years and if their rate determined the national total yearly there would only be 45 construction deaths each year nationally and 4300 injuries.²

Construction workers are injured and killed because of illogical, unwarranted and unconstitutional immunity to those who profit by unsafe construction; the owners, the contractors, the architects and engineers, and the distributors of unsafe equipment. Common law courts have failed to understand that construction accidents can be *eliminated*, but that their elimination is a sophisticated task and the courts' grants of immunity is the greatest single hindrance to construction safety, that the courts are incapable legally and practically of framing rules of behavior that amount to rules of law simply because they do not know anything about accident prevention in construction.

In many jurisdictions, the courts have denied plaintiffs due process and equal protection of the law by granting immunity to employers of contractors from suit by injured employees of the contractor while requiring the remainder of society to use due care. As soon as the courts adopt the simple common law rule which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care or to govern his actions as not to unreasonably endanger the person or property of others, then liability costs will exceed accident prevention costs on the graphs and safety will result.³

If our common law develops as it must and places legal liability on those whose lack of care causes construction injuries and death, then the death toll will be less than 100 each year and the injury toll would be less than 10,000 annually. This has begun to happen.

In the past two years there have been several important decisions revoking the legal license of principals,⁴ architects,⁵ and insurance companies⁶ to kill construction workers for adopting inadequate safety specifications or allowing sloppy performance and in one instance, an appellate court approved punitive damages against an owner who knowingly adopted inadequate specifications and who knowingly allowed negligent performance.⁷

In a recent case, *Gowdy v. United States*⁸ the United States as the landowner of a lighthouse in Muskegon Harbor was held liable for the damages sustained

¹ This figure has increased since 1961 and the latest figures indicate that they may be higher than 2,700. See Statistical Abstract of the United States 1966, 87th ed. U.S. Dept. of Commerce, p. 245. Another figure which indicates the seriousness of the problems is that contract construction industries had frequency rates twice as high and severity rates three times as high as manufacturing. See Injury Rates: By Industry 1964 and 1965 BLS Report No. 342, p. 18.

² See: Specifying Safety In Contracts by Frank E. McElroy, National Safety News, April, 1965.

³ For an analysis of how this safety will follow see Graphic Trees Help Study of Reliability v. Cost, Product Engineering, Jan. 30, 1967 p. 48.

⁴ McDonald v. City of Oakland, 63 Cal. Rptr. 593 (1967); Van Arsdale v. Hollinger et al., 66 Cal. Rptr. 20, 437 P 2d 508 (1968); Giarrantano v. The Weitz Co. Inc., Iowa 147 N.W. 2d (1967); Associated Engineers Inc. v. Job, 370 F 2d 633 (C.C.A. 8) (rehearing denied 1967); Hamilton v. Armstrong Cork Co., 371 F 2d 139 (C.C.A. 5, 1967).

⁵ Miller v. DeWitt, 226 N.E. 2d 630 (Ill. 1967); Holt v. A. L. Salzman & Sons, 232 N.E. 2d 537 (Ill. 1967); Nauman v. Harold K. Beecher & Associates, 19 Utah 2d 101, 426 P 2d 621 (1967); Matlow v. Tucker, Sadler & Bennett, Architects & Eng., Inc., 54 Cal. Rptr. 174 (1966).

⁶ Nelson v. Union Wire Rope Corporation, 199 N.E. 2d 769 (Ill. 1964).

⁷ Hennigan v. City of Philadelphia, et al. — F. Supp. — (ED. Pa 1967).

⁸ 271 F. Sup. 733 (W.D. Mich. 1967).

by an independent contractor's employee's fall from the unguarded lighthouse platform.

"The United States contracted with the Whittaker Electric Co. to repair a lighthouse located on a breakwater. Gowdy, one of Whittaker Electric's employees, had a number of jobs to perform in conjunction with the repairs, including assisting in the removal and replacement of the steel door of the machinery room (located in the lighthouse) at the beginning and end of each working day. The door was removed and replaced through the use of a chain hoist which was connected, by an employee to a davit located on the edge of the roof of the lighthouse. There was a working platform on the east side of the roof in a rectangular area four by eight feet, in which area it was possible for one to stand and walk. On day of the accident, Gowdy went to the roof, as he had done eight to ten times before that day, to operate the hoist to replace the machinery room door. As the hoist was operated, the davit took up slack in order to lift the door; it could also be let-off to lower the door. To operate the lift in this manner, Gowdy had to stand about one foot from the edge of the roof, lean forward toward the edge of the roof, and reach over his head with one of his hands to grasp the end of the ratchet hoist handle. The ratchet was about eighteen inches long. Because of his height, Gowdy was only able to reach approximately three inches of the handle of the ratchet. While in this position, after having taken up the slack in the chain, and as he was attempting to operate the handle of the ratchet hoist to raise the steel door so that it could be swung into position, and while the door was resting on its bottom edge, Gowdy lost his balance and fell from the top of the roof to the concrete foundation below. Gowdy sustained serious injuries including comminuted fractures of both heels which caused, besides pain and suffering, hospitalization and treatment over an extended period of time, loss of earnings, and medical expenses.

The trial was held before the court without a jury. The court awarded damages of \$289,248.82.

Gowdy v. U.S. is a landmark case because it is the first common law decision which states with clarity for all to read that the duty of an owner employing an independent contractor to employees of the independent contractor is simply the duty of due care.

What is important also, is that the trial judge did it with a criticism of "open sesame" phrases and "honorary degrees" pointing out that some courts in situations where there is fault resulting in harm to another have excused the wrongdoer by saying there was no duty owed by the wrongdoer to the injured party.

But what Judge Fox said with caustic decisiveness was simply a clarification of an early Michigan case involving negligent injury to an employee of an independent contractor by an owner's lack of care.⁹

Judge Fox in citing an earlier Michigan decision said:

"Justice Voelker's admonition to analyze all of the evidence in each case and to avoid uncritical application of general rules is particularly appropriate to the present case, since the thinking inherent in such "open sesame phrases" as whether a danger was obvious, or whether defendant controlled the employees of the independent contractor, or whether there was a duty owing plaintiff from defendant, could make for simple and swift resolution of this case, despite a multitude of facts and circumstances which militate to the contrary.

"Some courts in situations where there is fault resulting in harm to another have excused the wrongdoer from liability by saying there was no duty owed by the wrongdoer to the injured party.

"Cases in which an injured employee of an independent contractor sues a landowner for injuries sustained as a result of claimed negligence on the part of the landowner lend themselves to temptations to simplism. It is important in these cases to distinguish *** between the problem of restricting liability to a negligent party, and the problem of restricting the liability of the defendant even though he was negligent * * *. This distinction * * * is one that is fundamental to an understanding of cases involving personal injuries for open and obvious dangers."¹⁰

⁹ Johnson v. Spear, 76 Mich. 139, 42 N.W. 1092 (1889).

¹⁰ Gowdy, at 739.

The United States was found liable in *Gowdy* because the court as the trier of the facts found factually that the government as a principal employing an independent contractor had not used due care and that the plaintiff was in the "target area of protection", that it was reasonably foreseeable that Mr. *Gowdy* could be injured by that lack of due care.

Although this article is intended to advocate a dramatic change in the law along doctrinal lines, following the *Gowdy* rationale, nevertheless the common denominator and policy goal prevalent throughout will be accident prevention. This policy of reducing job hazards and preventing injury and death will be analyzed in a historical perspective in order to show the reasons for the development of the principal's immunity in construction torts as well as expositing arguments for its eradication in modern day conditions. An attempt will be made to show how duty as a tort concept has been used by those who would keep society in the dark ages and by those who are not capable of understanding, to thwart the development of any meaningful elimination of the construction negligence which causes injury and death.

Finally, a definitive statement of the law of liability will be suggested which might assist to bring about a return to the liability that existed a century ago.

II. HISTORICAL DEVELOPMENT

The general rule as to the non-liability of an employer for physical harm caused to another by the act or omission of an independent contractor, was the original common law rule. The explanation for it most commonly given is that, since the employer has no power of control over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it.

The first departure from the old common law rule was in *Bower v. Peate*,¹¹ in which an employer was held liable when the foundation of the plaintiff's building was undermined by the contractor's excavation. Since that decision, the law has progressed by the recognition of a large number of "exceptions" to the "general rule".¹²

They are so numerous, and they have so far eroded the "general rule", that it can now be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it. As was said in *Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*, "Indeed it would be proper to say that the rule is now primarily important as a preamble to the catalog of its exceptions." (201 Minn. 500, 227 N.W. 226 (1937))

Most authorities¹³ contend that the theory of respondeat superior and the exceptions to that rule, of which the above is an example, is of very recent origin.

The very early common law developed with the premise that an individual should not be responsible for another person's tortious conduct.^{13a}

This early immunity was compromised with the doctrine of respondeat superior. This theory emerged due to the recognition that the master could more easily compensate the plaintiff than his servant.¹⁴

The early Anglo-Saxon law declared this liability as absolute:

"The doer of a deed was responsible whether he acted innocently, because he was the doer; the owner of an instrument which caused harm was responsible, because he was the owner, though the instrument had been wielded by a thief;

¹¹ Q.B.D. 321 (1876).

¹² These exceptions are stated in the Restatement (second) Torts Sections 410-429.

¹³ Prosser, *Law of Torts*, 3rd Ed., 1964, pages 480-481.

^{13a} "However, our common law when it took shape in Edward I's day did not, unless we are much misled, make masters pay for acts that they had neither commanded nor ratified. Had it done so, it would have 'punished' a man for an offence in which he had no part." See Pollack & Maitland, *The History of English Law*, Vol. II, pp. 533-34, citing *Bogode Clare's case* (1290). Rot. Parl. i. 24.

¹⁴ See Wigmore, *Responsibility for Tortious Acts: Its History—I*, 7 Harv. L. Rev. 315, 330, for the discussion of the historical antecedents of the masters liability for harms connected with the servant. Also, Morris, *The Torts of an Independent Contractor*, 29 Ill L. Rev. 334 (1934), for an excellent analysis of the development respondeat superior and the entrepreneur theory of liability.

the owner of an animal, the master of a slave, was responsible because he was associated with it as owner, as master. . . ."¹⁵

The development of respondeat superior and its attendant outgrowth of employer immunity is a good example of common law judges being willing to compromise rules in order to satisfy public policy.¹⁶

The prevalent economic thought at the time was characterized by laissez-faire and the judicial encouragement of individualistic industrial enterprise whose burdens were made as light as possible in order to facilitate general expediency.¹⁷

As late as 1685, the common law judges were still following the medieval rule that the master was not responsible for the torts of his servant.¹⁸

It was not until 1691 that the rule of respondeat superior was actually judicially enunciated. In *Boston v. Sandford*¹⁹ the issue was whether the owners of a ship were responsible for goods received by the master and spoiled by his negligence. Lord Holt declared that:

"The owners are liable in respect of the freight and as employing the master; for whoever employs another is answerable for him, and undertakes for his care to all that make use of him."²⁰

Holt was basing the employer's liability on the broadest base of convenience and general policy of social duty.²¹

Although a distinction is ascertainable between the early rule of absolute liability for tortious conduct and the vicarious liability of an innocent master for unauthorized torts of his servant,²² a sense of its harshness with respect to the business conditions of the time and a desire to restrict its operation are mainly responsible for the immunity of the employer.

In 1799 the problem of an independent contractor was for the first time clearly presented in *Bush v. Steinman*.²³

In that case, A, having a house, contracted with B to repair it for a fixed sum. B then contracted with C to do the work, and C with D to furnish the materials. The servant of D placed lime in the road in front of A's premises, by reason of which plaintiff's carriage collided with the lime and overthrew it whereby plaintiff was injured. The Court held that A, the owner, was liable in damages to plaintiff, although a satisfactory basis for the decision was not expounded.

However, Chief Justice Eyre, alluding to an earlier decision, said:

"A master having employed his servant to do some work, the servant out of idleness employed another to do it, and that person, in carrying into execution the orders which had been given to the servant, committed an injury to the plaintiff for which the master was held liable. The responsibility was thrown on the principal from whom the authority originally moved. This determination is certainly highly convenient and beneficial to the public. Where a civil injury of the kind now complained of has been sustained, the remedy ought to be obvious,

¹⁵ See Wigmore, *Select Essays in Anglo-American Legal History*, Vol. 3, p. 480. Found in Plucknett, *A Concise History of the Common Law*, 5th Ed., p. 463. Also included in presentation of the historical extract of early Anglo-Saxon Liability is a passage from the laws of Aethelred which indicated this rule of respondeat superior was flexible and was not as harsh as would appear. It read:

"And always the greater a man's position in this present life or the higher the privileges of his rank, the more full shall he make amends for his sins, and the more dearly shall pay for all misdeeds; for the strong and the weak are not alike nor can they bear a like burden, any more than the sick can be treated like the sound. And, therefore, in forming a judgment, careful discrimination must be made between age and youth, wealth and poverty, health and sickness, and the various ranks of life, both in the amends imposed by ecclesiastical authority, and in the penalties inflicted by the secular law. And if it happens that a man commits a misdeed involuntarily or unintentionally, the case is different from that of one who offends of his own free will voluntarily and intentionally; and likewise he who is involuntary agent in his misdeeds should always be entitled to clemency and better terms, owing to the fact that he has acted as involuntary agent." Plucknett at 464.

¹⁶ For a statutory development and trend in this direction see Pollock and Maitland, *supra*, Vol. II, p. 533, N. 1. The practical application and consequences of such a rule were effected by the circumstances surrounding the Industrial Revolution.

¹⁷ This theory is suggested by E. H. Downey, *History of Work Accident Immunity in Iowa* (1912) and Walter F. Dodd, *Administration of Workmen's Compensation* (The Commonwealth Fund, 1938). Found in Larson, *Workmen's Compensation Law*, Vol. 1, p. 26, Footnotes 8 and 9.

¹⁸ *Kingston v. Booth, Skinner*, 228. For a statement of the facts and holding of this case see Wigmore, *Responsibility for Tortious Acts: Its History—II*, 7 Harv. L. Rev. 383, 391 (1894).

¹⁹ 2 Salk 440 (1691).

²⁰ *Id.*

²¹ For a contrary view see Blackstone's *Commentaries*, Vol. I, p. 430.

²² See Hayser, *The Basis of the Immunity of an Employer of an Independent Contractor*.

²³ 1 Ind. L.S. 494, 495-6. The continuity of principle is evident in early English case law.

²⁴ 1 Bos & P 404 (1799).

and the person injured should have only to discover the owner of the house which was the occasion of the mischief not be compelled to enter into concerns between that owner and other persons, the inconvenience of which would be most heavily felt than any which can arise from a circuity of action."²⁴

Justice Brooke added:

"I am of the same opinion. He who has work going on for his benefit, and on his own premises, must be civilly answerable for the acts of those whom he employs. . . . He ought to reserve such control. And if he deprives himself of it, the law should not permit him to take advantage of that circumstance in order to screen himself from an action. . . . The person from whom the authority is originally derived is the person who ought to be answerable, and great inconvenience would follow if it were otherwise."²⁵

Although the struggle to find a legal principle upon which to base a decision is clearly evident, the judges in *Bush v. Steinman* denied the defendant immunity on the grounds of respondeat superior and that an owner of real estate is liable for damages resulting from work negligently done upon his land as well as off.

From 1826 through 1876, the English common law courts, troubled by the sweeping rule of *Bush v. Steinman* in which the principal was held liable on a respondeat superior doctrine for off-premises injuries, whittled away at the rule and gave immunity to the principal employing an independent contractor for off-premises injuries.

After *Bush*, two minor decisions²⁶ followed the rationale enunciated there, but in 1826 in *Laugher v. Pointer*²⁷ the immunity of the owner was first developed.

In that case the owner of a carriage who had hired horses and a driver from a livery stable was there held not responsible for the negligent operation of the carriage by the driver.

The English bench in *Laugher v. Pointer* examined *Bush* and found it wanting in precedential vigor and distinguished it factually. As a result of that decision, decisions which followed *Laugher v. Pointer* also distinguished *Bush* as being concerned only with injuries involving realty.²⁸ The *Bush* rationale was finally discarded and complete insulation was established in *Reedie v. London & N. W. Ry.*²⁹ Baron Rolfe's decision in *Reedie* was simply that the employer could not be made liable on the principles of respondeat superior. What is of vital importance was his acknowledgment that the owner of land might be liable for damage caused by another not his servant. Such liability "must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others."³⁰

Thus the employer was given full insulation and it was not until a quarter of a century later that the judges were able to make inroads upon it.

Moreover, the initial decision in which employer was held liable was based not upon the rationale of a duty of reasonable care, but upon the existence of a responsibility enacted by statute. In *Ellis v. Sheffield Gas Consumer's Co.*³¹ in which plaintiff stumbled over a pile of stones left in a pathway by employees of an independent contractor, the work was illegal because no permit had been procured for its continuance. The Court held the employer liable on the ground that the principal cause of the accident was the illegal act for which the defendant had contracted.

The Courts, however, came to recognize that the liability of the principal had to be much broader and soon evolved a number of exceptional situations where a general employer could not relieve himself from liability for negligent injuries by the simple means of employing an independent contractor.

In *Pickard v. Smith*,³² where a coal dealer negligently left open a coal hole, the doctrine was first promulgated that the duty of the employer in such a situation to take precautions was one he could not avoid by entrusting to another.

²⁴ *Id.* at 408.

²⁵ *Id.* at 409-410.

²⁶ *Sly v. Elgley*; 6 Esp. 6 (1806) where a bricklayer who was employed to clean a sewer left open an excavation into which the plaintiff fell. *Mathews v. West London Waterworks Co.*, 3 Compl. 403 (1813) where contractors laying pipes threw rubbish into street and stage coach was wrecked.

²⁷ 5 B & C 547 (1826).

²⁸ See Comment, Responsibility for the Torts of an Independent Contractor, 39 Yale L.J. 861, 863 N.9.

²⁹ 4 Ex 244 (1849).

³⁰ *Id.* at 256.

³¹ 2 E & B 767 (1853).

³² 10 C.B. (NS) 470, 142 Eng. Rep. 535 (CF1861).

Mr. Justice Williams found that the defendant was under a duty to the plaintiff and asserted that:

"The defendant employed the coal merchant to open the trap in order to put in the coals; and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant; and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted; and the fact of his having intrusted it to a person who also neglected it, furnishes no excuse, either in good sense or law."³³

This was followed by *Gray v Pullen*³⁴ where the employer was made responsible for a contractor's negligence in filling a drain, the theory being that the Act authorizing the defendant to break up the street provided that he must keep it in a safe condition.

The final and most fruitful and forceful decision in negating employer insulation was *Bower v Peate*,³⁵ in which an employer was held liable when the foundation of the plaintiff's building was undermined by the contractor's excavation.

Chief Justice Cockburn placed the employers' responsibility upon the broad ground that if "*a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.*" (Emphasis added)³⁶

The development of the law in America followed the two trends coinciding with the *Bush v Steinman* and *Laugher v Pointer* dichotomy. A number of early decisions held the employer responsible on the *ratio decidendi* that he was the "author" of the work.³⁷ However, the doctrine which was accepted as the prevailing view seemed to be influenced by the rationale of *Laugher v Pointer*.³⁸

The incongruity in the development of the law is that *Bower v. Peate*, standing for the proposition that an employer is liable for injuries caused by the independent contractor's failure to use due care in the performance of work which is "inherently" or "intrinsically dangerous", was given merely lip service by the American Judiciary. A careful analysis of *Bower v. Peate* shows that presumed fault less than the absolute liability theory envisioned by *Rylands v. Fletcher*³⁹ limited its application to certain details of the work; but, as so qualified, made it apply to all transactions wherever likelihood of harm to third persons was reasonably foreseeable.

Chief Justice Cockburn's argument in *Bower v. Peate* was that the "case is therefore an authority for saying that where work is being executed from which

³³ Id. at 480.

³⁴ 5 B & S 970 (1864).

³⁵ For a list of English cases following the rationale of these decisions, see Jolowicz, Liability for Independent Contractors in the English Common Law—A suggestion, 9 Stan. L. Rev. 690, 693, N. 18.

³⁶ 1 Q.B. D. 321 (1876).

³⁷ Id. at 326.

³⁸ In *Lowell v Boston & Lowell RR Corp.* 23 Pick 24 (Mass 1839) the Court stated that the employer was liable because "The work was done for their benefit, under their authority and by their direction. They are therefore to be regarded as the principals, and it is immaterial, whether the work was done under contract for a stipulated sum or workmen employed directly by the defendant's at lay wages. This question was fully discussed and settled in the case of *Bush v Steinman*," (at p. 31). In *Stone v Cheshire R. Co.*, 19 N.H. 427 (1849) the plaintiff was injured by the blasting of a contractor hired by defendant. The court said: "Now in this case the soundness of the decision in *Bush v Steinman* is not questioned nor is there any inconsistency between the two cases. . . . The railroad corporation made a contract with certain persons to construct a part of the railroad. . . . The defendants employed the persons that did the injury, and we are not aware that to such a state of facts the case of *Bush v Steinman* and the other cases in accordance with it, have been held to be inapplicable, or their doctrine considered as unsound." (at p. 441-42).

³⁹ In *Blake v Ferris* 5 N.Y. 48 (1851) the general rule was laid down that an employer is not liable for the tortious acts of an independent contractor or his servants, and *Bush v Steinman* was repudiated as it had been done in England. However, just as in England, the American courts sensing the harshness of the rule in certain cases decided to qualify it with certain measurements, which in actuality reasserted *Bush v Steinman*. A valuable and exhaustive summary of the cases in New York in this area may be found in New York Law Revision Commission Report, Recommendations and Studies 411-688 (1939).

⁴⁰ See Steffen, Independent Contractor and the Good Life, 2 U. Ch. L. Rev. 501, 505 (1934).

danger may arise to others, and it thereby becomes incumbent on the party doing or ordering it to be done to take measures to prevent damage resulting to others, he cannot divest himself of liability by transferring the duty to a contractor."⁴⁰

The "intrinsically dangerous" doctrine,⁴¹ although applied as an exception to the general rule by most courts,⁴² cannot be reconciled with the remaining language of *Bower v. Peate*.

The concept of who was responsible to ensure prevention of injury was summarized by Cockburn in these words:

"There is an obvious difference between committing work to a contractor to be executed from which, if properly done no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise."

An early Michigan decision, *Johnson v. Spear*,⁴³ followed *Bower v. Peate* in theory and held that:

"As between the employer and his employees, it is the duty of the master to furnish suitable machinery, and to see that it is kept in proper repair, and he is bound to exercise reasonable care to prevent accidents. His duty is not discharged by furnishing suitable machinery and appliances in the first instance, and fit and proper for carrying on the business, but he is in duty bound to see that they are kept so. He must exercise reasonable and proper watchfulness as to their condition, and guard against dangers liable to arise from ordinary wear and use from which they may become weakened or unfit for the purpose for which they are supplied. . . .

The principles above enunciated apply to the relation of master and servant. It does not follow, however, that the defendant is not liable for injuries which may be received by those persons employed by his contractor to unload vessels at his dock, if the injuries result from the negligence of the defendant while work is being done upon his premises, and through his fault in not keeping them in a suitable and safe condition, he is liable to any servants of the contractor for injuries resulting to them from defects therein; not because there is any contract obligation between the parties but arising out of his obligation or duty to provide safe appliances for the servants of the contractor to use, and to keep his premises upon which such servants are at work in a reasonably safe condition, whether the contract provides for it or not."⁴⁴

However, just as in England, so too in America, the overwhelming political, economic, and social objective of the early 20th Century was commercial exploitation, more euphemistically stated as progress."⁴⁵

Bower v. Peate was forgotten. Most judicial authority was caught in the wave of expansion and was imbued with the ideas of individualism and then found it convenient to allow the contractor's business to thrive while on the other hand encouraging his employer by shielding him from liability.

With these historical influences and case decisions in mind, we turn to an analysis of why the law of principals employing contractors has not developed in relation to modern day requirements thereby removing the immunity principle completely.

III. MODERN VIEW OF PRINCIPALS EMPLOYING CONTRACTORS

A. Rules in every jurisdiction clouded

When the early legislative attempts resulted in an alienation of the burden of industrial accident losses, it was assumed that the theory underlying the compensation acts would alleviate the onerous situation which existed at the com-

⁴⁰ 1 Q.B.D. 321, at 329.

⁴¹ The first use of the concept "intrinsically dangerous" work seems to be in *Dillion Municipal Corporations* (1st ed. 1872) Sec. 792.

⁴² For a collection of these decisions see 41 Can.L.J.49, 159 (1905) and 66 L.R.A. 941 (1905).

⁴³ 76 Mich 139, 42 N.W. 1092 (1889).

⁴⁴ *Id.* at 142-3.

⁴⁵ This development is described and analyzed in great detail by Arnold, *Theories About Economic Theory*, 172 *Annals of American Academy of Pol. and Social Science* 26, 27 (1934).

mon law. Despite the rationale that the coverage would include only those within the statutory framework (those instances where employer-employee or master-servant relation is present) the general immunity of the principal was retained.

The statutory provisions apply only to those falling within clearly defined categories. While the acts in themselves are specific in their definition of these categories, the great mass of litigation that has developed under these provisions resulted from the effort to apply the definition to a particular fact situation.

In twenty states⁴⁶ the principal employing a contractor is given immunity by a statute which makes him a statutory employer if the activity conducted by the principal is in the trade or business.

In order to come within the test, a determination must be made as to whether or not the particular work resulting in the injury is directly connected with the commercial function of the "statutory employee" as opposed to activities which are ancillary or incidental to that commercial function.

It is understandable that this statutory immunity clouds an otherwise cloudy area of the law and causes the unsophisticated substantial problems in attempting to discern a correct statement of the law. Much of the litigation involving principals employing independent contractors has been under the Federal Tort Claims Act⁴⁸ since the federal government is far and away the largest employer of contractors in dollar volume in any one year. Major agencies employing contractors are the Corps of Engineers, General Services Administration, U.S. Navy, Bureau of Reclamation, Department of Agriculture and the U.S. Coast Guard. The federal government is immune from suit if the tort is willful, if absolute liability is involved, if a discretionary function is involved and the wrongful conduct must be an act or omission of an employee of the federal government. These exceptions have added nothing but confusion.⁴⁹

B. Restatement of torts not definitive

Although the principal has a preferred position it has been gradually whittled away by exceptions which "are so numerous, and that have so far eroded the 'general rule' that it can be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it."⁵⁰

⁴⁶ New Mexico, Nevada, Idaho, Hawaii, S. Carolina, S. Dakota, Vermont, Missouri, Maryland, Massachusetts, Pennsylvania, Connecticut, Kansas, Tennessee, Washington, Louisiana, Kentucky, Virginia, Georgia, and Oklahoma. Connecticut Gen. Stats. Ann. Title 31, Sec. 31-291; Ga. Code Ann. Title 114, Sec. 114-112; Rev. Laws of Hawaii, 1955 (1965 Suppl.), Chpt. 97, Sec. 97-1; Idaho Code, Title 72, Chapter 8, Sec. 72-811; Gen. Stats. of Kansas, 1949, Chpt. 44, Art. 5, Sec. 44-503; Kentucky Rev. Stats. Ann., Chpt. 342, Sec. 342.060; Louisiana Rev. Stat. of 1950, Chpt. 23, Sec. 1061-1063; Ann. Code of Maryland, Art. 101, Sec. 62; Ann. Laws of Mass., Chpt. 152, Sec. 18; Vernons Ann., Missouri Statutes, Chpt. 287, Sec. 287.040; Nevada Rev. Stats., Title 53, Chpt. 616, Sec. 616.085; New Mexico Statutes, 1953 (1967 Pocket Suppl.), Chpt. 59, Sec. 59-10-12.15; Oklahoma Stats. Ann., Title 85, Sec. 11; Purdens Penn. Stats. Ann., Title 77, Sec. 52; Code of Laws of S. Carolina, Vol. 6, Title 72, Chpt. 3, Sec. 72-111 et seq.; S. Dakota Code of 1939, Title 64, Chpt. 64.01, Sec. 64.0108; Tenn. Code of Ann., Chpt. 9, Sec. 50-915; Code of Va., 1950, Title 65, Sec. 65-5 et seq.; Vermont Statutes Ann., Title 21, Sec. 601; Revised Code of Wash., Title 51, Sec. 24.010.

In seven additional states, N. Dakota, Mississippi, Arkansas, Colorado, Illinois, Ohio, and North Carolina, a principal employing a contractor is a statutory employer if that contractor has not secured workmen's compensation insurance. Ark. Stats. 1947 Ann., Vol. 7A, Sec. 81.1306; Colo. Rev. Stats. 1953, Chpt. 81, Sec. 81-9-1; Smith-Hurd Illinois Annot. Stats., Chpt. 48, Sec. 138.1; Mississippi Code Ann., 1942, Chpt. 4, Sec. 6998-04; Gen. Stats. North Carolina, Chpt. 97, Sec. 97-19; North Dakota Century Code, Vol. 12, Chpt. 65-01, Sec. 65-01-02; Ohio—Pages Revised Code Ann., Chpt. 41.

In Texas and Nebraska, the principal is a statutory employer if he subcontracts to avoid workmen's compensation liability. Vernon's Tex. Stat., 1948, art. 8306; Nebr. Rev. Stat., 1943, Secs. 48-101 et seq.

There is no statutory immunity in the great majority of the remaining jurisdictions. Code of Alabama, Recompiled, Title 26, Sec. 253; Alaska Stat., Title 23, Sec. 30.230; Wests Ann. Calif. Codes, Labor Sec. 3353-3357; Delaware Code Ann., Title 19, Chpt. 23, Sec. 2311; Dist. of Columbia Code, Title 36, Sec. 36-501; Burns Indiana Stat. Ann., Sec. 40-2205; Code of Iowa, 1962, Chpt. 85A et seq.; Nev. Stat. Maine, 1954, Chpt. 31, Sec. 1-47; Mich. Stats. Ann., Chpt. 150, Sec. 17.150; Minnesota Stats. Ann., Sec. 176.205; New Hampshire RSA 281-10-15; N.J. Stat. Ann., Title 34, Sec. 15-1-15-40; McKinneys Consol. Laws of N.Y. Ann., Chpt. 74, Sec. 2; Oregon Rev. Stats., Title 51, Sec. 656.154; General Laws of R.I. Ann., Title 28, Sec. 35-58; West Virginia Code, Chpt. 23, Secs. 23-2-6, 23-2-9; Wisconsin Stats Ann., Title 13, Chpt. 102, Sec. 102.06; Wyoming, Sec. 27-49-27-60, W.S. 1957, C. 1967.

⁴⁸ 28 U.S.C. section 1346(h).

⁴⁹ See Federal Tort Claims Act: An Examination of the Rule of Nondelegable Duty, 13 Wayne Law Review 572-580 (1967).

⁵⁰ See Prosser, *Law of Torts* (3 ed. 1964) p. 481—Also *Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co.* 201 Minn. 500, 277 N.W. 226 (1937) and *Van Arsdale v. Hollinger*, supra at 513.

This list of liability imposing exceptions indicates a concern by the judiciary for individual rights. The exceptions are embodied within the framework of the Restatement of the Law of Torts.⁵¹ The exceptions⁵² include: (1) The personal fault of the employer,⁵³ (2) Non-delegable duty of the employer,⁵⁴ and (3) Respondeat superior.⁵⁵

The term "nondelegable duty" is the basic concept underlying the entire catalogue of exceptions to the rule of employer immunity.

Whether the reason for prohibiting the delegation is the inherent hazardous nature of the activity or the broader application of a statutory duty or some special status between the employer and the injured person, liability is imposed because the duty of care which the employer had was one which could not be delegated or contracted away.⁵⁶

This principle has been generally adopted in the Restatement of Torts, Second, Sections 416, 427.

"One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise." *Restatement*, supra, Section 415.

"One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, of which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger." *Restatement*, supra, Section 427.

⁵¹ Restatement (Second), Torts Sec. 409-429 (1905) 2 Harper & James, Torts Sec. 26.11. Each of those categories has numerous exceptions within the group, nonetheless they are generally categorized within this broad classification.

⁵² This involves the landowner-contractor's *active negligence* in such areas as (a) *negligently selecting an independent contractor* (see *Hunt v. McNane*, 141 Fed. 293 (4th Cir. 1905); *Baker v. Scott County Milling Co.* 373 Mo. 1089, 20 S.W. 2d 494 (1929); *Associated Engineers v. Job* 370 F. 2d 633 (C.C.A. 8, 1966); *Mullich v. Bracker*, 119 Mo. App. 332, 97 S.W. 549 (1905); *Jolly Motor Livery Corp. v. Allenberg*, 188 Tenn. 452, 221 S.W. 2d 513 (1949); *Ellis & Lewis v. Warner*, 180 Ark. 53, 20 S.W. 2d 320 (1929); *Fox v. Ireland*, 46 App. Div. 541, 61 N.Y.S. 1061 (1900) *RESTATEMENT (Second) TORTS* Sec. 411 (1965); (b) *providing defective equipment* (see *Brady v. Joy*, 111 La. 1071, 36 S. 132 (1904); *Johnson v. J. I. Case Threshing Mach. Co.* 193 Mo. App. 198, 182 S. W. 7089 (1916); *Mack v. Marshall Field & Co.* 218 N.C. 697, 12 S.E. 2d 235 (1940); *Peters v. Carolina Cotton & Woolen Mills, Inc.* 199 N.C. 753, 155 S.E. 867 (1930); *Risley v. Lenwell*, 129 Cal. App. 2d 608, 277 P. 2d 897 (1954); *Paderick v. Goldsboro Lumber Co.* 190 N.C. 308, 130 S.E. 29 (1928); *Kunh v. P. J. Carlin Const. Co.*, 145 Misc. 892, 278 N.Y.S. 635 (1935); (c) *Negligently giving ambiguous instructions pursuant to the work*. (See *Starr v. Standard-Tolton Milling Co.* (183 Ill. App. 754 (1913); *Board of County Comm'rs. v. Vickers*, 62 Kan. 25, 61 Pac. 391 (1900); *State Highway & Pub. Works Comm'n v. Diamond Transp. Corp.* 226 N.C. 371, 38 S.E. 2d 214 (1946); *Besner v. Central Trust Co.*, 230 N.Y. 357, 130 N.E. 572 (1921); *Humphries v. Kendall*, 195 Ark. 45, 111 S.W. 2d 493 (1937)); and (d) *Negligent failure to exercise control retained by principal over the work* (*Bissel v. Ford*, 176 Mich. 64, 141 N.W. 860 (1913); *Bergquist v. Pentarman*, 46 N.J. Super. 74, 134 2d 20 (1957); *Allen v. Texas Ele. Serv. Co.* 350 S.W. 2d 866 (Tex. Civ. App. 1961); *Giarratano v. The Weltz Co., Inc.* 147 N.W. 2d 824 (Ia 1967); *Quinones v. Township of Upper Moreland*, 293 F. 2d 297 (CCA 3, 1961); *Lpinozzi et al. v. E. J. Lavino and Company*, 243 F. 2d 80 (C.C.A. 3, 1957)).

⁵³ This group concerns those nondelegable duties imposed by statute: e.g. *Hess v. United States*, 282 F. 2d 633 (C.C.A. 9) (1961); *Schmid v. United States*, 273 F. 2d 172 (C.C.A. 7), an excellent example of nondelegable duty under a scaffolding act; *Snyder v. Southern Cal. Edison Co.*, 44 Cal. 793, 285 P. 2d 912 (1955); *John Griffiths & Son v. National Fire Proofing Co.*, 310 Ill. 351, 141 N.E. 739 (1923); *Charter or Franchise* (*Newsome v. Suratt*, 237 N.C. 297, 74 S.E. 2d 732 (1953); *Eli v. Murphy*, 39 Cal. 2d 598, 2PS P2d 756 (1952); *Cotton v. Ship-by-truck Co.* 337 Mo. 270, 85 S.W. 2d 80 (1935); and the common law). (E. G. *Ferguson v. Ashkenazy*, 307 Mass. 197, 29 N.E. 2d 829 (1940) (landlord tenant relationship to provide safe premises); *Blancher v. Bank of Calif.* 47 Wash. 2d 1, 286 P. 2d 92 (1955) (to keep premises safe for business invitees); *Davis v. Summerfield*, 133 N.C. 325, 45 S.F. 654 (1903) (afford support to adjacent property owners). *Van Arsdale v. Hollinger*, supra; *Watkins v. Gabriel Steel Co.* 260 Mich. 692, 245 N.W. 801 (1932); *Janice v. State*, 107 N.Y. Supp. 679, 201 Misc. 920; *U.S. v. Pierce*, 235 F. 2d 466 (C.C.A. 6); *McDonald v. City of Oakland*, 63 Cal. Rptr. 593 (1967).

⁵⁴ If the liability is nondelegable then liability may also be vicarious and the architect, general contractor, and subcontractors are all agents in carrying out nondelegable duties. The principal is therefore vicariously liable on a respondeat superior theory. See the cogent discussion of this responsibility in *McDonald v. City of Oakland*, supra; at pages 597, 598.

⁵⁵ Prosser states that, "these exceptions making the employer liable overlap and shade into one another; and cases are comparatively rare in which at least two of them do not appear." *Prosser Torts*, Sec. 70, at 481.

Liability for breach of a non-delegable duty arises out of the nature of the activity which the employer of the independent contractor or the landowner has initiated. Because the activity is inherently hazardous, the employer or landowner must see to it that the necessary precautions are taken to prevent injury. If he does not see to it himself, he has not exercised due care. He may entrust the duty to a competent contractor, but, if the contractor does not exercise due care, it is the duty of the employer or landowner to do so.

It was expressed by a New York court in this way:

"To this rule, however, there is a distinct and well-grounded exception. If the character of the work creates the danger of injury, then the owner of the property who made the contract *remains* liable to persons who are injured by a failure to properly guard or protect the work, even though the same in its entirety is entrusted to a competent independent contractor."⁵⁷

Later the rule was interpreted in this manner:

"Where one owes a duty to another, he cannot acquit himself of liability by delegating performance of the duty to an independent contractor . . . The Christman Company was principal contractor for the erection of the building on the premises in question, and cannot evade liability by the mere fact it hired Gohr to do excavating with a steam shovel. *It* was bound to see that the excavating, which as a part of its contract it was bound to do, was not done by a subcontractor in a negligent manner."⁵⁸

The rule states, in effect, that he who creates an inherently hazardous situation, be he landowner or general contractor, owes to those endangered by that situation, the utmost vigilance to protect them from the inherent hazards. That requirement of vigilance is placed, first and foremost, upon that person who initiates the hazard.

In effect, the negligence of the independent contractor provides the plaintiff with a theory of recovery additional to or alternative with that of the personal fault of the employer.

A recent North Carolina decision sets out the essential rationale of holding the employer liable for the contractor's liability. In *Dockery v. World of Mirth Shows, Inc.*,⁵⁹ the employer failed to inspect and supervise the operation of the ride. The court stated that the liability of such owner or general concessionaire is based *either* upon his nondelegable duty to maintain a reasonably safe place for the patrons, in accord with which he must answer for the negligence of the sub-concessionaire . . . in rendering the premises and devices unsafe, *or* merely upon the general ground that such owner or general concessionaire is responsible for his breach of duty to keep the premises, including the devices, reasonably safe, without reference to any separate act or omission of the sub-concessionaire.⁶⁰

The liability arising out of the breach of a non-delegable duty is not absolute. In order for there to be liability, an act of negligence, lack of due care, must have occurred. Referring to Section 427 of the *Restatement*, the rule clearly requires the failure to take reasonable precautions.

The Seventh Circuit Court of Appeals examined these issues at length in *Schmid v. U.S.*,⁶¹ the Court said:

"The duty of compliance as an owner of property being repaired or constructed by an independent contractor, designated as 'independent' and 'nondelegable' by the Illinois Supreme Court does not create absolute liability or render the owner an insurer. The statute creates a standard of care for the persons therein designated: namely the obligation that all scaffolds shall be erected in a 'safe, suitable and proper manner'. Any owner who knows or in the exercise of reasonable care could have known that the scaffold was not erected in such a manner becomes liable for noncompliance with the duty placed upon him by the terms of the Scaffold Act. The owner's liability is predicated on his failure of compliance, not on any negligence of an independent contractor."⁶²

Another case following this rationale was *Pierce v. U.S.*,⁶³ where it was shown that the United States contracted with an independent contractor to perform certain alterations to the electrical plant on U.S. premises. The contractor negli-

⁵⁷ *Murphy v. Perlstein*, 76 N.Y. Supp. 657.

⁵⁸ *Wright v. H. G. Christman Co.*, 244 Mich. 208, 215.

⁵⁹ 264 N.C. 406, 142 S.E. 2d 29 (1965).

⁶⁰ *Id.* at 411, 142 S.E. 2d at 33 (emphasis added).

⁶¹ 273 F. 2d, 82.

⁶² *Id.* at 176—See also: *American Exchange Bank of Madison, Wis. v. U.S.* (7 C.C.A. 1958), 257 F. 2d 938, and *Hess v. U.S.*, 80 Sup. Ct. 341, 361 U.S. 314 (1960).

⁶³ 142 F. Supp. 721 (E.D. Tenn., 1955).

gently planned and coordinated its work. The plaintiff alleged that the United States owed to him a non-delegable duty and Judge Dan agreed, formulating that duty in the following familiar terms:

"It is true that an employer is not generally liable for the negligence of an independent contractor. However, there is an exception in those cases where from the nature of the particular work or project, in the natural course of events mischievous consequences can be expected to arise unless means are adopted to prevent it. In such cases the owner-employer is held to be under a nondelegable duty to see that appropriate preventative measures are adopted."⁶⁴

The court found that precautions which would have prevented plaintiff's injuries could have been taken by the defendant but were not. The defendant interposed the defense that the breach of a non-delegable duty was not a negligent or wrongful action or omission as envisaged under the Federal Tort Claims Act. To this defense, the court responded as follows:

"As the doctrine of nondelegable duty is applied in this state it is not a rule of strict liability regardless of fault. Negligence is required, the sole effect of the doctrine being to preclude the owner-employer from escaping liability for negligence which was a proximate cause of injury on the ground that others may have been guilty of negligence, which was also a proximate cause of injury. As in any other case the basis of liability is negligence. This was made perfectly clear in the *Sartain* case, supra, where the Court pointed out (32 Ten. App. 425, 222 S.W. 2d 866) that the rule 'is one requiring ordinary care under the circumstances, which may be a high degree of care actually, but is not a rule of absolute liability regardless of the exercise of ordinary care, so to make the owner an insurer . . .'. Therefore, if the Act requires negligence, the Tennessee cases are in complete conformity with the requirement, liability being imposed upon proof of failure to exercise due care."⁶⁵

The view, persuasively argued in *Pierce*, is that when the danger is great, the care owed is proportionately great and may not be delegated. For this reason, the liability is neither absolute nor necessarily vicarious.

In recent years the United States Supreme Court has had two leading cases involving suits by employees of contractors against owners; they are: *Hess v. United States*,⁶⁶ in which there was eventual recovery after being sent back to the lower court, the court having found that the United States could be liable as owner under Maritime Law, Oregon Law and Federal Tort Claims Law to the employee of an independent contractor on a non-delegable duty theory. *Halecki v. United New York & New Jersey Sandy Hook Pilots Association*,⁶⁷ allowed a suit against a shipward owner under New Jersey Law by an employee of a subcontractor because "special precautions were not taken for a recognized hazard."

While the principal may not delegate the duties, he can require by contract of indemnity that the principal be held harmless in the event of injury because of violation of a duty by both the principal and the contractor. In other words, the principal can delegate the task but this act does not free the principal from the legal duty to third persons. There are however, inroads being made upon this possible indemnity. A recent Michigan statute⁶⁸ has declared it to be against public policy for one to enforce an indemnity agreement where one is held harmless for his own negligence.

Construction is inherently hazardous work; that is, work if negligently done could cause serious injury or death. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious circumstances will arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case free from liability for negligence which he had no reason to anticipate, there is on the other hand good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if such consequences are not in fact prevented no matter through whose default the omission to take the necessary measures for such prevention may arise.

⁶⁴Id at 778.

⁶⁵Id at 734. There is an excellent annotation on the subject of construction site liability and particularly duty of owners to contractor employees by a leading tort writer, Dean Lambert, in 29 NACCA Law Journal 74, particularly beginning at page 982.

⁶⁶80 Sup. Ct. 341 (1960).

⁶⁷358 U.S. 613, 79 S. Ct. 517, 3 L Ed 2d 541.

⁶⁸Michigan Compiled Laws 691.991.

What constitutes inherently hazardous activity is defined by the *Restatement* as follows:

"The rule stated in this Section is commonly expressed by the courts in terms of liability of the employer for negligence of the contractor in doing work which is 'inherently' or 'intrinsically' dangerous. It is not, however, necessary to the employer's liability that the work be of a kind which involves a high degree of risk of such harm, or that the risk be one of very serious harm, such as death or serious bodily injury. It is not necessary that the work call for any special skill or care in doing it. It is sufficient that work of any kind involves a risk, recognizable in advance, of physical harm to others which is inherent in the work itself, or normally to be expected in the ordinary course of the usual or prescribed way of doing it, or that the employer has special reason to contemplate such a risk under the particular circumstances under which the work is to be done."⁶⁹

Clearly, whether an activity is inherently hazardous is a factual question, subject to proof.⁷⁰

Approximately one year ago, the Eighth Circuit Court of Appeals examined this question and answered:

"The question of what type of work is considered inherently dangerous is not always readily soluble. Our research indicates that courts have found no rule of universal application by which they may abstractly draw a line of classification. At least one court has said:

"* * * Generally speaking, the proper test is whether danger "inheres" in performance of the work, and important factors to be understood and considered are the contemplated conditions under which the work is to be done and the known circumstances attending it. It is not enough that it may possibly produce injury. Stated another way, intrinsic danger in an undertaking is one which inheres in the performance of the contract and results directly from the work to be done—not from the collateral negligence of the contractor."

"In North Dakota, the question whether the undertaking is inherently dangerous is primarily a fact question for the jury to determine. *Taute v. J. I. Case Threshing Machine Co.*, supra, 141 N.W. at 136. Judge Register submitted the issue by an instruction which properly included all the facets of the doctrine. The jury was told that 'inherently or intrinsically dangerous means that an element of danger exists in the performance of the contract resulting directly from the work to be done, and not from the negligence of the party actually performing the work; * * *.' The construction of the bridge involved extremely heavy steel girders and the use of machines and men working at a height of 18 to 20 feet, to name only a few factors. A witness for appellee who had been a structural engineer for the North Dakota State Highway Department, stated unequivocally that the construction was inherently dangerous and hazardous. We conclude that the evidence warranted submission of the issue to the jury."⁷¹

Even by having an activity performed by an "independent contractor," a person cannot avoid responsibility when the activity involves unreasonable risk of harm to others.⁷² One recent expression of the California Supreme Court's attitude on the inherently dangerous activities rule is in *Ferrel v. Safeway Steel Scaffolds*,⁷³ holding that there was sufficient evidence to bring the owner within the ambit of the rule and that, although the evidence indicated that the owner was unaware of the dangers involved, such evidence was insufficient to absolve the owner as a matter of law.

This decision was based on the theory of Section 413, comment (b) of the *Restatement of Torts* which has since been revised and now states:

Although the employer at the time he lets the contract has no reason to anticipate that conditions will arise which require special precautions to be taken, if in fact such conditions do arise and he knows or should know of them, he is then required to act in the manner required by the rule stated in this Section.

Prior to *Ferrel*, the concept of "independent contractor" furnished a fair amount of protection to owners and general contractors, who were allowed to

⁶⁹ *Restatement of Torts*, 2nd, Comment (b) to Section 427.

⁷⁰ See *Ross v. Heltner*, 156 So. 2d 869 (1963).

⁷¹ *Schultz v. Lindsay Construction Co.*, 352 F.2d 425, 436 (1967).

⁷² See *Prosser, Law of Torts*, at 484-86; *Restatement Torts* Sec. 413 (1934); *Restatement Torts* (Second) Sec. 413 (1965).

⁷³ 57 Cal. 2d 641, 371 P.2d 311, 21 Cal. Rptr. 575 (1963). See also: *MacDonald v. City of Oakland*, supra, and *Van Arsedale v. Hollinger*, supra.

have sufficient contacts to give knowledge of conditions on the jobsite without being labeled as investors. Under the inherently dangerous activities rule, as expounded by Ferrel, the owner or general contractor who retains sufficient overall control and contacts must nevertheless assume responsibility for minimizing risks in the manner of performance.⁷⁴

Section 413: "One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiarly unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions."

and in Section 416 of the Restatement of Torts (Second):

"One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise."

The apparent inconsistency is cleared up by comment (c) to Section 416, which permits indemnity but does not relieve liability:

(c) Section 413 states the liability of one who employs an independent contractor to do such work and does not provide in the contract that the contractor shall take the precautions necessary to make its progress safe. This Section deals with the liability of one who employs a contractor to do such work, even though he stipulates in his contract or in a contract with another independent contractor that the precautions shall be taken, for bodily harm caused by the negligent failure of either contractor to take such precautions. In such case the contractor who is employed to take the precautions is under a duty to indemnify his employer for any liability which the contractor's negligence in failure to take reasonably adequate precautions may bring upon him. However, the fact that the contract contains express stipulations for the taking of adequate precautions and that the contractor agrees to assume all liability for harm caused by his failure to do so, does not relieve his employer from the liability stated in this Section.

Personal Negligence of Principal

The law is stated succinctly by the Restatement of Torts, Second, Section 414 as follows:

"Negligence in Exercising Control Retained by Employer.

"One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

The law where any control remains in the contractee is well stated in *Quinones v. Township of Upper Moreland*.⁷⁵ In the *Quinones* case, the defendant claimed as in the case at bar, that it retained no control over the work. The contract entrusted the entire sewer project involved to an independent contractor, McCabe.

The Third Circuit said:

"It was wholly within McCabe's power to hire, fire, control and supervise its employees; the contract specifically provided that shoring of trenches was to be performed in compliance with Pennsylvania Laws and regulations; the work was to be performed in accordance with the specifications set forth in the contract and Township's 'Engineers' (Harris, Henry & Potter, Inc., an engineering firm) was authorized to insure compliance by McCabe with the specifications and 'to decide all questions which may arise with the Contractor relative to * * * the manner, performance * * * and acceptable fulfillment of the contract on the part of the Contractor.'

"With respect to the happening of the accident it is undisputed that the trench was then about 25 feet deep and four or five feet wide; it was not shored as required by the Pennsylvania statute and its pertinent regulations; decedent was operating a drill at the bottom of the trench when its walls collapsed and a large quantity of dirt buried him; he died almost instantly of suffocation and a skull

⁷⁴ See Brooks, *Tort Liability of Owners and General Contractors for on-the-job Injuries to Workmen*, 13 U.C.L.A. L. Rev. 99, 115 (1965).

⁷⁵ 293 F.2 297 (C.C.A. 3, 1961).

fracture, and the absence of shoring was the proximate cause of decedent's injuries and death."⁷⁶

Prosser suggests at page 368 of his Second Edition . . . "So far as he . . . retains any control over any part of the work . . . he must likewise interfere to put a stop to unnecessarily dangerous practices."⁷⁷

An employer of an independent contractor owes a duty to third persons to employ a competent and careful contractor.⁷⁸ The same rule is more particularly delineated in Restatement of Torts, Second, Section 411:

"An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons."

The duty is not merely in the initial selection, but is continuing to determine that the contractor is doing his work in a careful and competent manner. The more hazardous the job, the greater the duty of continuing surveillance.

Certain factors are important: (1) the danger to which others will be exposed if the contractor's work is not properly done; (2) the character of the work to be done—whether the work lies within the competence of the average man or is work which can be properly done only by persons possessing special skills and training; and (3) the existence of a relation between the parties which imposes upon the one a peculiar duty of protecting the other . . . So too, a master owes to his servant not only the duty to exercise care in the selection of a contractor to whom he entrusts the preparation of a safe working place and appliances but also, as stated in Section 412, Comment (e), a duty to inspect the working place and appliances in order to discover whether the contractor's work has been properly done.⁷⁹ Restatement, *supra*, Section 412, Comment (c).

Inadequacies of Restatement

Lawyers and judges are busy people. They seek quick solutions to complex legal problems. Since the Restatement is a distillation of the law from fifty-one different jurisdictions with half of the states granting statutory immunity to principals, it has been extremely difficult for the Restatement Committee to state the law definitively. The inability or the unwillingness of the bar to read the Restatement in historical context, conceptually rather than mechanically, and understand the statutory limitations on a general statement, has resulted in the following limitations:

(1) The Restatement is thought to state a "general rule" of immunity when it no longer serves a useful purpose and in fact constitutes a legal license to kill.

(2) The Restatement, read mechanically, defines in the late 20th Century, a scientifically outmoded concept that suggests that standards of prudent conduct can be set forth long in advance and amount to propositions of law.⁸⁰

(3) The Restatement fails to define "third persons" to include employees when that protection is absolutely essential to a moral society.⁸¹

C. Liability of Other Entrepreneurs

One of the ironical aspects of the law in this area has been the failure to recognize that new knowledge of risk, loss and prevention necessitates new principles of liability.

⁷⁶ *Id.*

⁷⁷ See also *Parsons v. Blount Bros. Const. Co.*, 331 F² 414 (C.C.A. 6, 1960).

⁷⁸ *Associated Engineers, Inc. v. Job*, *supra*.

⁷⁹ See *Hooey v. Airport Construction Co.*, 253 N.Y. 436; *Caspersen v. LaSale Brothers*, 253 N.Y. 491; *Kuhn v. Carlin Construction Co., Inc.*, 154 Misc. 892 (N.Y.) and particularly the extended discussion in the latter case concerning the duty of one who knows or in the exercise of due care should know that his contractor is using unsafe equipment or improper methods.

⁸⁰ See *Bishop v. N.Y. Central R. Co.*, 348 Mich 345, 83 N.W. 2d 278 wherein the Court warns against postulating such rules in advance. See also: the oft-published essay of Fleming James, "The Qualities of the Reasonable Man In Negligence Cases," in *Personal Injury*, volume 1 page 24.

⁸¹ For an example of the resultant confusion see the horrendous example of a legal license to kill given by the court in *Lipka v. U.S. F²* at pages 466, 467. At the same time the Second Circuit was denying recovery to a project employee interpreting New York law, because of workmen's compensation contribution by the principal, the New York Court of Appeals in *Belt v. Port of Authority of N.Y.*, 19 N.Y. 2d 850, was approving recovery to a project employee despite workmen's compensation contribution by the principal.

This failing is surprising when considered in the light of the revolution in the law of products liability.⁸²

The Restatement Committee is composed of many of the great legal minds in the world and certainly in the field of torts. One has only to read the names to appreciate the quality of the committee. It has stated the law of torts in dynamic terms and has fully understood the qualities of the common law. Dean Prosser, the Reporter and Dean Wade, an Assistant to the Reporter have been as responsible for the revolution in product safety as any two individuals in the country.⁸³

The common law has also been able to adapt to new concepts of care required in the railroad crossing litigation.^{84 85}

D. Construction Safety—Problems Not Tackled

There are seven basic reasons why construction safety has not become an integral part of our legal framework and all are attributable to an inadequate social policy.⁸⁶

First and foremost.—The owners who are undertaking constructions enjoy both the advantage of a cheap bid and immunity from liability in too many jurisdictions.

The contractors who recognize the need to use nets, trench shoring, safe personnel hoists, etc., are faced with a choice of computing their costs as part of the bid price and losing the bid, or not computing them in the bid and therefore being handcuffed in their use and winning the bid. Death's handyman is the victor.

Second.—In every construction bid, all aspects of safety are presumably part of the bid price rather than major safety items being paid for on a cost-plus basis above the bid price.

Third.—Hold-harmless agreements are against public policy—encourage negligent performance and should be outlawed everywhere.

Fourth.—Most construction contract specification writers are totally incompetent to write the safety specifications of the contract. No architectural and engineering firm in the country employs a construction safety engineer. It requires great arrogance for these specification writers and architectural superintendents to write or supervise safety specifications with their level of safety sophistication. No contractor can or should be held to job tolerances in the area of safety performance that are not part of the specifications upon which he figured the bid price.

Fifth.—The Construction industry has not begun to adopt the safety standards, codes and safe practices which are required in the exercise of due care.

Sixth.—There is totally inadequate construction equipment—unguarded, not interlocked or fail-safed, with poor lateral acceleration capability.

Seventh.—There is totally inadequate pay for construction safety men. The safety man is often the lowest paid employee on the project. Underpaid safety personnel are perfectly capable of telling workers to "be careful" and to wear their unsafe helmets and also capable of performing their role in a ridiculous safety awards program but are incapable of recognizing major job hazards and the safety program necessary to prevent the unsafe condition from resulting in major injury or death.

IV. WHY WE ARE WHERE WE ARE

A. Lack of appreciation of the social purpose of tort law

There has been a lack of appreciation of the social purpose of tort law. The conflict existing in the field of torts which was present, when Justice Talbot Smith was writing *Collateral Negligence*, supra in 1941—namely the conflict

⁸² See Prosser, *The Assault Upon The Citadel*, 69 Yale L.J. 1099 (1960); Prosser, *The Fall of the Citadel* 50 Minn. L.R. 791 (1966) 32 ATLJ 1 (1968); Wade, *Strict Liability of Manufacturers*, 19 Southwestern L.J. 5 (1965); P. Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 Mich. L. Rev. 1329, (1966).

⁸³ The extent of the revolution in product safety since Dean Prosser's article in 1960 is indicated in the following articles: Rosenfield, *A Report of Federal Activities That Relate To Safety*, National Safety News, April, 1968 p. 71-85. See also National Traffic And Motor Vehicle Safety Act, 15 U.S.C.A. sec. Safer Goods: 'Caveat Emptor's' Decline and Fall, the National Observer, 9/16/68; Consumerism, The New Fact of Product Safety, ASHRAE Journal, August, 1968.

⁸⁴ See *Emery v. C & O Railway Co.*, 372 Mich. 663, N.W. 2d and the cases cited therein.
⁸⁵ For other areas of expanded tort liability, see Ehrenzweiz, *Negligence Without Fault*, 54 Calif. L. Rev. 1422, 1429-1436 (1966).

⁸⁶ See Transactions-Construction Section, National Safety Congress (1967) address "What's Wrong With Construction Safety In The United States" by the author.

whether principles of fault or social considerations⁸² still exists today. The development of ergonomics, biotechnology and safety engineering, however, make it mandatory that the social purpose of the tort law be accident prevention and only when the law fails in achieving its primary social purpose, then and only then should compensation for the victim be weighed against other conflicting principles.

Both Prosser⁸³ and Seavey⁸⁴ take the position that the function of the law of torts is directed toward the compensation of individuals for harm which they have suffered.

There are two basic interests which come into conflict in the area of tort law: The security interest of the individual plaintiff against damage and the defendant's claim to freedom of action. Generally, the former requires compensation irrespective of fault and the latter requires compensation only when intentional harm or undue lack of care is shown.

The primitive law sought security. The 18th century stressed economic movement and freedom of action. Towards the end of the 19th century a balance was attempted where the rationale developed that one who engages in activity and employs or controls others should be liable for the harm caused by his activities, agencies or things, and conversely, non-wrongful conduct shielded the actor from liability.⁸⁵

Tort law in the late twentieth century has begun to recognize that only out of liability do you get accident prevention.

"Be the exception more or less numerous, the general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation or estate, at the hands of his neighbors, not because they are wrong, but because they are harms. The true explanation of the reference of liability to a moral standard, in the sense which has been explained, is not that it is for the purpose of improving men's hearts, *but that it is to give a man a fair chance to avoid doing the harm before he is held responsible for it.* It is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury. . . . As the law, on the one hand, allows certain harms to be inflicted irrespective of the moral condition of him who inflicts them, so, at the other extreme, it may on grounds of policy throw the absolute risk of certain transactions on the person engaging in them, irrespective of blame-worthiness in any sense."⁸⁶

Not only has there been a failure to recognize the social function of the law of torts but the development of a technologically complicated society has made new demands upon the old tort doctrine. These demands necessitate a new fabric. Harlan F. Stone characterized the situation in these terms:

"In the brief space of about seventy years our law has been called upon to accommodate itself to changes of conditions, social and economic, more marked and extensive in their creation of new interests requiring legal protection and control, than occurred in the three centuries which followed the discovery of America. Rapid social change, more than all else, puts to the test a legal system which seeks its inspiration and its guidance in a past which could make no adequate prophecy of the future."⁸⁷

The failure is attributable in part to changing economic conditions and the need to adapt. Pound said that:

"What stands out in the history of Anglo-American law is the resistance of the taught tradition in the hands of judges drawn from any class you like, so they have been trained in a tradition, against all manner of economically or politically powerful interests. It is not that economic power has dictated decision of particular cases or judicial promulgation of particular rules, but rather that economic progress has led to new wants, new claims, new demands, new desires, . . . There has been a gradual shaping of obstinate traditional precepts and

⁸² See the excellent collection of background articles contained in Justice Smith's article, *supra*, page 399 n. 2.

⁸³ Prosser, *Law of Torts*, (34d ed. 1964) p. 56, citing Wright, *Introduction to the Law of Torts*, 1944, 8 Camb. L.J. 238 where it is stated that "the various and ever-increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society . . . there must of necessity be losses, or injuries of many kinds sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses and to afford compensation for injuries sustained by one person as the result of the conduct of another."

⁸⁴ Seavey, *Principles of Tort*, 56 Harv. L. Rev. 72 (1942).

⁸⁵ *Id.* at 73-74.

⁸⁶ Holmes, *The Common Law*, 144-45 (1881).

⁸⁷ Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 11 (1936).

traditional doctrines through the need of applying them to new economic conditions in the light of reshaping ideals of the legal order."⁸⁸

Fleming James has posed the situation⁸⁹ and what it means to one formulating theories of tort liability:

"As scientific knowledge advances, more risks can be discovered and avoided. Those who deal with matters affected by these advances must keep reasonably abreast of them. What is excusable ignorance today may be negligence tomorrow. In the last century little was known of allergies and a manufacturer could scarcely be charged with knowledge that chrome mordanted stockings might produce ulceration. Today the manufacturer must acquire knowledge of such things. Only a few years ago there was no way to detect a transverse fissure in a steel rail. Today this can be done by the Sperry Detector car, and the conduct of railroads will be judged in the light of this fact. As techniques for detecting accident proneness become perfected, employers will have to take account of them so as to remove accident prone employees from posts of danger.

"Perception of the risk is the sum of all that has heretofore been dealt with in this section. It is the correlation of past experience with the specific facts in a situation. If a reasonable man with the actor's own knowledge and experience plus the knowledge and experience with which he is charged would perceive a risk in the conduct in question the actor will be held to perceiving that risk. The courts, of course, set the outer boundary to what man may reasonably be held to foresee. But a judgment upon this question, in the nature of things, may be exercised with wide limits, and this is one of the focal points where the concept of negligence is being expanded. Not only have the scientific advances noted above enlarged the scope of what a jury may find to be foreseeable, but a quickening social conscience and the general trend towards wider liability have led the courts to perceive risks in ordinary activities of men where not so long ago they ruled them out of the permissible range of what might be found."

B. A safety unconscious society

1. Generally

There are approximately 110,000 accidental deaths and more than 10 million disabling injuries in the United States annually.⁹⁰ This is a sad indictment of a legal system charged with minimizing the harms and conflicts between people and things. The recent auto safety controversy has made the legal profession aware of the lack of attention which has been given to safety engineering. The injury and severity rates are higher in construction than for the same exposure in motor vehicle travel.

In September 1899 the first recorded death by automobile occurred in the United States. It wasn't until 1,250,000 lives had been lost that a Congressional Committee began considering a study into the causes of such a large casualty rate. The lack of appreciation for safety in this area as well as others was expressed by one Congressman in these words:

"I am getting tired of introducing bills and holding hearings on safety matters. This is certainly not a far reaching bill. But it is a bill that can save a lot of lives. And when the Department continually comes up here and recommends against a very small step in the direction of the safety of our people on the highways, roads, and streets of this country, it seems to me that certainly we ought to investigate and find out what is wrong with the Department of Commerce. . . . They constantly opposed every effort the Congress made for Safety in that field. I am not going to be satisfied until we find out what is happening at the Department level."⁹¹

The Board of Directors of any American Corporation that, fifteen years ago, put any substantial sum into accident prevention, except as to injuries for their own employees, was not maximizing profits, as was their responsibility to their stockholders. There was little liability in the law for negligent performance.

Because lawyers, judges, legislatures and tort writers were slow in developing liability, the slogans "Drive Safely", "Operate Your Machine Safely", "Be Careful", etc., became not only the safety slogans, but also the safety philosophy of the Nation. The idea that accidental injury is always the individual's own fault was perpetuated and developed by a society placed in a strait jacket by the law.

⁸⁸ Pound, *The Economic Interpretation and the Law of Torts*, 53 Harv. L. Rev. 365, 366-67 (1940).

⁸⁹ "The Qualities of the Reasonable Man" *supra* n.

⁹⁰ Annual Accident Facts, National Safety Council.

⁹¹ Nader, *Unsafe at Any Speed*, pages 299-300 (1965).

This emphasis on individual responsibility did not develop as a logical conclusion of a safety profession, which unfettered by restrictions, had researched, investigated, studied, catalogued injury statistics and analyzed the statistics objectively. The emphasis resulted from the legal straitjackets placed upon the safety profession by the law. Unable, because of immunity, privity, jurisdictional limitations, notice requirements, etc., to formulate correct principles of safety engineering they were forced to turn to safe practices.⁹²

Construction specifically

The statistics at the beginning of this article are testimony to the lack of safety in construction.⁹³ Four vignettes will assist the reader in understanding what's wrong with construction safety.

Some ten years ago, the top safety engineer for the U.S. Coast Guard wrote to the Coast Guard commandant and heads of Civil and Naval Engineering that due care required specific safety rules in bid specifications. He was told by letter that it would be too expensive and limit their ability to get contractors—since contractors would not want to be so regulated or would insist upon more money if they were compelled to perform safely;⁹⁴

On February 24, 1967, the man in charge of all major construction for the Ford Motor Company testified in a Federal Court matter that in his opinion it was not necessary to cover a floor hole adjacent to a pallet of bricks and under which employees of contractors were expected to work;⁹⁵

On July 27, 1967, the assistant director of safety for General Motors testified that upon being subpoenaed to bring the A.S.A. Safety Code For Building Construction and A.S.A. Code For Cranes, Derricks and Hoists and Accident Prevention Manual in Construction that he was unable to find them and as far as he knew General Motors never had them;⁹⁶

And General Motors' engineers testified that their legal department had more than fifteen years ago written the safety specifications of the construction contract general conditions and that General Motors employed architectural firms to custom fit the safety specifications to the contract but knew the architects were incapable of writing the safety specifications because of lack of expertise.⁹⁷

It has caused the Associated General Contractors to hold its first safety conference in history in February of 1968.⁹⁸

There are about 8,200 general contractors doing construction work in the United States who belong to the Associated General Contractors. It is particularly significant that at this first national safety conference in this organization's fifty year history, which was held in February of 1968, the implicit theme of this conference was heading off adoption of federal construction safety legislation. Fewer than one hundred of the 8,200 general contractors who are members cared enough about safety to have any representative present and the overwhelming majority of the top 400 firms who do billions of dollars of construction annually were conspicuous by their absence.

Few of these firms have a trained safety engineer with no other duties than safety.

It has caused the Construction Section of the National Safety Council to send an article entitled "Construction Safety and Legal Liability" to its members⁹⁹ and invite an American Trial Lawyer leader to address its Congress session on "What's Wrong With Construction Safety In The United States?"¹⁰⁰ It has resulted in the first national "Construction Safety Day" in history in many states. It has brought about many articles on the cost of liability in the trade journals.¹⁰¹ It has caused many construction companies to hire safety engineers, adopt safety programs and the engineering profession to examine the adequacy of its contract safety specifications.¹⁰²

⁹² See: Human Factors Engineering—What Research Found for Safetymen In Pandora's Box. National Safety News, August, 1968.

⁹³ See also the published proceedings of the first A.G.C. National Safety Conference (1968).

⁹⁴ See testimony of Fred Bisel, *Gowdy v. U.S.*, supra.

⁹⁵ See testimony Thomas Dunlop, *Gaston v Ford Motor Co.*, Case #25772 Federal District Court Eastern District of Michigan.

⁹⁶ See testimony of Benj. J. Cieslik, *McDonough v. G.M. Genessee County Mich. Cir. Court case #4074.*

⁹⁷ See testimony of Wm. DeGrow Jr., *McDonough v G.M.* supra.

⁹⁸ For report data see Note supra.

⁹⁹ 1967.

¹⁰⁰ See Address of Harry M. Philo, National Safety Congress, October 23, 1967.

¹⁰¹ Baxter, Make It Safe or Be Sued, *The Iron Age*, July 28, 1966, p. 46.

¹⁰² See Latham, It's Time To Re-Evaluate Our Safety Effort, *Constructor*, June 1967, p. 34.

Safety sophistication is relatively new in the construction safety field also. It has only been in the last twenty years that reasonably prudent owners formulated and controlled all aspects of contractor safety. It is not surprising that few courts have had trial records which would present factual proof of reasonably foreseeable risk to assist the Court in fulfilling its role as social architects in the field of accident prevention.¹⁰³

There has been a widespread recognition by owners and contractors for the most recent decade that construction safety can only be achieved by strict owner supervision in every sense.¹⁰⁴

It has also caused a continuing controversy regarding "hold harmless" clauses in various parts of the country. This has brought about legislative action in the form of statutes which make unenforceable clauses in construction contracts holding a contractor liable for damages arising out of injury to persons or damage to property that is the consequence of the negligence of the owner, his employees, and agents.¹⁰⁵

The new law in Michigan "declares as being against public policy, therefore, void and unenforceable, a covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agent or employees, or indemnitee' . . ."¹⁰⁶

There is one aspect of construction safety that magnifies a problem acutely peculiar to the industry. In almost all major industries the bulk of the work is done by established firms who have industrial safety programs and long ago realized that safety pays and who have made serious attempts at achieving low injury frequency and severity rates. This is not true for construction, however. There are approximately 700,000 contracting firms in construction and few have adequate safety programs, trained personnel or reasonably safe tools and equipment. "Probably the most common cause for controversies on the matter of job tolerances results from a contractor using poor construction equipment or unskilled labor with which the desired accuracy cannot be produced."¹⁰⁷ The marginal companies cannot afford to have a safety program, safe equipment or trained personnel. They must gamble and hope for few accidents. The law of averages is against them. It is for this reason that the employers' workmen compensation liability does little or nothing for construction safety.

Against this backdrop is the attempt by Federal Agencies to formalize legislation which would be a comprehensive program designed to put a halt to the inaction and penny in eliminating the carnage in the area of industrial accidents. Thus far such efforts have been stifled by the representatives of industry and commerce. The central issue is being skirted due to the fact that it is to the benefit of big business to block federal bills. Secretary of Labor Wirtz told a Senate subcommittee on labor that the facts indicate a need to act before our society is engulfed in the growing industrial slaughter: In describing the main issue he said:

"It is whether the Congress is going to act to stop a carnage which continues for one reason, and one reason only, and that is because the people in this country don't realize what is involved, and they can't see the blood on the food that they eat, and on the things that they buy, and on the services they get."¹⁰⁸

C. Workmen's compensation election statutes

A major impediment to the development of any meaningful law in the area of principals employing contractors was the election requirements of workmen's compensation statutes. A construction worker injured at work by the negligence of a third party elected from 1905-1955 to take the sure remedy of low workmen's compensation benefits rather than gamble on electing to sue the third

¹⁰³ See Justice Black's dissent urging the court to adopt a rule which would prevent injury in *Douglas v. Edgewater Park*, 369 Mich. 320 at 332.

¹⁰⁴ See e.g. Cummings, *Job Safety Must Be Pre-Planned*, Roads and Streets, August 1961, p. 75. McElroy, *Specifying Safety in Construction Contracts*, National Safety News, April 1965, p. 20.

¹⁰⁵ See, *Hold Harmless Disputes*, Engineering News Record, August 18, 1966, p. 71.

¹⁰⁶ Michigan Compiled Laws, 691.991.

¹⁰⁷ Chapt. Owners Engineer, *Handbook of Heavy Construction*, McGraw-Hill (1959).

¹⁰⁸ See Nader and Gordon, *Safety on the Job*, New Republic, June 15, 1968, p. 23.

party and being barred by statute from the compensation remedy because of the election.

At the same time legislatures felt it desirable to not become involved in the prevention of industrial accidents.¹⁰⁹

Since the law is what the court will say in the next case when the precise issue is presented with adequate evidence, properly briefed and argued, rather than what it has said the last time, then it is obvious the absence of advocacy, so necessary to the correct development of the law, has left the law undeveloped and in a state of limbo until recently when the election statutes were repealed.

D. Common law counts

The early English common law pleadings have wreaked havoc with the logical development of tort law. The requirement that a pleading spell out conformance to a rule of a prior case has limited and hampered understanding of the elements of a tort case.

The early English law did not construct a broad concept of liability, but was interested in procedural conformance. The courts erected and judicially developed a law of negligence that required an individual to adhere and abide by a predetermined legal duty. Thus negligence and duty become correlatives and required the party injured to prove that a duty was owed and that the defendant failed to live up to the standard as the facts of the pleading spelled out.

In time there developed a body of law which declared that an individual would be responsible for the negligent performance of his personal undertaking.

The questions "what is duty?" and "what are duties?" gave rise to a great battleground with two mighty forces arrayed on each side. On one side the concept of due care—on the other the vested interests, the sanctity of land championed by those who would limit the recovery of the many from the few. Land, manufacturing, construction, transportation have been owned by the few and those who would deny recovery to persons injured in their undertakings have for more than one hundred years found willing judges to give immunity where popular legislatures were reluctant to grant immunity from liability.

The courts have gone even further in thwarting justice in the past. When "duty" was too obvious for directed verdicts, the bench has proceeded to spell out duties.¹¹⁰

E. Judicial confusion of the concept of duty

The concept of "duty" is wholly alien to Roman Law and there is no trace in the modern Continental systems.¹¹¹ It may well be asked: Does it serve any useful function at all?

When negligence began to develop as a separate basis of tort liability then the courts developed the idea of duty, as a matter of some specific relation between the plaintiff and the defendant, without which there could be no liability.

The concept of duty was not in any way related to the activity or tortious conduct of the injurer. It was based on a status relationship which is irrelevant in determining the actual commission of a tort. The amorphous term duty was invoked by the courts in order to insure the status quo and served no useful purpose and was productive only in creating confusion.

From 1837 to 1842 three English cases led the judicial minds in later decades into the foggy realm of "duty".¹¹² A good example of how the duty concept clouded judicial reasoning is found in *Le Lieve v Gould*¹¹³ decided in 1893. Lord Esher declared:

"The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. . . . A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."¹¹⁴

¹⁰⁹ See Friedman & Ladinsky, Social Change and the Law of Industrial Accidents, 67 Columbia L. Rev. 50, 76 (1967).

¹¹⁰ See *Ackerberg v. Muskegon Osteopathic Hosp.*, 366 Mich. 596.

¹¹¹ See Buckland, "The Duty To Take Care," 51 L. Q. Rev. 637 (1939), in an analysis of duty in Roman Law. And See Prossen, Law of Torts (3rd Ed., 1964), p. 331, n. 2.

¹¹² *Vaughan v. Menlove*, 1837, 3 Bing. N.C. 468, 132 Eng. Rep. 490; *Langridge v. Levy*, 1837, 2 M. & W. 519, 150 Eng. Rep. 863; *Winterbottom v. Wright*, 1842, 10 M. & W. 109, 152 Eng. Rep. 402.

¹¹³ 1 Q.B.D. 491 (1893).

¹¹⁴ Id. at 497.

This was a repudiation by Lord Esher of a concept of a general duty of reasonable care formulated in *Heanen v Pender*¹¹⁶ and stated in this manner:

"Whenever any person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."¹¹⁷

The conceptual error persisted in England for another 40 years and was generalized by Lord Atkin in *Donoghue v Stevenson*:¹¹⁸

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."¹¹⁹

While the English judiciary was engulfing itself in a legal straightjacket, the concept of duty minus the status relation had already been formulated in one treatise:¹²⁰

"Before the law every man is entitled to the enjoyment of unfettered freedom so long as his conduct does not interfere with the equal liberty of all others. Where one man's sphere of activity impinges on another man's, a conflict of interests arises. The debateable land where these collision may occur is taken possession of by the law, which lays down the rules of mutual intercourse. A liberty of action which is allowed therein is called a right, the obligation of restraint a duty, and these terms are purely relative each implying the other. Duty, then, as a legal term indicates the obligation to limit freedom of action and to conform to a prescribed course of conduct. The widest generalisation of duty is that each citizen 'must do no act to injure another'."¹²⁰

The whole principle of subdividing or categorizing the duty of reasonable care has come under much judicial scrutiny in recent times. The courts have generally recognized that the practice of delineating and isolating specific "exceptions" or situations in which a duty is owed, is an anachronism related directly to the old writs and common counts which required factual conformance to the particular rule before permitting recovery. The courts have long recognized that justice does not have any a priori relationship to the specific counts, and have generally adopted an ad hoc stance as to particular cases, using only the "reasonable care" standard for guidance.

The awareness of the narrow legalistic thinking was explicit in these words nearly a decade ago:

"Care does not increase or diminish by calling it names. We think the abstract concept of reasonable care is in itself quite difficult enough to grapple with and apply in our law without our courts gratuitously conferring honorary degrees upon it. There is only *one* degree of care in the law, and that is the standard of care which may reasonably be required or expected under all the circumstances of a given situation, whether arising in the manufacture of canned beans or cinder block."¹²¹

Perhaps the best formulation of the rule is stated as follows:

"In sum, then, liability for negligent nonperformance of contract should be imposed where injury to plaintiff (over and above the mere withholding of performance) is foreseeable and (1) where there is foreseeable and reasonable reliance on the undertaking which has been a cause in fact of the injury, or (2) where the contract is an incident to an enterprise of the defendant and there are adequate reasons from policy for imposing a duty of care to avoid the risk thus encountered, as an incident to the enterprise."¹²²

¹¹⁵ 11 Q.B.D. 503 (1883).

¹¹⁶ Id. at 509.

¹¹⁷ 1932 A.C. 562.

¹¹⁸ Id. at 580.

¹¹⁹ Beven, *Negligence in Law* (4th Ed. 1928) Vol. I.

¹²⁰ Id. at p. 7-8. Found in Winfield, *Duty in Tortious Negligence* 34 Col L. Rev. 41, 42 (1934) Footnote 4.

¹²¹ See *Spence v. Three Rivers Supply*, 353 Mich. 120, 130 (1958).

¹²² 2 Harper and James, *Torts*, Section 18.7 (1956).

The common law standard of care has been the same for centuries: a duty of reasonable care under all circumstances.¹²³

The problems for the judiciary have been:

(1) They have failed to recognize that due care is sophisticated knowledge. Believing it to be common sense, they have felt free to express as a matter of law the care which they believe was the limit of prudence required of the principal. They called this the duty owed. Due care however, is what a jury would consider to be reasonable prudence after evidence of a standard of care rather than a trial judge's 19th century concept of due care.

(2) With their limited sophistication of how reasonably prudent owners obtain job safety they have proceeded to limit the persons to whom duty is owed to exclude even those within the "zone of danger."¹²⁴

(3) They have confused the law of owner-invitee with the law of principal's employing contractors and thereby in many instances attached the lesser rules of prudent behavior judicially approved for the owner-invitee situation to the case involving an undertaking of a principal.

The American conceptualization of duty took place in the celebrated case of *Palsgraf v. Long Island R. Co.*¹²⁵

There plaintiff, a passenger standing on a station platform, was hurt by some scales which fell down on her as the result of an explosion some distance away. The explosion was caused by fireworks dropped by another passenger because an employee of defendant pushed him to help him board a crowded train. Nothing about the appearance of the package indicated its contents. The only negligence complained of was this action by the employee in pushing the unknown passenger. The Court of Appeals held that the defendant was not liable.

Cardoza held that since Mrs. Palsgraf was not within the "zone of danger" there was no duty owed to her. He said that "The conduct of the defendant's employee was a wrong in relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relative to her, it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed . . . If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeing with reference to her, did not take to itself the quality of a tort because it happened to be a wrong . . . with reference to someone . . . What the plaintiff must show is a wrong to herself."¹²⁶

He reiterated the theory of the necessity for proving a status between the parties and that the wrong committed had to be "reasonably perceived." He said:

"Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all . . . Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended . . ."

"We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary . . ."¹²⁷

This view presents the scope of "duty" as measured by the scope of the risk which negligent conduct foreseeably entails.¹²⁸

The dissenting opinion written by Judge Andrews attacked the majority view as to the concept of duty. Negligence, he argued, is not dependent upon a status between litigants. It is the commission of a wrong which results in injury by the

¹²³ Goodman, A Safe Place to Live: Exploring Safety Standards and Codes in the Cities; 44 Journal of Urban Law 341, 342 (1967).

¹²⁴ See *Lipka v. U.S.*, supra.

¹²⁵ 248 N.Y. 339, 162 N.E. 99 (1928).

¹²⁶ 248 N.Y. at 341-3, 162 N.E. at 99-100.

¹²⁷ 248 N.Y. at 341-347, 162 N.E. 99-102.

¹²⁸ Seavey, Mr. Justice Cardoza and the Law of Torts, 52 Harv. L. Rev. 372, 48 Yale L.J. 390, 39 Col L. Rev. 20 (1939).

negligent conduct. The opinion stated that there is a duty toward the entire world, not to any particular existing relationship.¹²⁹

The limitations upon the tortfeasor's liability are whether the act was the proximate cause and whether the acts caused the specific injury complained of.

"The result we shall reach depends upon our theory as to the nature of negligence. Is it a relative concept—the breach of some duty owing to a particular person or to particular persons? Or where there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger? . . .

" . . . In an empty world negligence would not exist. It does involve a relationship between man and his fellows. But not merely a relationship between man and those whom he might reasonably expect his act would injure. Rather, a relationship between him and those whom he does in fact injure. If his act has a tendency to harm some one, it harms him a mile away as surely as it does those on the scene . . .

"The proposition is this. Every one owes to the world at large, the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain . . . Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt . . .

" . . . But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former . . . What we do mean by the word 'proximate' is, that because of convenience, of public policy, or a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics . . . And here not, what the (defendant) had reason to believe would be the result of his conduct, but what the prudent would foresee, may have a bearing. May have some bearing, for the problem of proximate cause is not to be solved by any one consideration."¹³⁰

With characteristic insight, Professor James has described the approach taken by the dissent in *Palsgraf* as follows:

"Under this rule it will be seen that the inquiry into the scope of duty is concerned with exactly the same factors as is the inquiry into whether conduct is unreasonably dangerous (i.e. negligent). Both seek to find what consequences of the challenged conduct should have been foreseen by the actor who engaged in it. Neither inquiry stops with what might be called the physical range of foreseeable harm, or with mere proximity in time or space. In both we look to see what natural forces and what human conduct should have appeared likely to come upon the scene, and we weigh the dangerous consequences likely to flow from the challenged conduct in the light of these interventions. And in this inquiry, foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful man would take account of it in guiding practical conduct. Just as this broadening of the quest adds to the risks which may make conduct unreasonably dangerous, just so does it add to the range of duty."¹³¹

Prosser has agreed that:

"The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. It is therefore not surprising to find that the problem of duty is as broad as the whole law of negligence, and that no universal test for it ever has been formulated. It is a shorthand statement of a conclusion, rather than an aid to analysis in itself . . . it should be recognized that 'duty' is not sacrosanct in itself, but only as expression of the sum total of those

¹²⁹ James, *Statutory Standards and Negligence in Accident Cases* 11 LA L. Rev., 95, 104 (1950).

¹³⁰ Andrews, J. dissenting in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 at 347-354, 162 N.E. 99 (1928).

¹³¹ James, *Scope of Duty in Negligence Cases*, 47 N.W. U. L. Rev. 778, 781-82 (1953).

considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."¹³²

F. Absence of a constitutional challenge

The Fourteenth Amendment to the United States Constitution provides in relevant part:

"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Equal protection requires equal treatment under the law—nothing more, but nothing less.

There has been no reported challenge to the immunity given principals by statute or in those few instances that a court has said the duty owed to everyone else is not owed to a project employee.

It appears however, that it is arbitrary, illogical and unreasonable for either the legislature or a common law court to classify a project employee subjected to a possible risk of harm from a principal, differently from all others subjected to the same possible risk of harm when there is no benefit from such classification. Recent tort decisions have struck down rules of law on the basis of equal protection requirements:

The United States Supreme Court in May of 1968, decided that it was a denial of equal protection to give immunity to a tortfeasor causing the wrongful death of a child born out of wedlock, when no immunity was given when a cause of action was brought by the mother of a so-called, "legitimate" child.¹³³

Whether or not one accepts the majority or minority viewpoint as expressed in *Palsgraf*, a workman on the project is in the "zone of danger" of the principal's failure to use care, and this probably should be as a matter of law.¹³⁴

Prosser states:

"The leading English case of *Indermaur v. Dames* laid down the rule that as to those who enter premises upon business which concerns the occupier, and upon his invitation expressed or implied, the latter is under an affirmative duty to protect them, not only against dangers of which he knows, but also against those which with reasonable care he might discover. The case has been accepted in all common law jurisdictions, and the invitee, or as he is sometimes called the business visitor, is placed upon a higher footing than a licensee. The typical example, of course, is the customer in a store. Patrons of restaurants, banks, theatres, bathing beaches, fairs and other places of amusement, and other businesses open to the public are included, as are drivers calling for or delivering goods purchased or sold, independent contractors doing work on the premises and the workmen employed by such contractors, as well as a large and miscellaneous group of similar persons who are present in the interest of the occupier as well as of their own."¹³⁵

In a Florida case (*Georgia Southern & Florida Ry. Co. v. Seven-Up Bottling Co.*),¹³⁶ a case treating this constitutional problem, it was held that a state statute, which provided a comparative law remedy in suits against railroads, was unconstitutional; this ruling was based on the observation that different legal treatment of railroads was not constitutionally proper in view of the development of competing modes of transportation.

Similarly in *Grasse v. Dealers Transport Co.*¹³⁷ a case before the Illinois Supreme Court, it was held that the Illinois workmen's compensation statute was partially invalid in that it provided injured employees with a common law right of action against third parties not subject to the statute while transferring the cause to the employer when the third party was covered by the act. The court held that no ascertainable logic or policy supported the distinction; further, that in order for such a distinction to prevail, "it must appear that the particular classification is based upon some real and substantial difference in kind, situation or circumstance in the persons or objects on which the classification rests, and which bears a rational relation to the evil to be remedied and the purpose to be attained by the statute, otherwise, the classification will be deemed arbi-

¹³² Prosser, *Law of Torts*, (34d ed. 1964) pp. 332-333. See also: the very cogent comments on this subject in 32 *ATLJ* 177, 178 (1968).

¹³³ *Giona v. American Guarantee & Liability Ins. Co.*, U.S. 88 S. Ct. 1515, 20 L. Ed (1968).

¹³⁴ See Justice Smith's incisive discussion in *Elbert v. City of Saginaw*, 363 Mich. 463, 109 N.W. 2d 879 on who as a matter of law is in the "zone of danger."

¹³⁵ Prosser, *The Law of Torts*, Third Edition, 1964 p. 394-395 (emphasis added).

¹³⁶ 175 So. 2d 39.

¹³⁷ 106 N.E. 2d 124.

trary and in violation of the constitutional guarantee of due process and equal protection of the laws."¹³⁸

Several courts have had occasion, recently, to point out (although not in a constitutional challenge) the lack of logic in treating project employees different than others.

In *Woolen v. Aerojet General Corporation*,¹³⁹ the California Supreme Court noted:

"We have held that employees of an independent contractor come within the 'others' sections 414 and 428 of the Restatement of Torts, which like section 413 set forth rules relating to the liability of one hiring an independent contractor (Citations omitted). There is *no reason* to hold otherwise with respect to section 413."¹⁴⁰

Likewise in *Associated Engineers v. Job*,¹⁴¹ Judge Blackmun, in writing an opinion of the court involving South Dakota law indicated that the duty imposed by Section 413 would probably extend to an employee of an independent contractor under the circumstances involved there.

"There can be no logical justification for the imposition of a different conclusion with respect to Sec. 427 and the court is therefore of the opinion that an employee of an independent contractor is so included within the purview of that rule. The Iowa Supreme Court has so held. *Giorratano v. Wertz Company*,¹⁴² ". . . If an employer is not absolved from his duty of care because of the nature of the work to be performed by the independent contractor, an employee of the latter should not be precluded from receiving the benefit of that duty solely on the basis of his relationship to the independent contractor."¹⁴³ (emphasis added) *Hagberg v. City of Sioux Falls*.¹⁴⁴

The Court in *Mallory v. Louisiana Pure Ice & Supply Co., et al.*,¹⁴⁵ also expressed the unreasonableness of a classification such as many defendants have urged in these cases, stating at p. 626:

". . . the contention that an owner might be liable to the public but not to the servants of the contractor was without support either *in reason* or authority." (emphasis added)

There is no more justification for giving a principal employing a contractor immunity from liability to the project employee than there was giving the defendant immunity in *Grasse, supra*. In the opinion of the writer there will be constitutional challenges to this alleged immunity in every jurisdiction in the next decade.

V. Stating it does not make it so; fictions that are used to justify immunity

"Fictions, of course are not necessarily bad. The danger is that a court, after frequent repetition, will begin to believe that they are real and thus employing them reach inequitable results."¹⁴⁶

A. Right to rely on contractor

In the practicalities of real life, there is no greater absurdity than the statement that in construction the principal "can rely on the contractor."¹⁴⁷

¹³⁸ Id. at 132.

¹³⁹ 57 Cal. 2d 407, 20 Cal. Repr. 12, 15, 369 P. 2d 708, 711 (Calif., 1962).

¹⁴⁰ See *Van Arsdale v. Hollinger*, Cal. App., 66 Cal. Repr. 20, 437 Pd. 508 (1968) in which it was held that the duty imposed by Section 416 was owed by a municipality to an employee of an independent contractor. See also *McDonald v. City of Oakland, supra*.

¹⁴¹ 370 F. 2d 633, 645 (8 Cir. 1966).

¹⁴² 147 N.W. 2d 824, 834 (Ia., 1967).

¹⁴³ (7.) One of the reasons defendant urges the adoption of the proposition that the principal employer owed no duty to an employee of an independent contractor is because of the workmen's compensation law. See *Welker v. Kennecott Copper Co.*, 1 Ariz. App. 395, 403 P. 2d 330 (1965). It is true that the rights and remedies under the workmen's compensation laws are exclusive of all others. SDC 64.0104 (1939). This, however, is as against his immediate employer. In the reporter's notes to Chapter 15 of the Tentative Draft of the Restatement of Torts 2d, it is indicated that an employee is generally not to be included within the purview of the applicable sections because of the workmen's compensation laws. *Richardson v. United States*, 251 F. Supp. 107 (W.D. Tenn., 1966). It is significant to note, however, that this comment was not included in the final publication. *Gowdy v. United States*, 271 F. Supp. 733, 746 (W.D. Mich., 1967).

¹⁴⁴ 281 F. Supp. 460 (1968).

¹⁴⁵ 6 S.W. 2d 617.

¹⁴⁶ *Lyshak v. City of Detroit*, 351 Mich. 230, 244, 88 N.W. 2d 596.

¹⁴⁷ See editorial *Construction Safety*, National Safety News, Sept. 1968; *Specifying Safety in Construction Contracts*, National Safety News, April 1965; see *Construction Division Safety Operational Methods*, Vols. I & II, duPont Engineering Dept.; *Accident Prevention Manual for Industrial Operations*, 4 Ed. 14-1 to 14-57, National Safety Council; A.G.C. National Safety Conference Proceedings, 1968, by Associated General Contractors.

In construction contract bids, the safety conscious contractor who recognizes the need to use nets will not win the bid if he adds \$50,000 for nets and his competitor submits a price which has been computed without nets.

The contractor who figures a bid with \$30,000 for trench shoring loses to the competitor who plans to do it in the unsafe way.

The same is true for safe construction passenger elevators, for proper scaffolding—for guarded machinery—even for the salary of a safety engineer.

If the contractor chooses to compete without figuring into the bid price the cost of safety items and he wins the bid, he cannot then use the safety items and achieve a profit.

It is well known that the construction field is highly competitive; that in order to offer a bid with a chance of acceptance, a contractor must pare his expenses down to the bare minimum in order to arrive at a favorable estimate. It is not feasible to narrow expenses as to the quality of materials to be used, for these materials are required to conform to a particular quality standard under *contractual compulsion*. The simplest, most effective means of narrowing costs is to use:

1. Cheap or old machinery.
2. Specialized machinery for a variety of uses;
3. Accomplish the given task in the quickest way possible (and thus eliminate much of the overhead) and
4. Eliminate whatever expenditures are not expressly or directly devoted to the construction of the building.

It would seem obvious from the above that the first expense to be extirpated is that of safety precautions; this, because adequate safety measures do not directly produce income, or quality, or contribute to expeditious construction. This consequence must follow if safety measures are not compelled by contract; for under the Workmen's Compensation law a contractor is economically justified in gambling that no injuries will occur for even if they do, a relatively small financial burden will arise. If an owner may escape liability by contracting over, regardless of safety specifications, it is clear that he will have received the benefit of low bids without having incurred any of the risks that the low bids entail; this risk is reserved to the workman. The end result is that there is no compelling economic reason 1. for the owner to include safety specifications in the contract or;

2. For the contractor to implement safety measures on the job.

In countenancing such a condition, the courts abdicate their traditional function, as protectors of the helpless, as instruments of social progress.

B. Right to Rely on the Expertise of the Architect or Engineer—A Fiction.

The architect and engineer enter the picture, whether it be a single residence or multi-million dollar project. They contract with the owner to be his agency in securing a quality job at the cheapest price. They agree, for a consideration, to write the bid specifications, and superintend conformance, one or both.

Since an aspect of the undertaking involves the safety of persons upon the construction site and a further aspect involves legal responsibility to pay damages, the architect's specifications include safety.

The only problem is that there may be no architectural and engineering firm in the United States which is competent to write construction safety specifications. The recognition of construction hazards and the steps necessary to prevent them from resulting in accidental injury or death is sophisticated knowledge involving safety engineering. While these firms may have several hundred architects, electrical, civil and mechanical engineers, few, if any, employ a trained construction safety engineer. They are, therefore, incapable of writing the contract provisions which will result in an accident-free job.

While there is willful and wanton misconduct in undertaking to write specifications with this inexpertise, the worst is yet to come.

The same firm agrees, for a price, to supervise job conformance. After telling the contractor to "be safe", the architect superintendent and his assistants parade around the job daily making minute inspections to see that the nuts and bolts are of X quality and that the paint is of a certain grade and overlook the fact that the trenches are not shored, the derricks are improperly rigged, holes are not covered, scaffolds are unguarded and workers are working fifty feet in the air with neither nets nor safety belts. The architectural firm is not only incompetent to write specifications, it is also incompetent to supervise conformance.

The ethical standards of the architectural and engineering professions will have much more substance when enforced by legal liability. This has been

proven by the increased number of cases involving architects and the trend in holding architects liable:

"Architects and engineers hold themselves out as competent to produce work requiring: (a) skill in the preparation of plans, drawings of designs suitable for the particular work to be executed; (b) knowledge of the materials to be used and the proper application or use; (c) knowledge of construction methods and procedures."¹⁴⁸

"It is customary to provide in the contract that the architect or engineer shall superintend the erection of the structure in accordance with the plans and specifications."¹⁴⁹

Reliance upon the good faith of the architect in allowing the builder to depart from the safety plans is no defense.¹⁵⁰

An early 1908 case, *Clinton v. Boehm*¹⁵¹ is a classic example of why the architect cannot and should not be relied upon. The Court concluded that there was no duty to supervise the construction project and protect the principal from liability. In that case a "state statute required that all elevator shafts be guarded during construction. A workman recovered judgment against the owner for injuries received in falling down an unguarded shaft. The owner attempted to recoup his loss by suing the architect for negligence in not insisting on proper guards on the shaft. The owner's claim was rejected on the ground that the duty to supervise construction did not include the duty to see that guard rails were provided."

The case provides the best answer for the problems that could arise out of such a situation. Since the very purpose of obtaining architectural assistance is to provide expertise which the principal does not possess, if the owner were liable for personal injury claims, and this would not be an undue burden, this would insure safety on the part of the architect.

The privity theory has been rejected by the courts with respect to architects and they now hold them liable unless they use due care. This was made clear in *Montijo v. Swift*.¹⁵² The court stated that:

"An architect who plans . . . construction work . . . is under a duty to exercise ordinary care . . . for the protection of any person who foreseeably and with reasonable certainty may be injured by his failure to do so, even though such injury may occur after his work has been accepted by the person engaging his services."¹⁵³

Negligence in supervision was made the cornerstone of the decision in *Day v. National U.S. Radiator Corp.*¹⁵⁴ There "the plumbing contractor completed the installation of a hot water system. A safety valve called for in the design of the system had not been installed. The system was tested by the plumbing subcontractor and resulted in an explosion. In holding that the architect was liable for the extensive damage, the court pointed out that if the architect had properly supervised the work he would have observed the danger in the installation of the hot water system. The mere fact that the subcontractor had not requested inspection of this system did not relieve the architect of his responsibility."

The court declared that:

"The negligence of the architect combined with that of Vince in contributing to the injury and rendered him liable in solido. One whose negligence combines with that of another to cause injury cannot plead the negligence of such other as a defense to an action by the injured party."¹⁵⁵

C. Danger is open and obvious—A fiction

One of the most cogent aspects of the Gowdy decision was the manner in which Judge Fox rejected the argument that the plaintiff could not recover for an "open and obvious" danger. The Court realistically concluded that even the most

¹⁴⁸ Bell, Professional Negligence of Architects and Engineers, 12 Vand L. Rev. 711, 715 (1959).

¹⁴⁹ AIA Doc. No. B-121, Standard Form of Agreement Between Owner and Architect, Condition 7.

¹⁵⁰ See Foelle v. Heintz, 137 Wisc. 169, 118 N.W. 543 (1908).

¹⁵¹ 139 App Dw. 73, 124 N.Y.S. 789 (1st Dept 1908).

¹⁵² 219 Cal. App. 2d 351, 33 Cal. Rptr. 133 (1963).

¹⁵³ 219 Cal. App. 2d at 353, 33 Cal. Rptr. at 134-35.

¹⁵⁴ 117 So. 2d 104 (1959).

¹⁵⁵ Found in Witherspoon, When Is An Architect Liable, 48 ABAJ 321, 323 (1962), where the author also cites in footnote 22 that the lower court decision in *Day v. National U.S. Radiator Corp.* was reversed by the Supreme Court of Louisiana, see 128 So. 2d, 660.

"reasonable" person could not be attentive and knowledgeable as to hazardous situations. Relying on the argument that the United States had superior knowledge they said:

"We have found that the defendant should have been aware that the plaintiff would not, while operating the davit, recognize the danger inherent in working on an unguarded elevated working surface in a concrete and water environment, and that the absence of a guardrail presented a deceptive and hidden danger to the plaintiff."¹⁵⁶

In a recent Michigan decision, *Askerberg v Muskegon Osteopathic Hospital*, liability was sought for the failure of the defendant to guard an elevated platform where the absence of the handrail was open, obvious and known to the plaintiff.

A unanimous court in rejecting the defendant's position declared:

"A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if he (a) knows, or by the exercise of reasonable care, could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them."¹⁵⁸

This case went to the Michigan Supreme Court after a directed verdict by a trial judge who found no duty upon the defendant because the plaintiff knew that the platform two or three feet high had no railing around it prior to and at the time of his using it.

The defendant's appellee brief to the Michigan Supreme Court in *Ackerberg* used twenty-one pages arguing that a possessor of land owes no duty to an invitee where the condition is "open," "obvious," or "known," putting considerable stress on the evidence that there was actual knowledge on the part of the plaintiff of the existence of the hazard.

The significance of this decision is that the court's whole decision regarding duty was based upon foreseeability of harm as the decisive fact question involved in duty. The Court did not devote one word to the antiquated and legally ridiculous argument "that there is no duty if the condition is open and obvious."

The weakness of the "open and obvious" concept is described this way by one commentator:

"In no case is the condition of open and obvious danger treated as an ultimate issue. In all cases it is nothing more than a strong summation of certain conditions which shed light on the conduct of the parties. Therefore in submitting the case to the jury, such questions should not be included in the special issues, nor in the instructions and definitions."¹⁵⁹

The logic and strength of *Gowdy* was evidenced when Judge Fox said it would be incorrect to permit that no duty was owed and the danger was "open and obvious." A distinction had to be made and he propounded it in this way:

"Cases in which an injured employee of an independent contractor sues a landowner for injuries sustained as a result of claimed negligence on the part of the landowner lend themselves to temptations to simplism. It is important in these cases to distinguish " * * * between the problem of restricting liability to a negligent party, and the problem of restricting the liability of the defendant even though he was negligent * * *." This distinction " * * * is one that is fundamental to an understanding of cases involving personal injuries for open and obvious dangers.

This distinction was supported by an authoritative study in this area cited in a footnote. A commentator observed¹⁶¹ that

"While statements are frequently made that without a duty there can be no negligence, this is misleading and not in accordance with the usage herein. A driver of a car can be negligent as a matter of law in failing to give a proper signal when turning to the left or right and yet not be liable to a passenger-guest who is hurt in precisely the manner that should have been anticipated. This is because for *various reasons of policy*, other than the need for limiting liability in some manner, courts have concluded in view of the relationship between the parties to *restrict the defendant's duty of care*. Thus, conduct more reprehensible than negligence must be found to justify the imposition of liability on a defendant to a passenger-guest in an automobile or to a trespasser on land.

¹⁵⁶ 271 F. Supp. 733 at 745 (1967).

¹⁵⁸ Id. at 600.

¹⁵⁹ See Laurence, "Open and Obvious Dangers In Step and Fall Cases," J. Baylor L. Rev. 176, 183.

¹⁶¹ Keeton, Personal Injuries Resulting from Open and Obvious Conditions, 100 U. Pa. L. Rev. 639, 632 (1952).

The lack of a duty in such instances does not mean and should not mean that the defendant has acted prudently. It simply means that even though he was guilty of anti-social conduct and conduct that should be discouraged, the achievement of other socially desirable ends or objectives that will be hindered by shifting the loss from the defendant to the plaintiff is a weightier consideration. Admittedly, a judge will often say that there was no duty to do something when in reality he means that it could not be said that it was negligence not to do it. This is unobjectionable since there is no liability without fault, i.e., negligence, but the lack of duty in such a case is covered by the general requirement of fault, whereas there are numerous examples of non-liability even though the fault or negligence requirement of liability is satisfied. (Emphasis supplied.)

The highly respected First Circuit Court of Appeals had the occasion recently to comment on this restrictive view of the landowner's duty to a business visitor when defendant contended that knowledge of danger or warning of danger completely discharged defendant's duty.

The court said:

"To the contrary, Connecticut has embraced the more modern trend of opinion which at least partially rejects the extremely favored position of the landowner in the law of torts. Only two weeks after the decision in *Laube v. Stevenson*, supra, the Supreme Court of Errors in *Reboni v. Case Bros.*, 1951, 137 Conn. 501, 78 A. 2d 887, clearly held that warning does not necessarily discharge the duty of due care. There, two employees of a general contractor were burned by electrocution upon close approach of a crane with which they were working, to high-tension wires while doing aerial work above defendant's factory yard. There was evidence that one of the plaintiffs not only was familiar with the danger of working near "hot" wires, but he had been warned of the danger and, indeed, had had personal experience with these wires in the past. The court, however, pointed to the extremely dangerous condition and held that the jury was warranted in finding that something more than a warning was required to discharge defendant's obligation to the plaintiffs."¹⁶²

Many of the decisions in the past had been based on the fact that since there was no "control" over the worksite, the injured persons should have been aware of the surrounding situation. This was emphatically rejected by a recent decision by the New Jersey Supreme Court where they said:

"The injured has no control over a relation with the contractor. The contractee, true, has no control over the doing of the work and in that sense is also innocent of the wrongdoing; but he does have the power of selection and in the application of concepts of distributive justice perhaps much can be said for the view that a loss arising out of the tortious conduct of a financially irresponsible contractor should fall on the contractee."¹⁶³

d. Fictions—That employees understand safety engineering: and—That employers want construction workers to, "Watch their step."

It is important that lawyers, judges and tort writers have some scope in understanding our advancing technology. The horrible injury and death toll is not the fault of a technology which has failed to recognize hazards, risks and dangers rather it is the fault of an underdeveloped social policy. The biotechnologists have long done important work in recognizing hazards and risks. They have made substantial additional contributions recently with research into risk acceptance and this has significance, particularly in limiting the liability defeating concepts of contributory negligence and assumption of the risk.

Although assumption of "risk" has been used by the courts in several different senses,¹⁶⁴ the use of the defense in relation to principals employing contractors can easily be shown to be illogical and erroneous.

The defense of assumption of risk presupposes that the plaintiff has knowledge and understands the risk and that he is acting voluntarily.¹⁶⁵

Assumption of risk also presupposes the gathering of information through the use of an individual's senses. This, however, takes much deliberation and the economic aspects of the principal-independent contractor relation requires that no such information be obtained by the employee.

¹⁶² *Csizmadia, v. P. Ballantine & Sons*, 287 F² 423, 425.

¹⁶³ *See Majestic Realty Assn' Inc. v. Totl Contracting Co.*, 30 N.J. 425, 153, A 2d 321 (1959).

¹⁶⁴ *See Keeton, Assumption of Risk in Products Liability Cases*, 22 L.A. L. Rev. 122 (1961).

¹⁶⁵ *See Ancinnate N.O. & T.R.R. Co., v. Thompson*, 236 F 1 (6th Cir. 1916).

Risk acceptance has been defined as the "behaviorial characteristic of an individual, exhibited when engaged in an action in which there is some probability of failure. There are only two alternatives, either a person will decline to engage in the project or will accept the risk. Reaching the latter may be a sophisticated subjective process involving ascertainment of the skill and ability needed to accomplish the intended result, personal probability of success, value judgments as to worth of risk and whether information is sufficient to proceed, and all this within the framework of past experience about the "risky activity."¹⁶⁶

If industrial safety is sophisticated knowledge, then an employee trying his best to accomplish the social task which he has been ordered to perform is not held to the same standard of care as a trained safety man, an architect, a job-site inspector with safety checklist or one letting a contract and charged with doing it safely.

The applicable law with respect to contributory negligence is stated in *Foster v. Buckner*,¹⁶⁷ the court held that contributory negligence is ordinarily a question of fact for the jury. It stated that the fact that plaintiff was attending to his duties at the time of the injury so that his attention was directed to objects other than the truck which injured him made contributory negligence a question of fact. Plaintiff was entitled to rely upon defendant's employees to perform their duty and to follow the general practice in such case. In *Mayala v. Underwood Veneer Company*, it was contended that the plaintiff had been guilty of contributory negligence in going under a log to throw a chain in the course of loading a truck with logs. The record showed, however, that this was an ordinary incident of operation. The court determined that under such circumstances it could not hold plaintiff guilty of negligence as a matter of law.¹⁶⁸

A claim of contributory negligence may not be predicated upon the failure of the plaintiff to observe or remember where neglect to do so is occasioned by his pre-occupation with the purpose for which defendant invited him to the premises, or the physical position he was required to assume in carrying out that purpose.¹⁶⁹

Courts and legislatures have long recognized in common law decisions and in statutes that an industrial worker needs special protection to prevent injury. Liability tends to bring about preventive and corrective measures.

Many persons may have knowledge as to dangers inherent in a type of work being performed, but with respect to the appreciation of the extent of the danger only the safety specialist is fully cognizant of the accurate assumptions to be made.

This requires training in the recognition of hazards, risks and danger. Hazard, risk and danger are relative terms. Hazardous in relation to what; risky in relation to what; dangerous in relation to what? Statistical experience in the frequency and severity of injury are key elements. Accident prevention psychological studies on attention span, attention arresters, fatigue, monotony, noise, peripheral vision, epidemiology of injury are relevant. The recognition in safety standards, codes and safe practice data sheets of hazards, risks and dangers are relevant.

In *Gowdy*, the court rejected the government's position that the injured plaintiff assumed the risk or was guilty of contributory negligence. In fact, they rejected its viability in such a factual situation. The Court said:

"Defendant's claim that plaintiff was guilty of contributory negligence is unfounded. From the testimony of defendant's former safety experts, we conclude that the attention of a reasonable and prudent workman, such as plaintiff, while working on the second deck of the lighthouse, would be concentrated almost exclusively on his work effort and that lulled into a sense of security, he could easily be lured into a position of danger.

"Under such circumstances, a workman would not be guilty of contributory negligence. Plaintiff was not guilty of contributory negligence."¹⁷⁰

E. It was not inherently hazardous

The limited safety sophistication of the trial court often expresses itself in the fiction: "it was not inherently dangerous."

¹⁶⁶ See *Burner & Rockwell, Information Seeking in Risk Acceptance*, American Society of Safety Engineers Journal, Feb., 1968 p. 6 for a scientific approach to awareness of "risk."

¹⁶⁷ 203 F.2d 527.

¹⁶⁸ 281 Mich. 434, 275 N.W. 198 at 530.

¹⁶⁹ See: *Dennis v. City of Albemarle*, 87 S.E.2d 561; *Johnson v. Roulon*, 70 A.2d 325, 363; *Phillippon v. Albion Vein State Co.*, 250 U.S. 76; *Bloomer v. Snellinberg*, 69 A. 1124; *Shreveport v. Southwestern Gas*, 32 S. 785; *Irronve v. Pac. Gas & Elec.*, 348 P.2d 208.

¹⁷⁰ 271 F. Supp. 733 at 745.

This article has covered supra, a definition of what is inherently hazardous and concludes that this is a jury question.

The recognition of hazards and risks is peculiarly within the scope of safety engineering. Often the most dangerous hazards are those which are most innocent appearing.¹⁷¹ The tools of the construction safety engineer are:

- (1) safety standards, codes and safety data sheets.
- (2) safety manuals.
- (3) statistics.
- (4) case histories.
- (5) reports of safety conferences.
- (6) expert consultants.
- (7) contract specifications of prudent owners.
- (8) safety films.
- (9) safety libraries.
- (10) literature of safety equipment manufacturers.

¹⁷¹ *Grogan v. U.S.*, 225 F. Supp 821 (W.D. Ky. 1963) in which the court said "scaffolding is not inherently dangerous" while every construction safety engineer in the country would testify otherwise and so hazardous in fact, that many states have enacted Scaffolding Acts. *West vs. Atkinson Const. Co.*, 59 Cal Rptr. 286, in which the court said scaffolding work was not inherently hazardous. In the *West* case, a floating scaffold was involved, making the safety problem even more acute.

Dees v. Largess, 1 Mich. App. 421, 136 N.W. 2d, 715, where the trial court said that the operation of a crane next to overhead power lines was not inherently hazardous.

In each of these cases and others like them, it must be said that plaintiff's counsel did not assist the court with expert testimony on how really hazardous the operation was. It may be just as presumptuous to suggest that the trial court should have recognized the evidence as sufficient for a jury question, as it was for the court to presume that a jury could not so infer.

The operation of a crane near an electric power line is so hazardous that a prudent owner puts extensive language in the contract specifications so that extra expenditure of time and money is known to the contractor and the principal has complete control.

duPont Corporation uses the following contract language:

CRANE WORK NEAR OVERHEAD ELECTRIC SERVICE LINES

The following is to be adhered to in every detail where cranes, drag lines, back hoes, power shovels, side boom cats, hoists and similar equipment with work in close proximity to any overhead electric power line:

1. When it becomes necessary for a crane boom or any part of a crane or similar equipment to be swung, worked or moved (for transit between work sites, a route providing adequate clearance must be predetermined) within fifteen (15) feet or less of any electric service line:

- a. The work is to be stopped immediately.

- b. The Craft Superintendent in charge of the equipment, the Craft Superintendent in charge of work, the Electrical Craft Superintendent, the Division Engineer and the Safety Supervisor are to be contacted.

- c. These individuals will decide whether the power is to be cut off, whether grounding of the crane is necessary, whether an electrical department standby man is necessary and whether certain protective equipment* must be worn by the crane operator.

- d. Written approval to proceed with the work will be given jointly to the foreman in charge by the committee outlined above after the precautions they decide upon have been placed in effect.

- e. The above procedure applies also to subcontractors' equipment.

2. No crane shall be operated under these conditions unless there is a signal man present whose sole function shall be to watch the operator of the equipment and men incidental to such equipment operation to insure the understanding of signals and to coordinate every move.

3. It is often possible to require only the crane operator on the equipment when the crane boom is swinging within 15 feet of power line. Keep the oiler or others off the equipment at such times of exposure.

4. Cranes or other equipment having booms should not be parked overnight or over a weekend directly under any high tension line. Booms must be lowered or tied off using load line.

5. Cranes, drag lines, back hoes, power shovels, side boom cats, hoists and similar equipment must not be loaded on low boys or other means of transportation within boom reach of a power line, banks of transformers, etc.

6. Precautions noted in this procedure apply to any electric service lines.

7. Correct identification of all overhead electric service lines is vital. This cautions you that there is considerable resemblance between some high voltage lines and "telephone" lines—be sure.

- *1. Tested Lineman's gloves with protectors to be worn by operator.

2. Electric Lineman's boots for Crane Operator.

3. Lineman's rubber blanket sufficient to cover operator's seat on the crane.

- *4. Men handling tag lines, or attaching or unattaching loads must also wear tested Lineman's gloves with protectors.

See: Du Pont Manual—supra, Vol. I D 13.

A trial judge is not expected to know a completely separate discipline such as safety engineering and should be assisted by expert testimony in understanding that what looks simple to him is really much more complicated.

The Gowdy case is the first case in which expert testimony was offered to prove:

- (1) that the recognition of hazards and risks is sophisticated knowledge.
- (2) that particular construction work was inherently hazardous with an explanation of the subtle character of the hazards.
- (3) what is involved in risk acceptance.¹⁷²

It should signal the beginning of this use of expert testimony to assist the court and jury in assessing liability and go a long way to eliminating defense fictions.

VI. A DEFINITIVE STATEMENT OF THE LAW

Courts have employed many fictions to get around the so called, "immunity" expressed by the so called, "general rule" to get around the harshness and injustice of that rule. The time has come for a definitive statement of the law.

The following chart represents the Restatement rules interpreted dynamically and taking into consideration all possible statutory limitations and expansions. It is an expression of law that will markedly expand past concepts of liability. It will serve until a more moral society expands fault concepts to strict liability. It should result in as dramatic a reduction in the injury and death toll as has resulted from the auto makers decision to use energy absorbing steering columns.¹⁷³

CHART OF LIABILITY WHERE PRINCIPAL UNDERTAKES WORK THROUGH INDEPENDENT CONTRACTOR

I. Liability for principal's own negligence	II. Liability for affirmative nondelegable duty violations and vicarious liability	III. Immunity from affirmative nondelegable liability and vicarious liability
The principal is liable for any lack of due care of his part. Examples of the negligent acts of the principal for which he may be liable: 1. The furnishing of a site which he knows or should know in the exercise of due care is unsafe. (A warning may or may not be enough.) 2. The furnishing of unsafe equipment which he knows or should know in the exercise of due care is unsafe. 3. The negligent failure to make proper regulations or the giving of ambiguous orders. 4. The negligent performance of any affirmative acts gratuitously or for a consideration undertaken by the principal. 5. Reckless misconduct. 6. Violation of statutory duties. 7. Violation of other nondelegable duties (sec. II).	The principal is liable vicariously and for affirmative care violations when: 1. The work is inherently hazardous, or 2. The principal retains the right of control, or 3. The principal exercises control, or 4. An incompetent contractor is employed, unless The legislature by statute has in a constitutional manner granted immunity from such liability.	There is immunity from vicarious liability if all of the following exist: 1. The work is not inherently hazardous. 2. A competent contractor has been employed. 3. The principal retains no right of control. 4. The principal exercises no control, unless The legislature by statute has required nondelegable duties of the principal.

Miscellaneous possible considerations

(A) The principal by contract with the independent contractor may not limit his liability to third persons.

(B) Contributory negligence may or may not be a defense.

(C) Assumption of the risk may be a defense remaining in some jurisdictions. dictions.

(D) The defense of statutory employer in some jurisdictions may be unconstitutional in that there is an unreasonable classification in either those immune or those who may sue, or there may be a taking of property without due process.

(E) The duty is owed to everyone who might reasonably, foreseeably be injured by lack of due care.

(F) The duty owed is due care (due care includes the concept of reasonably safe place to work for employees on the site).

There are three basic clarifications made by the chart in the Restatement:

- (1) It eliminates a general rule of immunity.¹⁷⁴
- (2) The duty owed is only limited by the "zone of danger."

¹⁷² See testimony of Robert Jenkins, former Chief of Safety of the U.S. Army Corps of Engineers, and Fred Bisel, former Chief of Safety of the U.S. Coast Guard.

¹⁷³ See the address of Robert Brenner, Deputy Director; National Highway Safety Bureau, "Advancing Human Ecology Through Progress in Safety Research" to the Annual Meeting of the ASSE—August 5, 1968—see also; *Larsen v. G.M.*, 391 F² 495 (C.C.A. 8, 1968).

¹⁷⁴ See *Rowland v. Christian*, 443 P² 561 (Cal. 1968) for an excellent example of a court's willingness to throw out the special treatment land owners have received.

(3) Restatement duties are seen as examples of due care violations rather than mechanical rules.¹⁷⁵

VII SUMMARY

The theme of the excellent construction safety handbook of the duPont Corporation is:

Humans are not expendable—Even by fractions

The law can and must make this meaningful in construction. The common law, interpreted dynamically can do this by making principals employing contractors subject to the same requirement of due care that everyone else in society is subject to and by ending the confusion that exists from judicially approved examples of duty violations being expressed as the parameters of prudent conduct.

STATEMENT OF HARRY M. PHILO, ATTORNEY, DETROIT, MICH.

Mr. PHILO. Thank you, Mr. Chairman. It is a pleasure for me to appear here, and I am thankful that as many members of the committee took the interest to come this morning.

I, as an attorney, have represented scores of widows of construction workers, the quadriplegics, paraplegics, the brain damaged construction workers, because of the utter lack of safety that exists in construction in the United States.

I also am the author of a leading safety reference work that is used by safety lawyers and safety engineers throughout the United States which has a large chapter on construction and demolition safety, and I have addressed the construction division of the National Safety Council on what is generally wrong with construction safety in the United States.

I support every action of this committee in an attempt to get more construction safety, but I think there has to be an understanding on the part of the committee of where the lack of safety is coming from, and how we can get safety and the economics of safety.

First of all, we can reduce the injury frequency and severity rate about 60 times. We can reduce the 2,800 accidental deaths in 1968 to about 50 a year within the state of art of engineering and competence of the industry presently. We can reduce the 250,000 disabling injuries to a tiny fraction of that.

The reason that we do not have construction safety in the United States is basically the immunity that is granted by law to owners undertaking construction. I think historically, the reason that we have the injury and death toll in construction is that because lawyers and legislators and judges as social architects did not do our job for about 50 years.

In fact, if the Federal Government had done nothing in the last 20 years in the area of construction safety, we would be further ahead.

What the Justice Department has done in defending negligence on the part of Government agencies and formulating policies of safety in every Federal agency has done more to limit construction safety than any single thing in the United States.

The position that the Justice Department takes in every case under the Federal Tort Claims Act in construction safety has limited safety in the Corps of Engineers, has limited safety in the Coast Guard, in the

¹⁷⁵ See Seavey, *Principles of Torts*, supra, at page 75.

Department of the Navy, has limited safety in the General Services Administration—

Mr. DANIELS. Would you yield at this point.

What does the Department of Justice do that limits safety in all of these areas.

Mr. PHILO. Well, I think probably if this committee would call Robert Jenkins who was construction safety engineer for the Corps of Engineers, and probably the best in the world, and go into the history of the Justice Department's suits involving the Corps of Engineers and their control over the safety policy of the Corps of Engineers, it would be interesting.

This committee heard in its 1967 bill from Mr. Latham, who is the Chief of Safety for the Bureau of Reclamation, and then compare Mr. Latham's testimony from his deposition in the Yellowtail Dam case about the role of the wreck in the safety setting connection or lack of specification by the Bureau of Reclamation, but it is a policy that is dictated by the Department of Justice.

I got off on this point simply to indicate that it is the owner who undertakes construction, and it is the owner who is profiting by cheap bids of contractors caught in the squeeze. The 10,000 general contractors in the country are caught completely in a squeeze. They don't have adequate bid specifications relating to safety. They don't have adequate enforcement, and the owners are unwilling to pay for job safety, and the owners get immunity by statute in 25 States of the United States from any liability for injuries created by the fact that they got a cheap bid.

This committee ought to have testimony from the Coast Guard where the Chief of Safety of the Coast Guard ten years ago recommended that the Coast Guard adopt safety standards in construction in contracts of the Coast Guard, and the Chief of Engineering and Chief of Naval Engineering rejected the suggestion saying it would cost too much money to get contractors to do it in a reasonably safe way.

You don't have construction safety simply because the owners are getting cheap bids. They are writing safety specifications in contracts that are completely inadequate for the job. The contractors then have to bid on those specifications, and if the specifications do not call for shoring, the contractors cannot afford to put in shoring. If the specifications do not call for netting, the contractors cannot afford to put in netting.

If the contract specifications do not call for safety engineering on the job, they cannot afford to put it in. And this has been repeated criticism on the construction in the executive committee of the construction section of the National Safety Council by good construction engineers from the major corporations.

The U.S. Steel safety engineer for American Bridge will say on the executive section on the National Safety Council that we ought to make sure that every construction contract bid specification in the United States has adequate bid specifications because we cannot compete with other contractors who are leaving safety out of their bid specification estimates.

If we don't put in the estimate and win, neither can we afford to do it when we get the bid.

So, what has happened in the past has resulted in the safety code of pathetically—first of all, a very low level of safety. The AGC Manual is a pathetic document as far as safety standards are concerned today.

Take the Du Pont Corp. Du Pont has employed over 2 million construction workers in the last 20 years. They have a severity rate which is one-sixtieth of the industry because DuPont, in undertaking construction by contract, sets adequate bid specifications and then enforces every bid specification. The people whom they enforce it with are no better than anybody else who is eligible in enforcing contract specifications around the United States. All safety codes today are at a pathetically low level.

Secondly, you have a paucity of trained construction engineers in the United States. In fact, the level of safety in the United States really mandates Congress to set up a Federal academy for a crash program of safety trained engineers in the country.

Thirdly, as I say, you have inadequate bid specifications. You have 60 times the reasonably possible injury rates and you have price fixing and conspiracy in trade by major construction firms. All of the major construction companies in the United States get together and fix the price of bids. They trade off the bid, joint ventures; the joint ventures never show up on the job.

But what happens is, you take this bid, you take that bid, and we will all get together and get a joint project, which allows them to rule out safety in the project.

Mr. DANIELS. Is that legal?

Mr. PHILO. It is not legal, but the Justice Department when it has been called to their attention overlooks it, and I think that the Justice Department knows that there is price fixing on all the giant construction projects for the Federal Government in the country and that this affects safety on all of those jobs in a very significant way, but it hasn't acted in that area.

Mr. DANIELS. You are making a very serious charge there. Now, I wonder if you want to clarify that any further.

Mr. PHILO. All right. Take the major construction projects that have been undertaken by the Federal Government, missile sites, et cetera, et cetera. Examine who wins the bid. The joint ventures win the bid. Then examine who of the joint ventures show up on the job. One shows up on each job.

Mr. DANIELS. Who do you mean when you say "joint ventures"? Do you mean the person that actually submits the bid?

Mr. PHILO. Kaiser, Perino, Knutson, Morris, Atkinson—the giant construction companies. They have five projects. They let us get together on a joint venture. Morris and Knutson, you take one job; Perino, you take this job; Atkinson you will do this job, and so on down the line. Only one of them shows up on each job, but they are participating as a joint venture in each job, so they don't really compete against each other in the bidding on the job.

When they fix the price of a bid in this way, they leave out safety, and they are allowed to leave out safety in the bids because they don't have the competitive situation.

I want to suggest areas for Federal legislation to eliminate the injuries and deaths in construction.

First of all, we need Federal workmen's compensation standards, and this will be important in raising the level of standards. You need to make it more expensive to do it in the unsafe way. That is the only way that you are going to get construction safety. If it is more expensive to do it in the unsafe way, then it will be done in the safe way.

If that is the only way in your system, when you have to analyze each company for a cost graph and decide that is less expensive to do it in the safest way, then it will be done in the safest way.

I have been asked to go to Louisiana and represent a construction worker who is paralyzed and the total benefits under workmen's compensation are \$13,500. Where in Michigan that same person might get \$200,000.

We need Federal workmen's compensation standards because all of the construction is in interstate commerce. But we need as part of the Federal minimum compensation standard a provision eliminating the immunity of owners undertaking construction in every State of the United States, and wipe out the 25 jurisdictions where there are statutory immunities to the owners undertaking construction who get the cheap bid and therefore kill and injure people.

Secondly, we need a Federal declaration that hold-harmless agreements of owners and contractors are against public policy. The owners who chiseled the contractors in the bid get a hold-harmless agreement from the contractor, holding the owner harmless, he sets the job up in an unsafe way and then gets a hold-harmless agreement.

Now, Michigan by statute has declared it to be against public policy, and there should be a Federal declaration by statute that it is against public policy for any owner employing a contractor engaged in interstate commerce from having a hold-harmless agreement.

There should be a statutory bar to major safety requirements being part of the bid price. You must take major safety items out of the bid price by Federal statute. You must take these cost-plus above the bid price because when safety is part of the bid price at this stage of history, you are not going to get a safe job.

If you take it out of the bid price and pay cost-plus on every job affecting interstate commerce, then you will move a long way toward getting a reasonably safe job.

We need a Federal academy to train safety engineers on a crash basis, and we need a Federal employers' liability act for construction workers just as for railroad workers and for seamen with a suit against the owner undertaking construction any time the work is done in a negligent way and injures people.

If these steps are taken, then we will reduce the injuries and deaths by 60 times, and this is a conservative approach. This is what will save industry money.

The Du Pont Corporation has saved tens of millions of dollars in the last 20 years because they have an injury frequency rate which is $\frac{1}{60}$ of the industry. They decided about 20 years ago that it would be much cheaper for them to do it in the safe way and they went about doing it in the safe way.

They have estimates it would be interesting for this committee to look at and have Joe DeLuca, who was chief of safety for the Du Pont Corporation for 20 years, and one of the best construction

safety people in the world, come in and show how they achieved a severity rate of one-sixtieth of the industry.

Mr. DANIELS. For what reasons was Mr. Jenkins associated with it.

Mr. PHILO. Mr. Jenkins was chief of safety for the U.S. Army Corps of Engineers for a great number of years. He just retired and bought a home out of Pensacola, Fla.

Mr. DANIELS. Would you furnish for us his address because counsel stated that he tried to get him as a witness in these hearings but was unsuccessful.

Mr. PHILO. I think these are the two men in the field of construction safety who better than any know the cost picture, know the necessity of owners who undertake construction, doing it in a certain way to achieve it and how to achieve it.

Certainly, the record of Mr. DeLuca with Du Pont has proven that you can run major construction projects all over the United States and do it in a way in which you don't kill and maim construction workers.

Mr. DANIELS. The House is in session so I am going to ask my colleagues here to briefly interrogate you.

Mr. O'HARA. No questions, Mr. Chairman. I would like to make a comment. I am sorry I was temporarily out of the room when Mr. Philo was introduced because as a resident of Michigan, I have long been aware of his outstanding work in the field of safety construction. I am pleased to see he has appeared before this committee.

Mr. DANIELS. Mr. Scherle.

Mr. SCHERLE. Only a statement, Mr. Chairman. I too am going to take a good look at the testimony, and we appreciate it very much.

Mr. DANIELS. Mr. Gaydos.

Mr. GAYDOS. No questions.

Mr. DANIELS. Just one question, Mr. Philo, with respect to the bill under consideration, H.R. 3290. You have not indicated whether or not this bill meets with your approval, nor have you stated whether this bill should be amended in respects to conform with the testimony you have given here today.

Mr. PHILO. I know the problems in attempting to get this bill through the last time. I offer my testimony in saying that what is needed is maybe 1,000 times as much as this bill, but this bill may be as much as we can hope to get through.

I certainly support every attempt to get more safety and I think this bill is in that direction.

Mr. DANIELS. As far as the bill goes, it meets with your approval?

Mr. PHILO. Very definitely, but I think much, much more is needed, and I think this committee has to look into this in a much more sophisticated way.

Safety engineers have now given us the way to protect every construction worker. The construction workers are only killed because the hazards are not recognized, and the hazards are not protected against on the job. All of the hazards in construction are now recognized.

Every single hazard can be eliminated and every single injury can be prevented.

Now, I think in a reasonable or practical sense, you are going to have 40 or 50 deaths rather than 2,800 deaths, 40 or 50 injuries rather than

50,000 injuries, and I think that is a gigantic step and something that should be accomplished in the next several years, and I hope this committee, after getting this bill enacted, will go much further and get the additional steps that I have recommended.

Mr. DANIELS. Mr. Philo, on behalf of the committee and myself personally, I want to compliment you on your testimony here. I think you have made a very valuable contribution and your testimony will be very helpful to all of us in considering this bill. Thank you very much.

Mr. PHILO. Thank you.

Mr. DANIELS. The subcommittee will stand adjourned until 10 o'clock tomorrow morning, at which time we shall be honored by the presence of the Secretary of Labor, Mr. George Shultz.

(Whereupon, at 12:05 p.m., the subcommittee recessed, to reconvene at 10 a.m., Thursday, March 27, 1969.)

TO PROMOTE HEALTH AND SAFETY IN THE BUILDING TRADES AND CONSTRUCTION INDUSTRY

THURSDAY, MARCH 27, 1969

HOUSE OF REPRESENTATIVES,
SELECT SUBCOMMITTEE ON LABOR OF THE
COMMITTEE ON EDUCATION AND LABOR,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to recess, in room 2175, Rayburn House Office Building, Hon. Dominick V. Daniels (chairman of the subcommittee) presiding.

Present: Representatives Daniels, Hathaway, Burton, Gaydos, Ford, Green, Scherle, Quie, Esch, Steiger, Erlenborn, and Collins.

Staff members present: Daniel H. Krivit, counsel; Loretta Bowen, clerk; Michael J. Bernstein, minority counsel for education and labor, and Marty LaVor, minority research assistant.

Mr. DANIELS. The subcommittee will come to order.

The purpose of today's hearing is to continue receiving testimony on H.R. 3290, a bill to promote health and safety in the building trades and construction industry in all Federal and federally financed or federally assisted construction projects.

Our first witness today is the Honorable George P. Shultz, Secretary of Labor, who is accompanied by the Honorable James D. Hodgson, Under Secretary of Labor.

I note, Mr. Secretary, that you have a prepared statement. You are free to proceed in any manner that you wish.

STATEMENT OF HON. GEORGE P. SHULTZ, SECRETARY OF LABOR, DEPARTMENT OF LABOR; ACCOMPANIED BY HON. JAMES D. HODGSON, UNDER SECRETARY OF LABOR

Secretary SHULTZ. Mr. Chairman, members of the subcommittee, I welcome very much the opportunity to appear this morning, even though, as you know, I can only be here for a brief moment. I come even though I can only stay for a moment for two reasons.

First, I want to emphasize the concern that I have personally and that we have in the Department of Labor for the general subject of safety. I have been quite struck in studying this subject at the extensive number of man-days lost through on-the-job accidents and to notice that the number exceeds the man-days lost through strikes, which, of course, gets a tremendous amount of attention, depending upon the year involved, on the order of seven to eight times. So we get some notion of the magnitude and importance of this problem. So I am here to emphasize that aspect of it.

(77)

Second, I am here to introduce the Under Secretary of Labor, Mr. James D. Hodgson, who will stay following my remarks and present the Department's position on this bill and respond to your questions. It is a special pleasure to have Mr. Hodgson in the Department and working on this subject because of his experience in safety work.

As you know, he was corporate vice president at Lockheed Aircraft before coming to this job. As such, the responsibility for safety fell directly under him, and it may be noted that the industry with which he is associated has a very good safety performance, but, more than that, that the performance of his company reflects in part his outstanding work in that industry.

So he is a person who has a great deal of experience in this field.

It is fitting, Mr. Chairman, that our first meeting with you concerns, generally, the subject of occupational safety and health, and specifically, H.R. 3290, which is related to this subject to the extent that the bill recognizes the Federal Government's obligation to promote the safe and healthful working conditions of those employees who work under Federal contracting authorities.

The safety and health aspects of working conditions are already protected under Federal law in the case of those employed on Government supply and service contracts. The extension of such protection to the one group of workers presently unprotected, that is, to the construction workers employed under Federal and federally assisted construction projects, strikes us as wise.

I favor the enactment of legislation along the general lines of H.R. 3290, which recognizes the Federal Government has a special obligation to those who work on Government contracts and extends safety and health protections to the one remaining class of workers who do not now have the benefit of those protections.

As I indicated earlier, Mr. Hodgson will, I am sure, expand on the Labor Department's views on this subject and answer your questions.

Mr. DANIELS. Mr. Secretary, do you propose to stay while Mr. Hodgson testifies?

Secretary SHULTZ. No, sir; I can't.

Mr. DANIELS. Just a question or two, then.

Safety regulations already apply to the manufacturer of supplies and also to service areas where the Federal Government is involved. It appears that the construction industry on federally financed or federally assisted projects is not covered. As you have already indicated, there appears to be no good reason why it should not be extended to that area. Isn't that so?

Secretary SHULTZ. Yes, sir.

Mr. DANIELS. In your comments you state that enactment of legislation along the general lines of H.R. 3290 met with your approval. Do you have any recommendations to amend or to change the provisions of H.R. 3290?

Secretary SHULTZ. I think I would rather have Under Secretary Hodgson speak to that. He has his prepared statement, which I think will be responsive to that question, sir.

Mr. DANIELS. The gentlewoman from Oregon?

Mrs. GREEN. No questions.

Mr. DANIELS. Mr. Scherle?

Mr. SCHERLE. Only a statement, Mr. Chairman; and that is to say that we appreciate the remarks from the Secretary this morning for the administration's honest and forthright statement. Thank you very much.

Mr. DANIELS. The gentleman from Pennsylvania, Mr. Gaydos.

Mr. GAYDOS. No questions.

Mr. DANIELS. The gentleman from Texas, Mr. Collins.

Mr. COLLINS. No questions.

Mr. DANIELS. The committee is very pleased with your testimony. Thank you, Mr. Secretary.

Secretary SHULTZ. Thank you, Mr. Chairman.

Mr. DANIELS. Mr. Hodgson, you may proceed.

Under Secretary HODGSON. Thank you, Mr. Chairman, and members of the committee; safety is certainly a matter of very great moment at this session. I find myself appearing before committees of the Congress on uranium mining safety problems, coal mine safety problems, and today on construction safety.

Since I first assumed my duties as Under Secretary of Labor last month, I have looked forward to the opportunity to discuss with you important legislative matters bearing upon the general welfare of the working men and women of this country.

Therefore, I am pleased that H.R. 3290 reflects an interest in the broad subject of occupational safety and health, even though its provisions deal only with the working conditions and practices of the building and construction industry when Federal contracting is involved.

H.R. 3290 would promote safe and healthful working conditions for those employed in one segment of a single industry. The measure recognizes that the Federal Government has a special responsibility toward those persons who work on contracts entered into under authority of the Federal Government.

Before going into the particulars of H.R. 3290, I believe it might be best to examine first the broad picture of industrial safety and health. In this way, we can gain some perspective on how H.R. 3290 fits into the more general view of industrial safety matters.

We have figures based on the year 1967 covering all industries, grouped into six major categories, which give us a fair overall picture of the workplace hazards for American employees. In industry as a whole, 14,200 persons are killed on the job every year; and over 2 million are disabled by injuries at work. Our figures show that of these total deaths, approximately 20 percent occur in the construction industry. Of the total disabling injuries, the construction industry accounts for about 11 percent.

National Safety Council figures for the same year, but in a more detailed grouping of 41 industries, show an all-industry injury frequency rate of 7.22 disabling injuries for every 1 million man-hours worked, the highest since 1954. The injury frequency rate for the construction industry is nearly double.

In terms of accident severity rates, instead of frequency rates, we see from the National Safety Council data more or less the same picture. There are 20 industries which have higher severity rates than the all-industry rate. Only five of these have severity rates higher than that of the construction industry.

I want to digress a moment to say that we realize that our statistics on work-related deaths and injuries are not what they should be. One of the major problems in the field of occupational safety and health is the insufficient and inadequate reporting of such fatalities and injuries. But, incomplete as they are, the figures add up this way:

First, we see over 14,000 people killed and over 2 million injured every year while earning their living.

Second, we can conclude that the construction industry involves a more than normally hazardous type of employment. Indeed, that industry is one of the most hazardous in the Nation. And it is a sizable industry employing millions of workers and involving the investment of billions of dollars annually.

At the same time, we might observe that while construction represents some of our most hazardous occupations, it is, in perspective, only a part of a general problem; it does not represent the whole problem. The construction industry accounts in statistical terms for a little less than a fifth of the overall national workers' safety problem.

In the view of the Department, it would thus appear that some sort of comprehensive approach toward improving the working conditions and practices of all industries, including, of course, the building and construction industry as a whole would be desirable.

However, legislation along the lines of H.R. 3290, which is confined to providing safe and healthful working conditions for the one group of employees working under Government contracting authorities who are not presently protected by Federal law, would be a step forward. The Federal Government would thus round out its safety coverage of those who work under its contracting authorities.

The purpose of H.R. 3290 is to extend to Federal construction contracts the same health and safety protections already provided under other Federal laws to those who work under Government contracts for the procurement of services and of supplies. Those other laws are the McNamara-O'Hara Service Contract Act and the Walsh-Healey Public Contracts Act.

We are not yet prepared to speak to the specific provisions of this construction safety bill, or of a general bill. I am sure you appreciate that we will need more time to work out the details of such legislation.

I would like to note, however, that as we see it, H.R. 3290 would operate as follows:

The new safety and health protection would take the form of a condition in a contract. The condition would be inserted in the types of contracts specified in the Contract Work Hours Act.

In the event the Secretary of Labor should find a violation of a contract condition relating to worker safety and health, the Government agency for which the work is being done could, after full due process of law, cancel the contract and enter into other contracts charging the additional cost to the original contractor.

H.R. 3290 would authorize the Secretary of Labor to enforce the bills provisions in the same manner as the safety and health provisions of the Walsh-Healey Act are enforced. The Secretary would hold hearings, make decisions based on findings, make rules and regulations, and take other appropriate actions.

Finally, the bill substantially adopts the provisions of the Walsh-Healey Act authorizing the Secretary of Labor, following carefully defined procedures, to debar contract violators for three years.

In summary, Mr. Chairman, I reiterate that we have a strong interest in a comprehensive occupational safety and health coverage for all industries, including the building and construction industry. However we endorse the idea of legislation which is especially designed for the building and construction industry, thus filling a gap in Federal coverage of on-the-job safety and health of those employees who work under Federal contracting authorities.

Thank you.

Mr. DANIELS. Thank you, Mr. Secretary. I am very pleased to note that you endorse the general terms of the provisions of this bill.

However, you state that you have not had sufficient time to give this bill your very close scrutiny and you make no recommendations as to its provisions.

Do you believe the Department, however, could establish effective rules and regulations with regard to safety?

Under Secretary HODGSON. We have done so in connection with Walsh-Healey regulations. I believe we could.

Mr. DANIELS. Is it not true that there are different health and safety rules prevailing in the various agencies of the Government today and that they are proliferated amongst the various agencies of the Government and that there are no standard regulations?

Under Secretary HODGSON. That is quite true.

Mr. DANIELS. Would it not be much better in practice for the Government to have a uniform set of rules and regulations which would pertain to all the agencies adopting the best of courses that prevail?

Under Secretary HODGSON. The reason we come down on the side of favoring legislation of this general concept is based on that idea, that a more uniform approach, we would hope, would produce a better safety record.

Mr. DANIELS. Thank you.

The gentleman from Maine, do you have any questions of the Under Secretary? Mr. Hathaway?

Mr. HATHAWAY. Thank you very much, Mr. Chairman.

I want to thank you, Mr. Under Secretary. I am sorry I got here too late to hear the Secretary talk. I wanted to commend you particularly for your strong interest in the comprehensive occupational safety and health bill, which will probably be taken up later on in this session.

You mention on page 4 of your statement that you are not yet prepared to speak on the specific provisions. At what time do you think you would be prepared to give us your recommendations?

Under Secretary HODGSON. We consider this to be a matter of some urgency, but I would not be prepared to say as to exactly what time we would be able to do that.

Mr. HATHAWAY. Would it be before the first of May, do you think?

Under Secretary HODGSON. I really don't want to make a commitment specifically to that effect. We will try to be cooperative in this matter. I would say this, that if there were an individual item that came to the committee's attention on which it needed further informa-

tion or a specific opinion of the Labor Department in advance or a general opinion, we would try to provide it for you.

Mr. HATHAWAY. Thank you very much. Thank you, Mr. Chairman.

Mr. DANIELS. The gentleman from Iowa, Mr. Scherle.

Mr. SCHERLE. Thank you, Mr. Chairman.

Mr. Under Secretary, it is a real pleasure to have you here this morning. I appreciate the contents of your testimony. The committee does realize that we have just opened hearings on the subject of construction safety. We also appreciate the fact that the administration does endorse the bill as written, with only slight reservations until you have time to give it close scrutiny. We do want to write a good bill. Any recommendations that the administration would make, certainly we would welcome them.

With this in mind, I thank you again for your testimony. As you go through the bill, content by content, if you do have recommendations, or find any discrepancies for that matter, let us know and we will consider them in regard to the final adoption of this legislation.

Thank you very much.

Under Secretary HODGSON. We will be glad to provide you with them.

Mr. DANIELS. The gentlewoman from Oregon?

Mrs. GREEN. No, Mr. Chairman.

Mr. DANIELS. Mr. Steiger?

Mr. STEIGER. Thank you, Mr. Chairman.

I wonder if the Under Secretary would be willing to comment on two things that were raised yesterday. I recognize that in your statement you have said you did not necessarily wish to comment on the specific provisions of H.R. 3290.

At the same time that the building trades unions were here yesterday, I asked as to whether there would be an objection on their part to the promulgation of the AGC Code immediately as at least the first step in construction safety that could be taken. They indicated they would not oppose such a move.

Second, I asked if they would object to writing into the bill the provisions for the selection of an advisory committee to counsel and advise the Secretary on what standards or modifications there should be in the initial code that was adopted.

Would you think that this would be a wise step to take on the part of this committee as it considered this bill, or would you rather not comment on it at this time?

Under Secretary HODGSON. With regard to the first part of the question, the matter of standards, we believe that we should use the best standards we could find. Some of those may be in the AGC, but we would consider all standards that are applicable to this industry and that come to our attention.

Second, with regard to a committee for counsel and advice, the Department is itself going to be soliciting outside advice in matters of safety in the ensuing months. Whether the form of that counsel will be as a committee, I am not prepared to say at this time, but we shall have a decision on that, I would say, within the next 10 days.

Mr. STEIGER. Do I take, Mr. Hodgson, from that answer then, that at least for the moment you would hope this committee would hold action in terms of supporting a bill until such time as you have had a further opportunity to comment or suggest specific recommendations for changes?

Under Secretary HODGSON. Naturally, we would like to have as much input as possible upon the ultimate result of this committee's work. So we would like to continue to contribute. I don't think I could ask the committee to change its schedule to meet our requirements. But we would like to continue to be of help to the committee as it goes forward.

Mr. DANIELS. Will the gentleman yield at that point?

Mr. Secretary, I would like you to know that the chair, and I believe it is also the sentiment of the entire committee, wants to cooperate fully with the Department of Labor. However, in view of the grave statistical data that you have already quoted concerning the construction industry, I think it is important that this committee get out a bill to protect the life and limb of these workers as quickly as possible.

I am sure you are aware of the fact that last year this subcommittee did report a bill substantially along the lines and provisions of the bill in question. But because of the fact that a rule could not be obtained from the Rules Committee, it was brought up on the House floor under suspension of the rules. A majority vote was cast in its favor, but the bill failed to pass because under suspension a two-thirds vote was required, which the bill failed to obtain.

So, consequently, the bill died. This year we would like H.R. 3290 to come to the floor at an early date. That is why we ask for the cooperation of your Department and urge you to give us the benefit of your views as promptly as possible.

Under Secretary HODGSON. We don't underestimate either the seriousness of the problem or the urgency of this matter, and we will continue to try to cooperate with the committee in this regard.

Mr. DANIELS. Thank you.

Mr. STEIGER. I thank the chairman, and I want to join in welcoming both you, Mr. Hodgson, and the Secretary, and I am sorry I missed the Secretary's presentation.

May I say that the statement you have presented, the support that you give to this legislation, and the viewpoint that you express in terms of the overall problem of the quality of the working environment for American men and women, is one of which I am particularly proud. I know that the Department will continue the kind of forthright, candid, sound recommendations which you have presented both in the coal mine field and in this field, and I know it will be a pleasure for this committee to work with you.

Under Secretary HODGSON. Thank you.

Mr. DANIELS. The gentleman from Michigan, Mr. Ford?

Mr. FORD. Thank you, Mr. Chairman.

In looking at the statement here, in two or three places, although you have not specifically indicated this, I get the impression that you support this legislation but you consider it to be only preparatory to solving the real problem. You note, for example, that the construction industry, although it is the fifth or sixth most hazardous industry ac-

according to the indices that you used in preparing this statement, represents only 20 percent of the total injuries that have come to the attention of your Department. I gather from this that what you are really saying is that we ought to have a general industrial safety act patterned along the form of the legislation now pending before this committee and that your Department is prepared to vigorously support that kind of legislation.

Under Secretary HODGSON. I would summarize our view of the relationship between this act and the more comprehensive subject in this way. We feel legislation along the lines of the bill that we have been discussing here this morning would fill a gap in existing legislation. That judgment on our part is reinforced by the knowledge that this is a particularly hazardous industry. But we would not want action on this individual industry to dissuade us from looking at and pursuing legislation along more comprehensive lines.

Mr. FORD. That didn't tell me anything. Are you or are you not in favor of industrial safety legislation broad enough to encompass the other 80 percent of the industrial accidents not covered by this legislation?

Under Secretary HODGSON. We are in favor of it, but the form it will take is something we are not yet prepared to discuss.

Mr. FORD. There are at least three bills presently pending before this committee that have been here for more than a month and a half, some of them for more than 2 months. Your Department is certainly aware of them.

Do you have any impression or opinion with regard to whether you are going to be prepared to support those bills or not?

Under Secretary HODGSON. Not that we are prepared to discuss today.

Mr. FORD. Before we close the hearings, will you be kind enough to respond with respect to those bills and give us at least a brief suggestion as to whether or not this fits the broad criteria of more comprehensive legislation that you have just outlined?

Under Secretary HODGSON. We will certainly try to.

Mr. FORD. We are talking about a principle here. I don't think we should play games in front of this committee, because it is very serious legislation. The principle is the thing that we have never been able to legislate here. We always get into a lot of nonsense about the specifics that are in the bill. The building trades feel very serious about one specific aspect of it, and the other organizations feel very strongly about other aspects.

But the plain fact is that we have not been able to get the Congress to accept the philosophy of a Federal law to protect these workers. That is what we want to know about the present stand of the administration. Are you prepared to support the philosophy of the Federal Government moving into this field and protecting construction workers, as distinguished from the position advocated by many of the organizations, that will testify after you, that such legislating should be done at the State level or not at all?

Under Secretary HODGSON. We think this bill does reflect that Federal involvement that you refer to, and we have come down in favor of that general or philosophic approach you suggest.

Mr. SCHERLE. Will the gentleman yield?

Mr. FORD. Certainly.

Mr. SCHERLE. My colleague from Michigan. The testimony before you and as submitted by the Secretary and Under Secretary, is pretty much self-explanatory. I think the history of labor, as far as the Republican Party and the administration is concerned, speaks for itself.

Furthermore to try and bring forth commitments this morning based on philosophy is inappropriate. There is ample time for that at a later date.

I do believe there are questions that should be asked and answers requested, but I do think that asking the Department "What bill will you support?" this early in the game, well, I can't necessarily subscribe to that.

Mr. FORD. I would like to assure the gentleman that I will ask the Associated General Contractors exactly the same questions when they have their turn at bat. So there will be absolutely no discrimination for or against a proponent or an opponent of this legislation.

I think everybody ought to have the chance before this committee to answer the same categorical questions, but I don't think that we ought to play semantic games about what the real issues are concerning this legislation.

Mr. SCHERLE. If you are trying to legislate philosophy, I don't think this is a good place to make that kind of an attempt.

Mr. FORD. If you don't believe that the Congress in legislating is expressing its will and what it believes to be the will of the people with respect to an important question such as this, then you and I have a different idea about the function of the Congress.

Mr. SCHERLE. I certainly accept that challenge. When you talk about philosophy, every member in this room has his own. I am sure we have more sound bases for questions this morning than based on philosophical approaches.

Mr. STEIGER. Will my colleague from Michigan yield?

Mr. FORD. Yes.

Mr. STEIGER. I will only say that perhaps I misunderstood the thrust of his questions.

Mr. FORD. You are not going to deliver another scathing attack on me like the gentleman from Iowa, I hope.

Mr. STEIGER. I want to clarify the record.

Mr. DANIELS. Let's have some order. The witness is here to respond to questions, so instead of having a debate between the members of the committee—that can be arranged. If you want me to arrange that, I will arrange that for you.

So, Mr. Ford, I would recommend that you proceed with any further questions that you may have of the witness.

Mr. FORD. Thank you, Mr. Chairman.

We are very serious about a broader approach to industrial safety than just this specific piece of legislation, although this is the one that historically has come the closest to success and may well be the logical place for us to cross that first hurdle making occupational safety a Federal concern.

The construction industry has some special characteristics about it that make it particularly amenable to Federal solutions as dis-

tinguished from local solutions, such as the mobility of the work force and the other conditions that are not found in some types of industry.

This issue that comes before this committee consistently is framed around the question of whether the Federal Government has this role to play and how far that role should extend.

In preparation for your position on this piece of legislation, has your Department had an opportunity to make an up-to-date study of what is in fact being done at the State level across this country in this field of construction safety?

Under Secretary HODGSON. The Department constantly keeps track of the general level of attention paid to safety matters by the States. If the committee would like, we could send our latest analysis of that to the committee.

Mr. FORD. I wonder if it would be possible in that analysis for someone in your Department to make a comparison and tell us when an organization represents to us that State "A," "B," or "C" is doing a better job than this bill would do whether there is in fact some basis to such an assertion. Tell us from your point of view whether you feel that this would be a more or less comprehensive and, in fact, stringent regulation concerning safety than exist in each of the 50 States. Could you do a comparison for us?

First of all, it won't require 50 States, because there aren't real construction safety laws in half of the States. So it isn't really as big a job as it first appears to be.

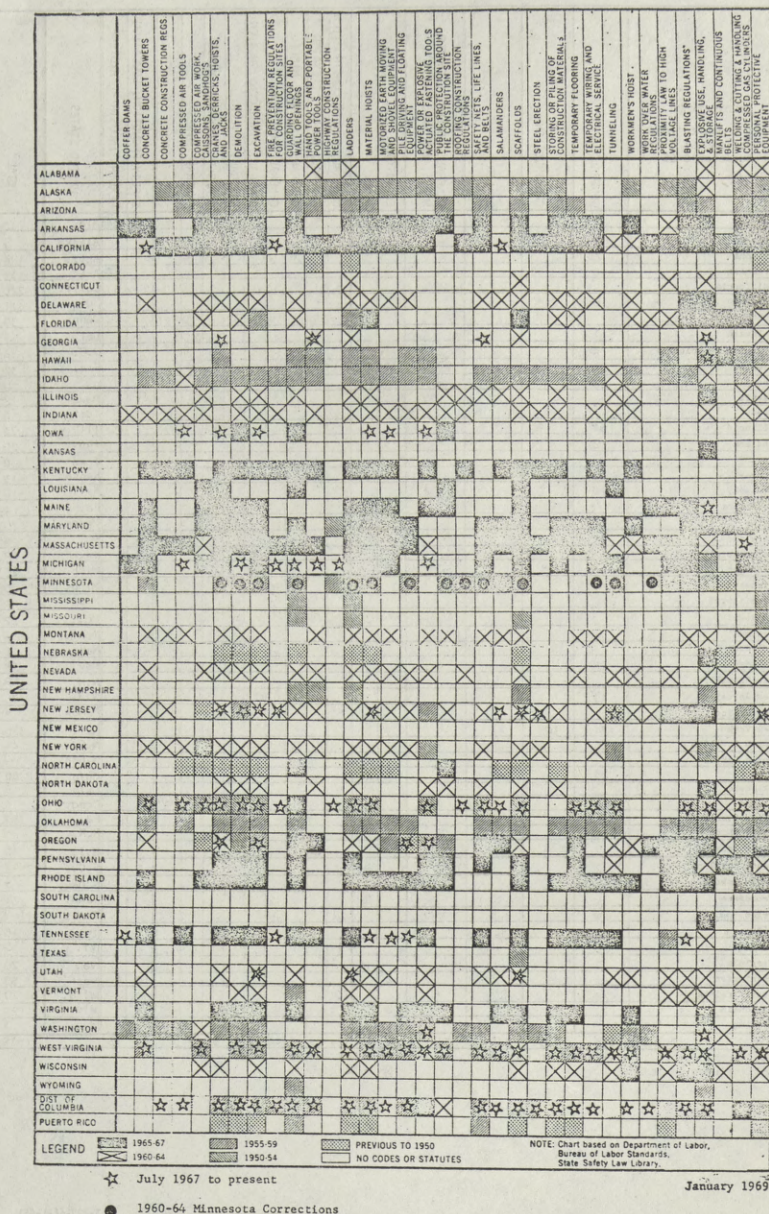
Under Secretary HODGSON. We can give you factual comparisons.

Mr. FORD. I think it would be important because when we have had hearings in the past, we have had a whole line of assertions that we already have a tougher or a better law in this State or that State, and we really haven't had the Labor Department answer that assertion in the past.

Mr. Chairman, I have no further questions and thank you very much.

(The information referred to follows:)

Present degree of coverage by states and their latest revision date.



STATE LABOR AGENCY SAFETY INSPECTION STAFF

UNITED STATES Source: Organizations and Functions of State Labor Agencies 6-65 LSB-55	GENERAL SAFETY	CONSTRUCTION	BOILER	GENERAL, BOILER, ELEVATOR MINES, AND CONSTRUCTION	ELEVATORS	MINES	GENERAL, BOILER, CONSTRUCTION	GENERAL, BOILER, ELEVATOR	GENERAL, ELEVATOR, MINES	GENERAL, ELEVATOR	GENERAL, MINES, CONSTRUCTION	GENERAL, BOILER	GEN. BLR., ELEVATOR, MINES	SAFETY PROMOTION, EDUCATION HEALTH, INDUSTRIAL HYGIENE	UNITED STATES	TOTAL	
Alabama						5	5							2/ 2/	Ala.	10	
Alaska	5		2												Alaska	7	
Arizona	6														Ariz.	6	
Arkansas	8		4		1										Ark.	13	
California				220										6	Calif.	220	
Colorado	6		5												Colo.	11	
Connecticut								39						6	Conn.	39	
Delaware	1														Del.	1	
District of Columbia	8														D.C.	8	
Florida	29				3										Fla.	32	
Georgia	20														Ge.	20	
Hawaii			1					11						1	Hawaii	12	
Idaho							3								Idaho	3	
Illinois	64	9			3	5								2	Ill.	73	
Indiana	12													1	Ind.	20	
Iowa			1					8							Iowa	9	
Kansas			2		2				9						Kansas	13	
Kentucky	10														Ky.	10	
Louisiana			4												La.	4	
Maine	4		1		1										Maine	6	
Maryland	27		2											2	Md.	29	
Massachusetts															Mass.	NR	
Michigan			2		2				22						Mich.	26	
Minnesota			14							16					Minn.	30	
Mississippi															Miss.	NR	
Missouri						3	19								Mo.	22	
Montana															Mont.	-	
Nebraska			2										6		Nebr.	8	
Nevada															Nev.	**	
New Hampshire															N.H.	NR	
New Jersey	49	14	5		7									1	N.J.	75	
New Mexico															N-Mex.	-	
New York	174	108	41		3										N.Y.	326	
North Carolina	26	4	7		4										N.C.	41	
North Dakota															N-Dak.	-	
Ohio	23		9		28										Ohio	66	
Oklahoma			2						7						Okla.	9	
Oregon	1/		6												Oreg.	6	
Pennsylvania	99		12		32	14							47		Pa.	157	
Puerto Rico														1	P.R.	47	
Rhode Island							15								R.I.	15	
South Carolina	12													5	S.C.	12	
South Dakota															S-Dak.	-	
Tennessee			10		9			12							Tenn.	31	
Texas			8										1		Texas	9	
Utah												5			Utah	5	
Vermont			1				4								Vt.	5	
Virginia	12					16									Va.	28	
Washington	49		3		2	1								10 4	Wash.	55	
West Virginia						20									W.Va.	20	
Wisconsin	21		4		4									1	Wis.	29	
Wyoming											3				Wyo.	3	
TOTAL	665	135	148	220	58	93	24	89	11	44	22	3	52	7	29	13	1571

1/ W.C. Comm. covers safety-also 6 in wage-hour

2/ Not included in totals

** - Not in Labor Department

NR - No report

February 12, 1966

TABLE 4

LOCATIONS OF VARIOUS OCCUPATIONAL SAFETY FUNCTIONS IN SEVEN COUNTRIES

State	Functions						
	Occupational Safety	Occupational Health	Boiler Inspection	Elevator Inspection	Radiation	Mine Safety	Women's Organization
Alabama	Dept. of Industrial Relations	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Department of Labor	Dept. of Labor
Arizona	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
California	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Colorado	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Connecticut	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Delaware	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Florida	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Georgia	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Idaho	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Illinois	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Indiana	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Iowa	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Kansas	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Kentucky	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Louisiana	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Maine	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Massachusetts	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Michigan	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Minnesota	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Mississippi	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Missouri	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Montana	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Nebraska	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Nevada	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
New Hampshire	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
New Jersey	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
New Mexico	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
New York	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
North Carolina	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
North Dakota	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Ohio	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Oklahoma	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Oregon	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Pennsylvania	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Rhode Island	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
South Carolina	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
South Dakota	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Tennessee	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Texas	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Vermont	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Virginia	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Washington	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
West Virginia	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Wisconsin	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor
Wyoming	Department of Labor	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Health	Dept. of Labor	Dept. of Labor

Notes:

1. A dash (—) in the column for a particular function indicates that there is no definable organization or department of the function, though it may be a safety function or closely related to it.

2. Three states are included here which may not provide timely information for this study.

Prepared by the U. S. Department of Labor, Mine and Labor Standards Administration.

Mr. DANIELS. The gentleman from Texas, Mr. Collins?

Mr. COLLINS. Following that same line my colleague from Michigan was mentioning, I have been concerned about whether we will really achieve anything by bringing in this additional safety legislation. Are you familiar with California and their results at this time?

Do you know the facts comparing it to a State like Texas? Do you know whether California has achieved a much better record in safety in the construction trades?

Under Secretary HODGSON. With regard to the individual States and their records in the construction trades, we would have to send you such comparative information.

Mr. DANIELS. The gentleman from Pennsylvania, Mr. Gaydos, any questions?

Mr. GAYDOS. I have no questions.

Mr. DANIELS. The gentleman from California, Mr. Burton?

Mr. BURTON. Thank you, Mr. Chairman.

In your statement, Mr. Secretary, you plead for additional time to determine the administration's position with reference to the general safety bill. How long is it going to take you before the administration makes up its mind on this legislation?

Under Secretary HODGSON. As I mentioned to the Congressman in response to a similar question earlier, we don't want to give you a timetable because we don't know how long it will take, but we view it as a matter of importance and a matter of urgency, and we also view it desirable to cooperate with this committee and will try to get further information and develop a position on this matter as early as possible.

Mr. BURTON. I am sure the administration has appointed experts in the respective fields in which they have a responsibility, however we would like some outside time frame. We don't need a timetable, but an outside time frame.

Will it be by the end of this year? Will it be by the end of June? Just give us some safe outer limit that your department, with your newly appointed experts, will be able to reach a judgment on this matter.

Under Secretary HODGSON. I don't have any outside time frame. It certainly would be before the end of this year.

Mr. BURTON. Do you think it will be before Labor Day?

Under Secretary HODGSON. I don't know.

Mr. BURTON. It could be after Labor Day, then?

Under Secretary HODGSON. It is very doubtful, but I don't want to be pinned down as to time, because I really don't know the magnitude of the problem.

Mr. BURTON. You don't consider yourself an expert, then, in this particular field?

Under Secretary HODGSON. The matter of my expertise in this matter may have been overplayed to this extent. My role in matters of industrial employee safety has been that of a practitioner trying to see to it that a large corporation develops the best possible safety record and protects its workers as best it can. I don't pretend to be an expert in the legislative aspects of safety.

Mr. BURTON. There is one part of your statement before this committee that troubles me in light of your statement before another sub-

committee that you appeared before. I would like to have you reconcile what appeared to me to be two absolutely irreconcilable points of view.

As I understood your testimony yesterday, when we were dealing with a certain aspect of the black lung problem, you felt that we should not proceed with that particular aspect of this problem until we saw the problem for all workers in similar situations, that we should take a look at the whole picture. Here today you are supporting legislation that just takes care of one small aspect of just one industry.

Are you telling us today that you think that it is fair and logical to proceed with this piece of this one industry before we try to solve the whole problem?

Mr. STEIGER. If my colleague will yield, the question—

Mr. BURTON. I do not yield, Mr. Steiger. You have used your time. I would like to use my time. I will not yield.

Under Secretary HODGSON. We have endorsed this general legislation because it involves the special responsibilities under Federal contracts. It fills a gap in that regard.

Mr. BURTON. Would you not characterize this legislation, however, as being legislation that deals with a segment of one industry's health and safety problems as distinguished from an entire industry or occupational safety program across the board? Is that not an accurate description?

Under Secretary HODGSON. Since it only covers Federal construction or federally assisted or federally financed construction, it obviously covers only one segment of one industry.

Mr. BURTON. At least in this instance you see a legitimate concern of ours, even though we can't settle the whole occupational safety problem across the board? We should deal with the problem before us as best we can and move on to the next one when that confronts us?

Under Secretary HODGSON. I see it this way.

Number one, the special obligations that arise under Federal contracts in the supply area and in the service area have been acknowledged. They have not yet been acknowledged in the construction area. Therefore, this bill does that.

Furthermore, it does it in an industry that has a more than normally hazardous kind of work.

But we would not want dealing solely with this industry to dissuade the committee from dealing more widely with the question of occupational safety.

Mr. BURTON. I have two more questions. One is on the statistical problem, which I think troubles a good many people.

Would you support a mechanism to require a standardization of reporting on work-related deaths and injuries, bearing in mind that some States probably have better reporting mechanisms and perhaps superior definitions than those that can be mandated as a national matter? How would you come to grips with the need for accurate data in terms of work-related deaths or injuries?

Under Secretary HODGSON. As we have commented, we think that the safety records that exist at the present time are inadequate. We think they should be improved. We will work toward improving our own statistics to the extent that one needs to standardize them in order

to do this. I don't know whether that would produce the desired effect. We are certainly in favor of better statistics.

Mr. BURTON. I would like the administration's response to the notion as to whether you should be authorized, not mandated—because the problem probably does not lend itself to some legislative formulation—authorized to require uniform reporting. I would like your response to that thought. If we consider that, would you like to be authorized to require minimum, uniform statistical reporting?

My final question is this.

You have stated that this administration has accepted its special responsibility in the area of Federal contracts and federally related contracts.

Would you just develop that concept a little further? Do you believe that because of the special interest, if you please, of the Federal Government in their own contracts that in addition to working conditions, benefits to be paid out as a result of people suffering from unsafe working conditions should be a part of that concern?

Under Secretary HODGSON. Our expression on that has been that there exists now what seems to be a gap in the coverage of this matter among types of contracts, supply contracts, and service contracts being covered, building and construction contracts not being covered.

Therefore, we think from the standpoint of reasonably uniform treatment it is appropriate to cover them. In the same vein, it would be desirable to have authority to require a uniform system of reporting accident and injury statistics for any health and safety program, including, of course, such a program for the construction industry.

With regard to the second part of the question dealing with compensation, I am not prepared to comment on that without further study. And, I would add, generally, that inequities in workmen's compensation present problems meriting further study. However, what we are discussing today is legislation designed to prevent accidents and injuries. I do not believe that legislation which is preventive in nature should necessarily be joined with the consideration of matters, such as workmen's compensation, which deals with remedies after the fact of injury.

Mr. BURTON. Let me highlight a specific problem, and then I will yield back whatever time I may have.

If a construction job is undertaken by the Federal Establishment and they hire or have this work done by employees on the Federal payroll, these employees when injured on the job are covered by the Federal Employees Compensation Act. As is often the case, they will be working not only with the federally payrolled people, but they will be working side by side with private construction contractor employees. Oftentimes, the employees working on the Federal payroll and those in the private contractor's payroll are doing similar or identical work.

But, depending on the happenstance of a State—and this is particularly true in some of the big damsite constructions which are situated in two or maybe three States depending on which side of the State line you happen to be on, whether you are on the Federal payroll or on the Federal contractor's payroll—even though you receive the identical injury in the identical incident, you may receive a much different level of payment. That is not fair to the workers involved.

There is another factor that isn't fair in relation to the budget.

Mr. SCHERLE. Can I ask my colleague from California——

Mr. BURTON. The Chair may recognize you if he chooses to after I yield back my time.

The other aspect of the problem——

Mr. DANIELS. Let's have order.

Mr. BURTON. The other aspect of the problem is that when you re-estimate what the costs are to have an in-shop operation or a contract operation—to the extent that you provide different levels of workmen's compensation benefits, that is a cost factor that tends to affect the cost analysis of which is the cheaper way to perform the work. So this is a problem that I think should be looked at, and I would appreciate in due course the administration's response to that dilemma. We have not been able to sort it out in the past.

Under Secretary HODGSON. I am not sure what the answer is, but it is certainly one on which we ought to see if we can find a solution.

Mr. BURTON. I yield back the balance of my time, Mr. Chairman.

Mr. DANIELS. Thank you.

The gentleman from Michigan, Mr. Esch.

Mr. ESCH. Yes; thank you very much, Mr. Chairman.

Mr. HODGSON. I haven't had an opportunity to read your testimony. We were in another committee. I would like to ask one or two questions specifically.

Am I correct that in most contracts between labor and management, labor has a responsibility of working toward safe working conditions as a condition of contracts under NLRB. Safety is one of the provisions which can be discussed between labor and management at contract time?

Under Secretary HODGSON. It is a subject of bargaining. The provisions regarding it are found in many labor-management contracts.

Mr. ESCH. So it is a mutual responsibility of labor and management to the degree that they can bargain for safe working conditions?

Under Secretary HODGSON. It is a normal subject of collective bargaining; yes, sir.

Mr. ESCH. Would 3290 affect that adversely or affirmatively, as it relates to working conditions being a condition of the contract in dispute?

Under Secretary HODGSON. We would hope that 3290 or whatever comes out of this kind of deliberation does not adversely affect any kind of safety program at the present time, whether that program is generated by management alone, by collective arrangements between labor and management, by Government agencies that now have clauses in their contracts that require certain safety conditions. We do not see that it adversely affects any of them.

Mr. ESCH. Am I correct in my assumption that under present conditions, labor does have the power to make conditions safer if they deem that a higher priority? I don't mean to the point of going out on strike or putting in a grievance and going through the grievance procedures. They do have that power, do they not?

Under Secretary HODGSON. They do, in the sense that they can try to deal with it through bargaining.

Mr. ESCH. But as a problem in terms of the relationship between

management and labor—why do you think they have not worked on that more?

Under Secretary HODGSON. I have no observations on those reasons.

Mr. ESCH. I would hope that as we look at the bill, we might find a way to involve labor more affirmatively. Some trades have been extremely effective in carrying on with management cooperative safety programs. Some, we know, perhaps have been somewhat derelict.

I would hope, Mr. Chairman, as we continue on with the markup of this bill that we might look at ways in which we might have full cooperation between management and labor in developing safety standards, because I think it is a mutual responsibility. Some of which the trades have been very, very successful in working out cooperative arrangements, others have not.

I thank the chairman.

Mr. DANIELS. We will have other witnesses here to present the views of the other segments of the industry—management as well as labor.

The gentleman from Illinois, Mr. Erlenborn?

Mr. ERLBORN. Thank you, Mr. Chairman.

Mr. Hodgson, let me welcome you before our subcommittee. I am sorry I wasn't here earlier, but I had a conflict. I had to be over at the White House for a bill-signing ceremony.

Mr. BURTON. You mean you weren't late. You had something else to do.

Mr. ERLBORN. That is right.

I hope you have had a warm welcome here today. Perhaps you have been treated a little more kindly than you were yesterday when you testified before the General Labor Subcommittee.

I only have one or two questions.

As to the coverage of this bill, what would be the complete coverage of the types of construction? I have in mind anything financed through FHA or VA insured loans. Would they be covered?

Under Secretary HODGSON. This is one of the reasons why we aren't prepared to talk about details. There is a vast range, as you know, of federally financed, federally assisted kinds of construction programs. The extent to which this covers them, the extent to which it should cover them, we have not formed a judgment on that as yet. We have not completely explored that matter yet.

Mr. ERLBORN. Apparently in the bill before us this year, contrasted to the one that was pending in the last Congress, there is some additional limitation and definition of coverage that relates to a reorganization plan.

I am not really familiar with it. Have you had an opportunity to become familiar with the limitation that occurs by reason of the insertion of that language?

Under Secretary HODGSON. I am familiar only to about the extent that you have inferred that there may be a difference.

Mr. ERLBORN. I would think that it would be difficult to enforce the extension of this proposal for instance, to every single family home that was insured through a VA or FHA insured loan. I doubt that we want that broad a coverage. I trust this bill does not go that far.

I want to thank you for coming here today and I look forward to the opportunity of going into this with you again in the future.

Mr. DANIELS. Mr. Under Secretary, there are no further questions. But the Chair does desire to make this statement. This legislation has been pending in this Congress since the Congress reconvened. Reports were requested of your department earlier in this session. Two months have already elapsed. These hearings will continue for several more weeks.

I do think that we will be in a position, about a month hence, to meet in executive session to mark up this bill.

I also think that 3 months time is sufficient and adequate for the department to express its views.

I want to be fair. All witnesses desired to be heard on this subject matter pro and con will be afforded that opportunity. I do believe, though, after hearing all of the witnesses and getting viewpoints of everybody involved that the department should be in a position by that time to let us have its views.

Under Secretary HODGSON. We will try to be responsive to the committee's needs and to the committee's time schedule. My only purpose in not wanting to fix a specific timetable is that I truly don't know the extent of the examination we are going to make.

Mr. SCHERLE. Mr. Chairman?

Mr. DANIELS. Yes, Mr. Scherle?

Mr. SCHERLE. I am quite amused by the questioning here this morning and it appears that some of my colleagues on the other side of the aisle are poor losers. We did win the election. We do have the administration, at least for 4 years.

I also would like to say that it appears strange to me that suddenly all of these administrative difficulties have suddenly arisen when you had the House and the Senate and the Presidency for 8 years. Now you find fault because we have not taken your chestnuts out of the fire in a short 2 months.

You must be a little patient. I am sure the administration will supply you with all the recommendations. I am sure you will be well satisfied with these recommendations. All we need is a little time.

Mr. BURTON. Mr. Chairman, I would like to note that I probably will find myself in certain aspects of the administration's recommendations in more support of them than perhaps our distinguished colleague from Iowa. Only time will tell.

It will be interesting to observe the 180-degree adagio turn by the distinguished gentleman from Iowa in the event the administration comes up with proposals that will be in the best interest of the workers of this country.

I don't recall what the gentleman from Iowa's position was on this particular matter.

Mr. SCHERLE. There were no minority views on this bill last year and I think that speaks for itself.

Voted for.—16 Democrats: Albert, Brademas, Burton of California, Carey, Daniels, Dent, William D. Ford, Gibbons, Hathaway, Hawkins, Meeds, Mink, O'Hara of Michigan, Perkins, Pucinski, Scheuer. 6 Republicans: Ayres, Bell, Delenback, Quie, Reid of New York, Steiger of Wisconsin.

Voted against.—No Democrats. 4 Republicans: Erlenborn, Eshleman, Gardner, Scherle.

Absent.—2 Democrats: Green of Oregon and Thompson of New Jersey (both paired for the bill). 4 Republicans: Ashbrook (paired against), Collins, Esch, Gurney (general pairs).

Note: In the House as a whole, 134 Democrats voted for the bill, and 50 against, while 62 Republicans voted for it, and 86 against.

Mr. DANIELS. Thank you, Mr. Secretary, for appearing here this morning and letting us have your testimony.

Our next witness will be Mr. William Naumann, chairman of the legislative committee of the Associated General Contractors of America.

The Chair desires to state at this time that the 5-minute rule will be imposed upon all members in asking questions of the witness.

STATEMENT OF WILLIAM E. NAUMANN, CHAIRMAN, LEGISLATIVE COMMITTEE, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ACCOMPANIED BY ART SCHMUL, SAFETY DIRECTOR, AGC, AND GRANT SHOWELL, LEGISLATIVE DIRECTOR

Mr. NAUMANN. Thank you very much, Mr. Chairman. I have a statement. If it would please the Chair I would like to proceed with the reading of it.

Mr. DANIELS. Yes. Will you just introduce the gentlemen who accompany you also?

Mr. NAUMANN. On my right is Art Schmul, the national safety director of the Associated General Contractors of America; on my left, Mr. Grant Shotwell, the legislative secretary on the national staff.

Mr. DANIELS. You may proceed, sir.

Mr. NAUMANN. Very well.

My name is William E. Naumann. I am chairman of the legislative committee of the Associated General Contractors of America, a trade association of approximately 9,000 of the Nation's leading general contractors who perform the greater part of all highway, heavy engineering, and building construction done in the United States each year.

I am also a member of the heavy division and a member of the association's executive and labor committees.

We appreciate your giving us an opportunity to testify on H.R. 3290, and to present the construction industry's views with regard to construction safety. Also, I am speaking for the contractor, Plasterers and Lathers International Association. At the outset, I want to emphasize that we are for safety, and do not oppose any positive program that would bring about greater safety in the construction industry. We disagree with the methods prescribed by H.R. 3290 because they will not accomplish the objectives intended.

The Associated General Contractors have had a longstanding interest in safety and have pioneered safety in construction. The AGC Manual of Accident Prevention in Construction has long been recognized as the guide for safety in the construction industry and has been reprinted in several foreign languages.

Five foreign nations have translated the AGC Manual of Accident Prevention in Construction for application by contractors in their efforts to reduce construction accidents. They are: Japan, Spain, Norway, Israel, Afrikaans (Netherlands). Plus those nations comprising the Inter-American Construction Association where the translation has been prepared for the Inter-American Federation of the Construction Industry by the Inter-American Safety Council.

For years this document has been recognized by the American Standards Association as the standard for the industry. We believe that em-

ployers, employees, unions, and government all have a part to play in providing safety at the worksite. We adhere to the idea that a particular safety program must be designed to suit the needs of the individual situation.

Each segment of our industry has its own safety problems peculiar to its own operations, just as each agency regulates and services their particular area of authority. The safety problems of the Corps of Engineers on its flood control work, for example, differ greatly from those of the GSA in constructing a high-rise building in a large city.

We believe that any proposal which would centralize control of safety matters would interfere with the special safety program of the contracting agencies where suitable safeguards have already been established.

For example, on work being done for the Bureau of Reclamation, health and safety standards are incorporated into the contract specifications. These specifications outline the obligations of the contractor in insuring the health and safety of his employees. Thus, these standards constitute a contractual obligation to the Federal Government.

In addition, such specifications require the contractor to abide by State and municipal safety and health statutes and codes. Any contractor found to be in noncompliance with these standards or contractual provisions is subject to termination of the contract.

To assure compliance with the safety requirements, projects are under the surveillance of the project engineer and the safety staff of the contracting agency. In addition to the Bureau of Reclamation, the Corps of Engineers, the Naval Facilities Engineering Command, Bureau of Public Roads, the Atomic Energy Commission, the Air Force, and the General Services Administration, just to name a few, all have similar contractual specifications and which are sound requirements developed over a long period of time.

The safety records of the Bureau of Reclamation and Corps of Engineers are truly outstanding, and are so good that it would be unfortunate to divest them of their responsibility for safety and put this function in the hands of the Labor Department, which has no experience in construction safety.

The corps' safety record is four times as good as the average. Why, then, should we say that they will no longer be responsible for this function?

At this point I would like to spell out what we consider the most desirable way to get the job done. Up to this point all the attention has been on a bill that would impose another layer of Federal bureaucracy on top of Federal control. What about those 2 million workers in construction who are not working on Government contracts, whose lives are just as important as a man working on a Federal or Federal-aid job?

What I am saying is that we need to upgrade the standards of all construction safety throughout the country, whether it is a man digging a ditch at a nearby shopping center or building a million-dollar hospital. Our proposal would reach into the local community by encouraging States to upgrade their safety standards through Federal grants and training programs.

In other words, let us have a standard of safety developed by industry, labor, and safety experts which would be the goal of every State throughout the Nation, and let there be grants from the Federal Gov-

ernment to assist the States in the improvement of their State laws and regulations in this connection.

What we are suggesting is touching upon those areas which are now neglected instead of putting more controls on areas that are presently regulated. I will have more to say on this in detail later on.

Government could make a unique contribution to construction safety through a program of developing standards through the consensus method and with the assistance of experts from industry, labor, professional groups, and the States, and not through the concept proposed in H.R. 3290.

The record will show a remarkable degree of voluntarism on the part of our industry in the area of safety. Coupled with a record of progress, we find absolutely no justification for the extensive and arbitrary enforcement powers contained in H.R. 3290.

The bill as drafted is punitive and vague in its application. It does not provide for adequate administrative review or any judicial review with regard to the methods of enforcement or in the standards. It is hard to believe that such a highly regulatory law, such as this would be, does not contain a simple provision for guaranteeing court review.

With regard to the development of standards, there is no way of determining beforehand what is unsanitary, hazardous, or dangerous to health and safety. In addition, the bill does not require the Secretary of Labor to provide standards of conduct or procedures for standards of conduct, it is completely discretionary. An action could be arbitrary and not related to the violation.

The punitive approach taken by the bill would place severe penalties upon all employers. Once the Secretary of Labor determines that a violation exists, a contractor may be blacklisted for a period of 3 years, or in instances where the project is federally assisted, funds may be withheld regardless of past performances. There is no relationship between the seriousness of the violation and the penalty.

This compulsory approach, with severe penalties, has a number of conceptual weaknesses. Safety through police action accomplishes merely limited progress—such as automobile safety. Compulsion does not equal affirmative action which is necessary for safety progress—such as education and training.

Only through a meaningful effort can the people be reached because of the fundamental importance of exercising day-to-day control—the toolbox approach. The more removed the enforcement effort—such as plant, State, Federal Government—the less import it has.

We do not believe that safety can be legislated and such a method has its shortcomings since safety is most of all an operating responsibility. Arthur Goldberg pointed out that good safety records are posted in the face of the greatest hazards because people talk, think, and act in safety.

Federalizing existing safety enforcement efforts now accomplished by the contracting agencies or at the State level would provide no certain answer and could even be a step backward.

We see no panacea in mandatory codes coupled with stiff penalties. No matter what the enforcement approach, actual safety performance turns on the voluntary efforts by the employer and the employee.

We believe that it is unwise to vest so much unlimited power, administrative or quasi-judicial, in any one person. The construction

industry employers believe that the Federal Government could make a more valuable and constructive effort in promoting safety in the construction industry if it would endorse legislation that would:

(1) Make the function of the Federal Government that of supporting, encouraging, and providing incentives in order to assist the States in carrying out their responsibilities for providing adequate safety standards for construction.

(2) Establish minimum safety standards to be promulgated by a construction safety board composed of seven members who represent construction management, organized labor, the insurance industry, private organizations that develop safety standards on a national basis and the general public.

(3) Authorize the board to make investigations and conduct studies, in order to develop minimum construction safety standards.

(4) Designate existing safety standards of Federal contracting agencies and those standards developed under the consensus principle by nationally recognized standards producing agencies as initial standards.

(5) Require States to provide assurances that they will apply minimum construction safety standards prescribed by the board.

(6) Require that States must meet the Federal minimum safety standards in order to obtain financial assistance from the Federal Government.

(7) Authorize States to enforce and administer the safety regulations including the availability of qualified personnel to carry out the purposes of the bill.

(8) Provide that under a State plan, no penalty can be imposed with respect to the application of a minimum construction safety standard without first affording such concern reasonable notice and opportunity for a hearing.

Such a proposal gives the Federal Government a unique opportunity to make a significant contribution by assisting States through financial aid, research and training and would permit enforcement efforts which are closer to the site to become more meaningful.

We believe that any safety program should be focused upon State and local governments rather than the Federal Government. We feel that a construction safety board, composed of qualified people and operating as an independent agency, could better serve the purpose of safety.

In conclusion, we would like to again thank the subcommittee for this opportunity to express our views on this priority subject.

Mr. Chairman, if I might, at the conclusion of this written statement point out that our recommendations are in line with what we have testified to previously, before this committee. We were in favor of safety on a basis that we could make our construction work and all operations in industry safe; we not only are keeping our word in that regard by endorsing this in our statement, but I have in my hand a bill in the proper form that sets out these same ideas. While it hasn't been introduced, I might point out to you that the reason that it has not been introduced is the fact that we on the management side of the industry don't always carry the strength and weight with the people that are directly most interested in these things. But I would like to

make this bill which I hold here in my hand part of the record. I assure you that it will be introduced very shortly.

Mr. DANIELS. I will accept it to be filed with the record of these proceedings and any member of the committee will have the privilege of examining it and, if they desire to introduce the bill, that would be their privilege.

(The document referred to follows:)

PROPOSED CONSTRUCTION SAFETY BILL PROPOSED BY CONSTRUCTION EMPLOYERS

A BILL To provide safer working conditions in the construction industry in the United States by establishing a Construction Safety Standards Board in the Department of Commerce and by providing grants to States for State programs for State construction safety programs

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Construction Safety Standards Assistance Act".

STATEMENT OF PURPOSE

SEC. 2. It is the purpose of this Act to promote safer working conditions in the construction industry in the United States by establishing a Construction Safety Standards Board to develop minimum safety standards, and to provide financial assistance to States in which such standards are adopted to carry out State construction safety standards programs.

DEFINITIONS

SEC. 3. As used in this Act—

(1) "Board" means the Construction Safety Standards Board established under section 4 of this Act;

(2) "construction safety standards" means reasonable criteria which will assure safe working conditions for employees at construction sites within any State or which will contribute to the prevention of accidents at any such site; and

(3) "State" includes in addition to each of the several States of the Union the District of Columbia.

ESTABLISHMENT OF CONSTRUCTION SAFETY STANDARDS BOARD

SEC. 4. (a) There is hereby established in the Department of Commerce a Construction Safety Standards Board.

(b) The Board shall be composed of 7 members to be appointed by the President, by and with the advice and consent of the Senate, from among individuals who by virtue of their service, experience, or education are especially qualified to serve on the Board. In making such appointments, the President shall appoint individuals who are representative of the construction industry, organized labor, the insurance industry, private organizations engaged in developing safety standards applicable on a national basis, and the general public. Not more than 4 members of the Board shall be members of the same political party.

(c) The terms of office of such member of the Board shall be 7 years, except that—

(1) the members first taking office shall serve, as designated by the President, one for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years, one for a term of five years, one for a term of six years, and one for a term of seven years; and

(2) any member appointed to fill a vacancy shall serve for the remainder of the term for which his predecessor was appointed.

(d) The President shall designate one of the members to serve as Chairman and one to serve as Vice Chairman of the Board.

(e) Any vacancy in the Board shall not affect its powers and four members of the Board shall constitute a quorum.

DUTIES OF THE BOARD

SEC. 5. (a) Subject to the general supervision of the Secretary of Commerce, the Board is authorized to—

(1) make necessary investigations and conduct studies in order to develop minimum construction safety standards;

(2) establish within one year after the enactment of this Act minimum construction safety standards;

(3) make grants to States which have State plans approved by the Board under section 6 in accordance with the provisions of this Act;

(4) conduct special studies on matters pertaining to the prevention of accidents in the construction industry; and

(5) report to the Congress annually on the conduct of its activities under this Act, together with such recommendations for additional legislation as the Board may deem appropriate.

(b) In developing minimum construction safety standards under paragraph (2) of subsection (a) the Board shall consider existing State regulations with respect to construction safety, construction safety standards developed by the consensus method by nationally recognized private organizations, and such standards in effect for Federal contracting agencies.

(c) Subchapter II of chapter 5 of title 5, United States Code, shall apply to regulations promulgated by the Board establishing, amending, or revoking construction safety standards under this Act.

STATE PLANS

SEC. 6. (a) Any State desiring to participate in the grant program under this Act shall designate or create an appropriate State agency for the purpose of this section, and submit through such State agency a State plan which shall—

(1) provide assurances that the State will accept and apply minimum construction safety standards prescribed by the Board pursuant to this Act;

(2) set forth a program for State enforcement of construction safety standards at sites within such State in accordance with the provisions of this Act, including adequate provisions for inspection and certification of compliance with such standards;

(3) provide for the administration of such plan by such State agency;

(4) provide that no penalty with respect to the application of a minimum construction safety standard to a business concern in such State shall be imposed without first affording such concern reasonable notice and opportunity for a hearing.

(5) provide for an advisory committee, to advise the State agency on the general policy with respect to the development and administration of the State plan, which committee shall include among its members representatives of the construction industry, the insurance industry, public or private agencies concerned with safety regulation, and the general public;

(6) provide that such State agency will make such reports in such form and containing such information as the Secretary may reasonably require;

(7) provide assurance that the State will pay from non-Federal sources the remaining cost of such program; and

(8) provide such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of and accounting of funds received under this Act.

(b) The Board shall approve any State plan and any modification thereof which complies with the provisions of subsection (a).

PAYMENTS; FEDERAL SHARE

SEC. 7. (a) (1) The Board shall pay to each State which has a State plan approved under section 6 an amount equal to the Federal share of the amount needed for the purposes set forth in such plan.

(2) For the purposes of this subsection, the Federal share for any fiscal year, stated in percentage terms, shall be determined by the Board on the basis of the funds appropriated for the purpose of making grants pursuant to section 12 for that fiscal year and the number of States having State plans approved by the Board; except that no State may receive a grant under this Act for any fiscal year in excess of \$——.

(b) No payments shall be made to any State from its allotment for any fiscal year unless and until the Board finds that the State which will carry out the State plan for that year will have available during that year for expenditure from non-Federal sources for construction safety purposes not less than the total amount actually expended by such States for such purposes from such sources during the fiscal year ending June 30, —, plus an amount equal to not less than the non-Federal share of the costs with respect to which payment pursuant to subsection (a) is sought.

(c) Payments to a State under this Act may be made in installments and in advance or by way of reimbursement with necessary adjustments on account of overpayments or underpayments, and they may be paid directly to the State or to one or more public agencies designated for this purpose by the State, or to both.

ADMINISTRATION OF STATE PLANS

SEC. 8. (a) The Board shall not finally disapprove any State plan submitted under this Act, or any modification thereof, without first affording the State agency submitting the plan reasonable notice and opportunity for a hearing.

(b) Whenever the Board, after reasonable notice and opportunity for hearing to the State agency administering a State plan approved under section 6, finds that—

(1) the State plan has been so changed that it no longer complies with the provisions of such section, or

(2) in the administration of the plan there is a failure to comply substantially with any such provision,

the Board shall notify the State agency that the State will not be regarded as eligible to participate in the program under this Act until it is satisfied that there is no longer any such failure to comply.

ADMINISTRATIVE POWERS

SEC. 9. (a) In order to carry out the provisions of this Act, the Board, or on authorization of the Board, a subcommittee of not more than two members thereof, is authorized, in addition to other powers conferred by this Act, to—

(1) provide such rules and regulations as the Board deems reasonably necessary;

(2) appoint and fix the compensation of an Executive Director, without regard to the provisions of title 5, United States Code, governing appointments in the competitive services and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but no individual so appointed shall receive compensation in excess of the rate prescribed for GS-18 in the General Schedule under section 5332 of title 5, United States Code;

(3) appoint and fix the compensation of such other personnel as the Board deems necessary;

(4) enter into contracts and make grants or other arrangements with public and private agencies and organizations necessary for the discharge of its functions under this Act;

(5) delegate any function of the Board, except the establishment of construction safety standards, to any officers or official of the Board, or, with the approval of the Secretary of Commerce, to any officer or employee of the Department of Commerce; and

(6) request directly from any department or agency of the Federal Government information, suggestions, estimates, and statistics needed to carry out its functions under this Act, and such department or agency is authorized to furnish such information, suggestions, estimates, and statistics directly to the Board.

(b) The Chairman shall be the chief executive and administrative officer of the Board and shall exercise the responsibility of the Board with respect to (1) the appointment and supervision of personnel employed by the Board; (2) the distribution of business among the personnel of the Board; and (3) the use and expenditure of funds. In executing and administering the functions of the Board on its behalf, the Chairman shall be governed by the general policies of the Board and by its decisions, findings, and determinations.

COMPENSATION

SEC. 10. (a) Section 5314 of title 5, United States Code is amended by adding at the end thereof the following new paragraph:

"(54) Chairman, Construction Safety Standards Board."

(b) Section 5315 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(92) Members, Construction Safety Standards Board."

EFFECT UPON STATE LAW

SEC. 11. Nothing in this Act shall be construed to prevent the Federal Government with respect to construction safety standards applicable to contractors of the Federal Government or projects assisted by the Federal Government, or the government of any State or subdivision thereof, from establishing safety standards imposing a higher construction safety standard than that required to comply with the otherwise applicable standard established under section 5(a) (2).

AUTHORIZATION OF APPROPRIATIONS

SEC. 12. For the purpose of making grants under this Act there are authorized to be appropriated the sum of \$_____ for the fiscal year ending June 30, 1970; \$_____ for the fiscal year ending June 30, 1971; and \$_____ for the fiscal year ending June 30, 1972.

MR. DANIELS. Mr. Naumann, I am at a loss to understand why you feel that States and local governments are capable and competent to legislate in the area of safety and health but the Federal Government is not.

How do you reconcile that statement? Why is the Federal Government incompetent or would be ineffective to properly regulate health and safety?

MR. NAUMANN. Mr. Chairman, I don't believe that we take the position that the Federal Government would be either incompetent or unable to regulate the matter of regulations and even enforcement of safety regulations in the construction industry.

I don't think we take this position. I think the position that we take very honestly is that the administration of these same things is more effective the closer that you get to the actual site of the work.

For this reason, we feel that this is such an unwieldy, you might say, industry by reason of its being scattered all over the 50 States that a better job could be done on a local basis than can be done by the Federal Government.

MR. DANIELS. Inasmuch as safety regulations are scattered over 50 States, would it not, therefore, be advisable to have one agency of the Government establishing at least minimum standards?

MR. NAUMANN. If you will recall our testimony, we proposed just that and arrived at it in a little different form than was proposed. We propose a set of national minimum standards.

MR. DANIELS. In listening to your testimony, I got the impression here that you just wanted the Federal Government to be a Santa Claus, just hand out the money to the State and local governments to administer this program.

MR. NAUMANN. I disagree.

MR. DANIELS. It surprises me in view of the fact that you are representing industry.

MR. NAUMANN. The point is—

Mr. DANIELS. You are usually opposed to the Federal Government handing out money?

Mr. NAUMANN. We feel very honestly that the Federal Government is going to do something about industrial safety, about occupational safety. We don't think that there is any question but what something will be done.

We are not dissatisfied with the idea of the Federal Government doing something real meaningful about occupational safety, not only applying to construction but to all occupational safety.

What we protest as regards to this legislation, under consideration here, is not in the basic theory or the minimum regulations or proper enforcement; but we object to the method as it is outlined. We don't think that one department or one individual should have this much regulatory power because we are frightened, as we have a perfect right to be sometimes, of the effect of this much power.

Mr. DANIELS. I call upon the gentleman from Maine, Mr. Hathaway.

Mr. HATHAWAY. Thank you, Mr. Chairman.

Mr. Naumann, it is a pleasure to see you here again. I am happy to note that you take a bipartisan approach to this. You are against the Secretary of Labor administering this law whether he is Republican or Democrat.

Mr. Naumann, I can't understand with the experience we have had under Walsh-Healey for 30 years and under the McNamara-O'Hara with the last 5 years, whether the Secretary of Labor has had this jurisdiction with respect to manufacturers and supplies, why the construction industry should have a special exemption.

What distinguishes that industry from manufacturing or supplying?

Mr. NAUMANN. My honest opinion is that it was a proper differentiation by reason of the fact that most supply contracts or in most manufacturing that is normally covered by Walsh-Healey—the problem of safety is more confined and less complex.

In other words, plant by plant, the problem is more easily identified. I think that construction, and properly so, is set aside because of the complexity and difference of every job and the complexity and difference of categories of work even among Federal agencies.

I think I mentioned in my testimony that the problems associated very often with work for the Corps of Engineers are different than those associated with the work for the Bureau of Reclamation. In the majority, of Federal work, under direct Federal contract and for all intents and purposes federally assisted contracts in the larger categories, the standards have been developed by the various agencies.

In many cases many of the basics are very similar. But they have been directed toward the particular needs of that particular agency.

They are excellent. They have been effective. I think the record stands and will speak for itself as to the effectiveness.

Believe me, gentlemen, they are tough. We work under these kinds of circumstances and I can recall as early as 1942 when a Corps of Engineers job that I was involved in, one of my own jobs, was shut down over the matter of safety. It was a floor in the hustle and bustle of manpower shortage and everything.

We had a project manager who hired a powderman who came, recommended as an expert from the South Carolina Highway Department, and found out after the trouble was over, and luckily nobody was hurt, that his greatest aspiration had been that of greasing equip-

ment for the South Carolina Highway Department, we found that the man's incapability as regards the handling of explosives. But let me point out to you while we were making up our minds what had happened the Corps of Engineers shut our job down and to my notion properly so.

Mr. HATHAWAY. Do you mean that the safety situation in the construction industry as compared with manufacturing and supplying is so complex the Secretary of Labor can't handle it and yet the State could?

Mr. NAUMANN. To my notion it represents just exactly this situation. We don't say that he can't handle it. What we say is that this is not the best way for the single department or for the Secretary to be charged with the responsibility.

We don't even think it is fair to the Secretary to be charged with this kind of a responsibility in as big and as complex an industry as the construction industry.

Mr. HATHAWAY. But he is going to be aided considerably by all of the regulations on safety that your organization and others have put out?

Mr. NAUMANN. No question of that. We have no quarrel, with the Secretary as the Secretary. We just don't feel that this should be an individual responsibility. We think that there should be a board carefully selected and consisting of experts who are familiar with all phases of the problem that would do the same job as the Secretary.

We think that it would be a better way to handle the problem, and this would apply to the initial regulations and to overall enforcement which we still maintain would be much more effective if it were brought closer to where the work goes on.

Mr. HATHAWAY. Perhaps you can incorporate that into the bill that the Secretary would have upon the advice of a board. Wouldn't that satisfy your objectives?

Mr. NAUMANN. It would go a long way if it were mandatory. You see, maybe we in the construction industry are used to taking risks. Every time we haul off and bid a lump sum job, a hard money job, we have got tremendous risks. But we would rather not take the risks based upon an individual's views because when this law gets on the books, it is going to be there a long time.

Maybe we would do pretty good under some administrations and maybe we would get our throats cut under others.

Mr. HATHAWAY. Wouldn't you be better off with national standards? That would reduce your risk than if you had 50 different standards in every State that you would go into?

Mr. NAUMANN. I didn't understand you.

Mr. HATHAWAY. You would be better off with uniform national standards that would reduce your risks than if you have 50 different standards in 50 different States?

Mr. NAUMANN. I would agree. We are proponents of uniform standards.

Mr. HATHAWAY. The best way to get them is to have the Federal Government promulgate them.

Mr. NAUMANN. That is right, If you will carefully examine one of our points, point No. 2, which was to establish minimum safety standards to be promulgated by a construction safety board, the only place

we are apart is where we don't feel it is fair to the Secretary or to the construction industry to have the Secretary solely responsible. Give him some people that know.

Mr. HATHAWAY. Thank you very much.

Mr. DANIELS. The gentleman from Wisconsin, Mr. Steiger?

Mr. STEIGER. Thank you, Mr. Chairman.

Let me go back to the point raised by my colleague from Maine, Mr. Hathaway.

You may have been filled in on the question that I asked of Mr. Mason yesterday in his appearance in which I said that I had hoped that we could provide in the bill a provision which perhaps is somewhat similar to the one you have suggested in your overall health and safety legislation for the construction industry; that is, to establish a board which would be responsible to the Secretary for the promulgation of the standards.

You said you felt, if I heard your answer correctly, that this would go a long step toward helping the problem if it were mandatory. So, I am saying to you if that is mandatory, if it is in this bill, would you support that provision?

Mr. NAUMANN. Support the bill?

Mr. STEIGER. I don't think we can commit him to supporting the bill necessarily at this point.

Mr. NAUMANN. Let me be honest. We would certainly give it very favorable consideration.

Mr. STEIGER. That doesn't answer the question. With all due respect, I really am interested in whether if an amendment were proposed to the bill to establish this board you would support such an amendment.

Mr. NAUMANN. Yes; we would support such an amendment.

Mr. STEIGER. Would you also support an amendment which would make it possible for the Secretary to promulgate the AGC Code or other code for construction safety as the first step in the establishment of construction standards for Federal programs and federally assisted projects?

Mr. NAUMANN. As we move forward one by one we would certainly support this kind or this particular safety standard because it is our life work, you might say.

Mr. STEIGER. I am somewhat confused, may I say to you, Mr. Naumann, because on page 5 of your testimony you say that the bill does not provide for adequate administrative review or any judicial review. This bill is not the same as last year's bill. In last year's bill that was one of the technicalities that was questioned. This year's bill does provide that the administrative procedures code is applicable. Am I correct in my reading of the bill? Section 554 of the bill?

Mr. NAUMANN. Section 554 of title 5, United States Code, shall apply to any adjudication under this section—I believe that is the language of the bill. Our concern is that it doesn't also include title 7.

Mr. STEIGER. It does not also include title 7.

Mr. NAUMANN. Title 7 is the judicial review section of the Administrative Procedure Act.

Mr. SHOTWELL. Section 554 merely sets out the format of an administration of a hearing. It does not give judicial review.

Mr. STEIGER. I suspect that judicial review is in fact intended to be included by the authors of the bill but your point is that it does not include that specific provision of the Administrative Procedures Act and you think it ought to include that.

Mr. SHOTWELL. Yes.

Mr. STEIGER. Let me ask one further question and yield back the balance of my time to allow the other members of the committee to ask questions.

You have suggested here a rather far-reaching piece of legislation. I have reviewed the bill but I will suggest that I do question whether it is appropriate to establish solely a board for this purpose for the construction industry only.

The bill as it is written now is a bill which does not as you point out in your testimony undertake to protect those workers who are not working on construction projects that involve Government projects, direct or federally assisted projects. But how do you get by the problem that exists as the Secretary of Labor and the Under Secretary, Mr. Hodgson, both pointed out, that while today safety is a requirement for the Contract Services Act and for Walsh-Healey, it is not for construction and this bill is but a simple extension of an authority that has been granted in the past for the safety and health of workers in other areas but not in this one?

Am I taking your statement to be in opposition to the Federal role in the question of Walsh-Healey and contract standards as it relates to construction? Are you opposed to the Federal Government establishing standards for Federal projects?

Mr. NAUMANN. We are opposed from this standpoint: We feel that as far as Federal construction is concerned that it is more than adequately covered now. Our concern is for the number of construction people that are involved in tremendous amount of construction that the proposed legislation wouldn't touch or wouldn't help. Our proposal encompasses protection for all people involved in construction.

And I might point out that with the change of just a couple of words, it could encompass all industries on the same theory.

Mr. STEIGER. It is very similar to the Hathaway Bill that was reported by this committee. I am sure that he takes great pride in that, as I do, in that you would be willing to recommend the adoption of that legislation. Perhaps the chairman will have you back when we get into the question of overall occupational health and safety which might include construction.

I appreciate your coming today and your testimony this morning.

Mr. NAUMANN. Thank you, sir.

Mr. DANIELS. The gentleman from Michigan, Mr. Ford.

Mr. FORD. Mr. Naumann, we have been over some of this ground together before. Would you identify for me Mr. George A. Moore of George A. Moore Associates in Portland and tell us what his position is in your organization?

Mr. NAUMANN. Mr. Moore is the gentleman similar to myself, a working contractor. He, as far as the general associated contractors are concerned, is the chairman of AGC's National Safety Committee.

Mr. FORD. Mr. Schmul is designated as the secretary. Is he an employee?

Mr. NAUMANN. He is an employee of the Associated General Contractors of America on their national staff.

Mr. FORD. Do you have a copy of the document from the Safety Committee on Activity Report that comments on this forthcoming legislation, H.R. 3290 and H.R. 843?

Mr. NAUMANN. I have seen the document that you refer to.

Mr. FORD. I would just like to read from the first paragraph entitled "Federal Safety Legislation" and ask for your comments on it as a spokesman for the organization to which this was submitted.

Both the Construction Safety Bill, H.R. 3290 and the Occupational Safety and Health Act, H.R. 843, have been reintroduced in this session of Congress (note the new H.R. numbers). Both bills are minor modifications of those introduced in the previous session of the Congress—

I take it from that that from the point of view of your Safety Committee they see these as virtually the same legislation that we covered in previous hearings with you—

As directed the legislative and safety personnel of AGC have drafted a Model Construction Safety Bill which has been reviewed by the appointed subcommittee. Their comments were considered in the redraft. With the makeup and tenor of Congress coupled with President Nixon's public statement giving a Construction Safety Bill this activity takes on a larger degree of importance. We cannot afford the risk or hope of defeating this type of legislation on mere technicalities again.

Would you care to comment on what they mean by defeating this kind of legislation on mere technicalities again?

Mr. NAUMANN. The first thing I would like to comment on is that this document is a report of an employee to his boss.

This is his opinion and this was in preparation for a meeting of the National Safety Committee. I think that it is very significant that the man who wrote this memorandum to his boss was very much aware of the importance of safety legislation for the consideration of this Congress and for obviously the consideration of this committee.

The basic attitudes—and we expressed it I believe in our testimony before this committee in the last Congress—are to the effect that we were not opposed to safety. We were opposed to the methods or the approach of the Federal Government in the legislation to the matter of safety.

We felt a responsibility as is pointed out there that we come at least with a proposal that we could and would support, that would accomplish the same objective in our mind. To my notion, I attach no significance as regarding policy to this particular document.

I think it was an honest expression of concern because obviously we feel very strongly that the legislation that is under consideration here would be the method of administration, not the concept, but the method of administration would be damaging to this industry.

Mr. FORD. What is most interesting to me as a member of the committee is that this gentleman did not sign this in his individual capacity but he signed it as secretary of the Committee. More importantly, in reading the document as a whole, you discover that he is in fact assuming the responsibility for the form of the draft bill that you proposed here today, the same man who believes that in the past, legislation of a similar kind before this committee has been defeated in the Congress by the use of technicalities.

From my point of view, that strikes at the credibility of his suggestion of alternatives to the legislation because I wonder where we will find the technicalities that are intended to do the job this time.

Perhaps the gentleman, in writing this report, was a little stronger than your organization and I would appreciate it if you would clarify it. I am going to ask the chairman to include the whole document, because it goes on to outline some of the very positive things that your organization has done and your safety committee was doing to further the cause of safety with construction workers.

But I know one other thing. It makes reference here to forwarding materials to the membership and the chapters of your organization. How many people would that encompass?

Mr. NAUMANN. It encompasses just under 150 chapters and about 9,000 members.

Mr. FORD. So you would have a mailing of 9,150 of these kits that he described here with the safety booklets?

Mr. NAUMANN. No, not necessarily so, sir. Each one of these kits has material for 100 men in it. The adjustment is made by the individual contractor as to the requirements of his own organization.

Mr. FORD. It says in accordance with committee and board direction the "man on the job safety program" was finalized and announced to the membership in chapters. All chapters have been provided with samples of one segment of the program for discussion with their members and he goes on to discuss what is in it.

Is this program what you have been discussing here as the kind of safety program you conduct? Is this your principal safety program?

Mr. NAUMANN. This is a sample of the kind of activity that goes on continuously. This happens to be one that is concentrated and it represents a different activity each month.

Mr. FORD. This goes on to refer to the issuance of safety certificates, to the safety manual revisions, to agency safety clauses and requirements and on and on until you finally get to a tie tack program. Apparently people receive tie tacks for their activities in safety.

One thing I am curious about, in light of your testimony about the activity of your organization in assisting State and local governments in developing safety legislation, is that nowhere in this long report is there a single mention of any effort on behalf of the safety committee to undertake that kind of activity. Perhaps you could tell me, if you will, which States or local governments you have contacted since you were before the committee a year ago in an attempt to secure the passage of safety legislation?

Mr. NAUMANN. I can give you very good examples. My own home State of Arizona, since I was before this committee a year ago, passed an entirely new set of safety legislation which does several things.

It reorganizes the industrial commission which I think is a very beneficial thing. It will now permit private carriers to write insurance in the State. It creates the office of a safety director. And it is mandatory that a complete new safety code—and I might point out that ours wasn't so bad—a new completely new safety code will be forthcoming within 1 year's time of the enactment of the legislation. This is one example.

Mr. FORD. How much money are they going to spend to develop these safety standards in Arizona?

Mr. NAUMANN. I can't give you exactly the figure. The budgets haven't all been set.

Mr. FORD. How much have you asked them to spend on this?

Mr. NAUMANN. We asked them to spend whatever was required. There has never been, I might point out, in the State of Arizona, a budgetary problem as regards the industrial commission section.

Mr. FORD. I am not concerned with what Arizona does. I am concerned with your assertion to this committee that we should not move in this area because you people, along with other organizations, are doing such a good job of solving the problem at the State and local level.

Now you suggest to me as your example of the results of your activity that in your own State of Arizona there have been certain changes in the labor department and there will be forthcoming at some time in the future some suggested safety standards. No safety standards have yet been promulgated. I take it that in your earnest support of this kind of legislation, you did propose safety standards to Arizona?

Mr. NAUMANN. There is a requirement in the act as it was passed. What they did was to update already to my motion to good safety standards.

I think that there is error in your understanding of our position. We have not indicated that we are opposed to development of safety standards. Under no circumstances have we done that. We have said that we think it would be a good idea, but are opposed to the way that they are proposed to be developed.

Mr. FORD. I think you are answering the question I asked you last year. I think, with what you have already said to previous members of the committee this morning that at this point, you are not opposing Federal standards because on page 4 of your prepared text you list several Federal agencies and you allude to the fine job they have done in promulgating Federal standards. Therefore Federal standards, I gather it from your formal statement, are not bad unless they are uniformly applied across the board with all Federal agencies.

Mr. NAUMANN. We don't take that position.

Mr. FORD. Let me call your attention to page 4. You say the Bureau of Reclamation, the Corps of Engineers, the Naval facility's Engineering Command, the Bureau of Public Roads, the Atomic Energy Commission, and the Air Force and GSA are just a few and they all have, to quote you "similar contractual specifications which are sound requirements developed over a long period of time."

It is only as you get to the bottom of that page that you indicate that your objection is not to the standards being promulgated by a Federal agency, but your objection is to "to divest them" meaning the ones I have just named, "of their responsibility for safety and put this function in the hands of the Labor Department."

What you seem to be objecting to is a single agency of the Federal Government promulgating and enforcing uniform standards for all of the Federal agencies that might be contracting with your membership. How do these standards which you allude to as being generally uniform, become better by having them promulgated piecemeal by individual departments and enforced in that fashion, than they would be with the Labor Department coordinating the entire activity?

Mr. NAUMANN. In the first place, let me point out that our concern is that in the valor of its enthusiasm under this legislation that the Labor Department might very well take away these standards and substitute in their stead standards that wouldn't be as effective.

We think that these people are much more experienced in the matter of construction safety and construction safety standards than the Labor Department is at this writing.

We still have no objection to uniform standards promulgated in a manner which we suggest, not by a single responsibility, but by a group of experts in the safety field.

Mr. FORD. My time is about up. I have just one final question. I would like you to comment on it.

During the 90th Congress you represented your organization before this committee on at least two occasions at public hearings similar in procedure and purpose to the one that we are engaged in at this moment here today. You testified on August 30, 1967, in opposition to the construction safety bill that was before the committee. And then on the evening of March 12, 1968, you testified in opposition to the general occupation safety bill which was again before this committee. Is that correct?

Mr. NAUMANN. I can't verify the dates, but I was here.

Mr. FORD. That may not seem serious to you, Mr. Naumann, but after the conclusion of those hearings, it seems that someone in your industry, attempted to mislead the Members of the Congress who are not on this committee because we were mystified by the number of telegrams coming to our colleagues and even to those of us on the committee expressing violent opposition to the passage of construction safety legislation—listing a bill that you had already testified on “without holding public hearings.”

We couldn't understand that. We finally concluded that they were being told that they should oppose this legislation and let their Congressmen know that they opposed it because “public hearings had not been held.” This is a rather serious sort of thing, Mr. Naumann. I am sure that you as a man who has personally appeared before the committee did not participate in that. But as one member of the committee, I would appreciate your cooperation in determining who is responsible for that and seeing to it that that sort of a misrepresentation is not made again.

So I would ask you this one question as a person who has been around here for years working on this legislation: is it in fact true that we have held public hearings on legislation virtually identical to this legislation before and we are now holding public hearings on this legislation with almost the same committee, incidentally, that we had in the 90th Congress?

Mr. NAUMANN. Mr. Ford, I believe the situation is this: that there were public hearings held on the construction safety bill, and there were public hearings held on the overall occupational safety bill and I testified before this committee on both of them.

Then I think that the legislation in question here may have been the effort to pass the legislation which involved only the amendment to the Contract Work Hours Standards Act which was made in an effort as I recall it, under the suspension of rule. On this particular bill there had been no public hearings held.

If there was a reference by telegrams in this particular regard, I would think this would explain it.

Mr. FORD. It may explain it. It scarcely justifies it. You have no question in your mind that the public hearings which have been held during the past couple of years, have in fact covered all of the areas that we have covered today on this piece of legislation?

Mr. NAUMANN. No question about the concept of the theory.

Mr. FORD. Maybe this is the technicality that AGC's safety committee was talking about, that when the bill was amended and went to the floor as what we refer to as a clean bill, it had a new number, and I suppose you could really say that about every bill that comes through this committee because on major legislation we introduce a clean bill and it gets a new number and you can probably say we had hearings on bill No. 1000, but now we are dealing with bill No. 4000 and that is the clean form of the original bill on which the hearings are held, and you could technically say that hearings were not held on bill No. 4000.

I think you could do that in almost every committee in this Congress. I would hope that with your very great expertise as a legislative representative of your organization—you do it very skillfully and very forcefully and demonstrate a great deal of experience—I would hope that you would assist us in informing your membership that this is not a technicality that constitutes any attempt to slip something by them.

Mr. NAUMANN. Thank you very kindly, sir, for the kind words about my ability. I assure you that we try our very best in our information to our membership and our legislative efforts to give them the true facts.

Mr. DANIELS. The gentleman from Texas, Mr. Collins?

Mr. COLLINS. Mr. Naumann, you are a contractor from Arizona?

Mr. NAUMANN. Yes.

Mr. COLLINS. You are active in the business yourself?

Mr. NAUMANN. Yes.

Mr. COLLINS. Where do you operate?

Mr. NAUMANN. Our headquarters are in Tucson, Ariz. and have been since 1929. Our firm dates back to 1890.

Mr. COLLINS. Where do you operate besides Arizona?

Mr. NAUMANN. We operate in California, Florida, we operate wherever we can get a job, to be honest with you. We are qualified in, I think, 23—if my memory serves me right—States and we are licensed in all of the States that require licenses.

Mr. COLLINS. There are many people in Washington that are as concerned as you are about the Federal Government becoming all embracing and going into everything. There are also many that are concerned about having inspectors from Washington that have to go out and supervise everything.

But we are also interested in this subject of safety just as you are. We have had safety rules in the past in many States. Some States have much better safety rules than others. Did I understand you right, to say that Arizona had no safety rules?

Mr. NAUMANN. It had safety regulations but the requirements of the law are the updating or the improving of them.

Mr. COLLINS. As I understand in my own State, we had very poor safety laws, but I wanted to know about other States so I am sure that you have a background on it. Out of these States that have had laws specifically covering safety features, how do they stand with States

that didn't have the safety features? What has that accomplished by the State legislature in the past on safety?

Mr. NAUMANN. The State legislature has accomplished about the same as any other legislature which promulgates regulations. It is only as good under any circumstances as the effort is made in two areas:

One, in education, and the other one in enforcement. Amazingly enough, the reason that there is very little difference of one State versus the next is that the matter of safety in construction is in most cases a matter of contractual obligation between employer and his representative.

For example, in the State of Arizona, our master labor agreements all provide that the contractor in all of his operations shall observe and live by the rules as set down in the AGC's Manual of Accident Prevention. The only place in that master labor agreement where a man has any variable from the contractor's right to hire and fire is with regard to safety.

If a man refuses to go into a place or refuses to get on a piece of equipment or refuses to work because he considers it is unsafe and is disciplined for it, he appears before a safety committee composed of half of management's team and half of labor's team and he has a hearing.

This is the only place wherein that entire agreement, where a man has any recourse in the event he is discharged. There is no just cause clause or anything this way. But in matters of safety, more amazingly enough, the requirements of safety as written into labor agreements are very often more effective, as long as they're backed by sound regulations. More often it is more effective than the State law.

Mr. COLLINS. Mr. Naumann, when I was in business I found California and New York are both very strict on enforcement of any laws they have, probably the best of any States as far as putting meat in it. Specifically in those two States, they have laws on safety. What do they do about them? What have been their results? How does it compare to States without safety laws?

Mr. NAUMANN. Without question, with the amount of attention that is paid to enforcement and with the amount of attention and the amount of money that is spent for the actual meeting, instructions, supervisor training, these kinds of things, they are effective. There is no question of that.

Mr. COLLINS. Do you know what the statistics are in those States on whether they have achieved better safety as a result of them, compared to States that didn't have rules?

Mr. NAUMANN. In my opinion, while I don't pay real close attention to the actual final statistics, I say yes.

Mr. COLLINS. You don't have any idea what the results have been in those two States?

Mr. NAUMANN. We can get it for you.

Mr. COLLINS. But you, in this whole report, talk about the need for State regulations and yet you don't have any factual concept of what States have done in the past?

Mr. NAUMANN. No, we don't say that. We don't say that there is a preference of State regulations over Federal regulations. We say that there should be a Federal minimum standard, good ones, and that every State should be required to come to those standards and that

every State should be assisted in carrying on their program of education and enforcement of those particular standards.

Mr. BURTON. Excuse me. When you said Federal minimum standards, you mean whether or not it is a federally assisted or financed program?

Mr. NAUMANN. It doesn't make any difference. We were talking about the concept of a single set of standards for all construction in the United States.

Mr. COLLINS. You prefer a Federal system, then?

Mr. NAUMANN. I think our statement is very clear. We endorse Federal standards. We are in disagreement with the method it is arrived at, but we are not opposed to the Federal standards.

The next step is that every State, by assistance from the Federal Government would be brought up in the matter of its own standards and the matter of enforcement to this point. We think this will be effective as long as in addition to just the standards and the police action that you carry on a program of education.

Mr. DANIELS. Thank you Mr. Collins. The gentleman from California, Mr. Burton.

Mr. BURTON. When you bid for Federal contracts, is the amount you have to pay for workmen's compensation just a part of your total bid or is it a segregated out factor?

How does your cost for paying for job-connected injuries show up in how you bid for the job?

Mr. NAUMANN. Obviously, workmen's compensation rates being what they are, it is a very significant cost without question. Based on the individual contractor's method of putting his bid together, where it appears is, there is no set rule but certainly it is taken into account. It must be. Obviously the nature of the job makes a wide differential.

For example, railroad work, the construction of a railroad, the erection of structural steel carry a much higher rate than normal concrete construction.

Mr. BURTON. Let me pose this question just before we get to that one: Does Arizona now require workmen's compensation benefits to be paid or is it still a permissive system in the main?

Mr. NAUMANN. No. Any employer who employs more than two employees must carry workmen's compensation.

Mr. BURTON. Let me get to the point of an in-shop carpenter and one of your carpenters working on the same project. If they are injured in the same accident at the same time with the same nature and extent of injuries, the Government-employed carpenter receives benefits payable under the schedule under the Federal Employees' Compensation Act. Am I right in assuming or wrong that the carpenter working for you gets paid under the schedule of benefits under whatever State the accident takes place in?

Mr. NAUMANN. This would be, to my notion, correct. Obviously the coverage on our job extends to the employees on our payroll only.

Mr. BURTON. And they are paid by level of benefits in the State?

Mr. NAUMANN. That is correct.

Mr. BURTON. So this is the dilemma that confronts me. You have two aspects of this problem: one is the establishment of standards by some mechanism. I can understand why you are a little afraid to have a safety czar, particularly if the standards aren't fairly clear. There is some limitation on his power. I think that is a legitimate concern. But

then you have the consequences of an inadequate safety measure which would show up in somebody being hurt on the job. It is the second part that also has some meaning.

Is it an outrageous notion to think in terms of on these Federal construction projects that somebody who is injured on the job be paid the same standard benefits, whether he is working for you or working on the Federal payroll and if it were a standardized thing, you wouldn't in State by State have a crapshoot. You would have a kind of standard thing but for the different injury experience on difference kinds of construction jobs.

Mr. NAUMANN. Obviously, the theory of the two different types of the same craft being on the same job is very unlikely. For an example, I will tell you how it could occur, carpenter per carpenter.

Mr. BURTON. Let us just assume for now that it does occur because we don't have that much time and other members still have a right to ask questions.

Don't you think it is fair that at least we consider the notion that if you are on a Federal construction project that if you are hurt on that job, whether the safety standards are followed or not, that you get paid by the same measurement in terms of your weekly benefit amount. Isn't that a legitimate thing to look at?

Mr. NAUMANN. I could certainly take no issue with this theory, the point being that our theory is that money does not compensate. We would just rather never have to pay a man because he has been hurt because this is the slogan of the Arizona Industrial Commission. Money does not compensate. This is right. I have had the experience of having to go and tell the widow and believe me, this is a bad way at a bad time.

There is not enough money in the world to take care of that one. So this our whole idea. We have good standards.

Mr. BURTON. I would like to just restate what I understand to be your tentative reaction. It certainly isn't a commitment on behalf of yourself or your organization. But you do think that it is worth looking into to see that if a man is injured on the job and it is a Government project, that that man working for a private contractor gets paid by the same yardstick for lost wages as the man working for the Government. Do you think that is a fair thing to look into without committing your organization?

Mr. NAUMANN. Certainly, it would be fair. It would seem a little bit unreasonable to my notion that a man, for example, that is employed by the post engineer, Davis Monthan Air Force Base, as a civil service carpenter and he gets himself hurt on that job and his shop is right across the street where we are constructing a building, I would be hard put to say that you would be paid \$20,000 for a broken leg, and our carpenter would be paid \$40,000.

Mr. BURTON. I hope our distinguished colleague on the other side heard that response because that has troubled me. And by way of conclusion, while we fight for adequate safety standards on the job, that is really the most important thing. Neither the employer nor worker wants to be hurt. But for whatever reason that fails, then the injured worker, at least on these Federal projects, really ought to be paid the same amount of money if he is in the same income bracket doing the same work. That, to me, is fairly simple.

How we arrive at that conclusion is something that may be a little more difficult. But, at least, that part of it appears to me to be elementary. I appreciate your candid response. I would like to say this: that a number of us on this side are going to make an effort for the most effective safety regulations. In light of the administration's support of this general notion, I hope that you will constructively lend your efforts, as elements of your testimony demonstrate, to that end.

I do not want to see a safety czar. I don't approve of all-powerful individuals. I don't think any of us really do. I think we might work out a mechanism that will be reasonably digestible if you will stretch to your limits what you might want to take place. I suspect here in the construction trades, either the Corps of Engineers or the Bureau of Reclamation has very stringent safety standards. You seem not to be too troubled by that.

You fear some unknown, perhaps inexperienced Secretary of Labor who has got the wrong adviser poking him on the shoulders at the 11th hour, handing you conditions that you simply can't meet because nobody in the industry who is working in the industry would ever buy those standards. Isn't that really your ultimate fear?

Mr. NAUMANN. Certainly. We are rather at home with these people because they come from our same side of the tracks and they know what we are talking about. They are tough, I might point out, so that we understand them. But for example, I know from experience where there have been Walsh-Healey inspections in plants that I have been associated with that were made by auditors. This thing frightens us to death, this kind of a thing.

Mr. BURTON of California. Mr. Chairman, I ask unanimous consent that there be printed, immediately following the colloquy between myself and the gentleman from Iowa, Mr. Scherle, the attached analysis of the rollcall vote in the House on last year's construction safety bill. This analysis is based on the listing of rollcall No. 324, page H8694 of the Congressional Record for September 16, 1968, and it shows precisely how the then members of this committee voted on last year's bill.

Mr. DANIELS. Without objection, it will be so ordered.

(The information referred to appears on p. 95.)

Thank you, Mr. Naumann and your associates.

This will conclude today's hearing. We will not have an opportunity to proceed to take the testimony of the other witnesses, Mr. Kelly and Mr. Christensen, Mr. Ostrowski and Mr. Connelley, who we did intend to hear. But because of the fact that the House is in session, it is not proper for the committee to continue without the authorization of the House.

Therefore, we will adjourn today to April 21, when the hearings will continue.

Mr. NAUMANN. Mr. Chairman, might I make one little tiny remark.

Mr. DANIELS. Yes.

Mr. NAUMANN. I would like to explain to you, Mr. Chairman, and to the committee that as quickly as we got our suggestions, regarding our ideas of how the safety legislation to accomplish the same objectives as the legislation that is under consideration here, together, we took them to labor, hoping that we could come as a common front in this particular endeavor. It so happened that labor felt that they ought to go their own way.

But I would have much hope that out of the two efforts, as was so aptly pointed out by Mr. Meeds, that there could come what we all, I believe, whether we are on management's team or labor's team or members of the committee and the Congress as a whole are trying to achieve, and that is a way to where everybody can have a perfect record of no accidents.

Mr. DANIELS. I am hopeful that that could be achieved. Of course, that is a practical impossibility of no accidents. But at least we hope that through the medium of some legislation which will be enacted in the future, that we can substantially cut the rate of fatalities and injuries that occur on construction jobs.

I would also further hope that management and labor could get together and agree upon a proposal that we all, on this committee, could unite on.

Mr. BURTON. Mr. Chairman, one final question on this Federal employees' compensation. In the event that the committee decides to require the same standard of benefits for the same people of same circumstances, would you favor or disfavor permitting the contractors to pay into a nonprofit fund or the Government's Federal employees' compensation fund, premiums that will not carry with it any override or any reserve which would have the effect of reducing the premiums about 35 percent. Would you approve of that authority?

Mr. NAUMANN. I think this would get into a very complicated field, anytime that you would assume the compensation responsibility for someone not in your employ.

Mr. BURTON. Heavens, no, I am not saying that. These men must be in your employ. Oh, heavens, no. These are men working for you but if they are working on a Government project, would you favor being permitted to pay into the Federal compensation fund an amount that would not require you also to have to pay to set up a reserve. You would be permitted to do this. You would not be required to do this.

It would only be for people working for you. You pay workmens' compensation premiums now just for the people working for you. Just for your own expenses. That same thing would prevail. We would just make it available to you to pay into a fund that you don't have to pay 35 percent more for and override for reserves. You would not be required to do that.

Mr. NAUMANN. Obviously, all contractors would be deeply interested in being able to buy adequate coverage at any reduced price. That is exactly what you would get from——

Mr. BURTON. That is exactly what you would get from your insurance people. If you have an in-shop insurance adviser, he would tell you that that is what you would get. You would save about 35 percent of your premiums.

Mr. DANIELS. The committee stands adjourned until April 21.

(Whereupon, at 12:10 p.m. the hearing adjourned, to reconvene on Monday, April 21, 1969.)

But I would have much hope that out of the two efforts, as was so aptly pointed out by Mr. Meeds, that there could come what we all believe, whether we are on management's team or labor's team or members of the committee and the Congress as a whole are trying to achieve, and that is a way to where everybody can have a perfect record of no accidents.

Mr. BARNES. I am hopeful that that could be achieved. Of course, that is a practical impossibility of no accidents, but at least we hope that through the medium of some legislation which will be enacted in the future that we can substantially cut the rate of fatalities and injuries that occur on construction jobs.

I would also further hope that management and labor could get together and agree upon a proposal that we all, on this committee, could unite on.

Mr. BARNES. Mr. Chairman, one final question on this Federal employees' compensation. In the event that the committee decides to re-phrase the same standard of benefits for the same people of same circumstances, would you favor or disfavor permitting the contractors to pay into a nonprofit fund or the Government's Federal employees' compensation fund, premiums that will not carry with it any over-ride or any reserve which would have the effect of reducing the premiums about 25 percent? Would you approve of that authority?

Mr. MEEDS. I think this would get into a very complicated field, saying that you would assume the construction responsibility for someone not in your employ.

Mr. BARNES. However, no I am not saying that these men must be in your employ. Of course, no. These are men working for you but if they are working on a Government project, would you favor being permitted to pay into the Federal compensation fund an amount that would not require you also to have to pay to set up a reserve? You would be permitted to do this? You would not be required to do this?

It would only be for people working for you? Or pay workmen's compensation premiums now just for the people working for you, just for your own expense? That same thing would prevail? We would just make it equitable to you to pay into a fund that you don't have to pay 25 percent more for and outside for reserves? You would not be required to do that?

Mr. MEEDS. Obviously, all contractors would be deeply interested in being able to put additional contracts and reduced costs. That is exactly what you would get from it.

Mr. BARNES. That is exactly what you would get from it. I am sure. I am sure that when you have a fund that you would help yourself that that is what you would get from it. I am sure that that is what you would get from it.

Mr. MEEDS. The committee has reported with a bill that would provide for the construction industry to have a fund that would be used to pay the compensation of Federal employees.

TO PROMOTE HEALTH AND SAFETY IN THE BUILDING TRADES AND CONSTRUCTION INDUSTRY

MONDAY, APRIL 21, 1969

HOUSE OF REPRESENTATIVES,
SELECT SUBCOMMITTEE ON LABOR
OF THE COMMITTEE ON EDUCATION AND LABOR,
Washington, D.C.

The subcommittee met at 10:10 a.m., pursuant to recess, in room 2261, Rayburn House Office Building, Hon. Dominick V. Daniels (chairman of the subcommittee) presiding.

Present: Representatives Daniels, Scherle, O'Hara, and Collins.

Staff members present: Daniel H. Krivit, counsel; Loretta Bowen, clerk, Sue Gencher, research assistant; Michael J. Bernstein, minority counsel for education and labor, and Marty LaVor, minority research assistant.

Mr. DANIELS. The Select Subcommittee on Labor will come to order.

We will continue today with the hearing on H.R. 3290, a bill to promote health and safety in the building trades and construction industry in all Federal and federally financed or federally assisted construction projects.

Our first witness today is Mr. James J. Kelly, chairman, and Mr. Wayne L. Christensen, cochairman, Accident Prevention Committee, National Constructors Association.

STATEMENT OF JAMES J. KELLY, CHAIRMAN; WAYNE L. CHRISTENSEN, COCHAIRMAN, ACCIDENT PREVENTION COMMITTEE, NATIONAL CONSTRUCTORS ASSOCIATION

Mr. KELLY. Thank you.

Mr. Chairman, I would like to also introduce a couple of my associates here: Mr. Edward Hoekstra, secretary-treasurer of the National Constructors Association, Mr. Jerry Ostrowski, public affairs manager of National Construction Association and my cochairman, Mr. Wayne Christensen.

The National Constructors Association welcomes this opportunity to present its views in opposition to H.R. 3290.

The association, known as NCA, is composed of 34 internationally known firms of engineers and constructors which design and erect large-scale industrial complexes for both private industry and the Government.

These include oil refineries, chemical plants, steel and paper mills, and power generating plants throughout the United States and

abroad. NCA companies have engineered and constructed many Government facilities.

Among these are atomic energy installations, desalinizing plants, missile and space projects, work for the Bureau of Reclamation and the Corps of Engineers.

Attached to this statement is an informational folder describing the association and listing its members, officers, and major committees.

The Accident Prevention Committee pioneered in developing a standard set of craft safety rules for the industry. Our booklet, "Job Site Safety Program" is used throughout the country. We maintain a constant exchange of information within the association on safety equipment, hazards peculiar to industrial plant construction, and accident prevention methods.

In addition to group activities, each member company prepares and publishes a set of specific safety rules for distribution to employees on all field projects. A comprehensive safety manual incorporating material contributed by all members is currently being developed for publication.

On March 5, 1969, the Bureau of Labor Statistics, U.S. Department of Labor, released the latest statistics for the year 1967 clearly showing a continuation of the declining trend in the injury-frequency rate for construction industries. The rate has dropped to 26 in 1967 from 28.3 in 1965 and 27.9 in 1966. Although employment in contract construction has risen over the past 10 years, the incidence of injuries has declined since 1959.

Many Federal agencies administering construction contracts have consistently achieved excellent safety records through comprehensive safety programs specifically established for the particular type of construction operation.

For example, the Corps of Engineers, the Atomic Energy Commission, the Bureau of Reclamation and others include an accident-prevention clause in all of their construction and architect-engineer contracts. Thus, the safety program is enforced as a contract requirement in the same manner as any other contractual provision.

Federally assisted projects are essentially State and local projects subject to applicable State and local laws, ordinances, rules, and regulations. The contractor is required to comply with any State or municipal safety or sanitation code applicable to a construction project.

If a new Federal system were superimposed upon existing requirements in the field of accident prevention, the construction contractor, subject to the bill, would have to comply with still another set of safety standards.

He would have to accommodate himself to visits by another set of inspectors. He would have to maintain additional records and fill out another set of forms for each accident involving lost time or major property damage.

The result, inevitably, would be higher overhead costs and, therefore, higher prices for the same amount of construction work. These higher costs would almost certainly be paid for by increased appropriations for all federally financed or assisted construction projects.

It is our view that safety cannot be achieved in any real or meaningful way by passing additional laws. Rather than laws, what is required

is education. In this context, education means the process of imparting knowledge in a planned and effective manner to project supervisors and workers as to potential hazards, safety procedures, and equipment safety to reduce or eliminate accidents.

The ASME code is an outstanding example of a voluntary, private program. This code, developed by the American Society of Mechanical Engineers for the safe construction, safe use, maintenance, and inspection of boilers and pressure vessels, has been accepted as the basis for Federal, State, and city regulations, while its qualifications for State and insurance inspectors under the code, is a standard accepted throughout the world.

Members of the National Constructors Association believe that safety is the primary responsibility of management and they accept that responsibility without reservation. For over 20 years, from the time the association was formed, they have sought to improve safety performance by individual company effort through collective action and study within NCA, and by working with all other elements in the construction industry.

In summary, we respectfully submit that the progress described previously is the result of a continuous, concerted, and cooperative effort on the part of Federal and State agencies and construction contractors.

We respectfully urge, therefore, that H.R. 3290 not be enacted.

Mr. DANIELS. Do your colleagues desire to supplement your statement in any way?

Mr. CHRISTENSEN. Not unless there is a question.

Mr. DANIELS. How does the accident rate of your organization in fatalities and injuries compare with the general construction trade?

Mr. KELLY. Much lower.

Mr. DANIELS. Do you have any statistics to furnish this committee?

Mr. KELLY. Mr. Christensen has our statistics for frequency and severity of injuries for the past several years.

Mr. DANIELS. I note on page 3 of your statement you said the rate of construction accidents has decreased to 26 to 1967, from 28.3 in 1965, and 27.9 in 1966.

Now those percentages are all right, but I would like to know, or the committee would like to know, just exactly what your accident fatality rate is.

Mr. CHRISTENSEN. The accident fatality rate, as such, I do not have. The statistics which we prepared on this, and as Mr. Kelly indicated in his prepared presentation, was that annually in an effort to encourage our member companies to work toward a better injury experience than our industry normally experiences, we award recognition to those companies who have experienced 25 percent or better than the national average as calculated by the National Safety Council.

Their injury index, which is a combination of both frequency and severity, if you are familiar with the formula, is simply frequency times severity over a thousand, to come up with a national yardstick.

The national frequency times severity over 1,000 is 35.02 for heavy construction.

The National Constructors Association on this basis then, to make an award to a member company, that company must have an injury index of 26.27, which is 75 percent of the previously mentioned index.

The composite of all National Constructors Association companies for that year was 17.78, or very nearly 50 percent of the national average for heavy construction as calculated by the National Safety Council.

Mr. DANIELS. But in round figures, though, what does that amount to so far as fatalities and accidents are concerned?

Mr. CHRISTENSEN. Approximately 50 percent of the national average.

Mr. DANIELS. As I understand the previous testimony, there were 2,800 construction workers killed on the job in 1968. Are you relating your figure to that?

Mr. CHRISTENSEN. If those figures come from your "Safety Facts" publication of National Safety News, then our source of accident facts are identical. I would have to know where you obtained your particular set of statistics to make a comparison.

Mr. DANIELS. Now you state that 25 of your 34 member companies received certificates for accident prevention; is that correct?

Mr. CHRISTENSEN. That is true.

Mr. DANIELS. So I assume that nine of those members experienced a high accident rate.

Mr. CHRISTENSEN. Higher than the 75 percent of the national average. They could have still been below the national average and not qualified. In fact, several of them were just fractional percentages above the 75 percent and were thus disqualified, but it is an attempt to apply a rule or measure rigidly, and so there are no deviations from our standards on it.

Mr. DANIELS. Do you know of any instance where one of your jobs was closed down for failure to comply with your safety code or because of the high accident index?

Mr. CHRISTENSEN. I have no such knowledge. Do you, through the association?

Mr. KELLY. Never to my knowledge have any of our member companies had a job closed down due to unsafe conditions.

Mr. DANIELS. Do you have any questions, Mr. O'Hara?

Mr. O'HARA. No, Mr. Chairman.

Mr. CHRISTENSEN. I might supplement my comments just by an additional fact here.

It also complements the statement Mr. Kelly made earlier about working in combination with the Corps of Engineers on a Federal contract basis. We have a copy of a letter directed from the Kansas City office of the Department of the Army, Kansas City District Corps of Engineers, with reference to a contract in which we were working in their area where they pointed out that their injury frequency goal for fiscal year 1968 was 5.54 in the Kansas City District.

This is based on a sought-after goal of a 10-percent improvement over their previous year's experience. It goes on at some length. Then concludes on this: "My records indicate that your firm had an accident frequency of 3.1 for fiscal year 1961 against the safety 70 goal of 5.54. Your corresponding record for the first 4 months of this fiscal year is 2.1."

So I think that if we have a predetermined basis on which we want to discuss statistics and know exactly what figures we are comparing

with what figures, that we can make a favorable comparison of our experience on any basis on which you would care to discuss them.

Mr. DANIELS. To what extent, sir, do you find a contractor supervising the work of a subcontractor?

Mr. CHRISTENSEN. I could speak on that only on the basis of our own individual company, because, while I am appearing here as a cochairman of the Accident Prevention Committee of NCA, in the field my duties are exclusively reserved to those of our company.

We recognize and accept the responsibility for the performance of our subcontractors and in our subcontract agreement require them to comply with the engineering safety program on the premises.

Mr. DANIELS. I have no further questions.

Mr. O'Hara, do you have any questions?

Mr. O'HARA. No, Mr. Chairman.

Mr. DANIELS. All right.

That will be all, gentlemen.

Mr. KELLY. Thank you, Mr. Chairman.

Mr. DANIELS. Our next witness is Mr. Burton F. Miller, executive vice president of American Road Builders' Association.

STATEMENT OF BURTON F. MILLER, EXECUTIVE VICE PRESIDENT, AMERICAN ROAD BUILDERS' ASSOCIATION, ACCOMPANIED BY DANIEL HANSON, MEMBER, EXECUTIVE COMMITTEE OF THE TRAFFIC CONFERENCE, NATIONAL SAFETY COUNCIL; AND EUGENE ROBBINS, MEMBER, CONSTRUCTION SECTION, NATIONAL SAFETY COUNCIL, AND VICE CHAIRMAN, HIGHWAY DIVISION OF THE NATIONAL SAFETY COUNCIL

Mr. MILLER. Mr. Chairman and gentlemen of the committee, my name is Burton F. Miller. I am executive vice president of the American Road Builders' Association with headquarters in Washington, D.C.

Mr. Chairman, if it meets with your pleasure, at this time I would like to introduce my associates, Daniel Hanson, who is my deputy, and I particularly wanted him here today because he also serves as a member of the Executive Committee of the Traffic Conference of the National Safety Council and has some expertise in this field.

On my right, my assistant, Gene Robbins, who also serves on the Executive Committee of the construction section of the National Safety Council and is also vice chairman of the Highway Division of the National Safety Council.

I thought perhaps that these gentlemen might be able to add to the record, Mr. Chairman.

Mr. DANIELS. Fine.

You may proceed, Mr. Miller.

Mr. MILLER. Mr. Chairman, first I would like to make it clear that our presentation deals solely with the highway construction industry. As you well know, there are many ramifications of the construction industry. We profess no expertise except in the highway construction industry. We do believe that our experiences may be of some advantage to this committee.

Mr. Chairman, for the record I would like to state that in our organization of approximately 5,500 firms and individuals we have Federal, State, county, and municipal engineers, consulting engineers, highway contractors, manufacturers of equipment, materials producers and suppliers, civil engineering educators and students.

Many of our members are closely involved in safety activities of various kinds, and the association serves as a meeting ground and a clearinghouse for the exchange of ideas in many areas, including the very important matter of safety procedures and safety training.

Because of our broad representation, we are able to serve effectively as a bridge between the various segments of the highway industry and between industry and Government.

Reduced to its basic essentials, ours is a program which seeks to promote agreement on goals and then, when the goals are set, looks for the most efficient and effective ways of reaching the goals.

In regard to the matter of construction safety, all concerned are in full agreement as to the goals. There is no question about the goals.

Safe working conditions are obviously desirable, and moreover they are economically attainable. The record is clear that employers with good safety records benefit from employees' higher morale, from lower insurance premiums and from fewer costly disruptions on the job.

It seems evident, then, that every manager of a construction operation should be interested in safety, if only from the standpoint of business efficiency and economy. It is equally evident that not every manager is a good one. There are marginal operators in every business who fail to follow sound business precepts.

As we understand H.R. 3290, the purpose of the bill is to establish some minimum level of safety operations and to require all employers engaged in the execution of Federal or Federal-aid projects to conform. Under the terms of the bill, both the development of standards and the enforcement of the law would be the primary responsibility of the Secretary of Labor.

The problems inherent to this procedure are in our opinion:

1. In order to be practicable for general application, minimum standards must seek a common denominator level. This means that the generalized standards will be lower than they should be for some types of work.

Unfortunately, a Federal "seal of approval" tends to be interpreted as a finding that the minimum standards are fully adequate for all applications. Thus, the net result may be a weakening of the construction safety effort instead of the desired strengthening.

2. If, on the other hand, Federal requirements are set too high, the administrative complications will result in costly delays. The emphasis should be on performance, not on procedures.

Inflexible requirements discourage private initiative to safeguard safety, encourage the "redtape" kind of compliance where the emphasis is on succeeding in submitting acceptable reports.

3. Whatever the intent may be, the issuance of Federal regulations tend to preempt the field. State and local governments will be inclined to withdraw from an active part in any area where the Federal Government seems to be taking over the responsibility.

And, Mr. Chairman, I might add that in our experience over many years of being closely associated with the administration of the Fed-

eral-aid-to-highway program statement, No. 3 is certainly an active appraisal.

4. In the case of the Federal-aid highway program is basically a State operation, and this Federal-State relationship has been well established over the years. H.R. 3290 gives authority to the Secretary of Labor to make findings which could result in the cancellation of Federal-aid highway contracts and the blacklisting of the highway contractors involved.

This bill also provides penalties which are, in our opinion, both unjust and unnecessary. Further, such procedures would clearly interfere with the right of the State highway departments to award and administer contracts, which is fundamental to the Federal-aid highway laws and the administration thereof.

In the light of these considerations, we are forced to the conclusion that H.R. 3290 will not achieve its intended purpose. How, then, should we proceed in our joint efforts to insure the health and safety of highway construction workers?

In our judgment, the highway industry and all levels of government have important roles to play. At the Federal level, a program of research and investigation to determine the primary causes of highway construction accidents and the most effective means of preventing them would constitute a most useful role.

The results of such research would provide a most useful guide for the States and local governments, as well as the highway industry, in carrying on an effective highway construction safety program.

Mr. Chairman, we have several important exhibits to leave with the committee. We believe they will be useful in your further study of this subject. These documents plainly indicate that there is currently extensive work underway in the highway construction safety field.

Exhibit A is a Bureau of Public Roads publication entitled "Construction Safety Requirements." These requirements are applicable to direct Federal highway construction and have the added value of serving as guidelines to the States. We are proud to have had a small part in the development of these standards and strongly endorse their use by both industry and Government.

Exhibit B was published last week. Exhibit B is a "Crawler Tractor Safety Manual" published by the Construction Industry Manufacturers Association, which is the Manufacturers Division of ARBA. This manual was prepared cooperatively by the principal manufacturers of crawler tractors.

While the subject matter is expressed in very clear and simple terms, it does reflect a thorough expert knowledge of this type of machinery and the hazards involved in its use.

It is simple in context. It uses a carbon-type of approach. We recommend it for your perusal, Mr. Chairman, and members of the committee, believing this type of a publication is most useful.

Exhibit C is the "Manual on Uniform Traffic Control Devices," prepared by the National Joint Committee on Uniform Traffic Control Devices and published by the Bureau of Public Roads. This is another example of cooperative effort.

The manual includes a more than 40-page chapter on the procedures for controlling traffic in highway construction zones. Our staff has substantially contributed to a revision of this material which is currently in the process of being prepared for publication.

Mr. DANIELS. Does exhibit C apply to public traffic officers, or those privately employed by the contractors?

Mr. MILLER. These uniform traffic control devices are promulgated by the American Association of State Highway Officials in cooperation with the U.S. Bureau of Public Roads.

When so promulgated they are offered as standards. The States are then urged, not compelled, to adopt these standards. When these standards are adopted, they then become part, as I understand, of the specifications governing the contract involved.

And they are enforced first by the inspectors of the State highway department, and second, by the inspectors of the Federal Government which are on each and every project under the Federal-aid highway program.

There is no such thing as a building project in our industry, sir, without adequate inspection.

Exhibit D is a publication of February 1969, of the recently created National Highway Safety Bureau in the U.S. Department of Transportation that lends much to advancement in this field.

Now, Mr. Chairman, these are relatively new, and I say to you, sir, in all sincerity, that we firmly believe that with a program of incentives and leadership on the part of the Federal Government, much more can be accomplished than positive directives which tend to have the adverse effects I have previously enumerated.

Mr. Chairman, the American Road Builders' Association is also an active participant in the work of the United States of America Standards Institute. This organization is currently engaged in writing safety standards for the construction industry.

The consensus process is used—that is, the standards are developed with the full collaboration of representatives of industry, Government, and labor. We are convinced that this is a more practical way to develop standards than through the Federal Establishment.

The ARBA also participates in and fully supports the work of both the Traffic Conference and the Construction Section of the National Safety Council. We vigorously support the council's efforts to gain the effective participation of individual contractors and of the national organizations which represent them.

A number of our affiliated State contractor organizations have outstanding highway construction safety programs. We feel that the success of these programs is a strong factor in encouraging other State organizations to do likewise.

One I have with me is typical. This happens to be with the State of Tennessee. A very voluminous and detailed regulations for the construction industry and highways. Other States are doing a similar thing.

Again, Mr. Chairman, we are fearful of any Federal action that might stifle the initiative and the great effort currently underway in promoting construction safety.

Now I assure you we are extending every effort to broaden this safety activity and believe that the effort will be very fruitful.

In conclusion, we wish to express our appreciation to this committee for the diligent attention it is giving to the problem of construction safety, and to express our thanks for this opportunity to present the views of the American Road Builders' Association.

Mr. Chairman and gentlemen of the committee, I thank you.

Mr. DANIELS. Thank you, sir.

Mr. Miller, the exhibits to which you refer will not be incorporated in the record but they will be filed with the record of proceedings of this hearing and will be available to all the members of the committee for their examination and study.

Mr. MILLER. Yes, sir. That was my intent. In fact, I might have to borrow them sometime in the near future.

Mr. DANIELS. Mr. Miller, it appears your objection is primarily based on the fact that the Secretary of Labor is apt to establish rules and regulations which are either too low or too high.

In the first event, standards that are established too low would be below the minimum safety requirements as some contractors already obey, and then where they are too high, it would be difficult and costly and often impossible to comply.

Yet, how do you explain the fact that in 1936 we adopted the Walsh-Healey Act, and also later on in 1966 we adopted the McNamara-O'Hara Services Act, and in both of these instances we have health and safety regulations governing services and also the supplying of material?

Now we have had no difficulty with those two acts and there has even been a marked improvement in safety in those instances.

Mr. MILLER. Well, Mr. Chairman, this question comes up frequently.

First, the Walsh-Healey Act as I understand largely governs manufacturing operations in a fixed establishment. The conditions existing, the application of uniform standards in such a case could be quite practical as you have stated.

On the other hand, highway construction operations are frequently carried on in remote areas, each project under different conditions.

What would constitute good practice on one job may not per se constitute good practice on another job. In other words, we have and maintain in all areas, both in job training, in union relationships, and others, that there is a vast distinction between building construction, as such, and the very extreme conditions facing the operations of the highway construction industry.

Mr. Chairman, you will frequently find in jurisdiction after jurisdiction, because of this, there are differentials even under union contracts in your labor rates, working conditions. The highway construction industry has separate contracts generally from the building construction, so there are basic differences, sir, and we find problems can best be advanced by specialized application to our industry through the expertise of the Department of Transportation, Bureau of Roads, the 50 State highway departments working in cooperation with industry.

We have found no combination, sir, that can produce results better than that.

Mr. DANIELS. But there are States that have no regulations at all. Then in those States where you do have regulations, they vary even with regard to specific projects between heavy construction projects and the lighter projects. Is that not true?

Mr. MILLER. This is correct, sir.

Mr. DANIELS. Well, can you explain why one State has a high standard with regard to health and safety and another State has a very low standard?

Mr. MILLER. Well, Mr. Chairman, conditions vary from State to State and region to region, both in wages and working conditions and customs.

We favor standardization, and time and patience is required. Our experience has been that the programs initiated by the Bureau of Public Roads in cooperation with the 50 sovereign States on an incentive basis has produced better and quicker results than a mandate out of Washington.

That has been our experience, sir, in other phases of the Federal aid highway program.

Mr. DANIELS. Are you familiar with the fact that the maritime industry also has health and safety laws?

Mr. MILLER. No, sir, I have no knowledge of the maritime industry, sir.

Mr. DANIELS. Mr. O'Hara, any questions?

Mr. O'HARA. Mr. Chairman, I would just comment that I think it would be very useful if Mr. Miller and his cohorts would take a look at the maritime industry.

Mr. MILLER. We would be delighted to, sir.

Mr. O'HARA. I am sure counsel can supply him with the accident statistics in the maritime industry, and we find that after the enactment of a Federal law, putting health and safety under Federal jurisdiction in the maritime industry, and after the promulgation of Federal standards and their enforcement by the Federal Government, there was a very significant decrease in both the frequency and severity rate of accidents in that industry and we would expect that the application of Federal safety standards to your industry would likewise result in some reduction of accident rates.

In fact, that is obviously the reason for the bill.

So, if you will take a look at that, we would be pleased to have you do so.

One further matter. You suggested something ought to be done and that some contractors are better than others. I would completely agree with that. That is the way it is. That is the way it is with traffic laws, for instance. Most drivers are good drivers, but you can't exempt the good one from the traffic laws. It is true that the bad ones are the drivers who usually get in trouble, but nevertheless the law applies to everyone. But there is one alternative that you came close to suggesting.

What about this—and I am not proposing this; I am just sort of thinking aloud?

Mr. MILLER. I understand, sir.

Mr. O'HARA. Let us say that no Federal construction contract shall be given to any contractor who has an accident frequency rate in excess of x and a severity rate in excess of y , and choose appropriate figures for those, and then require all contractors to keep detailed records of job related injuries and accidents, and give contracts only to the best performers.

What would be your reaction to that?

Mr. MILLER. Mr. O'Hara, I think a strict application of a percentage would be wrong. However, presumably there is an area where consideration could be given to a contractor's safety record in his prequalification.

As you perhaps know, the contractor who is bidding on Federal aid highway work must prequalify with the highway department as to their financial record, equipment and so forth.

Perhaps this could be woven in as one of the basic factors.

But as of today, to the best of my ability, I have been unable to find any accurate source of highway construction statistics, accidents. It is nonexistent. They throw it in with overall construction.

But, Mr. Chairman, gentlemen, we need research in this field so sorely that I would certainly—and the industry would—be appreciative of anything your committee could do to help get a project. We have research funds within the Federal aid highway program, but we would appreciate the assistance of this committee in establishing proper research and analysis so that we would have accurate information.

The National Safety Council—and I would like to ask my experts here, but I understand just in 1966 changed their basis. So they say that you can't compare these records any more because we have got a new base.

So far as I can ascertain, with specific reference again, Mr. Chairman, to highway construction solely, to try to break this out and get a definitive answer, it could not be done today, and until we have some research on how these records should be set up, uniform reporting and put on a computer system, in my opinion we won't get the answer.

I plead with you: Let us find what the problem is before we start legislating in the highway field.

Mr. O'HARA. I have no further questions.

Mr. DANIELS. Mr. Miller, reviewing your statement, in paragraph 4, page 3, you state:

H.R. 3290 gives authority to the Secretary of Labor to make findings which could result in the cancellation of Federal-aid contracts and the blacklisting of the contractors involved, provides penalties which are both unjust and unnecessary.

Can you tell me specifically what those penalties are? You do not make any mention of them.

Mr. MILLER. Well, sir, I guess the statement is a little ambiguous, but I was referring to the penalties just stated. I consider cancellation of a contract a penalty and blacklisting a most vicious penalty.

Mr. DANIELS. No criminal penalties are involved?

Mr. MILLER. No, sir.

Mr. DANIELS. What would your reaction be if we did enact the bill, if we provided for judicial review?

Mr. MILLER. Are you speaking now of the trial de novo?

Mr. DANIELS. That you could apply to the court to review the action of the Secretary of Labor as to the correctness of his decision.

Mr. MILLER. But as a matter of fact or as a matter of law, Mr. Chairman, so many of our reviews are a review—

Mr. DANIELS. I refer to something that pertains to the law when I refer to judicial, so it would be a matter of law.

Mr. MILLER. Yes, sir.

Well, the problem that we have been confronted with in most of the administrative determinations has dealt with the findings of the examiner or the inspector, where we would want to question on appeal

the facts of the case in addition to the application of the law there, too.

Mr. DANIELS. I presume that is the way judges decide cases. They first undertake to ascertain the facts and then, based on the facts, give their opinion.

Mr. MILLER. I didn't mean to get into a legal discourse. Counsel knows as well as I do that in certain appellant procedures you are limited to procedures of law, sir.

Mr. DANIELS. Mr. Miller, I presume you know that hearings were conducted on a similar bill in the 90th Congress?

Mr. MILLER. I understand that.

Mr. DANIELS. I believe more than a year ago.

Mr. MILLER. That is my understanding, sir.

Mr. DANIELS. In the course of your testimony, you stated that your organization is currently engaged in writing safety standards for the construction industry. When did your organization commence writing the safety standards?

Mr. MILLER. What page is that on?

Mr. DANIELS. That is at the bottom of page 4, the last sentence.

Mr. MILLER. Mr. Chairman, I thought I had notified the committee. As you recall, Mr. Chairman, I didn't have the opportunity to testify in my previous appearance. It was some time ago, and I have made some modifications in my testimony. The copy I have before me, which is dated today, doesn't make that statement.

Mr. DANIELS. Well, I will read it to you, sir.

The last paragraph on page 4 of your statement.

The American Road Builders' Association is an active participant in the work of the United States of America Standards Institute. This organization is currently engaged in writing safety standards for the construction industry.

Mr. MILLER. Yes, sir. Mr. Chairman, if I may, I would like to refer this question to Mr. Robbins who has the direct responsibility for this matter in my organization.

Mr. DANIELS. All right.

Mr. ROBBINS. Mr. Chairman, we have been asked by a committee of the U.S.A. Standards Institute to undertake the development of standards for asphalt mixing, asphalt paving, Portland cement mixing, Portland cement paving. These, of course, are major areas in highway construction, and we, meaning the American Road Builders' Association, have been asked to coordinate these efforts, and this new committee organization has only been effected with the last 3 months, so we are pursuing it as rapidly as possible.

But it has only been a recent development that we have gotten into it on this basis.

Mr. DANIELS. Well then, actually nothing has been promulgated as of this time?

Mr. ROBBINS. We have only drafts of material at this time.

Mr. O'HARA. Will the chairman yield?

Mr. DANIELS. Yes.

Mr. O'HARA. How long has the United States of America Standards Institute been working on a construction safety code?

Mr. ROBBINS. They have been in this field for some time, and until about 3 years ago they used the AGC manual as the code for the construction industry, and at that time 3 years ago, they determined that rather than have one overall manual, that they would begin to develop

separate standards for each area of activity in the construction industry, and this is the process they are in now.

Mr. O'HARA. Well, it is my recollection, and I hope you can enlighten me, that the United States of America Standards Institute has been at work on a safety code for many years, and there has been very little progress. I am told there has been more progress since we started considering safety legislation than before.

Mr. ROBBINS. Yes, sir; I agree with you that the progress has been painfully slow, but in our area we have undertaken this responsibility, and we intend to expedite the development of the standards in our field.

Mr. O'HARA. Thank you, Mr. Chairman.

Mr. DANIELS. The gentleman from Texas, Mr. Collins, do you have any questions?

Mr. COLLINS. No. I have read their statement and I think it pretty well covers those ideas.

Mr. DANIELS. That will be all, gentlemen.

Mr. MILLER. Thank you very much, Mr. Chairman and members of the committee.

Mr. DANIELS. Our next witness is Mr. Paul Connelley, safety director, United Brotherhood of Carpenters.

STATEMENT OF PAUL CONNELLEY, SAFETY DIRECTOR, UNITED BROTHERHOOD OF CARPENTERS, WASHINGTON, D.C.; ACCOMPANIED BY W. VERNIE REED, FIRST VICE PRESIDENT OF THE LABORERS INTERNATIONAL UNION

Mr. CONNELLEY. Thank you, Mr. Chairman.

Mr. DANIELS. Do you have a prepared statement, Mr. Connelley?

Mr. CONNELLEY. No; I do not.

Before I begin, may I introduce Mr. Vernie Reed, first vice president of the Laborers International Union.

I believe that a convincing case for this legislation has already been made before this committee.

I would like to try to clean up a few loose ends and to comment on some of the arguments of those who oppose the bill.

May I begin by saying that we in labor do not support this bill just because we believe it is good for safety. We also think it is good for the industry.

A big portion of the estimated \$3 billion which accidents cost the construction industry every year could be saved to the industry and its customers by the investment of a few millions of dollars in an effective Federal construction safety program.

It seems to me that the tremendous human and economic cost of accidents in the industry has more than demonstrated the urgent need for governmental standards and enforcement which will help to counteract the economic imperatives which have made safety an item of competition, instead of the basic working condition it should be.

To illustrate, let us try to look at safety through the eyes of a contractor who is uninformed or has very limited resources. In bidding a job or trying to complete one, safety to him is an expense to be avoided—pure and simple.

It makes it harder to bid low, harder to finish a job, and cuts down his profits.

In the long run, he is wrong. But his numbers are legion. The safety-minded contractor knows better, but he can lose work to the gambler who bids below the true cost of a job. Sometimes the gambler gets away with it, but usually he loses. If he loses too often, he goes out of business.

But not before many construction workers have paid with their lives and limbs for this irresponsible and short-sighted way of doing business.

I should think that responsible contractors would welcome action which would help to eliminate this kind of competition from the industry.

The industry would certainly benefit from the continued use of the skills of the 2,800 craftsmen killed on the job every year. And perhaps another 50,000 are lost through injury severe enough to force their retirement from the industry.

In this time of complaints of labor shortage, the additional manpower would certainly be a big plus to the industry and to its customers, and I understand the Federal Government is one of its big customers.

This points up one of the major problems—what some of the previous people were talking about. The diffusion of responsibility in the industry because of its way of doing business.

So much of the work is actually done by subcontractors. You may hear a real fine story from a general contractor who has a real fine safety record. You can't even be sure that that represents all of the safety record that is actually taking place on its job, because many of its subs—or the compilations are made on the basis of their record, separately, and they are not included in it.

One reason for the reluctance and general inability of general contractors to control their sub, is their worry about third-party liability.

A year and a half ago at a previous meeting, a hearing of this committee, I heard a gentleman testify. And I happen to know the gentleman. He is a very sincere and dedicated safety man.

He said, he stated frankly that they were inhibited from controlling their subcontractors because of this fear, that if they really clamped down on them and tightened up the screws and made them comply, that they would make themselves liable for an accident that happens on the job through a third-party liability.

This is one of the things, hearing about good records of a few general contractors, that can be very deceptive.

I would like to comment a little bit about statistics in a very general way. Injury frequency rates in construction are often used to argue the need or lack of need for this legislation.

While the comparative magnitude of construction injuries is generally conceded, uncritical use of most of the available statistics can lead us to underestimate the seriousness of the problem.

If, for example, we talk about national safety council figures, we think of rates in the range of 12 to 15. These, of course, are based on only 27 National Safety Council members who choose to report. Obviously it is not really representative of the industry.

If we talk about Bureau of Labor statistics figures, we think of rates in the 26 to 28 range. Their figures are based on a sampling of voluntary reporters. While their sample may be statistically impeccable, we don't think that accidents happen in the tidy manner assumed by a sampling procedure.

The Bureau itself states that their rates should be regarded as minimums rather than maximums.

If we use rough data from the annual survey of the Public Health Service combined with construction employment figures, we get a rate of about 46 per million. Forty-six disabling injuries per million man-hours.

A set of figures from the Province of Ontario in Canada that came to my attention recently I find even more interesting. They found that they had a rate of 63 in 1967, and this rate had dropped to 57 in 1968. Now I find this most interesting because I happen to know that Ontario has good safety laws, recently passed. Their contractors have been very active in safety in recent years, and I would be willing to bet my money that their record is certainly not worse than most of the practice that you would find in the United States.

Now I should imagine by this time that you have caught onto the fact that I am playing games with statistics just to convince you that you should take them with a grain of salt, and I am willing that you should apply the same criteria to what I have just said. But I think it is true that uncritical quoting of statistics to prove a particular point should be looked at pretty carefully.

I think there has been plenty of that in the record before his committee.

Now I would like to comment on a few of the specific arguments made in testimony opposing this bill. The argument was made that this legislation would in some unspecified manner centralize control of safety matters and interfere with the safety programs of such contracting Federal agencies as the Army Engineers and the Bureau of Reclamation.

The setting of uniform minimum standards hardly constitutes centralized control, and we see nothing in this bill to prevent a Federal agency, or private contractor for that matter, which has a good safety program, from maintaining a good program.

The responsibility for safety on the job stops right where it is: with the contracting agency.

By leaning on the admittedly good programs of the Army Engineers and the Bureau of Reclamation, some testimony attempted to infer that the safety performance of all Federal contracting agencies is on the same level.

This inference is, of course, absurd. Moreover, it ignores the fact that much of this bill's impact is directed to federally assisted projects, including such high-volume construction as the interstate highway program.

Some opposing testimony criticizes the bill because it won't solve the safety problems of all of the industry. This seems to me the logical equivalent of saying that if you can't save all the victims of a shipwreck, you shouldn't bother saving any of them. It also overlooks the multiplying effect that we could reasonably expect from Federal leadership.

The bill is criticized for not providing for setting standards by the consensus method. Experience under such parallel legislation as the Walsh-Healey Act indicates that consensus standards are precisely the kind of standards that would be used in enforcing this legislation.

As usual, the committee has heard testimony that local and State safety enforcement is made more meaningful than Federal enforcement because it is closer to the construction site.

Safety on the job is achieved by good standards, plus good inspection and enforcement. I know of no reason for believing that a State safety inspector as such on a job site will do a better job than a Federal inspector on the same site.

Opposition testimony emphasizes the limitations of compulsion and the superior virtues of education and training in achieving safety.

In his submitted statement for the building trades department, Alan Burch dealt with this question, and I would like to read a short excerpt from this statement:

All the talk about the supervisor being responsible for safety, and the workers needing only more safety training, are evasions of reality. Workmen are hired to produce, not to be safe, and supervisors are hired to see that they do produce, not to look out for their welfare. This is a simple fact of life that we always bump up against hard when we try to make safety programs work. The workman who spends any large portion of his time making sure he is not too close to the edge of the floor, or examining a job-made ladder to see if it is safe, or waiting for a supervisor, who may be miles away, to see that a trench is shored before he enters it, usually achieves only one thing: He gets fired for not producing. Not because he failed to observe all these swell little work rules that have been plastered about the job on bulletin boards, but because he spends too much time for himself and not enough for the company. The supervisor is in the same boat. If he holds up the job until the proper scaffolding is in place, or the shoring is built, or the new hoist cable installed, too often he gets replaced by someone who concentrates more on production and less on welfare. This, gentlemen, is why we have industrial accidents and why the record of the construction industry is so poor.

I think that is a pretty good punchline, even if it isn't mine, and I will rest right there.

Mr. DANIELS. Thank you, Mr. Connelley. It is then your frank opinion that minimum rules of health and safety can be established for the entire industry on federally financed jobs?

Mr. CONNELLEY. It certainly is. I don't see any different problem in settling it under the axis of the Federal Government than any other.

Mr. DANIELS. Mr. O'Hara, any questions?

Mr. O'HARA. No; no questions, Mr. Chairman.

I wish to thank the representatives of the Carpenters Union for their testimony today, and for the restrained and effective manner in which they have presented it.

Mr. DANIELS. The gentleman from Texas, Mr. Collins.

Mr. COLLINS. I want to know what your own opinion would be as to how much we would need in the way of Government bureaucracy to supervise this. Do you think unions could represent themselves whenever we have any type of claim come up, or the company hadn't followed the construction code, or we need Government inspectors on these jobs?

Mr. CONNELLEY. Well, I think you certainly have to have a number of them. I would hope that the educational effect would wear off, and in this country we don't have a Government inspector to take care of everybody's income tax.

I would suppose that the industry would be decent enough that there would be a considerable amount of voluntary compliance, but I think, yes, you have to have basic teeth somewhere.

Mr. COLLINS. Couldn't the union representatives file claims when they did not meet them? Why do we need Government inspectors on this type of a job? Suppose we put this in the contract per se. Is this a part of your contract? Of course, in the law you draw up your contract in line with it, don't you?

Mr. CONNELLEY. Well, I would say, judging on my own experience of the number of Federal inspectors available for any job or for any task—let us not confuse the term—that you would be depending on complaints.

You are not going to have that many inspectors available and most of those complaints would presumably come from union people who would have the courage to make them.

Mr. COLLINS. That is right. Through their representatives.

Aren't nearly all these Federal jobs under union contracts?

Mr. CONNELLEY. I wish that were true.

Mr. COLLINS. We have had experience at home in the field of education where I think we sometimes have too many Government inspectors. They spend all their time and they divert the need from education, and I certainly hope that they can concentrate on the field of safety and we don't end up to too many inspectors.

Mr. CONNELLEY. I would say one function of a Government inspector is to educate, and I think this is the whole philosophy of the Bureau of Labor Standards who have done most of the Government enforcing in related fields.

There have been times when I would criticize them for doing too damn much education and too little enforcement you know, but I think you will find any good safety inspector is doing at least as much education.

We don't want contractors punished; we want them to learn and to do the job safely and save lives.

Mr. COLLINS. That is all. Thank you.

Mr. DANIELS. I would like to point out to my colleague that under the provisions of this bill, subsection (b) that the Secretary of Labor is authorized to administer the provisions of the act, and he may with the consent of the States delegate that authority to the State inspectors.

Mr. COLLINS. That is an interesting aspect.

Mr. DANIELS. I understand they do that under Walsh-Healey.

Mr. COLLINS. He could do it in one State—turn it to the State—and in the other he could do it himself.

Mr. REED. Mr. Chairman and members of the committee, my name is Vernie Reed.

Primarily I am here with Mr. Connelley as a colleague and the working relationship between our members demands we have close working relationship at headquarters.

We have one item to report of extreme interest to the committee, and when it is published we will see that it gets into your hands. Particularly it is interesting to those in the construction industry that drill tunnels, especially under compressed air.

Through the U.S. Navy studies with their deep sea dives, we have revised some of our tunnel codes, especially on the West Coast. The

one here in Washington, D.C., has been updated to meet all the best information we have in saving our people from exposure to industrial diseases under compressed air, and for the past 2 years our mining local in Ontario, Local 183, and the International Union supporting their program, have been engaged in medical research, the effects of compression and decompression on the human life, and we recently have been notified by the doctor in charge, that his studies are completed, they are in the process now of coordinating that report, editing it, and it will soon be published.

We believe that it determines many of the causes and also points out necessary changes to retard or to eliminate certain disease, certain tragedies our people have been faced with in this type of underground construction.

This is particularly important, I believe to the industry. You people will have been conscientious in trying to protect our members, because this type of construction is on the increase. Two years ago it was practically nonexistent but we do find the needs of compressed air construction growing on the planning boards day by day.

We find that the needs of education in this area has to be supported by medical research data. Up to this point we have only known that we have taken husky young people of 25 to 30 years of age and at that particular time, anybody looking at them would think that without an accident they would live a very long, useful life.

We find that there has been a change in these individuals. Some of the case histories before the doctor in Ontario, which number in the hundreds of cases, finds it almost impossible to believe what happens to some of our members being exposed to compression and decompression.

We believe that this research material, although undoubtedly we will put it in places where it will be subject to challenge, will open some new doors and turn on some new lights in this section of the industry.

This particular compressed-air code which we have adopted now for the rapid transit system here in Washington decreases the cost, increases production, and will at the same time more adequately serve the health conditions of our people.

We have been advised by the Navy medical doctors that the compression, itself, the time spent working at the face of the tunnel, has not been the danger point. The danger point has been on too rapid decompression time. This, of course, means when you isolate men in the decompression chamber they are going to have to be more adequately housed. We are going to have to have heat; we are going to have to have dryness; we are going to have to have some of the comforts where a man is in isolation of 4 hours 57 minutes which will be the maximum decompression time.

The individual will have to go through the decompression chambers when he completes his day's work on your proposed transit system here. All of these are just the reverse of what we have been practicing for the many years this industry has been serving the needs of the American people.

Our insurance rates are the highest insurance rates in the country. We believe we can effect not only immediate savings in production, but also the related expenses that our employers have been subjected to in the past. We find a good reception to the limited information

we have at the present time, and we thought because of your very pronounced interest in the lives of the working people of this great Nation, that you would also find some very good information in the medical reports which we hope to have in your hands within the next 2 weeks.

Mr. DANIELS. Thank you.

I want to compliment you for those remarks.

I now recognize my colleague from Michigan, Mr. O'Hara.

Mr. O'HARA. Thank you, Mr. Chairman.

Mr. Reed, we would be very anxious to see these reports. You know there has been a remarkable new awareness of some of the dangers to which American workers are exposed just in the last few years that suggests that we have been deficient indeed in exercising our responsibilities here in the U.S. Congress. I am very anxious to see these reports and review them.

Mr. REED. We will be glad to furnish the committee with the reports as they are available. We have budget problems, also, and we had to go back for some additional funds because we thought the autopsy reports showed up specially well in color, and being an expensive printing process, this is why we delayed the publication of this report, to go back for additional revenues.

Mr. Boscoe, our president, has okayed the publication of the report as recommended by the research doctors. So we hope not only to have a report but the best possible production of these studies.

Mr. DANIELS. Do you think they will be available in about 2 weeks?

Mr. REED. We hope so.

Mr. DANIELS. All right.

Then when you do supply those reports, they will be examined carefully by this subcommittee.

This concludes the hearing on this bill. The subcommittee will meet in executive session at the call of the Chair in the near future.

(Whereupon, at 11:15 a.m. the subcommittee adjourned to the call of the Chair.)

(The following material was submitted for the record:)

THE AMERICAN INSTITUTE OF ARCHITECTS,

St. Louis, Mo., April 24, 1969.

Re H.R. 3290, construction safety bill.

HON. DOMINICK V. DANIELS,

Chairman, Select Subcommittee on Labor, Committee on Education and Labor,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The American Institute of Architects, a professional society representing slightly over 22,000 licensed architects, supports the enactment of H.R. 3290, legislation to require safe working conditions at construction sites. We believe this legislation will change the concept of construction safety from a matter of competition among Federal agencies, contractors and labor unions to that of a basic right of the construction worker.

It may be useful to point out that the Institute has worked with other members of the construction industry to develop contracts and other documents to further an orderly construction process. Safety is one area that is covered by our document "General Conditions of the Contract for Construction (AIA Document A201, 1967 Edition)," a copy of which is attached. You will note that Article 10, "Protection of Persons and Property," states, in part: "the contractor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to: 1. All employees on the work and all other persons who may be affected thereby..."

Article 10 continues:

"The contractor shall comply with all applicable laws, ordinances, rules, regulations and orders of any public authority having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss. He shall erect and maintain, as required by existing conditions and progress of the work, all reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent utilities."

The purpose in calling this language to your attention is to note that the AIA contract documents which are widely used in the construction industry (and are endorsed by such organizations as the Associated General Contractors of America), are fully consonant with the purpose of H.R. 3290.

Under the subject legislation, the Secretary of Labor is authorized to promulgate such safety standards as are necessary to carry out the purpose of the Act. We believe that it is most important for the Secretary to seek the advice and counsel of all facets of the construction industry in developing such standards. Thus the building trades, contractors, subcontractors, architects, engineers, and possibly others should be involved. Contributions should also be sought from the U.S.A. Standards Institute which has been working on standards for construction safety for some time. If this recommendation was followed, we believe the eventual safety standards promulgated by the Secretary of Labor would probably represent a consensus by the construction industry.

We note with approval that the Secretary of Labor is authorized by the bill to utilize Federal, State and local officers and employees to administer the safety standards. In our opinion the Federal construction agencies, or state or local government may be in a better position to assure safe working conditions on construction sites than a cadre of Labor Department inspectors specially hired for this purpose.

The Institute believes the bill could be improved in the following respects:

Provide that any person who is adversely affected or aggrieved by the Secretary's rulings or other action under the Act shall be entitled to judicial review.

Provide that the Secretary of Labor shall submit a report to the Congress for each of three succeeding years following the enactment of the bill which shall provide information on construction safety including safety statistics, the disposition of cases involving violations of the Secretary's standards, and recommendations with respect to any additional legislation or administrative action which is necessary or desirable to achieve safe working conditions for construction workers.

In summary, the AIA believes that the enactment of H.R. 3290 will help promote a safe environment for the construction worker. We hope that our comments will be helpful to the Subcommittee as it deliberates on this bill.

Sincerely yours,

GEORGE E. KASSABAUM, *President.*

STATEMENT BY CHARLES H. PILLARD, INTERNATIONAL PRESIDENT,
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

It is a matter of public record that the International Brotherhood of Electrical Workers has over the years, not only been vitally interested in the Health and Safety of its membership and all workers in the construction industry, but has diligently promoted the adoption of safety standards at both local and state levels throughout the nation. Results have been meager because of the opposition of some management groups who have wanted *no* restrictions placed on their modus operandi and who have wanted the unilateral right to change operating procedures at will.

The states have not (in most cases) assumed their proclaimed responsibility to provide for the health and safety in this very important but hazardous construction industry. Thus our only recourse is to appeal to you to provide at the Federal level the protection that the workers so richly deserve.

Last year the International Brotherhood of Electrical Workers submitted a statement of position and appeared with the Building and Construction Trades Department, AFL-CIO before the Honorable James G. O'Hara and the Select Subcommittee of Labor, Committee of Education and Labor as proponents of House Bill HR 2567.

This year, again in company with the Building and Construction Trades Department, AFL-CIO, we will be in attendance and available to answer ques-

tions from your committee relative to material already submitted on HR 2567 as well as that which will be submitted in support of HR 3290, the Bill now under consideration.

Repetition at this time of the facts already submitted in favor of the Construction Safety Bill could serve no useful purpose as the facts and figures submitted already to the Committee are still valid and to reintroduce them could only serve to consume valuable time.

We respectfully suggest that passage of HR 3290 will be a constructive step forward in saving many lives and limbs of skilled craftsmen in the construction industry, to the benefit not only the craftsmen themselves but also the Employers and the Country as a whole. However, we feel that in addition to the Bill as now written, funds must be forthcoming to implement the rules, regulations and to set up an enforcement structure; therefore the International Brotherhood of Electrical Workers recommends that the Committee attach an addendum to the Bill providing ten million dollars (\$10,000,000) for the first year and a continuing funding to assure the affective continuance of the program.

Therefore, the International Brotherhood of Electrical Workers supports and encourages adoption of HR 3290 as a necessary constructive step toward the reduction of accidents in construction and the construction industry.

STATEMENT BY DAN C. CHRISTIE, CHAIRMAN, A10 COMMITTEE ON CONSTRUCTION,
UNITED STATES OF AMERICA STANDARDS INSTITUTE

Mr. Chairman and Members of the Select Subcommittee on Labor, you are hearing today testimony on construction safety and its application throughout these United States.

As a construction safety consultant vitally interested in safety of the employee and the related costs and inefficient operation associated with accidents I believe it necessary to inform you of the work presently underway in developing construction safety standards under the auspices of the National Safety Council and the United States of America Standards Institute.

The reason for drafting this statement is that many associated with the construction industry have not heard of the work presently under development by the United States of America Standards Institute, A10 Committee on Construction Safety Standards. This committee is composed of members from government, labor, insurance, manufacturing and contractor organizations with many independent experts assisting each committee.

The purpose of the Construction Safety Standards Committee is "to develop standards relating to the protection of employees and to the public from hazards arising out of or associated with construction and demolition operations."

The standards now under development, the committee chairman and their present status are:

A10.3—Explosive-actuated fastening tools; Chairman, Arthur Schmuhl; first standard in print—presently under revision.

A10.4—Workmans hoists; Chairman, Robert Wendell; awaiting completion of A10.13.

A10.6—Earth moving and grading equipment operation and maintainace; Chairman, Robert Jenkins; completion in approximately one year.

A10.7—Excavations; Chairman, Warren Mendal; completion in approximately 9 months.

A10.8—Scaffolds; Chairman, F. A. Peterson; will be in print in approximately two months.

A10.9—Fire protection; Chairman, Thomas J. Laskowski; completion in about one year.

A10.10—Protective equipment in proximity with high voltage lines; Chairman, Frank W. Marcaccio; completion in about one year.

A10.11—Blasting; Chairman, B. W. Carr; completion in about four months.

A10.12—Ladders (job-made); Chairman, R. L. Moore; completion—two years.

A10.13—Material hoists; Chairman, Robert Wendell; in print within 60 days.

A10.14—Demolition; Chairman, Frank Otto; in print within 30 days.

A10.15—Roofing operations; Chairman, Fred Good; completion within two years.

A10.16—Safety belts and life lines; Chairman, F. A. Van Atta.

A10.17—Concrete construction and masonry; Chairman, Howard

Latham; completion within 90 days.

A10.18—Tunnels, shafts and caissons; Chairman, E. W. Wheeler.

A10.19—Marine piling and marine construction; Chairman L. O. Tracy; completion within two years.

A10.20—Asphalt concrete mixing; Chairman, Richard Schroeder; completion within two years.

A10.21—Steel erection; Chairman, T. S. McKosky; completion within one year.

A10.22—Pile driving; Chairman, Thomas J. Laskowski; completion within two years.

A10.23—Dredging; Chairman, A. J. Scardino; completion within three years.

A10.24—Electrical wiring for temporary use; Chairman, Milton Minto; completion within three years.

A10.25—Safety nets; Chairman, Robert Jenkins; completion within two years.

A10.26—Temporary and portable space heating devices and equipment; Chairman, Dan C. Christie; in print within four months.

A10.27—Trenching operations; Chairman, Warren Mendel; completion within two years.

A10.28—Asphalt concrete paving; Chairman, John Spangler; completion within three years.

A10.29—Portland cement mixing; Chairman, Hamilton Strayer.

A10.30—Portland cement concrete paving; Chairman, to be assigned; completion within three years.

Many of the afore-mentioned standards could be completed and in print if funds were available to support these committees.

STATEMENT OF THE SOUTHERN STATES INDUSTRIAL COUNCIL

The Southern States Industrial Council asks to be placed on record in opposition to H.R. 3290 which purports to promote health and safety standards for all federally financed or federally assisted construction projects. The Council represents over 3,000 business and industrial firms, the majority of them located in 16 Southern states but a substantial number located throughout the nation. Many of the member firms are engaged in building or construction work or related industries. Headquarters of the SSIC are in Nashville, Tennessee.

H.R. 3290 exemplifies a trend that has developed over a period of several years to place autocratic and dictatorial powers in the hands of Federal departments and agencies. Congressional prerogatives have been usurped. States have lost more and more of their powers to the mushrooming Federal establishment. And business and industry are being made subject to the whims of Washington bureaucrats and punished if they fail to comply in every respect with their edicts.

Under H.R. 3290, the U.S. Secretary of Labor is given virtually absolute authority to establish health and safety standards for firms performing work on construction projects in which federal funds are involved. Furthermore, the Secretary would serve as both prosecutor and judge in the determination of whether his standards had been met. He would mete out punishment to those he ruled to be in non-compliance.

H.R. 3290 is a harsh and punitive measure. If the Secretary of Labor should decide there had been a violation of his regulations, he would have the power under this act to cancel the contract, enter into other contracts, and charge any additional cost to the original contractor. No matter how inadvertent the violation, the contractor or any person or firm having an interest in the business could be put on an official blacklist and prevented from receiving a contract on work involving federal funds for a period of three years.

If health and safety guidelines are needed for the construction industry, the industry itself and related industries should have a substantial role in the preparation of such guidelines. Furthermore, enforcement should be left with the states and carried out in a fair and reasonable manner. H.R. 3290 does not meet these criteria.

For all the foregoing reasons, the Southern States Industrial Council asks that the Subcommittee withhold its approval from H.R. 3290.

STATEMENT OF ASSOCIATED BUILDERS & CONTRACTORS, INC.

This statement is filed on behalf of Associated Builders and Contractors, an association of more than 2500 firms in 19 states with its national office in Friendship Heights, Maryland. Most of the member firms are directly engaged in the construction industry and a large number of others, such as suppliers and financial institutions, although not builders, are directly involved in the industry.

The Association throughout its history has had a deep interest in construction safety. It has worked assiduously toward eliminating hazardous working conditions in whatever form they may exist.

Out of its interest in this subject the Association files this statement. It opposes H.R. 3290 because of a definite belief that the bill will interfere with the progress that is being made in the construction safety field.

The Department of Labor itself grants that progress has been steadily made in the construction industry as evidenced by the declining trend in the injury frequency rate. A news release from the Department of Labor dated March 5, 1969, states: "Contract construction industries, in contrast, have had a generally declining trend in the injury-frequency rate. The rate has dropped to 26.0 in 1967 and 28.3 in 1965, and 27.9 in 1966. The incidence of injuries in contract construction has been declining since 1959, when the rate was 32.1. Although employment in contract construction has been rising over the past 10 years, there has been no corresponding growth in the injury-frequency rate, partly because increased mechanization has eliminated many injuries that resulted from manual handling."

Other statistics bear out this statement made by the Department of Labor in the news release quoted above. For example, statistics of the National Safety Council show a decline in recent years in the accident frequency rate in general building construction.*

ABC further opposes this bill because it places an inordinate amount of power in the hands of the Secretary of Labor. The Secretary of Labor, pursuant to the bill, would be authorized to:

- (1) Make rules and regulations.
- (2) Issue orders.
- (3) Make decisions.
- (4) Have the final say as to what firms are precluded from federal contracts.

He would have all this power, yet there is not a word in the bill that would specifically give aggrieved employers the opportunity to appeal to the courts.

We should be honest with ourselves and admit that once the bill were to become law, there would have to be a veritable army of inspectors because of the far-flung activities of the building industry performing federal construction projects. Some of them would almost surely be drawn from the ranks of organized labor. These inspectors being only human, certain of them would be highly prejudiced. With their human foibles, there would be no way to stop them from taking a highly prejudiced action against employers whose employees had not seen fit to have a labor organization represent them. There are no safeguards in the bill for the contractor who might be the victim of such highly prejudicial action against him.

The bill is defective moreover because it appears to envision the same sort of standards for all branches of construction. At the present time the different federal agencies have responsibility for their own safety programs. The problems of the Corps of Engineers, for instance, may be very different from those of the Air Force. Those of the General Services Administration would be very different from the Bureau of Public Roads. Yet H.R. 3290 would place all these agencies under a common rule-maker, to wit, the Secretary of Labor. ABC submits that this kind of blind uniformity would likely defeat the purpose of the bill because there is not uniformity in the safety problems of these different agencies.

After all, safety is to a great extent a matter of education. A great deal more can always be done in this area. Federal assistance in promotion of safety education can be of very great service and would in no way run the risk of upsetting the current favorable trend in the reduction of construction accidents.

Any one who thinks federal action is a panacea in this field should take second thoughts when he views what has happened in the Walsh-Healy area. Efforts of the federal government to promulgate satisfactory safety regulations under that Act have been a subject of heated controversy for a number of years. Even now,

*See Work Injury Rates, 1968 Edition, Nation Safety Council, p. 9.

these regulations are anything but generally acceptable. That these regulations have not helped with respect to safety in manufacturing, moreover, is indicated by the fact that the Department of Labor in the news release mentioned at the outset of this statement says very definitely that the accident rate has been rising in manufacturing. Likewise the Federal Government has failed to bring a solution to accidents in the field of coal mining because the same release shows that the accident frequency rate in that industry is far higher than it is in either manufacturing or construction.

It is to be hoped, therefore, that Congress will not disturb the current favorable trend in construction safety by injecting itself at this time. It is suggested, moreover, that time be allowed the Secretary of Labor's National Safety Advisory Committee to assess the entire safety situation, and that now is an ill-advised time to pass new safety legislation accordingly.

STATEMENT OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

Mr. Chairman and Members of the Subcommittee: The National Association of Home Builders is a trade association representing the residential construction industry. Our Association has over 50,000 members affiliated with over 450 State and local home builder associations in the United States, the Virgin Islands and Puerto Rico.

The subject of worker health and safety within this industry has been and continues to be, of prime concern to this Association and its members. Our members work in close cooperation with State and local officials on the effective implementation of existing requirements for on-site construction worker safety, and on steps to increase their effectiveness in the home building industry.

We believe that the development and application of safe work practices should be the responsibility of State and local officials and appropriate representatives of home building industry. Construction on-site work conditions relate necessarily to the type of construction involved, the scope of such work, and the degree of management control required to insure safe conditions of work.

Accordingly, when this proposal which is now embodied in H.R. 3290 was before the House last fall, we vigorously opposed its passage and restated our belief that construction safety is, and should be, a matter of State and local law and control. As we read H.R. 3290, this proposal, if enacted into law, would grant the Secretary of Labor unlimited authority to issue standards, regulations, rulings, interpretations, and enforcement procedures relating to construction worker safety.

Enactment of this legislation would override or effectively displace existing on-site safety requirements enforced by Federal contracting agencies and by agencies of State and local governments. All of these now operate closer than the Federal government to local contractor on-site operations, workers needs, and to those elements of construction activity which are a potential source of harm or injury to the worker.

We are convinced that any decrease in the number of injuries and accidents at building sites will only be obtainable through greater education of construction workers to the dangers of unsafe work practices and effective enforcement of required safety programs at the local level. Therefore, we feel that the interest of the Congress towards improved construction site worker health and safety should be directed primarily at meaningful steps which will enable concerned Federal agencies and units of local government to improve their present safety education programs, on-site safety requirements, and enforcement procedures.

Federal direction and assistance could be tailored along the lines of existing financial grant-in-aid programs in other fields and would afford the Federal government, the State and local agencies, and the industry an opportunity to become partners in a national construction safety effort. The NAHB Executive Committee is currently studying the possibility of supporting just such a proposal. The benefits accruing to the on-site worker and his family, the general public, and the industry would be well worth the financial contribution required and would, we think, produce greater worker protection within a much shorter time.

We are hopeful that every consideration will be given to this alternative legislative approach prior to any final determination by the Subcommittee on the issues raised in H.R. 3290.

We appreciate very much this opportunity to submit our views on this important question. Thank you for your consideration.

STATEMENT OF AMERICAN MUTUAL INSURANCE ALLIANCE BY LEE B. HOLMES

The American Mutual Insurance Alliance is a Trade Association composed of over 118 mutual fire and casualty insurance companies writing workmen's compensation and other lines of insurance coverage throughout the nation. While we are not involved directly in any Federal and federally financed or federally assisted construction projects, our member companies, as a service to their policyholders, provide effective accident prevention service to construction concerns who do have such contracts. We have a keen, objective, and continuing interest in activities intended to improve our national occupational safety and health record.

It should be noted that our accident prevention work on behalf of our member companies includes support of the system through which consensus standards are made; keeping abreast of new developments and their potential hazards; publication and distribution of technical and promotional material; and a continuing emphasis on research. Additionally, our member companies that write workmen's compensation coverages on construction operations have developed teams of construction safety specialists whose advice and help are much sought after by construction contractors.

Our interest, effort and activities are parallel to the occupational safety objectives of the proposed amendment to the Contract Work Hours Standards Act. However, we seriously doubt that these mutual and desirable objectives will be obtained to a greater degree through the approaches prescribed under the proposed amendment.

In brief, HR 3290 proposes to promote health and safety in the building trades and construction industry in all Federal and federally financed or federally assisted construction projects through an amendment to the Contract Work Hours Standards Act.

Adoption of the proposed amendment would, in effect, transfer the responsibility for safety on Federal construction projects from the governmental agency for which the contract work is being done, to the U.S. Department of Labor. In our opinion, such a transfer of responsibility is unnecessary and undesirable. We believe that the responsibility for safety should be retained by the contracting agency.

Several contracting agencies, such as the United States Corps of Engineers and the Bureau of Reclamation, have developed excellent programs for safety on construction projects under their jurisdiction. In such programs the obligation of the contractor in ensuring the health and safety of his employees engaged in the performance of work under the contract, is incorporated in the contract specifications. As a result, it becomes a contractual obligation on the part of the contractor to the federal government. It is enforceable by the designated contracting officer and his authorized representative. Such a contractual obligation, providing for compliance with the agencies health and safety standards, is considered and enforced in the same way as are any other contractual provisions. Commendable safety records have been developed under such programs. Further, the safety activities of the contractor are carried on under the day to day surveillance of the contracting officer and his authorized representatives who are familiar with the project. The assistance of construction safety specialists within the contracting agencies own organization is readily available in time of need. The cost of the governmental effort in such programs is rightfully included in the overall administrative costs of the projects.

The procedure of including the safety requirements in the contract specifications, with compliance required by the contracting officer, has been effective and acceptable to both the contracting agency and the contractor. Inasmuch as commendable safety records have been attained under such an approach to safety, it seems to us that programs of this type offer the best possibility for further progress in safety on Federal projects and that they should be extended to those contracting agencies who have not already adopted them.

The objective of preventing any laborer or mechanic from working under conditions which are unsanitary, hazardous, or dangerous to his health or safety is proper, commendable and one which we heartily endorse. It is our feeling, however, that this worthwhile objective will not be reached to a greater degree by procedures whereby the Secretary of Labor would singly set the standard of safety to be achieved, judge the achievement, and assess penalties for what, in his opinion, is a lack of achievement. We would recommend that, as a minimum, HR 3290 should reflect industry participation in the setting of safety standards.

We would urge insurance industry representation in any body established to develop such standards. Additionally, we feel that the actions of the Secretary under this legislation should properly be subject to the provisions of the Administrative Procedure Act.

The continued improvement of safety and health conditions in general is a prime concern of our association and we appreciate this opportunity to present our views.

STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ON
H.R. 3290

The Department of Housing and Urban Development is pleased to have this opportunity to comment on the provisions of H.R. 3290, and the problems of health and safety in the building trades and construction industry.

This Department shares with labor and industry a deep concern with the need to promote health and safety in the construction industry. Data assembled by the Bureau of Labor Statistics for 1967, the most recent full year for which information is available, indicate that more than 240,000 construction workers were disabled in some way during the year, and 33½ million man-days were lost due to such disabling injuries. While these figures do not represent a significant increase over 1966, they certainly indicate the need for a review of existing efforts to promote health and safety in the construction industry.

We find it promising that a number of States, in recent years, have adopted new construction safety measures, and reinforced existing programs. But State law varies widely as to scope, sanction, the adequacy of staff and the intensity and effectiveness of administration.

Efforts by private organizations such as the Associated General Contractors, the National Safety Council, the AFL-CIO Subcommittee on Safety and Health and construction trade unions have been admirable and have generally contributed to a reduced accident toll. They are, however, limited in scope and effectiveness of control to the members of these organizations. Broader and more intensive voluntary programs, nevertheless, could be of great value.

Under a number of federally assisted construction programs administered by this Department, guide form contracts which we suggest for use by local public bodies in letting construction contracts contain safety clauses. These clauses emphasize compliance with local codes, laws, rules and regulations and also incorporate by reference the Associated General Contractors' Manual of Accident Prevention in Construction as the standard for certain safety precautions. They obligate the recipient of assistance to assure that safety requirements are applied to construction contracted under the program.

Pre-construction conferences are also used in federally assisted construction programs administered by this Department to stress safety requirements and to engender compliance with local laws and regulations and acceptance of the standards of the Associated General Contractors' Manual of Accident Prevention. To the extent practicable, field inspections are made to monitor compliance with safety standards.

The bill now before the Subcommittee has been described as simply extending to Federal construction contracts the safety requirements now applicable to direct Federal supply contracts under the Walsh-Healey Act and to direct Federal services contracts under the McNamara-O'Hara Act. Of course, in reaching federally assisted contracts, the bill goes well beyond the scope of the kind of direct Federal contracts now reached by Walsh-Healey-McNamara-O'Hara. At the same time, the bill does not reach safety problems in non-federally assisted construction which comprises the great bulk of construction in the United States. Accidents, of course, do not limit themselves to Federal and federally assisted construction.

As presently drafted, H.R. 3290 does not provide for recognition of compliance with State law in substitution of compliance with Federal law as is now provided for the Walsh-Healey Act. Neither does it provide for the development of State and local safety programs as did, for example, some of the occupational safety bills introduced in the Congress last year. We think any proposal in the field should address itself to these questions.

Sanctions authorized to be imposed for violations of health and safety standards promulgated under the bill seem to us to be too rigid—limited as they are to cancellation, in the case of direct Federal contracts, and to withholding assistance in the case of federally assisted contracts. We question whether with-

holding of assistance on federally assisted contracts offers a satisfactory approach to the problem; particularly where the violator is a contractor or subcontractor who is not himself a recipient of such assistance.

Violators could also be placed on a black list similar to those now used under other Federal labor standards laws. The black list for direct Federal contracts has proven an unwieldy tool in the past.

There are a number of technical questions about the bill that we believe should be resolved. For example, it is not clear how standards for determining what constitutes unsanitary hazards or dangerous conditions will be adopted. Presumably, the Secretary of Labor would have responsibility for developing such standards. There are also questions as to whether the bill, by extending its coverage to all programs subject to Reorganization Plan No. 14, would, in fact, reach all federally assisted construction. There are a number of laws such as the College Housing Act of 1950 and the senior citizens housing provision of the Housing Act of 1959 which do not appear subject to Reorganization Plan No. 14.

We would also note in closing that this Department has very little involvement with direct Federal construction contracts. In assessing the impact of that aspect of the bill, we would defer to the views of the Department of Defense, the General Services Administration and to other agencies more directly affected.

STATEMENT BY GENERAL PRESIDENT S. FRANK RAFTERY, BROTHERHOOD OF PAINTERS, DECORATORS, AND PAPERHANGERS OF AMERICA, AFL-CIO

Mr. Chairman and members of the Select Subcommittee of the House Education and Labor Committee: The opportunity for me to appear and support the Construction Safety Bill is, I assure you, deeply appreciated. Not only do I personally support this legislation, but as General President of our Brotherhood, I hereby convey the endorsement and support of the 205,000 members of our Brotherhood who are affiliated with 1,150 District Councils and Local Unions throughout the Nation.

House Resolution 3290 would, if finally enacted, serve a great and humanitarian benefit to the Nation's construction workers—at least those employed on all government and federally-assisted construction projects.

The construction industry is the Nation's largest single enterprise, and the fact is that during 1968 more than 2,750 construction workers were killed and 240,000 disabled. Only four (4) states of the Nation have construction safety laws, and some of these states have failed to appropriate for proper inspection. Only a total of 135 full time safety inspectors are engaged in this country. It is important to mention here that no local or state inspector, regardless of the statutes in the area, can have any jurisdiction on government and federally-assisted construction projects. These federal reservations are actually "no-mans-land" when it comes to safety regulations and the protection of human health, life, limb and body.

At present, the U.S. Corps of Engineers, the Department of Interior, and other major federal procurement agencies engaged in construction work have virtually no safety rules and regulations for the safety of the construction workers. Actually, today in this great country of ours construction management groups are using the overall question of safety on the fact that there are no safety requirements as a competitive element throughout the construction industry, and this is especially true on federal government work such as would be affected by the passage of H.R. 3290. Experience has proven that "safety is good business"—at least it has been proven by such employers and industries of the Nation who comply with safety requirements. The legislation now before the Select Subcommittee on Labor is, in my judgment, fully justified. The passage of same would fill a wide void in the Government's operations, because throughout the federal government procurement policies with the exception of the construction industry, the workers are protected under the terms of the Walsh-Healey Act, and this has been the case since the passage of this protective legislation in 1936.

To illustrate the point that federal public works is sorely in need of statutory safety standards, let me cite that when the Department of Interior building was constructed, 13 construction workers were killed because of bad management work arrangements. As a matter of fact, the Washington, D.C. Building and Construction Trades Council actually called a strike on the new Interior Department project and declined to return to work until safety measures were established.

STATEMENT OF M. A. HUTCHESON, GENERAL PRESIDENT, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA

In August 1967, the Building and Construction Trades Department and many of its constituent international unions testified before this Committee in favor of H.R. 2567, a Construction Safety bill with objectives similar to those of H.R. 3290. In that testimony we believe that we have amply documented the need for federal construction safety standards and federal enforcement of those standards. We also believe that the urgency of that need has been fully established by the long-standing and continuing toll of deaths and injuries in the construction industry. Rather than blow up the record unnecessarily with a detailed repetition of the arguments already on the record, we respectfully recommend a review of the previous testimony of the building trades unions, including our own statement dated August 29, 1967.

Perhaps this statement can be most useful to the Committee if it attempts to put in one place a brief summary of the reasons for the urgent need for this legislation:

1. Outside of mining, construction is the most dangerous of industries with extremely high injury frequency rates and a very high proportion of deaths and serious injuries.
2. In spite of a relatively few good safety performances, this fragmented industry as a whole is doing little to cope with its serious accident problems. This helps to account for the fact that deaths and injuries are rising rather than falling.
3. The basic safety performance of the industry is so poor that the imposition and enforcement of decent physical standards alone would drastically reduce accidents and injuries. Certainly education and training are just as important; but the end result of successful safety training for many workers could well be that they would refuse to work at all on many of the thousands of atrociously unsafe jobs in this country. Regardless of the level of worker safety attitudes and practice, a safe work environment is still the prime essential for safety.
4. The Federal government has a responsibility to require safe work places on Federal projects. For non-construction workers this responsibility has already been recognized in such legislation as the Walsh-Healey Act.
5. Enforceable federal safety requirements can at least begin to carry out this responsibility and save the lives and limbs of many construction workers. Experience under such Federal legislation as provided for longshoremen proves that this kind of Federal safety program can pay off in reduced accidents and injuries.
6. Since federal construction is a significant part of the whole, the direct and indirect effects of Federal action should have a general effect to reduce accidents in the industry.

Judged by the industry testimony available to date, their answer consists mainly in a general denial of what is obviously true—that they have utterly failed to put their own safety house in order. Nor do their general complaints that Federal safety standards would conflict with the perfect private and state programs that more objective viewers find non-existent carry much conviction. Some industry representatives point with pride to programs that exist mostly on paper. A few contractors of course can honestly talk about decent safety programs. We can sympathize with such contractors and their natural desire to avoid regulation. But such few good programs as there are only further point up the miserable record of the industry in general.

It seems to us that the record is clear and conclusive. We need federal construction safety legislation; and we need it now. H.R. 3290 is a constructive step in providing construction workers with safer working conditions. We urge its immediate passage and its effective implementation.

