NOMINATION

HEARING

BEFORE THE

COMMITTEE ON HUMAN RESOURCES
UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

BERTRAM ROBERT COTTINE, OF THE DISTRICT OF COLUMBIA, TO BE A MEMBER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SEPTEMBER 27, 1977

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NOMINATION

TUESDAY, SEPTEMBER 27, 1977

U.S. SENATE,
COMMITTEE ON HUMAN RESOURCES,
Washington, D.C.

The committee met, pursuant to call, in room 4232 of the Dirksen Senate Office Building, at 10:03 a.m., Senator Harrison A. Williams, Jr. (chairman) presiding.

Present: Senators Williams and Hatch.

The CHAIRMAN. The committee will come to order. We consider today the nomination of Bertram Robert Cottine to be a member of the Occupational Safety and Health Review Commission. The Commission was established by section 12 of the Occupational Safety and Health Act of 1970, and has the responsibility for administrative adjudication of enforcement actions under the act.

Mr. Cottine has devoted most of his professional life to problems of industrial safety and health. He currently serves as assistant to Assistant Secretary of Labor Bingham in the policy area.

Prior to this he has served with the Health Research Group and as an adjunct professor of law at Georgetown University. Mr. Cottine brings a wealth of valuable experience to this position. I enjoyed my discussions with him and from those discussions I know he is committed to simplifying the procedures of the Commission and making it truly responsive to the needs of America's workers and industry.

We welcome you before our committee and are pleased to receive your statement.

STATEMENT OF BERTRAM ROBERT COTTINE OF THE DISTRICT OF COLUMBIA TO BE A MEMBER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Mr. COTTINE. Thank you, Mr. Chairman, especially for that gracious introduction.

I am honored by the President's nomination to serve on the Occupational Safety and Health Review Commission and I welcome this opportunity to appear in support of my confirmation this morning.

The Commission plays a critical role in the just administration of the Occupational Safety and Health Act for it must assure to every employer and employee a fair and prompt hearing in the Federal effort to preserve worker health and safety. Like any court, the Commission must resolve disputed interpretations of the act and conflicting factual claims. However, I believe it is essential that the Commission follow commonsense procedures to arrive at commonsense decisions regarding health and safety.

When Congress created the Occupational Safety and Health Review Commission in 1970 it expected that a nonlawyer could effectively participate in the administrative proceedings. By 1975 it became necessary for me to author a 175-page handbook to help nonlawyers prepare for these hearings. The impact of complex procedures is obvious. Small businessmen and employees are significantly disadvantaged because they are unable to retain a battery of lawyers to overcome this complex procedural maze.

It is my strong belief that every party is entitled to their day in court with a full and fair hearing on the issues. If confirmed, I will support simplified procedures to assist parties in proving their cases in a prompt and uncomplicated manner. However, this simplification of Commission procedures must not sacrifice or in any way diminish the employer's or the employee's fundamental right to a full and fair hearing.

When the hearing date arrives, each party has a special and important case to present. No party should be denied a hearing simply because his evidence does not satisfy the detailed requirements of the hearsay rule or the specific conditions for authentication of a document. When the Commission or its judges exclude evidence on intricate evidentiary rules it jeopardizes the acceptance of the act as a whole by both employers and employees. To paraphrase an old proverb: "you haven't convinced a man because you've silenced him."

In my mind, every case must receive careful and expeditious consideration. If confirmed, I will actively support the Commission's continued efforts to reduce delays. Simplifying complex procedures should assist in this effort. However, I believe the solution to most delay is hard work. I pledge the prompt consideration of every case by me and, in turn, I will insist on the productivity of my staff.

With respect to the decisions of the Commission, the opinions determine the statutory framework, as you know, for the Federal enforcement actions throughout the Nation. Therefore, these decisions must not only resolve the controversy between the immediate parties, they must provide sound guidance to employers and employees in their efforts to control workplace hazards.

If confirmed as Commissioner, I will closely analyze all the evidence and carefully consider all the legal arguments in reaching my decisions. As far as I am concerned, the Secretary must prove his case. The Secretary is entitled to no special consideration in these cases, and I intend to extend none. Plainly put, the Commission is not a rubber stamp for the Secretary. If the Secretary fails to prove his case, then the citation must be vacated and the case dismissed. Further, I intend to deal with all the facts in a case presented. To ignore a central factual issue is to make bad law.

I am also mindful that the Commission's decisions are subject to judicial review under the act. This is consistent with our constitutional system for reviewing administrative action. I do not believe that the Commission should count on a lenient and uncritical review of its decisions by the courts of appeals. The Federal judiciary has a right to expect a searching examination of the facts and a well-reasoned interpretation of the law from the Commission. If confirmed, I intend to author opinions which will supply the reviewing courts with a solid foundation for upholding the Commission's decisions.

The Commission must take seriously the health and safety hazards which threaten the lives and health of working men and women and which also burden ths Nation in terms of lost production, wage loss, medical expenses, and disability compensation payments, as well as the inestimable cost of suffering to workers and their families.

With the Labor Department's new concentration on serious health and safety hazards, the Commission must increase its vigilance because both the employer and the affected employees have far more at stake when a serious violation is alleged. In addition, the Commission will have to increase its technical expertise. If confirmed, I intend to hire at least one staff attorney who has a background in safety engineering and another staff attorney with a background in industrial hygiene. Simple fairness to all parties requires this expertise on my staff.

In conclusion, Mr. Chairman, the lives, health, and safety of American workers as well as the success and operation of American business depend on the Commission's decisions.

I pledge to this committee and to the Senate that I will fully and fairly consider each case presented for the Commission's review and that my decisions will be based on a forthright and complete analysis of the facts with careful deliberation on each party's arguments and an informed and honest judgment on the law. Moreover, I will make every effort to assure that the Commission's decisions are sufficient to meet the careful and informed review of the U.S. courts of appeals. My best efforts will be invested in this challenge.

Finally, I take seriously my constitutional oath of office as well as my oath as an officer of the court. If confirmed, I will faithfully execute my responsibilities as Commissioner affording to every person who comes before the Commission a full opportunity to be heard and a just and equitable decision.

Thank you.

[Mr. Cottine's biographical sketch follows:]

BERTRAM ROBERT COTTINE
NOMINEE TO BE A MEMBER
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

BERTRAM ROBERT COTTINE is an attorney who has significant experience in administrative and health law. He is a member of the District of Columbia Bar and admitted to practice in several Federal jurisdictions.

Bert Cottine is the author of a major handbook for non-lawyers on how to prepare and argue a case before the Review Commission. This handbook was based on his working familiarity with the Commission's case law and procedures.

Since April 1977 Mr. Cottine has served on the staff of the Assistant Secretary of Labor, Dr. Eula Bingham.

Bert Cottine served on the faculty of the Georgetown University Law Center prior to his April appointment. He developed a comprehensive clinical program on the medical-legal problems of the disabled and also worked with the Georgetown University Program for Child Development on health and disability related legal issues.

From 1972 to 1975, Mr. Cottine was the staff attorney for occupational health at the Health Research Group in Washington, D.C. His responsibilities included administrative proceedings and appellate litigation on health standards, Review Commission proceedings, and testimony on the implementation of the Occupational Safety and Health Act.

Bert Cottine was educated in the public schools of Hicksville, New York. He completed his bachelor's degree with honors at Carnegie-Mellon University and received his Juris Doctor from Boston University School of Law. While at law school he founded a legislative research bureau and was presented the faculty award for community service.

Professional associations include the American Bar Association and the American Public Health Association.

Bert Cottine is a native of New York State and currently resides in the District of Columbia.

CURRICULUM VITA

BERTRAM ROBERT COTTINE

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Washington, D.C. 20007 (202) 965-2719

Born: April 2, 1947, Kingston, New York

Marital Status: Single

Admissions

United States Court of Appeals: District of Columbia, Third and Seventh Circuits
United States District Court for the District of Columbia
District of Columbia Court of Appeals

Legal Education

Boston University School of Law
J.D. Conferred June 1972

Preparatory Education

Carnegie-Mellon University
Bachelor's Degree Conferred with Honors June 1969

Hicksville High School, Hicksville, New York
Regents Scholar

Honors

Who's Who in Health Care
Law School Faculty Award for Dedication to Community Service
Carnegie-Mellon University Degree Conferred with Honors
Regents Diploma with Scientific Honors

Employment

Special Assistant, Office of the Assistant Secretary of Labor
for Occupational Safety and Health
United States Department of Labor
April 1977 - Present

Adjunct Professor, Georgetown University Law Center
Project Coordinator & Attorney - Law and Developmentally Disabled
Deputy Director, D.C. Project: Community Legal Assistance & Street Law
October 1975 - March 1977

Legal Advisor, Developmental Disabilities State Planning Council for the District of Columbia
Seminar Instructor, Law and Developmental Disabilities
Supervising Attorney: Clinical Students & Research Assistants
Mock Trial: The Infant's Right to Survive
Attorney, Georgetown Adolescent Intervention Team, University Affiliated Program for Child Development, Georgetown University Medical Center
Legal Consultant, University Affiliated Program for Child Development
Associate Director on Legal Barriers, Regional Rehabilitation Research Institute, George Washington University

Staff Attorney & Staff Associate for Occupational Health
Health Research Group, Washington, D.C.
August 1972 - October 1975

Author, Winning at the Occupational Safety and Health Review Commission: A Handbook (1975)
Proceedings on Occupational Health Standard on Carcinogens
Occupational Safety and Health Review Commission Proceedings
Director, Task Force on Workers' Health
Imminent Danger & Discriminatory Discharge at Metro Subway Construction Site
Economic Impact Analysis of Permanent Standard on Vinyl Chloride
Comments on Proposed Rulemaking, Administrative Testimony, Legislative Activities, Speeches and Press Conferences

Faculty, Practicing Law Institute, Occupational Safety and Health Law 1975

Legislative Intern, Massachusetts House of Representatives
Summer 1971
Investigation & Legislation on Equal Educational Opportunity

Law Clerk, Supreme Court of New York-Nassau County
Summer 1970
Research & Briefings on New Criminal Procedure Law
Investigation & Preparation of Criminal Defense Cases

Recent Publications and Other Written Work

Cottine, The Path to Adulthood: Adolescence, Disability and the Law in M. L. Siantz, The Nurse and the Developmentally Disabled Adolescent (1977).

Cottine, Preventive Advocacy and the Right to Treatment, Services and Habilitation in Advocacy Systems for Persons with Developmental Disabilities: Context, Components & Resources (L. Baucom & G. Bensberg eds., 1977).

Review: J. Burns, The Sometime Governments (1971), 5 Bost. U. Commentaries 7 (1972)

Institutionalization & the Prohibitions of the Eighth Amendment (unpublished 1971)

Professional Associations

American Association for the Advancement of Science (Medical Sciences Section)
American Bar Association (Sections on Administrative Law & Procedure, Individual Rights & Responsibilities, Labor Law, and Science and Technology)
American Public Health Association (Occupational Health Section)
Society for Occupational and Environmental Health

MAJOR PROFESSIONAL RESPONSIBILITIES: OCCUPATIONAL SAFETY AND HEALTH

Proceedings on Occupational Health Standard on Carcinogens

Rulemaking Petition for Emergency Temporary Standard
Suit for Mandatory Injunction Directing the Issuance of Emergency Standard (D.D.C. 1973)
Brief on Petition for Review of Emergency Standard (3d Cir. 1973)
Proposed Regulations for Use Permit System
Advisory Committee Statement, Public Hearing Testimony, and Reply Statement on Permanent Standard
Petition for Formal Opportunity for Cross-Examination at the Public Hearing
Consultant to Public & Employee Advisory Committee Members
Comments on Supplement to Final Environmental Impact Statement on the Permanent Standard
Suit for Mandatory Injunction Directing the Issuance of Permanent Standard (D.D.C. 1973)
Briefs & Oral Argument on Industry Petitions for Review of Permanent Standard (3d Cir. 1974)
Brief & Oral Argument on Employee Petition for Review of Permanent Standard (3d Cir. 1974)
Petition for Writ of Certiorari, Oil, Chemical & Atomic Workers Int'l Union vs. Dunlop, No. 74-1443 (1975)
Standard-Setting Hearing on Judicial Remand of Occupational Health Standard on MOCA

Standard-Setting Proceedings

Attorney for North Carolina Public Interest Research Group, Petition for the Modification of the Cotton Dust Standard (1975)
Attorney for the Oil, Chemical & Atomic Workers' Representative, Standards Advisory Committee on Coke Oven Emissions (1975)

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Complaints and Inspections

Imminent Danger Complaint on Airborne Contaminants & Construction Safety Violations
Complaint on Discriminatory Discharge of Employee for Health and Safety Activities
Testimony Before the House District of Columbia Committee Investigating Metro Safety and Health Programs

APPELLATE LITIGATION

Carcinogen Litigation, supra.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. Occupational Safety and Health Review Commission, No. 76-1718 (7th Cir. 1976)

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION PROCEEDINGS

Author, Winning at the Occupational Safety and Health Review Commission: A Handbook (1975)

Secretary v. Koppers Company, Docket No. 3449
Secretary v. Sun Oil Company, Docket No. 76-3749

Other cases, including clinical supervision of law student representation, have involved pre-hearing conferences, discovery motions, memoranda on motions for summary judgment, hearing representation, post-hearing briefs, petitions for directed review, and briefs on directed review.

INVESTIGATIONS

Case Study Survey on State Workers Compensation Programs

COMMENTS ON PROPOSED RULEMAKING

Final Rules of Procedure for the Occupational Safety and Health Review Commission
Temporary Orders Preserving State Enforcement Authority Under the Occupational Safety and Health Act
Regulations Governing Changes to State Developmental Plans
Department Authority to Determine the Extent of Other Federal Agency Jurisdiction
Public Disclosure of the Monitoring of Certain Hazards
Occupational Safety and Health Program for Federal Employees
Regulations on Federal Program Change Supplements to State Developmental Plans
Regulations on Federal & State Variances from Standards
Regulations on the Exercise of Federal Enforcement Authority
Proposed Permanent Standard on Exposure to Vinyl Chloride
Voluntary Compliance & Abatement Agreements
Contracts for On-Site Consultation Programs by States

TESTIMONY

Before the Senate Appropriation Committee:
Occupational Safety & Health Administration and
National Institute for Occupational Safety and Health
Budgets for FY 1974
Before the House Committee on Education and Labor:
The Failure of Three Years of the Implementation and
Enforcement of the Occupational Safety and Health Act,
120 Cong. Rec. E3462 (daily ed. May 30, 1974)
Before the National Advisory Committee on Occupational Safety
and Health:
State Occupational Safety and Health Plans: Review and Funding
State Occupational Safety & Health Plans: Continued
Federal Enforcement and Monitoring

LEGISLATIVE ACTIVITIES

H.R. 8860, 93d Cong., 1st Sess. (1973): Agriculture & Consumer
Protection Act of 1973
H.R. 8877, 93d Cong., 1st Sess. (1973): Labor-HEW Appropriations
H.R. 15580, 93d Cong., 2nd Sess. (1974): Labor-HEW Appropriations
Draftsman, Discriminatory Discharge Provision, Safe Drinking
Water Act, Public Law 93-523, sec. 1450 (i)
H.R. 2460, 94th Cong., 1st Sess. (1975): Congressional Letter -
"Towards an Effective National Institute for Occupational
Safety and Health"

SPEECHES & LECTURES

"Occupational Health Standards," Federal Bar Association
Bureau of National Affairs Briefing Conference (1973)
"The Occupational Safety and Health Act: An Overview"
Sears, Roebuck & Company Conference on Workmen's
Compensation (1974)
"Workplace Hazards and Occupational Health," Union Label
& Service Trades Council of Pennsylvania, AFL-CIO (1975)
"Interface of Law, Medicine & Science: Occupational Hazards
& Public Health Policy," University of North Carolina
School of Public Health (1975)
"Barrier-Free and Access-Facilitated: The Legal Challenge."
Management Institute, National Therapeutic Recreation
Society (1976)
"The Legal Process and the Developmentally Disabled Youthful
Offender," Conference on the Handicapped Young Offender:
Identification Through Evaluation, Georgetown University
Affiliated Program for Child Development (1976)
"The Legal Rights of Handicapped Children and Their Parents:
Developmental Disabilities," Conference on the Parent/
Professional Partnership, Urban Planning Organization
(1976)
"Preventive Advocacy and the Right to Treatment, Services and
Habilitation," Developmental Disabilities Advocacy
Conference, U.S. Department of Health, Education and
Welfare (1976)

The CHAIRMAN. Thank you very much, Mr. Cottine. I am very grateful for that statement and very grateful, too, that you come to us as a nominee for this important position. I was refreshed by your statement—I read it last night. After a long day and long night of filibuster by rollcall here, I finally got to your statement at midnight—and I didn't think anything would refresh me after yesterday, but it did. Your nomination is to be greatly appreciated, particularly by those from this committee who were significant in developing the basic law that you will be working with.

The part of your statement that impressed me so much last night was the way you addressed yourself to your concern for the simplification of procedures before the Commission.

Could you give us for our record a little bit more flesh in that regard? How do you feel that the Commission's processes can be simplified while you still develop a full and complete record, which is of course necessary for your decision.

Mr. COTTINE. I think two things I mentioned are of particular importance—they relate to any party's opportunity to fully present evidence. I have a great deal of faith in the administrative law judges of the Commission to weigh evidence appropriately. Therefore, I don't think there should be any grounds to exclude evidence from those hearings. Moreover, I think that a party feels that they have been denied an opportunity to present their case when evidence or testimony has been excluded during a hearing.

In my mind, the opportunity for full expression is part of the simplification of those procedures. I don't think it should be necessary to conduct these proceedings in the same way a Federal district court proceeding is conducted, with complicated rules of procedure and evidence.

Second of all, I know the Commission has under consideration some detailed rules which would in many ways alleviate the paperwork burden on both employers and employees in terms of the exchange of documents. I want to carefully review that particular area, because I think it is of special importance.

Finally, an area that has been in controversy in the past has been the blanket direction of review of cases in which the case comes on briefs before the entire three-Commissioner panel. I think that we should very specifically direct the issues we want heard, so that the parties do not have to consume themselves in the many issues that a Commissioner might examine.

Those are three areas, of immediate importance.

The CHAIRMAN. Thank you. Now, most recently you have served as special assistant to Assistant Secretary Bingham for policy. During that period I know that considerable changes in the administration of the act have been put into effect.

Could you describe some of your responsibilities as special assistant for policy?

Mr. COTTINE. Well, in many ways I participated in the transition of the Department to its current activities. Specifically, I worked in the development of health standards, and also in the initiatives of OSHA and the other agencies, such as EPA, Food and Drug Administration and the Consumer Products Safety Commission, to integrate their overall efforts. Those have been my primary responsibilities during the brief 5 months I have been with the Labor Department.

The CHAIRMAN. Do you think that as a Commissioner you will be called upon to assess the proprietary of some of your work as special assistant?

Mr. COTTINE. Mr. Chairman, I have on very few occasions been asked to advise the Assistant Secretary regarding any enforcement cases. I will file with the committee, as well as with the Executive Secretary of the Commission, the designation of those few cases that I have participated in, I think both the canons of judicial ethics as well as the United States Code would require my disqualification.

But for the most part there will be no decision that I participated in that will be actively before the Commission for decision.

The CHAIRMAN. Do you feel as though you are sensitive to any situation that would have a conflict or would have the appearance of a conflict?

Mr. COTTINE. Yes; I am.

The CHAIRMAN. And your action would be disqualifying yourself in those areas?

Mr. COTTINE. Where I have actively participated in a case in any way, yes; I would.

The CHAIRMAN. Mr. Cottine, the Commission in the past has been accused of not issuing clearly definitive decisions which can serve as guidance to the Secretary in enforcing the act and to industry in conducting its affairs. I concur in your suggestion that it is important for the Commission's decisions to be clear, concise, and definitive.

I wonder, what procedures you think the Commission should adopt in an effort to reach decisions which provide this much-needed guidance and which are definitive?

Mr. COTTINE. Well, I think—the first is one I mentioned a few minutes ago, and that is very specifically identifying for the parties in any case that comes before the Commission the issues which they should address. I think that will help focus the Commission's consideration of the legal issues brought to them.

Second of all, I think it requires good, honest editorial work by every Commissioner and a solid look at the law. While I don't think we should ignore any facts, I think we should get down to the basics and decide them carefully. I think that will be accomplished especially if we make our decisions supportable in front of the court of appeals. And I intend to do so.

The CHAIRMAN. Senator Hatch, we have a nominee before us for the Occupational Safety and Health Review Commission, Mr. Bertram Cottine, who has given us a kind of statement that I suggest we can all applaud.

And I am going to give Senator Hatch an opportunity to greet you and applaud your nomination, Bert.

Mr. Cottine has been nominated to the Commission, and I have applauded the nomination, applauded his statement. He talks about bringing commonsense to this area of law.

Senator HATCH. Well, that would be refreshing is all I can say.

The CHAIRMAN. Well, I used the word "refreshing" myself; we are together on this, Orrin.

Senator HATCH. We go right down the line together on almost everything, except the important issues.

[Laughter.]

The CHAIRMAN. This is an important issue, and I am glad we are together on this.

Senator HATCH. I appreciate that. Do you want me to——

The CHAIRMAN. I wanted to give you an opportunity to greet and to——

Senator HATCH. Oh, you bet. Well, I am so happy to see you this morning and I appreciated your coming in and visiting with me yesterday. I do have some questions; as soon as the chairman recognizes me, I will ask them.

The CHAIRMAN. I am ready for your questions. I just want to find out what rules we are working on here this morning in terms of sitting, does anybody know? We have other nominations. We probably have an 11 o'clock deadline, Orrin, and we have four other nominations.

So I am happy to recognize you.

Senator HATCH. How do you view the role of the Review Commission—and let me break that down into two parts. Do you view it as an impartial adjudicatory body, or do you feel that the Commission should equally represent labor, management, and the public?

Mr. COTTINE. It is in fact to be an independent agency. I concur in that entirely. I think that to try to divide the Commission's slots up was certainly not one that was intended by the act; I think all Commissioners take the same oath of office, which is to fairly and objectively analyze the facts and to reach a just and honest judgment as to the application of the law.

Senator HATCH. OK. Do you feel that the Review Commission has effectively functioned in the past?

Mr. COTTINE. That's a tough question to answer. I think the Commission has failed on many occasions to supply the clarity and guidance that's necessary for employers. I cite one case, which, as I recall, was split 1–1–1, and which affirmed an administrative law judge's decision. I think that as an adjudicatory body it is the responsibility of the Commissioners to try to reach a shared understanding of the facts, and a shared interpretation of the law itself. Certainly I will strive to do that.

Senator HATCH. How do you view your appointment to this Commission, as strongly supported by management, by labor, by the public, by employees, by whom? And whether or not strongly supported, which role do you think you need to represent the most?

Mr. COTTINE. I don't believe I represent any of those groups as Commissioner. I believe it is my responsibility to look at all of the arguments and positions that are presented to the Commission and to decide amongst them, and to decide amongst them on the merits of each case.

Senator HATCH. I would submit that maybe the role should be one of representing the public, for the benefit of the public and of the country.

Mr. COTTINE. I would agree with that, and I think each Commissioner has that responsibility.

Senator HATCH. How do you view the position of a public member, assuming that you agree with that—a public member's responsibility, a public member of the Commissioner?

Mr. COTTINE. As I pointed out, I really don't think that varies from any of the other two Commissioners' responsibilities. I think that

each of us has to come to a sense of what the parties are saying, why they think a violation should or should not be sustained, and what the appropriate action should be by the Commission itself, based on those facts.

Senator HATCH. Well, a number of people, since we met yesterday, have informed me that they feel that from your public statements, your actions in the past, from background data that they have and selected quotations that you have made, that you have been an active and an emotional advocate of unreasonably severe enforcement—higher penalties, shortened abatement periods, disregard for economic factors, and disregard for employers' good faith efforts at compliance and abatement. Now, this is the way a number of people view you. Whether that is true or not, I personally don't know. But a number of people have complained to me that they are very upset with this appointment.

Now, in this regard, given the fact that you have been closely associated in your career with representatives of organized labor, and given Commissioner Cleary's generally consistent support for positions promoted by the Solicitor's office, will your presence on the Commission create an imbalance insofar as the Commission's evaluation of employer positions is concerned?

Mr. COTTINE. I don't believe it will create an imbalance at all, Senator. I believe that the situation that I am charged with is to perform an adjudicatory role. I have been an advocate in the past, and, as any attorney, I tried to zealously represent my clients within the bounds of the law; I have provided advice to clients and made statements—and this can be reviewed—but that is a function that any attorney performs representing his clients.

Senator HATCH. Well, you have to be an advocate, but some of the critics that have chatted with me indicate that your sympathies are clearly and unequivocally on the side of labor. Now, under certain circumstances I understand that, because mine are, too. But not in all cases. And they submit to me that your attitude is characterized—and you will have to tell me whether you agree with this or not, and I am sure that you wouldn't, but I would like to have your response to it—that your attitude is characterized by severe criticism of the Department of Labor and OSHA on the grounds of insufficient inspection, too-low penalties, as well as OSHA's alleged eagerness to avoid contest by withdrawal of citations or compromise with some of these abatement periods. They say you have charged the Labor Department as being concerned with the statutorily irrelevant impacts of the standards, and they indicate to me that your philosophy has been an employer will never recognize the force of law behind standards so long as there are infrequent inspections, relatively mild penalties, and long abatement periods.

And so these are some of the concerns that have been raised with me.

Do you feel that they are accurate and fair concerns about your appointment?

Mr. COTTINE. Let me try to deal with those generally. First of all, I think that the comments that you were reciting are from congressional testimony that I gave 3 years ago.

Senator HATCH. That's correct. Among other things.

Mr. COTTINE. And I think those statements have to be viewed in the context in which they were made. First of all, with respect to penalties, at that time the Labor Department attempted to justify its activity really on paper; that is, how high or low were the penalties, how many inspections did we conduct—it was a strict data analysis. I do not support a strict data analysis of the Department's position. However, my statement was in response to their position. I think penalties have a role to play, but I think that their role is certainly not simply to say it's a high penalty or a low penalty, but whether the penalty accurately assesses the employer's good faith, size of the business, and the past record of the employer with respect to health and safety violations.

Senator HATCH. Let me say this. All over the West, which is basically my constituency, and especially in particular Utah, people are incensed about the overregulatory, dictatorial, technical approach to OSHA standards and problems that have been taken in the past by representatives of the Government. And their concern, if you are appointed is that the situation is going to get worse rather than better.

One of the things that Mrs. Bingham indicated to me is that she is going to go a lot more, the thrust of her administration over OSHA will be a lot more toward trying to solve the toxicity problems and other problems rather than harassment of individual business people about which complaints were made all over the West, and I am sure all over the country.

Now, there is a real fear that if you are appointed to this Commission and we confirm your appointment, that you are just going to continue that past harassment set of techniques. And I would like to have your viewpoint with regard to whether that is true or not true, because if it is true I—well, maybe I shouldn't tell you this in advance, but I think you could conclude that I would not support your appointment, and that if it is true after you are appointed I would certainly do everything in my power to see that you are stripped of that appointment.

Mr. COTTINE. First of all, I think it's fair to say that I believe that Dr. Bingham's efforts to remove those standards which are not directly related to health and safety from the Federal Register is an appropriate and important move. I say important for a number of reasons, the first of which is that those regulations that are not directly related to health and safety jeopardize the acceptance for precisely the reasons that you state. Second of all, I think that the concentration of the Labor Department in terms of toxicity and other health hazards associated with chemicals is a very important one, and one which I have spent a good deal of my time over the course of the past 5 years.

I think that in that regard the Commission has to prepare itself to deal with those issues and to deal with them effectively.

Finally, I think it is important to point out that the Commission has tried to deal with what it considers unnecessary regulations through the de minimis provision of the act which allowed it to essentially simply issue a notice as opposed to a citation, I think that that is appropriate use of the Commission's authority; it's one I hope will have to be exercised less and less in the future with the revocation and modification of certain Labor Department standards. But finally

I don't think we at the Commission can simply count on the Assistant Secretary to do all that work. I think we must continue to utilize that provision of the act when it is appropriate and when there is no direct relation to health and safety in a regulation that has been cited.

Senator HATCH. Some people think that you want to do it whenever it isn't appropriate, that you want to overregulate, and that you are a believer that the Federal Government is the way to solve the problems rather than expecting businessmen to care for the safety of their employees themselves.

Mr. COTTINE. Well, I think there is a shared responsibility there under the act. Clearly the act recognized that joint efforts in health and safety were an important component. I think we have to realize that they are critical in ultimately eliminating hazards at a particular work site. And I am not unmindful of that.

And I am also aware that the act has a definite purpose in terms of the enforcement capacity of the Federal Government and that when it is exercised, the Commission's job is to see whether the Government has in fact properly cited the employer, whether the penalty really does relate to the size and the good faith and the past violations that that employer has been engaged in. And I think those are important, and I intend to give them appropriate consideration.

Senator HATCH. Given the argument that Chairman Cleary already consistently has backed labor's arguments with regard to enforcement of OSHA regulations, and that you only need the vote of two Commissioners to control, do you feel that there will be an imbalance created on the Commission by your appointment?

Mr. COTTINE. Well, first of all, I have, of course, read Chairman Cleary's opinions in the past. I would not want to predict on any case that came up how I might vote, but you have my pledge that I will independently assess each one of those cases. I do not intend to frivolously exercise my vote simply to affirm Commissioner Cleary's position in a particular case.

Senator HATCH. Given your present understanding of OSHA law that is developed through Review Commission and administrative law judge decisions, and your understanding of the way OSHRC functions, what, if any, substantive and procedural changes do you feel should be made?

Mr. COTTINE. Well, I think it's very important to simplify the procedures at the Commission, but I don't think the procedures should be simplified at the sacrifice of any rights that an employer or employee has there. I think a lot of that simplification can be simply giving each employer and employee an opportunity to state their case, and to state it as they know it best.

And, to follow up on your earlier question, I think that is particularly important, because it is the employers and the employees who ultimately have the day-to-day contact with the work place.

Beyond that, the Commission has in the past simply blanketly directed the review of cases without assisting the parties in any way as to the issues to be addressed. I don't think this is an appropriate course of conduct. In directing review, I think that each Commissioner should responsibly articulate the issues that should be addressed and not have the parties all over the field, as you know can occur in any appellate review of a case.

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Senator HATCH. Do you believe then that the employer should be first notified, given a period to correct the difficulty before any assessments or fines or penalties are made against him?

Mr. COTTINE. Well, no, that's really not an issue that confronts the Review Commission itself.

Senator HATCH. No, but let's talk about it as an issue that confronts the attitude of the Review Commission.

Mr. COTTINE. Well, I think the act is clear that in serious violations that penalties are to be assessed and a reasonable abatement date set for the correction of the hazard. I believe that reasonable abatement date should consider the nature of the controls that have to be implemented——

Senator HATCH. But you still would promote the approach, if you had your way and were able to do so, of assessing fines and penalties in, quote, serious violations of the act?

Mr. COTTINE. The act is clear; they are mandatory. But it is also clear that in assessing any penalty, the size of the particular business, the good faith of the employer, and the past record at that work site are to be considered.

Senator HATCH. Do you think the act should be changed with regard to that approach? A lot of people feel that people in our society should not be assessed any fines or penalties until there is some sort of a hearing and due process, and that after they have been given a reasonable time to correct the difficulty, then they should be penalized if they do not comply. But enforced compliance without knowledge, based upon OSHA regulations that are not understood, have not been explained, about which you complained here today—don't you find something wrong with that?

Mr. COTTINE. I think that we certainly are in a situation where each employer has an opportunity to have the case proven by the Secretary of Labor in front of the Review Commission, and I think that's an important function.

Senator HATCH. But do they really have to go that far? What I am saying is, the minute the OSHA man comes in on his premises—well, let's start with the beginning. Let's say that the inspector or the OSHA representative comes on the premises, should he have the right to just walk on the premises without some sort of warrant or some sort of permission by the court to enable him to do so, and then issue a first-instance fine or penalty?

Mr. COTTINE. Well, as you know, the issue regarding the warrant is currently in front of the Supreme Court.

Senator HATCH. I know.

Mr. COTTINE. I would hazard no guess as to how the Court will ultimately dispose of this.

Senator HATCH. Well, let's not make a guess, let's talk about what you believe. Do you believe somebody should be able to go on an employer's premises without some sort of judicial writ or release in order to do so and then issue a first-cause fine or penalty?

Mr. COTTINE. If the Court sustains that as constitutional, then I think the act provision should be——

Senator HATCH. If you had your choice of the arguments, which would you argue before the Supreme Court of the United States?

Mr. COTTINE. Well, quite honestly, I would adopt the position that the Labor Department has argued that under the public welfare

clause and the interstate commerce clause, the Government has the authority to enter, to enforce public right. I don't believe I will ever, however, have to reach that decision. The Court, I hope, will dispose of those issues one way or the other, and the Labor Department will either obtain a warrant from the U.S. magistrate or proceed as it has in the past.

Senator HATCH. OK. Now, do you accept the current situation that the burden of proving the violation rests with the Secretary of Labor?

Mr. COTTINE. Absolutely.

Senator HATCH. You do. Now, then, would you oppose actively any change or effort which would place responsibility and burden of proof on the shoulders of the employer?

Mr. COTTINE. I have to say to you quite honestly that in any particular adjudicatory provision there are some shifts in the burden of proof. Sometimes they arise because a certain amount of evidence has been introduced and sometimes because they are affirmative defenses.

But I don't believe that those shiftings in the burden of proof should in any way diminish the Secretary's full responsibility to prove that the alleged violation actually occurred, that the abatement date is reasonable in terms of the particular facts at that worksite, and that the penalty as proposed is appropriate. Those are the affirmative and complete burden of the Secretary of Labor. And I would not support the reduction in those in any way.

Senator HATCH. What was your role in the joint petition of Health Research Group in the Oil, Chemical & Atomic Workers Union for issuance of carcinogen standards in January of 1974?

Mr. COTTINE. In January of 1974?

Senator HATCH. I believe it was January of 1974; if I am wrong on the date——

Mr. COTTINE. Oh, I'm sorry, OK. It was December 1972. I served as a staff associate and staff attorney with the Health Research Group in the joint petition for the regulation of those toxic substances. I subsequently appeared as a representative in the administrative hearings and ultimately in the appellate litigation that was brought in front of third circuit, first on the emergency temporary standard and, second, on the permanent standard.

Senator HATCH. Were you lead counsel in that matter?

Mr. COTTINE. I was not lead counsel; I was second counsel.

Senator HATCH. I see. What was your role in the joint petition of North Carolina Public Interest Research Group, which, as I understand it, is a Ralph Nader-associated organization—and I may be wrong on that—and the Textile Workers of America, AFL–CIO, to the Department of Labor for revision of the occupational health standard on cotton dust?

Mr. COTTINE. They sought legal assistance for the purpose of preparing a petition to the Department for appropriate modification of the cotton dust standard, and I provided that legal assistance.

Senator HATCH. In your position at the Department of Labor, as Special Assistant for Policy to the Assistant Secretary for Occupational Safety and Health, were you ever directly or indirectly involved in the selection of specific companies to be inspected by OSHA?

Mr. COTTINE. No, I was not.

Senator HATCH. Not at all, directly or indirectly?

Mr. COTTINE. No.

Senator HATCH. Were you not the primary author, or at least one of the authors, of a book entitled "Winning at the Occupational Safety and Health Review Commission"?

Mr. COTTINE. Yes, I was.

Senator HATCH. Was much of the content of the handbook supplied by Oil, Chemical & Atomic Workers International Union, AFL–CIO?

Mr. COTTINE. No, it was not. The contents of the book were authored entirely by me and my two law student assistants. We chose to insert material in there that was from actual cases. I believe it is very important, especially when a nonlawyer is proceeding, to see the documents they have to offer so they have a sense of what might be contained in them.

Senator HATCH. Did you work closely with representatives of that union in compiling the book, or in any way?

Mr. COTTINE. I have represented them as an attorney in the past, and, of course, they have called on my counsel on occasion regarding the——

Senator HATCH. Did you rely on them for some of the input for the book? Did they provide you with some of the input for the book?

Mr. COTTINE. Many of those cases I was their attorney or representative myself, so it was from my files.

Senator HATCH. So you utilized basically your files.

Mr. COTTINE. Yes, in terms of legal services, that's right.

Senator HATCH. Was industry consulted in any way in the writing of your handbook?

Mr. COTTINE. No, it was not directly consulted.

Senator HATCH. OK. Was this handbook written because the Health Research Group felt that the Commission was not doing an effective job?

Mr. COTTINE. It was written essentially so that employees, who are basically nonlawyers, could effectively participate in its proceedings.

Senator HATCH. OK. With what unions have you worked to challenge standards issued by OSHA? For instance, in the introductory section of your handbook, you state "The Health Research Group has joined with numerous unions to actively challenge the inadequate and incomplete standards issued by OSHA."

Mr. COTTINE. I have represented the Oil, Chemical, and Atomic Workers International Union, affiliated with the AFL–CIO; I have also been assisting counsel in a case involving the review of the asbestos regulation which was sought by the Industrial Union Department of the AFL–CIO; and have participated in other cases for the purposes of administrative hearing.

Senator HATCH. OK. What is your definition of "conflict of interest"?

Mr. COTTINE. In my mind, conflict of interest first is financial, that is, if I have any holdings in a company or any financial interest in a case that is currently pending before me for decision. I have no such financial interest.

Senator HATCH. Either past, prospective, or present, I suppose.

Mr. COTTINE. Well, prospective is pretty hard to guess, but I certainly would not purchase any as a commissioner.

Conflict of interest, second, deals with intimate familiarity with the facts in a particular case that I am ultimately asked to judge. There have been very few of those. There is one case in front of the Commission at this point in time that is pending review by the full Commission; I intend to disqualify myself from that case; it would be entirely inappropriate for me, as counsel of record, to judge that case.

The CHAIRMAN. All right, how are we doing?

Senator HATCH. I am just about through, and this is the only witness that I am going to interrogate, so I think we can save time on the subsequent witnesses. But I do have just a few more questions—and I have some from Senator Javits as well.

The CHAIRMAN. I wonder if we could have some of these extended in writing for written response, because we are running very short on time? Certainly Senator Javits' questions could be presented in writing to——

Senator HATCH. I think we can comply with that. How much time do we have?

The CHAIRMAN. Give it a run at 3 minutes, Orrin.

Senator HATCH. Well, let me take 3 minutes and see what we can do, and if we can't get through we will submit the questions to you. And then maybe in a week you could answer them.

During questioning before the Select Committee on Labor on May 22, 1974, you made a statement regarding the contracting out of health research contracts by NIOSH to the effect that "Any contractor who had previously consulted with on behalf of industry had a problem of conflict of interest." Do you remember making that statement?

Mr. COTTINE. I recall a discussion regarding that issue, yes.

Senator HATCH. Do you still hold that same opinion?

Mr. COTTINE. I think one has to examine those conflicts of interest, yes.

Senator HATCH. OK. Do you not feel that your widely publicized close association with numerous labor organizations creates a philosophical conflict of interest for you?

Mr. COTTINE. I do not believe so. I think that I have exercised my zealous representation of these individuals within the bounds of professional responsibility in the past, and I believe that there is a very different role to be played by a commissioner. And that role is very simply the objective assessment of each case, based on the merits presented.

Senator HATCH. Some of the people who are concerned about your nomination here have raised the point that—well, they have raised serious doubts as to your objectivity, as at least a public representative on the Review Commission. And they have asked this question: Likewise, would not your association with the Department of Labor create a conflict for you?

Mr. COTTINE. Not at all. I believe the Secretary of Labor, as was pointed out, has to prove his case, and I intend to exact that measure of proof from the Secretary.

Senator HATCH. In August 1975, in a letter to Labor Secretary John T. Dunlop, signed by you, the Health Research Group requested additional information on Burt Conklin and Marshall Miller, the

then newly appointed Deputy Assistant Secretary of Labor for Occupational Safety and Health, requesting a detailed educational background and work experience and any "actual or apparent conflicts of interest."

Now, since you expressed great concern at that time for not only actual conflicts of interest but also for, quote, apparent, unquote, conflicts of interest, of certain individuals and programs within the Federal Government, could you explain what you meant by, quote, apparent, unquote, conflicts of interest?

Mr. COTTINE. I believe that is a direct quotation from the code of Federal regulations regarding employees of the Department of Labor who are in executive position, such as Mr. Conklin and Mr. Marshall were in.

Senator HATCH. You feel those standards should only apply to those who are in those positions?

Mr. COTTINE. No, not at all. I think the appropriate rules regarding conflicts of interest have been articulated in the Commission's regulations. In terms of 28 U.S.C. section 455 which relates to the Federal judiciary as well as the Canons of Judicial Ethics, I intend to abide by these although there is no Federal law that binds me to those two provisions.

Senator HATCH. I am going to have to ask you this question. It has been established that you have consistently worked with and in support of the position of organized labor throughout your career, and you have stated that "neither inexperience nor conflicts of interest should be permitted to infect the mandated protections of the act."

Now, do you feel that after what appears to be only 4 to 5 years of experience, heavily leaning toward organized labor's viewpoint, that you have developed the judgment, wisdom, and skill necessary to occupy an objective quasi-judicial position of such importance?

Mr. COTTINE. I believe I do, Senator, and I submit that during those 5 years I also spent time at the Georgetown University Law Center. That was after my 3 years of work at the Health Research Group. I have had a lot of opportunity in that time to reflect on the act, and also on the related health and safety problems in terms of disabled persons. So that I believe I bring to the Commission the appropriate experience, training, and qualifications.

Senator HATCH. OK. I have taken my 3 minutes. We will have some other questions for you. I will try to get them out in the next few days, and if you can answer them in, what, 7 days? As soon as you can. How much time would you need?

The CHAIRMAN. Are the questions prepared?

Senator HATCH. Not yet, we will have to prepare them.

The CHAIRMAN. Well, all of those that are prepared, if we could have them for Mr. Cottine today. We earnestly hope this can be discussed in executive committee tomorrow.

Senator HATCH. Well, I have many more questions from a lot of people who are quite upset with his appointment. Whether they are justified or not, we are going to have to have those questions answered. What difference would a week make?

The CHAIRMAN. We'll talk about this in our——

Senator HATCH. Would you? OK. Well, I will submit questions to you.

The CHAIRMAN. You are always ready to respond to any questions, aren't you, whatever is decided here?

Mr. COTTINE. Certainly.

Senator HATCH. All right. I appreciate being able to chat with you today and appreciate your responses to these questions.

Thank you, Mr. Chairman.

The CHAIRMAN. And thank you, Senator Hatch. The record will be made complete with some statements that have been filed with me for submission to the record. Robert Moran has a statement, the Mechanical Contractors Association has a statement—they have some question whether it is appropriate for the Secretary of Labor to recommend a nomination of an individual to become a Commissioner in view of the fact that the Secretary of Labor appears as a party litigant in each case which is reviewed by the Commission.

I think that overstates Secretary Marshall's position in this—but you have dealt with this. I wonder if yould say one thing about that, the fact that Secretary Marshall does support you in this position.

Mr. COTTINE. Well, certainly. I think that the Secretaries of Labor, since the creation of the Cabinet-level position in 1913, have been regularly consulted on national labor law, involving both the issues as well as the appointments. The Secretary has been involved in the selection of NLRB appointees and many others. And this is consistent with the traditional practice of even the Attorney General's involvement in the selection of the Associates and Chief Justices of the United States, which in fact are the last courts of review in this land.

And the Commission, of course, is not the last court of review; the U.S. Court of Appeals and ultimately the Supreme Court may review its decisions.

Finally there has been no suggestion by the Secretary or any of his assistants at any time that my selection was based on a decision that I would vote for him. I submit that no improper conduct of that type has occurred.

The CHAIRMAN. I appreciate that, and I have nothing further. It impresses me that your nomination and your background fits so precisely the qualities that we describe in the law for members of the Commission that there should be no question.

Mr. COTTINE. Thank you, Mr. Chairman.

The CHAIRMAN. There are other statements here of support, and rather than taking all the time to list them here, the statements in support of your nomination will be included with other necessary and relevant materials.

Thank you very much, Mr. Cottine.

[The prepared statement of Mr. Cottine and other statements and material referred to follow:]

STATEMENT OF

BERTRAM ROBERT COTTINE
OF THE DISTRICT OF COLUMBIA

TO BE A MEMBER
OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

BEFORE THE
COMMITTEE ON HUMAN RESOURCES
UNITED STATES SENATE

SEPTEMBER 27, 1977

Mr. Chairman and Members of the Committee--I am honored by the President's nomination to serve as a Member of the Occupational Safety and Health Review Commission and I welcome this opportunity to appear in support of my confirmation.

Introduction

The Commission plays a critical role in the just administration of the Occupational Safety and Health Act for it must assure to every employer and employee a fair and prompt hearing in the Federal effort to preserve worker health and safety. Like any court, the Commission must resolve disputed interpretations of the Act and conflicting factual claims. However, I believe it is essential that the Commission follow common sense procedures to arrive at common sense decisions regarding health and safety.

Common Sense Procedures

When Congress created the Occupational Safety and Health Review Commission in 1970 it expected that a non-lawyer could effectively participate in the administrative proceedings. By 1975 it became necessary for me to author a hundred-seventy-five page handbook to help non-lawyers prepare for these hearings. The impact of complex procedures is obvious. Small businessmen and employees are significantly disadvantaged because they are unable to retain a battery of lawyers to overcome this complex procedural maze.

It is my strong belief that every party is entitled to their day in court with a full and fair hearing on the issues. If confirmed, I will support simplified procedures to assist parties in proving their cases in a prompt and uncomplicated manner. However, this simplification of Commission procedures must not sacrifice or in any way diminish the employer's or the employee's fundamental right to a full and fair hearing.

When the hearing date arrives, each party has a special and important case to present. No party should be denied a hearing simply because his evidence does not satisfy the detailed requirements of the hearsay rule or the specific conditions for authentication of

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a document. When the Commission excludes evidence on intricate evidentiary rules it jeopardizes the acceptance of the Act by employers and employees. To paraphrase an old proverb, "you haven't convinced a man because you've silenced him."

Every case must receive careful and expeditious consideration. If confirmed, I will actively support the Commission's continued efforts to reduce delays. Simplifying complex procedures should assist in this effort. However, I believe the solution to most delays is hard work. I pledge the prompt consideration of every case by me and I will insist on the productivity of my staff.

Common Sense Decisions

The opinions of the Commission determine the statutory framework for Federal enforcement actions throughout the Nation. Therefore, these decisions must not only resolve the controversy between the immediate parties, they must provide sound guidance to employers and employees in their efforts to control workplace hazards.

If confirmed as Commissioner, I will closely analyze all the evidence and carefully consider all the legal arguments in reaching my decisions. As far as I am concerned the Secretary must prove his case.

The Secretary is entitled to no special consideration in these cases and I will extend none. Plainly put, the Commission is not a rubber stamp for the Secretary. If the Secretary fails to prove his case, then the citation must be vacated and the case dismissed. And, I intend to deal with all the facts in a case presented. To ignore a central factual issue is to make bad law.

I am also mindful that the Commission's decisions are subject to judicial review under the Act. This is consistent with our constitutional system for reviewing administrative action. I do not believe that the Commission should count on a lenient and uncritical review of its decisions by the Courts of Appeals. The Federal judiciary has a right to expect a searching examination of the facts and a well-reasoned interpretation of the law from the Commission. If confirmed, I intend to author opinions which will supply the reviewing courts with a solid foundation for upholding the Commission's decisions.

The Commission must take seriously the health and safety hazards which threaten the lives and health of working men and women and which also burden this Nation in terms of lost production, wage loss, medical expenses and disability compensation payments, as well as the inestimable cost of suffering to workers and their families.

With the Labor Department's new concentration on serious health and safety hazards, the Commission must increase its vigilance because both the employer and the affected employees have far more at stake when a serious violation is alleged. In addition, the Commission will have to increase its technical expertise. If confirmed, I intend to hire one staff attorney who has a background in safety engineering and another staff attorney with a background in industrial hygiene. Simple fairness to all parties requires this expertise on my staff.

Conclusion

The lives, health and safety of American workers as well as the success and operation of American business depend on the Commission's decisions.

I pledge to this Committee and to the Senate that I will fully and fairly consider each case presented for the Commission's review and that my decisions will be based on a forthright and complete analysis of the facts with careful deliberation on each party's arguments and an informed and honest judgment on the law. Moreover, I will make every effort to assure that the Commission's decisions are sufficient to meet the careful and informed review of the United States

Courts of Appeals. My best efforts will be invested in this challenge.

Finally, I take seriously my constitutional oath of office as well as my oath as an officer of the court. If confirmed, I will faithfully execute my responsibilities as Commissioner affording to every person who comes before the Commission a full opportunity to be heard and a just and equitable decision.

Thank you very much for this opportunity to appear before the Committee.

Text of an Address by

Robert D. Moran*

before the

1977 Annual Meeting of the

AMERICAN BAR ASSOCIATION

Section of Labor Relations Law

Palmer House
Chicago, Illinois
August 8, 1977

The title for the afternoon session of this Section ["OSHA - A Look at its Record"] suggests an oft-quoted remark from a 1928 campaign speech of that colorful Democrat from the sidewalks of New York, Alfred Emanuel Smith: "Let's look at the record". Since this Labor Law Section is nothing if not meticulously bipartisan, I feel obligated to choose a quotation from a triple-monikered New York Republican - John Foster Dulles - as a guide to what people should look for when they follow Al Smith's advice. Said Dulles: "The measure of success is not whether you have a tough problem to deal with, but whether its the same problem you had last year."

It goes without saying that "OSHA" and "problems" are synonymous. OSHA was created to solve tough problems - and, its 6 years of existence to date, has meant problems of all kinds for just about everyone.

If this were the opening session of a 2-semester law school course on the subject, I could say with some assurance that we would take a hard look at both the problems and the solutions, if any, which have been applied. I make that statement so you will know that there necessarily must be large gaps in what I am about to say. I'll try not to disappoint those who lust in their hearts for controversy, but I will concentrate on the area of OSHA closest to my heart: the adjudicatory functions.

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*Attorney at Law, Washington, DC. Former Chairman OSAH Review Commission.

A third New York political figure, Senator Javits - who was right in the thick of it and ought to know - called the legislative process leading to enactment of this law "The most bitter labor-management fight in years." And one of the small handful of hotly-contested issues that separated the contending forces throughout that battle was whether the Act's initial adjudicatory functions should be given to the Secretary of Labor - as organized labor wanted - or placed elsewhere. Anyone who reads the Act today with a limited OSHA familiarity would confidently conclude that the forces advocating the "placed elsewhere" structure were victorious. What I am about to say, however, might shake that confidence somewhat.

The Act did, of course, create an entirely new government entity - the Occupational Safety and Health Review Commission - and made it a veritable Jeffersonian mugwump by putting its mug in the Executive Branch (29 U.S.C. §661) and its wump in the court system. (29 U.S.C. §§651(b)(3), 659(c), & 660(a)-(b)). We all know that Congress many years ago created collegial agencies like the ICC, the FTC, the NLRB - and many others - which can both legislate and execute, enforce and adjudicate - functions that Jefferson thought he had structurally separated in the Constitution. But the Review Commission was something else again.

It was not created as a single agency with multiple functions, some legislative, some executive, and some judicial - traditional hallmarks of our "Four Branch" agencies. It was carefully limited to one single function - judicial - and deliberately placed where judicial independence is impossible - the Executive Branch - which is why "mugwump", that 1884 election-year antipodean, has meaning here.

This, to my mind, has created OSHA problem Number One - which has been complicated by problem Number Two: The Commission's low visibility and non-existent priority within the bureaucracy.

If you think this is hyperbole, let me give you a couple of quick examples. Anyone who can read can easily know that the Commission has only one function to perform. Its right there in the Act's "Congressional Findings and Purposes Clause": the ". . . Review Commission [is created] for carrying out adjudicatory functions under the Act". Period! Nothing else! Thats all! The very first Commission decision ever appealed (it bore number 9 on a Commission docket that is rapidly approaching 50,000 cases) resulted in a decision by the Ninth Circuit stating flatly - and correctly - "The administrative structure limits the Commission to adjudication." So there could be no mistake, the Court virtually drew pictures when it also said: "Unlike the NLRB and the FTC, it has neither prosecution nor enforcement powers. Those have been exclusively delegated to the Secretary." Madden v. Hodgson, 502 F. 2d 278, 280-281 (9th Cir. 1974).

In June 1977, however, more than six years after the law's enactment, 3-judge panels in two different Circuits issued factually erroneous decisions confusing the Commission with the Secretary of Labor. And both panels included a retired Associate Justice of the U.S. Supreme Court as one of the 3 judges.

A June 16, 1977 per curiam decision of the First Circuit spoke of OSHRC "compliance proceedings" and ended with this sentence:

> "In short, we would strongly urge OSHRC to straighten up its own trenches lest the employers it prosecutes be able to slip through unscathed [emphasis supplied]". D. Federico Co., Inc. V. OSAHRC, No. 76-1084 (1st Cir 1977).

Two weeks later, on June 28, 1977, a decision issued from the D.C. Circuit containing a concurrence with such factual errors as ". . . the Commission would construe its regulation" and "The statute requires the Commission to 'set [a] standard'". CAF Corporation v. OSAHRC, No. 76-1028 (D.C. Cir. 1977) [emphasis supplied].

I could cite other such examples in other decisions. The point I make, however, is: What happens to that judicial independence sought by the so-call

"victors" in the 1970 legislative struggle if the Courts themselves cannot tell the difference between the Secretary and the Commission? I will suggest an answer in a minute - but first, let me point out another legal problem flowing from this hybrid structure.

Udall v. Tallman, 380 U.S. 1, 16-17 (1965), stands for the proposition that the government's interpretation of a regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Until the Review Commission was created, there was only one Executive Branch interpretation reaching the Courts - that of the ICC or the Secretary of Labor or the SEC or what have you. Now, however, in many OSHA cases there are two often contradictory interpretations of regulations reaching the Circuit Courts one by OSHA - another by the Commission.

Which one "becomes of controlling weight"? Which one is due the Court's deference? Well, pay your money and take your choice. They've gone both ways on this. The most disturbing thing, however, is not so much the inconsistency of it all - but the fact that a careful reading of many of these decisions convinces me, at least, that some courts didn't even know - or, at least, took no cognizance of the fact - that they were dealing with 2 separate agencies.

The bitter 1970 legislative fight for an adjudicatory system independent of the Secretary of Labor may well have been fought in vain if the Circuit Courts themselves overlook the interpretation placed on an OSHA regulation by the Review Commission and blandly give "deference" to the Secretary's interpretation in those cases where that interpretation has already been rejected by the body Congress specifically created to perform the Act's adjudicatory functions. I submit that this result would be different if the Commission had been properly placed structurally within the government.

The structural confusion mentioned above has a meaning for everyone who must seek justice under this law. But also - and most especially - because of what I am now about to say.

During one of the many closed-door sessions held in 1970 in an attempt to get agreement on an OSHA bill amoung the contending forces, one of the opponents of an independent appeals tribunal stated rather bluntly that his opposition to the concept was based on the fact that "You can't monkey with a Commission". Those were the exact words used. Since he was supporting the competing bill under which initial adjudicatory power was given to the Secretary of Labor, the remark left a clear implication that, at least in his mind, you could "monkey" with the Secretary of Labor.

Being a much more ingenuous person at the time, I was somewhat astounded to hear talk about "monkeying" with a member of the Cabinet. Things are different now. Three Cabinet members - and a number of other high officials - have been convicted of crimes during recent years. There has been talk of White House officials "monkeying" with the FBI, the CIA, the IRS and - yes - even with OSHA.

I headed the Review Commission during those years so perhaps you might wonder whether anyone "monkeyed" with the Commission. Well, this much I'll tell you: there were a number of attempts. None of this involved individual OSHA decisions which would have amounted to ex parte communications or even a criminal offense. But, had the resistance to what was attempted been less stubborn, the Commission's independence - such as it was - would have been even less. I am not going to recite those right now. Some are mentioned in Secretary v. Francisco Tower Service, Inc., OSAHRC Docket No. 4845, February 6, 1976, and the attachments to the dissenting opinion.

The Review Commission, of course, does not have Cabinet status - the Secretary of Labor does. This situation is frought with potential transgressions in a system where government power very often depends upon one's proximity to the President. Even beyond this, the Review Commission's status as an Executiv agency, no matter how independent, raises serious questions as to whether it is appropriate - or even possible - for one Executive agency to be sitting in judgement over the determinations of another Executive agency.

One example of the 3 foregoing sentences: When an employer contests an OSHA citation, the 2 parties to the contest (the cited employer and the Secretary of Labor) are equals before the Review Commission's bar. That's the American system of justice. Right? Well, unlike employers, OSHA often refuses to abide by Review Commission decisions. And, again unlike employers, they get away with it.

OSHA suffers from political as well as structural problems. It is my opinion - and I have considered this often, and from a number of perspectives - that the quality of justice under OSHA - or, at least, the appearence thereof - is adversely affected by the manner in which both Presidents Nixon and Ford filled Commission vacancies. I see little value in beating a dead horse, so I wouldn't mention this except for the existence of reports that President Carter has decided to follow the Nixon-Ford policy of allowing the Secretary of Labor to choose the person that he (Carter) will appoint to the Review Commission's existing vacancy.

Now I know that past Labor Secretarys have been allowed by Presidents to effectively fill vacancies on the NLRB, the EEOC and other "independent" agencies. I see no serious impropriety with that because the Secretary of Labor has no official interest in the outcome of any of their decisions. In the Review Commission, however, the Secretary of Labor is the prosecutor in every case. He files thousands of briefs each year, and his attorneys argue thousands of cases each year, trying to persuade the Commission to decide cases his way rather than the Respondent's way. At this very moment, the Secretary of Labor is an adversary in literally hundreds of cases previously decided by administrative law judges (ALJ's) which are pending on appeal before the 2 sitting Commission members. His attorneys have filed briefs in most of them.

Many of these cases are unresolved because one member is persuaded by the respondent's case and the other by the Secretary's case. Only the appointment of a third member can break the deadlock. Now, I ask you this, should one of

these two adversaries select the person who will cast the deciding vote? Both Nixon and Ford answered "yes" when similarly confronted. Carter's answer is still to come.

Now I don't say that the person who is eventually selected will necessarily vote the way advocated by the person who chooses her (or him). But should he (or she) do so in any of these pending cases, it will surely create an appearence of injustice. Having been subjected to many instances of unethical conduct by high government officials in recent years, I submit that the public would be inclined to be suspicious.

Confidence in the integrity of the judicial system is a fundamental necessity in a free society. I sincerely believe that this concept deserves more respect than it has received to date from the White House.

Suppose, God forbid, that I had wanted reappointment when my term expired 3 months ago. Knowing that my fate was in the hands of the Labor Department, wouldn't it have been human nature to have refrained from rendering some of the opinions I issued in recent years? The job, after all, is monetarily attractive. It pays $50,000 a year. I submit that it would be a formidable strain for a person who wanted to continue in such an office to have to vote each day for or against positions strongly advocated by the party who will make the appointment decision. It places such a member in a humanly intolerable position.

Does this fact affect the outcome of decisions? I have no evidence that it does but a cumulative analysis of past decisions does reveal one rather interesting fact. The Secretary of Labor does much better with his cases before the Commission members than he does before administrative law judges who have life tenure and do not have to look to the Secretary either for appointment or reappointment.

All OSHA cases are (unless previously settled) heard and decided by one of the 45 Review Commission ALJ's. Their decisions are then subject to review by the 3 members sitting as a panel. On review, the members change the result

ordered by the ALJ in about 35 to 40 percent of the cases. When they do so, they favor the Secretary 3 times more often than they do the employer. In other words, for every ALJ decision favoring the Secretary which the members reverse in order to enter a finding for the employer, there are 3 ALJ decisions for the employer which are reversed in order to enter findings favoring the Secretary.

These figures wouldn't show much if only the decisions of a single judge are counted. But a pool of 45 separate judges would presumably be large enough to compensate for idiosyncrasies in any single judge or his decisions.

I submit that nothing has been done to change the apparent injustice of allowing the Secretary of Labor to fill Review Commission vacancies because of the low visibility of the agency and the consequent total lack of interest by the public, the press, the bar, and the Congress. When no one pays attention, injustice is more likely to flourish. That, as I said earlier, is what I designated "OSHA Problem Number Two."

Now, for a brief look at some other OSHA problems.

State Plans

OSHA can be taken over by any state if the Secretary of Labor approves of a state-submitted proposal for so-doing which meets certain statutory criterion set forth in 29 U.S.C. §667. This has already happened in 20 to 25 states. The problem is that these states then become the judge of OSHA within their borders. The D.C. Circuit's GAF decision (cited earlier) illustrates that the identical OSHA standard on asbestos - a substance identified by Congress as one of the most harmful to working people - received diametrically opposite interpretations in 2 jurisdictions - and a third jurisdiction (the Nation's largest state - has been permitted by OSHA to have a different asbestos regulation. In my opinion, if something is hazardous to workers in Wisconsin, its equally hazardous in Illinois and everywhere else. Equal protection of all American workers is impossible unless there are uniform safety and health regulations which are uniformily interpreted.

What we are now seeing is the balkanization of job safety and health - the situation which prevailed for the pre-1971 years and which provided one of the major justifications for the Federal Government to get into this field at all.

The OSHA Standards

I don't think it necessary at this point to belabor once again the fact that far too many of the OSHA standards are subject to Constitutional challenge for failure to give employers regulated by them fair warning of what they are supposed to do. Others are far too specific to be meaningful in the rapidly changing industrial climate existing today. Still others are designed for comfort and convenience - not job safety and health.

The fact is obvious. OSHA standards are poorly written. Machiavelli pointed out more than 500 years ago that one of the chief foundations of all States is good laws. OSHA's failure to clean up its regulations is shaking the very foundation of its existence.

OSHA should have - but has not yet - taken its marching orders from the concluding paragraph of the Fifth Circuit's decision in Diamond Roofing Co. v OSAHRC, 528 F. 2d 645, 650 (5th Cir. 1976):

> "The purpose of OSHA is to obtain safe and healthful working conditions through promulgation of occupational safety and health standards which tell employers what they must do to avoid hazardous conditions. To strain the plain and natural meaning of words for the purpose of alleviating a perceived safety hazard is to delay the day when the occupational safety and health regulations will be written in clear and concise language so that employers will be better able to understand and observe them."

Both labor and management want this. A June 16, 1977 report from the Industrial Union Department, AFL-CIO, contains this apt comment:

> "To the employer the standard should be the expression of a practical objective - and a method of achieving that objective - which results in the reduction of risk to his employees and to himself, to the lowest possible level."

The Inspection Priorities

OSHA is obsessed with statistics. How many inspections, how many citations how many dollars proposed in penalties! They even evaluate State plans on the

criteria. Yet, none of these things will necessarily advance the Act's purposes - reduction in hazards to workers through improved job safety and health conditions.

A few years ago I noted that OSHA issued some 8,000 citations one year for improperly guarded fans - yet that same year (and the year before) there was no report of any worker injuries - not even a single cut finger - from improperly guarded fans.

The figures are there to show what causes injuries to workers. I know the States keep them for Workmen's Comp reasons. Its almost too obvious to bear repeating but the first element in reducing hazards is to discover what causes them. Meaningful priorities for inspections cannot be established without that information. Bear in mind that I am not speaking of industry-by-industry accident figures, I'm speaking of hazard-by-hazard figures. The OSHA standards ostensibly address themselves to individual hazards - not industries. The injury statistics should conform to this system - and the inspections conducted accordingly.

Obtaining Compliance

The purpose of this Act is employee safety and health. The first stated Congressional purpose of the Act is

> ". . . encouraging employers and employees in their efforts to reduce . . . [employment hazards]". 29 U.S.C. §651(b)(1) [emphasis supplied].

I suggest that the issuance of 100,000 citations per year not only does little to encourage the employer's efforts - it has, so far, produced little or nothing in the way of accident reduction.

For 6 years now, OSHA has been conducted like some kind of industrial police force making unannounced raids on workplaces around the country to catch employers before they get a chance to sweep the day's debris from the floor or replace a burned-out light bulb. What OSHA fails to realize is that policemen play a largely symbolic role in our society. In a free society nearly all

of the policing is done by citizens who accept the laws and abide by them. Nearly all employers are good law-abiding citizens. So are nearly all employees They will obey the law if they know about it.

For OSHA's benefit, I think this point should be made: If, on any single day, as few as one percent of the employers were determined to violate a single provision of OSHA regulations, it would take 50,000 OSHA inspectors to catch them in the act.

In 1970 the Labor Department boasted of its 12-year record of success under the Maritime Safety Act - a 47% to 53% reduction in the injury frequency ratios. This noteworthy achievement resulted - not from the handful of enforcement actions initiated each year - but from enlightened encouragement of voluntary compliance.

They did it before. They can do it again. But the first requirement is to abandon the cops-and-robbers approach and return to methods which proved successful in the past.

Okay!

I promised something for those of you with lust in your hearts for controversy - so here comes my deliverance.

OSHA IS NOT A LABOR-MANAGEMENT LAW

This Act is not a bit like the Wagner Act or Taft-Hartley where labor and management are lined up as adversaries. I know the ABA has structured this section so as to achieve as equal a balance as possible between lawyers representing management and lawyers who represent unions. That's fine. It reflects the realities of the NLRA. OSHA was added to this Section soon after its enactment and our OSHA subcommittee is structured like a mini-Section of Labor Relations Law. But it just doesn't make any sense. It does not reflect the realities of OSHA.

Former Labor Secretary John Dunlop rightfully deplored the adversarial nature of OSHA, and at least once publicly lamented that "The present proc-

edures are aimed at maximizing antagonisms."

The Act does provide for adversary hearings but they aren't labor on one side - management on the other. They are government against management. I doubt if anyone will take exception if I say that I've read - and written - more opinions under this Act than any other human being. That experience has taught me that most cases are simple enforcement proceedings against employers - not unlike building code or food and drug cases. Labor is not a party and workers do not participate.

When workers do participate in the hearings, they show up most often as witnesses for the employer. When labor unions appear - and these are rare occasions - they most often support the government position, but they also oppose it on occasion. See, for example, UAW v. OSAHRC, a June 24, 1977 decision of the Seventh Circuit (No. 76-1718). What the Supreme Court said in Dunlop v. Bachowski, 421 U.S. 560 (1975) under a different statute - applies equally to OSHA - to wit: The statute, in effect, makes the Secretary the union member's lawyer in carrying out the purposes of the Act.

This disposition to think of OSHA along labor-management lines has created many anomalous situations. Some people think the 3 Review Commission members - like a tripartite labor arbitration tribunal - must include one from labor, one from management, and one neutral. Indeed, some State Review Commissions even require this by statute. If this is right, where does that leave the single ALJ who has heard and decided the case before it reaches the members? Must each of them be like all of Gaul, divided into three parts?

The Act requires the members - just as it requires the judges - to apply the law to the facts of each case on the basis of the record made before the judge, and to do so in accordance with 5 U.S.C. §554. See 29 U.S.C. §659(c). There is no room for partisan representation under such a requirement.

Review Commission Doesn't Promote Safety

In this connection, several Circuit Courts have mistakenly asserted that

the members of the Review Commission are safety experts - and some safety organizations have promoted the notion (with some success, unfortunately) that safety professionals should sit as members of that tribunal.

The Act tells the President [not the Secretary of Labor] to select Review Commission members "from amoung persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act." 29 U.S.C. §661(a) [emphasis supplied]. The Act specifies that these functions are limited to adjudication. 29 U.S.C. §§651(a), 659(c). The members must be qualified to adjudicate issues in dispute - issues like the burden of proof, relevency, jurisdiction, constitutionality, sufficiency of the evidence, and the like. The safety experts belong in the witness chair - not on the bench.

Conclusion

These are a few of the OSHA problems as I see them. Are they the same ones that existed last year? In my opinion the answer is "yes".

President Carter seems destined to follow the Nixon-Ford method for selecting Review Commission members. The promise of improvement in the OSHA standards remains just that - a promise. You will recall our new President - the one who said he'd never lie to us - saying in a fireside chat last Winter that he intends to do more about Federal regulations than merely cut down on them or put them in English - that they would carry their author's name and be personally read by the Cabinet member issuing them. He told Labor Department employees on February 9th that he was "very serious" about reducing the complexity of government regulations and called for "minimum regulations and maximum common sense".

Similar statements have been made by Ray Marshall, Bill Usery, John Dunlop and Peter Brennan - and by Eula Bingham, Morton Corn, John Stender and George Guenther. I don't question the good intentions of any of these people. But its time they took implementation of those promises out of the hands of

Scarlet O'Hara.

We are told there will be new emphasis on health standards (that, too, has been said by all of the 4 who have headed OSHA). But the legal infirmities seem to remain, whether the standard covers toilet seats or carcinogens. One of the "new" standards - designed to reduce asbestos exposure - has already failed of enforcement in the Sixth Circuit, partially due to inclusion of such definitive criteria as "where necessary". Dunlop v. Rockwell International, 540 F. 2d 1283 (6th Cir. 1976). And in the GAF case (cited earlier), D.C. Circuit Judge George MacKinnon said ". . . there is every indication that a proper case can be made . . . to justify setting aside the regulation." The Vinyl Chloride standard didn't fare very well in the Review Commission's Western Electric case (Docket No. 8902, decided Jan. 24, 1977), and OSHA - which appealed the decision to the Eighth Circuit in March - then moved to dismiss its own appeal in April.

If OSHA would only take Diamond Roofing to heart, I think things might come out better for both safety - and health - standards.

I see no change in inspection priorities or State plans or any of the other problem areas discussed.

This is unfortunate. But the real tragedy is that there is virtually no discernable progress toward achievement of the Act's goal - reduction in occupational hazards - which can be traced to any of the Labor Department's activities over the past six years. This is truly a sad commentary on the hundreds of millions of tax dollars which have been given to OSHA for injury-reduction purposes over this period. It brings to mind a well-known stanza of John Greenleaf Whittier:

> "For of all sad words of tongue or pen,
> The saddest are these: 'It might have been'."

Thank you.

UNIVERSITY OF CALIFORNIA, BERKELEY

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LABOR OCCUPATIONAL HEALTH PROGRAM
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BERKELEY, CALIFORNIA 94720

September 16, 1977

Honorable Harrison Williams, Chairman
Senate Select Subcommittee on Labor
Senate Office Building
Washington, D.C.

Dear Senator Williams:

I am writing to ask for your support of Bert Cottine for the vacant position on the OSHA Review Board. As one of the sponsors of the 1970 Occupational Safety and Health Act, I know you are concerned about the functioning of the agencies and organizations established to implement the intent of Congress. For this reason, the positions on the review board are extremely important.

I have known Mr. Cottine in a professional capacity for more than five years and believe him to be a responsible, intelligent and professional individual. In his years at the Health Research Group he has demonstrated his knowledge of the many complex issues that are commonplace in the field of occupational health and safety. His manual "Winning at the Review Commission" is an incisive, detailed, and useful guide for any individual or organization seeking to present a case before the Review Board. This manual is also an excellent indication of his grasp of the issues surrounding the actions of the Review Board.

I am aware that certain elements of the business community might be opposed to Mr. Cottine's nomination. For too long various organizations have supported issues or individuals based on whether they were considered "labor" or "business". Mr. Cottine, with a five year history of work in a public interest organization, in addition to his current work in OSHA, would bring a background of concern for the health and safety of the American worker.

As a physician and director of an occupational health program at the University of California, Berkeley, I strongly urge your support for President Carter's nomination of Mr. Cottine for the Review Commission.

Sincerely yours,

Don Whorton, M.D.
Director

DW/kp

MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA, INC.

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TELEPHONE (615) 244-2030

September 2, 1977

Senator Harrison A. Williams, Jr., Chairman
Senate Committee on Human Resources
352 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Williams:

On behalf of the Mechanical Contractors Association of America, Inc. (MCAA), I submit to you this strong objection to the procedure whereby the Secretary of Labor has become directly involved in filling a current vacancy on the Occupational Safety and Health Review Commission (OSHRC).

MCAA is a construction trade association of about 1500 firms employing approximately 125,000 persons.

Recent news items have stated that the Secretary of Labor recommended the person to fill the existing OSHRC position, and that this recommendation was accepted by the President. While the President properly should and does get recommendations from the Secretaries on many matters, recommendations by the Secretary of Labor for OSHRC positions are improper.

The Secretary of Labor develops and promulgates OSHA regulations and employs and directs the compliance officers. When the Secretary then selects or influences selection of the Review Commission, he has in essence written the law (regulations), appointed the enforcement officers and selected the judges for OSHA. This is totally unfair to the employers affected and calls into question the validity of any claims of an impartial review system within OSHA for cases the employer may wish to contest.

We appeal to you, as a sponsor of OSHA and one intimately acquainted with its provisions and operations, to consider the manner of nomination of the OSHRC member during Senate confirmation hearings. Regardless of any past precedents, the procedure in this case is questionable. Confidence of employers in OSHA and its appeals process is at stake.

MCAA strongly recommends that the President use the same

system for appointment of OSHRC members as for the appointment of judges to the Federal Judiciary. The Secretary of Labor should not become involved.

We will be pleased to burnish additional information as may be helpful. Thank you for your consideration.

Sincerely,

Robert L. Bibb, Jr.
President

RLB/pmf

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BERKELEY, CALIFORNIA 94720

September 19, 1977

1977 SEP 26 AM 10 25
COMMITTEE ON
HUMAN RESOURCES

Senator Harrison Williams
Senate Committee on Human Resources
Suite 4230
Dirksen Senate Office Building
Washington, D.C. 20570

Dear Senator Williams:

This letter is written in support of the nomination of Mr. Bertram R. Cottine as a commissioner on the Occupational Safety and Health Review Commission.

Mr. Cottine has been a colleague and friend of mine for six years. We worked together for several years on issues dealing with occupational health as staff associates at the Health Research Group, a Washington-based public interest organization. During those years I grew to admire and respect his legal abilities, his diligence, and his dedication to seeing that the Occupational Safety and Health Act of 1970 is fully implemented.

I believe that Mr. Cottine's experience and expertise in handling the legal issues involving occupational health equal-if not surpass- that of any other person in the country.

Since I began work at the University of California, Berkeley, I have continued to seek Mr. Cottine's advice on occupational health issues and have effectively used his book Winning at the Review Commission as a guide in exploring workers' rights under OSHA.

I recommend him without hesitation as an honest, fair, and objective person. His integrity and fine judgment would make him a great asset on the Review Commission.

Thank you for your consideration.

Sincerely yours,

Andrea M. Hricko

Andrea M. Hricko
Health Coordinator

AH/kp

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SCHOOL FOR WORKERS

September 19, 1977

Senator Harrison B. Williams
Chairman
Committee on Human Resources
United States Senate
Washington, D. C. 20510

Dear Senator Williams:

This is to express my support for the appointment of Professor Bert Cottine as Public Member on the OSHA Review Commission.

Mr. Cottine is well versed in the working of the Occupational Safety and Health Act and would bring a great deal of knowledge and expertise to the Review Commission. I sincerely hope that your Committee will support his appointment as Public Member.

His credentials are of high calibre and his dedication to improvement of working conditions in American industry has been without parallel.

Sincerely,

George Hagglund

George Hagglund
Professor of Labor Education
and
Supervisor, Occupational
Safety and Health Project

GH:bjr

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September 21, 1977

Honorable Harrison A. Williams
Chairman, Committee on Human Resources
Suite 4230, Dirksen Building
United States Senate
Washington, D.C. 20510

Re: Nomination of Bertram Robert Cottine

Dear Senator Williams:

I am writing you to offer my strong support for the nomination of Bertram Robert Cottine for a position as a Member of the Occupational Safety and Health Review Commission. I have worked with Mr. Cottine extensively during the past five years, and I believe that he is exceptionally well qualified for this position for a number of reasons.

First, he is particularly experienced and knowledgeable in the field of occupational health and safety. This is of great importance at this time since the Commission has a backlog of over 400 cases, and an inexperienced person would take a considerable period of time before being able to make a significant contribution toward eliminating that problem. With his background, Mr. Cottine would be able to step in immediately, thus resolving matters of importance to all parties concerned.

Second, he is sympathetic to the basic aims of the Act which he will be administering. As you are aware, one of the problems with the enforcement of the Occupational Health and Safety Act of 1970 has been a marked lack of enthusiasm by those charged with the duty of bringing about compliance with its objectives. Mr. Cottine's professional career is a testimony to his concern for eliminating health and safety problems in the workplace. On the other hand, he is not someone who fails to take into account the practicable, consistent with the directions of the law that no worker shall be exposed to unsafe or unhealthy working conditions. I firmly believe that he will fairly protect the worker, without neglecting the legitimate concerns of the employer.

Third, he is extremely hard working, intelligent, and attentive to details. He will, I am convinced, carefully focus on the facts of each case before him and will not shy away from a difficult problem involving technical, but non-legal questions.

In conclusion, let me say that I cannot think of a person who is better qualified by reason of ability, experience, and dedication to the goals of the Commission than Bertram Robert Cottine. I urge your Committee to approve his nomination promptly so that he may begin his important work as soon as possible.

Respectfully submitted,

Alan B. Morrison
Director

GEORGETOWN UNIVERSITY LAW CENTER
WASHINGTON, D. C. 20001

OFFICE OF THE DEAN

EXECUTIVE VICE PRESIDENT
FOR
LAW CENTER AFFAIRS

1977 SEP 26 PM 1:46

September 23, 1977

1977 SEP 26 PM 1:54

The Honorable Harrison A. Williams
Chairman
Senate Committee on Human Rights
Suite 4320
Dirksen Office Building
Washington, D.C. 20510

Dear Senator Williams:

I am writing in support of the qualifications of Bertram R. Cottine, who I understand has been nominated by the President to be a member of the Occupational Safety and Health Review Commission. Bert taught at this Law Center from 1975 until 1977, running our Development Disabilities Seminar and acting as Deputy Director of our D.C. Project.

Bert created the seminar and structured its operation. He carefully prepared a thorough curriculum, providing the students with a broad overview of the current state of the law on rights of persons with disabilities as well as intensive analysis of legal issues (e.g., problems of classification, treatment, habilitation, and deinstitutionalization). He trained the students superbly by sharpening their writing skills, rendering them sensitive to the needs of their clients, and helping them improve their counseling techniques. The structure he built lives after him. Even though we miss his guiding hand, we have been able to continue the seminar because of the strong foundation he laid.

Bert had a fine reputation among his colleagues. We respected him for his integrity and fundamental sense of fairness. He is above all an excellent lawyer, able to see clearly both sides of any issue and to appreciate the merit in the arguments of the

opposing attorneys with whom he dealt. Bert's mind is keen and incisive. His range of knowledge in the field is both broad and deep. He is firmly committed to impartial and rigorous analysis of any problem he confronts.

I am convinced that he would make an excellent member of the Commission. Thank you for giving his nomination the consideration it deserves.

Sincerely,

John R. Kramer
Associate Dean
Clinical and Sponsored Programs

JRK/cjw

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Attorneys and Counselors
1000 Connecticut Avenue, N.W.
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George H. Cohen
Michael H. Gottesman
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Frank Petramalo, Jr.
Jeffrey L. Gibbs
Julia Penny Clark
Jeremiah A. Collins
David M. Silberman

Area Code 202
833-9340

September 21, 1977

The Hon. Harrison A. Williams
Chairman, Committee on Human
Resources
Suite 4230
Dirksen Senate Office Building
Washington, D. C. 20510

Re: Appointment of Bertram Cottine to the Occupational Safety and Health Review Commission.

Dear Mr. Chairman:

I am a partner in a Washington, D. C. law firm which represents numerous private sector labor organizations, including, most notably, the United Steelworkers of America and the Industrial Union Department, AFL-CIO. Subsequent to the passage of the Occupational Safety and Health Act of 1970, I have appeared on behalf of these clients in numerous lawsuits in federal courts and before the Commission which raised significant questions as to the meaning and application of that statute. I have also appeared in several administrative proceedings conducted by the Secretary of Labor in the performance of his all-important obligation to set occupational safety and health standards.

In connection with these activities, I initially met Bert Cottine about five years ago in his capacity, first, as a staff associate and, thereafter, as counsel to the Health Research Group. Since that time I have had occasion to work with Mr. Cottine in performing legal research, drafting comprehensive legal briefs in several court of appeals cases, and in the Secretary of Labor's proceeding to set an occupational health standard to protect employees in steel mills from cancer-causing coke oven emissions.

I found Mr. Cottine to be a very able advocate who not only represented his clients, but, equally important, he did so in a responsible, professional manner. Indeed, while

striving to assure that the Secretary and the courts would accord employees the full scope of the extensive rights provided by OSHA, he always recognized the presence of legitimate employer interests which the statute was designed to accommodate.

With respect to your Committee's current deliberations concerning Mr. Cottine's appointment to the Occupational Safety and Health Review Commission, please add my name to the list of persons who have already expressed their confidence in him. If confirmed, I believe Mr. Cottine will steadfastly devote his considerable talent and energies in an objective, impartial manner so as to effectuate the congressional intent reflected in the statute and its underlying legislative history.

Sincerely,

George H. Cohen

GHC/njc

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September 26, 1977

Senator Harrison Williams
Chairman, Human Resources Comm.
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman,

The UAW strongly supports the nomination of Bertram Robert Cottine as a member of the Occupational Safety and Health Review Commission.

Mr. Cottine is a recognized expert in the field of Occupational Safety and Health Law. He has demonstrated this as a scholar as well as a litigator. Already familiar with review commission procedures and practices, he is prepared to perform immediately useful services to government.

Mr. Cottine is a fair minded person with a fundamental sense of integrity. His cognizance of the purpose and intent of the Occupational Safety and Health Act, along with his respect for due process of law, will guide him in wise decision making at the Commission. His administrative experience at the Georgetown Law Center will also help the Commission extricate itself from the quagmire of delay that it has, unfortunately, become.

His wide legal experience, fair mindedness and administrative skill make him one of the best qualified persons in the nation for this post.

Mr. Cottine's confirmation as a member of the Occupational Safety and Health Review Commission will enrich the Commission and bring a person of extraordinary high caliber to the government services.

The UAW urges, in the best interests of the country, and the sensible and fair enforcement of the law, Mr. Cottine's nomination be affirmed.

We would appreciate it if you would have this letter placed in the record of the confirmation hearings on Mr. Cottine.

Sincerely,

Stephen I. Schlossberg

SIS:car
opeiu494

cc
Doug Fraser
Howard Paster

[At the direction of the Chairman, the questions submitted by Senator Hatch and Mr. Cottine's responses are also included in the Record.]

1. In your statement before the Committee on Human Resources, United States Senate, September 27, 1977, you stated:

> "No party should be denied a hearing simply because his evidence does not satisfy the detailed requirements of the hearsay rule or the specific conditions for authentication of a document. When the Commission excludes evidence on intricate evidentiary rules it jeopardizes the acceptance of the Act by employers and employees."

Rules of Evidence exist in large part to protect against the consideration of information which for some reason is of questionable authenticity, veracity, relevance, or which might unfairly prejudice the consideration of the matter in dispute. Why are these protections unnecessary before the Review Commission?

2. To what extent should Commission Judges interject themselves into a specific proceeding to, for example, undertake the questioning of witnesses?

3. Should the Review Commission have the authority to reject a settlement agreement arrived at between the employer and the Secretary of Labor?

4. Both the Act (Section 6(b)(5)) and some of the standards refer to "feasibility" and "feasible controls." As Special Assistant to the Assistant Secretary of OSHA, you have undoubtedly had occasion to make policy recommendations with respect to feasible controls and feasibility. In your opinion, how much weight should be put on economic feasibility in requiring engineering controls when there are other means for protecting employee health (i.e., ear protectors re noise)?

5. What weight would you give to economic feasibility in cases comirg before the Review Commission? (Where there is no question about the company's ability to make the economic investment involved)?

6. Would it be relevant to your deliberations on whether to affirm a citation if a company had indicated that it would rather discontinue the product or close the plant rather than make the investment for controls?

7. To what extent should an employer be able to question the validity of a standard before the Review Commission?

8. To what extent should employees be allowed to participate in OSHA hearings? Should they be allowed to introduce and question witnesses on issues other than the length of an abatement period? If so, what issues?

9. Should employees have standing to object to a settlement reached between the Secretary of Labor and the employer?

10. Does the Secretary of Labor adequately represent the interests of employees? If no, in what sense is the Department's representation inadequate?

11. Under what circumstances in your opinion is an Emergency Temporary Standard warranted?

12. What was the nature of your involvement in the Assistant Secretary of Labor's development and promulgation of an Emergency Temporary Standard on Benzene?

13. Was not the leukemogenic effect of Benzene known for many years?

14. Did you agree with the circumstances which were used to justify issuance of the Emergency Temporary Standard on Benzene.

a. If yes, what was the evidence which persuaded you?
b. To what extent, if any, would your general agreement that the nature of the hazard was such to warrant the issuance of an ETS affect your deliberations on a citation issued to an employer under that standard?

15. In your statement before the Committee on Human Resources, United States Senate, September 27, 1977, you stated:

"The Commission must take seriously the health and safety hazards which threaten the lives and health of working men and women and which also burden this Nation in terms of lost production, wage loss, medical expenses and disability

compensation payments, as well as the inestimable cost of suffering to workers and their families."

Do you feel that the Commission does this now? If not, would you please explain what, if anything, you will do to see that the Commission will take these issues more seriously?

16. In this same statement of September 27, 1977, you stated:

". . ., the Commission must increase its vigilance . . ."

In your view, does the OSHRC have "oversight" authority over the DOL's enforcement policies and, if so, is this a proper function for an adjudicatory body?

17. You also stated that "If confirmed, I intend to hire one staff attorney who has a background in safety engineering and another staff attorney with a background in industrial hygiene."

Would you seriously consider candidates for these positions who had at anytime in their past worked for Industry?

Would you, likewise, seriously consider candidates who were previously affiliated with labor organizations?

18. In your statement before the Committee on Human Resources, September 27, 1977, you stated:

"By 1975 it became necessary for me to author a hundred seventy-five page handbook to help non-lawyers prepare for these hearings."

Were you requested to write this handbook? If so, by whom?

19. In your statement before the Committee on Human Resources, September 27, 1977, while addressing yourself to the need for a handbook--

"To help non-lawyers prepare for these hearings." . . . "Small businessmen and employees are unable to retain a battery of lawyers to overcome this complex procedural maze."

The implication is made that the handbook was written to aid both the worker and small businesses in dealing directly with the Review Commission without representation of an attorney? Is this a correct assumption that the handbook

was intended to aid small businesses as well as the workers?

a. The entire text of the handbook is written in the first person, i.e. "Your participation in Commission proceedings . . . categories." pg. 17

"If your employer is . . . notice of contest." pg. 18

"The simpilest way . . . place in your letter your employer's name . . . (Figure 1). pg. 20

To whom are you referring in the use of the term "your" throughout this handbook?

20. Please list all cases in which you have participated as counsel or in any capacity while employed by:

1. Health Research Group
2. Georgetown University
3. Department of Labor
4. Any other employment

21. In what respect do you believe that OSHA and OSHRC have "overdeveloped" concepts of due process?

What individuals, if any, assisted you in preparing your replies to these questions?

27 September 1977

The Honorable Harrison A. Williams
Chairman, Committee on Human Resources
United States Senate
Room 4230, Dirksen Senate Office Buiding
Washington, D.C. 20510

Dear Mr. Chairman:

I have enclosed my written responses to the questions posed by the Honorable Orrin G. Hatch with repect to my nomination to be a member of the Occupational Safety and Health Review Commission.

I appreciated the opportunity to appear before the Committee in support of my nomination and to discuss the important issues bearing on the just administration of the Occupational Safety and Health Act.

I thank you and the Committee for your thoughtful consideration of my nomination.

Respectfully submitted,

Bertram Robert Cottine

Bertram Robert Cottine

Attachment (1) & Exhibits (2)

ANSWERS TO WRITTEN QUESTIONS POSED TO NOMINEE
BERTRAM ROBERT COTTINE BY THE HONORABLE
ORRIN G. HATCH

1. Certainly authenticity, veracity, and relevance are appropriate issues to be carefully considered by the administrative law judge in making his findings of fact on the record evidence. I trust the capability of the Commission's administrative law judges in avoiding prejudicial influence on their determinations. Our judicial system invests similar trust when cases are tried before a judge without a jury. In addition, the record and the judge's findings are open to review by the three-person Commission. Finally, the receipt of the evidence at the hearing makes it unnecessary to rehear the case if the evidence was improperly excluded and a remand to the judge is necessary. This approach not only promotes judicial efficiency , it eliminates the cost and inconvenience of a rehearing on the employer and employees.

2. Administrative law judges should not become involved in questioning of witnesses when the representatives for the parties have explored the factual issues at the hearing. However, the Manual for Administrative Law Judges prepared by the Administrative Conference of the United States suggests that "the judge should assist those who lack counsel to participate effectively -- by advising them, for example, of the information that is needed or by questioning their witnesses to develop relevant material." This practice was supported by Commissioner Barnako in his testimony before the House Committee on Small Business in May of 1977. This balanced approach should assure a complete record as well as a fair and impartial hearing.

3. Commission Rule 100 encourages settlement agreements provided the agreement "is consistent with the provisions and objectives of the Act." Moreover, in Secretary v. Dawson Brothers, Docket No. 12 (Feb. 12, 1972), the Commission articulated the following conditions:

> 1. the agreement must set a date on which the abatement of the violation has been or will be accomplished,
>
> 2. the agreement must contain assurances by the employer of continuing compliance,

3. the employer must tender payment of the penalty proposed by the Secretary, and

4. there must be evidence that the affected employees or their authorized representative have been afforded an opportunity to participate in the proceeding.

These are factual matters which require specific proof and will necessarily depend on the unique circumstances in each case. If proof is not introduced which meets these conditions, then the Commission has the authority to reject the settlement agreement. This is similar to the approval of settlement agreements in district court proceedings involving the enforcement of public rights; e.g., antitrust.

4. The courts have made it clear that feasibility necessarily includes consideration of economic feasibility. The preference for engineering controls over other controls is consistent with sound practices of occupational medicine because it is the most effective means of controlling workplace hazards. The preference was not established by Commission precedent. Rather, the Commission is applying the standard promulgated under Section 6 of the Act.

5. This question refers to an issue which is currently on remand to the Commission in the case of Turner Company, Division of Olin Corporation v. Secretary of Labor, No. 76-2025 (7th Cir., Aug. 31, 1977). It would be inappropriate to prejudge these issues without the benefit of the parties' briefs. I am aware of the consistent judicial precedent which interprets feasibility to include economic considerations as a component of practicability. Moreover, economic considerations are appropriately a consideration in establishing a "reasonable abatement period".

6. If the Secretary has sustained his burden of proof, then the citation must be affirmed. Assuming this is not a question of economic feasibility, the decision to discontinue a product or close a plant based on any investment criteria is a decision which remains with the company.

7. Where the general validity of a standard is in issue and has previously been affirmed by a Court

of Appeals, then the Commission would be bound to uphold its general validity. Where a party questions the specific validity of a standard, e.g., the application of the standard to a particular operation, then an appropriate issue has been raised for the Commission's consideration.

8. It has been the practice of the Commission to permit employees to present evidence on all issues in controversy when the employees have elected party status in a proceeding. This is consistent with the statutory grant of party status.

9. If the employees submit that the agreement does not satisfy the conditions set forth in Question 3, then the employees have standing to object. Notice is provided to affected employees for the express purpose of receiving their comments on hazards which may directly affect their health and safety.

10. The Secretary is not the legal representative of the interests of the employees nor is the Secretary legally obligated to represent their interest if it differs from the Government's position. Therefore, the adequacy of the representation of the exclusive interests of the employees varies from case to case depending on the identity of interests between the Secretary and the employees. Certainly the Secretary must maintain his independent judgment in a case as must the employees.

11. An emergency temporary standard is warranted under section 6(c) of the Act when the best available evidence indicates that "...employees are exposed to a grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such dangers." The individual circumstances depend on the severity of the hazard, e.g., carcinogenicity, and the actuality of exposure.

12. As a special assistant I coordinated the development of the benzene emergency temporary standard by the responsible offices in the Department. This involved primarily editorial review and the identification of major policy issues requiring the Assistant Secretary's attention.

13. Evidence of a leukemogenic effect had been accumulating for years. However, conclusive evidence establishing the leukemia hazards for humans was made available to the Agency in April, 1977.

14 a. Yes. I believe that the total record evidence available at the time supports the issuance of the emergency temporary standard.

b. The emergency temporary standard has been stayed since its effective date. Therefore, no enforcement cases are pending before the Commission. The permanent standard is expected to be issued in November. I have not been involved in the review of this extensive new

record or made any policy recommendations. Moreover, Commission cases focus on the specific requirements of the standard. Since I have not participated in the development of the contents of the permanent standard, I do not believe that my agreement with the existence of the hazard for the earlier emergency standard will affect my deliberations .

15. The remark in my statement regarding health and safety hazards was a declaration of my personal commitment to seriously consider these issues. It was not meant as a commentary on the Commission.

16. The Commission is not a general "oversight" agency. Its' adjudicatory functions restrict its deliberations to the facts in controversy and the necessary interpretations of the law. While specific "enforcement policies" may be part of a case, the Commission's role is not involved in the oversight of the Agency's policies. That oversight function is appropriately reserved to the Congress and its respective Committees.

17. I will consider candidates for my staff based on their training, experience, and qualifications regardless of where they may have obtained their experience. When conflict of interest considerations require it, I will ask them to disqualify themselves from participation in cases.

18. No.

19. The Handbook's immediate audience was employees. However, a number of employers also purchased the Handbook. I believe that most of the discussion in the Handbook on papers, preparation, the hearing, and appeals would be useful to small businessmen as well as employees. The "your" in the Handbook was used to personalize the book for its immediate audience. It was an editorial choice to avoid the impersonal style which often makes legal proceedings so difficult to explain to non-lawyers.

20. A memorandum indicating the Commission cases in which I have participated is attached as Exhibit #1. A law student generally consulted with me on a brief for directed review in Secretary v. Amoco Corp., Docket No. 4804 , and another law student requested that I technically review the amicus brief of the Oil, Chemical and Atomic Workers International Union in United Auto Workers v. Budd Company, 513 F.2d 201 (3d Cir. 1975). My other litigation is identified in my curriculum vita appended in pertinent part as Exhibit #2.

21. The characterization of "overdevelopment" of due process at the Review Commission was in response to arguments being raised in 1974 that the Commission proceedings were "criminal proceedings" or that a jury trial was required under the Seventh Amendment. The United States Supreme Court ruled on the latter claim in Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission, ___ U.S. ___, 97 S.Ct. 1261 (1977). The Court concluded that a jury trial was not constitutionally required in an administrative proceeding involving

statutorily-created public rights. With respect to the Occupational Safety and Health Administration, this remark referred to a process which inserted an additional step in the rulemaking procedure entitled an "advance notice of proposed rulemaking". This procedure was blanketly utilized when a criteria document was received from the National Institute for Occupational Safety and Health even if affected employers and employees had participated in the development of a criteria document. Now the Agency simply notices receipt of the document and requests comments.

* * * * * * * * * * *

The responses to these questions were prepared entirely by the nominee, Bertram Robert Cottine.

EXHIBIT NO. 1

September 26, 1977

Honorable Harrison A. Williams
Chairman, Committee on Human
Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I have enclosed a copy of my memorandum to the Chairman of the Occupational Safety and Health Review Commission regarding my advice and counsel in enforcement cases under the Occupational Safety and Health Act of 1970.

If there are any questions regarding the contents of this memorandum, please feel free to contact me.

Respectfully submitted,

Bertram Robert Cottine

Bertram Robert Cottine

Enclosure

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

IN THE MATTER OF:

BERTRAM ROBERT COTTINE, MEMBER-DESIGNATE

TO: TIMOTHY F. CLEARY, CHAIRMAN

MEMORANDUM OF MEMBER-DESIGNATE
REGARDING ADVICE AND COUNSEL
ON ENFORCEMENT CASES
UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT

This memorandum serves notice of enforcement cases under the Occupational Safety and Health Act, 29 U.S.C. Section 651 et. seq., in which I have given advice or counsel.

1. I served as counsel in the following case which is currently pending before the Occupational Safety and Health Review Commission: Secretary v. Sun Oil Company, Docket No. 76-3749. I will disqualify myself from any consideration of this case. This disqualification is consistent with requirements for Federal judges under 28 U.S.C. Section 455.

2. I was retained as private counsel on the following case which terminated in a final judgment and order of the United States Court of Appeals for the Seventh Circuit on June 24, 1977: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Occupational Safety and Health Review Commission, Docket No. 76-1718.

3. As a part of my pro bono practice I served as a representative or counsel in the following cases which have now terminated in final orders and are no longer subject to appellate review: Secretary v. Kawecki-Berylco, Docket Nos. 1942 and 2017; Secretary v. Koppers Company, Docket No. 3449; Secretary v. Mobil Oil Company, Docket No. 2128; Secretary v. Union Carbide, Docket Nos. 3373 and 12511; and, Secretary v. General Electric Company, Docket No. 2739.

4. On a few occasions involving the following enforcement actions I have reviewed limited enforcement issues brought to the attention of the Assistant Secretary for discussion with the staff: Dawes Laboratories, Inc., Case File Number G4512, Report Numbers 48, 50, 51; Hardwood Mouldings, Inc., Case File Number M2318, Report Numbers 171 and 213; Bellmonte Finishing Co., Case File Number C1388, Report Number 180, Case File Number B4776, Report Number 334; Kettridge Equipment Co., Case File Number B7589, Report Number 049; Erie Coke & Chemical Co., Case File Number E8680, Report Number 149; United States Steel Corp. - Fairless Hills, Case File Number C5653, Report No. 064; and London Harness and Cable Co., Case File Number G1724, Report Number 054. I will disqualify myself from participation in any Review Commission proceedings which might arise from these enforcement activities. I believe that disqualification in these circumstances is consistent with the requirements of 28 U.S.C. Section 455.

Respectfully submitted,

Bertram Robert Cottine
Member-Designate

Dated: 26 September 1977
Washington, D.C.

EXHIBIT NO. 2

MAJOR PROFESSIONAL RESPONSIBILITIES: OCCUPATIONAL SAFETY AND HEALTH

Proceedings on Occupational Health Standard on Carcinogens

- Rulemaking Petition for Emergency Temporary Standard
- Suit for Mandatory Injunction Directing the Issuance of Emergency Standard (D.D.C. 1973)
- Brief on Petition for Review of Emergency Standard (3d Cir. 1973)
- Proposed Regulations for Use Permit System
- Advisory Committee Statement, Public Hearing Testimony, and Reply Statement on Permanent Standard
- Petition for Formal Opportunity for Cross-Examination at the Public Hearing
- Consultant to Public & Employee Advisory Committee Members
- Comments on Supplement to Final Environmental Impact Statement on the Permanent Standard
- Suit for Mandatory Injunction Directing the Issuance of Permanent Standard (D.D.C. 1973)
- Briefs & Oral Argument on Industry Petitions for Review of Permanent Standard (3d Cir. 1974)
- Brief & Oral Argument on Employee Petition for Review of Permanent Standard (3d Cir. 1974)
- Petition for Writ of Certiorari, Oil, Chemical & Atomic Workers Int'l Union vs. Dunlop, No. 74-1443 (1975)
- Standard-Setting Hearing on Judicial Remand of Occupational Health Standard on MOCA

Standard-Setting Proceedings

- Attorney for North Carolina Public Interest Research Group, Petition for the Modification of the Cotton Dust Standard (1975)
- Attorney for the Oil, Chemical & Atomic Workers' Representative, Standards Advisory Committee on Coke Oven Emissions (1975)

Complaints and Inspections

Imminent Danger Complaint on Airborne Contaminants & Construction Safety Violations
Complaint on Discriminatory Discharge of Employee for Health and Safety Activities
Testimony Before the House District of Columbia Committee Investigating Metro Safety and Health Programs

APPELLATE LITIGATION

Carcinogen Litigation, supra.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. Occupational Safety and Health Review Commission, No. 76-1718 (7th Cir. 1976)

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION PROCEEDINGS

Author, Winning at the Occupational Safety and Health Review Commission: A Handbook (1975)

Secretary v. Koppers Company, Docket No. 3449
Secretary v. Sun Oil Company, Docket No. 76-3749

Other cases, including clinical supervision of law student representation, have involved pre-hearing conferences, discovery motions, memoranda on motions for summary judgment, hearing representation, post-hearing briefs, petitions for directed review, and briefs on directed review.

INVESTIGATIONS

Case Study Survey on State Workers Compensation Programs

COMMENTS ON PROPOSED RULEMAKING

Final Rules of Procedure for the Occupational Safety and Health Review Commission
Temporary Orders Preserving State Enforcement Authority Under the Occupational Safety and Health Act
Regulations Governing Changes to State Developmental Plans
Department Authority to Determine the Extent of Other Federal Agency Jurisdiction
Public Disclosure of the Monitoring of Certain Hazards
Occupational Safety and Health Program for Federal Employees
Regulations on Federal Program Change Supplements to State Developmental Plans
Regulations on Federal & State Variances from Standards
Regulations on the Exercise of Federal Enforcement Authority
Proposed Permanent Standard on Exposure to Vinyl Chloride
Voluntary Compliance & Abatement Agreements
Contracts for On-Site Consultation Programs by States

The CHAIRMAN. The committee stands adjourned.
[The committee adjourned at 11:05 a.m.]

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