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SAFETY ADVANCEMENT FOR EMPLOYEES ACT OF 1999

OCTOBER 28, 1999.—Ordered to be printed

Mr. JEFFORDS, from the Committee on Health, Education, Labor,
and Pensions, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 385]

The Committee on Health, Education, Labor, and Pensions, to which was referred the bill (S. 385) to amend the Occupational Safety and Health Act of 1970 to further improve the safety and health of working environments, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

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I. INTRODUCTION

On any given day in the United States, 17 workers will die and 18,600 workers will be injured on the job.¹ Safety inspections by the government are rare, and consultations with employers are even rarer. To stop the injuries and deaths suffered every day by the American worker, a system must be put in place to encourage the good employers to get safe voluntarily while simultaneously targeting and punishing the thin layer of bad work sites. This is the system promoted by the Safety Advancement for Employees (“SAFE”) Act (S. 385), and enacting it will save workers lives.

The Occupational Safety and Health Administration, or OSHA, is the government agency responsible for regulating safety laws in America. The way that OSHA is supposed to work is to provide helpful assistance to the overwhelming number of employers who are actively pursuing safer workplaces. Simultaneously, OSHA should be effectively targeting those employers who are willfully disregarding safety laws, inspecting them, fining them, and then following up to make sure that bad practices are stopped before accidents occur. But what everyone knows is that this is not what is actually happening. What is happening is that OSHA lumps all employers together—both the good and the bad—treats them the same, and tries to inspect and fine them all, no matter how small or ridiculous the violation. Meanwhile, serious and potentially deadly practices go uninspected and unstopped. The result is disastrous, and unfortunately, is often fatal.

As reported in the Associated Press, three quarters of work sites in the United States that suffered serious accidents in 1994 and 1995 had never been inspected by OSHA during this decade.² The report also showed that even OSHA officials acknowledge that their inspectors “do not get to a lion’s share of lethal sites until after accidents occur.”³ Because it takes OSHA over 167 years to reach every work site in this country,⁴ the fact is that OSHA neither helps those good faith employers who want to achieve compliance with safety laws, nor effectively deters bad employers from breaking the law.

This is why the committee believes that passing legislation like the SAFE Act is so vitally important. It will effectively add thousands of highly-trained safety and health professionals to the job of inspecting work sites all over the country where OSHA hasn’t even been able to make a dent, while encouraging employers to get into compliance voluntarily. At the same time, it would allow OSHA to use its resources to target and punish serious safety offenders.

The SAFE Act’s proactive approach to achieving safer workplaces is revolutionary because it empowers both OSHA and employers who truly seek safety and health solutions. The result will mean vastly improved safety for America’s workers.

¹ Anne Scott, A Kinder, gentler, OSHA?, Bus. Rec. (Des Moines), April 7, 1997, at 10.

² The Associated Press, OSHA Failed to Inspect Committee of Workplaces Where Workers Died in ’94, Asheville Citizen Times, September 5, 1995, at 1A.

³ Ibid.

⁴ AFL-CIO, Death on the Job: The Toll of Neglect, Apr. 1997, at 3.

II. SUMMARY AND PURPOSE

The Clinton administration has acknowledged that OSHA's adversarial, command and control approach to worker safety hasn't worked, and it has responded by pledging a "reinvented government" that partners with employers in the effort to improve occupational safety and health. Vice President Gore has made strong statements that "OSHA doesn't work well enough," and that OSHA should "hire third parties such as private inspection companies" to perform inspections.⁵ He has advocated a new approach at OSHA that would parallel the accountant's role on behalf of small businesses at tax time.

No army of federal auditors descends upon American businesses to audit their books; the government forces them to have the job done themselves. In the same way, no army of OSHA inspectors need descend upon corporate America.⁶

In fact, the Vice President's conclusions are at the heart of the SAFE Act's partnership approach. The SAFE Act will encourage employers to voluntarily hire third party consultants to audit their workplaces for compliance with OSHA and safety in general. These consultants must be qualified by OSHA as legitimate safety consultants and will work with employers on an ongoing basis to ensure that the employer is in compliance with OSHA regulations. Once the employer is in compliance, the consultant will issue him a "certificate of compliance," which will exempt him from civil penalties for one year. However, at all times and under all circumstances, OSHA remains free to inspect those work sites, and if that employer is not acting in "good faith" as determined by OSHA, that employer is removed from the program.

The SAFE Act's third party consultation provision codifies the Vice President's intent. It will result in tens of thousands of employers, perhaps more, getting expert safety consultations. It will allow OSHA to target its enforcement resources where they are most needed, and it preserves OSHA's power to inspect any workplace and order abatement as it sees fit.

III. LEGISLATIVE HISTORY AND COMMITTEE ACTION

On February 6, 1999, Senator Enzi introduced S. 385, the Safety Advancement for Employees (SAFE) Act of 1999.

On March 4, 1999, the Senate Subcommittee on Employment, Safety and Training held a hearing on the SAFE Act entitled, "The New SAFE Act: Using Third Party Consultations and Encouraging Safety Programs to Make Workplaces Safer" (S. Hrg. 106-37). The following individuals provided testimony:

The Honorable Charles N. Jeffress, Assistant Secretary, Occupational Safety and Health Administration, Washington, D.C.
 Harry C. Alford, President and C.E.O. of the National Black Chamber of Commerce, Inc., Washington, D.C.

⁵Albert Gore, The Gore Report on Reinventing Government (Washington, D.C. September 1993), at 62-63.

⁶See *id.* at 62.

Robert J. Cornell, Director of Dealer Operations, Director of Environmental Regulations, Chairman of the Safety Committee, Mon Valley Petroleum, McKeesport, PA

Roslyn C. Wade, Assistant Commissioner, Minnesota Department of Labor and Industry, St. Paul, MN

Curtis McGuire, President, Redlegs Lumper Service, Columbus, OH

Margaret Seminario, Director of Occupational Safety and Health, AFL-CIO, Washington, D.C.

Edwin J. Folke, Jr., Partner, Jackson, Lewis, Shnitzler and Krupman, Greenville, SC

Scott Hobbs, President, Hobbs, Inc., New Canaan, CT

On April 13, 1999, the Subcommittee on Employment, Safety and Training had a second hearing on the SAFE Act entitled, "Accident Prevention, the Focus of SAFE" (S. Hrg. 106-53). The following individuals provided testimony:

Ron Hayes, Founder and Director, Families In Grief Hold Together (FIGHT) Project, Fairhope, AL

Charles LeCroy, Tallahassee, FL

Joanne Royce, Director, Program on Worker Health and Safety, Government Accountability Project (GAP), Washington, D.C.

William F. Alcarese, Baltimore, MD

On April 29, 1999, the Senate Committee on Health, Education, Labor, and Pensions met in Executive Session to consider Senate bill 385, the Safety Advancement for Employees Act. The committee voted on the following amendments:

Senator Enzi offered an amendment in the form of a substitute making technical corrections to S. 385. The amendment was accepted by voice vote and was used as the underlying vehicle.

Senator Harkin offered an amendment to require Federal contracts debarment for persons who violate the Act's provisions. The amendment failed (8-10) on a rollcall vote:

YEAS	NAYS
Kennedy	Gregg
Dodd	Frist
Harkin	DeWine
Mikulski	Enzi
Bingaman	Hutchinson
Wellstone	Collins
Murray	Brownback
Reed	Hagel
	Sessions
	Jeffords

Senator Wellstone offered an amendment to protect employees against reprisals from employers based on certain employee conduct concerning safe and healthy working conditions. The amendment failed (8-10) on a rollcall vote:

YEAS	NAYS
Kennedy	Gregg
Dodd	Frist
Harkin	DeWine

Mikulski	Enzi
Bingaman	Hutchinson
Wellstone	Collins
Murray	Brownback
Reed	Hagel
	Sessions
	Jeffords

Senator Wellstone offered an amendment to modify provisions relating to citations and penalties. The amendment failed (9–9) on a rollcall vote:

YEAS	NAYS
Kennedy	Gregg
Dodd	Frist
Harkin	DeWine
Mikulski	Enzi
Bingaman	Hutchinson
Wellstone	Collins
Murray	Brownback
Reed	Hagel
Jeffords	Sessions

Senator Kennedy offered an amendment to strike provisions relating to exemptions from civil penalties for compliance with a certificate of compliance. The amendment failed (8–10) on a rollcall vote:

YEAS	NAYS
Kennedy	Gregg
Dodd	Frist
Harkin	DeWine
Mikulski	Enzi
Bingaman	Hutchinson
Wellstone	Collins
Murray	Brownback
Reed	Hagel
	Sessions
	Jeffords

Senator Kennedy offered an amendment to clarify that the civil penalty exemption does not apply to violations that were willful, repeat, or likely to cause serious harm to employees. The amendment failed (8–10) on a rollcall vote:

YEAS	NAYS
Kennedy	Gregg
Dodd	Frist
Harkin	DeWine
Mikulski	Enzi
Bingaman	Hutchinson
Wellstone	Collins
Murray	Brownback
Reed	Hagel
	Sessions
	Jeffords

Senator Kennedy offered an amendment to limit the exemption of an employer from certain civil penalties based on the employer's receipt of a certificate of compliance. The amendment failed (8–10) on a rollcall vote:

YEAS	NAYS
Kennedy	Gregg
Dodd	Frist
Harkin	DeWine
Mikulski	Enzi
Bingaman	Hutchinson
Wellstone	Collins
Murray	Brownback
Reed	Hagel
	Sessions
	Jeffords

Senator Wellstone offered an amendment to protect the safety and health of State and local employees. The amendment failed (9–9) on a rollcall vote:

YEAS	NAYS
Kennedy	Gregg
Dodd	Frist
Harkin	DeWine
Mikulski	Enzi
Bingaman	Hutchinson
Wellstone	Collins
Murray	Brownback
Reed	Hagel
Jeffords	Sessions

Senator Reed offered an amendment to permit the expenditure of funds to complete certain reports concerning accidents that result in the death of minor employees engaged in farming operations. The amendment failed (9–9) on a rollcall vote:

YEAS	NAYS
Kennedy	Gregg
Dodd	Frist
Harkin	DeWine
Mikulski	Enzi
Bingaman	Hutchinson
Wellstone	Brownback
Murray	Hagel
Reed	Sessions
Collins	Jeffords

Senator Reed offered an amendment to provide for a private right of action and criminal penalties for certain conduct during a third party consultation. The amendment failed (8–10) on a rollcall vote:

YEAS	NAYS
Kennedy	Gregg
Dodd	Frist
Harkin	DeWine

Mikulski	Enzi
Bingaman	Hutchinson
Wellstone	Collins
Murray	Brownback
Reed	Hagel
	Sessions
	Jeffords

Senator Brownback offered an amendment to ensure that individuals with expertise in workplace safety and health are eligible to be certified safety and health consultants. The amendment was accepted by voice vote.

Senator Wellstone offered an amendment to provide for coverage of employees of the Federal Government. The amendment failed on a voice vote.

Senator Murray offered an amendment to provide flexibility in screening certain complaints while protecting fundamental worker rights. The amendment failed (8–10) on a rollcall vote:

YEAS	NAYS
Kennedy	Gregg
Dodd	Frist
Harkin	DeWine
Mikulski	Enzi
Bingaman	Hutchinson
Wellstone	Collins
Murray	Brownback
Reed	Hagel
	Sessions
	Jeffords

The committee then voted (10–8) to report the bill, as amended, on a rollcall vote:

YEAS	NAYS
Gregg	Kennedy
Frist	Dodd
DeWine	Harkin
Enzi	Mikulski
Hutchinson	Bingaman
Collins	Wellstone
Brownback	Murray
Hagel	Reed
Sessions	
Jeffords	

IV. COMMITTEE VIEWS

THIRD PARTY CONSULTATIONS

OSHA leaves small businesses stranded

When OSHA was created by Congress in 1970, its mandate was to assure for all workers safe and healthful working conditions “by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places

of employment.”⁷ The agency, however, has never seriously attempted to “encourag[e] employers and employees in *their* efforts”⁸ to create safe workplaces. Instead, OSHA operates according to an adversarial, command and control mentality which neither encourages good faith employers nor effectively deters bad faith employers. The result is that the majority of small business people who care about worker safety are left stranded without needed compliance help while those employers who do not care simply “play the odds” that they will never be inspected.

OSHA has estimated that 95 percent of American employers “are doing their level best to try to voluntarily comply with OSHA.”⁹ On March 4, 1999, the Subcommittee on Employment, Safety and Training held the first of two hearings on the SAFE Act to highlight how so many of these good faith employers want the safest of workplaces, but are drowning in over 1,200 pages of highly technical safety regulations promulgated by OSHA. All of the employers who came to the hearing testified that they were left on their own to comply with every one of the thousands of rules without helpful assistance from OSHA, and that passing the SAFE Act would give them the tools they need to get safer work sites. As stated by Harry C. Alford, President & CEO of the National Black Chamber of Commerce,

At the White House Conference on Small Business, 1995, Vice President Gore spoke and assured the delegates that OSHA, under the reinvented government, would work as a partner with employers. “There is going to be much less paper work and far fewer fines. We want you in compliance and the fastest, simplest and least painful way to get you there is how we want to do it.” The Vice President said OSHA inspectors would be trained to work with employers as partners. * * * The SAFE Act is the proper vehicle to achieve the ends stated by the Vice President.¹⁰

The sheer volume of OSHA regulations that even the smallest of businesses are expected to read, understand and implement is staggering—comprising of more pages than *Gone With the Wind*, the *Canterbury Tales*, or even the Old and New Testaments of the King James Version of the Bible combined. In fact, many of the regulations bear no relationship to safety at the workplace. Others are so vague that discerning one correct interpretation is impossible. The result is that employers are left to fend for themselves, wasting valuable time and money misinterpreting regulations and making work site improvements that are either not required by OSHA or related to workplace safety, or both. Edwin Folke, former Chairman of the Occupational Safety and Health Review Commission and current partner in the law firm of Jackson, Lewis,

⁷ Occupational Safety and Health Act, 29 U.S.C. § 651(b)(1) (1970).

⁸ *Id.* (Emphasis added.)

⁹ Ellen Byerrum, *Decline in Inspection Numbers Prompts Renewed Enforcement Emphasis*, Says OSHA, (BNA), No. 38, at A-8 (February 26 1997). Author quotes Deputy Assistant Secretary Frank Strasheim who estimates that “probably 95 percent of the employers in the country do their level best to try to voluntarily comply with OSHA.”

¹⁰ The New SAFE Act, Hearing on S. 385 Before the Senate Subcomm. on Employment, Safety and Training, 106th Cong., 1st Sess (1999) [hereinafter *The New SAFE Act Hearing*] (statement of Harry C. Alford, Jr., Chairman and C.E.O. of the National Black Chamber of Commerce, Inc.) at 41.

Schnitzler and Krupman, testified that one major advantage of the SAFE Act was that it would help particularly the smallest of employers wade through complex regulations with professional assistance to improve on-the-job safety and health.

Most employers strive to provide a safe and healthful workplace. However, many employers, especially small businesses, just do not have—and most likely will never be able to achieve—the scientific expertise necessary to address every conceivable workplace hazard that might exist. We must also recognize that many small employers will never have the personnel, nor the financial ability, to implement a comprehensive safety and health program that you would expect to see at a Fortune 500 company. However, encouraging an employer through modest incentives to voluntarily work with a qualified and certified safety and health professional to develop and implement a safety and health program, which is tailored to meet that employer's unique needs, seems appropriate.¹¹

In fact, many small employers have responded to the overwhelming regulatory burden by hiring an outside, private safety professional to audit the workplace for safety hazards and to find out how to implement workable abatement strategies. The results have been overwhelmingly successful. Studies have demonstrated the tangible results that flow from such safety consultations, including sizable reductions in worker injury and illness rates.¹² The testimony of Scott Hobbs lends further support to this conclusion:

The use of third-party auditors to improve workplace safety and health is not a radical or untested new idea. It is a common practice in the construction industry. In fact, 80 of [the Associated General Contractors' (AGC)] 99 chapters across the country provide some form of safety and health audit for AGC members. These audits are a proven means of improving safety and health, especially for small and medium-sized contractors who otherwise would receive no formal safety and health information. In a survey of AGC members, several contractors report their injury and illness rates dropping more than 20% after a third-party safety audit.¹³

The statistics illustrating the importance of safety consultants in the workplace parallel Vice President Gore's call for OSHA to use private safety professionals more while simultaneously requiring less paperwork and issuing fewer fines. In his Report on Reinventing Government, the Vice President concluded that employers

¹¹See *id.* at 74 (statement of Edwin G. Folke, Jr. Partner, Jackson, Lewis, Schnitzler and Krupman).

¹²National Association of Manufacturers, OSHA Reform Survey: Summary of Findings, 1996 (A 1996 survey of 191 companies concluded that the predominant theme of the respondents' occupational success stories was that employee safety and health was improved by the company's own initiatives—including employing safety consultants to anticipate and correct OSHA problems—rather than anything done by OSHA.); James L. Loud, Are your safety inspections a waste of time?, *Professional Safety*, January 1989, at 32 (A 1981 survey of 143 Nebraska firms showed that those conducting safety audits averaged nearly 40 percent fewer accidents than firms without an established audit program.).

¹³The New SAFE Act, Hearing, *supra* note 10, at 86 (statement of Scott Hobbs, President of Hobbs, Inc.).

should be encouraged by OSHA to use private safety professionals as a way to vastly improve the health and safety of American workers “without bankrupting the federal treasury.”¹⁴ Such an approach would “ensure that all workplaces are regularly inspected, without hiring thousands of new employees.”¹⁵ By establishing incentives designed to encourage workplaces to comply, “[w]orksites with good health, safety, and compliance records would be allowed to report less frequently to the Labor Department, to undergo fewer audits, and to submit less paperwork.”¹⁶

Following the Vice President’s lead, even OSHA has recognized the significant value of the third party auditor; it has recommended to employers seeking help from a State OSHA consultation service that in the event of a backlog, the employer “may be able to obtain similar services from [its] insurance carrier or *private consultant* in a more timely fashion.”¹⁷ The General Accounting Office (GAO) has also concluded that an important way for OSHA to “stretch the existing inspection workforce” would be to allow “consultations by OSHA-certified private sector safety and health specialists as substitutes for targeted inspections.”¹⁸

The value of third party audits in improving safety and health at work sites was widely supported at the two hearings on the SAFE Act held by the Subcommittee on Employment, Safety and Training. Three of the witnesses at the March 4, 1999, subcommittee hearing had used a private safety consultant and testified as to the overwhelmingly positive results. In each instance, the small business owner expended substantial amounts of money to hire a private safety professional and fix the identified problems, and the result was that each employer experienced significant reductions in their worker injury and illness rates following the involvement of the safety professional. According to Bob Cornell’s testimony, this occurred in great part because his company both expected and received from the consultant an honest reporting of safety problems that did not gloss over areas of needed improvement.

We knew going in that it would be a comprehensive inspection, and that no stone would be left unturned. But that was our objective. Even though we had requested the inspection, we were not looking for a favorable report. We wanted an honest report. We wanted to know if we had any deficiencies, and if so, where they were. Our goal was to correct those deficiencies and, most importantly, to provide a safe workplace for our employees.

When we received the inspection report, it showed us where we were in compliance with OSHA and where we were not. Using the information contained in the report,

¹⁴ Gore, *supra* note 5, at 62.

¹⁵ *Id.* at 62.

¹⁶ *Id.* at 63.

¹⁷ Occupational Safety and Health Reform and Reinvention Act, Hearing on S. 1423 Before the Senate Comm. on Labor and Human Resources, 104th Cong., 1st Sess. 99 (1995) [Memorandum from John B. Miles, Jr., Director, Directorate of Compliance Programs and Nelson Reyneri, Director, Office of Reinvention, to the OSHA Regional Administrators (May 2, 1995) (emphasis added)].

¹⁸ U.S. General Accounting Office, Options for Improving Safety and Health in the Workplace (Washington, D.C.:GAO/HRD-90-66BR, 1990), at 15.

our Safety Committee followed through on the recommendation we could complete in-house.¹⁹

Also significant was that the employers at the March hearing uniformly testified that they were able to openly communicate with the private consultant about safety problems. This is significant because many employers, and particularly the smallest of employers, are very reluctant to communicate safety problems to OSHA for fear of retaliation. Both Bob Cornell and Curtis McGuire agreed that they were not comfortable calling OSHA for help. As Bob Cornell testified:

I was extremely apprehensive about asking OSHA for help, feeling that would open the door to extensive fines and penalties. Yes, I feared the statement, "Hello, I'm from the government and I'm here to help."²⁰

Curtis McGuire also testified that the open communication he shared with his safety consultant was a key factor in obtaining the improved safety results achieved at his company.

I felt free to explain to him what I expect of my employees and what happens on a daily basis—whether good or bad. This was important to me, because there had been days when my employees had not followed our set safety guidelines, and I did not know how to adequately address and correct this for the future. * * * This freedom to honestly discuss our workplace practices was key to accurately assessing what we could do to prevent injuries and create a safer workplace.²¹

Mr. McGuire went on to testify that he would not feel comfortable talking in such an open manner about his company's safety concerns with an OSHA consultant.

In all honesty, my personal preference is to work with a private consultant hired by us than one provided by OSHA.²²

The substantial training and qualifications required to become a consultant under the SAFE Act

For over 25 years, safety professionals have become experienced at understanding OSHA's requirements and at implementing individual solutions that fit workplaces as diverse as manufacturing plants, funeral homes and retail stores. Indeed, one of the most important benefits provided by third party consultants is that they are not bound to conduct compliance inspections (as OSHA inspectors are), but can also target other safety problems that exist in each work environment. The SAFE Act recognizes and responds to the diversity of small and medium-sized employers by giving them an incentive to call a safety consultant who can work with them to find solutions to their specialized safety needs.

¹⁹The New SAFE Act Hearing, supra note 10, at 45 (statement of Robert J. Cornell, Director of Dealer Operations, Chairman of the Safety Committee, Mon Valley Petroleum, Inc.).

²⁰Ibid.

²¹The New SAFE Act Hearing, supra note 10, at 53 (statement of Curtis McGuire, Owner, Redlegs Lumper Service).

²²Ibid.

Additionally, the SAFE Act specifies that only the most well-trained safety professionals may conduct safety audits under the bill. For example, the bill makes Certified Industrial Hygienists (CIH) and Certified Safety Professionals (CSP) eligible for qualification as consultants. In both cases, the highest degree of safety education and training is required. To become a CIH, individuals must have a bachelor's degree in science, at least 5 years employment in the field, and have passed a comprehensive examination.²³ Board certified safety professionals (CSP) and safety engineers must have a bachelor's degree, have at least 4 years professional safety experience or an advanced degree or certification, and pass a comprehensive national examination.²⁴

Another highly important aspect of becoming a CIH or CSP are the strict ethical codes to which each is bound. Each CIH, for example, is required to follow six Canons of Ethical Conduct, including the mandatory requirement to "Avoid circumstances where a compromise of professional judgment or conflict of interest may arise."²⁵ Similarly, all CSP's are bound by a six-pronged code of professional conduct, which includes the standard to "Hold paramount the safety and health of people."²⁶

These requirements and standards far exceed the education and training prerequisites for becoming an OSHA inspector. Under current regulations, the only formal training required for becoming an OSHA inspector is 6 to 7 weeks of formal classroom instruction at OSHA.²⁷

SAFE Act consultants can be held liable for bad behavior; OSHA inspectors are immune

It is also highly significant that there is a far different standard of liability for private consultants than for OSHA inspectors who act with negligence or even gross negligence in performing their safety duties. Private safety consultants have been uniformly held liable for negligence in performing safety inspections; OSHA inspectors are wholly immune from liability, even for the most negligent behavior.

In one recent case, the Supreme Court of Arkansas held that a private safety consultant owed a duty of reasonable care in making inspections, and could be held liable if he was found to have breached that duty.²⁸ Rulings in other courts have been similar.²⁹ However, similar negligence practiced by an OSHA inspector has the absolute opposite result. Further, the courts have taken a strict interpretation of this immunity, even when the facts of the case illustrate an OSHA inspector has engaged in "disturbing" neg-

²³ American Board of Industrial Hygiene certification handbook, at 7-12.

²⁴ Board of Certified Safety Professionals, Certified Safety Professional Candidate Handbook, May 1997, at 3-5 (See Appendix II).

²⁵ Code of Ethics for the Practice of Industrial Hygiene, Canons of Ethical Conduct.

²⁶ Board of Certified Safety Professionals, Certified Safety Professional Candidate Handbook, May 1997, at 7.

²⁷ Letter from Gregory Watchman, Acting Assistant Secretary, Occupational Safety and Health Administration, to James Talent, Chairman, U.S. House of Representatives Small Business Committee, (August 15, 1997), at 2.

²⁸ *O'Neal Wilson v. Rebsamen Insurance, Inc., et al.*, 957 S.W.2d 678 (Ark. 1997).

²⁹ See *Price v. Management Safety, Inc.*, 485 So.2d 1093 (Ala. 1986); *Santillo v. Chambersburg Engineering Company, et al.*, 603 F. Supp. 211 (E.D. Pa. 1985); *Canipe v. National Loss Control Service Corporation*, 736 F.2d 1055 (5th Cir. 1984).

ligence.³⁰ In one case before the First Circuit, for example, a woman brought suit against negligent OSHA inspectors after suffering horrible injuries when her hair was drawn into a vacuum created by the high-speed rotation of a drive shaft. The court held, however, that its hands were tied. While noting that the “case has disturbing aspects” because “the government’s [OSHA] inspectors appear to have been negligent and the plaintiff suffered grievous harm,” the court was prevented from assigning liability to OSHA due to OSHA’s immunity from suit.³¹

Safety and health groups, former OSHA inspectors support the SAFE Act

The SAFE Act is supported by two of the most prominent safety professional organizations in America, the American Society of Safety Engineers (ASSE) and the American Industrial Hygiene Association (AIHA). Their support is particularly important given the groups’ dedication to and expertise in improving safety and health and given their frequent support of many of OSHA’s programs and regulations.

ASSE and AIHA have said that they support the SAFE Act because it embodies suggestions that they have long believed should be part of an effective OSHA. Testifying on behalf of AIHA, Gayla McClusky, a former OSHA inspector and current Treasurer and member of the Board of Directors of AIHA, testified that:

There are more than six million workplaces that are under the jurisdiction of OSHA. Currently, there are approximately 2,500 compliance officers in the Federal and state programs. Given the millions of workplaces, it should be obvious that most will never see a compliance officer. OSHA’s goal should be that every employer has routine assessments of their facilities conducted by a competent health and safety professional to identify and correct health and safety hazards. Therefore, strategies such as third party assistance can be a part of the solution.³²

ASSE has taken a similar position in a letter endorsing the SAFE Act:

Utilizing the skills and abilities of qualified private sector safety professionals as a third party consultation medium benefits the employer, the government, and most important of all—the American worker.³³

Other former OSHA inspectors have endorsed the SAFE Act as well. William Alcarese, a former Federal and State OSHA inspector, testified that the SAFE Act is a good idea because it would help employers take a more active view in how they address safety in the workplace.

³⁰ *Irving v. United States*, 162 F.3d 154, 169 (1st Cir. 1998).

³¹ *Id.* at 169.

³² The New SAFE Act Hearing, *supra* note 10 at 79 (statement of Gayla McCluskey, Treasurer, American Industrial Hygiene Association).

³³ Letter from Jerry P. Ray, CSP, President, American Society of Safety Engineers, to James Talent, Chairman, U.S. House of Representatives Small Business Committee (October 7, 1997), at 5.

Safety management is a process not an event. S. 385 addresses safety management as a methodology to tackle work place safety issues. It provides employers resources to tackle and learn through the aid of competent trained safety professionals what this safety stuff really means. It allows for the approach to address hazards where the losses are occurring, and where the potential problems are festering.³⁴

Steve Cave, former Assistant Area Director/Team Leader with OSHA, has also strongly supported the SAFE Act. Speaking at the press conference accompanying introduction of the SAFE Act, Mr. Cave remarked that:

[The SAFE Act] will provide a direct incentive to private-sector employers to improve workplace safety and health by enabling them to correct hazards in the most effective manner possible. In addition, use of private-sector third-party consultants will empower OSHA to focus its efforts in areas that will provide more direct benefit to employee safety and health.³⁵

Victims rights advocates support the SAFE Act

As discussed above, the Subcommittee on Employment, Safety and Training's first hearing on March 4, 1999, highlighted how OSHA is not helping the 95 percent of small business people who care about worker safety read through or implement the thousands of pages of safety regulations. The subcommittee's second hearing on April 13, 1999, focused on the flip side of that coin, and looked at how OSHA is not deterring the thin layer of bad employers from willfully violating safety laws either. At its second hearing, the subcommittee heard from family members who lost loved ones in workplace accidents and how OSHA neither helped prevent these accidents from occurring nor adequately responded after the accidents took place. They agreed that the SAFE Act would make OSHA a more effective agency as well as improve workplace safety and health across the board.

Ron Hayes, founder and director of the Families In Grief Hold Together ("FIGHT") Project, was one of the witnesses at this hearing. Mr. Hayes began the FIGHT Project after his nineteen year old son Patrick was killed on the job in 1993. He testified that passing the SAFE Act would put OSHA "on the right track" and be a proactive step towards ending worker injuries and fatalities.

It is still disheartening to see so many people injured and killed on the job, I believe any initiative that brings about good positive change and oversight to this agency, such as this bill, should be embraced and put to the test. It has been said "if we do not learn from our past, we are doomed to repeat it in the future." [W]e have given OSHA 29 years to make a difference, can we really wait many

³⁴ Accident Prevention: The Focus of SAFE, Hearing on S. 385 Before the Senate Subcommittee on Employment, Safety and Training, 106th Cong., 1st Sess (1999) [hereinafter Accident Prevention Hearing] (statement of William Alcarese) at 29.

³⁵ Press conference to introduce the SAFE Act in the House and Senate, 105th Cong., 1st Sess. (September 30, 1997) (statement of Steve Cave).

more years to find out if this agency will learn to become a proactive partner with everyone in the work place?³⁶

Mr. Hayes specifically targeted OSHA's unsuccessful "reactive enforcement methodology" as being the reason that OSHA has been both unresponsive to the good faith employer's compliance needs and absent from the bad faith employer's work site all together.³⁷ He also testified that OSHA's approach forces the good faith companies to lose out to the bad faith employers in the marketplace as well.

[The] good businesses build into their product or bids safety measures and are sometimes undercut by other uncaring business owners, so under our present OSHA system, what is their benefit?

The bad companies know OSHA is ineffective and because of the length of time it will take OSHA to inspect every work site or get around to inspecting them, the odds are on their side and even if caught, they know OSHA will not do much. This bill will give the good business some incentive to continue their good work and will bring more business into safety compliance, saving life and limb.³⁸

Charles LeCroy also testified at the Subcommittee's April hearing. Mr. LeCroy's son, Lance, was killed in 1994 in an industrial explosion in Florida. Mr. LeCroy testified that OSHA needed to be more proactive in approaching workplace safety, and urged the subcommittee members to pass the SAFE Act.

OSHA has been in the past and today is still in need of substantial alteration if they are to meet the goals of providing health and safety for millions of workers as Congress has mandated. We just ask the subcommittee to know that OSHA has fallen seriously short of insuring work sites free of hazards. * * * Please lead the way to enacting S. 385. That piece of legislation will be a giant step for millions of men and women who go someplace everyday earning their living. * * * While S. 385 may not be the perfect piece of legislation [sic] it is considered a significant move to enhance the image, integrity and audibility of OSHA. All the while OSHA has been known as the big watchdog of work sites. Let's enable the watch dog to be better trained, work better trained trainers, to be more responsible, to be more cooperative with employers and employees, to take the lead and be proactive rather than merely to wait for something to happen.³⁹

Two groups opposed to the SAFE Act: OSHA and the national AFL-CIO

Eleven witnesses testified about the SAFE Act in the two hearings dedicated to the bill in the Subcommittee on Employment, Safety and Training this Congress. Nine of those witnesses testified

³⁶ Accident Prevention Hearing, *supra* note 34, at 10 (statement of Ron Hayes, Founder, Families In Grief Hold Together (FIGHT) Project).

³⁷ *Id.* at 9.

³⁸ *Id.* at 9-10.

³⁹ Accident Prevention Hearing, *supra* note 34, at 16 (statement of Charles LeCroy).

in favor of the bill, including two former OSHA compliance officers, safety professionals, small businesses, the former Chairman of the Occupational Safety and Health Review Commission, victim rights advocates, and fathers of sons killed in workplace accidents.⁴⁰ Every one of these diverse groups thought the SAFE Act was a good idea; every one believed that the SAFE Act embodied a system that would encourage the good employers to find out how to achieve safety voluntarily while also targeting and punishing the thin layer of bad work sites. Two groups have opposed the bill: the Occupational Safety and Health Administration (OSHA) and the National AFL-CIO.

Both Charles Jeffress, Assistant Secretary of OSHA, and Margaret Seminario, Director of Occupational Safety and Health for the AFL-CIO, testified against the bill. In fact, the heart of OSHA's and the AFL-CIO's opposition is what the committee sees as the great virtue of the bill: the SAFE Act utilizes and relies on the most qualified and highly trained safety professionals to get the Nation's work sites into compliance. This new approach is what the committee considers to be the crown jewel of the SAFE Act.

It takes years of schooling and training to become a private safety consultant under the SAFE Act;⁴¹ it only takes about 6 to 7 weeks of formal classroom training to become an OSHA inspector.⁴² Private safety professionals are also held responsible for their actions as they are bound by strict ethical codes and can be held legally liable for negligent behavior. It is for these reasons that the committee so strongly supports the SAFE Act's utilization and reliance on highly trained safety professionals to get workplaces into compliance. However, OSHA and the National AFL-CIO rest almost all of their opposition to the bill on this same basis.

Assistant Secretary Jeffress' testimony in opposition to the bill suggested that government employees (such as OSHA compliance officers) have more integrity when it comes to protecting worker safety and health than do private safety professionals. Assistant Secretary Jeffress testified as follows:

[T]he private sector is driven by the market, not a mandate to protect employee safety and health.

The consultant would feel pressured to sell penalty exemptions without rigorously inspecting workplaces in order to create business.⁴³

One of Assistant Secretary Jeffress' additional concerns was that, as he testified, OSHA would be unable to adequately discipline "unconscientious consultants" who could inflict harm on "thousands

⁴⁰ See generally, The New SAFE Act, Hearing on S. 385 Before the Senate Subcomm. on Employment, Safety and Training, 106th Cong., 1st Sess (1999); Accident Prevention: The Focus of SAFE, Hearing on S. 385 Before the Senate Subcomm. on Employment, Safety and Training, 106th Cong., 1st Sess (1999).

⁴¹ The bill makes Certified Industrial Hygienists (CIH) and Certified Safety Professionals (CSP) eligible for qualification as consultants. In both cases, the highest degree of safety education and training is required. To become a CIH, individuals must have a bachelor's degree in science, at least 5 years employment in the field, and have passed a comprehensive examination. Board certified safety professionals (CSP) and safety engineers must have a bachelor's degree, have a least 4 years professional safety experience or an advanced degree or certification, and pass a comprehensive national examination. See Board of Certified Safety Professionals, Certified Safety Professional Candidate Handbook, May 1997, at 3-5 (See Appendix II).

⁴² Watchman letter, *supra* note 27, at 2.

⁴³ The New SAFE Act Hearing, *supra* note 10, at 16 (statement of Charles Jeffress, Assistant Secretary, Occupational Safety and Health Administration)

of working Americans,”⁴⁴ despite the fact that a consultant could be held criminally liable under Section 17(g) of the OSH Act for making “any false statement, representation or certification,”⁴⁵ and could have his professional license revoked by the professional certifying body for bad behavior.⁴⁶ Interestingly, however, Assistant Secretary Jeffress has noted that these penalties—criminal liability under section 17(g) and “appropriate personnel action”—are a sufficient deterrent for OSHA inspectors.⁴⁷

Statements such as these which suggest that private safety professionals are less ethical than OSHA inspectors are unacceptable and downright false. What the evidence in fact suggests is that OSHA inspectors are just as subject to ethical failings as anyone else. Some evidence even suggests that some OSHA inspectors—with the power to ruin or save a company based on the number of citations and monetary fines levied—have engaged in behavior that is suspect.⁴⁸

The testimony of the AFL-CIO witness, Margaret Seminario, paralleled that of Assistant Secretary Jeffress. One additional point of note that Ms. Seminario made was that the SAFE Act should be opposed because “even the best companies, with the best safety and health programs can have serious safety and health hazards that put workers in danger.”⁴⁹ This statement, however, only begs the question that the SAFE Act attempts to answer: why should the best companies with the best plans in place be hit over the head with OSHA fines rather than helped into compliance under the SAFE Act? The point is that good companies are currently doing what they think needs doing now, and threats from OSHA will not improve workplace safety. In these workplaces, what the employer needs is effective help, not additional coercion.

What OSHA and the AFL-CIO want is what ultimately, it can never have: total control for OSHA to dictate how worker safety should be achieved without turning a critical eye to OSHA’s most serious shortcomings and seeking solutions that remedy problems. With only about 2,500 inspectors for the whole country⁵⁰, OSHA is only able to inspect every work site once every 167 years.⁵¹ OSHA inspectors simply cannot spend enough time at any given workplace to really understand the particular safety needs of that workplace. Therefore, just as OSHA in its current set up is no real help to employers who want to comply, it is no real deterrent to that thin layer of employers who are insensitive to safety. Those employers know that the chance of a serious OSHA inspection is very small. Even OSHA has admitted that in the vast majority of cases, it does not inspect workplaces where a death occurs until after the

⁴⁴ Ibid.

⁴⁵ Occupational Safety and Health Act, 29 USC 666(g).

⁴⁶ Letter from Jerry P. Ray, President, American Society of Safety Engineers, to Alexis Herman, Secretary, Department of Labor (January 6, 1998), at 4.

⁴⁷ Letter from Charles Jeffress, Assistant Secretary, Occupational Safety and Health Administration, to Michael B. Enzi, Chairman, U.S. Senate Employment, Safety and Training Subcommittee (April 16, 1999), at 2.

⁴⁸ See Michael Dresser, Ticket gift may violate ethics laws, *The Sun*, September 30, 1996, at 1B; Jim Morris, Dangerous bridge led to OSHA official’s resignation, *Houston Chronicle*, Fall 1994, at 13.

⁴⁹ The New SAFE Act Hearing, *supra* note 10, at 61 (statement of Margaret Seminario, Director of Occupational Safety and Health, AFL-CIO).

⁵⁰ Watchman letter, *supra* note 27 at 4.

⁵¹ AFL-CIO, *supra* note 4, at 3.

fatality,⁵² when it is too late for the deceased worker and his family.

Why the SAFE Act is needed and so strongly supported.

OSHA has suggested that, if passed, the SAFE Act will not be used by employers. It bases this conclusion on a survey of employers conducted by North Carolina's state OSHA plan. This survey asked employers whether they would prefer to have an OSHA consultant perform safety consultations at their work sites or a private consultant, and the majority of employers responded that they would rather use an OSHA consultant.⁵³

This survey, however, misses the point entirely. The first and most obvious problem with OSHA's conclusion is that these employers were asked whether they would use a private consultant under the current system; they were not asked if they would want to pay for and use a private consultant if the SAFE Act passed and they had an incentive to do so. Such a question would clearly yield quite different results.

The second disconnect with OSHA's conclusion is that the SAFE Act is the most supported OSHA reform bill in history. Dozens of business groups have applauded the SAFE Act for giving businesses the tools they need to get safer workplaces, including the American Bakers Association, the American Dental Association, the American Farm Bureau Federation, the American Health Care Association, the Associated Builders Contractors, Inc., the Associated General Contractors of America, the Coalition on Occupational Safety & Health, the Food Distributors International, the National Association of Convenience Stores, the National Association of Home Builders, the National Association of Manufacturers, the National Black Chamber of Commerce, the National Cattleman's Beef Association, the National Cotton Council of America, the National Cotton Ginners' Association, the National Federation of Independent Businesses, the National Funeral Directors Association, the National Mining Association, the National Paint and Coatings Association, the National Restaurant Association, the National Roofing Contractors Association, National Small Business United, the Painting and Decorating Contractors of America, the Printing Industries of America, Inc., the Small Business Survival Committee, the Society of American Florists, the Synthetic Organic Chemical Manufacturers Association, and the United States Chamber of Commerce.

Indeed, when the panel of small business witnesses was asked by Senator Wellstone (D-MN) at the subcommittee's March hearing why the SAFE Act was needed given the fact that employers are already using safety consultants, the strong response from the panelists was that the incentive contained in the SAFE Act was instrumental in getting more employers involved in safety. Scott Hobbs testified as follows:

[The SAFE Act] would allow us just one more carrot to try to bring these people into the safety blanket. Once they

⁵² Associated Press, *supra* note 2, at 1A.

⁵³ The New SAFE Act Hearing (Jeffress testimony), *supra* note 43, at 24.

try it, they very well might find out all the other benefits that can come along.⁵⁴

Mr. Cornell strongly agreed that adding a “kicker to a small business person who does not want to generally get involved with big government anyway” would help bring even more employers into the safety fold.⁵⁵

The new SAFE Act: Safety and Health Plans added based on OSHA’s SHARP program

One of the most important changes made to the SAFE Act in the 106th Congress is that the third party consultation section of the bill has been strengthened significantly. This section now requires that employers who voluntarily opt into the SAFE Act’s consultation program must develop work site-specific safety and health programs before they receive a Certificate of Compliance. The new language in the SAFE Act regarding these “safety plans” was taken directly from one of OSHA’s successful consultation programs, the Safety and Health Achievement Recognition Program, or SHARP. SHARP is a consultation-based program available to businesses who want to work with an OSHA consultant and develop a safety and health program in return for 1 year free from programmed inspections.⁵⁶ The key to this program’s success is that it is voluntary, it helps employers achieve compliance by working with a trained safety consultant, and it contains incentives to encourage employers to seek solutions to safety and health hazards.

The outstanding results of the SHARP program will be amplified by its inclusion in the SAFE Act. Due to the limited resources that OSHA dedicates to consultation, very few employers are able to take advantage of the SHARP program. However, under the SAFE Act, the safety benefits of the program will be available to every employer on a voluntary basis.

An important and additional benefit of including OSHA’s voluntary, consultation-based SHARP program in the SAFE Act is that it strikes a compromise. OSHA has been moving forward in promulgating a mandatory safety and health program rule applicable to all employers regardless of size or type. The rule is not only mandatory but it is also a “performance-based” rule, the elements of which are almost completely subjective in nature. For example, the rule requires a program “appropriate” to conditions in the workplace, an employer to evaluate the effectiveness of the program “as often as necessary” to ensure program effectiveness, and “where appropriate,” to initiate corrective action.⁵⁷

Employers are justifiably concerned because the draft rule offers no definition of these terms to help them in their compliance efforts. They are also concerned because there is no objectivity to the rule. OSHA is answering these concerns by promising that their inspectors will be fair in their application of the rule and flexible in their interpretations. That does not satisfy employers who have safety and health programs in place or are working to develop such

⁵⁴ The New SAFE Act Hearing (Hobbs testimony), supra note 13, at 94.

⁵⁵ The New SAFE Act Hearing (Cornell testimony), supra note 19, at 56–57.

⁵⁶ www.osha.gov/oshprogs.consult.html

⁵⁷ See OSHA Draft Proposed Safety and Health Program Rule, 29 CFR 1900.1, Docket No. S&H–0027, October 1998.

programs in a way that meets with OSHA's approval without the threat of fines. As stated by Brian Landon, a small business owner who participated in OSHA's Small Business Advocacy Review Panel process for OSHA's draft safety and health program rule-making,

I find the vague language and terms in the proposed rule troubling and scary. Very small business employers would be overwhelmed implementing the vague and sweeping mandates that are part of the rule.⁵⁸

Many others have also questioned OSHA's mandatory draft rule, which, as Edwin Folke, former Chairman of the Occupational Safety and Health Review Commission has pointed out, has a questionable and inadequate scientific record.⁵⁹ The alternative, he testified, is the SAFE Act's voluntary standard.

I also believe that a benefit of the SAFE Act is that it would provide a voluntary mechanism for employers to implement a safety and health program, which is tailored to that employer's unique facility and work processes. In addition, it would allow employers a way to measure the effectiveness of that program with the assistance of a knowledgeable, certified consultant. The kind of proactive consultation program that the SAFE Act envisions can be implemented without an undue burden on OSHA, either financially or in terms of personnel.⁶⁰

The SAFE Act combines the need to promote a safety and health program standard that is sanctioned by OSHA with the need of the employer to know specifically how to achieve regulatory compliance. By keeping the SAFE Act consultation-based, employers will have full access to personalized compliance assistance. Neither will there be a threat of subjective enforcement under the SAFE Act because good-faith employers cannot be penalized for good-faith compliance efforts. The SAFE Act is the workable alternative to encourage and implement safety and health programs that work to improve conditions for America's workers.

The New SAFE Act: Other changes

Another important change to the SAFE Act is that the bill has been streamlined to strengthen the consultation theme by removing provisions that do not relate to consultation. The importance of such streamlining is that, by highlighting consultation, the SAFE Act is able to maintain a one-theme message that consultations work and that their availability should be expanded to more employers.

During markup of a prior version of the SAFE Act in the 105th Congress (S. 1237), of the minority's nine intents to file amendments related directly to the SAFE Act, the SAFE Act of the 106th Congress (S. 385) adopted over seven of those nine intents. When S. 385 was introduced this Congress, three entire sections had been

⁵⁸ Small Business Advocacy Review Panel Report, OSHA's draft proposed rule on safety and health programs, January 4, 1999, (comments of Brian Landon, owner, Landon's Carwash and Laundry) at 4.

⁵⁹ The New SAFE Act Hearing (Folke Testimony), *supra* note 11, at 75.

⁶⁰ *Ibid.*

removed, penalties were strengthened for bad-acting consultants, and OSHA's right to inspect was clarified. And as specified directly above, S. 385 also requires participating employers to implement a safety and health plan using language taken directly from OSHA's SHARP program. These massive changes and overhaul demonstrate that the majority has considered and accommodated most of the minorities concerns. However, every time the majority has made such efforts, the minority has moved the goal post.

The reasonableness of this year's SAFE Act cannot be denied. In addition to the changes made to the third party consultation section of the bill, the SAFE Act contains a number of well-reasoned programs that either parallel or improve OSHA's current programs.

CONTINUING EDUCATION AND PROFESSIONAL CERTIFICATION FOR CERTAIN OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION PERSONNEL

This section of the bill requires that the OSHA personnel performing inspections, consultations and standards promulgation functions must obtain private sector professional certification within 2 years of initial hire at OSHA. In addition, OSHA employees who carry out inspections or consultations under this section must also receive ongoing professional education and training every 5 years of employment. This makes obvious sense because under current regulations, the only formal training required for becoming an OSHA inspector is 6 to 7 weeks of classroom instruction at OSHA.⁶¹ Such minimal requirements pale in comparison to the requirements to become a private safety professional. To become a Certified Industrial Hygienist (CIH), for example, individuals must have a bachelor's degree in science, at least 5 years employment in the field, and have passed a comprehensive examination.⁶² Board certified safety professionals (CSP) and safety engineers must also have a bachelor's degree, have at least 4 years professional safety experience or an advanced degree or certification, and pass a comprehensive national examination.⁶³

Nonetheless, the SAFE Act, which includes the provision which would ensure that OSHA is better-trained and able to meet the safety needs of an ever-changing work force, was opposed by the minority.

EXPANDED INSPECTION METHODS

This section of the bill, which would empower OSHA in its own discretion to investigate complaints other than through an on-site inspection (such as by phone or fax), was also opposed by the minority even though it directly parallels one of OSHA's own successful programs. OSHA's "New Nonformal Complaint Process," or "phone/fax" procedure, provides as follows:

OSHA has reached an important milestone in building on its successes in process improvement * * * [A] new non-formal complaint process has been developed and piloted,

⁶¹ Watchman letter, *supra* note 27, at 2.

⁶² American Board of Industrial Hygiene certification handbook, at 7-12.

⁶³ Board of Certified Safety Professionals, Certified Safety Professional Candidate Handbook, May 1997, at 3-5 (See Appendix II).

demonstrating significant reductions in complaint turn-around time. *By responding to nonformal complaints with the telephone and fax, the pilot offices have been [sic] able to reduce the time to achieve hazard abatement by more than 75%. * * * We are now prepared to implement the new nonformal complaint pilot program in all federal offices.*⁶⁴

Under the phone/fax provision in the bill, such inspections would be made for all complaints relating to safety and health just as currently occurs at OSHA. The minority, however, opposed the provision and offered an amendment that would allow an employee to make complaints for reasons other than safety and health. The committee opposes efforts that would force OSHA, the agency dedicated solely to preserving worker safety and health, to use its limited budget to respond to non safety and health related complaints. The minority would not support the phone/fax provision without this expansive language, and thus, opposed the SAFE Act's phone/fax provision despite the fact that it is current OSHA policy.

WORK SITE-SPECIFIC COMPLIANCE METHODS

This section of the bill allows OSHA citations to be vacated if an employer can demonstrate that the employees of such employer are protected by alternative methods that equal or are more protective than the OSHA regulation. It was also opposed by the minority. In the minority views of the committee report on the SAFE Act during the 105th Congress, the minority stated as follows:

[This section] of the bill would create an entirely new statutory defense to an OSHA citation, based on an employer's demonstration that employees were protected by alternative methods as protective or more protective than those required by the standard the employer violated.⁶⁵

This section, however, does not create an "entirely new statutory defense" to an employer under OSHA." Far from it. In fact, this section is a mere offshoot of current OSHA policy, which states as follows:

At times employers may not be able to comply fully with a new safety or health standard in the time provided due to a shortage of personnel, materials or equipment. In situations such as these, employers may apply to OSHA for a temporary variance from the standard. In other cases, employers sometimes are using methods, equipment or facilities that differ from those prescribed by OSHA, but that the employer believes are equal to or better than OSHA's requirements. In applying for a permanent variance, the employer must be able to show that his/her facility or method of operation provides employee protection "at least as effective as" that required by OSHA's standard.⁶⁶

⁶⁴ www.osha-slc.gov (Emphasis added).

⁶⁵ Safety Advancement for Employees Act of 1997, S. Rep. No. 105-159, 105th Cong., 2nd Sess (1998) at 43.

⁶⁶ www.osha-slc.gov

Nonetheless, despite the fact that the SAFE Act parallels OSHA's current policy, the minority remains opposed.

TECHNICAL ASSISTANCE PROGRAM

This section of the legislation would allow States to give technical assistance through cooperative agreements with OSHA and be reimbursed in an amount that equals 90 percent. To increase health and safety awareness, the SAFE Act mandates that not less than 15 percent of OSHA's total amount of funds appropriated for a fiscal year shall be used for education, consultation, and outreach. The SAFE Act consultation services under this pilot program must occur no later than 4 weeks after being requested by an employer. In addition, where violations were discovered during the consultation, OSHA would issue a warning in lieu of citations and conduct no more than 2 visits to the workplace to determine if corrective measures have occurred. If the violation was not corrected, OSHA could issue a citation. The committee has found that small businesses often lack the necessary resources to seek a third party consultant. Moreover, small businesses who currently request a free consultation under existing State cooperative agreements can confront an excessive waiting period in some States. Under this pilot program, small businesses could still seek a free consultation, or opt for an expedited consultation in a participating State.

VOLUNTARY PROTECTION PROGRAMS

In addition to providing cooperative initiatives for employers to establish employer/employee participation programs and seek third party consultation services, S. 385 would also codify Voluntary Protection Programs (VPP) created by OSHA in 1982. VPP currently recognizes larger work sites for their extraordinary commitment to health and safety. After an extensive work site review, OSHA awards VPP status to work sites with effective health and safety programs and superior lost workday records. Such work sites are removed from OSHA's programmed inspection list.

By codifying the VPP, the committee intends to provide stability and permanence to these important programs. Moreover, the committee recognizes that codification reaffirms the federal commitment to providing the private sector with the occupational safety and health information needed to comply with the law. In addition to codifying the VPP, S. 385 would also require OSHA to encourage small businesses (as the term is defined by the Administrator of the Small Business Administration) to participate in the voluntary protection program by carrying out assistance and outreach initiatives and to develop program requirements that address the needs of small businesses.

PREVENTION OF ALCOHOL AND SUBSTANCE ABUSE

This section of the SAFE Act allows employers to establish drug and alcohol testing programs. The effect that drugs and alcohol have on the workplace is staggering. In 1992, for example, the Bureau of Labor Statistics' Census of Fatal Occupation Injuries (CFOI) program collected 1,355 toxicology reports from 43 States and the District of Columbia, roughly one report for every four of

the 1992 fatalities. In about one-sixth of the cases for which toxicology reports were available, fatally injured workers tested positive for toxic substances, most frequently alcohol followed by cocaine and marijuana.⁶⁷

What's more, even the Department of Labor encourages employers to establish drug and alcohol testing programs based on its finding that drug and alcohol use by employees has a hugely negative effect on worker safety and health. Some of DOL's findings are as follows:

- Seventy-three percent of all current drug users aged 18 and older (8.3 million adults) were employed in 1997. This includes 6.7 million full-time workers and 1.6 million part-time workers.⁶⁸
- The National Institutes of Health recently reported that alcohol and drug abuse cost the economy \$246 billion in 1992.⁶⁹
- In 1990, problems resulting from the use of alcohol and other drugs cost American businesses an estimated \$81.6 billion in lost productivity due to premature death and illness; 86% of these combined costs were attributed to drinking.⁷⁰
- A survey of callers to the national cocaine helpline revealed that 75 percent reported using drugs on the job, 64 percent admitted that drugs adversely affected their job performance, 44 percent sold drugs to other employees, and 18 percent had stolen from co-workers to support their drug habit.⁷¹
- Alcoholism causes 500 million lost workdays each year.⁷²

To respond to the growing problem of drug and alcohol abuse in the workplace, the DOL has recommended that employers implement drug testing programs.⁷³ The committee has responded to this by including a strong but voluntary drug and alcohol testing program section in the SAFE Act that would give OSHA the discretion to conduct testing of employees (including managerial personnel) of an employer for use of alcohol or controlled substances during any investigation of a work-related fatality or serious injury. Indeed, even the testimony of Assistant Secretary Jeffress was favorable with regard to the voluntary drug testing program established in the SAFE Act.⁷⁴

The minority, however, has opposed these efforts in the past, stating that “[i]nserting OSHA into this process seems unnecessary and unwise.”⁷⁵ This despite the fact that drug and alcohol abuse

⁶⁷ William M. Marine, M.D., and Tracy Jack, Analysis of Toxicology Reports from the 1992 Census of Fatal Occupational Injuries, Compensation and Working Conditions, October 1994.

⁶⁸ www.dol.gov [quoting United States Department of Health and Human Services, National Household Survey on Drug Abuse, (Rockville, MD, August 1998)].

⁶⁹ www.dol.gov [quoting National Institute on Drug Abuse and the National Institute on Alcoholism and Alcohol Abuse, The Economic Costs of Alcohol and Drug Abuse in the United States. (Rockville, MD, 1992)].

⁷⁰ www.dol.gov [quoting Substance Abuse and Mental Health Services Administration, United States Department of Health and Human Services, Substance Abuse and Mental Health Statistics Sourcebook, 3 (Rockville, MD, May 1995)].

⁷¹ www.dol.gov (quoting National Cocaine Helpline. “1-800-COCAINE.” Summit, N.J. 1987).

⁷² www.dol.gov [National Association of Treatment Providers, Treatment is the Answer: A White Paper on the Cost-Effectiveness of Alcoholism and Drug Dependency Treatment (Laguna Hills, CA, March 1991)].

⁷³ www.dol.gov

⁷⁴ The New SAFE Act Hearing, (Jeffress testimony), *supra* note 43, at 7 (attachments section).

⁷⁵ Safety Advancement for Employees Act of 1997, S. Rep. No. 105-159, 105th Cong., 2nd Sess (1998) at 50.

on the job is not only common, but is in fact one of the leading causes of workplace accidents and fatalities.

DISCRETIONARY COMPLIANCE ASSISTANCE

Under current law, inspectors are not permitted to consult with an employer on how to abate a hazard, but are required to issue a citation. The SAFE Act would give inspectors the ability to provide inspectors with technical or compliance assistance in correcting a violation discovered during an inspection or investigation without issuing a citation. This consultative flexibility would be entirely discretionary on the part of the inspector and would not undermine the agency's enforcement responsibilities.

This section would permit, not require, OSHA inspectors to issue warnings in lieu of citations in appropriate situations. The OSH Act states that inspectors must issue a citation when they see a violation, although the act does provide for a "de minimis notice" (which is not a citation and carries no penalty) under sec. 9(a) of the act for violations that have "no direct or immediate relationship to safety or health."⁷⁶ The committee expects OSHA inspectors to use good judgment. If they see a problem, then perhaps a citation is required. But if the employer has tried to comply with the law and the problem is not serious, a warning could be in order. The committee recognizes that current law fails to provide inspectors with this type of flexibility.

The constitutionality of the SAFE Act

On April 29, 1999, Senator Kennedy received a letter from the Department of Justice (DOJ) which he shared with the committee regarding DOJ's constitutional concerns with the Safety Advancement for Employees ("SAFE") Act of 1999. The letter offered a discourse on the separation of powers and delegation doctrines under the Constitution, and concluded that the SAFE Act likely violates both constitutional mandates. This letter, however, is inaccurate.

It is critical to understand that the arguments proffered in the DOJ's letter against the constitutionality of the SAFE Act are premised entirely on DOJ's interpretation of what authority the consultant actually has. Indeed, if DOJ's interpretation of the third party consultant's role were factual, most of their analysis could be supported. But because the interpretation is wholly incorrect, both the factual and legal premise upon which the DOJ bases its argument must be strongly questioned.

According to the letter, the underlying reason that the DOJ finds the SAFE Act to be unconstitutional is that the third party consultants envisioned by the bill would be acting in the role of surrogate OSHA compliance officers, inspecting and finding where and how an employer has broken OSHA regulations without having the authority to do so. According to the DOJ, such activities are "central executive functions" and go to the heart of what "executive agencies typically do."⁷⁷ The SAFE Act, states the DOJ letter, is likely unconstitutional because it "delegates to private entities outside

⁷⁶ Occupational Safety and Health Act, 29 USC 651(b)(1) (1970).

⁷⁷ Letter from Jon P. Jennings, Acting Assistant Attorney General, Department of Justice, to Senator Edward M. Kennedy, Ranking Member, U.S. Senate Health, Education, Labor and Pensions Committee, (April 29, 1999), at 2.

the Executive branch substantial authority to execute the laws,”⁷⁸ and as such, “implicates the Secretary’s power to make case-by-case determinations as to whether admittedly applicable law has been violated”⁷⁹ and “constrain[s] the executive branch’s implementation of the law.”⁸⁰ The letter even goes so far as to state that the bill would “eliminat[e] the executive’s control over the enforcement of the law.”⁸¹

This analysis, however, misses the point entirely. The fundamental role of the SAFE Act consultant is not to “implement the legislative mandate”⁸² by imposing penalties for noncompliance with the OSH Act as stated by the DOJ. Instead, third party consultants are involved only to exempt “good faith” employers from a 1 year civil penalty. By passing the SAFE Act, Congress would simply be exercising its clear and unquestionable authority to enhance and reduce OSHA penalties.

There are sufficient examples where Congress has acted to exercise this authority for the purpose of establishing a penalty ceiling, for mitigating penalties, or for exempting from civil penalties altogether. It is clear, for example, that Congress may not be prohibited from establishing civil penalties for environmentally harmful acts.⁸³ In addition, Congress has acted within its authority to increase the maximum civil penalty limits for a violation of the Mine Act⁸⁴ and the Occupational Safety And Health Act.⁸⁵ Of even greater relevance, in 1996, Congress passed the Small Business Regulatory Enforcement and Fairness Act (SBREFA), which instructed each agency regulating the activities of small businesses to “establish a policy or program within one year of enactment * * * to provide for the reduction, and under the appropriate circumstances waiver, of civil penalties for violations of a statutory or regulatory requirement.”⁸⁶ The Environmental Protection Agency (EPA) responded to SBREFA by promulgating Incentives For Self-Policing⁸⁷, a policy that waives or mitigates gravity-based civil penalties for those companies who conduct their own audit and disclose and correct violations. It was unquestionably EPA’s intent—flowing from the intent of Congress in passing SBREFA—to promote penalty waivers and compliance assistance and show “leniency for good actors in order to ensure continued protection of the American public and of our Nation’s environment.”⁸⁸ It is plain that Congress, and the agencies following Congress’ lead, have the authority to

⁷⁸Id. at 2.

⁷⁹Id. at 4.

⁸⁰Id. at 2.

⁸¹Id. at 5.

⁸²Id. at 2.

⁸³*United States v. General Motors Corp.*, 403 F. Supp. 1151 (1975). See also Federal Water Pollution Control Act (Clean Water Act) Amendments of 1972, 33 U.S.C.A. Sect. 1321(b)(6).

⁸⁴See Federal Mine Safety And Health Act Amendments of 1990, 30 U.S.C.A. Sect. 820(a).

⁸⁵29 U.S.C.A. Sect. 666 (e).

⁸⁶Small Business Regulatory Enforcement Fairness Act of 1996, Sec. 223.

⁸⁷60 Fed. Reg. 66706, Dec. 22, 1995

⁸⁸Department of Justice, Environmental And Natural Resources Division Statement Before The Senate Subcommittee On Administrative Oversight And The Courts, May 21, 1996, p.4. Since its issuance, EPA’s policy has been widely used, generating disclosure of violations from an estimated 470 entities at more than 1,880 facilities. The policy has also “encouraged companies to expand their use of environmental auditing and compliance management systems.” EPA, Office of Regulatory Enforcement, Audit Policy, Vol. 4, Number 1. See also 64 Fed. Reg. 26745 (May 17, 1999).

show “leniency for good actors” by mitigating and waiving penalties.

The DOJ’s letter also implicates the Supreme Court case of *Morrison v. Olson* to bolster its argument that the SAFE Act violates the separation of powers and delegation doctrines.⁸⁹ This case, however, has no application whatsoever to the relevant sections of the SAFE Act. *Morrison* dealt with investigative and prosecutorial authority in criminal cases, and, indeed, the committee fully agrees that criminal law enforcement and prosecutorial authority should be left solely to the executive branch. But again, the SAFE Act does not eliminate the control of the executive branch over law enforcement. The SAFE Act simply prevents penalties on certain civil violations for good faith actors. If an OSHA inspector discovers that the employer did not make a good faith effort to remain in compliance, if there has been a fundamental change in the hazards of the workplace, or if the employer has engaged in behavior rising to criminal levels, the inspector may vigorously pursue all penalties available. The third party audit provision in no way immunizes the employer from recklessness or intentional misconduct. Nor does it in any way create an evidentiary privilege which would stymie OSHA investigations into wrongdoing. The OSHA inspector may continue his inspections unabated and uninterrupted.

In a similar vein, the Supreme Court has upheld the constitutionality of the Professional Standards Review Law⁹⁰ in which Congress designated private health organizations with the authority to regulate their peers,⁹¹ subject at least theoretically, to Health and Human Services control.⁹² In fact, authorities have noted that the only enactment of Congress ever invalidated for delegating too much authority outside Congress was the Bituminous Coal Act of 1935 in the case of *Carter v. Carter Coal Company*.⁹³ In overturning this law, the Supreme Court in *Carter* held that the government intrusted too much power in one party to regulate the private property of another—including competitors—by allowing coal producers and miners to fix maximum hours of labor, minimum wages, penalize defectors with a “prohibitive” tax and prohibition from government contracting.⁹⁴ It is without question that the third party consultation provision of the SAFE Act in no way infringes on interstate commerce or fosters unfair methods of competition as the law in question was held to do in *Carter*.

The fundamental issue under the SAFE Act is whether OSHA’s mandate to “encourag[e] employers and employees in their efforts to reduce the number of occupational safety and health hazards” is bolstered by providing positive incentives for voluntary compliance and remediation. The issue is not whether such incentives should be provided in lieu of enforcement for those who shirk their responsibility under the law. Passing the SAFE Act will have no effect whatsoever on OSHA’s ability to punish the bad actors; the SAFE

⁸⁹ *Morrison v. Olson*, 487 U.S. 654 (1988).

⁹⁰ 42 U.S.C. 1320c.

⁹¹ *Assoc. of Am. Physicians and Surgeons v. Weinburger*, 395 F. Supp. 125 (1975), aff’d without opinion, 423 U.S. 975 (1975).

⁹² Harold J. Krent, Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government, 85 Nw. U. L. Rev. 62, 96, n. 108 (1990).

⁹³ *Carter v. Carter Coal Company*, 298 U.S. 238 (1936).

⁹⁴ *Id.* at 311. The Court invalidated the Coal Act as a violation of the commerce clause and due process clause. See also Krent Article, 85 Nw. U. Law Rev. at 88, fn. 81.

Act only applies to the good actors who can have penalties waived for good faith efforts.

V. CONCLUSION

For 2 years, the committee has attempted to modernize OSHA and make it more effective. And for 2 years, the misinformation campaign about the SAFE Act has persisted. There have been reports alleging that the SAFE act is an attempt to dismantle OSHA, articles that maintain that employers will be able to buy immunity from penalties despite non compliance, and remarks that OSHA officials are more ethical than private professionals because “the private sector is driven by the market, not a mandate to protect employee safety and health.”⁹⁵ This despite the fact that the committee has listened and responded to the minority’s concerns. The SAFE Act has incorporated major changes to address the concerns of the minority: it has been substantially narrowed in scope, it has tightened controls on third party consultants, and it now includes much of OSHA’s own SHARP program language. The minority has yet to take one step toward compromise.

What keeps happening is that as the committee talks about what has been changed, or dispels myths about the bill, the minority changes the subject. They say they are opposed to one provision, and then when it is removed, they say that they are opposed to another. The committee is tired of playing this game. The new SAFE Act demonstrates the committee’s commitment to compromise, but it cannot continue to compromise over and over again while the bar is moved higher and higher, when no constructive suggestions are received, and when compromise is not reciprocated.

There is no perfect fix to the crisis that is facing America’s workers, but the SAFE Act comes close. What the SAFE Act would do is tap the thousands of safety and health professionals who have the highest level of training and have them work with employers to get them into compliance with safety laws. If the employer gets into compliance with the law—and not before—that employer can receive a certificate of compliance which will exempt him from civil penalties only for 1 year. However, at all times and under all circumstances, OSHA remains free to inspect these work sites, and if that employer is not acting in “good faith” as determined by OSHA, that employer is removed from the program. If the consultant is not acting in good faith, he loses a career. Both can be subject to monetary penalties for bad behavior as well. It’s as simple as that.

The SAFE Act is supported by testimony from two former OSHA inspectors, safety professionals, small businesses, the former Chairman of the Occupational Safety and Health Review Commission, victims rights advocates, and fathers of sons killed in workplace accidents. For those in the minority who believe that the SAFE Act is so wrong that it is beyond passage—beyond even compromise—it should be asked why so many diverse groups think that the SAFE Act is a good idea. It should be asked why people like Charles LeCroy and Ron Hayes who have lost children in horrific workplace accidents and have so much at stake in the fight to keep workers safe say that the SAFE Act is a good bill that will save

⁹⁵The New SAFE Act Hearing (Jeffress testimony), *supra* note 43, at 16.

workers lives. It simply is not possible that everyone who has signed on in favor of the SAFE Act is wrong about what it will take to improve worker safety. And by shutting down effective discussion on the bill and by failing to take constructive action, it is the American worker who loses out.

The SAFE Act is, at its heart, a bill that takes a step away from the adversarial approach to worker safety that virtually everyone agrees is without benefit or substantive result. It is a step toward a proactive approach to achieve safer workplaces that involves employees, employers and OSHA. By striking a new and healthier balance for America's workers, it will result in tens of thousands of employers getting expert safety consultations; it will allow OSHA to target its resources where they are most needed; and unlike other OSHA reform bills, it preserves in full OSHA's power to inspect any workplace and order abatement as it sees fit.

VI. SECTION-BY-SECTION ANALYSIS

Section 3: Third party consultation provision

Establishes a program to allow employers to voluntarily enlist the help of highly-trained safety and health professionals to create safe and healthful work sites for the benefit of the American worker. Employers who fully utilize the service of qualified safety and health professionals under this program will be exempt for a period of 1 year from any civil penalty prescribed under the OSH Act. This does not affect the right of OSHA to inspect and investigate workplaces covered by a certificate of compliance.

Section 4: Establishment of special advisory committee

Provides that no later than 6 months after the date of enactment, the Secretary will establish an advisory committee pursuant to the Federal Advisory Committee Act for the purpose of advising and making recommendations to the Secretary with respect to the establishment and implementation of certification standards for individuals participating in third party audit and evaluation programs. The committee will be broadly represented by employees (3), employers (3), the general public (2), and states with safety and health plans (1). All committee members are required to have expertise in workplace safety and health.

Section 5: Continuing education and professional certification for certain OSHA personnel

Requires the federal employees charged with enforcing the OSH Act and crafting new standards be capable and qualified. Calls on all OSHA personnel performing inspection, consultation and standards promulgation functions requiring knowledge of safety or health disciplines to obtain private sector professional certification within 2 years of initial hire at OSHA. In addition, OSHA personnel who carry out inspections or consultations under this section must also receive ongoing professional education and training every 5 years of employment.

Section 6: Expanded inspection methods

Empowers OSHA, entirely in its own discretion, to investigate complaints other than through an on-site inspection. Some complaints may only take a phone call or written inquiry to clear up; this provision will allow OSHA to have the discretion to save its inspectors' time for investigating the most serious of problems.

Section 7: Work site specific compliance methods

All workplaces are unique and require individual worker safety solutions. In this vein, citations in violation of OSHA regulations will be abandoned if an employer can demonstrate that the employees of such employer were protected by alternative methods equally or more protective of the workers' safety and health.

Section 8: Technical Assistance Program

It is often the case that employers who request a free consultation from a State plan wait for a period of 16 to 18 months prior to receiving the service. Meanwhile, the employer is left vulnerable to routine OSHA inspection and fines.

This section broadens the availability of consultation services by states and OSHA to employers who voluntarily seek a safe and healthful workplace. It codifies OSHA's current consultation policy in cooperation with states with a state safety and health plan by establishing a "pilot" program within 90 days of enactment in 3 states for a period of 2 years to provide expedited consultation services to small business employers (defined by the Small Business Administration). OSHA may charge a nominal fee for such expedited consultation services. Under the pilot program, OSHA must provide consultation services no later than 4 weeks after the employer's request.

To further enhance such services, this section also requires that 15 percent of the total amount of annual funds appropriated to OSHA be used for education, consultation, and outreach efforts.

Section 9: Voluntary protection programs

Codifies OSHA's Voluntary Protection Program (VPP) to further establish cooperative agreements that encourage comprehensive safety and health management systems. This section requires the Secretary of Labor to encourage small business participation in the VPP program by providing outreach and assistance initiatives and developing program requirements that address the needs of small businesses.

Section 10: Prevention of alcohol and substance abuse

The bill addresses the fact that preventing drug- and alcohol-related deaths and injuries is imperative to increasing worker safety and health in America by permitting employers to establish drug and alcohol abuse testing programs.

Substance abuse testing programs will permit the use of on-site or off-site urine screening or other recognized screening methods, so long as the confirmation tests are performed in a lab subject to subpart B of the mandatory guidelines for federal workplace drug testing programs, State certification, the Clinical Laboratory Improvements Act, or the College of American Pathologists. The alco-

hol testing program would take the form of alcohol breath analysis and would conform to any guidelines developed by the Secretary of Transportation for alcohol testing of mass transit employees under the Department of Transportation and Related Agencies Appropriations Act, 1992.

The provisions prescribed under this section preempt any provisions of State law to the extent that such State law is inconsistent with this section.

Section 11: Discretionary compliance assistance

Would permit, not require, OSHA inspectors to issue warnings in lieu of citations in appropriate situations. Current law fails to provide OSHA with this flexibility. Under this section, OSHA inspectors could rely on good judgment; if they see a problem, then perhaps a citation is required. But if the employer has tried to comply with the law and the problem is not serious, a warning could be in order.

VII. APPLICATION OF LAW TO LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act (CAA), requires a description of the application of this bill to the legislative branch. S. 385 amends the Occupational Safety and Health Act of 1970 (OSH Act) to further improve the safety and health of working environments, and for other purposes. S. 385 amends section 9 of the OSH Act to consider employer knowledge of an alleged violation when issuing a citation, and to permit demonstration by an employer of satisfactory alternative methods of protection of the safety and health of its employees. S. 385 further amends section 9 to allow inspectors to exercise discretion regarding the issuance of a citation. Section 215(a)(1) of the CAA requires each employing office and each covered employee of the legislative branch to comply with the provisions of section 5 of the OSH Act. Section 215(b) of the CAA requires that the remedy for a violation shall be an order to correct the violation as would be appropriate under section 13(a) of the OSH Act. Section 215(c)(1) and (2) of the CAA grants the General Counsel of the Office of Compliance the authority granted the Secretary of Labor in sections 8(a), 8(d), 8(e), 8(f), 9 and 10 of the OSH Act. Section 215(c)(4) of the CAA grants the Board of Directors of the Office of Compliance the authority granted the Secretary of Labor in sections 6(b)(6) and 6(d) of the OSH Act. S. 385 amends sections 8(f) and 9 of the OSH Act. Therefore, the changes made by S. 385 to sections 8(f) and 9 apply to the legislative branch.

VIII. REGULATORY IMPACT STATEMENT

The committee has determined that there will be only a negative increase in the regulatory burden of paperwork as a result of this legislation.

IX. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 27, 1999.

Hon. JAMES M. JEFFORDS,
Chairman, Committee on Health, Education, Labor, and Pensions,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 385, the Safety Advancement for Employees Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Cyndi Dudzinski (for federal costs), Susan Sieg (for the state and local impact), and Theresa J. Devine (for the private-sector impact).

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 385—Safety Advancement for Employees Act of 1999

Summary: S. 385 would direct the Secretary of Labor to establish programs to help employers comply with the Occupational Safety and Health Act and avoid citations. Those programs would include third-party consultation services and expedited consultation services to small businesses.

Implementing the bill would result in additional costs to the Occupational Safety and Health Administration (OSHA). The precise amounts would depend on how provisions in the bill would be implemented and the response to the new programs. CBO estimates such costs could be several million dollars over the first two years, and about \$3 million per year thereafter, subject to the availability of appropriations. In addition, enactment of S. 385 would eliminate fines levied by OSHA in cases where companies demonstrate that they have implemented a safety measure at least as stringent as the OSHA regulation being violated. This could decrease the total amount of fines collected; therefore, pay-as-you-go procedures would apply. However, CBO estimates the amounts involved would be less than \$500,000 a year.

S. 385 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA). However, that mandate would impose no costs on state, local, or tribal governments. Other provisions of the bill would impose costs on state governments, but such costs would be incurred voluntarily. S. 385 contains a private-sector mandate on workers related to testing for alcohol or controlled substances, but CBO estimates that the direct costs to workers would be negligible.

Estimated cost to the Federal Government: For purposes of this estimate, CBO assumes that the necessary amounts will be appropriated for each year. The estimate is based on information from OSHA and from professional safety and health associations. Because this bill would create several new programs within OSHA, CBO cannot provide a precise estimate. The costs of these provisions would depend on how the new programs are implemented

and on the extent to which employers and safety and health professionals participate in them.

Third-Party Consultation Services Program and Special Advisory Committee

Sections 3 and 4 would require the Secretary of Labor to provide third-party consultation services within 18 months of enactment. Under this program, an employer could hire a consultant to inspect the workplace and write a consultation report identifying violations and providing for a safety and health program to be established and maintained by the employer. A consultant would give an employer that met the requirements of such a report a certificate of compliance that would exempt that employer from any civil penalty for a period of one year. The exemption would not apply if the employer did not make a good faith effort to remain in compliance as required under the declaration of compliance or to the extent that there was a fundamental change in the hazards of the workplace. The exemption could be extended for another year if the employer passed a re-inspection by a certified consultant.

To implement this program, the Secretary would establish an advisory committee to provide recommendations for third-party consultation services. The Secretary also would be responsible for approving consultants and maintaining a public registry of the names of those who are approved. The Secretary could revoke the status of a qualified consultant or employer if that individual or employer fails to meet the requirements of the program.

Implementing sections 3 and 4 could increase or decrease spending by OSHA. On the one hand, OSHA would pay for the meetings and support staff for the advisory committee. OSHA also would need additional staff to process the applications of individuals that apply to be certified as consultants, maintain a public data bank containing the names of certified individuals, and monitor practicing consultants to ensure compliance. On the other hand, the same number of workplaces could be inspected using fewer OSHA staff, because CBO expects that OSHA would rarely inspect a workplace that had received a certificate of compliance. On balance, CBO expects the net impact of implementing these provisions would likely be a cost of several million dollars over the 2000–2004 period, subject to appropriation of the necessary amounts.

Potential Costs. Most of the costs for implementing sections 3 and 4 would arise in processing applications and policing the program to prevent fraud and abuse. Without knowing the required qualifications or the demand for consultants, CBO cannot estimate how many individuals would apply for certification as consultants. For example, if 25,000 people applied, OSHA would spend \$6 million dollars over the first few years to process applications. Under this scenario, CBO estimates that OSHA would employ 32 full-time employees at about \$90,000 a year (in 2000 dollars) to process 8,000 applications per year. CBO estimates that maintaining the program after the initial pool of applications is processed and policing the program to ensure proper compliance would cost \$1 million annually.

Potential Savings. If OSHA otherwise would have inspected a workplace that successfully participated in the consultation pro-

gram and S. 385 freed those enforcement efforts to be applied to another establishment, then these provisions could reduce the resources needed at OSHA to maintain the same inspection status for each workplace. That result would occur if giving employers the option to hire private consultants reduces the number of workplaces that OSHA would need to inspect. CBO estimates, however, that any such decrease would be negligible for several reasons. First, many of the people eligible to be consultants might inspect few workplaces. Second, it is unlikely that OSHA would otherwise have inspected many of the employers seeking certificates of compliance. Third, a certification would not exempt employers from inspections. So until the program was well-established, OSHA would still inspect high-hazard workplaces whether or not they received a certificate of compliance under the new program of third-party consultation services.

Education and certification for OSHA personnel

Section 5 of S. 385 would require federal employees responsible for enforcing the Occupational Safety and Health Act to meet the same eligibility requirements as a qualified individual under the consultation program created by sections 3 and 4. Many of the inspectors currently working for OSHA do not meet the criteria specified in the bill, and many could require additional training and certification if OSHA inspectors were held to these standards. Because the bill would allow the Secretary to determine criteria by which current employees would qualify, however, CBO estimates this provision would result in minimal additional costs.

Worksite-specific compliance methods

Section 7 would require citations to be waived if employers could demonstrate that employees were protected by methods at least as stringent as the OSHA regulation being violated. By giving employers more leverage and thereby increasing their incentive to contest OSHA citations, this provision could increase the proportion of citations that are contested and the amount of resources OSHA would devote toward litigation. Under current law, about 9 percent of cases involving a citation are contested and OSHA spends about 5 percent or \$6 million a year of its enforcement resources on such cases. The response to this provision and its effect on OSHA's resources cannot be predicted. Based on information from OSHA, this could increase the number of cases by about 25 percent. If this did occur, CBO estimates it would increase the amount OSHA spends on litigation by \$2 million a year.

Technical Assistance Program

Section 8 would require the Secretary to establish a pilot program that would provide expedited consultation services to small business in return for a nominal fee. The program would occur in three states for a maximum period of two years. Within 90 days of the termination of the pilot project, the Secretary would submit a report to the Congress evaluating the pilot program. In addition, the bill would codify the existing state consultation program, but reduce the amount OSHA reimburses for travel expenses by 10 per-

cent. CBO estimates that these provisions would not have a significant effect on federal spending.

Prevention of alcohol and substance abuse

Section 10 would permit employers to test for alcohol and substance abuse in accordance with federal guidelines. It also would authorize the Secretary to test employees for use of alcohol or controlled substances during any investigations of a work-related fatality or serious injury. CBO estimates that the cost of overseeing the drug and alcohol programs or of any additional drug and alcohol tests the Secretary would perform as a result of this provision would not be significant.

Pay-as-you-go consideration: The Balanced Budget and Emergency Deficit Control sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. Implementing worksite-specific compliance methods could affect fines collected by OSHA in cases where companies demonstrate that they implemented a safety measure at least as stringent as the OSHA regulation being violated. Amounts collected from fines and penalties are considered revenues and are thus subject to pay-as-you-go procedures. However, CBO estimates the amount involved would be less than \$500,000 a year.

Estimated impact on state, local, and tribal governments: Section 10 of the bill would preempt state laws that are consistent with provisions that establish a voluntary alcohol and drug abuse testing program. CBO considers such preemptions of state law to be mandates under UMRA. This mandate would impose no costs on state, local, or tribal governments.

Section 8 would codify an OSHA regulation under which OSHA enters into cooperative agreements with states to provide consultation services to employers. Currently, states agreeing to participate in this program receive federal reimbursement for 90 percent of the cost of consultation services provided as well as the full cost of training and out-of-state travel. S. 385 would retain the current reimbursement for consultation services, but decrease the reimbursement for training and travel to 90 percent of the costs incurred. Such costs would be voluntary and not significant.

CBO has determined that all other provisions of this bill contain no intergovernmental mandates as defined in UMRA.

Estimated impact on the private sector: Section 10 would impose a private-sector mandate, as defined by UMRA, by giving the Secretary of Labor the authority to conduct tests for alcohol or controlled substances on private-sector workers during investigations of work-related fatalities or serious injuries. CBO estimates that taking such tests would impose negligible or no monetary costs on affected workers.

Estimate prepared by: Federal costs: Cyndi Dudzinski. Impact on State, local, and tribal governments: Susan Sieg. Impact on the private sector: Theresa J. Devine.

Estimate Approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

X. VIEWS OF SENATORS KENNEDY, DODD, HARKIN, MIKULSKI,
BINGAMAN, WELLSTONE, MURRAY, AND REED

INTRODUCTION

S. 385, the “Safety Advancement for Employees (SAFE) Act of 1999,” is unconstitutional legislation that would jeopardize the safety and health of American workers. The SAFE Act would delegate substantial authority for implementation of the Occupational Health and Safety (OSH) Act¹ to private sector “consultants” selected and hired by employers themselves, seriously undermining the ability of the Occupational Safety and Health Administration (OSHA) to protect American workers from health and safety hazards in the workplace. The Department of Justice has “serious reservations” about the constitutionality of the SAFE Act, while Harvard Law Professor Lawrence Tribe states flatly that S. 385 cannot pass constitutional muster. For these and other reasons, Secretary of Labor Alexis Herman has recommended a presidential veto. The SAFE Act is unsafe for American workers and for the U.S. Constitution, and it should be rejected.

SECTION 3—DELEGATION OF OSHA ENFORCEMENT AUTHORITY TO
PRIVATE SECTOR CONSULTANTS

The fundamental flaw of the SAFE Act lies in Section 3, its core provision. Under the “Third Party Consultation Services Program” established in Section 3, employers would be allowed to hire their own private “consultants” to determine their compliance with OSHA regulations and the OSH Act.² Employers who thereafter receive a “certificate of compliance” from their private consultants would be exempt from OSHA civil penalties for a period of one year.³

Constitutionality

The SAFE Act is unconstitutional. The Justice Department Office of Legal Counsel warns that it has “serious reservations about the constitutionality of the SAFE Act.”⁴ Lawrence H. Tribe, Tyler Professor of Constitutional Law at Harvard Law School, concludes that, “strictly as a federal constitutional matter, I believe that Section 3—Third Party Consultation—cannot pass muster.”⁵

¹ 29 U.S.C. § 651(b)(1).

² S. 385, Section 3 (adding Section 8A(e)).

³ S. 385, Section 3 (adding Section 8A(f)).

⁴ Letter from Jon P. Jennings, Acting Assistant Attorney General, Department of Justice, to Senator Edward M. Kennedy, Ranking Member, U.S. Senate Committee on Health, Education, Labor, and Pensions (April 29, 1999), at 5 (hereinafter cited as Justice Letter). A complete copy of the Justice letter is appended at the conclusion of the Minority Views.

⁵ Letter from Lawrence H. Tribe, Ralph S. Tyler Jr., Professor of Constitutional Law, Harvard University Law School, to Senator Edward M. Kennedy, Ranking Member, U.S. Senate Committee on Health, Education, Labor, and Pensions (September 14, 1999), at 1 (hereinafter cited as Tribe Letter). A complete copy of the Tribe letter is appended at the conclusion of the Minority Views.

Section 3 of the SAFE Act suffers from two constitutional infirmities. First, it would violate the separation of powers by delegating core executive branch functions to private sector “consultants,” thereby undermining the ability of the executive branch to execute the laws. Second, this delegation of core executive branch functions to private sector consultants would be broad enough to require their appointment as “Officers of the United States” pursuant to the Appointments Clause, which would be inconsistent with the selection procedures set forth in S. 385.

Both the Justice Department and Professor Tribe focus much of their constitutional analysis on Section 3’s violation of the separation of powers. The Justice Department states that Section 3 “appear[s] to raise substantial constitutional concerns involving the separation of powers.”⁶ Professor Tribe agrees: “It is my conclusion that S. 385 would violate the separation of powers.”⁷

The Justice Department explains that “a statute violates the separation of powers if it ‘impermissibly undermine[s]’ the powers of the Executive Branch * * * or ‘disrupts the proper balance between the coordinate branches [by] prevent[ing] the executive branch from accomplishing its constitutionally assigned functions,’”⁸ citing the Supreme Court case of *Morrison v. Olson*.⁹ “The SAFE Act implicates these principles,” Justice argues, “because it delegates to private entities outside the executive branch substantial authority to execute the laws.”¹⁰

The Justice Department argues that the “substantial authority” which the SAFE Act delegates to private sector consultants would include “central executive functions.”

Indeed, “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.” *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). Private consultants under the bill would be doing precisely what executive agencies typically do, administer a federal regulatory program by determining whether individuals are in compliance with a federal statute and regulations. Moreover, the bill would constrain the executive branch’s implementation of the law in a tangible way—by making employers exempt for a period of one year from civil penalties otherwise assessable under the OSH Act.¹¹

Professor Tribe agrees that “there is nothing in the statutory scheme that prevents these consultants from performing a significant and indeed powerful role in implementation and execution of a congressional enactment, OSHA.” “There is no question,” he adds, “that the private ‘consultants’ * * * are entrusted with important governmental functions.”¹² The delegation of such “central executive functions” would “prevent the executive branch from accom-

⁶Justice Letter, at 1.

⁷Tribe Letter, at 3.

⁸Justice Letter, at 2.

⁹487 U.S. 654, 695 (1988).

¹⁰Justice Letter, at 2.

¹¹*Ibid.*

¹²Tribe Letter, at 1.

plishing its constitutionally assigned functions,”¹³ and would therefore violate the separation of powers.

Professor Tribe also makes the related argument that Section 3 of the SAFE Act would violate the Appointments Clause of the Constitution:

It seems impossible to escape the conclusion that the enforcement and anti-enforcement powers of consultants appointed under Section 3 of S. 385 would be broad enough to require their appointment as “Officers of the United States” in accord with the strictures of Article II, Section 2, Clause 2—something for which the proposed law obviously does not provide. * * * Accordingly, under the separation of powers principles articulated in *Buckley*¹⁴ and adhered to ever since, those consultants would have to be appointed by the President or, pursuant to federal legislation, by the Courts of Law or the Heads of Departments. * * * Although the Secretary [of Labor] is given a role in certifying a given consultant to perform the services required, the selection process is placed entirely in the self-interested hands of the employers regulated by OSHA—the very antithesis of the public-minded process that the Constitution is structured to ensure in the choice of those who would wield significant power over the public under laws enacted by Congress.¹⁵

Professor Tribe asserts that Section 3 of the SAFE Act “would transgress the Constitution’s carefully wrought structure for the appointment of those exercising significant public authority in implementing the laws of the United States.”¹⁶

Professor Tribe concludes with this withering judgment:

For all these reasons, and for the reasons additionally elaborated by the Department of Justice in its analysis of April 28, 1999, it is my conclusion that S. 385 would violate the separation of powers, would impermissibly delegate discretionary federal authority to private individuals, would resemble the line-item veto in entrusting to individuals outside Congress the power effectively to nullify on a temporary basis duly enacted provisions of federal legislation, and would transgress the Constitution’s carefully wrought structure for the appointment of those exercising significant public authority in implementing the laws of the United States.¹⁷

The Majority fails to refute the Justice Department’s analysis.¹⁸ The Majority essentially makes three related arguments: (1) penalty exemptions fall within Congress’s “unquestionable authority to enhance and reduce OSHA penalties”; (2) the Justice Department’s constitutional analysis is premised on the mistaken belief that the SAFE Act would give private consultants authority to impose

¹³ See *Morrison v. Olson*, 487 U.S. 654, 695 (1988).

¹⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁵ Tribe Letter, at 2 (emphasis in original).

¹⁶ *Ibid.*, at 3.

¹⁷ *Ibid.*

¹⁸ The letter from Professor Tribe was received after the Majority completed its report.

OSHA penalties; and (3) while delegating authority to issue penalties might be impermissible, providing for penalty exemptions is not. None of these arguments withstands scrutiny.

First, while Congress clearly does have “unquestionable authority to enhance and reduce OSHA penalties,” this is not what the SAFE Act does. S. 385 does not uniformly reduce or raise penalties. It delegates to private consultants the authority to grant, on a case-by-case basis, exemptions from fines otherwise assessable under the OSH Act. As the Justice Department letter explains, the authority to issue such penalty exemptions is a “central executive function” whose delegation to private consultants violates the separation of powers.

Second, the Justice Department’s conclusions are by no means premised on the assumption that the SAFE Act would give private consultants authority to impose OSHA penalties. The Majority contends in its Report that

the underlying reason that the DOJ finds the SAFE Act to be unconstitutional is that the third party consultants envisioned by the bill would be acting in the role of surrogate OSHA compliance officers, inspecting and finding where and how an employer has broken OSHA regulations without having the authority to do so.

“The fundamental role of the SAFE Act,” the Majority asserts, “is not to ‘implement the legislative mandate’ by imposing penalties for noncompliance with the OSH Act, as stated by the DOJ.” The Justice Department states no such thing, however.

On the contrary, the Department quite clearly identifies the specific provisions of the SAFE Act that would impermissibly delegate “central executive branch functions,” quoting extensively from S. 385 itself. Justice argues that private consultants would be “implementing the legislative mandate” of the OSH Act by interpreting the law prior to issuing a certificate of compliance, and by issuing a penalty exemption based on that interpretation.¹⁹ Neither of these “central executive branch functions” involves “imposing penalties for noncompliance with the OSH Act,” and Justice is obviously under no illusion that they do. Justice cites only one “tangible way” in which the SAFE Act would constrain “the executive branch’s implementation of the law,” and that is the delegation of authority to grant penalty exemptions.²⁰

Third, it certainly follows from the Justice Department’s analysis that issuing penalties would be a “central executive function.” But the fact that the SAFE Act does not delegate this particular function has no bearing whatsoever on the “central executive functions” that it does delegate. Delegation of these “central executive branch functions,” by itself, violates the separation of powers, regardless of whether there may be additional functions whose delegations might also violate this constitutional principle.

The Majority concedes that “if DOJ’s interpretation of the third party consultant’s role were factual, most of their analysis could be supported.” But the Majority fails to identify any respect in which DOJ’s interpretation of S. 385 is not factual. The constitutional in-

¹⁹ Justice Letter, at 2.

²⁰ *Ibid.*

firmities diagnosed by the Justice Department and Professor Tribe are fatal to the SAFE Act.

Conflict of interest and accountability

The delegation of penalty exemption authority to private sector consultants is deeply objectionable for policy reasons that closely parallel these constitutional arguments—conflict of interest and lack of accountability.

Professor Tribe's Appointments Clause analysis, for example, underscores the inherent conflict of interest that arises when employers are allowed to select and hire their own regulators. Professor Tribe notes that, under Section 3 of the SAFE Act,

the selection process is placed entirely in the self-interested hands of the employers regulated by OSHA—the very antithesis of the public-minded process that the Constitution is structured to ensure in the choice of those who would wield significant power over the public under laws enacted by Congress.²¹

In testimony before the Employment, Safety and Training Subcommittee ("the Subcommittee") on March 4, 1999, Assistant Secretary of Labor Charles N. Jeffress elaborated on the problems of conflict of interest raised by Section 3 of the SAFE Act:

The third party consultation provision creates a powerful incentive for consultants to please employers in order to create and maintain business. The consultant's business interest in conducting inspections and granting penalty exemptions could place him or her at odds with the interests of employee safety and health. * * * The consultant would feel pressured to sell penalty exemptions without rigorously inspecting workplaces in order to create business.²²

The conflict of interest of private consultants under the SAFE Act would jeopardize the health and safety of American workers. Consultants would likely feel pressure to either approve an employer's program or risk termination or non-renewal of their contract. S. 385 would not prevent employers from "shopping" for consultants until they find one willing to either approve their operations or recommend minimal abatement. Moreover, the SAFE Act does nothing to stop employers from obtaining penalty exemptions from their own employees.²³ Public functions such as implementation of the OSH Act with respect to employers should not be delegated to employees who are subject to discipline, discharge, or being passed up for promotion.

This inherent conflict of interest has nothing to do with the relative ethical integrity of OSHA inspectors and private sector consultants, contrary to the claims of the Majority. OSHA inspectors are prohibited from receiving money from regulated employers on

²¹ Tribe Letter, at 2–3.

²² Hearing on S. 385 Before the Senate Subcommittee on Employment, Safety, and Training, 106th Congress, 1st Session (March 4, 1999) (hereinafter cited as Jeffress Testimony), at 16.

²³ Senator Enzi stated at the Subcommittee's March 4 hearing that S. 385 does not envisage employees qualifying as consultants, but S. 385 contains no such restriction. Hearing on S. 385 Before the Senate Subcommittee on Employment, Safety, and Training, 106th Congress, 1st Session (March 4, 1999), at 27.

the basis of the exact same presumption of an inherent conflict of interest.²⁴ There is an obvious and undeniable conflict of interest when any person selected and hired by the employer is entrusted to implement laws that regulate the employer.

Professor Tribe and the Justice Department also highlight the lack of accountability of private consultants under the SAFE Act. Professor Tribe notes, “[T]hese consultants are removable by the Secretary only for failure to perform their duties or for malfeasance in office, and are not subject to any day-to-day supervision of any executive officer.”²⁵ The Justice Department adds: “Because these private consultants would not be directly responsible to the President, the public’s ultimate check on negligent or arbitrary government action would be weakened.”²⁶

In his testimony before the Subcommittee, Assistant Secretary Jeffress elaborated on the problem of lack of accountability. “The bill provides OSHA with little recourse against consultants whose improper certifications put workers at risk,” he told the Subcommittee. While OSHA can discipline its own compliance officers, it “would have no meaningful recourse against a consultant who was overly generous in granting penalty exemptions due to incompetence or negligence.”²⁷ Even in cases of “fraud, collusion, malfeasance, or gross negligence,” OSHA’s only recourse would be to expel the offending consultant from the program.²⁸

Obstruction of OSHA’s ability to protect workers

The Justice Department argues that delegation of authority to grant penalty exemptions would inherently “constrain the executive branch’s implementation of the law in a tangible way.”²⁹ Indeed, there are several reasons why penalty exemptions would, as Assistant Secretary Jeffress testified before the Subcommittee, “undermine the Occupational Safety and Health Administration’s (OSHA) ability to protect workers.”³⁰

First, Section 3 penalty exemptions would significantly impede OSHA’s efforts to abate dangerous workplace hazards. Under the OSH Act, OSHA has no sanction other than penalties to compel abatement of workplace hazards, and no incentives it can offer employers to correct hazards voluntarily.³¹ In fact, OSHA typically obtains abatement through penalty reductions. If OSHA had no penalty authority, obtaining abatement by recalcitrant employers would be difficult—if not impossible—without some other type of available sanction.³² Section 3 of the SAFE Act would deprive

²⁴ 18 U.S.C. § 201.

²⁵ Tribe Letter, at 1–2.

²⁶ Justice Letter, at 5.

²⁷ The Majority argues that OSHA would have no need to discipline consultants, because the consultants could be sued by wronged employers. However, the Majority rejected the Reed Amendment, which would have given injured workers and the heirs of deceased workers legal recourse for gross negligence or willful misconduct by private consultants.

²⁸ Jeffress Testimony, at 16.

²⁹ Justice Letter, at 2.

³⁰ Jeffress Testimony, at 15.

³¹ OSHA has no statutory authority to obtain abatement orders, per se. Abatement may be ordered by the Occupational Safety and Health Review Commission (OSHRC), but only after an OSHA citation becomes a Final Order of the OSHRC. This can be a lengthy process, however, frustrating OSHA’s efforts to obtain immediate abatement of serious workplace hazards.

³² There is a criminal sanction, but only if the citation is willful and the violation has caused the death of an employee. Then OSHA can refer the case to the Justice Department for prosecution.

OSHA of its most effective—and in most cases, its only—means of protecting workers from imminent workplace hazards.

Second, civil fines are one of OSHA's most effective tools for reducing deaths and injuries in the most dangerous workplaces. The only large-scale study performed to date found that OSHA inspections resulting in penalties led to a 22 percent reduction in injuries at inspected sites during the three years following inspection.³³ The study also found that inspections without penalties have no appreciable impact on subsequent rates of injuries. By immunizing employers against penalties, the SAFE Act would eliminate one of OSHA's most effective means of protecting workers' health and safety.

An invitation to abuse

Concerns over conflicts of interest and accountability are especially serious given that Section 3 penalty exemptions would virtually invite abuse by bad actors. Most alarmingly, Section 3 would exempt employers from OSHA fines even if they are in willful violation of OSHA regulations and even if their willful violation results in serious injury to an employee.

During Committee consideration of S. 385, Senator Kennedy offered an amendment to close this gaping loophole. The Kennedy amendment would have disallowed penalty exemptions "if the employer knew or should have known of the violation." The Majority rejected the Kennedy amendment on a party-line vote of 8 to 10. This vote makes clear that the SAFE Act would immunize bad actors who knew or should have known of their violation.

A second Kennedy amendment would have disallowed penalty exemptions for employers who commit violations that are "willful, repeat, or have a substantial probability of causing death or serious physical harm." This amendment was modeled after the recommendations of Majority witness Ron Hayes, who testified at the Subcommittee hearing of April 13, 1999. While Mr. Hayes endorsed S. 385, he also testified that the SAFE Act's one-year penalty exemption should not apply against violations that are "willful," "repeat," or even "serious" (having a substantial probability of causing death or serious physical harm).³⁴ The Majority rejected the second Kennedy amendment—and the recommendations of its own witness—on a party-line vote of 8 to 10.

The Majority denies the possibility of such abuse by arguing that "at all times and under all circumstances, OSHA remains free to inspect those worksites, and if that employer is not acting in 'good faith' as determined by OSHA, that employer is removed from the program." The protections to which the Majority alludes are illusory, however.³⁵

tion. However, these cases are rarely prosecuted because the crime is classified as a misdemeanor. In imminent danger situations, OSHA can petition a district court for injunctive relief, but OSHA has had difficulties obtaining such relief. See *Reich v. Dayton Tire, Div. of Bridgestone/Firestone*, 853 F. Supp. 376 (W.D. Okla. 1994).

³³ Wayne Gray and John Scholz, "Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement," *Law and Society Review* (July 1993), at 177–213.

³⁴ Hearing on S. 385 Before the Senate Subcommittee on Employment, Safety, and Training, 106th Congress, 1st Session (April 13, 1999), at 38.

³⁵ As discussed *supra*, authority to inspect the worksite has little practical effect if OSHA is unable to obtain abatement.

Section 3 does contain a “bad faith” exception. An employer shall not be exempt from OSHA fines “if the employer has not made a good faith effort to remain in compliance as required under the certificate of compliance.”³⁶ However, under this provision, the employer need only make a good faith effort to comply with his or her certificate, not with OSHA regulations or the OSH Act. The certificate may well be inaccurate. The employer may be aware of its inaccuracy. But no matter. As the Majority’s rejection of the Kennedy amendments makes clear, the employer would nevertheless be immune from OSHA fines—even if it knew or should have known of the violation, and even if the violation were willful and repeat.³⁷

Nor is this an improbable scenario. Employers aware of potentially costly safety hazards would have every incentive under the SAFE Act to purchase a one-year immunity from the first consultant who failed to notice the hazard, or from the consultant who recommended the least costly abatement. And it would not be unusual for employers at large worksites to be much more intimately familiar with potential safety hazards than consultants who visit their worksite solely for the purpose of conducting a “full service visit and consultation.”³⁸ The SAFE Act would allow such bad actors to obtain immunity from OSHA penalties while making a “good faith” effort to remain in compliance with their certificates.

Indeed, Section 3 penalty exemptions would be of greatest economic value to firms with the greatest exposure to OSHA penalties. Large corporations already in compliance with OSHA regulations and the OSH Act need little additional incentive to develop safety and health programs; they typically have such programs in place already. And the SAFE Act would provide little additional economic incentive for smaller firms already in compliance, or for firms with limited penalty exposure, to undergo the considerable expense of hiring a consultant. This is especially true of small businesses with fewer than 250 employees, who can already obtain free consultation services from OSHA in all 50 states. The SAFE Act would offer the greatest economic benefit to firms whose penalty exposure exceeds the marginal cost of consultation.

While S. 385 is ostensibly designed to meet the needs of small business, in practice it would allow very large Fortune 500 corporations effectively to immunize themselves from OSHA enforcement. Section 3 contains no limitation on the size of firms that are eligible for penalty exemptions. Section 3 penalty exemptions would thus be available to large corporations that typically have safety and health programs already in place. And there is nothing in this legislation that would prevent qualifying firms from hiring their own employees as Section 3 consultants. Under the SAFE Act, in-house safety and health staff could certify their own existing programs. The SAFE Act would therefore have the perverse effect of letting employees of Fortune 500 corporations grant penalty exemptions to their own employers.

³⁶ S. 385, Section 3 (adding Section 8A(f)(2)(a)).

³⁷ Notwithstanding the Majority’s assertion that “good faith” would be “determined by OSHA,” Section 3 is silent on the procedures for determining when an employer “has made a good faith effort to remain in compliance” with the certificate, as well as who makes such a determination.

³⁸ S. 385, Section 3 (adding Section 8A(e)(1)).

OSHA's support for consultation

It should be emphasized that the Minority does not object in any way to the use of private sector consultants. On the contrary, OSHA and the Minority strongly encourage the use of third-party consultants, as well as in-house safety and health staff. The Minority's fundamental disagreement with the SAFE Act is not over the use of private sector consultants, but over the delegation to these consultants of penalty exemption authority.

In testimony before the Subcommittee, Assistant Secretary Jeffress declared his support for the use of third-party consultants. "Private safety and health consultants provide an important service and OSHA encourages employers to use them as a valuable resource," he told the Subcommittee.³⁹ In fact, OSHA already encourages the use of such consultants, whether third-party or in-house, by granting employers penalty reductions in recognition of their "good faith efforts."

Margaret Seminario, Occupational Safety and Health Director of the AFL-CIO, described OSHA's procedures for "good faith" penalty reductions in her testimony before the Subcommittee on March 4, 1999:

Good faith efforts would include establishing a safety and health program, whether it is done in-house or whether it is done by a third-party. If an employer did what is in Mr. Enzi's bill, setting up a safety and health program, whether they did it on their own or had a third party come in, they would now get a 25 percent reduction from OSHA penalties. It is right there in their field operations manual. In addition, if you are a small employer, there is an automatic penalty reduction, and I think that for an employer of from one to 25 [employees], it is a 60 percent reduction.⁴⁰

In fact, small businesses who hire third-party consultants to establish a safety and health program would be eligible for penalty reductions of up to 95 percent. These and other incentives may be appropriate and desirable, unlike delegation of penalty exemption authority to private consultants.

In addition, OSHA and the Minority also strongly support the development and use of free consultation programs. Assistant Secretary Jeffress testified that OSHA "provides free consultation for small businesses in each of the fifty states, the District of Columbia, and three territories."⁴¹ These free consultation services are available to small business with fewer than 250 employees, or about 99 percent of employers. At the Subcommittee's hearing on March 4, 1999, Roslyn Wade, director of the Minnesota state OSHA program, testified that the waiting period for the free consultation program in Minnesota is less than two weeks.⁴²

³⁹ Jeffress Testimony, at 15.

⁴⁰ Hearing on S. 385 Before the Senate Subcommittee on Employment, Safety, and Training, 106th Congress, 1st Session (March 4, 1999), at 90.

⁴¹ Jeffress Testimony, at 15.

⁴² See Hearing on S. 385 Before the Senate Subcommittee on Employment, Safety, and Training, 106th Congress, 1st Session (March 4, 1999), at 54.

OSHA's increased emphasis on cooperative programs

Since 1993 OSHA has significantly altered its approach to place a much greater emphasis on consultation, outreach and assistance. Notwithstanding the Majority's claims that OSHA pursues an "adversarial" rather than a "collaborative" approach, OSHA has in fact strengthened its cooperative programs, partnering with conscientious employers, offering free consultation, and reaching out to small businesses.

OSHA's Safety and Health Achievement Recognition Program (SHARP) is one example of OSHA's cooperative partnerships with businesses. Under the SHARP program, employers and private consultants work together to fix hazards in the workplace in exchange for exemptions from programmed OSHA inspections. Even the Majority acknowledges that the SHARP program achieves "outstanding results."

It is important to note the significant differences between the SHARP program and the SAFE Act, however. Under the SHARP program, OSHA still retains oversight authority to ensure that workers are protected. SHARP provides exemptions only from programmed inspections, but OSHA can still inspect the worksite in the case of a serious accident or an employee complaint. The SHARP program does not provide blanket immunity from civil penalties, and OSHA retains authority to revoke participation in the program at any time.

Similarly, OSHA's Voluntary Protection Program (VPP) rewards employers who partner with OSHA to improve safety and health conditions at their worksites. Once OSHA has certified a VPP participant, that worksite is not subject to routine OSHA inspections. According to OSHA statistics, lost workday injuries at VPP star sites have been about 50 percent below the industry average. In 1995, the National Performance Review recognized the VPP as an example of excellence in reinventing government, and Vice President Gore presented OSHA with the Hammer Award.

As these innovative programs demonstrate, OSHA treats good and bad employers very differently, contrary to the Majority's charge that "OSHA lumps all employers together—both the good and the bad—[and] treats them the same." OSHA is now targeting enforcement efforts towards the most dangerous workplaces. Each year OSHA targets 12,500 of the most dangerous non-construction worksites in the country and inspects as many of them as possible. OSHA now conducts approximately 3,000 targeted inspections each year in the manufacturing industry alone. With this strategy, OSHA can spend more time where it is most needed—at workplaces where employers are putting their workers' safety and health in jeopardy. As a result, safer workplaces face fewer inspections.

The importance of enforcement

In short, OSHA employs a balanced approach that includes not only compliance assistance, education, training, and free consultation services for small businesses, but also targeted enforcement initiatives. Enforcement and cooperative programs are complementary functions, and neither can succeed without the other. By emasculating OSHA's enforcement authority, the SAFE Act would

paradoxically undermine the very cooperative programs the Majority supports.

As enforcement encourages employers to bring their worksites into compliance with OSHA regulations and the OSH Act, it simultaneously creates incentives for employers to hire consultants or to participate in free consultation programs. The Majority ignores the advice of experts who warn that many employers will lose interest in collaborative initiatives if OSHA fails to maintain a credible enforcement program. And as Margaret Seminario testified before the Subcommittee on March 4, 1999, "If you take the penalties off the table, you are essentially creating a system which does not really have any teeth to it."⁴³

Enforcement is not only necessary; but has proven to be very effective in improving workplace health and safety. The most significant reductions in injury and illness rates have occurred in sectors of the economy that have been subject to the most intensive enforcement. In manufacturing and construction, industries that have received the vast majority of OSHA inspections, injury and illness rates have declined by 30.7 percent and 50 percent, respectively, since 1973. The mining industry, whose inspection frequency under the Mine Safety and Health Act is much more intensive, has experienced the greatest decline in injury and illness rates—57 percent since 1973.

The results have been much less impressive in industries that have received little or no attention, where safety and health have been left largely to the voluntary compliance efforts of employers. Those sectors have made little or no progress in reducing job injuries and illnesses. For example, in both the finance sector and the service sector, there has been no decline in injury rates. Within the service sector, injury rates in nursing homes and hospitals have been increasing, with rates in both of these industries now higher than in construction, once one of the most hazardous industries. The finance and service industries, which have experienced a large growth in employment, are now responsible for a major part of the overall occupational injury and disease burden in this country.

The Majority argues that continued reliance on OSHA for enforcement of the OSH Act is not a viable option, since OSHA is only "able to inspect every worksite once every 167 years." This frequently-cited statistic needs to be put in context, however. OSHA is prohibited from conducting scheduled safety inspections of over three million businesses—firms with 10 or fewer employees or in lines of business with injury rates below the national average. OSHA is able to target some of the more dangerous industries for inspections with far greater frequency than the quoted figure would suggest.

Nevertheless, the inability of OSHA inspectors to reach more worksites in this country is a serious concern. A helpful first step towards a solution to this problem would be to stop cutting OSHA's enforcement budget. Despite rapid growth in the labor force since 1980, the number of OSHA federal compliance officers has fallen from 1,388 to 1,064. Meanwhile, the House Labor/HHS Appropria-

⁴³Hearing on S. 385 Before the Senate Subcommittee on Employment, Safety, and Training, 106th Congress, 1st Session (March 4, 1999), at 89.

tions bill for FY 2000 cuts the OSHA enforcement budget by 12 percent, and Subcommittee Chairman Enzi offered an amendment to the FY 2000 Senate Labor/HHS Appropriations bill that was intended to cut OSHA's proposed enforcement budget by \$16.8 million.

Another obvious solution would be to leverage OSHA's resources with enhanced legal protections for safety and health whistleblowers. However, despite the support of all three Majority witnesses at the April 13, 1999 Subcommittee hearing,⁴⁴ the Majority rejected Senator Wellstone's amendment to enhance OSHA whistleblower protections.

The Majority Report contends that OSHA enforcement is inadequate and does not "effectively deter bad employers from breaking the law." To illustrate the point, Majority witnesses at the April 13 hearing expressed concern over excessive reductions of OSHA civil penalties resulting from alleged collusion between OSHA compliance officers and employers. Yet the Majority rejected the Wellstone amendment to enhance criminal penalties, which would have addressed these concerns. The Wellstone amendment, which was also endorsed by all three Majority witnesses at the April 13 hearing,⁴⁵ would have classified willful violations that result in the death of an employee as felonies rather than misdemeanors. Such enhanced criminal penalties would indeed "effectively deter bad employers from breaking the law" and reduce the frequency of inappropriately low civil penalties.

The success of the OSH Act

While the Minority agrees that OSHA enforcement, training, and consultation programs need to be strengthened and improved, it is simply inaccurate to claim that OSHA's record has been "disastrous." Injury and illness rates have been dropping steadily almost since the agency's inception. Since 1973, workplace injuries are down 36 percent. The injury and illness rate for 1997 was the lowest since the Bureau of Labor Statistics (BLS) began reporting this information early in the 1970s. In addition, the rate of workplace fatalities has declined. In just four years, from 1994 to 1998, workplace fatalities have decreased by 15 percent.

According to the BLS Annual Survey of Occupational Injuries and Illnesses, the overall private sector job injury/illness rate declined from 11 per 100 full-time workers in 1973, to a record low rate of 7.4 per 100 workers in 1996. This represents an overall decline of 32.7 percent. The number of fatal work injuries fell in 1996 to 6,112, the lowest level in the five-year history of this BLS survey. From 1948 through 1970, the occupational death rate declined by 37.9 percent. Between enactment of the OSH Act in 1970 and 1992, the occupational death rate declined by over 60 percent.

⁴⁴The three witnesses invited by the Majority—Ron Hayes, Charles LeCroy, and William Alcarese—all supported enhanced protections for OSHA whistleblowers and to enhance criminal penalties. See Hearing on S. 385 Before the Senate Subcommittee on Employment, Safety, and Training, 106th Congress, 1st Session (April 13, 1999), at 36–37. By contrast, no Minority witnesses endorsed the SAFE Act.

⁴⁵Hearing on S. 385 Before the Senate Subcommittee on Employment, Safety, and Training, 106th Congress, 1st Session (April 13, 1999), at 36–37.

Real OSHA Reform

Despite this remarkable progress in reducing workplace injuries and fatalities, the Minority agrees that too many American workers continue to be injured, get sick, or die on the job. The Minority also agrees that OSHA needs to reach a greater percentage of American workplaces, but notes that this will require adequate resources. OSHA's resources could be effectively leveraged by enhancing protection for whistleblowers, as all three Majority witnesses testified at the April 13 Subcommittee hearing. In addition, as these Majority witnesses also testified, criminal penalties should be enhanced to "effectively deter bad employers from breaking the law." The Minority agrees that education and training for OSHA inspectors could be improved, but again, this will require adequate resources. And OSH Act coverage should also be extended to federal, state, and local workers, as several members of the Majority have advocated in the past.

While there is much that could be done to strengthen protections for workplace safety and health, the Majority's brief against OSHA is riddled with logical contradictions. It makes little sense to criticize OSHA for failing to inspect more workplaces, while at the same time cutting OSHA's enforcement budget and opposing stronger protections for OSHA whistleblowers. It makes little sense to criticize OSHA for failing to "effectively deter bad employers from breaking the law," while at the same time opposing stronger criminal penalties. It makes little sense to criticize OSHA for issuing inappropriately low civil penalties, while at the same time depriving OSHA of its authority to issue any penalties at all. It makes little sense to criticize OSHA for alleged collusion with employers, while at the same time delegating substantial OSHA enforcement authority to unaccountable private sector consultants selected and hired by employers themselves.

The Majority's arguments in support of the Section 3's private consultation program are unpersuasive. Section 3 is an unconstitutional provision that would invite abuse by bad actors and obstruct OSHA's ability to protect workers from dangerous hazards in the workplace. For these and other reasons discussed above, the Minority strongly opposes Section 3.

EXPANDED INSPECTION METHODS

Section 6 of the SAFE Act would allow OSHA to investigate alleged violations by telephone or fax. This provision would also allow OSHA to decline investigation of a complaint if OSHA suspects that the request was made "for reasons other than the safety and health of the employees" or if OSHA determines that workers are not at risk.

The Minority finds this section objectionable for two reasons. First, it creates a one-size-fits-all approach, failing to acknowledge that OSHA conducts many types of inspections. All employees have a fundamental right to initiate an OSHA inspection with a formal complaint. Where a worker formally seeks to exercise that statutory right, investigating by telephone or fax will not suffice. For inspections following an informal complaint, on the other hand, OSHA may currently investigate by telephone or fax. OSHA has al-

ready reduced the delay between the filing of complaints and the abatement of hazards.

Second, Section 6 would allow OSHA to forgo conducting a complaint inspection if it determines that the complaint was made for reasons other than safety and health—even if workers are at risk. Where workers face substantial hazards, OSHA is compelled by statute to act, regardless of the motivation of the complainant. Moreover, determining the motivations for a complaint is work better suited to psychologists than to OSHA compliance officers. Attempting to discern what is in the minds of each complainant would consume scarce agency resources and delay inspections. The Minority believes OSHA should continue to inspect where workers are at risk.

EMPLOYER DEFENSES

Section 7 of the bill would create an entirely new statutory defense to OSHA citations. Under Section 7, an employer would be allowed to argue that employees are protected by alternate methods as protective as, or more protective than, the OSHA standard violated by the employer. This provision could seriously undermine OSHA's standards, and transform every enforcement action into a costly and time-consuming variance proceeding.

The Occupational Safety and Health Review Commission (OSHRC) and the courts have held repeatedly that, when OSHA standards require employers to adopt specific precautions for protecting their workers, employers must comply in the manner specified. Under current law, employers have the right to select alternative means of compliance only when literal compliance is impossible or would pose a greater hazard to employees. In "greater hazard" cases, the Commission requires an employer to demonstrate that a variance has either been sought or would be inappropriate.

Under these rules, the challenge rate has remained relatively low; fewer than ten percent of all citations are currently contested. Under Section 7, however, virtually every employer cited for violating the statute or its interpretive regulations could claim that an alternative means of compliance was as effective as the standard in question. In effect, standards would become guidelines, subject to challenge—and potential waiver—in every contested case.

Section 7 would sweep aside the years of public comment, risk assessment and feasibility evidence that go into the compliance obligations expressed in OSHA standards. It would make OSHA rule-making—and public participation by businesses, trade associations, employee groups and other stakeholders—largely irrelevant. Moreover, if the Majority believes that current OSHA standards fail to give clear guidance to the regulated community, this new defense allowing employers to decide their own precautions would make the tort law system look like a model of simplicity and predictability. Section 7 could have a substantial impact on agency resources, and would greatly increase litigation burdens on OSHA, the OSHRC, and the federal courts.

TECHNICAL ASSISTANCE PROGRAM

Section 8 of the SAFE Act requires cooperative agreements between OSHA and the States to provide consultation programs. This

section purports to codify OSHA's current consultation policy. It requires a pilot program to be established in three states for up to two years to experiment with a fee-for-service system. However, the fifty state agencies that already administer the consultation program have expressed serious reservations about charging fees for the consultation program.

The practical effect of imposing a fee for consultation services is obvious: those who could pay would be visited first. This contradicts the Majority's stated desire to direct these consultation services to small employers and very dangerous worksites that cannot afford to hire other consultants.

VOLUNTARY PROTECTION PROGRAM

Section 9 of the SAFE Act attempts to codify OSHA's Voluntary Protection Program by requiring OSHA to establish cooperative agreements with employers who create and maintain comprehensive safety and health management systems. Section 9 requires enhanced OSHA efforts to include small businesses in the program. Participation would result in exemptions from inspections and from certain paperwork requirements.

However, the VPP has traditionally been a program for worksites, not employers, and it should remain so. Although Section 9 makes some references to "the worksite," this critical foundation of the program must be emphasized. Accordingly, the Minority does not support this provision as drafted.

PREVENTION OF ALCOHOL AND SUBSTANCE ABUSE

Section 10 of the SAFE Act authorizes OSHA to test workers and managers for drugs and alcohol following a work-related death or serious injury. It also allows employers to institute their own testing programs within state and federal guidelines.

The Minority supports measures that contribute to a drug-free work environment. Reasonable drug testing programs can be appropriate for certain workplace environments, such as those involving safety-sensitive duties. But employees' privacy rights must be protected adequately. This provision would divert scarce OSHA resources to the oversight of drug and alcohol programs—an area in which the agency has no expertise. Furthermore, the Majority overlooks the fact that employers are already free to institute substance abuse testing programs, as long as they comply with applicable federal and state laws. Inserting OSHA into this process seems unnecessary and unwise.

CONSULTATION ALTERNATIVES

Section 11 of the SAFE Act provides that OSHA should be allowed to issue warnings, rather than citations, to employers when their violations poses no significant safety hazard, or when they have acted in good faith to abate their violations promptly.

The OSH Act currently provides that OSHA "shall" issue citations, and Section 11 would change this language to "may." The impact of this change is unclear. Federal case law demonstrates that OSHA already has a high degree of prosecutorial discretion and has the power to establish programs such as Maine 200, in which

it does not issue a citation for every violation it discovers. So Section 11 may be simply unnecessary.

But Section 11 could also undermine OSHA's enforcement authority. Some employers could misunderstand Section 11 as a limitation on OSHA's authority to issue citations. Especially troubling is the language permitting a warning in lieu of citation for violations that the employer "acts promptly to abate." Although OSHA would still have discretion to issue citations in such circumstances, this language might encourage employers to let violations go uncorrected until they are discovered by OSHA inspectors. This provision could thus undermine the preventive purpose and the deterrent effect of OSHA's enforcement program.

Employers should always be encouraged to abate hazards promptly, but the appropriate mechanism should be reduction of penalties rather than failure to issue citations. Otherwise, employers who make good faith efforts before an OSHA inspector arrives on the doorstep will be treated in the same way as negligent employers who ignore their workers' safety until they are inspected.

DEMOCRATIC AMENDMENTS

Strike penalty exemption

To resolve the serious constitutional, conflict of interest and accountability problems in the SAFE Act, Senator Kennedy offered an amendment to remove the penalty exemption provisions of Section 3. Delegating penalty exemption authority to private consultants is unconstitutional and dangerous to American workers. The Department of Justice and Harvard Law Professor Lawrence Tribe have argued that this provision violates the separation of powers and the Appointments Clause—Article II, Section 2, Clause 2. For this reason alone, the penalty exemption provision should be stricken.

Striking this provision from the SAFE Act would have also addressed the bill's obvious conflict of interest and accountability problems. Allowing employers to select and hire private individuals to exempt them from OSHA penalties presents undeniable conflict of interest problems. OSHA inspectors are prohibited from receiving money from employers—and for good reason. A financial relationship, however well-intended, undermines the ability of inspectors to uphold the public interest. For this reason, private paid consultants should not be given the authority to shield employers from OSHA penalties.

In addition, as drafted, S. 385 lacks any meaningful mechanism to deal with consultants who, through incompetence or negligence, grant penalty exemptions that leave workers exposed to workplace hazards. And for employers who engage in more culpable conduct, such as collusion or fraud, the SAFE Act only provides for their expulsion from the program. This remedy, where it exists, is simply insufficient to redress the potential harm to which workers would be subjected. The SAFE Act contains no mechanism for revoking certificates of compliance that are inaccurate, not even when workers are seriously injured or killed. OSHA must be allowed to retain its authority to enforce workplace health and safety standards when workers are at risk.

The Kennedy amendment was a constructive step towards resolving the Minority's concerns with S. 385. Unfortunately, the Majority defeated the amendment on party-line vote of 8 to 10.

Strike penalty exemption for willful, repeat and serious violations

The penalty exemption authority delegated to private consultants under the SAFE Act is broad and overreaching. Once a consultant issues the certificate of compliance, OSHA has no remedies against employers who deliberately jeopardize the safety and health of their workers. The Majority's own witnesses, Mr. Ron Hayes, agreed that the SAFE Act's penalty exemptions should not apply against employers whose violations are willful, repeat, or serious.⁴⁶ Senator Kennedy's second amendment, based on the recommendations of Mr. Hayes, would have disallowed exemptions for employers who commit violations that are "willful, repeat, or have a substantial probability of causing death or serious physical harm." The Majority rejected this amendment, and the recommendations of its own witness, on a party-line vote of 8 to 10.

Strike penalty exemptions for employers who knew of violations

Senator Kennedy's third amendment was designed to prevent penalty exemptions from shielding bad actors. Under the amendment, employers would forfeit their penalty exemption if they knew or should have known of their violation. Employers who know they are violating the law should not be immunized from OSHA enforcement just because a private consultant failed to notice a workplace hazard or agrees to let them fix it over a prolonged period of time. Again, this amendment underscores the Minority's view that penalty exemptions should not give employers an excuse to ignore the safety and health of their workers. The Majority's rejection of this amendment on a vote of 8 to 10 makes it clear that S. 385 Act would immunize bad actors.

Enhanced whistleblower protections

While the SAFE Act purports to protect workers, the Majority rejected an amendment offered by Senator Wellstone that would have given workers real safety and health protections. Senator Wellstone's amendment would have strengthened and expanded anti-discrimination protections for employees who report workplace health and safety hazards in the workplace. The Wellstone amendment would encourage employees to step forward and identify hazards in the workplace without fear of retaliation from their employers.

In theory, workers are already protected from retaliation under Section 11(c) of the OSH Act, but this protection is all too often meaningless. As Assistant Secretary of Labor Charles Jeffress testified before the Employment, Safety, and Training Subcommittee, "The provisions in place today in Section 11(c) of the Act are too weak and too cumbersome to discourage employer retaliation or to provide an effective remedy for the victims of retaliation."⁴⁷

⁴⁶Hearing on S. 385 Before the Senate Subcommittee on Employment, Safety, and Training, 106th Congress, 1st Session (April 13, 1999), at 38.

⁴⁷Jeffress Testimony, at 18.

The Wellstone amendment would have corrected the flaws in Section 11(c). It would have given workers 6 months, rather than 30 days, to file a grievance for retaliation. It would have protected not only workers who report unsafe conditions, but also employees who refuse to work when they have good reason to think they might be harmed or injured. To expedite the grievance process, the Wellstone amendment provided for prompt hearings before an administrative law judge. It would have allowed dissatisfied workers to then take their case to a federal appeals court themselves, not having to rely on the Department. And it would have provided for reinstatement during these proceedings, as well as compensatory damages and exemplary damages when the employer's behavior is particularly outrageous.

At a time when too many workers are injured or killed on the job, the courageous individuals who report workplace safety and health hazards need more protection, not less. All four witnesses at the April 13, 1999 hearing of the Employment, Safety, and Training Subcommittee—including the three Majority witnesses—endorsed the Wellstone amendment.⁴⁸ Ignoring the recommendations of its own witnesses, the Majority rejected this amendment on a vote of 8 to 10.

Criminal penalties

The Majority argues that OSHA's enforcement of the OSH Act has been excessively burdensome, and that employers need relief from excessive and costly compliance requirements. Yet the Majority also argues, and Majority witnesses have testified, that OSHA does not "effectively deter bad actors from breaking the law." Senator Wellstone offered an amendment that would have deterred bad actors without imposing any new administrative burdens.

By statute, an employer who willfully violates the OSH Act and causes the death of an employee can only be charged with a misdemeanor. Because this criminal penalty is so insignificant, the Justice Department rarely prosecutes employers whose deliberate actions cause the death of their employees.

Senator Wellstone's amendment would have reclassified willful violations that result in the death of an employee as felonies, rather than misdemeanors. For willful violations resulting in death, the Wellstone amendment would have increased the maximum fine from \$10,000 to \$250,000, and the maximum jail time from six months to 10 years. All four witnesses at the April 13, 1999 hearing of the Employment, Safety, and Training Subcommittee—including three Majority witnesses—endorsed this amendment.⁴⁹ However, the Wellstone amendment failed on a split vote of 9 to 9.

State and local public employee protections

Senator Wellstone offered an amendment extending OSH Act coverage to state and local public employees who are not currently covered. Today, 29 years after the OSH Act was enacted, over eight

⁴⁸ Hearing on S. 385 Before the Senate Subcommittee on Employment, Safety, and Training, 106th Congress, 1st Session (April 13, 1999), at 36–37.

⁴⁹ Hearing on S. 385 Before the Senate Subcommittee on Employment, Safety, and Training, 106th Congress, 1st Session (April 13, 1999), at 36–37.

million state and local workers continue to be excluded. Public workers often perform dangerous work and suffer injury rates higher than most other workers. In 1997, 624 state and local workers were killed at work.

The extension of OSH Act protections to state and local government employees has had bipartisan support in the past, including the support of the Bush Administration in 1991. The Clinton Administration supports extension of OSH Act coverage to public employees, as well. At the March 4 hearing of the Subcommittee, Assistant Secretary Charles Jeffress testified,

Another area this Subcommittee may want to consider is protections for public employees. The OSH Act currently * * * does not protect state and local employees (maintenance workers, construction workers, firefighters, etc.) * * * There are numerous examples of on-the-job tragedies that occurred primarily because safety and health protections do not apply to public employees. These tragedies could have been prevented by compliance with OSHA rules.⁵⁰

Despite significant bipartisan support in the past for this common-sense reform, the Wellstone amendment failed on a 9 to 9 vote.

Federal employee protection

Similarly, Senator Wellstone offered an amendment to extend full OSHA coverage to employees of the federal government. Federal employees have been excluded from OSHA coverage for almost 30 years. While a 1980 executive order requires federal agencies to comply with OSHA standards, it provides no real enforcement authority to ensure that federal workers are in fact being protected.

Again, this common sense amendment should have been bipartisan and uncontroversial. In 1994, Republican congressman Cass Ballenger proposed to cover federal employees in his OSHA reform legislation. Last year, under the leadership of Senator Enzi, the Senate voted unanimously to extend OSHA coverage to the U.S. Postal Service. On introducing his Postal Employees Safety Enhancement Act of 1998, Senator Enzi indicated that all federal employees should ultimately be covered, stating, "This important legislation is an incremental step in the effort to ensure that the 'law of the land' applies equally to all branches of government as well as the private sector—and everything in between."⁵¹ Nevertheless, the Wellstone amendment failed on a party-line vote of 8 to 10.

OSHA investigations for fatalities on small farms

A rider attached to previous and current Labor, Health and Human Services, and Education appropriations bills prevents OSHA from obligating or expending funds to prescribe, issue, administer, or enforce any standard, rule, regulation, or order under the OSH Act in the case of a farming operation that does not have a temporary labor camp and that has 10 or fewer employees.

⁵⁰ Jeffress Testimony, at 18.

⁵¹ Congressional Record (May 22, 1998), at S5434.

To address the critical issue of child labor safety in the agriculture industry, Senator Reed proposed an amendment that would have granted OSHA funding to conduct inspections and issue reports on the causes of accidents that claim the lives of employees under the age of 18 who die while working on small farms. The Reed amendment would have retained the rest of the small farm rider, preventing OSHA from levying fines, issuing citations, or taking any other enforcement action on small farms.

The Minority recognizes the importance that many Senators place on protecting smaller farms and businesses from undue regulation. The Minority is also aware that the small farm rider has been part of the law since 1977. However, agriculture remains the second most hazardous industry in the nation, with 592 work-related deaths on farms in 1998. The risk of fatal injury is particularly great for children. Indeed, the magnitude of this problem was recognized by the National Research Council (NRC) in a 1998 report entitled *Protecting Youth at Work*.⁵²

The level of OSHA enforcement applied to non-agricultural small businesses is more rigorous than the OSHA activity allowed on small farms. Under a separate rider, non-agricultural small businesses with 10 or fewer employees are already subject to OSHA enforcement (including citations and fines) for hazards that present an imminent danger to employee safety and health. More significantly, these firms are subject to inspections and fines as a consequence of an employee death, incidents that seriously multiple employees, and complaints made by an employee.

Rather than placing small farms on a par with small businesses of comparable size, Senator Reed's amendment would have retained the ban on OSHA enforcement, but would have allowed important information on the causes of fatal accidents to be gathered and shared with the operators of small farms. This narrowly tailored amendment struck an appropriate balance by allowing OSHA to determine the cause of a worker's death, but not to impose penalties on the farm operator. However, the Reed amendment failed on a split vote of 9 to 9.

Private right of action and criminal penalties

Senator Reed also offered an amendment to make consultants more accountable under the SAFE Act. The Reed Amendment would have created a private right of action for employees injured by the culpable conduct of consultants, and also would have established criminal penalties.

The SAFE Act provides OSHA only very limited authority to oversee the private consultants who are delegated penalty exemption authority. OSHA would have little recourse against consultants who engage in misconduct or simply fail to keep the workplace safe. Because of this lack of accountability, Senator Reed offered an amendment to make consultants accountable to any employees injured due to the consultant's gross negligence or willful misconduct. Specifically, the Reed amendment would have added a new private right of action against consultants and employers for employees (or

⁵² National Research Council, *Protecting Youth at Work* (1988).

their heirs) injured or killed due to willful or grossly negligent misconduct.

In addition to this private right of action, the Reed amendment would have made bad consultants subject to criminal penalties. The amendment would have made it a misdemeanor for an employer and consultant to conspire to hide a hazard. Under the Reed Amendment, a misdemeanor charge would also attach if the consultant failed to identify a hazard through gross negligence.

The Reed amendment would have provided at least some assurance that parties responsible for the death or injury of an employee could be held accountable under the SAFE Act. However, it failed on a party line vote of 8 to 10.

Alternative complaint procedures

Senator Murray offered an amendment to restore the right of employees to secure an inspection of their workplace when they file a formal, written, and signed complaint that makes out a prima facie case of a health or safety violation threatening physical harm or imminent danger. S. 385 eliminates this most fundamental right of employees to obtain the assistance of their government in protecting their health and their lives—a right that is all the more essential because the OSH Act provides no private right of action to compel employers to comply with the law.

Senator Murray's amendment would codify current law, which permits OSHA to investigate informal complaints—those which are not written and signed by an employee—by phone or fax, while guaranteeing the right to have OSHA perform an on-sight, physical inspection of the workplace if an employee signs a complaint alleging violations that could kill or seriously injure workers. The majority defeated the Murray amendment on a party-line vote of 8 to 10.

Federal contracts debarment

Senator Harkin offered an amendment to prohibit any employer from obtaining federal contracts when it has demonstrated a clear pattern and practice of committing serious violations of the OSH Act. This amendment is consistent with the General Accounting Office recommendation of August 1996, which urges the Department of Labor to examine debarment as an additional tool to improve workplace safety and health.⁵³

The debarment approach to encourage compliance with other labor laws has already proven effective. For example, the Davis-Bacon Act contains a debarment provision, and for the last 60 years this provision has provided a deterrent against violations of the law.

The Harkin amendment was also consistent with the Majority's arguments for S. 385: that OSHA's enforcement reach is too short, and that future additional funding for federal compliance staff is unlikely. The sponsors of S. 385 have argued that additional enforcement strategies are needed.

Debarment for serious workplace violations is a reasonable and common sense approach. When contractors exhibit a clear pattern

⁵³ GAO/HEHS 96-157 (1996).

or practice of exposing their workers to serious violations of existing regulations—violations that are likely to cause serious bodily harm or death—they should not be rewarded with additional federal dollars. If the Majority is correct that 95 percent of employers are doing their best to provide a safe and healthy workplace, there is no reason for to rely on the 5 percent who are consistently negligent or reckless to perform the government's work.

The Harkin amendment would have provided a major incentive for firms to keep their workplaces safe, but it was defeated on a party-line vote of 8 to 10.

CONCLUSION

S. 385 is unconstitutional legislation that would endanger the safety, health, and lives of American workers. Section 3, in particular, is an unconstitutional provision that would invite abuse by bad actors and obstruct OSHA's ability to protect workers from dangerous hazards in the workplace.

Although Section 3 is the most objectionable provision of the SAFE Act, the Minority finds several other provisions of this legislation highly objectionable. S. 385 creates new employer defenses that would effectively render OSHA regulations meaningless. It gives employers one bite at the apple before they need to comply with safety and health regulations. It tramples on employee inspection rights and permits OSHA to forgo complaint investigations, even when employees are at risk. And it creates fee-for-service consultation programs that would put small, less wealthy businesses at a serious disadvantage.

Assistant Secretary Jeffress testified before the Subcommittee on March 4, 1999, that "if S. 385 were passed, as drafted, the Secretary again would be forced to recommend a veto."⁵⁴ The Minority agrees that the Administration should veto this legislation, if enacted. For all the reasons stated above, the Minority strongly opposes S. 385.

EDWARD M. KENNEDY.
TOM HARKIN.
JEFF BINGAMAN.
PATTY MURRAY.
CHRIS J. DODD.
BARBARA A. MIKULSKI.
PAUL WELLSTONE.
JACK REED.

Enclosure.

HARVARD UNIVERSITY LAW SCHOOL,
Cambridge, MA, September 14, 1999.

Hon. EDWARD KENNEDY,
Russell Senate Office Building,
Washington, DC.

DEAR SENATOR KENNEDY: You have asked me to analyze the constitutional issues posed by S. 385, the "SAFE Act," which would in effect allow private individuals to exempt employers from OSHA

⁵⁴Hearing on S. 385 Before the Senate Subcommittee on Employment, Safety, and Training, 106th Congress, 1st Session (March 4, 1999), at 15.

penalties. This letter reflects the results of that analysis. I should emphasize at the outset that I have given no thought to the policy implications of S. 385 and have no personal views one way or the other as to the wisdom of the measure, or the balance of costs and benefits that might lead one who felt unconstrained by the Constitution either to support or to oppose it. Strictly as a federal constitutional matter, I believe that Section 3—Third Party Consultation—cannot pass muster.

There is no question that the private “consultants” with whom employers may contract to advise them as to whether they are in compliance with the requirements of the Occupational Safety and Health Act of 1970 (“OSHA”), including regulations promulgated under OSHA, are entrusted with important governmental responsibilities by Section 3 of S. 385. For, with limited exceptions, an employer armed with a “certificate of compliance” from one of these “consultants” enjoys immunity from the imposition of civil penalties under OSHA for a period of twelve months.

Although consultants must, under S. 385, be certified by the Secretary of Labor as qualified to provide this immunity-conferring certificate, and although such consultants are removable from their positions by the Secretary upon “failure to meet the requirements of the program” or upon the commission of “malfeasance, gross negligence, collusion or fraud in connection with any consultation service provided by the * * * consultant,” there is nothing in the statutory scheme that prevents these consultants from performing a significant and indeed powerful role in the implementation and execution of a congressional enactment, OSHA. Their role is in no sense merely advisory; they are delegated the power to interpret and apply OSHA’s requirements to particular employers and specific situations, and thereupon to take action—either issuing or refusing to issue a certificate of compliance—that has dramatic legal consequences for the employer involved, for his, her or its employees, and for the public. Yes these consultants remain private individuals, rather than public officials appointed in accord with the Appointments Clause of the Constitution, Article II, Section 2, Clause 2.

Because these consultants are removable by the Secretary only for failure to perform their duties or for malfeasance in office, and are not subject to the day-to-day supervision of any executive officer, they certainly cannot be described as adjuncts of the Executive Branch. Nor, despite the significant interpretive functions they perform with respect to the provisions of OSHA and its regulations across the entire range of industries and economic sectors covered by OSHA, can these consultants be regarded as functionaries within the Judicial Branch. Finally, because their actions affect legal rights, duties, and responsibilities of ordinary citizens and companies rather than simply facilitating the work of Congress, they cannot be deemed auxiliaries of the Legislative Branch.

Even though the Supreme Court has been relatively tolerant over the past six decades or so of federal laws delegating power to executive officials or even to officials of independent agencies appointed in accord with Article II, it has been understandably concerned about delegations of power to private individuals or entities. Those delegations of this character that have been upheld have tended to

involve delegations of a “more or less technical nature,” *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935), or delegations of a power simply to reject or veto specific courses of action—not delegations of broadly discretionary authority to construe and apply federal regulatory measures, with the power effectively to suspend the operation of those measures to restrain particular regulated entities. If, as the Supreme Court recently held in *Clinton v. New York*, 524 U.S. 417 (1998), not even the President may be armed by Congress with a line-item veto enabling the Chief Executive to cancel or rescind part of a duly enacted statute, it would seem to follow *a fortiori* that a private citizen cannot be armed by Congress with a line-item suspension power enabling that citizen to shield another from the consequences of non-compliance with a law duly enacted by Congress.

Beyond this constitutional infirmity, it seems impossible to escape the conclusion that the enforcement and anti-enforcement powers of consultants appointed under Section 3 of S. 385 would be broad enough to require their appointment as “Officers of the United States” in accord with the strictures of Article II, Section 2, Clause 2—something for which the proposed law obviously does not provide. Although these consultants undoubtedly have less wide-ranging powers than those the Supreme Court found impermissibly entrusted to non-Officers of the United States in *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating the statute creating the Federal Election Commission insofar as it entrusted such enforcement powers as the power to institute civil actions against violators of the statute to individuals appointed by the President pro tempore of the Senate and the Speaker of the House), the powers wielded by S. 385-consultants cannot be regarded as entailing anything less than significant authority under the laws of the United States. Accordingly, under the separation of powers principles articulated in *Buckley* and adhered to ever since, those consultants would have to be appointed by the President or, pursuant to federal legislation, by the Courts of Law of the Heads of Departments. Even assuming that these consultants, despite the lack of direct supervision by the Secretary, could be deemed “inferior” officers within the meaning of *Morrison v. Olson*, 487 U.S. 654 (1988), and thus could be appointed without confirmation by the Senate, the proposed statute fails to provide for their appointment by any of the authorized repositories of appointment power under Article II. The Secretary of Labor is, to be sure, among the “Heads of Departments,” but it is not the Secretary under S. 385 who appoints the consultants. Although the Secretary is given a role in certifying a given consultant to perform the services required, the selection process is placed entirely in the self-interested hands of the employers regulated by OSHA—the very antithesis of the public-minded process that the Constitution is structured to ensure in the notice of those who would wield significant power over the public under laws enacted by Congress.

For all these reasons, and for the reasons additionally, elaborated by the Department of Justice in its analysis of April 28, 1999, it is my conclusion that S. 385 would violate the separation of powers, would permissibly delegate discretionary federal authority to private individuals, would resemble the line-item veto in entrusting

to individuals outside Congress the power effectively to nullify on a temporary basis duly enacted provisions of federal legislation, and would transgress the Constitution's carefully wrought structure for the appointment of those exercising significant public authority implementing the laws of the United States. Whether S. 385 is a good or a bad idea in policy terms. I believe it violates the Constitution.

Sincerely yours,

LAURENCE H. TRIBE.

XI. EXECUTIVE AGENCY COMMENTS ON S. 385

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, April 29, 1999.

Hon. EDWARD M. KENNEDY,
*Ranking Minority Member, Committee on Health, Education, Labor
and Pensions, U.S. Senate, Washington, DC.*

DEAR SENATOR KENNEDY: This letter sets forth the views of the Office of Legal Counsel on the Safety Advancement for Employees Act of 1999 ("SAFE Act"), S. 385. Due to time constraints, our comments are necessarily preliminary. The scheme established by the SAFE Act appears to be a novel one, and it is therefore difficult to predict how a court would assess its constitutionality. S. 385 does, however, appear to raise substantial constitutional concerns involving the separation of powers.

Section 3 of S. 385 would establish a "third party consultation services program" under the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. §§ 651 et seq. Under that program, an employer may contract with a private "consultant," who would conduct an "evaluation of the workplace of an employer to determine if the employer is in compliance with the requirements of [the OSH Act], including any regulations promulgated pursuant to [the] Act." Section 3(a) (adding sec. 8A(e)(1)). If an employer receives a "certificate of compliance" from the consultant, the "employer shall be exempt from the assessment of any civil penalty under section 17 for a period of 1 year after the date on which the employer receives such certificate." Id. (sec. 8A(f)(1)). There are two exceptions to an employer's one-year exemption from civil penalties: (1) "if the employer has not made a good faith effort to remain in compliance as required under the certificate of compliance"; and (2) "to the extent that there has been a fundamental change in the hazards of the workplace." Id. (sec. 8A(f)(2)).

The bill provides that consultants must be certified by the Secretary of Labor to provide consultation services, and it lists categories of professionals who shall be eligible for such certification, including state-licensed physicians, engineers, safety professionals, occupational nurses, and persons qualified in an occupational health or safety field by an organization whose program has been accredited by a nationally recognized private accreditation organization or by the Secretary. Id. (sec. 8A(b)(2)). Finally, the Secretary may revoke the status of a qualified consultant if the consultant "has failed to meet the requirements of the program" or "has committed malfeasance, gross negligence, collusion or fraud in connection with any consultation services provided by the qualified consultant." Id. (sec. 8A(d)).

The Constitution establishes a system of separate powers, and it provides that "[t]he executive Power shall be vested in a President

of the United States of America,” U.S. Const. art. II, § 1, who “shall take Care that the Laws be faithfully executed,” id. art. II, § 3. A statute violates the separation of powers if it “‘impermissibly undermine[s]’ the powers of the Executive Branch, * * * or ‘disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions. * * *’” *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (citations omitted).

The SAFE Act implicates these principles because it delegates to private entities outside the executive branch substantial authority to execute the laws. The functions permitted to be carried out by consultants under the bill are central executive functions. Indeed, “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law. *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). Private consultants under the bill would be doing precisely what executive agencies typically do: administer a federal regulatory program by determining whether individuals are in compliance with a federal statute and regulations. Moreover, the bill would constrain the executive branch’s implementation of the law in a tangible way—by making employers exempt for a period of one year from civil penalties otherwise assessable under the OSH Act.¹

Delegating some executive functions to entities outside the executive branch does not necessarily violate the Constitution. In *Morrison v. Olson*, the Court upheld the grant of investigative and prosecutorial authority under the Ethics in Government Act to the independent counsel, an individual neither appointed nor removable at will by the President. The Court concluded that the statute did not prevent the executive branch from performing its constitutionally assigned duties, emphasizing the degree of control retained by the Attorney General in initiating an investigation and in being able to remove the independent counsel for “good cause.” 487 U.S. at 695–96; see also *United States ex rel. Kelly v. Boeing Co.* 9 F.3d 743 (9th Cir. 1993) (upholding delegation of litigation authority on behalf of the United States to private individuals under qui tam provisions of the False Claims Act).

Another common form of delegation that generally does not present a constitutional problem is the grant of authority to private parties (or to state, local, or tribal officials) to stop federal action by declining to consent to it. Such legislation “merely sets a condition on the executive branch’s exercise of authority that the executive would not possess at all in the absence of the legislation.” Memorandum for the General Counsels of the Federal Government from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: The Constitutional Separation of Powers Between the President and Congress 58 n.135 (May 7, 1996) (“Dellinger Memo”). Thus, in upholding a statute requiring a supermajority of regulated farmers to agree before the Secretary of Agriculture could exercise certain powers, the Supreme court rejected the argument that the

¹ Section 17 of the OSH Act, 29 U.S.C. § 666, provides for various civil penalties for violations of the Act. It also provides for criminal penalties for willful violations resulting in an employee’s death, for giving unauthorized advance notice of an OSHA inspection, and for false statements. Certification by a private consultant under this proposal would not exempt employers from criminal penalties.

statute impermissible delegated legislative power: “Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market ‘unless two-thirds of the growers voting favor it.’” *Currin v. Wallace*, 306 U.S. 1, 15 (1939).²

The SAFE Act would effect a type of delegation to private entities that is somewhat different from those addressed by the authorities of which we are aware. See generally Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 *Nw. U. L. Rev.* 62, 84–93 (1990) (surveying congressional delegations to private entities). The bill appears to go beyond other examples of such delegation in impairing the ability of the executive branch to execute the laws. First, the functions given to private consultants under the bill are more in the nature of execution of the laws than, for example, the authority of an industry to “veto” the substance of the proposed regulation in *Currin*. The SAFE Act, like the “veto” legislation, can be viewed as imposing a condition on Congress’s regulation of a certain field (workplace safety) that Congress could choose not to regulate at all, but the condition here works in a different manner. While the “veto” legislation involves whether the law applies to a particular group, the SAFE Act implicates the Secretary’s power to make case-by-case determinations as to whether admittedly applicable law has been violated.

Second, the authority given to consultants under the SAFE Act would be particularly broad-based. It is not merely authority over a specified industry, or particular technical matters (although the bill does provide that consultants may only provide services coinciding with their expertise), but authority to determine employers’ compliance with the entirety of the OSH Act and regulations under that Act.³ *Cf. A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (suggesting that “matters of a more or less technical nature” could be delegated to private parties).

Third, the limited degree of executive branch control over the consultants’ exercise of authority for which the proposal provides may not be constitutionally adequate. It is true that consultants would have to be certified by the Secretary of Labor, and could be de-certified for “malfeasance” or other reasons. In addition, the Secretary would retain certain limited authority with respect to employers that have contracted with consultants, including the authority to impose criminal penalties and to “inspect and investigate” worksites covered by a certificate of compliance. But the bill provides for no executive branch supervision of the day-to-day activities of consultants determining compliance with the OSH Act. Moreover, if a consultant had issued a certificate of compliance, then OSHA could not impose any civil penalties upon an employer

² *Currin* and similar decisions address the nondelegation doctrine, which prohibits standardless grants of legislative power, rather than the impairment of executive power under separation of powers principles. The nondelegation doctrine is essentially moribund in the courts, see, e.g., *Yakus v. United States*, 321 U.S. 414 (1944) (upholding broad delegation), but for reasons parallel to those the Court relied on in *Currin*, we think that the growers’ “veto” at issue there would not violate the separation of powers. See Memo at 58 n.135.

³ Under section 5 of the OSH Act, 29 U.S.C. § 654, each employer has a general duty to furnish employees with employment and a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees,” *id.* § 654(a)(1), as well as a duty to comply with specific occupational safety and health standards promulgated by regulation, *id.* § 654(a)(2).

for a year, so a de-certification of the consultant would do little to protect the executive's authority with respect to particular violations.

By eliminating the executive's control over the enforcement of the law, the bill would threaten one of the core values protected by the Constitution's placement of the executive power in a single President: political accountability. Because these private consultants would not be directly responsible to the President, the public's ultimate check on negligent or arbitrary government action would be weakened. Hamilton's objection in Federalist No. 70 to a plural executive also has some bearing here. Use of private consultants to certify OSH Act compliance risks creating a situation in which accountability "is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. * * * [I]t may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable." The Federalist No. 70, at 427-28 (Clinton Rossiter ed., 1961).

For these reasons, we have serious reservations about the constitutionality of the SAFE Act. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget advises that there is no objection to submission of this report and that enactment of S. 385 would not be in accord with the Administration's program.

Sincerely,

JON P. JENNINGS,
Acting Assistant Attorney General.

XII. CHANGE IN EXISTING LAW

In compliance with rule XXVI paragraph 12 of the Standing rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

* * * * *
SECTION 1. * * *

* * * * *

CONGRESSIONAL FINDINGS AND PURPOSE

SEC. (2) * * *

* * * * *

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment; **[and]**

(14) by increasing the joint cooperation of employers, employees, and the Secretary of Labor in the effort to ensure safe and healthful working conditions for employees.

* * * * *

ADVISORY COMMITTEES; ADMINISTRATION

SEC. 7. (a)(1) * * *

* * * * *

(d)(1) Not later than 6 months after the date of enactment of this subsection, the Secretary shall establish an advisory committee (pursuant to the Federal Advisory Committee Act (5 U.S.C. App.)) to carry out the duties described in paragraph (3).

(2) the advisory committee shall be composed of—

(A) 3 members who are employees;

(B) 3 members who are employers;

(C) 2 members who are members of the general public; and

(D) 1 member who is a State official from a State plan State.

Each member of the advisory committee shall have expertise in workplace safety and health as demonstrated by the educational background of the member.

(3) The advisory committee shall advise and make recommendations to the Secretary with respect to the establishment and implementation of a consultation services program under section 8A.

INSPECTIONS, INVESTIGATIONS, AND RECORDKEEPING

SEC. 8. (a) * * *

* * * * * *

(f)(1) * * *

* * * * * *

(3) *The Secretary or an authorized representative of the Secretary may, as a method of investigating an alleged violation or danger under this subsection, attempt, if feasible, to contact an employer by telephone, facsimile, or other appropriate methods to determine whether—*

(A) *the employer has taken corrective actions with respect to the alleged violation or danger; or*

(B) *there are reasonable grounds to believe that a hazard exists.*

(4) *The Secretary is not required to conduct an inspection under this subsection if the Secretary determines that a request for an inspection was made for reasons other than the safety and health of the employees of an employer or that the employees of an employer are not at risk.*

* * * * * *

(i) *Any Federal employee responsible for enforcing this Act shall, not later than 2 years after the date of enactment of this subsection or 2 years after the initial employment of the employee involved, meet the eligibility requirements prescribed under subsection (b)(2) of section 8A.*

(j) *The Secretary shall ensure that any Federal employee responsible for enforcing this Act who carries out inspections or investigations under this section, receive professional education and training at least every 5 years as prescribed by the Secretary.*

SEC. 8A. THIRD PARTY CONSULTATION SERVICES PROGRAM.

[(a) PURPOSE. recognizing that

[(1) employee safety is of paramount concern;

[(2) employers are overburdened by regulations and are unable to read through, understand and effectively comply with the voluminous requirements of this Act, and

[(3) the Secretary is unable to individually satisfy the compliance needs of each employer and employee within its jurisdiction;

it is]

(a) *PURPOSE.—It is the purpose of this section to encourage employees to conduct voluntary safety and health audits using the expertise of qualified safety and health consultants and to proactively seek individualized solutions to workplace safety and health concerns.*

(b) *ESTABLISHMENT OF PROGRAM.—*

(1) *IN GENERAL.—Not later than 18 months after the date of enactment of this section, the Secretary, in consultation with the advisory committee established under section 7(d), shall establish and implement, by regulation, a program that qualifies individuals to provide consultation services to employers to assist*

employers in the identification and correction of safety and health hazards in the workplaces of employers.

(2) *ELIGIBILITY.—The following individuals shall be eligible to be qualified under the program under paragraph (1) as certified safety and health consultants:*

(A) An individual who is licensed by a State authority as a physician, industrial hygienist, professional engineer, safety engineer, safety professional, or registered nurse.

(B) An individual who has been employed as an inspector for a State plan State or as a Federal occupational safety and health inspector for not less than a 5-year period.

(C) An individual who is qualified in an occupational health or safety field by an organization whose program has been accredited by a nationally recognized private accreditation organization or by the Secretary.

(D) An individual who has not less than 10 years expertise in workplace safety and health.

(E) Other individuals determined to be qualified by the Secretary.

(3) *GEOGRAPHICAL SCOPE OF CONSULTATION SERVICES.—A consultant qualified under the program under paragraph (1) may provide consultation services in any State.*

(4) *LIMITATION BASED ON EXPERTISE.—A consultant qualified under the program under paragraph (1) may only provide consultation services to an employer with respect to a worksite if the work performed at that worksite coincides with the particular expertise of the individual.*

(c) *SAFETY AND HEALTH REGISTRY.—The Secretary shall develop and maintain a registry that includes all consultants that are qualified under the program under subsection (b)(1) to provide the consultation services described in subsection (b) and shall publish and make such registry readily available to the general public.*

(d) *DISCIPLINARY ACTIONS.—The Secretary may revoke the status of a consultant qualified under subsection (b), or the participation of an employer under subsection (b) in the third party consultation program, if the Secretary determines that the consultant or employer—*

(1) has failed to meet the requirements of the program; or

(2) has committed malfeasance, gross negligence, collusion or fraud in connection with any consultation services provided by the qualified consultant.

(e) *PROGRAM REQUIREMENTS.—*

(1) FULL SERVICE CONSULTATION.—The consultation services described in subsection (b), and provided by a consultant qualified under the program under subsection (b)(1), shall include an evaluation of the workplace of an employer to determine if the employer is in compliance with the requirements of this Act, including any regulations promulgated pursuant to this Act. Employers electing to participate in such program shall contract with a consultant qualified under subsection (b)(2) to perform a full service visit and consultation covering the employer's establishment, including a complete safety and health program review. Following the guidance as specified in this sec-

tion, the consultant shall discuss with the employer the elements of an effective program.

(2) CONSULTATION REPORT.—

(A) IN GENERAL.—After a consultant conducts a comprehensive survey of an employer under a program under this section, the consultant shall prepare and submit to the employer a written report that includes an action plan identifying any violations of this Act, and any appropriate corrective measures to address the violations that are identified using an effective safety and health program.

(B) ELEMENTS.—A consultation report shall contain each of the following elements.

(i) ACTION PLAN.—

(I) IN GENERAL.—An action plan under subparagraph (A) shall be developed in consultation with the employer as part of the initial comprehensive survey. The consultant and the employer shall jointly use the on site time in the initial visit to the employer's place of business to agree on the terms of the action plan and the time frames for achieving specific items.

(II) REQUIREMENTS.—The action plan shall outline the specific steps that must be accomplished by the employer prior to receiving a certificate of compliance. The action plan shall address in detail

(aa) the employer's correction of all identified safety and health hazards, with applicable time frames;

(bb) the steps necessary for the employer to implement an effective safety and health program, with applicable time frames; and

(cc) a statement of the employer's commitment to work with the consultation project to achieve a certificate of compliance.

(ii) SAFETY AND HEALTH PROGRAM.—An employer electing to participate in a program under this section shall establish a safety and health program to manage workplace safety and health to reduce injuries, illnesses and fatalities that complies with paragraph (3). Such safety and health program shall be appropriate to the conditions of the workplace involved.

(3) REQUIREMENTS FOR SAFETY AND HEALTH PROGRAM.—

(A) WRITTEN PROGRAM.—An employer electing to participate shall maintain a written safety and health program that contains policies, procedures, and practices to recognize and protect their employees from occupational safety and health hazards. Such procedures shall include provisions for the identification, evaluation and prevention or control of workplace hazards.

(B) MAJOR ELEMENTS.—A safety and health program shall include the following elements, and may include other elements as necessary to the specific worksite involved and

as determined appropriate by the qualified consultant and employer:

(i) *EMPLOYER COMMITMENT AND EMPLOYEE INVOLVEMENT.*—

(I) *IN GENERAL.*—The existence of both management leadership and employee participation must be demonstrated in accordance with subclauses (II) and (III).

(II) *MANAGEMENT LEADERSHIP.*—To make a demonstration of management leadership under this subclause, the employer shall—

(aa) set a clear worksite safety and health policy that employees can fully understand;

(bb) set and communicate clear goals and objectives with the involvement of employees;

(cc) provide essential safety and health leadership in tangible and recognizable ways;

(dd) set positive safety and health examples; and

(ee) perform comprehensive reviews of safety and health programs for quality assurance using a process which promotes continuous correction.

(III) *EMPLOYEE PARTICIPATION.*—With respect to employee participation, the employer shall demonstrate a commitment to working to develop a comprehensive, written and operational safety and health program that involves employees in significant ways that affect safety and health. In making such a demonstration, the employer shall—

(aa) provide for employee participation in actively identifying and resolving safety and health issues in tangible ways that employees can clearly understand;

(bb) assign safety and health responsibilities in such a way that employees can understand clearly what is expected of them;

(cc) provide employees with the necessary authority and resources to meet their safety and health responsibilities; and

(dd) provide that safety and health performance for managers, supervisors and employees be measured in tangible ways.

(ii) *WORKPLACE ANALYSIS.*—The employer, in consultation with the consultant, shall systematically identify and assess hazards in the following ways:

(I) Conduct corrective action and regular expert surveys to update hazard inventories.

(II) Have competent personnel review every planned or new facility, process material, or equipment.

(III) Train all employees and supervisors, conduct routine joint inspections, and correct items identified.

(IV) *Establish a way for employees to report hazards and provide prompt responses to such reports.*

(V) *investigate worksite accidents and near accidents.*

(VI) *Provide employees with the necessary information regarding incident trends, causes and means of prevention.*

(iii) *HAZARD PREVENTION.—The employer, in consultation with the consultant, shall—*

(I) *engage in timely hazard control, working to ensure that hazard controls are fully in place and communicated to employees, with emphasis on engineering controls and enforcing safe work procedures;*

(II) *maintain equipment using operators who are trained to recognize maintenance needs and perform or direct timely maintenance;*

(III) *provide training on emergency planning and preparation, working to ensure that all personnel know immediately how to respond as a result of effective planning, training, and drills;*

(IV) *equip facilities for emergencies with all systems and equipment in place and regularly tested so that all employees know how to communicate during emergencies and how to use equipment; and*

(V) *provide for emergency medical situations using employees who are fully trained in emergency medicine.*

(iv) *SAFETY AND HEALTH TRAINING.—The employer, in consultation with the consultant, shall—*

(I) *involve employees in hazard assessment, development and delivery of training;*

(II) *actively involve supervisors in worksite analysis by empowering them to ensure physical protections, reinforce training, enforce discipline, and explain work procedures; and*

(III) *provide training in safety and health management to managers.*

(4) *REINSPECTION.—At a time agreed to by the employer and the consultant may reinspect the workplace of the employer to verify that the required elements in the consultation report have been satisfied. If such requirements have been satisfied, the employer shall be provided with a certificate of compliance for that workplace by the qualified consultant.*

(f) *EXEMPTION FROM CIVIL PENALTIES FOR COMPLIANCE.—*

(1) *IN GENERAL.—If an employer enters into a contract with an individual qualified under the program under this section, to provide consultation services described in subsection (b), and receives a certificate of compliance under subsection (e)(4), the employer shall be exempt from the assessment of any civil penalty under section 17 for a period of 1 year after the date on which the employer receives such certificate.*

(2) *EXCEPTIONS.*—An employer shall not be exempt under paragraph (1)—

(A) if the employer has not made a good faith effort to remain in compliance as required under the certificate of compliance; or

(B) to the extent that there has been a fundamental change in the hazards of the workplace.

(g) *RIGHT TO INSPECT.*—Nothing in this section shall be construed to affect the rights of the Secretary to inspect and investigate worksites covered by a certificate of compliance.

(h) *RENEWAL REQUIREMENTS.*—An employer that is granted a certificate of compliance under this section may receive a 1 year renewal of the certificate if the following elements are satisfied:

(1) A qualified consultant shall conduct a complete onsite safety and health survey to ensure that the safety and health program has been effectively maintained or improved, workplace hazards are under control, and elements of the safety and health program are operating effectively.

(2) The consultant, in an onsite visit by the consultant, has determined that the program requirements have been complied with and the health and safety program has been operating effectively.

(i) *NON-FIXED WORK SITES.*—With respect to employer worksites that do not have a fixed location, a certificate of compliance shall only apply to that worksite which satisfies the criteria under this section and such certificate shall not be portable to any other worksite. This section shall not apply to service establishments that utilize essentially the same work equipment at each non-fixed worksite.

CITATIONS

SEC. 9. [(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 5 of this Act, of any standard, rule or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.]

(a)(1) *Nothing in this Act shall be construed as prohibiting the Secretary or the authorized representative of the Secretary from providing technical or compliance assistance to an employer in correcting a violation discovered during an inspection or investigation under this Act without issuing a citation.*

(2) *Except as provided in paragraph (3), if, upon an inspection or investigation, the Secretary or an authorized representative of the Secretary believes that an employer has violated a requirement of section 5, of any regulation, rule, or order promulgated pursuant to section 6, or of any regulations prescribed pursuant to this Act, the*

Secretary may with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of a violation, including a reference to the provision of the Act, regulation, rule, or order alleged to have been violated. The citation shall fix a reasonable time for the abatement of the violation.

(3) The Secretary or the authorized representative of the Secretary—

(A) may issue a warning in lieu of a citation with respect to a violation that has no significant relationship to employee safety and health; and

(B) may issue a warning in lieu of a citation in cases in which an employer in good faith acts promptly to abate a violation if the violation is not a willful or repeated violation.

* * * * *

(d) A citation issued under subsection (a) to an employer who violates section 5, any standard, rule, or order promulgated pursuant to section 6, or any other regulation promulgated under this Act shall be vacated if such employer demonstrates that the employees of such employer were protected by alternative methods that are equally or more protective of the safety and health of the employees than the methods required by such standard, rule, order, or regulation in the factual circumstances underlying the citation.

(e) Subsection (d) shall not construed to eliminate or modify other defenses that may exist to any citation.

TRAINING AND EMPLOYEE EDUCATION

SEC. 21. (a) * * *

* * * * *

[(c) The] *(c)(1) The Secretary, in consultation with the Secretary of Health, Education, and Welfare, shall [(1) provide] (A) provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance, and prevention of unsafe or unhealthful working conditions in employments covered by this Act, and [(2) consult] (B) consult with and advise employers and employees, and organizations representing employers and employees as to effective means of preventing occupational injuries and illnesses.*

(2)(A) The Secretary shall, through the authority granted under section 7(c) and paragraph (1), enter into cooperative agreements with States for the provision of consultation services by such States to employers concerning the provision of safe and healthful working conditions.

(B)(i) Except as provided in clause (ii), the Secretary shall reimburse a State that enters into a cooperative agreement under subparagraph (A) in an amount that equals 90 percent of the costs incurred by the State for the provision of consultation services under such agreement.

(ii) A State shall be reimbursed by the Secretary for 90 percent of the costs incurred by the State for the provision of—

(I) training approved by the Secretary for State personnel operating under a cooperative agreement; and

(II) specified out-of-State travel expenses incurred by such personnel.

(iii) A reimbursement paid to a State under this subparagraph shall be limited to costs incurred by such State for the provision of consultation services under this paragraph and the costs described in clause (ii).

(d)(1) Not later than 90 days after the date of enactment of this subsection, the Secretary shall establish and carry out a pilot program in 3 States to provide expedited consultation services, with respect to the provision of safe and healthful working conditions, to employers that are small businesses (as the term is defined by the Administrator of the Small Business Administration). The Secretary shall carry out the program for a period of not of exceed 2 years.

(2) The Secretary shall provide consultation services under paragraph (1) not later than 4 weeks after the date on which the Secretary receives a request from an employer.

(3) The Secretary may impose a nominal fee to an employer requesting consultation services under paragraph (1). The fee shall be in an amount determined by the Secretary. Employers paying a fee shall receive priority consultation services by the Secretary.

(4) In lieu of issuing a citation under section 9 to an employer for a violation found by the Secretary during a consultation under paragraph (1), the Secretary shall permit the employer to carry out corrective measures to correct the conditions causing the violation. The Secretary shall conduct not more than 2 visits to the workplace of the employer to determine if the employer has carried out the corrective measures. The Secretary shall issue a citation as prescribed under section 5 if, after such visits, the employer has failed to carry out the corrective measures.

(5) Not later than 90 days after the termination of the program under paragraph (1), the Secretary shall prepare and submit a report to the appropriate committees of Congress that contains an evaluation of the implementation of the pilot program.

[(d)(1)] (e)(1) The Secretary shall establish and support cooperative agreements with the States under which employers subject to this Act may consult with State personnel with respect to—

* * * * *

SEC. 35. ALCOHOL AND SUBSTANCE ABUSE TESTING.

(a) **PROGRAM PURPOSE.**—In order to secure a safe workplace, employers may establish and carry out an alcohol and substance abuse testing program in accordance with subsection (b).

(b) **FEDERAL GUIDELINES.**—

(1) **REQUIREMENTS.**—An alcohol and substance abuse testing program described in subsection (a) shall meet the following requirements:

(A) **SUBSTANCE ABUSE.**—A substance abuse testing program shall permit the use of an onsite or offsite testing.

(B) **ALCOHOL.**—The alcohol testing component of the program shall take the form of alcohol breath analysis and shall conform to any guidelines developed by the Secretary of Transportation for alcohol testing of mass transit employees under the Department of Transportation and Related Agencies Appropriations Act, 1992.

(2) *DEFINITION.*—For purposes of this section the term “alcohol and substance abuse testing program” means any program under which test procedures are used to take an analyze blood, breath, hair, urine, saliva, or other body fluids or materials for the purpose of detecting the presence or absence of alcohol or a drug or its metabolites. In the case of urine testing, the confirmation tests must be performed in accordance with the mandatory guidelines for Federal workplace testing programs published by the Secretary of Health and Human Services on April 11, 1988, at section 11979 of title 53, Code of Federal Regulations (including any amendments to such guidelines). Proper laboratory protocols and procedures shall be used to assure accuracy and fairness and laboratories must be subject to the requirements of subpart B of the mandatory guidelines, State certification, the Clinical Laboratory Improvements Act of the College of American Pathologists.

(c) *TEST REQUIREMENTS.*—This section shall not be construed to prohibit an employer from requiring—

(1) an applicant for employment to submit to and pass an alcohol or substance abuse test before employment by the employer; or

(2) an employee, including managerial personnel, to submit to and pass an alcohol substance abuse test—

(A) on a for-cause basis or where the employer has reasonable suspicion to believe that such employee is using or is under the influence of alcohol or a controlled substance;

(B) where such test is administered as part of a scheduled medical examination;

(C) in the case of an accident or incident, involving the actual or potential loss of human life, bodily injury, or property damage;

(D) during the participation of an employee in an alcohol or substance abuse treatment program, and for a reasonable period of time (not to exceed 5 years) after the conclusion of such program; or

(E) on a random selection basis in work units, locations, or facilities.

(d) *CONSTRUCTION.*—Nothing in this section shall be construed to require an employer to establish an alcohol and substance abuse testing program for applicants or employees or make employment decisions based on such test results.

(e) *PREEMPTION.*—The provisions of this section shall not preempt any provision of State law to the extent that such State law is inconsistent with this section.

(f) *INVESTIGATIONS.*—The Secretary is authorized to conduct testing of employees (including managerial personnel) of an employer for use of alcohol or controlled substances during any investigations of a work-related fatality or serious injury.