PLAINTIFF'S
EXHIBIT
DUP-1303

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 72-1713

INDUSTRIAL UNION DEPARTMENT,
AFL-CIO, et al, PETITIONERS,

v.

JAMES D. HODGSON, SECRETARY,
DEPARTMENT OF LABOR, RESPONDENT

ENVIRONMENTAL DEFENSE FUND, INC., INTERVENOR.

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On Petition for Review of the Secretary of Labor's
Standard for Exposure to Asbestos Dust
Under the Occupational Safety and Health Act

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Decided April 15, 1974

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*George H. Cohen*, with whom *Elliot Bredhoff* was on the brief, for petitioners. *Michael H. Cottesman* also entered an appearance for petitioners.

*Walter H. Fleischer*, Attorney, Department of Justice, with whom *Lee B. Charlin*, Attorney, Department of Justice, was on the brief, for respondent. *Michael J. Lewis*, Attorney, United States Department of Labor, *Michael Kimmel*, Attorney, Department of Justice, and

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...ch A. Feilner, Attorney, Appellate Litigation of Divi-
...n of Occupational Safety and Health, Department of
...bor.

Scott H. Lang, of the bar of the United States District
...urt for the District of Columbia, pro hac vice by spe-
...l leave of court, with whom John F. Dienelt was on
...e brief, for intervenor.

Alan B. Morrison and Arthur L. Fox II filed a brief
...behalf of Health Research Group as amicus curiae,
...ging reversal.

Joseph W. Burns filed a brief on behalf of Asbestos
...formation Association/North America as amicus curiae
...ging affirmance. John P. Keegan also entered an ap-
...rance for amicus curiae Asbestos Information Associ-
...ion/North America.

Before McGowan, Leventhal and MacKinnon, Cir-
...it Judges.

Opinion for the Court filed by Circuit Judge McGowan.

McGowan, Circuit Judge: This direct review proceed-
...g presents a classic case of what Judge Friendly has
...tly termed "a new form of uneasy partnership" be-
...en agency and court that results whenever Congress
...legates decision making of a legislative character to the
...e, subject to review by the other. Associated Industries
...Unit of States Dept. of Labor, 487 F.2d 342, 351 (2nd
...r. 1973). The angularity of this relationship is only
...argued when, as here, Congress—with no apparent
...areness of anomaly—has explicitly combined an in-
...rmal agency procedure with a standard of review tra-
...tionally conceived of as suited to formal adjudication
...rulemaking. The federal courts, hard pressed as they
...e by the flood of new tasks imposed upon them by
...ngress, surely have some claim to be spared additional



burdens deriving from the illogic of legislative compro-
mise. At the least, it would have been helpful if there
had been some recognition by Congress that the quick
answer it gave to a legislative stalemate posed serious
problems for a reviewing court, and that there would
inevitably have to be some latitude accorded it to sur-
mount those problems consistently with the legislative
purposes. The duty remains, in any event, to decide the
case before us in accordance with our statutory man-
date, however dimly the rationale, if any, underlying it
can be perceived.

The petition before us seeks review of standards promul-
gated by the Secretary of Labor under the Occupa-
tional Safety and Health Act of 1970, 29 U.S.C. §§ [illegible]
et seq. (hereinafter OSHA). The standards in question
regulate the atmospheric concentrations of asbestos dust
in industrial workplaces. Petitioners are unions whose
members are affected by the health hazards of asbestos
dust. They challenge the timetable established by the
standards for the achievement of permissible levels of con-
centration, and object to portions of the standards con-
cerning methods of compliance, monitoring intervals and
techniques, cautionary labels and notices, and medical
examinations and records. We remand two of such issues
to the Secretary for further consideration. In all other
respects, the petition is denied.

I.

A. *The Occupational Safety and Health Act.*

Technological progress in industry appears not to have
been accompanied uniformly by corresponding reductions
in the health hazards of industrial working conditions.
More than 2.2 million persons are disabled on the job
each year, and in 1967 the Surgeon General estimated
that approximately 400,000 new cases of occupation-

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... would occur in each succeeding year.[4] The Chair- ... of the Committee on Labor and Public Welfare ... the problem as follows:

... only are occupational diseases which first came ... light at the beginning of the Industrial Revolu- ... still undermining the health of workers, but ... substances, new processes, and new sources of ... are presenting health problems of ever-in- ... complexity.

... ord, LEGISLATIVE HISTORY OF THE OCCUPATIONAL ... AND HEALTH ACT OF 1970 (hereinafter LEGIS. ...).

... the first comprehensive attempt by Congress to ... these problems,[5] covers every employer whose ... affects interstate commerce.[6] Eschewing any ... to establish substantive provisions to control all ... employers, the Act erects a general frame- ... to govern the development of regulations, and ... the task of formulating particular health and ... standards to the Secretary of Labor. Civil and ... functions are provided to enforce compliance.

... specifies the procedure to be followed in the ... of standards, and provides for the estab- ... of a research institute and the appointment of

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... Comm. on Education and Labor, Occupational ... and Health Act, H. R. Rep. No. [illegible], [illegible] Cong., ... 11 (1970); Cohen, *The Occupational Safety and ... A Labor Lawyer's Overview*, 33 OHIO ST. L. J. ... (1972).

... of prior regulation, see Cohen, note 1 ... Comment, *OSHA: Employer Beware*, 10 ... L. Rev. [illegible], 426-28 (1973).

... United States, and state and local governments, are ... from OSHA by 29 U.S.C. § 652(5) (1970).

advisory committees to assist the Secretary. The substantive provisions of the Act impose a general obligation upon employers to provide safe [illegible] U.S.C. § 654(a)(1) (1970). The Secretary is required to promulgate standards to control particular health hazards that come to his attention. Certain types of controls, including monitoring, medical examinations, warnings, record keeping, and specific protective measures are specified by the statute itself, but the decision as to when and how they should be required with regard to particular health hazards is left to the Secretary.

B. *Asbestos.*

Asbestos is a generic term applicable to a number of fibrous, inorganic, silicate minerals that are incombustible in air. Its commercial value is high, and its uses are many and varied. Asbestos can be woven into cloth, used in powder form, or incorporated into materials of various shapes and consistencies. Almost one million tons of asbestos are used in this country annually; and, for many purposes, it cannot easily be replaced with other substances.[4]

Unfortunately, asbestos is as hazardous to health as it is useful to industry. During its production and use,

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[4] The Act establishes within the Department of Health, Education, and Welfare a National Institute for Occupational Safety and Health (NIOSH) which is authorized to [illegible] and establish recommended occupational safety and health standards" for transmission to the Secretary [illegible] U.S.C. § 671. The Secretary of Labor may also appoint an advisory committee to assist him in his standard setting functions. In this instance a 5-member Advisory Committee on Asbestos Standards was constituted, consisting of two employer and two labor members, and one representative of the public.

[5] *Occupational Exposure to Asbestos* (NIOSH Criteria Document, 1972). App. 61-62.

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[illegible] asbestos fibers are released as a dust in the air, [illegible] the course of this century, thousands of workers have been killed or disabled by the effects of inhaling these fibers. There are no precise figures concerning the number of workers involved, but it is estimated that three to five million workers are exposed to some extent to asbestos fibers in the building construction and shipyard industries alone.[6] While OSHA was under consideration in Congress, the health hazards of the asbestos industry were among the examples used to stress the need for legislation.[7]

### C. *Proceedings before the Secretary*

Within a few months of the effective date of OSHA, petitioners requested the Secretary to establish an emergency standard to control concentrations of asbestos dust.[8] The Secretary promptly issued a temporary standard and set in motion the procedure for establishment of a permanent standard. Notice of the proposed rulemaking was published, and interested persons were invited to submit their views. NIOSH submitted its recommendations, as did the Advisory Committee. These were made public,

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[6] *Id.* [illegible] 32.

[7] Legislative History at 319, 412-13, 1002. The Secretary expressed the problem as follows (37 F.R. 11315):

> No one has disputed that exposure to asbestos of high enough intensity and long enough duration is causally related to asbestosis and cancers. The dispute is as to the determination of a specific level below which exposure is safe.

[8] Under 29 U.S.C. § 655(c), the Secretary can issue an immediately effective emergency standard without observing the procedural requirements for a permanent standard if (1) employees are exposed to grave danger, and (2) the emergency standard is necessary to protect them. The Secretary must then publish a permanent standard within six months.



and the Secretary conducted a hearing [illegible] representatives and experts [illegible] ested parties. On the [illegible] a formidable record of documents and oral [illegible] including highly technical statements by expert [illegible] es, the Secretary established the standards in [illegible] His statement of reasons covers some four and one [illegible] pages of the Federal Register.[10]

Petitioners allege no procedural errors in the promulgation of these standards, but they characterize the

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[9] A qualified hearing examiner presided over the four [illegible] consumed by the public hearing. At the close his [illegible] tion was to certify the record to the Secretary, [illegible] sisted of the written statements and [illegible] the notice of rulemaking, the transcript of [illegible] and many exhibits received during the hearing [illegible] ther period allowed after the hearing for [illegible] Joint Appendix filed in this court contains [illegible] of which over 400 are from the hearing [illegible] monial pattern generally was for the [illegible] statements, at the close of which they [illegible] examination. The questions actually asked [illegible] sporadic, and perfunctory, and the record [illegible] so much as that of a typical legislative [illegible]

[10] The statutory direction is that the Secretary, [illegible] he promulgates a standard, "shall include [illegible] sons for such action [illegible]." 29 U.S.C. § 655(c). [illegible] has by regulation, 29 C.F.R. § 1911.25(b), [illegible] F.R. [illegible] (1972), defined this [illegible]

> Any rule or standard adopted [illegible] concise general statement of its [illegible] statement is not required to include [illegible] findings and conclusions of the [illegible] ated with formal proceedings. However, the [illegible] will show the significant issues which [illegible] and will articulate the rationale for their [illegible]

Petitioners have not challenged the propriety of this [illegible] lation.

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inadequate to protect the health of employees as required by the Act. They attack the Secretary's interpretation of OSHA in certain particulars, as well as the enforcement measures he has selected.

II

OSHA is a self-contained statute in the sense that it does not depend upon reference to the Administrative Procedure Act for specification of the procedures to be followed. It prescribes that the process of promulgating standards is to be initiated by the publication of a proposed rule. Interested persons are given a period of 30 days thereafter within which to submit written data or comments. Within this period any interested person may file written objections, and may request a public hearing thereon. In such event the Secretary shall publish a notice specifying the particular standard involved and stating the time and place of the hearing. Within 60 days after the completion of such hearing, the Secretary shall issue his decision. Judicial review by the courts of appeals is provided."

This procedure is characteristic of the informal rule-making contemplated by Section 4 of the APA, 5 U.S.C. 553, and it was so understood by the Congress. By regulation, however, the Secretary, although describing it as "legislative in type," has provided that the oral hearing "called for in the statute shall contain some elements usually associated with the adjudicatory or formal rule-making model. As indicated in the text of the regulations set forth in the margin,[3] the Secretary apparently

[2] 5 U.S.C. § 553(d) reads in relevant part: "The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole."

[3] In 29 C.F.R. § 1911.15 ("Nature of Hearing"), the Secretary stated in relevant part:

"(a) (1) Section 6(b)(3) provides an opportunity for a hearing on objections to proposed rule making, and

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concluded that this was necessary because of the necessity of having a record to which the substantial evidence test could be intelligently applied by a reviewing court. The only controversy we have in this case as to the procedural requirements of the statute is not with respect to the manner in which the rulemaking was done by the Secretary, but as to the reach of the substantial evidence test in the course of judicial review.

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section 6(f) provides in connection with the judicial review of standards, that determinations of fact by the Secretary shall be conclusive if supported by substantial evidence in the record as a whole. Although these proceedings are not subject to the adjudicatory provisions of the Act within the meaning of the last sentence of 5 U.S.C. 554(a), the application of the formal requirements of §§ 556 and 557 they do suggest a Congressional understanding that the rule making would be on the basis of a record to which a substantial evidence test could be applied in the event an informal hearing such as

"(3) The oral hearing shall be informal in nature. However, fairness may require an opportunity for cross-examination on crucial issues. The presiding officer is empowered to permit cross-examination under such circumstances. . . .

"(b) Although any hearing shall be informal and legislative in type, this part is intended to provide more than the bare essentials of informal rule making under 5 U.S.C. 553. The additional requirements are the following:

"(1) The presiding officer shall be a hearing examiner appointed under 5 U.S.C. 3105.

"(2) The presiding officer shall provide an opportunity for cross-examination on crucial issues.

"(3) The hearing shall be reported verbatim, and a transcript shall be available to any interested person on such terms as the presiding officer may provide."

The substantial evidence test has customarily been directed to adjudicatory proceedings or formal rulemaking.[9] The hybrid nature of OSHA in this respect can be explained historically, if not logically, as a legislative compromise. The Conference Report reflects that the Senate called for informal rulemaking, but the House version specified formal rulemaking and substantial evidence review. The House receded on the procedure for promulgating standards, but the substantial evidence standard of review was adopted.[10]

One question generated by this anomalous combination is whether the determinations in question here are the kind to which substantial evidence review can appropriately be applied. The Government in its argument suggested that a proper accommodation could be reached by construing the statute to require substantial evidence review of factual determinations, while weighing considerations of policy drawn from these facts in terms of protection from arbitrariness or irrationality. We do not believe this approach would affect the rigorousness of review to the extent the Government seems to

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[9] Cases such as Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Camp v. Pitts, 411 U.S. 138 (1973); City of Chicago v. Federal Power Commission, 458 F.2d 731, 741 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972); Automotive Parts and Accessories Ass'n. v. Boyd, 407 F.2d 330, 338-38 (D.C. Cir. 1968); Wirtz v. Hotel, Motel & Club Employees Union, Local 6, 391 F.2d 884, 892-93 (D.C. Cir. 1968).

[10] This legislative history, as more confusion than a statement in the record that seems to indicate that the Conference Committee thought the substantial evidence standard was less stringent than the standard of rationality ordinarily applicable to review of informal rulemaking. H. Rep. No. 91-1765 (Conf.), 91st Cong., 2d Sess. 32 (1970). For a more detailed discussion of these legislative materials, see *Industrial Union Department, AFL-CIO v. Hodgson*, 499 F.2d 467, 474 n. 2 (D.C. Cir. 1974), *supra*, where this Court stated that the Congressional intention was to "accept the substantial evidence test for review as a limit upon the Board's absolute insistence on relocating on the record . . ." 457 F.2d at 349.



suppose, or that petitioners purport to favor. The analysis may, however, be useful for the purpose of clarifying the diverse nature of the judicial task imposed upon us by a statute like OSHA.[11]

Another problem arising from substantial evidence review of informal proceedings concerns the adequacy of the record to permit meaningful performance of the re-

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[11] The Government's theory in this regard was passed upon by the Second Circuit in *Associated Industries*, n. 2, *supra*, at 347-50. Judge Friendly, speaking for the court, felt called upon by reference to the face of the Act to reject its application in abstract proposition. He also appears to have been impelled to this conclusion in some degree by what he construed to be the Secretary's own concession in his regulations (footnote, *supra*) of "a Congressional expectation that review would be on the basis of a record to which a substantial evidence test, whose particular application to informal hearings is in doubt," although his position in this regard seems weakened by the qualifying phrase, "it is believed." He concluded, however, that very specific [illegible] is semantic in some degree, at least in the context of informal rulemaking," and held "the dispositional importance" claimed for it by the Government.

[12] Although formulated in the context of [illegible] comments by Judge Leventhal on [illegible] should go about the discharge of his responsibilities [illegible] court-reference partnership in furtherance of the [illegible] are helpful here. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[illegible] Circuit, to be published in the court's [illegible] ings, Professor Roy Schotland, of the Georgetown [illegible] Law Center, has explicated the degree to which the [illegible] of the partnership favor an elastic [illegible] the review to be afforded by the judicial [illegible] Schotland's useful perceptions are [illegible] his reminder that the concept of scope of review [illegible] ecalized application, and connotes, instead, close attention to the nature of the particular problem faced by the agency

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...review. Although this issue has not been directly ...argument, it underlies much of the controversy ...the sufficiency of the evidence to support various specific determinations of the Secretary. Thus some ...tion of the procedural implications of the prescribed substantial evidence standard of review should ...to clarify our resolution of the particular substantive issues presented by this petition.

...ed with the fact that his determinations were compelled by Congress to be reviewed under a substantial ...standard, the Secretary did voluntarily move his ...rules significantly towards the formal model. He ...ded that (1) a qualified hearing examiner should preside at the oral hearing, (2) cross-examination should be permitted, and (3) a verbatim transcript made. The ...record in this case was in part created under the ...rules that obtain in a formal proceeding. In substantial, ...standing part, however, it consists of a melange ...written statements, letters, reports, and similar materials received outside the bounds of the oral hearing and ...kind of unveiling approaching the adversary process.

...thus, in some degree the record approaches the form ...ordinarily conceived of as appropriate for substantial evidence review. In other respects, it does not. ...record of this mixed nature, when the facts underlying the Secretary's determinations are susceptible of ...found in the usual sense, that must be done, and ...reviewing court will weigh them by the substantial ...evidence standard. But, in a statute like OSHA where the ...ultimate finding vested in the Secretary is legislative ...in nature, there are areas where explicit factual findings are not possible and the act of decision is essentially ...based upon pure legislative judgment, as ...when a Congressman decides to vote for or against a particular bill.

OSHA sets forth general policy objectives and establishes the basic procedural framework for promulgation of standards, but the formulation of substantive provisions is left largely to the Secretary.[9] The Secretary's task thus contains "elements of both a legislative policy determination and an adjudicative assessment of disputed facts." *Mobil Oil Corp. v. FTC*, 483 F.2d 1238, 1257 (D.C. Cir. 1973). Although in practice these elements may so intertwine as to be virtually inseparable, they are conceptually distinct and can only be regarded as such by a reviewing court.

From extensive and often conflicting evidence the Secretary in this case made numerous factual determinations. With respect to some of these questions, the evidence was such that the task consisted primarily of evaluating the data and drawing conclusions therefrom. The court can review that data in the record and determine whether it reflects substantial support for the Secretary's findings. But some of the questions involved in the promulgation of these standards are on the frontiers of scientific knowledge, and [illegible] insufficient data to support [illegible] formed factual determinations. [illegible] that circumstance depend to a great extent upon judgments and less upon purely [illegible] In addition to correctly understanding factual issues, the formulation of standards involves choices [illegible] by their nature require basic policy determinations [illegible]

[9] For a comparison of this aspect of OSHA with the National Labor Relations Act, which delegates only procedural powers, *see* Cohen, *supra* note 1, at 92[illegible]

[9] Where existing methodology is inadequate [illegible] of regulation is decisive, the agency [illegible] discretion to attempt to formulate [illegible] its ability on the basis of available information. [illegible] Basin Area Rate Case, 390 U.S. 747, 811 (196[illegible]

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[illegible] factual controversies. Judicial review of inherently legislative decisions of this sort is obviously an undertaking of different dimensions.[illegible]

For example, in this case the evidence indicated that reliable data is not currently available with respect to the precisely predictable health effects of various levels of exposure to asbestos dust; nevertheless, the Secretary was obligated to establish some specific level as the maximum permissible exposure. After considering all the conflicting evidence, the Secretary explained his decision to adopt, over strong employer objection, a relatively low limit in terms of the severe health consequences which could result from over-exposure. Inasmuch as the protection of the health of employees is the overriding concern of OSHA, this choice is doubtless sound, but it rests in the final analysis on an essentially legislative policy judgment, rather than a factual determination, concerning the relative risks of underprotection as compared to overprotection.

Regardless of the manner in which the task of judicial review is articulated, policy choices of this sort are not susceptible to the same type of verification or refutation by reference to the record as are some factual questions. Consequently, the court's approach must necessarily be different no matter how the standards of review are labeled. That does not mean that such decisions escape exacting scrutiny, for, as this court has stated in a similar context:

> This exercise need be no less searching and strict in its weighing of whether the agency has performed in accordance with the Congressional purposes, but, because it is addressed to different materials, it inevitably varies from the adjudicatory model. The paramount objective is to see whether the agency, given an essentially legislative [illegible] carried it out in a manner calculated to [illegible] dangers of arbitrariness and [illegible] formulation of rules for general [illegible] future.

*Automotive Parts & Accessories Association v. B[illegible]*, F.2d 330, 338 (1968).

We do not understand Congress to have in this [illegible] nullified this approach for all purposes by directing [illegible] stantial evidence review. As noted above, that p[illegible] is important as an indication of how we should [illegible] certain kinds of questions and what kind of [illegible] should demand of the Secretary. But it is [illegible] be taken as a direction by Congress [illegible] Secretary's decision making [illegible] different from what it is, [illegible] gated power to make [illegible] Congress normally makes [illegible] courts have long recognized and accepted, [illegible] self. A due respect for the boundaries between [illegible] lative and the judicial function dictates [illegible] our reviewing task with a flexibility informed [illegible] by sensitivity to the diverse origins of the determinations that enter into a legislative judgment.

What we are entitled to at all events is a [illegible] tification by the Secretary, when his [illegible] are challenged, of the reasons why he [illegible] one course rather than another. Where [illegible] ports to be based on the existence of [illegible] able facts, the Secretary must, in form as well [illegible] stance, find those facts from evidence in the [illegible] the same token, when the Secretary is [illegible] policy judgments where no factual [illegible] where facts alone do not provide the answer, [illegible] so state and go on to identify the considerations [illegible] persuasive.

[illegible] Automotive Parts and Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C.Cir. 1968); Body & Tank Corp. v. NLRB, 339 F.2d 76, 78-79 (2d Cir. 1964).

legislative policy judgment in absence of factual determination
Delegated Power from Congress

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Judge Friendly concluded his ruminations in *Associated Industries* with an expression of doubt as to whether judicial review of legislative standards resulting from informal rule-making will ultimately prove to be feasible."[9] That is certainly a serious and substantial question. Whether it can eventually be answered affirmatively must depend in large measure upon the care and good sense with which both the delegates of what is essentially legislative power and the reviewing court go about their respective duties. In the case of OSHA, the Secretary has wisely acted by regulation to go beyond the minimum requirements of the statute and to expand his capacity to find facts by providing an evidentiary hearing in which cross-examination is available. We think it equally the part of wisdom and restraint on our part to show a comparable flexibility, and to be always mindful that at least some legislative judgments cannot be anchored securely and solely in demonstrable fact. Such a principle, far from being destructive of the Congressional purpose to provide judicial review, seems to us within the Congressional contemplation as essential to its preservation.

## III

Before addressing the specific challenges made to the Secretary's action, we examine two further problems raised by petitioners involving statutory construction. One has to do with the weight to be accorded by the Secretary to the NIOSH recommendations. The other relates

[9] After noting the twin dangers that the courts may do [illegible] much and too little in this elusive area, Judge [illegible] that there is much to be said "for the wisdom of Mr. Justice Brandeis in Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935), that 'where the regulation is within the scope of authority legally delegated, the [illegible] of the existence of facts justifying its specific [illegible] to statutes, to municipal ordinances, and to orders of administrative bodies.'" 487 F.2d at 354.



to whether the Secretary may take economic [illegible] tions into account.

With respect to the former, the statute directs [illegible] to develop criteria documents that describe safe [illegible] exposure, and the Secretary is to promulgate [illegible] that insure that employees are protected. The [illegible] employed by Congress in these two mandates is [illegible] tially identical except that the Secretary must [illegible] elements of feasibility.[10] From this similarity petition argue that the determinations of NIOSH are [illegible] be conclusive on the question of what exposure [illegible] adequately protect health, and that the Secretary [illegible] deviate from the NIOSH document only to the [illegible] dictated by feasibility.

The Act merely says that the Director of NIOSH [illegible] immediately forward recommended standards to the Secretary without specifying how the Secretary is to [illegible] them, but the procedure prescribed for the formulation of standards militates against petitioners' position [illegible]

[10] *Compare* 29 U.S.C. § 669(a)(3):

> [NIOSH] shall develop criteria dealing with [illegible] rials and harmful physical agents and [illegible] will describe exposure levels that [illegible] periods of employment, including but [illegible] sure levels at which no employee will [illegible] health or functional capacities or diminished life [illegible] tancy as a result of his work experience.

with 29 U.S.C. § 655(b)(5):

> The Secretary, in promulgating standards [illegible] tonic materials or harmful physical agents [illegible] subsection, shall set the standard [illegible] quately assures, *to the extent feasible*, [illegible] best available evidence, that no employee will [illegible] terial impairment of health or functional capacity [illegible] if such employee has regular exposure to the [illegible] with by the standard for the period of his working [illegible] . . . (Emphasis supplied.)

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[illegible] Secretary rather than NIOSH who conducts hearings [illegible] receives the comments of interested persons. The Secretary may also appoint a special advisory committee to assist him in his standard-setting functions, and receive recommendations from it, as he did here.

The Act, or so it seems to us, must be taken as contemplating that the Secretary may consider all of this information as well as that received from NIOSH. Petitioners' argument would restrict the advisory committees and interested parties to comments relating solely to feasibility, a role petitioners themselves clearly—and, we think, legitimately—exceeded at the hearing and in [illegible] before this court. The NIOSH recommendation was undoubtedly important in the eyes of Congress [illegible] to the Secretary, but we cannot see that [illegible] as more than that.

NIOSH criteria Documents

In connection with the second issue, we note that the Secretary authority for the promulgation of standards reads in relevant part:

> The Secretary . . . shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity. . . . 29 U.S.C. § 655(b)(5) (emphasis supplied).

The standards as promulgated retain the concentration level specified by the temporary emergency standard until 1976 when a lower permanent standard becomes effective. The Secretary explained his decision to delay, two years longer than the period suggested by NIOSH, implementation of the tougher standard as "necessary to allow employers to make the needed changes for coming into compliance," and petitioners argue that the Secretary improperly considered economic factors in reaching this conclusion. We conclude that the factors entering into the Secretary's conclusion could properly include [illegible] of economic feasibility.

Economic Feasibility

There can be no question that OSHA [illegible] decision to require safeguards for the health of [illegible] even if such measures substantially increase [illegible] costs. This is not, however, the [illegible] Congress intended to require immediate implementation of all protective measures technologically achievable [illegible] out regard for their economic impact. To the [illegible] it would comport with common usage to say that [illegible] ard that is prohibitively expensive is not "feasible." Senator Javits, author of the amendment that added [illegible] phrase in question to the Act, explained it in [illegible] terms:

> As a result of this amendment the Secretary, [illegible] setting standards, is expressly required to [illegible] feasibility of proposed standards. This is [illegible] provement over the Daniels bill, which [illegible] interpreted to require absolute health and [illegible] all cases, regardless of feasibility, and the [illegible] tration bill, which contains no criteria for [illegible] at all.

S. Rep. No. 91-1282, 91st Cong., 2d Sess., p. 58; [illegible] Hist. at 197.

The thrust of these remarks would seem to be that [illegible] tical considerations can temper protective requirements [illegible] Congress does not appear to have [illegible]

[illegible] A discussion of some of the costs of [illegible] in Hills, *Economics of Dust Control*, [illegible] New York Academy of Sciences, 322 (1968), [illegible] Several industry representatives [illegible] the cost of attempting to meet the standards [illegible] Co. v. United States Dept. of Transportation, [illegible] (7th Cir. 1972); Chrysler Corporation v. Dept. [illegible] Transportation, 472 F.2d 659 (6th Cir. 1972). [illegible] support the proposition that "practical" as [illegible] Automobile Safety Act of 1966, 15 U.S.C. § [illegible] economic considerations, but the legislative history of [illegible] statute, unlike the history of OSHA, is more explicit on [illegible] point.

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...putting their employers out of business—[illegible] by requiring protective devices unavailable under existing technology or by making financial viability generally impossible.

This qualification is not intended to provide a route by which recalcitrant employers or industries may avoid the reforms contemplated by the Act. Standards may be economically feasible even though, from the standpoint of employers, they are financially burdensome and affect profit margins adversely. Nor does the concept of economic feasibility necessarily guarantee the continued existence of individual employers. It would appear to be inconsistent with the purposes of the Act to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting the health and safety of employees and is consequently financially unable to comply with new standards as quickly as other employers. As the effect becomes more widespread within an industry, the problem of economic feasibility becomes more pressing. For example, if the standard requires changes that only a few leading firms could quickly make, delay might be necessary to avoid increasing the concentration of that industry. Similarly, if the competitive structure or posture of the industry would be drastically adversely affected—perhaps rendered unable to compete with imports or with substitute products"—the Secretary could properly consider that factor. These illustrative examples are offered not to illustrate concrete instances of economic unfeasibility but rather to suggest the complex elements that may be relevant to the determination.[*]

With the aid of the foregoing analysis as background, the procedural and substantive provisions of the Act, we turn to the specific objections raised by petitioners to the standards.

1. *Effective Date for the Two Fiber Standard.*

The most important aspect of setting the standards is the determination of an acceptable dust concentration level. Under the emergency standards, the eight hour time-weighted average airborne concentration of asbestos dust had been limited to five fibers greater than five microns in length per milliliter of air (hereinafter "the five fiber standard"). 36 F.R. 23207, 23208. A p...

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[*] Since technological problems [illegible] other than the traditional economic ones, [illegible] of industry, accommodation of [illegible] times involve social economic problems. [illegible] ...ester Co. v. Rockefeller, 475 F.2d 616 (D.C. Cir. [illegible] ...lustrates some of these problems in the context of [illegible] ...mobile emission standards of the Clean Air Act, [illegible] §§ 1857 *et seq.* In the highly competitive [illegible] ...try the costs decreed as likely to, by small margins, [illegible] ...importance to the economy, any one of the [illegible] ...panies could obtain a relaxation of the [illegible] ...standards if it could not meet them. In the [illegible] ...other manufacturers had proper [illegible] ...ard, the technology had improved [illegible] ...sanctions against installation of the control [illegible] ...the vehicles less efficient to operate. This circumstance [illegible] ...fied insuring that the standards could be met by all ... producers before they became effective.

[*] Although [illegible] ...partly to [illegible] ...than five microns in [illegible] ...The most accurate sampling [illegible] ...employed, the membrane filter method, [illegible] ...smaller particles. App. at 152-203, 225-227, 229, [illegible]

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[*] Temporary variances may be obtained when timely compliance is technologically impossible.

[*] Testimony of industry representatives predicted both of these results. See, e.g., App. at 560-62.

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...e hearings on the permanent standards ...ether the standard should remain at five fibers ...lowered to two. Proponents of standards ranging ...zero to 12 fibers appeared, and it is fair to say ...the evidence did not establish any one position as ...ly correct. The Secretary decided to resolve this ...in favor of greater protection of the health of ...loyees, and established the two fiber standard recommended by NIOSH and his Advisory Committee as the ...ultimately to be achieved.

...industry representatives testified that they simply could ...reduce concentrations to the two fiber level in the ...reasonable future. In the course of formulating its pro... NIOSH had undertaken a limited analysis of in...try's capacity to comply and had recommended de...ing the effective date of the two-fiber standard for ...ocos, Inc., July 1, 1974. The Secretary decided to ...in the five fiber standard for approximately four ...rs, until July 1, 1976, before requiring the reduction to ...fibers, in order to give employers time to prepare ...the lower limit. Petitioners assert that the four year ...period established by the Secretary is too long because (1) ...health of employees is endangered thereby, and (2) ...loyers do not need that much time.

### ... *Health Hazards Occasioned by the Delay.*

...The Secretary solicited the views of several experts ...the question of the predictable health effects of main...ing a five fiber standard until 1976. The experts ...ld sharply in some of their opinions, but their re...rks are generally cautious and reflect deficiencies ...available data concerning the relationship between ex...ure to asbestos dust and the likelihood of disease. The ...ord indicates that no precise prediction of increased ...k can be made at this time.[*]

[*] The Secretary directed his inquiries to Marcus M. Key, ...D., Assistant Surgeon General, Director of NIOSH; George ...W. Wright, M.D., Head of the Medical Research Division, St. Luke's Hospital, Cleveland, Ohio, W. Cl... Cooper, M.D., Professor in Residence, University of Cali...nia at ... and Duncan A. Holaday, Research Professor, ... School of Medicine, City University of New ... Implies are found in the Supplemental Record, ... Examples of the responses, the first ... in the effects of asbestosis, but not of ... Supp. App. 3b. With regard to ... he said data was insufficient to ... safety required proceeding on the ... should be minimized. Dr. Wright ... evidence whatsoever to indicate that ... cinogen in the sense of being an initiator, ... and that it is reasonably ... centrations below the five fiber level is ... Supp. App. 16b. On the other hand, Dr. ... that he did not see how a level higher than ... be justified. Supp. App. 42b.

The Secretary must establish ... adequately insure that no employee will ... impairment of health. We cannot say, on the ... the conflicting testimony in the record, that the Secretary ...erred in his prediction of the health effect of the four year ... delay,[**] but neither can we say that employees ... exposed to some additional risk of disease because of ... greater exposure. In view of the Act's express ... for problems of feasibility, the Secretary's decision to ... allow a four year delay is not irrational with regard to ... those industries that require that long to meet the ... ard. It is appropriate to allow sufficient time to ... an orderly industry-wide transition since, in these ... the indeterminate degree of risk involved is ... anced by considerations of feasibility; it is not, however, ... a risk to which employees should be recklessly ...

[**] The Secretary concluded that "so long as ... is complied with, no harm is reasonably ... from exposures during the transitional ..." This ... ment, although not compelled by the evidence, finds ... in the record.

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*c. Industrial Compliance Capability.*

The evidence indicates that significant inter-industry, as well as intra-industry, differences exist concerning the time needed by employers to meet a two fiber standard. Within particular industries the concentration levels at some plants, usually newer ones, are much lower than at others. Supp. App. 12a. More importantly, some industries could implement a two fiber standard more quickly than others.[24] The Director of NIOSH recommended that the Secretary require compliance sooner than 1976 where possible, and that he prohibit degradation of workplaces with concentrations currently below the limits.

Despite this recommendation and the evidence of these differences, the Secretary issued a single uniform effective date for all employers in all industries. He explained this decision as follows:

> It is undesirable there should be one minimum standard of exposure to asbestos applicable to all work-

[24] On the question of feasibility in particular industries, the statements of the experts listed in note 27 *supra* may be summarized as follows:

1. textiles, application—within two years (Wright, Cooper and Holaday);
2. textiles, in addition—within two years (Holaday); more than two years (Cooper);
3. asbestos textiles—more than two years (Wright and Holaday);
4. [illegible] plants and friction products plants—within immediately (Holaday).

Dr. Key, the Director of NIOSH, did not respond in terms of [illegible] but he did say that some plants could [illegible] before 1976, and that they should [illegible]

By [illegible] we do not mean to suggest any [illegible] to the accuracy of these predictions. The record at [illegible] contains little data from which to draw such a conclusion.



> places exposed to any kind of [illegible] asbestos. Reasons of practical administration dictate [illegible] include a variety of standards for different [illegible] amounts and of weight [illegible]

We cannot say on this record that an attempt to [illegible] differing effective dates to employers within an industry based on the time needed by each employer to alter its plant would be practicable. However, insofar as inter-industry differences are concerned, those reasons of practical administration are neither explained nor readily apparent.[25]

Government counsel suggested at oral argument that the Secretary possessed insufficient information at the time of formulation of the standards to differentiate among industries. That may be true, but it is not clear whether the lack of information is a cause or result of the Secretary's approach. While the Secretary [illegible] opinions concerning compliance capabilities [illegible] suggested that some industries could comply immediately, some could comply within two years, and some might require longer. The lack of more precise information may be partially attributable to the Secretary's failure to seek it. The record reflects little effort to cross-examine industry witnesses on this point, and, notwithstanding their insistence that a two fiber standard was not practicable, such questioning might have elicited some information pertinent to inter-industry distinctions.[26]

[25] Similarly, problems of competitive advantage [illegible] to intra-industry standards, are [illegible] inter-industry level. *Cf.* International Harvester Co. v. [illegible] Board, note 25 *supra*.

[26] It is possible that the Secretary failed to [illegible] point because he interpreted the statute to require a uniform standard for reasons of practical [illegible] case, we disagree. The statutory scheme is generally [illegible] to give the Secretary broad responsibility for [illegible]

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Separate standards for different industries would not appear to create opportunities for employers in one industry to challenge their standards on the grounds that standards for another industry were less demanding. The only relevant question would be whether the time schedule established for each industry was feasible for that industry; therefore, comparisons with the standards established for a different industry with different technological problems would be pointless unless the two industries were in competition with one another.[illegible] If one industry could gain a competitive advantage over another by virtue of differing standards, employers in the disadvantaged industry might challenge the standards on a comparative basis, but the threat of problems of that type does not appear on the basis of the record before us to justify a uniform standard for all industries.

It may be that the task of devising categories and classifying employers by industry would be unmanageable in view of the many diverse uses of asbestos. However, there is no evidence to that effect in the record, and it is not for the court to guess at the Secretary's reasoning or to supply justifications for his action. We have noted his cryptic reference to "reasons of practical administration," but, insofar as inter-industry distinctions are concerned, those reasons are not self-evident. Therefore, we remand this aspect of the standards to the Secretary for clarification or reconsideration.

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when standards are required and what those standards should be. If the Secretary determines that meaningful distinctions between the compliance capabilities of various industries can be [illegible], he is authorized to structure the standards accordingly.

[illegible] Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 385-90 (D.C. Cir. 1973).







2. *Monitoring Requirements.*

Within six months of publication of the standards, all employers are required to monitor work [illegible] to determine whether the concentrations of asbestos dust are within the allowable limits; thereafter, monitoring [illegible] in all cases be of such pattern and frequency as to identify accurately the levels of exposure. Monitoring must occur no less frequently than once every six months where the concentrations may reasonably be foreseen to exceed the standards. Petitioners object that these provisions are inadequate to protect the health of employees.[illegible]

The monitoring provisions are especially important because the results of that process often determine when and what protective measures are required.[illegible] Petitioners argue that the reasonable foreseeability qualification vests control of this key provision in the [illegible] the employer. They suggest that an employer may [illegible] the controls imposed by the standards simply [illegible] that no violations can reasonably be foreseen [illegible], thereby exempting his business from the [illegible] monitoring be conducted once every six months. [illegible] though it is true that the standards [illegible] employer to exercise some judgment concerning the likelihood of a violation, we do not give the foreseeability exception the broad construction feared by petitioners.

Periodic monitoring is important to insure that concentration levels have not been allowed to increase since the initial monitoring. Further, [illegible] may not be entirely uniform,[illegible] and, in any event, [illegible]

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[illegible] 29 U.S.C. § 655(b)(7) requires that the [illegible] appropriate

shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees.

[illegible] *See, e.g.*, 29 C.F.R. 1910.93a (c), (f)(1).

[illegible] *See, e.g.*, App. at 355-50.

[illegible] of asbestos in the air may not remain stable [illegible] a working day or from one day to the next. [illegible] or not the initial monitoring reflects a vio[illegible] will be the product of several variables other than [illegible] average concentration of asbestos dust in that [illegible]. In light of these factors, satisfactory results in the [illegible] monitoring would not necessarily justify a con[illegible] that concentrations in excess of the limits could [illegible] be foreseen. It might well require several samples [illegible] consistently low exposure levels before such [illegible] could be made with any confidence. Thus [illegible] the qualification based on reasonable fore[illegible] to be a narrow one applicable only when con[illegible] information regarding the workplace is avail[illegible]. Even then occasional monitoring would be re[illegible] in order to insure that no changes had occurred, [illegible] six months schedule would not apply.

[illegible] jobs pose particularly difficult monitoring prob[illegible], and petitioners argue that monitoring once every [illegible] months is inadequate to control such situations ef[illegible]. This may be true, but the problem should be [illegible] handled by the general requirement that moni[illegible] be tailored to reflect exposure levels accurately. [illegible] excessive exposure may reasonably be foreseen, [illegible] is required *at least* once every six months and [illegible] frequently where appropriate.

[illegible] seem to fear that, because of the imprecise [illegible] of this requirement, the six month maximum [illegible] between monitoring samples will in practice be-

[illegible] standards recognize these problems and attempt to [illegible] by establishing limits for peak periods:

(a) [illegible] concentration. No employee shall be exposed [illegible] concentrations of asbestos fibers [illegible] of 10 fibers, longer than 5 micrometers, per [illegible] of air. . . .

9 C.F.R. § 1910.[illegible](b)(3).

come the minimum as well, and they [illegible] appropriate. The imprecision [illegible] however, in view of the [illegible] situations involved. The most effective [illegible] to deal with problems of this sort would appear to be to invoke the procedures for detecting and correcting [illegible] tions in particular workplaces.[illegible] In the [illegible] claim concerning a specific situation, it would be possible to develop a record on the question of the adequacy of the monitoring interval for that particular workplace—a record necessarily absent in the context of these proceedings to establish a general guideline.

*C. Methods of Compliance—Scope of Applicability.*

The Act specifies particular methods of compliance that must be employed in order to meet [illegible], but there is some ambiguity as to the situations in which those provisions are operative. Part of this [illegible] stems from the following sentence quoted from the initial monitoring requirement:

> If the limits are exceeded, the employer shall immediately undertake a compliance program in accordance with paragraph (e) of this section. 29 C.F.R. 1910.[illegible] (f)(1).

Petitioners fear, and the Government [illegible] to suggest, that this language restricts applicability of the provisions concerning methods of compliance to those situations in which the *initial* monitoring [illegible] a violation. These provisions are not by [illegible] restricted, nor does an examination of this [illegible] gest that they were meant to be. They [illegible] for example, that engineering controls [illegible]

[illegible] Employees may report to the Secretary [illegible] they believe to be in violation of [illegible] an inspection. 29 U.S.C. § [illegible] (f)(1). [illegible] tions available for violations, these provisions [illegible] to deter employers from ignoring their responsibilities.

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[illegible] the [illegible]." The provision dealing [illegible] tools states:

> [illegible] and power-operated tools which [illegible] asbestos fibers in excess of [illegible] prescribed in paragraph (b) of [illegible] be provided with local exhaust [illegible] 29 C.F.R. 1910.93a (c) [illegible] supplied).

[illegible] clause italicized above would hardly seem [illegible] this provision applied only to those workplaces where a violation has already been detected.[illegible] [illegible] provisions are concerned with [illegible] that may create high concentrations of asbestos [illegible] periods of time—situations that can be identified [illegible] without resort to monitoring and as to [illegible] is least effective.[illegible]

[illegible] can be used not only to correct violations that have been discovered but also as a [illegible] to the monitoring procedure. Whether monitoring [illegible] concentrations of asbestos [illegible] workplace may depend upon when [illegible] is taken. The danger that hazardous conditions will consequently exist undetected and unremedied can be reduced by requiring that certain objective [illegible] be employed as well. Whereas monitoring requires skilled technicians, anyone, including a labor union representative, could determine whether exhaust fans or wet handling methods were being employed.[illegible] Since the record indicates a [illegible] toring personnel, this may prove to [illegible] important benefits of the [illegible] provisions.

For these reasons, we do not [illegible] compliance provisions as being applicable [illegible] instances in which a violation has already [illegible] Although the terms of these provisions [illegible] ciently broad to allow considerable flexibility in the [illegible] of methods, they are generally applicable to all [illegible] places covered by the asbestos standards.

D. *Use of Moisturization as a Control Method.*

The standards require that asbestos [illegible] fore being handled and worked to avoid [illegible] "unless the usefulness of the product [illegible] [illegible]." Petitioners argue that [illegible] not be modified by considerations of utility. In considering this issue it is important to recall that this is supplemental regulation. The employer [illegible] the concentration limits in any event; the [illegible] he must use this particular method.

Moisturization is effective and is subject neither to [illegible] uncertainties of monitoring nor to the [illegible] lems of malfunction and repairs [illegible] tion and exhaust systems. The [illegible] advantages and required that this [illegible] where practicable, but left to the employer the [illegible] tunity to seek other methods in some circumstances. [illegible] solution seems to accommodate as nearly [illegible] interests of safety and efficiency. Petitioners' objection that flexibility is again achieved by relying on a [illegible] ment by the employer. Although we can understand [illegible] concern on the part of labor representatives in a matt

[illegible] Petitioners attack this language as unduly imprecise, but [illegible] is governed by the same reasoning as the "reasonable foreseeability" modification of the monitoring requirement. The exception is a narrow one limited to workplaces that present no serious question of compliance. It is noteworthy that the EPA speaks of this section as creating a general duty to use local exhausts with no mention of the exception. [illegible] (Apr. 6, 1973) (Statement accompanying 40 C.F.R. Part 61).

[illegible] See, e.g., 29 C.F.R. 1910.93a (c) (2) (ii), (iii).

[illegible] See App. at 227-28, 808-09.

[illegible] 29 C.F.R. 1910.93a (c) (2) (i).

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is sort, [illegible] too early in the history of this statute [illegible] that employers will not make a good faith [illegible] to comply.

[illegible] this aspect of the Secretary's standards is [illegible] with the general Congressional scheme. OSHA [illegible] to an estimated four million employers and 57 [illegible] employees, but the Secretary has only about 600 [illegible] and 100 industrial hygienists. In this situa[illegible] some reliance on self-policing by employers is clearly [illegible]. Although this self-regulatory aspect of the [illegible] would make specific, objective standards desirable, [illegible] standards of this sort that will be generally ap[illegible] to thousands of different situations involves enor[illegible] practical difficulties. Setting forth inflexible require[illegible] of particular methods would be effective only if [illegible] could anticipate all possible problems [illegible] a uniform approach appropriate to each. [illegible] to do so, the Secretary has in some [illegible] employed a somewhat open-ended scheme to [illegible] development of different methods for different work[illegible]. As a safeguard against abuses by the employer, [illegible] has provided employees or their representatives [illegible] opportunities to participate in the policy [illegible] or to instigate enforcement by the Secretary."

*[illegible]abels and Warnings.*

[illegible] order to insure that employees handle materials like[illegible] produce asbestos dust carefully and to prevent per[illegible] from entering areas where they will be exposed [illegible] dust needlessly, cautionary labels and warning [illegible] are required by the Secretary's standards. Peti[illegible] assert that the language selected by the Secretary

[illegible] 29 U.S. §§ 655(b)(1), 656(a)(1), 657(c)(3), [illegible] One commentator has described this [illegible] participation as unparalleled in any [illegible] Cohen, supra note 1, at 799.

is not strong enough for these purpo[illegible] suggested a [illegible] that they [illegible] the [illegible] was [illegible] standards as originally proposed, [illegible] quired by OSHA. After examination of [illegible] promulgated in light of the terms of the statute, we conclude that they are within the range of the Secretary's discretion.

4. *Medical Examinations.*

The standards require that all employers provide a medical examination (1) when an employee is first assigned to a job involving exposure to asbestos (2) when

"The statutory mandate regarding labeling [illegible]

Any standard promulgated [illegible] prescribe the use of labels or other [illegible] warning [illegible] necessary to insure that [illegible] apprised of [illegible] to which they are [illegible]

29 U.S.C. § 655(b)(5)

The caution signs required by the standards read:

Asbestos Dust Hazard

Avoid Breathing Dust
Wear Assigned Protective Equipment
Do Not Remain In Area Unless Your Work Requires It
Breathing Asbestos Dust May Be Hazardous
To Your Health

29 C.F.R. § 1910.93a(g)(1)(ii).

The warning labels state:

Caution
Contains Asbestos Fibers
Avoid Breathing Dust
Breathing Asbestos Dust May Cause
Serious Bodily Harm

29 C.F.R. § 1910.93a(g)(2)(ii)

The language favored by [illegible] "Danger" and "warning" and would make [illegible] of particular health hazards such as cancer [illegible]



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he leaves [illegible] job, and (3) annually during his employment in the position. Petitioners do not attack this timetable or the substantive requirements governing the nature of the examination, but they do assert that the examinations should be given by a physician of the employee's choice, and that the results should be given to the employer only if the employee decides to do so."

Petitioners argue that the standards violate the principle of physician patient confidentiality because they would allow the physical examinations to be conducted by company doctors and would make the results available to the employer. Confidentiality is necessary, they argue, to avert the possibility that, in hiring and discharging employees, employers will discriminate against those with symptoms of asbestos-related disease or prior histories of exposure to asbestos dust. The Secretary recognized this potential problem, and stated that uses of the records would be scrutinized carefully. However, he did not consider the possibility of such abuse sufficient to outweigh the opposing considerations.

The standards require the employer to take into consideration the result of an employee's most recent physical examination in making assignments to jobs requiring the use of respirators. An employee who [illegible] form such a job is to be [illegible] ity or wages. The Secretary [illegible] purposes of this provision could not [illegible] ployers were denied access to the [illegible]

Since the results are to be [illegible] ployer, allowing the employer to [illegible] the advantages of both [illegible] employers already maintain an industrial [illegible] skilled in dealing with asbestos [illegible] and the requirements of the standards [illegible] pear likely to encourage the [illegible] staffs of this sort. The employee [illegible] the expertise associated with [illegible] of medical knowledge concerning [illegible] knowledge be improved. All of these factors, [illegible] the record, operate to make the Secretary's decision [illegible] this point a non-arbitrary one.

5. *The Recordkeeping Requirements.*

Many of the problems the Secretary [illegible] ing standards regarding asbestos dust were directly [illegible] tributable to the lack of [illegible] asbestos-related diseases. The Act attempts to [illegible] this d[illegible] by requiring that:

> [illegible] employer shall make [illegible] make available to the Secretary [illegible] Health, Education, and [illegible] Secretary [illegible] may prescribe by [illegible] essary or appropriate for the [illegible] chapter or for developing information [illegible]

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[illegible] Petitioners also argue that the examination should be available to retired as well as to active employees. The statute requires that where appropriate the standards "prescribe the [illegible] of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure." 29 U.S.C. § 655(b)(7). [illegible] the protection of this provision extends only to [illegible] would terminate with that status. Although [illegible] might conceivably be read to include former employees if such a construction were necessary to effectuate the purposes of the Act, we are not persuaded that the measures adopted by the Secretary have been shown to be inadequate by reference to the language of the statute.

[illegible] The ultimate choice [illegible] in any event since the [illegible] are entirely voluntary insofar as employees are [illegible]

[illegible] See App. [illegible] 12, 569-70.

control and prevention of occupational accidents and illnesses. 29 U.S.C. § 657(c)(1).

Under the standards promulgated by the Secretary to implement this provision of the statute, employers must retain for thirty years records of each employee's required medical examinations. The standards also require that employers keep records of personal and environmental monitoring, but these records need only be kept for the most recent three years.

Petitioners challenge both requirements as inadequate to protect the health of employees and to advance the present state of knowledge in this area. They argue that, in view of the long latency period associated with many asbestos-related diseases, all records, beginning with initial exposure and continuing throughout the life of each employee, should be retained. Since the recordkeeping requirements for medical examinations and monitoring differ not only in retention period but also in purpose, we treat each separately and reach different conclusions with regard to the two standards.

*a. Medical Records*

Records of an employee's prior physical examinations may enable a physician in the detection, diagnosis and treatment of that employee's illnesses. Although completeness would be desirable, it may be that the most critical medical records are the most recent ones, perhaps reflecting the examinations of the past two to five years.[*] Since Congress expressed the desire to avoid unnecessary recordkeeping and to impose the "minimum burden upon employers," 29 U.S.C. § 657(d),[**] the Secretary is to require retention of employee exposure records for twenty years and medical records for the duration of employment plus twenty years, or for thirty years, whichever is longer.

Records of past medical examinations may be useful in several ways; for example, they may help in the tracing of the latent medical effects of exposure, in the detection of the long-term effects of various types of exposure, and to aid in diagnosis. These purposes suggest a lengthy retention period that would allow the detection and treatment of particular pathological conditions, or the study of records of some cohort of employees who have had similar examinations.[***] This early detection and treatment can occur in the several years after initial exposure. The Secretary could not by a reasonable rule require that these records be kept for a period of less than twenty years, since many diseases could be detected and treated.

Further, we note that the Secretary has established a minimum time which records must be retained for employees. If retention is required for a longer period of time for purposes of research, the researcher presumably can obtain copies of the records from the employers who kept them. The standards require the employers to transfer these records to the Government at the end of the twenty year period upon request of the Director for research purposes. This arrangement seems adequate to assure that the records of every employee may be available for future research. Ordinarily, sampling techniques can be employed to select limited numbers of employees for detailed study. After research groups have had the opportunity to examine and to obtain the records, and once the data contained in them have been digested in statistical summaries, the records themselves or the records arguably are of little utility.

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[*] See the statement of Dr. Johnson at page 103 of the Official Report of Proceedings before the U. S. Department of Labor Advisory Committee on Asbestos Dust Conference, App. 210.

[**] See also S. Rep. No. 91-1282, 91st Cong., 2d Sess., at 10-17, 1 Leg. Hist. at 150-57.

[***] See Advisory Committee Proceedings, supra note 5, at 100-03, App. I. 210-21, App. II. 2-3.

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b. *Record of Exposure Levels Detected by Monitoring.*

The three year retention period for the monitoring records seems surprisingly short in comparison to the twenty [illegible] requirement for medical records—especially in view [illegible] their respective functions. Whereas the medical records of primary importance may be those beginning with [illegible] first manifestations of a disorder, a complete record [illegible] an employee's history of exposure to asbestos prior to [illegible] development of disease would be important to research. [illegible] this point in time, relatively little is known about the [illegible] relationship between exposure to asbestos dust and [illegible] diseases. Persons manifesting disorders are being [illegible] but that research is hindered by the lack of information concerning the exposure levels at industrial [illegible] in the past. As the Secretary observes:

> "We have now evidence of the consequences of exposure, but we do not have, in general, accurate measures of the levels of exposure occurring 20 or 30 years ago, which have given rise to these consequences." 37 F.R. 11318.[illegible]

[illegible] this reason, in the proceedings before the Advisory [illegible] committee two members of the committee suggested that [illegible] twenty year period for exposure records and a five year [illegible] requirement for medical records would be appropriate.[illegible]

The Secretary did not explain his decision to require [illegible] a three year retention period for exposure records, [illegible] the Government has suggested several justifications [illegible] its brief. Passing over the problem of considering a [illegible] advanced by counsel rather than by the Secretary, we have examined those arguments and conclude [illegible] do not adequately clarify the Secretary's action.

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[illegible] See also EPA Statement, *supra* note 38, at 8820.

[illegible] App. at 221.

The Government notes that the Act [illegible] tions for violations [illegible] the occurrence of the violation. [illegible] a period of three years is [illegible] ment purposes. This argument is [illegible] not speak to the Secretary's [illegible] to require retention of these records necessary to develop information concerning the causes of disease.

The second justification offered is that it is the responsibility of NIOSH, the Secretary, and [illegible] to collect the exposure data necessary to reevaluate the standards. 29 U.S.C. §§ 671, [illegible] Employers must [illegible] records on request,[illegible] and the Government asserts that three years is an adequate period of time to [illegible] the agencies to make such [illegible]

A single permanent [illegible] might well be the best solution. [illegible] change jobs and employers may [illegible] ity may be best achieved if the agency [illegible] the records.[illegible] If such a program [illegible] the three year period may be [illegible] indication that current agency [illegible] pilation of such records. Further, the [illegible] from the Government's brief [illegible] concerning the interpretation of the purpose of [illegible] ing:

> "These records are not relevant [illegible] vidual records of exposure. Monitoring of [illegible] exposure is not continuously [illegible]

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[illegible] Records shall be maintained for a period of at [illegible] years and shall be made available upon [illegible] Assistant Secretary of Labor for [illegible] Health, the Director of the National [illegible] pational Safety and Health, and to authorized [illegible] tives of either. 29 C.F.R. 1910.93a (i) (1)

[illegible] See App. at 216.

[illegible] is never truly obtainable. Unless [illegible] employees are linked with exposure data these [illegible] relevant for purposes of determining [illegible] employee exposure. Because these records [illegible] relevant to total employee exposure there is [illegible] to transfer monitoring records if a company goes out of business.

[illegible] above, data concerning prior exposure is con[illegible] very important in determining the causal rela[illegible] between exposure to asbestos dust and disease. [illegible] extent that the note quoted above suggests that [illegible] of such data is unnecessary, it reflects a mis[illegible] of the Act. It may be that an adequate [illegible] for research may be established on the basis of ex[illegible] generally prevalent in the industry without [illegible] employee to the particular [illegible] taken [illegible] workplace, but the purposes of the recordkeeping [illegible] cannot be fulfilled without providing some [illegible] means of relating health records to exposure [illegible]

[illegible] Secretary has provided no explanation of the rela[illegible] retention period for monitoring results, and [illegible] no adequate assurance in the record that the [illegible] as promulgated will provide the data needed [illegible] into the causes and prevention of asbestos [illegible] disease. Consequently, we remand the record[illegible] requirements to the Secretary for such modifica[illegible] clarification as may be necessary to insure that the [illegible] objectives will be fulfilled.

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Except for the remand we o[illegible] (1) the uniform [illegible] for the [illegible] tion period for [illegible] view is denied. All of [illegible] standards appear to [illegible] type of decision making by the S[illegible] ance of the broad delegation made to [illegible] Had any one of these decisions [illegible] instance by Congress itself [illegible] its vulnerability to judicial [illegible] dubious indeed. In this context, [illegible] inevitably runs the risk of [illegible] sion and revision of the Secretary's [illegible] the legislative purposes in [illegible]

What, in our view, [illegible] we have remanded from those we have [illegible] that the record, examined [illegible] vant concerns of the Act, [illegible] for the inexpert observer—as to [illegible] for the Secretary's particular choices. [illegible] utory standard for our review may be [illegible] consider that our dispositions fall within it.

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