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ADMINISTRATIVE SEPARATION OF FUNCTIONS: OSHA AND THE NLRB

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On December 29, 1970, the Occupational Safety and Health Act (OSHA) was signed into law.[1] Congress designed OSHA "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . ."[2] OSHA established a new administrative agency within the United States Department of Labor, namely the Occupational Safety and Health Administration (OSH Administration). Congress delegated this new agency broad authority to develop and promulgate legally enforceable occupational safety and health standards, and to enforce these standards through workplace inspections, the issuance of citations, and the imposition of civil penalties. In many respects, OSHA's regulatory structure resembled those of other federal regulatory programs. However, in one aspect OSHA was unprecedented. Under the Act, the adjudication of citations and penalties issued by the regulatory agency was delegated to a separate administrative entity that was completely independent of the OSH Administration. This adjudicatory agency is known as the Occupational Safety and Health Review Commission (OSH Review Commission or the Review Commission) and is comprised of three members who are appointed by the President and confirmed by the Senate.[3] This novel administrative structure, which separated adjudicative responsibilities from other agency functions, was

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1. Pub. Law No. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. §§ 651-678 (1994)). Following its enactment, the statute was sometimes referred to as the Williams-Steiger Occupational Safety and Health Act in recognition of the important role in the development of the statute played by Senator Harrison A. Williams and Representative William A. Steiger. *Cf.* BENJAMIN W. MINTZ, OSHA: HISTORY, LAW AND POLICY 14-17 (1984) (discussing the efforts of Senator Williams and Congressman Steiger in Securing Passage of the Act). This name is rarely used at present. The Occupational Safety and Health Act will sometimes be referred to hereinafter as the OSH Act or the Act.

2. 29 U.S.C. § 651(b) (1994).

3. *See id.* § 661(a).

mandated neither by constitutional requirements nor the Administrative Procedure Act (APA).[4] Rather, OSHA was enacted, in the words of the late Senator Jacob Javits, who was the main sponsor of the arrangement, to "more closely accord[] with traditional notions of due process" than would be possible under a unitary agency model, that is, a scheme that establishes a single agency to administer both prosecutorial and decision-making functions.[5]

This Article addresses the separation of decision-making and investigatory-prosecutorial functions under OSHA's statutory scheme.[6] First, this Article addresses the constitutional and statutory development of the separation of agency functions. Second, this Article provides a detailed description of OSHA's legislative history emphasizing the congressional debate surrounding the proposed structure of the new agency or agencies. Third, this Article analyzes the legal controversies that have emerged during OSHA's twenty-five year history involving the separation of prosecutory and decision-making functions. Finally, this Article seeks to place OSHA's administrative arrangement in perspective and evaluates the impact of the split-enforcement structure on OSHA's effectiveness.

I. THE U.S. CONSTITUTION, THE ADMINISTRATIVE PROCEDURE ACT, AND SEPARATION OF FUNCTIONS

Although the first administrative agencies were created during this nation's infancy, their importance within the governmental structure has grown at an extraordinary pace. Many constitutional and legal issues deriving from the existence of administrative agencies have been debated and litigated, both in the courts and in scholarly commentary. This Article considers one of those issues, namely, the separation of functions within administrative agencies.

At the highest level of this country's governmental structure, the legislative, executive, and judicial powers are assigned to different branches: the Congress, the President, and the Supreme Court. While this separation is not absolute, it is a central feature of the constitutional system and, on occasion, the Constitutional imperative for separation of powers has been the basis for the Supreme Court to invalidate legislative enactments.[7] In administrative agencies, which are typically assigned respon-

4. 5 U.S.C. §§ 551-559 (1994).

5. 116 CONG. REC. 36,532 (1970) (statement of Sen. Javits).

6. Unless otherwise indicated, references to the agency's prosecutory function are generally intended to include the agency's investigative function as well.

7. *See* Bowsher v. Synar, 478 U.S. 714, 734 (1986). In *Bowsher*, the Court held the

sibility for regulation of an entire program, the three governmental functions have classically been combined in a single body. This unitary structure serves a number of purposes, among them, concentration of expertise, focusing of accountability, efficiency of operations, and coordinated policy making.[8]

Despite the importance of the commingling of various governmental functions in the administrative agency, it was recognized from the beginning that this led to several undesirable results. This was particularly true respecting the combination of the executive functions of investigation and prosecution with the judicial functions of adjudication and decisionmaking. In substance, it was argued that if the investigator or advocate was permitted to participate in the decision "this may produce a state of mind incompatible with the objective impartiality which must be brought to bear in the process of deciding."[9] In addition, the investigator

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Gramm-Rudman-Hollings Act unconstitutional on the grounds that the statute placed responsibility for the execution of the law in the hands of an official, the Comptroller General of the United States, who was subject to removal by Congress by methods other than impeachment. *See id.*; *see also* INS v. Chadha, 462 U.S. 919, 959 (1983) (holding the legislative veto contained in the Immigration and Nationality Act unconstitutional). In *Chadha*, the Court articulated its basic principles on separation of powers. However, the rationale of the majority of the Court for holding the legislative veto unconstitutional was the fact that the law in question authorized Congress to engage in lawmaking without following the bicameralism and presentment clauses in Article 1 of the U.S. Constitution. *See id.* at 957-58.

8. There is vast literature on the theory and practice of administrative agencies. A useful introduction to the subject is 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE (3d ed. 1994). The structure and powers of administrative agencies may raise issues relating to constitutional separation of powers. *See* Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 276-77 (1991) (holding the statute creating the Metropolitan Washington Airports Authority unconstitutional because it would allow Congress to direct the actions of an independent administrative agency). However, on separations of powers grounds, issues involving the allocation of functions *within* an administrative agency are typically characterized as involving "separation of functions." *See* 2 DAVIS & PIERCE, *supra*, § 9.9, at 92. The requirements for separation of functions in administrative agencies are most frequently a statutory issue under the agency's enabling statute or the Administrative Procedure Act (APA), rather than a constitutional question. *See id.* § 9.9, at 94-98.

9. S. DOC. NO. 77-8, at 56 (1941). The Committee continued:

> [T]he advocate—the agency's attorney who upheld a definite position adverse to the private parties at the hearing—cannot be permitted to participate after the hearing in the making of the decision. A man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions.

Id.

The Attorney General's Committee was appointed by President Franklin D. Roosevelt to investigate the need for reforms in the administrative process. *See id.* at 1. Although the APA was not enacted until 1946, the Attorney General's Committee was very influential in the debates on its enactment. *See* H.R. REP. NO. 79-1980 (1946), *reprinted in* 1946

or prosecutor participating in the decisionmaking would have had access to facts and information discovered ex parte and not adduced in an adversarial hearing where testimony is sworn and subject to rebuttal and cross-examination.[10]

The commingling of agency functions in formal adjudicatory hearings thus raised serious questions as to the fairness of the proceeding. The issue was important in the debates which preceded the enactment of the 1946 Administrative Procedure Act. Some advocated for a requirement that there be total separation in administrative agencies between adjudicatory authority, and investigatory prosecutory authority. Under this approach, which has been called institutional separation, completely separate agencies would be created to administer a regulatory program, each with different functions, in order to assure complete fairness in the decision-making process.[11]

In its final report, the Attorney General's Committee rejected institutional separation as unnecessary to insure fairness and because it entailed unacceptable costs to the administrative process. Among the Committee's major objections to institutional separation were the disadvantages resulting from the multiplication of separate government agencies and the danger of friction between the agencies and the bifurcation of policy-making responsibility. Instead, the Committee recommended an "appropriate internal division of labor."[12] The Committee reasoned that this would go far in eliminating the unfairness, for the disqualification of investigators and advocates in decisionmaking would be based on "personal, psychological [factors], . . . and the [solution] is simply one of isolating those who engage in the activity."[13] The Attorney General's Committee therefore recommended a structure which has come to be known as the internal separation of functions. This administrative ar-

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U.S.C.C.A.N. 1195, 1200.

10. *See* S. DOC. NO. 77-8, at 56. The Committee continued to say that "investigators, if allowed to participate, would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal." *Id.*

11. *See id.* at 55. The Committee proposed that "the deciding powers of Federal administrative agencies should be vested in separate tribunals which are independent of the bodies charged with the functions of prosecution and perhaps other functions of administration." *Id.*

12. *Id.* at 56.

13. *Id.* at 59. The Committee also argued that the predispositions of administrative officials to decide in a certain way "are mainly the product of many factors of mind and experience, and have comparatively little relation to the administrative machinery." *Id.* at 59. The only way to eliminate these predispositions, the Committee said, is "through wise and self-controlled men." *Id.*

rangement was later incorporated into the APA as a requirement for administrative agencies.

The APA implements the separation of functions in two basic ways. First, independent officials, now called administrative law judges (ALJs) are responsible for conducting the initial hearing and may also issue a preliminary decision. These independent officials are insulated from the investigative and prosecutory aspects of the proceeding.[14] Second, no official of the agency who had a role in the investigation or prosecution of the case may participate or advise in the decision or agency review of the case.[15] Through these internal separation requirements, in the view of the Attorney General's Committee, there would be afforded "substantially complete protection against the danger that impartiality of decision will be impaired by the personal precommittments of the investigator and the advocate."[16]

In 1947, shortly after the enactment of the APA, Congress passed the Taft-Hartley Amendments (Taft-Hartley Act) to the National Labor Relations Act (NLRA).[17] Under Taft-Hartley, among other significant

14. *See* 5 U.S.C. § 556(b) (1994) (providing for an administrative law judge, appointed under 5 U.S.C. § 3105, to preside at the taking of evidence in agency adjudications). In 1992, the Administrative Conference of the United States published an extensive report on the role of administrative law judges in the administrative process. *See generally* Paul R. Verkuil et al., *Report for Recommendation 92-7: The Federal Administrative Judiciary*, *in* 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 777 (1992).

15. *See* 5 U.S.C. § 554(d) (1994). This section reads, in relevant part, "[a]n employee or agent engaged in the performance of investigative or prosecuting functions . . . may not . . . participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title . . . ." *Id.* The APA contains three exceptions to the separation of functions requirement, the most relevant of which states that it does not apply to a "member or members of the body comprising the agency." *Id.* § 554(d)(2)(C). Thus, a member of the Federal Trade Commission would be permitted to participate in both investigatory and prosecutory activities and later decide the same case. *But see* Grolier Inc. v. FTC, 615 F.2d 1215, 1220 (9th Cir. 1980) (holding that the exception in section 554 for members of the agency did not apply to the attorney-advisor to a member who participated in the investigation of a proceeding and later decided the same case as an administrative law judge).

As explained by Professor Daniel J. Gifford, the largely unstated premise of the Attorney General's Committee's acceptance of limited commingling at the agency-head level was that since adjudication was then the Agency's principal method of policymaking, and decisions on whether to issue complaints were also critical to the policy-formulating role, it was essential that the Agency head be permitted to participate in decision making in both the adjudication and prosecution stages of the proceeding. *See* Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 978 (1991).

16. *See* S. DOC. NO. 77-8, at 59-60.

17. Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 151-166 (1994)).

changes, Congress restructured the National Labor Relations Board (NLRB or Board), the administrative agency responsible for administering the federal labor relations program. In particular, a new position was created, the General Counsel, an officer separately appointed by the President who was assigned exclusive authority to investigate charges and to decide whether to issue a complaint initiating a prosecution and to prosecute cases before the NLRB.[18] The Board, on the other hand, continued to have responsibility for decisionmaking under Taft-Hartley.[19] Thus, shortly after the APA rejected generic requirements for institutional separation in administrative agencies, Congress in Taft-Hartley established a structure for the NLRB which embodied a form of total separation between investigating and prosecution on one hand, and decision making on the other.

The controversy over separation of functions in administrative agencies did not terminate with the enactment of APA, nor was it solely a legislative issue. Challenges under the U.S. Constitution to various forms of intermingling of prosecutory and decision-making functions in both federal and state agencies reached the courts on a number of occasions. In several significant decisions in the 1970s, the U.S. Supreme Court ruled that combinations of administrative prosecutory and decision-making functions did not raise insurmountable objections under the Due Process Clause of the U.S. Constitution. Thus, in *Richardson v. Perales*,[20] the Supreme Court ruled that a system under which a federal social security Examiner was responsible both for developing facts and making a decision on a disability claim was not unconstitutional, saying that the challenge to the arrangement "assumes too much and would bring down too many procedures designed, and working well, for a government structure of great and growing complexity."[21] Similarly, in

18. *See* 29 U.S.C. § 153(d) (1994). The General Counsel was given general supervisory responsibility for all attorneys employed by the Board and final authority in investigating and deciding whether or not to issue complaints before the Board. *See id.*

19. *See id.* § 160 (detailing the range of powers possessed by the Board, including issuing cease and desist orders to injunctions).

20. 402 U.S. 389 (1971).

21. *Id.* at 410. In that case, Pedro Perales became disabled as a result of a back injury. *See id.* at 390. Mr. Perales's disability claim was denied by the Bureau of Disability Insurance of the Social Security Administration (SSA) after independent review. *See id.* at 394. Subsequently, Mr. Perales appealed the decision of the SSA, based in part on an allegation that the hearing examiner had the responsibility for gathering evidence and had a natural bias in favor of the federal government. *See id.* at 408-09. The Court rejected the "advocate-judge-multiple-hat suggestion" holding that SSA's examination procedures were fair and did not violate procedural due process notions. *See id.* at 410.

Withrow v. Larkin,[22] a case involving a due process challenge to the procedures followed by a state board seeking to sanction a physician for professional misconduct, the Supreme Court stated that the challenge must "overcome a presumption of honesty and integrity in those serving as adjudicators . . . ."[23] The Court concluded that in that factual context the "probability of actual bias on the part of the judge or decision maker [was not] too high to be constitutionally [in]tolerable."[24]

In sum, therefore, federal agency separation of function arrangements must be analyzed by the courts under the agency's enabling statute and, to the extent relevant, the APA. Following the passage of the Taft-Hartley Act, in effect, no statute created an institutional separation structure until OSHA was enacted in 1970. However, institutional separation was put into place in those regulatory programs in which the prosecuting agency was required to initiate its enforcement actions in a district court, rather than in an administrative agency. In this arrangement, the separation of adjudication from prosecution is complete, since it is carried out in a separate branch of the government.[25] This structure was embodied in most areas under the Fair Labor Standards Act and under Title VII of the Civil Rights Act of 1964 and related statutes.

II. OSHA AND MSHA: LEGISLATIVE HISTORY AND THE TAFT-HARTLEY ACT

The development of the Occupational Safety and Health Act was complex and difficult.[26] A variety of sharply conflicting points of view were brought to bear on Congress during the two-year period when the statute was being considered. While ultimately the law as passed em-

22. 421 U.S. 35 (1975).

23. *Id.* at 47. In *Withrow*, a physician practicing in Wisconsin was notified by the Wisconsin Medical Examining Board that he would be the target of an investigative hearing to determine whether he violated state law by performing abortions. *See id.* at 38-39. The physician subsequently sued for an injunction, claiming that the combination of investigative and adjudicatory functions constituted a violation of his due process rights. *See id.* at 39. The Court rejected that argument, holding that the risk of unfairness due to the combination of these functions must be "intolerably high" before due process will be violated. *Id.* at 58.

24. *Id.* at 58.

25. This is not to suggest that separation of functions considerations are the exclusive, or even the primary, reasons for establishing regulatory programs with adjudicative authority situated in the courts.

26. *See* MINTZ, *supra* note 1, at 1-33 (discussing OSHA's evolution); OCCUPATIONAL SAFETY AND HEALTH LAW 39-56 (1988) (Stephen A. Bokat & Horace A. Thompson, III, eds., 1988) [hereinafter OSHL]; (discussing the relevant legislative history of OSHA); *see also* Tracy N. Tool, Note, *Begging to Defer: OSHA and the Problem of Interpretive Authority*, 73 MINN. L. REV. 1336, 1340-43 (1989).

bodies a rigorous enforcement program, the administrative structure established in the statute represents a compromise among sharply opposing viewpoints. There was broad agreement on certain basic principles. For example, under the program, employer obligations for employee safety and health would be defined primarily through occupational safety and health standards, which would be issued after rulemaking proceedings affording an opportunity for public participation. These standards would be enforced through workplace inspections and, where violations were found, civil sanctions could be imposed. Finally, formal adjudications would be conducted with a right to appeal in the courts to determine if these sanctions were properly issued. In other words, in the OSHA program, the agency or agencies responsible for implementation would have legislative authority (issuance of standards), executive authority (investigation and prosecution), and adjudicative authority (deciding appeals from OSH Administration sanctions).

Significant controversial issues arose, however, relating to the allocation of these various responsibilities. Groups representing the interests of employees, typically unions, took the position that all responsibilities should be assigned to a single agency which would be located in the Department of Labor. The business community, on the other hand, while agreeing that the agency in the Department of Labor, which came to be known as the Occupational Safety and Health Administration, should be responsible for investigation and prosecution under the new statute, argued that the standards-setting function and the adjudicatory functions should be separated and assigned to agencies independent of the Department of Labor. Thus, under the employer view, a three-member standards board would conduct rulemaking proceedings and promulgate standards, and a separate commission would conduct formal adjudicatory hearings and decide cases involving appeals from OSHA enforcement actions. This administrative arrangement, which parallels the three-branch structure of the Federal Government was necessary, the business community argued, to avoid the concentration of and potential abuse of power by a single agency in the Department of Labor.[27]

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27. The position of the employer groups was articulated by Senator Patrick Dominick of Colorado, who argued that:

> The concentration of all authority for the promulgation of standards, the inspection and investigation of complaints, the prosecution of cases, and the adjudication of cases, totally in the hands of the Secretary of Labor is not a balanced approach. It is this structure, this procedural mechanism, which is objectionable to me, and I believe objectionable to many people around the country. It is objectionable because concentration of power gives rise to a great potential for abuse.

116 CONG. REC. S37,336 (1970) (statement of Sen. Dominick). This position was the basis

The unions, in particular, opposed the separate standards board, claiming that it was neither constitutionally required nor required by the APA, and by separating the standards-setting and prosecution authority, agency policymaking would be crippled and accountability would be undermined.[28] Ultimately a compromise sponsored by Senator Javits was adopted.[29] Under the Javits amendment first passed by the Senate and later incorporated into the Conference bill, the enforcement and standards setting responsibilities were assigned to the OSH Administration, while a separate presidentially appointed review commission was assigned adjudicatory authority.[30] This arrangement reflected an institutional separation of functions that went beyond the internal separation requirements of the APA. It reflected a political compromise designed

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of the Steiger substitute that was passed by the House of Representatives. *See* H.R. 16785, 92nd Cong., § 2(b)(3) (1970), *reprinted in* SENATE SUBCOMM. ON LABOR, LEGISLATIVE HISTORY OF OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 1092 (Comm. Print 1971) [hereinafter LEGISLATIVE HISTORY]. Under this House-passed bill, the National Occupational Safety and Health Board, appointed by the President, would be responsible for the development and promulgation of occupational safety and health standards and the Occupational Safety and Health Appeals Commission, also appointed by the President, would be responsible for adjudicating enforcement actions initiated and prosecuted by the Secretary of Labor. *See id.*

28. The Senate Committee on Labor and Public Welfare rejected the proposals that would have created the separate standards and adjudicatory boards. *See* S. REP. NO. 91-1282, at 8 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5177, 5184. In its report, the Committee expressed its view "that a sounder program will result if responsibility for formulation of rules is assigned to the same administrator who it [sic] also responsible for their enforcement and for seeing that they are workable and effective in their day-to-day application, thus permitting cohesive administration of a total program." *Id.* The Committee also rejected the argument that due process required that there be a separate adjudicatory board on the ground that the APA already required separation of functions within the Department of Labor between prosecution and adjudication and "[t]he overwhelming majority of other regulatory programs are administered in just this fashion, and the requirements of due process are fully observed." *Id.* at 15.

29. In arguing for his amendment, Senator Javits offered three reasons why the separate adjudicatory panel was preferable: (1) under the procedures of his amendment, speed of enforcement would be greatly increased; (2) adjudication by an independent panel would "more closely accord with traditional notions of due process" than would hearing and determination by the Secretary of Labor; and (3) because of the heavy burden of personally reviewing large numbers of enforcement cases, the Secretary of Labor would, in any event, delegate adjudication to a panel of officials within the Department of Labor, but "not one which is independent." 116 CONG. REC. S36,532-33 (1970).

30. *See* 29 U.S.C. § 661 (1994) (creating the OSH Review Commission); *id.* § 655 (giving the Secretary of Labor authority over the promulgation of standards); *id.* § 659 (giving the Secretary of Labor authority to pursue enforcement proceedings). Adjudication of the anti-retaliation provisions of the Act, 29 U.S.C. § 660(c) and the imminent danger provisions, 29 U.S.C. § 662(a), take place in the United States District Courts as actions brought by the Secretary of Labor.

to accommodate the need for effective administration and unified policymaking with concerns about fairness in that administration.

In 1977, Congress enacted the Federal Mine Safety and Health Act (MSHA).[31] This new statute amended earlier statutes dealing with coal, metal, and non-metal mine safety and health, and transferred primary regulatory authority for the program from the U.S. Department of Interior to the U.S. Department of Labor.[32] The structure of the new mine safety and health program was modeled quite closely on the administrative structure under OSHA. Thus, the newly created Mine Safety and Health Review Commission (MSH Review Commission), like the OSH Review Commission, was authorized to adjudicate sanctions for violation of standards issued by the Mine Safety and Health Administration (MSH Administration), which was located in the Department of Labor.[33]

In significant respects, both the OSHA and MSHA structures followed the administrative arrangement of the NLRB in that all three reflected institutional separation beyond the individual, that is, internal separation mandated under the APA. However, there were certain significant differences between the two safety and health agencies and the NLRB. From its inception, the five-member NLRB, has had broad lawmaking authority, which is implemented through its adjudication of unfair labor practice cases.[34] In contrast, the General Counsel's role is limited by the

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31. Pub. L. No. 95-164, 91 Stat. 1290 (1977) (codified as amended at 30 U.S.C. §§ 801-825 (1994)).

32. *See* 30 U.S.C. § 557(a) (1994). However, the two occupational safety and health programs were not consolidated into a single agency in the Department of Labor. Rather, the new statute created a separate administration, the Mine Safety and Health Administration (MSH Administration), which paralleled the OSH Administration, and delegated to this new administration rulemaking and prosecution authority. *See id.* The legislative history makes clear that Congress wished to maintain the separate identity of the Mine Safety and Health program, and in particular, to separate it from the controversies that had surrounded the OSHA program. *Cf.* S. REP. NO. 95-181, at 11 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3411 (transferring all responsibility for mine safety and health to a new agency within the Department of Labor, the MSH Administration).

33. *See* 30 U.S.C. § 815(d) (empowering the MSH Review Commission to review citations and proposed penalties issued by the Department of Labor). In a number of important respects, the enforcement mechanisms under the MSHA differed from those under OSHA, generally reflecting the more serious and immediate employee hazards in mine operations. *See generally* OSHL, *supra* note 26, at 731-93 (discussing some of the major provisions of the MSHA); W. Christian Schumann, *The Allocation of Authority Under the Mine Act: Is the Authority to Decide Questions of Policy Vested in the Secretary of Labor or in the Review Commission?*, 98 W. VA. L. REV. 1063, 1065-71 (1996) (discussing the MSHA's review and enforcement scheme).

34. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 275-90 (1974) (chronicling the Board's definition of "managerial employee" through the case method). The Board also has authority to promulgate legislative rules. *See* American Hosp. Ass'n v. NLRB,

Taft-Hartley Act to the investigation and prosecution of cases. In the OSHA program Congress assigned broad policy-making authority to OSHA. This authority is implemented both through the promulgation of legally enforceable occupational safety and health standards and the making of prosecutory decisions. The role of the Review Commission is limited to making adjudicatory decisions. As will appear later, however, this adjudicatory function of the OSH and MSH Review Commissions does not encompass the same policy-making component as that of the NLRB. This crucial distinction among the programs accounts for the differences in the role of the various constituent agencies in the NLRB, OSHA, and MSHA programs.

In summary, therefore, several points become clear. First, the U.S. Constitution established not-too-demanding minimal constitutional requirements for separation of functions in administrative agencies. Second, the APA imposes more rigorous separation of function requirements, but even these are limited to separation of individuals involved in investigation and prosecution from those involved in decisionmaking. Finally, under some regulatory statutes, Congress has established administrative structures that encompass even more stringent separation of function arrangements. The Taft-Hartley Act and the two occupational safety and health acts, OSHA and MSHA, represent two different approaches to institutional separation of functions.

III. OSHA SEPARATION OF FUNCTIONS: HISTORY OF LITIGATION

The institutional separation established under OSHA has resulted in litigation over several issues involving the administrative structure of the OSHA program, and over which the OSH Administration, the Review Commission, and other parties to the proceedings have disagreed. These issues are: (1) the party status of the Review Commission in courts of appeals proceedings involving review of decisions of the Review Commission; (2) the authority of the Review Commission to review the Secretary of Labor's withdrawal or settlement of a citation and penalty; and (3) in courts of appeal review of decisions of the Review Commission, where the OSH Administration and the Review Commission differ in their interpretation of an ambiguous OSHA standard, and where Agency interpretation is entitled to court deference. The OSH Administration view

499 U.S. 606, 608-09 (1991); *see also* Martin v. OSHRC, 499 U.S. 144, 154 (1991) (noting that the NLRB's authority to make law through adjudication derives from its legislative rulemaking authority). The Board has used its legislative rulemaking authority sparingly. *See* Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 170 (1985) (noting the NLRB's "exclusive reliance on adjudication as the vehicle for policy formation").

prevailed regarding all three of these issues. Two of these issues were resolved in two Supreme Court decisions while the party-status issue was decided in decisions of the courts of appeals in a majority of circuits. In each case, the underlying rationale of the court decision was based on an understanding of Congress's intention that the Review Commission be solely an adjudicative agency, with a role similar to that of a district court reviewing an agency decision, and not a policy-making agency. The OSH Administration is the policy-making agency under OSHA.

A. Party Status Before the Courts of Appeals

By way of background, under OSHA's enforcement scheme, compliance officers conduct regular inspections of employer workplaces. Where violations of OSHA standards are disclosed, the OSH Administration issues a citation describing the violation and setting an abatement date, and, if appropriate, proposing a penalty.[35] The employer receiving the citation and penalty has fifteen working days to contest the citation and penalty before the Review Commission.[36] An employee representative may contest only the date for abatement set in the citation. If no contest is filed, the citation and penalty becomes a final order of the Review Commission and may be enforced by the OSH Administration in a federal court.[37]

Contested cases are litigated first before an ALJ, an independent decision-making official, who is nominally employed by the Review Commission.[38] In those evidentiary proceedings, the OSH Administration is the prosecutor, seeking to uphold the citation and penalty, and, in employer contests, the employer is respondent in the proceeding.[39] An employee representative has a right to participate in Review Commission proceedings as parties.[40] The three-member Review Commission may as a matter of discretion review initial decisions of the ALJs. If no review is granted, the judge's order becomes the final order of the Review Commission.[41]

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35. *See* 29 U.S.C. § 659(a) (1994).

36. *See id.* § 659(a), (c).

37. *See id.* § 659(a).

38. *See id.* § 661(j).

39. *See* 29 C.F.R. § 2200.20(b) (1997) (explaining that employers can attain party status in the event that an employee contests the abatement period in a citation, and likewise, an employee can get party status when an employer contests a citation).

40. *See* 29 U.S.C. § 659(c).

41. *See id.* § 661(j).

Decisions of the Review Commission may be appealed to an appropriate court of appeals, either by the employer, the employee representative, or by the Secretary of Labor.[42] In the court of appeals, the parties are the Secretary and the employer and/or the employee representative, depending on the procedural posture of the case. The dispute which divided the OSH Administration and the Review Commission in *American Cyanimid* was whether the Review Commission itself was properly a party before the court of appeals. The Secretary argued against party status for the Review Commission, and the Review Commission took the opposite position.

An analogous issue had arisen with respect to other administrative agencies and had been settled by the courts in different ways depending on the agency involved. Thus, the Supreme Court has upheld the right of the FTC to participate as a party in the court of appeals proceedings reviewing its orders,[43] and the NLRB has long participated as a party in the courts of appeals in proceedings to review Board decisions.[44] On the other hand, the Benefits Review Board (BRB), which reviews workers compensation determinations made by the Secretary of Labor for employees covered by the Longshoremen and Harbor Workers Compensation Act, was held not to be a party in those review proceedings.[45] The

42. The Act expressly authorizes the Secretary of Labor, that is the OSH Administration, to seek review in the Courts of Appeals of decisions of the Review Commission. *See id.* § 660(b). The General Counsel of the NLRB has no similar right. In *Oil, Chemical & Atomic Workers Int'l Union v. OSHRC*, the Court of Appeals for the District of Columbia Circuit held that a labor organization representing affected employees which had participated as a party in the Review Commission proceedings had a right to appeal an adverse Review Commission decision to the courts of appeals. *See* 671 F.2d 643, 648-49 (D.C. Cir. 1982) (*American Cyanimid*). The court rejected the argument that the OSH Administration's role as exclusive prosecutor precluded the union's right to seek review, holding that, where it had participated in the proceeding, the union was a party "adversely affected or aggrieved" by the Review Commission decision within the meaning of the Act. *See id.* at 649.

43. *See* Federal Trade Commission v. Dean Foods Co., 384 U.S. 597, 607 (1966) (noting that party status for the FTC in cases involving its enforcement powers constitutes one of the ancillary powers that is essential to the fulfillment of the agency's statutory duties).

44. *See* Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Company, 514 U.S. 122, 127 n.2 (1995) (noting that the National Labor Relations Board is "always a party respondent to an employer or employee appeal"). However, in the courts of appeals, the Board is represented by attorneys from the General Counsel's office. *See* STANLEY R. STRAUSS & JOHN E. HIGGINS, JR., PRACTICE AND PROCEDURE BEFORE THE NATIONAL LABOR RELATIONS BOARD § 6.11, at 105 (5th ed. 1996).

45. *See* Nacirema Operating Co., Inc. v. Benefits Review Board, U.S. Dep't of Labor, 538 F.2d 73, 75 (3d Cir. 1976) (granting a motion by the Benefits Review Board that it be dismissed as a party in appellate proceedings).

issue thus confronting the courts was to which administrative agency should the Review Commission be analogized?

Several courts sided with the Review Commission and held that it should be a party in the court of appeals.[46] These courts relied heavily on a statement of Senator Javits, who, in proposing his amendment creating the Review Commission, compared the Review Commission to the Federal Trade Commission.[47] These courts reasoned that the Review Commission was like the FTC in all aspects of its adjudicative role and therefore should have party status when a party seeks review of its decision.

This statement in the legislative history was found unpersuasive by other courts of appeals which rejected the Review Commission claim for party status. Thus, for example, the Court of Appeals for the Third Circuit in *Marshall v. Sun Petroleum Products Co.*[48] believed that Senator Javits intended only to say that the Review Commission would be similar to the FTC in its adjudicative role in the limited sense that it too would conduct formal administrative hearings in contested cases and decide these cases following the same procedures as the FTC.[49] The court found far more significant another lesser-known point in the legislative history of OSHA involving Senator Javits. In an early bill to establish the OSHA program introduced by Senator Javits,[50] which never was reported by committee, a different administrative arrangement for OSHA was provided: both adjudicative and rulemaking authority would be assigned to a separate national board, and the OSH Administration would have only investigative and prosecutory authority.[51] Significantly, in that

46. *See* Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 648 n.8 (5th Cir. 1976) (noting that the OSH Review Commission was properly a party on appeal); Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1266-67 (4th Cir. 1974) (same).

47. In introducing his amendment to establish an independent Review Commission, Senator Javits said "[the amendment] creates a review commission which will deal with all complaints referred to it by the Secretary and which will have the same type of authority that the Federal Trade Commission exercises . . . ." LEGISLATIVE HISTORY, *supra* note 27, at 462. After describing the procedure established by the amendment, which included the ability to issue cease and desist orders by the Review Commission, provided for review in the court of appeals, and allowed for contempt proceedings in the court of appeals, Senator Javits said, "[i]t is the traditional Federal Trade Commission type of procedure." *Id.*

48. 622 F.2d 1176 (3d Cir. 1980).

49. *See id.* at 1181. This case also considered the issue of the authority of the Review Commission to review settlements of contested cases by the OSH Administration. *See id.* at 1184-85.

50. A similar bill, H.R. 13373, was introduced by Representative Ayers. *See* H.R. 13373, 91st Cong. (1969), *reprinted in* LEGISLATIVE HISTORY, *supra* note 27, at 679.

51. *See* S.2788, 91st Cong. (1969), *reprinted in* LEGISLATIVE HISTORY, *supra* note 27, at 31. This administrative arrangement differs from that ultimately adopted by Congress in

original bill, Senator Javits included a provision that when the OSH Administration challenges an action of the Board in court, the Solicitor of Labor would represent the OSH Administration and the Attorney General of the United States would represent the board.[52] Thus, in the structure as originally conceived by Senator Javits, the independent board would, at least when challenged by the Secretary, be a party in court of appeals proceedings. However, in his later amendment, which ultimately was enacted, Senator Javits made no provision for the separate representation of the OSH Review Commission. This omission, when viewed in light of his earlier bill was "critical" in the view of the Third Circuit Court of Appeals, demonstrating that it was not Senator Javits's intention to give party status to the Review Commission under OSHA.[53]

In addition, the court of appeals in *Sun Petroleum* cited the many policy-making responsibilities of the OSH Administration in the OSHA program, in particular, its authority to develop and issue occupational safety and health standards, its power to decide whether to issue citations and penalties, and to decide which cases to prosecute. The court concluded that since the Act confers "all rulemaking and policymaking responsibilities on the Secretary and not the Commission," the Review Commission was "designed strictly as an independent adjudicator, with . . . no direct policy role in administering the Act. . . ."[54] Accordingly, the court of appeals ruled that the Review Commission had no interest in defending its decisions in court and no independent right to representation in court of appeals proceedings.[55]

In *Oil, Chemical & Atomic Workers International Union v. OSHRC (American Cyanamid)*,[56] the Court of Appeals for the District of Colum-

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that the rulemaking authority would have been assigned to a separate board, but it also differs from the arrangement advocated by business groups, in that a single board, separate from the Department of Labor, would have had both rulemaking and adjudicative authority. Interestingly, however, it parallels the existing structure of the NLRB, where the Board has both adjudicative and rulemaking authority, although Board lawmaking is normally through adjudication and not rulemaking. Presumably, Senator Javits discarded this structure because of the strong objections by employee groups to separating the rulemaking authority from the OSHA Administration.

52. *See id.* § 8(c), *reprinted in* LEGISLATIVE HISTORY, *supra* note 27, at 51. In those cases in which the Review Commission has appeared in the Court of Appeals as a party to review proceedings, it was represented by attorneys of the U.S. Department of Justice, while the OSH Administration was represented by attorneys in the Department of Labor's Office of the Solicitor. *Cf. Sun Petroleum*, 622 F.2d at 1180 (noting that the Review commission had been represented by the Department of Justice).

53. *See Sun Petroleum*, 622 F.2d at 1183.

54. *Id.* at 1183-84.

55. *See id.* at 1184.

56. 671 F.2d 643 (D.C. Cir. 1982).

bia Circuit, in reaching the same conclusion as the *Sun Petroleum* Court, concluded that Congress, in creating the Review Commission, "envisioned [the Commission] . . . to be similar to a district court" in that its purpose was to settle disputes between the Secretary and employers arising under OSHA's citations and penalties, but not that the Review Commission would have an interest or duty to defend its decisions in the courts of appeals or a stake in the outcome of the litigation.[57]

The court in *American Cyanamid* considered the practical implications of the exclusion of the Review Commission from party status, concluding that the absence of the Review Commission in the court of appeals would not foreclose the effective adjudication of the merits of the appeal. The District of Columbia Court of Appeals dealt with two separate situations. First, if the Commission affirms the citation, and the employer files the appeal, then the OSH Administration is the respondent, and would defend its citation. If employees had elected party status they could join the OSH Administration to defend the citation in the court of appeals. Second, if the Review Commission dismissed the citation, then either the Secretary or employees could file a petition for review.[58] In that case the employer would be the party respondent, since the employer has the practical stake in affirming the Review Commission decision.[59]

In either event, "sufficient adversity" would exist in the court of appeals, and the presence of the Review Commission to defend its decision would be unnecessary.[60] A majority of the courts of appeals concurred in

57. *Id.* at 652. The Court continued, noting that the Commission was created "to settle disputes between employers and the Secretary of Labor over citations issued by the Secretary's inspectors. The commission, like a district court, has no duty or interest in defending its decision on appeal. As a purely adjudicative entity, it has no stake in the outcome of the litigation." *Id.* The Supreme Court affirmed this conception of the Review Commission in *Martin v. OSHRC*, saying, "we think the more plausible inference is that Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context." 499 U.S. 144, 154 (1991). These powers included, according to the Supreme Court, reviewing the OSH Administration's interpretations for reasonableness and consistency with the statute and finding facts and applying standards to those facts. *See id.* at 154-55.

58. *See American Cyanamid*, 671 F.2d at 650.

59. *See id.* at 652. The court concluded that "sufficient adversity exists between the union and the company to insure proper litigation without the participation of the [Review Commission]." *Id.* at 653. Further, the OSH Administration could defend its citation in the court of appeals against the challenge of the employee representative. *See id.* In *American Cyanamid*, however, OSH Administration did not file a petition for review and participated in the proceeding only as amicus. *See* MINTZ, *supra* note 1, at 467-68 (discussing the controversial background of the case).

60. *See American Cyanamid*, 671 F.2d at 652-53. The court of appeals said "[t]o require the [Review Commission] to appear as a party would parallel requiring a district

the decisions of the D.C. Circuit and the Third Circuit on this issue, and, as a practical matter, the Review Commission has not pursued its view that it has party status.[61]

To summarize the party status issue, the prevailing view is that the OSH Review Commission, lacking significant policy-making authority, differs from the FTC, which, as a unitary agency, possess policy-making authority through its prosecutory, rulemaking, and adjudicatory actions. Accordingly, the Review Commission, unlike the FTC, has no party status in the court of appeals in the review of its decisions. Similarly, the OSH Review Commission differs from the NLRB, which has policy-making authority through rulemaking and adjudication, and which is a party in court of appeals proceedings reviewing decisions. On the other hand, the General Counsel of the Board is unlike the OSH Administration in that the General Counsel may not seek court of appeals review of the Board decision, and is therefore not a party in the court of appeals, while the OSH Administration by statute may seek review of Review Commission decisions and may elect to participate in court of appeals proceedings. Underlying these doctrines are the differing roles of the General Counsel of the Board and the OSH Administration: the General Counsel's role under Taft-Hartley is limited to the prosecutory function; the OSHA Administration is responsible for policy under the OSHA Act.

B. Authority of Secretary to Withdraw or Settle Citations and Penalties

OSHA gives the Secretary of Labor unreviewable discretion to decide whether to issue citations and penalties.[62] These citations and penalties may be contested by the cited employer and, to a limited extent, by affected employees. Under Review Commission procedures, after contest, the Secretary, within specified time limits, is required to file a complaint

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court to appear and defend its decision upon direct appeal." *Id.* at 653.

61. *See* Glenn A. Guarino, Annotation, *Participation by Occupational Safety and Health Review Commission as Party in Proceedings for Judicial Review of its Decision*, 65 A.L.R. FED. 599, 601-04 (1983) (discussing the case law surrounding the party status in court proceedings of the Review Commission); *see also* Robert D. Moran, *Parties to Proceedings in the Court of Appeals Under the Occupational Safety and Health Act of 1970*, 15 B. C. & COMM. L. REV. 1089, 1096-1104 (1974) (discussing the party status of the Review Commission in the courts of appeals, as well as the party status of other agency adjudicatory bodies).

62. *See* 29 U.S.C. § 658(a) (1994). Under the rules of the OSH Administration, there is a procedure for review within the Agency of a decision by an OSH Administration area office not to issue a citation. *See* 29 C.F.R. § 1903.12 (1997). The General Counsel of the NLRB also has unreviewable discretion to decide whether to file a complaint.

with the Review Commission.[63] The respondent (the employer or employee representative) then files an answer and an evidentiary hearing is conducted before an ALJ.

At any point during these proceedings, the OSH Administration may wish to discontinue the enforcement action by withdrawing the citation and penalty or by settling the case through a settlement agreement with the employer or with employees. This action could take place either in the fifteen-day working period before a contest is filed; or, after the contest is filed but before the Secretary files the complaint; or at any time subsequent to filing the complaint during the Review Commission proceeding.

The issue thus was whether the OSH Administration's action is subject to review by the Review Commission. There has been general agreement that prior to the filing of the notice of contest, the OSH Administration has full discretion to withdraw or to settle citations and penalties, the reason being that prior to contest the Review Commission jurisdiction has not been invoked. The controverted issue, however, was the scope of the authority of the Secretary to withdraw or settle citations and penalties after the contest is filed, at which point the Review Commission has obtained jurisdiction over the proceeding. The argument was made that since the Commission has jurisdiction, it may review the OSH Administration's decision to withdraw or settle the cases and in its discretion, to deny the OSH Administration's request for withdrawal or to reject the settlement. This issue would typically arise when an employee representative which has become a party to in the Review Commission proceeding objects to the OSH Administration's withdrawal or settlement.[64]

This issue reached the U.S. Supreme Court in *Cuyahoga Valley Railway Co. v. United Transportation Union*.[65] In that case, the OSH Administration issued a citation against the employer, Cuyahoga. The citation was contested, the OSH Administration filed the complaint, the employer answered, and the union obtained party status. At that point, the OSH Administration moved before the ALJ to withdraw the citation, in part on the grounds that it did not have jurisdiction over the Cuyahoga's working conditions and partly because the facts disclosed in

63. *See* 29 C.F.R. § 1903.17.

64. The issue could also arise if the employee representative contested an abatement date, or if the OSH Administration sought to settle the proceeding with the union and the employer objected. This scenario is less likely because far fewer employee contests are filed with the Review Commission.

65. 474 U.S. 3 (1985) (per curiam).

the investigation did not warrant litigating the case. The union objected, but the ALJ granted the motion to withdraw. The Review Commission reversed and remanded the proceeding to the judge to consider the Union's objections. On appeal, the Court of Appeals for the Sixth Circuit upheld the Commission, noting that the "adversarial process was well advanced when . . . the Secretary attempted to withdraw the citation," and held that the Commission "as the adjudicative body, had control of the case and the authority to review the Secretary's withdrawal of the citation."[66]

The Supreme Court in a summary disposition reversed the court of appeals.[67] After noting that eight other courts of appeals had decided against Commission jurisdiction to review the Secretary's withdrawals, the Supreme Court reviewed the "detailed statutory scheme" and concluded that "enforcement of the Act is the sole responsibility of the Secretary" and a "necessary adjunct of that power is the authority to withdraw a citation and enter into settlement discussions with the employer."[68] The Commission's function the Supreme Court said was to act as a "neutral arbiter" in deciding whether citations should be upheld over employer and union objections.[69] Its statutory power did not include authority to overturn the Secretary's decision to withdraw a citation. Indeed, the Supreme Court reasoned, under the Sixth Circuit's view, Congress's intent to separate prosecution and adjudication would be defeated since the Commission's authority as adjudicator would conflict with its power to review the decision whether to withdraw a citation which is a prosecutory decision.[70]

While *Cuyahoga* itself involved the withdrawal of a citation, in principle the same rule would apply to an OSH Administration settlement. Indeed, in its decision the Supreme Court equated the OSH Administra-

66. Donovan v. United Transportation Union, 748 F.2d 343 (6th Cir. 1984), *rev'd*, 474 U.S. 3 (1985) (per curiam). The Court of Appeals for the Sixth Circuit's decision was based, in part, on its view that the Review Commission's interpretation of the Act, and not the OSH Administration's interpretation, was entitled to deference. *See id.* at 346. The Supreme Court subsequently held to the contrary on the deference issue. *See* Martin v. OSHRC, 499 U.S. 144, 152-53 (1991). Moreover, in *Cuyahoga* itself, the Supreme Court noted that the Review Commission had changed its position and no longer sought to review the OSH Administration's dismissal of the citation. *See Cuyahoga*, 474 U.S. at 5 n.2.

67. *See Cuyahoga*, 474 U.S. at 7-8. It should be noted that Justices Brennan, Blackmun, and Marshall dissented from the per curiam disposition. *See id.* at 8.

68. *Id.* at 6-7.

69. *See id.* at 7; *see also Martin*, 499 U.S. at 152 (characterizing the Review Commission as a "neutral arbiter" in enforcement proceedings).

70. *See Cuyahoga*, 474 U.S. at 7.

tion's unreviewable power to withdraw a citation with its authority to enter into settlement negotiations.[71]

Although the Supreme Court in *Cuyahoga* did not refer to the practice of other federal agencies, in a later case involving the NLRB General Counsel's authority to settle cases, *NLRB v. United Food & Commercial Workers Union*,[72] the Supreme Court cited the *Cuyahoga* decision.[73] The Supreme Court in *United Food* upheld an NLRB regulation providing that an informal settlement entered into between the General Counsel and a party after the general counsel has filed a complaint, but before a Board hearing had commenced, was not subject to Board review and therefore could not be appealed to a court of appeals. The Supreme Court concluded that "[t]he General Counsel's unreviewable discretion to file and withdraw a complaint, in turn, logically supports a reading that he or she must also have final authority to dismiss a complaint in favor of an informal settlement, at least before a hearing begins."[74] While conceding that the filing of a complaint is the "necessary first step to trigger the Board's adjudicatory authority," the Court stated that until the hearing is held "no adjudication has yet taken place" and, therefore, at that particular point, "settlement or dismissal determinations are prosecutorial" and within the discretion of the General Counsel.[75]

Since the reviewability of informal settlements entered into after the hearing had begun was not before the Court, the Supreme Court did not directly deal with the question of whether the General Counsel's withdrawal or settlement after hearing was a prosecutorial decision.[76] In theory, it is at least arguable that even after the hearing has begun, and, in the words of the Supreme Court in *United Food*, "adjudication has taken place," the decision of the General Counsel or the OSH Administration to withdraw or settle is still prosecutorial, just as decisions or strategy

71. *See id.* The Supreme Court also said that the Sixth Circuit view to allow the Review Commission to review the OSH Administration's decision to withdraw a citation "would discourage the Secretary from seeking voluntary settlements with employers in violation of the Act, thus unduly hampering the enforcement of the Act." *Id.* at 7. A settlement agreement normally entails the withdrawal of the citation and penalty and the submission of the settlement in its place.

72. 484 U.S. 112 (1987) (*United Food*).

73. *See id.* at 126.

74. *Id.* at 126.

75. *Id.* at 125-26.

76. Nor did the Supreme Court in *Cuyahoga* deal with the issue of the Review Commission's authority to review the OSH Administration's withdrawal or settlement after hearing.

taking place at the hearing on how to proceed (which witnesses to call and the like) are routinely characterized as prosecutorial decisions.[77]

C. Deferral to Regulatory Interpretations

In 1991, in *Martin v. OSHRC*,[78] a unanimous Supreme Court held that the power to issue "authoritative" interpretations of standards was a "necessary adjunct" of the OSH Administration's authority to issue standards and therefore the courts were obligated to accord deference to the Secretary's reasonable interpretations of standards.[79] The Supreme Court rejected the view of several courts of appeals that where the Review Commission differed with the OSH Administration's reasonable interpretation, the Review Commission, as the adjudicative body in the OSHA program, was entitled to deference from the Court.[80]

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77. This would suggest that in administrative litigation, the question whether a particular action is prosecutorial or adjudicatory is not determined primarily on the basis of *when* it takes place, that is, at which point in the proceeding a prosecutorial action becomes adjudicatory, but rather is determined on the basis of the *nature* of the action. Thus, if the General Counsel (or the OSH Administration) withdraws a complaint, this action is inherently prosecutorial whenever it takes place. When the Board (or the Review Commission) decides the case after a hearing on the record, this is inherently an adjudicatory decision. A later case, *Reich v. OSHRC*, raised the issue of whether the decision by the Review Commission to reduce an OSHA violation from an other-than-serious violation to a de minimis violation was prosecutorial or adjudicatory. *See* 998 F.2d 134, 138 (3d Cir. 1993) (*Erie Coke*). De minimis violations are not subject to Review Commission jurisdiction. *Cf.* 29 U.S.C. § 658 (a) (1994) (noting that "[t]he Secretary may proscribe procedures for the issuance of a notice in lieu of a citation with respect to de minimus violations"). The OSH Administration and the union, with whom the dissent agreed, argued that reducing a violation to de minimis is tantamount to dismissing the citation, and therefore is a prosecutory decision that can be taken only by the OSH Administration. *See Erie Coke,* 998 F.2d at 138; *see also id.* at 142 (Becker, J., concurring in part and dissenting in part). A majority of the Third Circuit disagreed, holding that in reducing a citation to de minimis, after the hearing, the Review Commission was performing its adjudicatory role in making findings of facts and applying the OSHA standards to those facts. *See id.* at 139.

78. 499 U.S. 144 (1991).

79. *See id.* at 152. In *Martin*, the OSH Administration issued a citation to CF&I Steel Corporation for violation of its coke-oven standard. *See id.* at 148. On appeal, the Review Commission vacated the ALJ's decision in favor of the OSH Administration, instead offering a different interpretation of the coke-oven standard. *See id.* at 148-49. The Review Commission interpreted the "respiratory protection program" referred to in the relevant regulation as requiring "only that an employer train employees in the proper use of respirators . . . ." *Id.* at 149. By contrast, the Secretary of Labor interpreted the same regulation to require the employer to ensure proper fit of the employees' respirators. *See id.*

80. *See id.* at 150 n.4 (citing in support of deference to the Commission over the Secretary, *Brock v. Cardinal Industries, Inc.*, 828 F.2d 373, 376 n. 4 (6th Cir. 1987); *Brock v. Bechtel Power Corp.*, 803 F.2d 999, 1000-01 (9th Cir. 1986); *Marshall v. Western Electric, Inc.*, 565 F.2d 240, 244 (2d Cir. 1977)). For a discussion of the deference issue prior to the *Martin* decision, see Tool, *supra* note 26, at 1350-55; see also Recommendations of the

In reversing the decision of the Sixth Circuit Court of Appeals holding that it was the Review Commission that was entitled to court deference, the Supreme Court first reasoned that an administrative agency is entitled to substantial deference for its construction of its own regulations.[81] The issue is whether the OSH Administration or the Review Commission is the relevant Agency for purposes of this deference. Second, the OSH Administration is in the "best position" to render authoritative interpretations of its regulations. As the prosecuting authority under the Act, the OSH Administration "comes into contact with a much greater number of regulatory problems than does the [Review] Commission" and is therefore "more likely to develop the expertise relevant to assessing the effect of a particular regulatory interpretation."[82]

Third, the Court noted that in enacting OSHA, Congress rejected proposals that would have created a separate board that would be responsible for promulgating occupational safety and health standards. It did so, according to the relevant committee report, so that a single official would have both responsibility for formulating rules and for seeing that they are both workable and effective in day to day application, and, in addition, to make it possible to hold a single official accountable for implementation of the Act. To separate rulemaking authority from authoritative interpretative authority would defeat these purposes.

Fourth, the lower court ruled that the Review Commission had the normal complement of adjudicatory powers possessed by "traditional" administrative agencies, such as the NLRB, including the right to authoritatively interpret regulations.[83] However, the Supreme Court said that in those "traditional" agencies, adjudication activity encompasses the exercise of lawmaking, or policy-making powers. Thus, for example, NLRB's authority to establish labor relations policy on a case-by-case basis through adjudication derives from its rulemaking authority.[84] The

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Administrative Conference of the United States, 1 C.F.R. 305. 86-4 (1992) (recommending that Congress require the adjudicatory agency to accept the rulemaking agency's interpretation of the standard unless it is arbitrary, capricious, or otherwise not in accordance with the law).

81. *See Martin*, 499 U.S. at 150 (citing Lyng v. Payne, 476 U.S. 926, 939 (1986) and Udall v. Tallman, 380 U.S. 1, 16-17 (1965)).

82. *Id.* at 152-53.

83. *See* Dole v. OSHRC, 891 F.2d 1495, 1498 (10th Cir. 1989) (*CF&I*), *rev'd sub nom.*, Martin v. OSHRC, 499 U.S. 144 (1991). The Tenth Circuit Court of Appeals relied on the statements of Senator Javits that the Review Commission would have the normal complement of adjudicative powers possessed by other administrative agencies. *See id.*

84. *See Martin*, 499 U.S. at 154. The Court cited *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974), in stating that an agency may properly make law and policy "only because the unitary agencies also . . . had been delegated the power to make law and policy through rulemaking." *Martin*, 499 U.S. at 154. This is a somewhat loose reading of

Review Commission, on the other hand, has no rulemaking authority, and therefore its adjudicatory power is limited to fact-finding and does not include authority to make OSHA policy. The Supreme Court described the Review Commission's adjudicatory authority as "nonpolicy making adjudicatory powers typically exercised by a *court* in the agency-review context."[85]

Finally, the Supreme Court addressed the issue of which interpretations of the OSH Administration were entitled to deference. The Court emphasized that only "reasonable" interpretations were entitled to deference. Further, it stated that not only are the Secretary's formally promulgated standards entitled to deference, but also that the OSH Administration's "less formal means of interpreting regulations prior to issuing a citation," such as those embodied in "interpretive rules" and published "agency enforcement guidelines," referring specifically to OSH Administration's Field Operations Manual.[86] Indeed, the Supreme Court further explained that interpretations embodied in agency actions, as for example an interpretation implicit in the issuance by the OSH Administration of a citation are also entitled to deference since the interpretation is "as much an exercise of delegated lawmaking powers" as the promulgation of a standard.[87] On the other hand, "litigating positions" that are advanced for the first time in the reviewing court are post-hoc views of the Agency attorneys that follow, rather than precede, agency enforcement action and are therefore not entitled to deference.[88]

Bell. While *Bell* clearly said that the Board could make law and policy through adjudication, and ultimately, the Board was found to have rulemaking authority, the Board's adjudicative lawmaking authority was not expressly linked to its rulemaking authority by the Supreme Court in *Bell*. *See Bell*, 416 U.S. at 294 (noting that "the Board is not precluded from announcing new principles in an adjudicative proceeding"). In deciding that the Review Commission had no lawmaking and policy making authority, the Supreme Court, in *Martin*, reasoned that an agency's power to adjudicate does not, standing alone, indicate that the agency has law and policy making authority, and that the issue of the agency's lawmaking and policy making authority must be determined by looking at all aspects of the agency's responsibility. *See Martin*, 499 U.S. at 152-54. Nor does the suggestion in *Martin* that the Board is a lawmaking agency because it is a "unitary" agency seem entirely accurate, since the NLRB is not "unitary" in the traditional sense that the FTC is a "unitary" agency, since the General Counsel has separate prosecutorial authority. The crucial issues would seem to be: what was Congress's intent, and to which agency did Congress intend to assign policy making authority.

85. *Martin*, 499 U.S. at 154.

86. *Id.* at 157. The Field Operations Manual was originally called the Compliance Operations Manual, *see* MINTZ, *supra* note 1, at 337 n.7, and is now called the Field Operations Manual. *See Martin*, 499 U.S. at 157. The Manual is widely distributed to Agency staff and the public, but is not published in the Federal Register, nor is its publication preceded by notice-and-comment rulemaking.

87. *Martin*, 499 U.S. at 157.

88. *See id.* at 156-57. The Supreme Court has refused to accept post hoc explanations

The *Martin* decision articulates in full a number of the important themes relating to the administrative structure of OSHA that had been stated in earlier court decisions and scholarly commentary since the inception of the program. The Supreme Court emphasized the limited adjudicatory role that Congress envisaged would be played by the Review Commission as well as the central lawmaking and policy role that was assigned to the OSH Administration. The Court's reading of OSHA's legislative history, particularly the fact that Congress rejected a separate standards board, was a key factor in its conclusion that Congress intended only to separate adjudication from policy responsibilities, and not to effect any split in the policy-making responsibilities. The Court's treatment of the so-called "traditional" administrative agencies such as NLRB was particularly significant because it clarified the critical structural distinctions between NLRB and OSHA, and particularly the differences in the adjudicatory roles of the Board and the Review Commission.

Subsequent litigation has defined the application of *Martin* by dealing with the issue of whether the OSH Administration's interpretation of a standard is reasonable in a particular factual situation.[89] Since *Martin* dealt with the interpretation of OSHA standards, it did not consider whether deference to the OSH Administration is equally appropriate in cases involving a conflict in interpretation of an ambiguous statutory provision. The Supreme Court's rationale for deference to the OSH Administration's expertise and its policy role would seem to apply equally to cases involving statutory interpretations. However, in a recent decision, the Review Commission refused to defer to the interpretation of the OSH Administration of the statutory General Duty clause.[90]

D. Application of Separation of Functions for OSHA Rulemaking

United Steelworkers of America v. Marshall[91] involved a challenge to the OSH Administration's occupational health standard regulating lead in the workplace.[92] The petitioning employer association, the Lead In-

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of OSHA standards preferred for the first time by attorneys for the Agency in the court of appeals or review of the standard. *See* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 539 (1981).

89. *See* Secretary of Labor v. Union Tank Car Co., 18 O.S.H. Rep. (BNA) 1067, 1069-70 (OSHRC Oct. 16, 1997) (finding "unreasonable" the OSHA Administration's interpretation that the language of its personal protective equipment standard, requiring that equipment be "provided," means that the employer must pay for the equipment).

90. *See* Secretary of Labor v. Arcadian Corp., 17 O.S.H. Cas. (BNA) 1345, 1345-46 (DSHRC 1995).

91. 647 F.2d 1189 (D.C. Cir. 1980) (*United Steelworkers*).

92. *See id.* at 1202. After lengthy rulemaking, OSHA amended its existing occupa-

dustries Association (LIA), among many other arguments[93] claimed that the contacts between the Assistant Secretary for OSHA, who made the final decision on the provisions of the lead standard, and the OSH Administration staff attorney who represented the Agency in the rulemaking proceeding, constituted prohibited contacts between the decision maker, the Assistant Secretary, and the attorney who engaged in investigative and prosecutory functions. LIA particularly emphasized the adversary nature of this hybrid rulemaking proceeding and argued that "the agency decision maker engaged in *ex parte* . . . contacts with one of the adverse sides in the rulemaking"; thus, the APA's separation of functions requirements applicable to formal adjudications should also apply to rulemaking of this hybrid nature.[94]

The court of appeals conceded the adversary tone and format of the proceedings and assumed for the purpose of decision that the rulemaking attorney should be considered an "advocate" for purposes of decision.[95] However, the court, relying on its earlier decision in *Hercules, Inc. v. EPA*[96] rejected LIA's argument on several grounds. First the APA by its terms applied the separation of functions requirements only to formal

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tional health standard for lead by lowering the permissible exposure limit to 50 micrograms per cubic meter of air (50 ug/m^3). *See id.* at 1204. It has long been known that serious health hazards, including kidney damage and damage to the peripheral and central nervous system, result from extensive absorption of lead by humans. *See id.*

93. LIA raised both substantive and procedural arguments to almost every aspect of the lead standard. The United Steelworkers of America also challenged certain provisions. The D.C. Circuit Court of Appeals rejected all the procedural challenges and most of the substantive challenges, except that it remanded to the OSH Administration for further consideration of the issue of the feasibility of the new permissible exposure in certain industries. *See id.* at 1311. The litigation was not finally resolved until 1996. *See* OCCUPATIONAL SAFETY AND HEALTH LAW 199-200 (Victoria L. Bar and Ilise Lavy Feitshans, eds., Supp. 1995) [hereinafter Bar & Feitshans] (discussing the history of *United Steelworkers*).

94. *United Steelworkers*, 647 F.2d at 1210. The OSHA provisions on the promulgation of standards require procedures in addition to the minimum rulemaking procedures required by Section 553 of the APA. In particular, the Act mandates a public hearing, if requested. *See* 29 U.S.C. § 655 (b)(3) (1994); *see also* Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 472 (D.C. Cir 1974) (noting the differences between OSHA and the APA). OSH Administration rulemaking and rulemaking involving similar procedures by other federal agencies is generally referred to as "hybrid" rulemaking. *See United Steelworkers*, 647 F.2d at 1213.

95. *See United Steelworkers*, 647 F.2d at 1211-12. At the same time, the Court of Appeals experienced unease at the idea that the attorney in a rulemaking is an advocate for a particular "side," since in rulemaking, the agency is not determining the "specific rights of a specific party" *Id.* at 1211. This is a basic distinction between rulemaking and adjudication, the former being a "legislative" process and the latter analogous to the judicial process. *Cf. id.* (discussing in detail the role of OSHA attorneys). *See generally* DAVIS & PIERCE, *supra* note 8, at § 6.1 (discussing in detail the role of OSHA attorneys).

96. 598 F.2d 91 (D.C. Cir. 1978).

adjudication.[97] The court also failed to find any intention by Congress in the statute, even though it included additional procedural rulemaking requirements beyond those in the APA to import any adjudicatory separation of functions requirements into OSH Administration rulemaking.[98] Moreover, the court of appeals noted that the contacts between the staff attorney and Assistant Secretary did not involve extra-record material, and therefore did not implicate any limitations on the use of ex parte material in rulemaking.[99] However one-sided the views expressed may have been, the court said they "remained within the general boundaries of the deliberative process."[100] Finally, the court of appeals underscored the overriding policy and practical consideration impelling its decision, stating that "[i]n an enormously complex proceeding like an OSHA standard setting, it may simply be unrealistic to expect an official facing a massive, almost inchoate, record to isolate herself from the people with whom she worked in generating the record."[101]

The decisions of the Court of Appeals for the District of Columbia Circuit in the OSHA lead case, and in the earlier EPA case, *Hercules*, in refusing to require separation of functions into rulemaking, suggest a number of interrelated conclusions. The court in these and in several other related decisions established that although "hybrid" rulemaking

97. *See United Steelworkers*, 647 F.2d at 1213; *see also Hercules*, 598 F.2d at 125 (setting forth a more detailed listing of the APA's legislative history, and noting that "[e]ven in formal rule making proceedings subject to sections 7 and 8, the [Administrative Procedure] Act leaves the hearing officer entirely free to consult with any other member of the agency's staff"). The Court of Appeals in *United Steelworkers* discussed the separation of functions issue together with the ex parte issue, and, of course, the two are closely related, since one of the main rationales for separation of functions is the possibility of ex parte communications between an investigator/advocate and decision maker.

98. *See United Steelworkers*, 647 F.2d 1213. The Court said "[t]he legislative history shows that Congress consistently turned back efforts to impose such formal procedures on OSHA standard-setting." *Id.*

99. *See id.* at 1212 n. 20. The court assumed that the standards attorney may have influenced the decision by reinforcing "according to his bias," certain information that was already in the record, but insisted that this case did not involve "actual new evidence" given to and relied on by the decisionmaker. *Id.*

100. *Id.* (emphasis omitted).

101. *Id.* at 1216. The Court, referring to the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), which "counsels restraint" in courts imposing nonstatutory procedural requirements on agencies, concluded that the "issue was one for Congress or the agencies to resolve." *United Steelworkers*, 647 F.2d at 1216. While the court of appeals in *Hercules* focused on the issues raised by the consultations between *attorneys* and the decision maker, *see Hercules*, 598 F.2d at 127, the Court in *United Steelworkers* raised doubts as to the wisdom of singling out the attorney in the case when non-legal staff also were involved in the decision making and participated with "equal vigor" in the rulemaking, *see United Steelworkers*, 647 F.2d at 1212 n.19.

included more elaborate procedures than classic APA-type informal rulemaking, it was nonetheless still rulemaking and not adjudication, and therefore formal adjudicatory procedures should not be imposed on these rulemaking proceedings.[102] In addition, the court assigned considerable importance to the need in complex rulemaking proceedings for the expertise of the entire agency to be available in determining the substance of the legislative rule. This goal would be frustrated, the court said, if the attorneys who conducted the rulemaking were separated from those who decide on the rule. If separation were enforced, the court stated that the Assistant Secretary of OSHA would be required to have a completely separate staff to advise her evaluation of the complex rulemaking record. Despite these overriding considerations, the court in *Hercules* expressed "uneasiness" about the "appearance of unfairness" involved in the contacts between staff involved in the rulemaking and the decision maker.[103] Once again, we observe the basic tension, between fairness and appearances of fairness on one side and agency efficiency on the other hand, which in the OSHA context at least has been resolved in adjudication by strengthening the separation of functions (institutional separation).

V. POST-*MARTIN* OSHA LITIGATION ON SEPARATION OF FUNCTIONS

The decision of the Supreme Court in *Martin* clearly established the obligations of a court to defer to the OSH Administration's interpretation of an ambiguous standard. While *Martin* did not expressly deal with the issue, the necessary implication of *Martin* is that the Review Commission, in exercising its adjudicatory function, is obliged to follow the policy determinations of the OSH Administration as expressed in its interpretations of standards. The bulk of cases applying *Martin* involved the question whether the OSH Administration interpretation was reasonable and entitled to deference or "unreasonable" and not worthy of

102. *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981) (*ex parte* restrictions do not apply to hybrid rulemaking); Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (stating that the strict rules disqualifying biased decision makers do not apply in hybrid rulemaking proceedings).

103. *Hercules*, 598 F.2d at 127 ("The fact that the attorneys who represented the staff's position at the administrative hearing were later consulted by the judicial officer who prepared the final decision possibly gives rise to an appearance of unfairness, even though the consultations did not involve factual or policy issues.").

deference.[104] In *Secretary of Labor v. Arcadian Corp.*,[105] decided by the Review Commission in 1995 and the Court of Appeals for the Fifth Circuit in 1997, a significant issue was the extent to which *Martin* applied to OSH Administration statutory interpretations.

By way of background, in enforcing OSHA requirements, the OSH Administration normally issues one simple citation item for each standard alleged to have been violated and a single civil penalty for each violation. Thus, for example, if an employer failed to comply with OSHA's perimeter guarding standards, this would be a single violation and penalty. The Act requires employers not only to comply with the requirements of OSHA standards, but also, in the general duty clause, to "furnish to each of his employees . . . a place of employment . . . free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[106] In enforcing the general duty clause, the OSH Administration had traditionally issued a single citation item and single proposed penalty for each violation.[107]

In the early 1990s, responding at least in part to criticism that its enforcement policy was insufficiently strong, the OSH Administration issued a statement that established an enforcement policy that would authorize field staff in certain "egregious" cases to count each instance of non-compliance as a separate violation for which a separate penalty is proposed.[108] The *Arcadian* case involved an explosion at a fertilizer plant in which eighty-seven employees were injured. The OSH Administration cited Arcadian for eighty-seven separate willful violations of the general duty clause. A $50,000 penalty was proposed for each of the eighty-seven violations, a total of $4,350,000. Arcadian contested the citations and penalties, the ALJ ruled that the OSH Administration's separate citation and penalty for each employee was "inappropriate," and the OSH Administration appealed to the Review Commission.[109]

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104. *See, e.g.*, Secretary of Labor v. Union Tank Car Co., 18 O.S.H. Cas. (BNA) 1067, 1069-70 (OSHRC Oct. 16, 1997) (finding an OSH Administration interpretation "unreasonable").

105. 17 O.S.H. Cas. (BNA) 1345 (OSHRC Sept. 15, 1995). The Fifth Circuit's decision is reported at *Reich v. Arcadian Corp.*, 110 F.3d 1192 (1997).

106. 29 U.S.C. § 654(a)(1) (1994).

107. For the background of the changes in the OSH Administration's enforcement policy, see Benjamin W. Mintz, *History of the Federal Occupational Safety and Health Administration, in* FUNDAMENTALS OF INDUSTRIAL HYGIENE 832-33 (4th ed. 1995).

108. *See* Bar & Feitshans, *supra* note 93, at 93-94 (describing the "egregious" enforcement policy).

109. *See Arcadian*, 17 O.S.H. Cas. (BNA) at 1346.

The Review Commission, with one member dissenting, upheld the decision of the ALJ.[110] The Review Commission initially determined that the OSH Administration interpretation that the general duty clause permitted per-employee citations and penalties was not "reasonable" and, therefore, under *Martin* was not entitled to deference.[111] In addition, the Commission held that even if OSH Administration's interpretation was "reasonable," it was not entitled to deference. *Martin*, the Review Commission said, involved the interpretation of an OSHA standard. At issue in *Arcadian*, however, was the interpretation of a statutory provision, the general duty clause, "the adjudication of which Congress expressly left to the Commission, not a regulation that the Secretary himself drafted and promulgated."[112] Moreover, the Review Commission concluded that the case "touche[d] directly upon the appropriateness of the penalty, which is solely within the Commission's statutory authority."[113] Finally, the Review Commission ruled that the OSH Administration instruction establishing the egregious policy was a "discretionary enforcement guideline not published in either the Federal Register or the Code of Federal Regulations," and therefore not entitled to deference.[114]

Review Commission Chairman Weisberg dissented, stating that although the OSH Administration's interpretations of the statute in other situations may not be entitled to deference, its interpretation in *Arcadian* was due deference here since it relates "directly" to the OSH Administration's prosecutorial discretion and went "to the heart of [its] enforcement authority."[115] The Court of Appeals for the Fifth Circuit af-

110. *See id.* at 1345-46, 1353.

111. *See id.* at 1351. A major factor in the Review Commission's reasoning that OSH Administration's interpretation of the General Duty Clause was unreasonable was the fact that "for more than twenty years," the focus of the OSH Administration's enforcement of section 5(a)(1) had been on the "existence of conditions which constitute a recognized hazard that can feasibly be abated" and the Agency has cited separate violations only "[t]o the extent a hazard is separate and its abatement is peculiar to it." In *Arcadian*, the Review Commission emphasized, only a single hazard was involved. *See id.* at 1350-51. In earlier decisions, the Review Commission had upheld separate citations and penalties in cases involving violations of standards or OSH Administration regulations (record-keeping violations under 29 C.F.R. § 1904 (1996)), depending on the language of the provision in question. *See* Secretary of Labor v. Caterpillar Inc., 15 O.S.H. Cas. (BNA) 2153, 2172 (OSHRC Feb. 5, 1993). *Arcadian*, however, involved a violation of the general duty clause.

112. *Arcadian*, 17 O.S.H. Cas. (BNA) at 1352.

113. *Id.*

114. *Id.*

115. *Id.* at 1360. Chairman Weisberg asserted that he would nonetheless require the OSH Administration to show why "instance-by-instance citations" were warranted in the

firmed the Review Commission,[116] but based its decision on the narrower ground that the OSH Administration interpretation was inconsistent with the plain meaning of the general duty clause, and therefore not entitled to deference under the *Chevron* analysis.[117] The Court of Appeals did not reach any of the other deference issues determined by the Review Commission.

While the Supreme Court decision in *Martin* plainly permitted the Court of Appeals and the Review Commission to refuse to affirm an OSH Administration interpretation that it found "unreasonable," the reasoning of the Review Commission in *Arcadian* in other respects is very troublesome. The Review Commission relied on three grounds for not deferring to "reasonable" OSH Administration interpretations of statutory provisions.

First, the Review Commission distinguished between interpretations of ambiguous standards and the interpretations of statutory provisions. To be sure, the *Martin* case dealt with a standards interpretation. However, the underlying Supreme Court rule mandating deference to administrative interpretations evolved in cases involving statutory interpretation and was regularly applied in statutory cases. Indeed, *Chevron*, the strongest recent articulation by the Supreme Court of deference to an agency, involved court deference to an EPA interpretation of a provision in the Clean Air Act.[118] The Review Commission in *Arcadian*, obviously troubled by its implications, reasoned that *Chevron* was distinguishable because EPA, unlike the OSH Administration, has "both administrative and adjudicative functions."[119] This purported distinction misses the basic thrust of *Martin* and *Chevron*. The EPA is like the OSH Administra-

particular case. *See id.* Among the relevant factors to be considered, Chairman Weisberg said, were: whether the "unit of prosecution" under the standard was an "individual act rather than an overall course of conduct;" and whether "the circumstances in the case [are] extraordinary, i.e., that the Secretary is warranted in using this extraordinary means of enforcement." *Id.* at 1360-61. Chairman Weisberg would therefore have remanded the case to determine if the particular circumstances would warrant the "extraordinary" remedy. *See id.* at 1361.

116. *See* Reich v. Arcadian Corp., 110 F.3d 1192, 1199 (5th Cir. 1997).

117. *See id.* at 1196.

118. *See* Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 840-42 (1984). *Chevron* involved an Environmental Protection Agency regulation that treated all pollution-emitting devices within the same industrial complex as though they were underneath a single "bubble." *See id.* at 840. At issue was the meaning of the "stationary source" as defined by the Clean Air Act. *See id.* at 841. In reviewing the EPA's construction of the statute, the Court developed what has come to be known as the "*Chevron* two-step test"—the first inquiry being whether Congress has directly spoken to the issue, and the second, to be applied only in the absence of clear legislative language, whether the interpretation offered by the agency is reasonable. *See id.* at 842-43.

119. *Arcadian*, 17 O.S.H. Cas. (BNA) at 1352.

tion because both have the central policy role in their respective programs. That the Review Commission and not the OSH Administration has adjudicatory authority is, under *Martin*, immaterial for purposes of determining deference, since the point of *Martin* is that deference is due to an Agency because Congress has assigned it a policy role, and in the OSHA program, it is the OSH Administration, and not the Review Commission, which has the policy role.[120]

The Review Commission also suggested that deference is more appropriate where standards are involved on practical grounds, since the OSH Administration developed and issued the standards, while it is Congress that enacts statutes. However, the Supreme Court has elaborated on many other reasons why the views of the Agency which administers a statute are worthy of court deference.[121] In relying on the OSH Administration's expertise respecting its own regulations in *Martin*, the Supreme Court addressed the case before it, and plainly did not intend to exclude deference to agency interpretations in other situations.

Second, the Review Commission argued that it is given express authority under section 17(j) of the statute "to assess all civil penalties provided in this section . . . ."[122] But it is not disputed that the Act assigns adjudicative authority to the Review Commission. *Martin* holds, however, that this adjudicative authority must be exercised with appropriate deference to the policy determinations of the OSH Administration. Thus, under *Martin*, the Review Commission is authorized to adjudicate the citation based on a violation of the standard, but the "law of the case" would be the OSH Administration standard. So, the adjudication

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120. Justice Stevens's opinion for the Court referred in *Chevron* to the EPA as "an agency to which Congress has delegated policymaking responsibilities" and characterized its interpretation at several points as a "policy choice." *Chevron*, 467 U.S. at 865. There is no indication in *Chevron* that the EPA's adjudicative authority, to the extent that it exists, was the basis for court deference.

121. For example, in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), the Supreme Court, in deferring to the Board's interpretation of the term "employee" in the National Labor Relations Act, cited various factors warranting reliance on the Board's view:

> Everyday experience in the administration of the statute gives [the Agency] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers.

Id. at 130. For cases involving deference to statutory interpretation, see 1 DAVIS & PIERCE, *supra* note 8, § 3.1, at 107-09.

122. 29 U.S.C. § 666(j) (1994). The Review Commission is instructed to give "due consideration" to four factors in deciding the appropriateness of the penalty: the "size of the business" involved, the "gravity of the violation," the "good faith of the employer," and the "history of previous violations." *Id.*

of penalties must be exercised with due deference to the OSH Administration's policy interpretation on the meaning of the statutory provisions underlying the penalties.[123]

Finally, the Review Commission noted that the OSH Administration policy on per-employee citations and penalties was not officially published. However, this assertion contradicts express language in *Martin*, which holds that even an OSH Administration "litigating position" before the Review Commission, which is obviously not published in the Federal Register, is entitled to deference because it is an "exercise of delegated lawmaking power."[124]

In sum, while there may be merit in the Review Commission's (and the Court's) ultimate conclusion that the OSH Administration's "egregious" policy is inconsistent with the general duty clause, the Review Commission's views on deference go far in undercutting principles that were supposed to have been settled in *Martin*.

VI. SEPARATION OF FUNCTIONS: OTHER FEDERAL AGENCIES

This discussion has focused on the OSH Administration and on the NLRB as illustrating two differing approaches of institutional separation of functions. The administrative structure of the federal mine safety and health program, also situated in the Department of Labor, closely parallels that of the OSH Administration and several other federal agencies with adjudicatory responsibility, such as the Merit Systems Protection Board[125] and the Benefits Review Board,[126] which exhibit varying degrees of institutional separation. Significantly, in a number of Federal regulatory programs, some recently enacted, enforcement responsibility is assigned to an administrative agency and adjudication of enforcement ac-

123. *See id.* The Review Commission's adjudicative authority thus exists concurrently with the OSH Administration's policy-making prosecutory authority and does not override the OSH Administration authority. *See supra* note 77 (discussing the court of appeals decision in *Erie Coke*).

124. Martin v. OSHRC, 499 U.S. 144, 158 (1994).

125. *See* 5 U.S.C. §§ 7701-7703 (1994). The Merit Systems Protection Board (MSPB) "is an independent Government agency that operates like a court." 5 C.F.R. § 1200.1 (1997). The MSPB was "created to ensure that all federal government agencies follow Federal merit system practices." *Id.* The Board is responsible for "adjudicating Federal employee appeals of agency personnel actions. *Id.* The Board is comprised of three Members, nominated by the President and confirmed by the Senate. *See id.* § 1200.2.

126. The Benefits Review Board is similar in makeup and procedure to the National Labor Relations Board, except that its members are appointed by the Secretary of Labor, and not the President. *See* 33 U.S.C. § 921(b)(1) (1994). It is charged with enforcing compensation orders granted under the Longshore and Harborworkers' Compensation Act. *See id.* § 921(b)(3).

tions is assigned to the federal district courts. Notable among these is the federal Fair Labor Standards Act (FLSA),[127] enacted in the New Deal era, under which prosecutory authority is vested in the Wage and Hour Administration in the Department of Labor, but under which most adjudication of enforcement actions take place in the U.S. district courts.[128] Several recently enacted labor regulatory programs have been modeled on the FLSA structure, such as the Family and Medical Leave Act (FMLA),[129] the Polygraph Protection Act,[130] and the Worker Adjustment and Retraining Notification Act (WARN),[131] requiring notice to employees of certain plant closings, in that adjudication of enforcement actions takes place in the U.S. district courts.

The recent congressional debate and statutory enactment in the federal air safety program is instructive on the issue of separation of functions. Two administrative agencies under earlier statutes were assigned roles in this program.[132] The Federal Aviation Administration (FAA) was delegated both regulatory authority over air safety, including responsibility for the promulgation of regulations on air safety, investigations to ensure compliance with these regulations, and the bringing of en-

127. Ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-219 (1994)).

128. The Act is administered in the Department of Labor by the Wage and Hour Division and headed by an Administrator. *See* 29 U.S.C. § 204(a) (1994). The Act generally sets the minimum wage, *see id.* § 206(a)(1), and maximum hours, *see id.* § 207(a)(1), to be worked in the United States.

129. Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified at 29 U.S.C. §§ 2601-2654 (1994)). The FMLA provides for 12 weeks of unpaid leave for a number of considerations with a guarantee of equivalent pay and benefits upon return from the leave. *See* 29 U.S.C. §§ 2614(a)(1) (1994). In addition, it provides backpay and interest for those employees who are wrongly denied leave by their employers. *See id.* § 2617(a)(1).

130. Pub. L. No. 100-347, 102 Stat. 646 (1988) (codified at 29 U.S.C. §§ 2001-2009 (1994)). The act makes it illegal for an employer to directly or indirectly require employees to submit to a polygraph (lie-detector) test. *See* 29 U.S.C. § 2002(1) (1994). Moreover, the Act provides for civil penalties up to $10,000 for employers who violate its provisions. *See id.* § 2005(a)(1).

131. Pub. L. No. 100-379, 102 Stat. 890 (1988) (codified at 29 U.S.C. §§ 2100-2109 (1994)). It requires, in most circumstances, that the employer delay a plant closure until 60 days after delivery to an employee representative and government officials of notice to close a plant or effect a large layoff. *See* 29 U.S.C. § 2102(a) (1994). In addition, it provides for backpay and benefits for those employees affected by an employer's violation of the Act. *See id.* § 2104(a)(1).

132. *See generally* Henry H. Perritt, Jr., *Report for Recommendation 91-8: Adjudication of Civil Penalties Under the Federal Aviation Act*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS, AND REPORTS 765-861 (1991) [hereinafter ACUS] (elucidating both the statutory framework of the air safety program and its relevant background).

forcement actions where violations were found.[133] The FAA also has general responsibility for issuing certificates for most aviation businesses and functions. The National Transportation Safety Board (NTSB), in addition to its authority to investigate transportation accidents and make appropriate recommendations on safety, was responsible for adjudication in proceedings brought by the FAA to revoke a certificate issued by the FAA to a carrier or to air personnel as a sanction for violation of its regulations.

Before 1987, actions for civil penalties for violations of FAA safety regulations were brought in the district courts by the Department of Justice on recommendations from the FAA. This arrangement was criticized as being ineffective and, in 1987, Congress enacted a demonstration program, allowing the FAA to assess civil monetary penalties of up to $50,000 through an administrative process which included both prosecutory and adjudicatory authority. Two years later, when the demonstration program came up for renewal, there was general agreement that the administrative assessment of penalties should continue. The debate however, centered on the question of whether the FAA should be responsible for the adjudication of penalties—the unitary model—or whether the authority should be assigned to the independent NTSB, which already had adjudicatory authority in certificate revocation actions. The Administrative Conference of the United States (ACUS), which had been asked to study the issue, recommended that the NTSB should continue to adjudicate certificate cases as before, however, the exception would be that authority to adjudicate civil penalty cases involving pilots and flight engineers would also be given to the NTSB.[134]

In addition, the ACUS recommended that the FAA would have to continue to have the authority to prosecute both certificate and civil penalty cases, subject, of course, to APA separation of function requirements and to adjudicate all other penalty cases except those involving pilots and flight engineers. In renewing the program, Congress enacted legislation accepting the ACUS recommendations, but modified it in one

133. *See* Richard H. Fallon, Jr., *Enforcing Aviation Safety Regulations: The Case for a Split-Enforcement Model of Agency Adjudication*, 4 ADMIN. L.J. 389, 395-96 (1991). The FAA was also assigned certain operational authority at air terminals. Relevantly, the FAA is the employer of air traffic controllers at airports.

134. *See Recommendation 91-8: Adjudication of Civil Penalties Under the Federal Aviation Act*, *in* ACUS, *supra* note 132 at 40, 46. The recommendation explained that the transfer of adjudicative authority for civil penalties assessed against pilots and flight engineers would "eliminate perceived conflicts of interest" in those cases in which "conflict is most likely between FAA employees with operational responsibility for air traffic control and persons subject to civil penalty authority (i.e., pilots and flight engineers)." *Id.*

respect by adding mechanics and repair persons to the adjudicatory jurisdiction of NTSB.[135] The statute required that NTSB be "bound by all validly adopted interpretations of laws and regulations" administered by the FAA and by "written agency policy guidance available to the public . . . unless the [NTSB] finds an interpretation is arbitrary, capricious, or otherwise not according to law."[136]

The report of the House Committee on Public Works and Transportation explained the rationale of Congress in adopting this administrative arrangement.[137] As stated by the Committee, the main argument for transferring all adjudication in penalty cases to the NTSB was the familiar one: if one agency, the FAA, were responsible both for prosecution and decision making, this would be unfair and create an appearance of unfairness. The Committee, however, refused to credit this argument in its entirety, saying that on the basis of the information available, the FAA's exercise of adjudicatory functions had not been "unfair" and the committee was unwilling to modify administrative procedures because of "perceptions of unfairness, when these perceptions have no basis in reality."[138] Moreover, the Committee stated that a transfer of authority for all civil penalty cases to the NTSB would involve that agency in adjudication in areas where it had no expertise and remove responsibility from

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135. *See* 49 U.S.C. § 46301(d)(5)(B) (1994).

136. *Id.* § 46301(d)(5)(C). The ACUS Report, which preceded the *Martin* decision, discussed the issue of NTSB deference to FAA policy positions. *See* Perritt, *supra* note 132, at 822-24. The Report for Recommendation expressed the view that while FAA rules promulgated under 5 U.S.C. § 553 were entitled to deference, "positions taken by FAA advocates are not entitled to deference simply because the advocate expressed them" and "propositions articulated in policy statements, press releases, or guidance to FAA employees are not entitled to any particular effect . . . ." *Id.* at 823-24. On the deference issue in the air safety program, see Hinson v. NTSB, 57 F.3d 1144, 1148, n.2 (D.C. Cir. 1995) (reasoning that the *Martin* standard was not applicable in the FAA-NTSB context). The statute also provides that the Administrator of FAA may obtain judicial review of an order of NTSB if he or she determines that the order will have significant adverse impact on the implementation of the Act. *See* 49 U.S.C. § 46301(d)(6). OSHA does not limit the right of the OSH Administration to seek review of Review Commission decisions in this way. *See* 29 U.S.C. § 660(b) (1994).

137. *See* H.R. REP. NO. 102-671, at 7 (1992), *reprinted in* 1992 U.S.C.C.A.N. 792, 796 (indicating the Congress intended to make civil penalties a permanent feature without the enforcement provisions governing air traffic safety).

138. *Id.* at 9, *reprinted in* 1992 U.S.C.C.A.N. at 798. The Committee also said that "to act on perceptions of unfairness would be to create a precedent requiring congress [sic] to establish an extensive new administrative structure to handle civil penalty cases under more than 200 other statutes." *Id.* at 9, *reprinted in* 1992 U.S.C.A.A.N. at 797-98. The Committee, quoting the ACUS Report, also observed that "respondents in enforcement proceedings have an economic interest in the establishment or maintenance of the most cumbersome procedural requirements possible . . . ." *Id.* at 8, *reprinted in* 1992 U.S.C.C.A.N. at 797.

the FAA, which has both the necessary staff and experience to perform the function effectively.[139] Congress, accordingly, decided that it would not transfer the adjudication of *all* penalty cases to the NTSB.

On the other hand, the Committee continued NTSB adjudication responsibility for certificate revocation cases and added to the NTSB's existing adjudicatory authority over certificate revocation cases the responsibility for penalty cases involving certain categories of airline personnel. On this issue, the Committee viewed FAA adjudicatory authority not as a problem of the "unfairness," but rather as involving a potential conflict of interest. Since the FAA operates the air traffic control system, and since some civil penalty cases involving pilots would turn on whether the responsibility for an accident was attributable to the pilot or to the air controller, the Committee expressed concern that, since controller responsibility could lead to tort action against the FAA, the FAA would have a conflict of interest in deciding the case. Similar issues could arise with regard to flight engineers, and, "in the interest of consistent treatment of airline employees certificated by FAA," the Committee and Congress also provided for NTSB adjudicatory jurisdiction over mechanics and repair persons.[140]

VII. DISCUSSION AND CONCLUSIONS

In determining the structure of an administrative agency, and in particular, in deciding the allocation of agency functions, Congress is confronted with competing values and interests. On one hand, any mixing of adjudicatory decision-making functions with investigation and prosecution functions threatens the fairness of the proceeding, and, apart from the reality, gives members of the public the appearance of bias and prejudgement in agency decision making. On the other hand, agency efficiency depends in no small measure on the existence of a single policy-making authority, within the agency, and on the availability of the expertise and experience of the entire agency, to agency decision makers. This conflict of values is exacerbated since all agency functions, including adjudicatory decision-making functions and investigation and prosecution functions inherently involve some policy-making activity,[141] so that the

139. *See id.* at 9, *reprinted in* 1992 U.S.C.C.A.N. at 798.

140. *Id.* at 9-10, *reprinted in* 1992 U.S.C.C.A.N. at 798.

141. Even in a program such as OSHA, in which policymaking is achieved primarily through legislative rulemaking and interpretation of rules, adjudicatory decisionmaking, in applying rules and interpretations in particular cases, necessarily requires some policy decisions by the official charged with the decision since the "existing" law is typically not congruent with the specific facts. Also, the investigation and prosecution role involves the

separation of investigation and prosecution from decision making inevitably fractures the policy making, and thus tends to undermine agency unified operation.

The dilemma inherent in this conflict of values has been solved in various ways in the administrative history of our governmental system. The APA structural model gives primary emphasis to the need for unified agency policy making by assigning to the highest agency official authority to make the policy decisions involved in both prosecution and adjudication, and by limiting the separation of functions requirements to individuals in the agency staff. This arrangement, while promoting agency efficiency and unified policy making, has lent itself some to public criticism on the ground that, in appearance, and perhaps in reality, the same individuals are both prosecuting and deciding cases.

With the Taft-Hartley Act, a new paradigm was developed by Congress: separation of functions would be imposed on an institutional level, a solution originally rejected by Congress in enacting the APA. Similarly in OSHA and MSHA, and to some extent, in the FAA-NTSB arrangement, Congress enacted institutional separation of functions, although in significant respects different from the NLRB structure. In all of these administrative arrangements, Congress gave major emphasis to the importance of separating prosecution from decision-making responsibilities, and avoiding any appearance of unfairness, while sacrificing, at least to some extent, the unity agency of policymaking.

This movement from the unitary APA model to the institutional separation model has been related to the changes in the way administrative agencies make agency policy.[142] In the era of the APA, policymaking was largely accomplished through case-by-case adjudication. In order to assure that the Agency head would ultimately be responsible for all critical policymaking, it was therefore necessary to maintain the unitary model, with the Agency head the ultimate adjudicative decision maker. However, in time, case-by-case policymaking was replaced by policymaking

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decision as to which cases to investigate and, critically, in which cases a complaint should be filed. The Supreme Court has held that these prosecutory decisions are presumptively not subject to court review since there is no "law to apply." Heckler v. Chaney, 470 U.S. 821, 831 (1985). In other words, the Prosecutory Agency's decisions are not legal decisions, but policy decisions which "often involve a complicated balancing of a number of factors which are peculiarly within its expertise." *Id. But see id.* at 825 n.2 (discussing the possibility of a different result if legal questions were involved).

142. The historical argument presented here is based on a thoughtful and groundbreaking article by Professor Daniel J. Gifford. *See generally* Gifford, *supra* note 15. For a critical view of "separation of functions" requirements for administrative agencies, see generally William F. Pederson, Jr., *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991 (1978).

by legislative rule, as was the case in agencies such as the OSH Administration and the EPA.[143] With the great increase in legislative rulemaking, there was no longer any pressing need from a policy view for the Agency head to decide adjudicatory cases, since agency policy was no longer established through the adjudicatory mode. In the institutional separation arrangement, therefore, decision making could be delegated to an independent agency and thus accomplish more complete separation of functions without significantly undermining the unity of policymaking.

With these developments in mind, differences in structure and procedure between the NLRB and the OSH Administration, differences particularly between the role of the five-member Board and the Review Commission, become more understandable. The Taft-Hartley Act of 1947 imposed institutional separation on an agency that continued to make policy on a case-by-case basis. As a result, the five-member Board continued to be the main policy-making component of the NLRB, and the General Counsel's role was statutorily limited to prosecution and investigation. In the OSHA program, on the other hand, the OSH Administration in the Department of Labor conducted rulemaking, which was the main vehicle for policymaking. As a result, the main policy-making role in OSHA was assigned to the OSH Administration and the Review Commission was limited to adjudicatory decisionmaking in a non-policy-making mode. So viewed, the NLRB was given an intermediate structure, between the APA unitary model and full institutional separation that was realized in OSHA.

These differences in allocation of authority between the OSH Administration and the NLRB account for specific variations in the way the two agencies operate. Because the Board makes policy, both the General Counsel in his or her prosecutory decision-making role and the courts in review proceedings defer to Board views on policy matters. Under OSHA, however, the Supreme Court has decided quite properly that

143. Professor Gifford also connects the development of policymaking by rules to the fact that in agencies with a high-volume caseload, "the most practical means for policy-making is rulemaking." Gifford, *supra* note 15, at 969 n.3. It should be noted, however, that legislative rulemaking has also resulted, and perhaps more importantly, from the nature of the regulatory activity undertaken by the Agency. It would be inconceivable that detailed regulatory requirements imposed by the OSH Administration and EPA could be established in adjudicatory decisions. The success of this health and environmental regulation depends, in large measure, on the promulgation of detailed rules, developed after rulemaking with extensive public participation, and affording the regulated public adequate notice of what is expected of them. *See* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 682-83 (D.C. Cir. 1973) (discussing the advantages of policymaking through rulemaking). The movement toward rulemaking has taken place even in agencies such as the OSH Administration which do not have a particularly high volume case-load.

deference is due to the OSH Administration, which is the policy-making entity in the program. In addition, the General Counsel of the NLRB is not authorized to seek review of the decisions of the Board, which he is bound to follow, while the OSH Administration is expressly allowed to file petitions in the court of appeals to review adverse Review Commission decisions. For essentially the same reasons, the Board is a party in review proceedings, since it has a policy interest in defending its decisions, while the Review Commission, like a district court, has no such role.

In one respect, however, both the Board and the Review Commission are the same: neither can review prosecutory decisions by the General Counsel or the OSH Administration, respectively. The underlying rationale, however, is somewhat different. In the NLRB arrangement it is the General Counsel's prosecutory authority that is exclusive and not subject to Board review. In the case of OSHA, it is the OSH Administration's broad policy-making authority, which encompasses the administrative responsibility for prosecutory decisions which must be accepted by the Review Commission.

Some critics of OSHA have pointed to its institutional separation as one of the main culprits for the disappointing performance of OSHA.[144] In particular, conflict in critical policy matters between the OSH Administration and the Review Commission accounts, for these critics, for the general ineffectiveness of OSHA enforcement. To be sure, in the legislative development of OSHA, efforts of employer groups to separate the responsibility for both adjudication and rulemaking from the OSH Administration were concededly made for the purpose of limiting the Department of Labor's power and to prevent its abuse.[145] Further, there

144. *See* 2 DAVIS & PIERCE, *supra* note 8, § 9.9, at 100. ("The inefficient multi-agency structure Congress chose to implement [the OSHA] regime ranks high on the list of the many explanations for [its] poor performance."); *see also* Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulating Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 2-10 (1989) (discussing the structural impediments which inhibit the OSH Administration's quality work product). Davis and Pierce have drawn a more general conclusion: at the legislative stage of establishing a regulatory program, if the opposition is strong, the opposition "can render the program ineffective by . . . [r]equiring [the establishment of] a decisionmaking structure with strict agency-based separation of functions".

This, the authors say, is "one of the most powerful ways of reducing the effectiveness of a regulatory program." DAVIS & PIERCE *supra* note 8, at § 9.9, at 101. A similar view was suggested by the House Committee in reporting on the FAA-NTSB air transport safety legislation in 1992. *Cf.* H.R. REP. NO. 102-671, at 7-8, *reprinted in* 1992 U.S.C.C.A.N. 792, 796-97 (noting that most administrative agencies do not employ a strict separation of functions).

145. *See supra* note 27 (discussing of remarks by Senator Dominick).

can be little doubt that on many critical issues the Review Commission has blocked significant OSHA enforcement initiatives and has reversed OSH Administration sanctions in particular and important cases. The recent *Arcadian* decision is only the latest example of the Review Commission setting aside a significant OSH Administration enforcement policy.

But this view must be tempered in a number of respects. First, it would be difficult to maintain that disabling the agency was the exclusive motivation for establishing a separate Review Commission. As discussed, fairness and the appearance of fairness in adjudication have long been good-faith concerns of legislators and scholars who have questioned the combination of functions in administrative agencies. As has been frequently noted, interests of procedural fairness almost inevitably conflict with efficiency of agency operations. The purpose of checks-and-balances is to "check" the exercise of power. There is no doubt that OSHA enforcement would be more effective if a compliance officer were authorized to assess penalties on the spot, with no review available, but it could not be seriously suggested that this "highly effective" procedure should be adopted.[146]

Congress is charged with the responsibility of deciding the proper balance between the interests served by differing procedural models. Is OSHA's split-enforcement arrangement more "fair"? It would be difficult to say.[147] Does it appear more fair? It seems likely. Has split en-

146. Congress refused to give authority to OSH Administration Compliance officers to "red tag," that is, to shut down administratively working conditions that presented an imminent danger of death or serious physical harm to employees. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 19-21 (1980) (discussing the legislative history surrounding the consideration and rejection of "shut-down" provisions in OSHA).

147. The Administrative Conference of the United States studied the experience in the OSHA and MSHA programs with the "split-enforcement" model and was "unable to conclude whether the model achieves a greater fairness in adjudication than does the traditional structural model." 51 Fed. Reg. 46,985, 46,986 (1986). "Because fairness is an important, but an unquantifiable and subjective value," the Conference took no position on which structural model was preferable. *Id.* It did decry the policy conflict between the OSH Administration and the Review Commission and recommended that "generally speaking" Congress should provide that the "adjudicatory agency must accept the rule-making agency's interpretation of the standard" unless, arbitrary, capricious, or inconsistent with law. *Id.* This view, was adopted by the Supreme Court in the *Martin* case. ACUS also noted that this issue was "largely avoided" in the later enacted mine safety legislation. Thus the Senate Report on the MSHA bill stated explicitly: "Since the Secretary of Labor is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. REP. NO. 95-181, at 49 (1977), *reprinted in* 1997 U.S.C.C.A.N. 3401, 3448; *see also* H.R. CONF. REP. NO. 95-655, at 60 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3485,

forcement undermined effective enforcement? In making this judgment, we might consider how the unitary model might function in the OSHA program.[148] In the first place, an independent administrative law judge would conduct the hearing and make the initial decision. The ultimate decision would be made by an official in the Department of Labor, probably the Secretary of Labor, but his or her right to consult staff from the OSHA Administration would be limited as a legal matter by the APA and, as a public appearance matter, it would be limited to an even greater degree. There is no clear reason to believe that under this unitary arrangement, the decision makers would be more expert on safety and health matters than the present Review Commission or that their policymaking would be more in tune with OSH Administration policy.

The proper working of the OSHA split-enforcement model depends, as the Supreme Court has insisted, on the recognition that it is the OSH Administration who makes policy for the program. While there may have been differences of view on this issue, after many years of litigation and two Supreme Court decisions, it might have been expected that the debate would be over. It is therefore disappointing that the Review Commission in the recent *Arcadian* case has resisted, with little legitimate justification, the Supreme Court's resolution of the issue of OSH Administration policy supremacy. It is noteworthy that in the NLRB the General Counsel has, for the most part, yielded to the Board's policy role.[149] The Review Commission, however, has not; we may then suggest that an adjudicatory agency does not easily reconcile itself to a nonpolicy role as would a prosecutory official, such as the General Counsel. The ultimate rapprochement between the OSH Administration and the Review Commission thus remains elusive.

3508 (noting the limited scope of review accorded the MSH Review Commission); Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537 (D.C. Cir. 1986) (opinion by Scalia, J.) (emphasizing the great deference accorded to the Secretary of Labor under the MSHA).

148. In any event, there has been no significant effort, even by those who urge stricter OSHA enforcement, to change the institutional separation structure in OSHA. *See generally* Comprehensive Occupational Safety and Health Reform Act, H.R. REP. NO. 102-663, at pt. I (1992).

149. *Cf.* STRAUSS & HIGGINS, *supra* note 44, § 6.11, at 105 (explaining that authority to institute contempt proceedings rests with the General Counsel, but is contingent upon approval of the Board).