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PARTIES TO PROCEEDINGS IN THE COURT OF APPEALS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

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It is a Persian custom to encourage prospective rug buyers to "live with" their purchase for a time to see if the rug suits their needs and tastes. Only by living with it from day to day can the buyer find out if it does for him what he wants it to do. New legislation is similar. Very often the true meaning of a new law and its effect upon those covered by its provisions do not become apparent until the legislation has been around for a period of time. This is particularly true when the new legislative scheme departs from traditional practice. The Occupational Safety and Health Act[1] is a case in point. It has been around for more than three years now. Many of those who opposed its enactment most strenuously are finding that living with it is not as bad as anticipated. Others are not so sure.

This comment will focus on a problem which arose from one relatively minor provision of the Act nearly two years after the law's enactment. Simply stated, the question is whether the Occupational Safety and Health Review Commission (OSAHRC or the Commission), the body created to adjudicate contested enforcement actions under the Act,[2] should be a party to proceedings in the court of appeals when a review is sought of its decision in a case.

One subsection of the Act specifically authorizes an appeal to the United States court of appeals by any person "aggrieved by an order of the Commission"[3] and another grants similar authority to the Secretary of Labor.[4] The Commission itself, however, is neither specifically authorized to participate nor prohibited from participating in review proceedings. As a general rule, many administrative agencies routinely appear in appellate proceedings to defend their orders whether or not there is specific statutory authorization therefor.[5] The Commission, however, is quite unlike most administrative agencies because its functions are solely adjudicatory, and it, in fact, has nothing to administer. This raises the question whether,

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[1] 29 U.S.C. §§ 651-78 (1970).

[2] 29 U.S.C. § 661 (1970).

[3] 29 U.S.C. § 660(a) (1970).

[4] 29 U.S.C. § 660(b) (1970).

[5] FTC v. Dean Foods Co., 384 U.S. 597, 606-07 (1966); See also 3 K. Davis, Administrative Law Treatise § 22.15, at 283 n.23 (1958).

except for its name and its placement in the executive branch, the Commission is a de facto court, and as such should abstain from participation in appellate review of its orders.

In 1973, the second full year of the Act's existence, one or more petitions for review of OSAHRC decisions were filed in each of the eleven circuits, a total of 48 cases for the year.[6] In each of these cases OSAHRC was named as a respondent and the specific issue of the Commission's party status has already been argued in four of the cases.[7] Two of these cases were decided in 1973,[8] and in both the court neatly sidestepped this issue. A third case was dismissed without opinion when the court concluded that the ruling being appealed was not a final decision.[9]

The other case in which the question of the Commission's party status was specifically raised was *Dale M. Madden Construction, Inc. v. Hodgson,*[10] which was the very first Commission decision ever to reach a United States court of appeals. The case was initiated on July 12, 1971, less than three months after the effective date of the Act, when the Labor Department's Occupational Safety and Health Administration (OSHA) issued a citation and a $650 penalty proposal to Dale M. Madden Construction, Inc. (Madden). Madden contested the action within the statutorily prescribed time[11] and the OSAHRC Administrative Law Judge hearing the case ruled

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[6] Of the types of litigation which can arise under the Act, petitions for review of OSAHRC decisions, under 29 U.S.C. §§ 660(a) & (b) (1970), arise most frequently. But cases have also been litigated, under 29 U.S.C. § 655(f) (1970), challenging the validity of an occupational safety and health standard promulgated by the Secretary of Labor. E.g., Associated Indus. of New York State, Inc. v. Department of Labor, 487 F.2d 342 (2d Cir. 1973); Industrial Union Dep't, AFL-CIO v. Hodgson, CCH Empl. Safety & Health Guide ¶ 17,618, at 22,029 (D.C. Cir. 1973). There have also been cases, under 29 U.S.C. § 662(a) (1970), to restrain conditions of employment constituting an imminent danger to employee safety and health. E.g., Hodgson v. A.G. Pinkston Co., [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,498, at 20,781 (E.D. Va. 1972); Hodgson v. C.N. Flagg & Co., Civil No. 15-268 (D. Conn., Sept. 14, 1972); Hodgson v. Greenfield & Assoc., Civil No. 37-596 (D. Mich., Feb. 5, 1972); BNA 1 OSHC 1015 (D. Mich. 1972). In addition, cases have been brought, under 29 U.S.C. § 660(c) (1970), to prevent unlawful discrimination against an employee who asserted his rights under the Act to complain about hazardous working conditions. E.g., Hodgson v. J.F. White Contractor Co., Civil No. 72-3052-G (D. Mass., filed Oct. 3, 1972). Certain criminal proceedings are also authorized under 29 U.S.C. 666(e) (1970). E.g., United States v. Turcon Co., Criminal No. 72-0-239 (D. Neb., Feb. 21, 1974).

[7] Brennan v. OSAHRC & J.W. Bounds, 488 F.2d 337 (5th Cir. 1973); Brennan v. OSAHRC & Brent Towing Co., 481 F.2d 619 (5th Cir. 1973); Dale M. Madden Constr., Inc. v. Hodgson, Civil No. 72-1874 (9th Cir., decided July 29, 1974); Secretary of Labor v. OSAHRC & Thorleif Larson & Son, Inc., Civil No. 73-1232 (7th Cir., Jan. 22, 1974).

[8] *J.W. Bounds,* 488 F.2d 337 (5th Cir. 1973); *Brent Towing,* 481 F.2d 619 (5th Cir. 1973).

[9] *Thorleif Larson,* Civil No. 73-1232 (7th Cir., Jan. 22, 1974).

[10] Civil No. 72-1874 (9th Cir., filed May 17, 1972).

[11] 29 U.S.C. § 659(c) (1970).

that there was no violation.[12] His decision was subsequently overturned by the three-member Commission which sustained the OSHA citation and assessed the $650 penalty.[13] In May 1972, Madden filed the first petition for review of an OSAHRC decision,[14] naming as respondents the Secretary of Labor, the Commission and its Executive Secretary.[15] The Attorney General appeared as counsel for the Secretary of Labor. No appearance was filed for OSAHRC or its Executive Secretary.

Late in 1972, the Secretary of Labor and counsel representing Madden reached a settlement of the case which called for dismissal of Madden's petition and OSHA's acceptance of a $150 penalty in lieu of the Commission's $650 assessment. Before filing the agreement with the court, the Department of Justice sought the consent of the Commission to the settlement. Each of the three Commission members declined to sign the document. The Commission Chairman felt that OSAHRC was not a party in interest before the court of appeals. Analogizing to the non-participation of United States District Court and Tax Court judges, the Chairman concluded that it would be improper to join in a settlement reached on a Commission decision which was pending on appeal. The refusal of the other two members was premised on the belief that the Secretary of Labor and an employer were without authority to agree upon disposition of a Commission case for a lesser penalty than that which the Commission had assessed.

This effectively stalemated the case. Justice Department attorneys, in an attempt to resolve the issue, filed a motion with the court seeking approval of the settlement in which it was recited:

> While the Occupational Safety and Health Review Commission has refused to join in this settlement, its consent is not necessary. Section 6(e) of the Occupational Safety and Health Act, 29 U.S.C. 655(e) authorizes the Secretary to compromise, mitigate or settle any penalty assessed under the Act. Furthermore . . . the review commission is not properly an active party to this proceeding. Instead it is essentially an administrative court which, like the Tax Court, does not properly have an adversary interest in its decisions once they are rendered.[16]

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[12] Dale M. Madden Constr., Inc., [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,027, at 20,026 (Admin. Law Judge 1971) (OSHRC Doc. No. 9).

[13] Secretary of Labor v. Dale M. Madden Constr., Inc., [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,048, at 20,097 (Review Comm'n 1972) (OSHRC Doc. No. 9).

[14] The appeal was filed pursuant to 29 U.S.C. § 660(a) (1970).

[15] See [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,049, at 20,099.

[16] Motion for Approval of Settlement, filed July 11, 1973, Dale M. Madden Constr. Inc. v. Hodgson, Civil No. 72-1874 (9th Cir., filed May 17, 1972).

The Commission's posture in the *Madden* case caused some discomfort within the Department of Justice because it presented the Attorney General with the dilemma of two conflicting statutory duties. As counsel for the Secretary of Labor, he must assume the traditional lawyer's role of arguing his client's position before the court in appeals from decisions of OSAHRC.[17] But as General Counsel for the United States Government, he alone is authorized to give legal advice to the Commission.[18] It would seem, however, that the Attorney General has the legal power to resolve the issue of the Commission's party status under his authority to rule upon questions of law arising in the administration of any agency of the executive branch.[19] This power has not been exercised, but the Attorney General has tried to present the issue to the court of appeals during its consideration of the *Madden*[20] case and three others.[21] In all four cases, the Commission received specific authorization from the Attorney General to employ counsel to represent its interests in the proceedings.[22] Accordingly, the Commission filed a brief in each case. Invariably, the Justice Department moved to strike the brief on the grounds that the Commission was not a proper party in interest before the court of appeals.

The 5th Circuit has twice refused to rule on the issue of whether the OSAHRC should be a party to proceedings when a review is sought of its decision in a case. In *Secretary of Labor v. OSAHRC & Brent Towing Co.*,[23] the court said:

> [W]e decline to render what in essence would be an advisory opinion simply for the purpose of untangling the procedural dogfight in which the Secretary and the Commission have become ensnarled. . . . [The] court should not undertake to resolve a contest between two federal agencies as to their respective rights, powers, duties and responsibilities in circumstances where the chief party in interest has long since, for reasons best known to itself, declined to remain the focal center for an administrative whirlwind of such minor proportions.[24]

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[17] See 28 U.S.C. §§ 516, 519 (1970); 29 U.S.C. §§ 660(b), 663 (1970).

[18] See 28 U.S.C. §§ 516, 519 (1970).

[19] 28 U.S.C. § 512 (1970).

[20] Civil No. 72-1874 (9th Cir., filed May 17, 1972).

[21] *J.W. Bounds*, 488 F.2d 337 (5th Cir. 1973); *Brent Towing*, 481 F.2d 619 (5th Cir. 1973); *Thorleif Larson*, Civil No. 73-1232 (7th Cir., Jan. 22, 1974).

[22] Query whether 28 U.S.C. § 516 (1970) prohibits even this procedure. That section limits representation to "officers of the Department of Justice." If this can be overlooked, a conflict of interest situation is apparent since counsel must be "under the direction of the Attorney General." See 28 U.S.C. § 516 (1970).

[23] 481 F.2d 619 (5th Cir. 1973).

[24] Id. at 619-20.

Five months later, citing the *Brent Towing* case, the same circuit ruled:

> We decline the invitation of the Commission to resolve at this time the conflict between the Secretary of Labor and the Commission as to their respective rights, powers, duties, and responsibilities . . . since such a determination is not necessary to our decision herein.[25]

Despite the court's reluctance to rule on the party status question, the issue exists, and is likely to reappear constantly until finally resolved.

Any approach to the resolution of this question ought to include an effort to divine the congressional intent. Since administrative agencies are creatures of the legislature, the congressional intent regarding the powers and duties of those bodies is determinative unless the congressional scheme runs afoul of the Constitution.[26] Neither the Occupational Safety and Health Act nor the comments and reports of Congress in passing the Act directly address the question of whether the Commission is to be made a party in reviews of its decisions.

This alone is not determinative of the issue, for it is well settled that a statute creating an agency in the executive branch of government need not contain a specific authorization of a power in order for courts to uphold the exercise of that power.[27] Administrative actions not specifically authorized by statute have been upheld when they were deemed necessary to further a conferred power or when the exercise of the power was consistent with the legislative purpose in creating the agency.[28] The statutory functions assigned to the Commission therefore must be examined to determine if there is implied authority for the Commission to appear in review proceedings. The legislative history must also be surveyed to determine if party status for the Commission is consistent with any articulated congressional purpose.

THE LEGISLATIVE SCHEME FOR JOB SAFETY

Basically the Act assigns adjudicatory functions to the Commission, and rule promulgation, prosecution, and enforcement to the Secretary of Labor. The Act requires employers to comply with the

[25] *J.W. Bounds*, 488 F.2d 337, 339 (5th Cir. 1973).

[26] FTC v. National Lead Co., 352 U.S. 419, 428-29 (1957); Regents v. Carroll 338 U.S. 586, 597-98 (1950); Stark v. Wickard 321 U.S. 288, 309 (1944).

[27] Morrow v. Clayton, 326 F.2d 36, 44 (10th Cir. 1963).

[28] See FTC v. Dean Foods Co., 384 U.S. 597 (1966); Pan Am. World Airways Inc. v. United States, 371 U.S. 296 (1963); Morrow v. Clayton, 326 F.2d 36 (10th Cir. 1963).

occupational safety and health standards promulgated by the Secretary of Labor.[29] The Secretary is authorized to conduct inspections of places of employment[30] and to cite employers for violations of the law whenever it appears that the employer is not complying with the standards.[31] The citations become due and payable if the person cited does not take positive action to assert his right to a hearing within fifteen working days.[32] If the employer fails to contest, the Secretary's citation and proposed penalty are deemed the final order of the Commission.[33] But by notifying the Secretary of Labor of an intention to contest a citation, an employer activates the hearing mechanism of the Commission.

> [T]he Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 . . .). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief . . . .[34]

Overall, there are very few references to the Commission in the Act. It is created as an independent agency of the executive branch[35] but, except for the portion of the Act set forth above, the only reference to the congressional purpose with respect to OSAHRC is contained in the following words:

> The Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources— . . . (3) . . . by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions . . . .[36]

The Commission, as structured, actually provides two levels of adjudication: initial hearing and decision by an Administrative Law Judge with discretionary review thereof by a tribunal consisting of three Presidentially-appointed members.[37] Each member is ap-

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[29] 29 U.S.C. § 654(a)(2) (1970).
[30] 29 U.S.C. § 657(a) (1970).
[31] 29 U.S.C. § 658(a) (1970).
[32] 29 U.S.C. § 659(a) (1970).
[33] Id.
[34] 29 U.S.C. § 659(c) (1970).
[35] 29 U.S.C. § 661 (1970).
[36] 29 U.S.C. § 651 (1970).
[37] 29 U.S.C. § 661(i) (1970). During the Commission's first 3 years of existence approximately 10% of the decisions were rendered by the 3-member tribunal. The balance became

pointed for a term of six years from among persons who "by reason of training, education, or experience are qualified to carry out the functions of the Commission . . . ."[38] The Administrative Law Judges are appointed by the Commission Chairman,[39] and have life tenure, pursuant to Civil Service Commission regulations.

Judicial review of the Commission's actions is similar in scope to that accorded jury verdicts of lower courts and decisions of regulatory agencies which exercise adjudicatory powers. The Act provides that "[t]he finding of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive."[40] Except in extraordinary circumstances, the appellate court will only consider objections which were raised during the proceedings before the Commission.[41]

In addition to his authority to promulgate occupational safety and health standards, to inspect for compliance therewith and to cite for violations, the Secretary of Labor is vested with all other administrative duties under the Act.[42] He is, for example, empowered to grant variances from the standards for certain specified reasons,[43] to promulgate record keeping and reporting regulations to be observed by employers with respect to occupational accidents and diseases,[44] to approve and finance state safety and health plans,[45] and to institute safety training programs for employers and employees.[46] Perhaps most significantly for the purpose of the party status question, it is the Secretary, and not the Commission, who is authorized to apply for enforcement of the Commission's orders.[47]

Only one statement in the Act arguably can be interpreted as intimating that specific authority for party status was contemplated by Congress. The section of the Act providing for judicial review declares that when an aggrieved party files a petition for appellate review of a Commission decision, "a copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in

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Commission decisions 30 days after being decided by a Judge because no member exercised his right of discretionary review during that period. Id.

[38] 29 U.S.C. § 661(a) (1970). While on first blush some believe this language implies experience in occupational safety and health, it is evident that since their responsibilities are only adjudicatory their qualifications have to be in the latter field.

[39] 29 U.S.C. § 661(d) (1970).

[40] 29 U.S.C. § 660(a) (1970).

[41] Id.

[42] Certain responsibility for research and related activities, however, has been delegated to the Secretary of Health, Education and Welfare. See 29 U.S.C. § 669 (1970).

[43] 29 U.S.C. § 655(d) (1970).

[44] 29 U.S.C. § 657(c) (1970).

[45] 29 U.S.C. § 667(c) (1970).

[46] 29 U.S.C. § 670(c) (1970).

[47] 29 U.S.C. § 660(b) (1970).

the court the record in the proceeding . . . ."[48] This phrase could be construed as an indication of a congressional intent that the Commission would be a party to the review of its decisions in the court of appeals, in addition to the parties who participated in the OSAHRC proceeding. Such a construction is hardly tenable. The use of the phrase "other parties" distinguishes the party filing the review petition from the other participants and thus relieves the clerk from having to forward a copy of the petition to the petitioner. The transmittal of the petition to the Commission merely notifies that body of its duty to file the record of the proceeding with the court for review. Hence, a more reasonable interpretation of the distinction made between the "Commission and other parties" is that the Commission is not a party. Any other construction would be redundant.

Indeed, two other provisions in the Act strongly suggest that upon rendering a decision, the Commission's work is at an end. The Secretary of Labor is directed to publish in the Federal Register the reasons for his action whenever he "compromises, mitigates, or settles any penalty assessed under this [Act]."[49] The Commission, however, is given no role in the settlement of cases. The Secretary's authority to negotiate settlements is consistent with his overall responsibility for obtaining compliance with the law as well as with his prosecution and enforcement duties under the Act. As noted earlier, administrative agencies which have prosecution and enforcement functions are active participants in appellate litigation[50] and, as a necessary concomitant of the same, they possess the authority to participate in settlement negotiations. The Labor Department is such an administrative agency. The Commission, on the other hand, is like a court: it does not prosecute; it does not enforce; and it has no business being involved in settlement negotiations once a case has been decided.

There is another feature of the Act which supports the proposition that the Commission was never intended to participate in appellate court proceedings. The Act expressly provides for the representation of the Secretary of Labor in litigation: "[T]he Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under this chapter but all such litigations shall be subject to the direction and control of the Attorney General."[51] The

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[48] 29 U.S.C. § 660(a) (1970).

[49] 29 U.S.C. § 655(e) (1970). The only penalties that are assessed under the Act are those resulting from final orders of the Commission; the Secretary of Labor may only "propose" penalties. See 29 U.S.C. §§ 659(a), 659(c), 666(i) (1970).

[50] See text at note 5 supra.

[51] 29 U.S.C. § 663 (1970).

Act, however, does not contain a provision for the representation of the Commission. Under the legislation as originally proposed, the adjudicatory functions were assigned to a Board of Appeals within the Labor Department. That version of the bill specifically provided "[t]hat in any appeal of any action of the Board brought by the Secretary under section 8(a), the Solicitor shall represent the Secretary; the Attorney General shall represent the Board in such proceedings."[52] Just prior to enactment of the law, the case-deciding function was taken out of the Department of Labor and a new independent Commission was established to assume those duties.[53] Concurrently, the provision for representation of the adjudicatory body was deleted.[54] This action by the Congress strongly suggests that the failure to provide for representation of the body exercising adjudicatory functions was intentional and thus that Congress did not intend for the Commission to appear in the court of appeals to defend its orders.

An overview of the legislative history of the Act reveals that the Commission was created to ensure public confidence in the fairness of the Act's administration by vesting adjudicatory functions in an autonomous agency which would be totally independent of the Secretary of Labor. The Commission originated with an amendment on the Senate floor to the bill that had been reported out of Committee. The amendment was designed to quell the fears of businessmen that they would not be dealt with impartially under the Act by the Labor Department, which was perceived as an advocate of the "Labor", as opposed to the "Business", point of view. Senators Javits and Holland advanced the idea that the creation of an independent tribunal would assist in overcoming these fears and thereby help to promote a cooperative attitude in obtaining compliance with the new law's numerous requirements. Voluntary compliance by employers was considered crucial to the goal of reducing hazards in the workplace.[55]

The contemplated division of functions between the Secretary and the Commission was described by Senator Prouty, one of the conferees, in advocating passage of the bill:

> The original bills introduced in both bodies provided that the Secretary of Labor would promulgate all health

[52] S. 2788, 91st Cong. 1st Sess. § 8(c) (1969); H.R. 13373, 91st Cong., 1st Sess. § 8(c) (1969). See 115 Cong. Rec. 22512, 22515 (1969) (text of S. 2788).

[53] See 29 U.S.C. § 661 (1970).

[54] See 29 U.S.C. § 663 (1970).

[55] 116 Cong. Rec. 35607, 37607-08, 37609-12 (1970) (remarks of Senators Saxbe, Javits, Holland and Dominick). See also Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, 298, 462-65, 469-70 (1971) [hereinafter cited as Legislative History].

> and safety standards and would also be responsible for deciding appeals from employers who contested violations found or penalties assessed by inspectors employed by the Department of Labor.
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> The conference report . . . adopts provisions contained in both the House- and Senate-passed bills, establishing an independent Commission to review all contested cases involving violations found or penalties assessed by the Secretary of Labor. The Commission's order in turn is subject to judicial review in an appropriate U.S. court of appeals.[56]

The purpose of this separation was explained by Senator Williams, who observed that the provision for an independent Commission "was designed to separate the adjudication of violations from the other functions performed by the Secretary of Labor, in order to provide every assurance that fairness and due process would be fully served."[57]

Various other remarks emphasize the judicial character of the Commission. Senator Javits, co-sponsor of the amendment, described the Commission as an "autonomous body which has tenure and quasi-judicial power,"[58] and as a "quasi-judicial authority expressly delegated for that purpose."[59] Speaking in support of the Javits amendment, Senator Holland expressed his wish that the Commission operate like a court when ruling on contested citations:

> I think we need to have as nearly the judicial temperament and the assurance of judicial settlement of these particular arguments as we can guarantee in this legislation . . . I favor the setting up of an independent quasi-judicial body, which . . . ought to be just as dependable as the courts themselves, and so regarded by all concerned—just as objective, just as practical, just as impartial in their approach.[60]

It is also apparent from the legislative history that the Commission was created *exclusively* for the purpose of performing adjudicatory functions. A report submitted by Senator Saxbe comparing the Committee bill, under which all functions were vested in the

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[56] 116 Cong. Rec. 41763 (1970) (remarks of Senator Prouty); Legislative History at 1149.

[57] 116 Cong. Rec. 41763 (1970) (remarks of Senator Williams); Legislative History at 1147.

[58] 116 Cong. Rec. 37608 (1970) (remarks of Senator Javits); Legislative History at 465.

[59] 116 Cong. Rec. 37607 (1970) (remarks of Senator Javits); Legislative History at 463.

[60] 116 Cong. Rec. 37611-12 (1970) (remarks of Senator Holland); Legislative History at 475.

Secretary of Labor, with the substitute bill providing for the independent Commission, manifests this intent: "[T]he substitute proposal would create an independent Presidentially appointed Occupational Safety and Health Appeals Commission whose *only* function would be to conduct hearings on alleged violations discovered by the Secretary . . . ."[61] The conclusion that the Commission was intended to serve solely as a court is further buttressed by the removal in conference of the only provision that would have given the Commission an extrajudicial function, the collection of penalties. This function was assigned to the Secretary.[62]

THE PARTY ISSUE IN OTHER AGENCIES

The FTC, ICC, SEC, FPC, and a number of other federal regulatory agencies are parties in judicial proceedings which review their orders. Many of these agencies do not have specific statutory authority to appear in court to defend their rulings, but the propriety of this practice has not been questioned.[63] These agencies have a sufficient interest in the proceedings because they administer the statutory enforcement scheme, and consequently a judicial decree must be directed to them in order to afford full relief.[64] In this

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[61] 116 Cong. Rec. 35607 (1970) (statement of Senator Saxbe) (emphasis added); Legislative History at 298.

[62] 29 U.S.C. § 666(k) (1970). See also Legislative History at 1194-95.

[63] See FTC v. Dean Foods Co., 384 U.S. 597 (1966). See also 3 K. Davis, Administrative Law Treatise § 22.15, at 283 n.23 (1958).

[64] The Federal Trade Commission is fairly representative of existing regulatory agencies. Coincidentally, an off-hand comparison between the Commission and the FTC during Senate debate has been frequently cited to support the assertion of party status by the Commission. The comment which was made by Senator Javits follows:

> I introduced the administration's bill originally, and the provision I now offer as an amendment is consistent with the approval of that bill. It 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: the power to issue a cease and desist order which, if challenged within a given period of time, can be reviewed by the Circuit Court of Appeals. Its operation is stayed if the Circuit Court of Appeals so orders. If the Secretary desires to enforce the order through the contempt power, similarly, he can go into court in order [to] get the Circuit Court of Appeals to enter an order for the specific purpose, and then that order can be enforced through the contempt powers of the Circuit Court of Appeals. It is the traditional Federal Trade Commission type of procedure.

116 Cong. Rec. 37607 (1970) (remarks of Senator Javits); Legislative History at 462.

Even from the standpoint of those who support party status for the Commission, this reference is, at best, a short-hand manner of conveying the thought that the Commission was to adjudicate cases as was done by the FTC and, at worst, an explanation of the enforcement procedure which would result from the adoption of the amendment—a procedure covering the functions of both the Secretary and the Commission which Javits equated with the FTC's cease and desist procedure. Both the language of the Javits amendment and the Senator's explanation of it indicate that it is incorrect to attempt to ascribe to Senator Javits an intent that the Commission operate like the FTC in ways other than the conduct of hearings.

respect, the role of these agencies under the laws they administer is identical to that of the Secretary of Labor, and not the Commission, under the Occupational Safety and Health Act. Moreover, by vesting the administration and enforcement of a single statute in one agency of the executive branch and adjudication in another, Congress departed from precedent, because, unlike OSAHRC, the established regulatory agencies perform all of these functions.[65]

There are agencies with solely adjudicatory functions outside the court system which are parties to appeals from their rulings. Such participation, however, is restricted to those agencies which are (a) so authorized by statute, (b) are charged with administering enforcement of their orders, or (c) must participate in order to provide representation for the public interest. The NLRB, for example, is by statute charged with the enforcement of its orders[66] and is, in fact, made the representative of the public interest since it is given the responsibility of preventing "any person from engaging in any unfair labor practice . . . affecting commerce."[67] The practices of these agencies, however, is not dispositive of the issue of the Commission's party status since OSAHRC has not been made a party by statute and is not charged with obtaining enforcement of its orders. The public interest in achieving occupational safety and health for America's working people is a responsibility which has been given to the Secretary of Labor who represents that interest as a party both before the Commission and the courts.[68]

OSAHRC, then, is a unique agency within the executive branch of the federal government. The closest comparative agency appears to be the National Railway Adjustment Board (NRAB).[69] The statute providing for judicial review of that agency's awards does not include a reference to respondents in petitions for review

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Moreover, the Commission is unlike the FTC in that it has no authority to regulate business, no enforcement power and cannot prosecute.

It should be noted that the Commission has no cease and desist power, but the Act's statutory enforcement scheme under which citations become binding 15 working days after being served if not contested within that time is quite similar to a cease and desist order. It is apparent that Senator Javits had in mind the entire statutory scheme which his amendment would introduce when he made this statement.

[65] The established regulatory agencies separate these duties within the agencies themselves. Whether this is mandated by statute (e.g., National Labor Relations Board, 29 U.S.C. § 153(d) (1970)) or the result of internal agency policy (e.g., Federal Trade Commission), the separation of these functions is necessary to satisfy the requirements of due process and the Administrative Procedure Act, 5 U.S.C. §§ 551-58 (1970).

[66] 29 U.S.C. § 160(e) (1970). The NLRB General Counsel, who by statute is independent of the membership of the Board, is charged with investigating and prosecuting actions before the Board members and with administering enforcement. 29 U.S.C. § 153(d) (1970).

[67] 29 U.S.C. § 160(a) (1970).

[68] 29 U.S.C. §§ 657, 660(b) (1970).

[69] 45 U.S.C. § 153 (1970).

nor does it explicitly exclude the Board as a party.[70] It was held in a case in which the Board members had been joined as respondents, however, that the Board was not a proper party to the action.[71] The judicial character of the Board, and the absence of any non-adjudicatory functions, persuaded the court that it would be as inappropriate to name the Board as a respondent as it would to name a trial judge in an appeal. The court said:

> The NRAB functions solely as an allegedly impartial adjudicatory tribunal, unlike a body such as the Federal Trade Commission, which operates as a quasi-legislative body. Petitions seeking review of FTC decisions normally name the agency as respondent. This is because the agency maintains an interest in its decisions, which represents part of its function to administer certain laws and formulate policy, and which accordingly makes the Commission a proper respondent to a petition for review. The NRAB has neither legislative nor prosecutorial functions—it sits merely as an adjudicative body, and does not administer laws or formulate policy.[72]

A persuasive analogy can also be drawn to the Tax Court.[73] The Tax Court, which was transferred to the judiciary less than five years ago,[74] was originally an independent agency within the executive branch. Prior to the transfer, the 3rd Circuit stated:

> The Tax Court is . . . for all practical purposes a judicial tribunal operating in the federal judicial system. Whether it is a legislative court created by Congress under Article I, section 8, of the Constitution, like the Customs Court, or some other form of judicial agency placed for convenience of housekeeping in the Executive Branch of the Government is, therefore, merely a matter of legal semantics since, whatever it may be called, it is an "independent" judicial agency the work of which is not subject to supervision or review in the Executive Branch of the Government but only by the federal appellate courts.[75]

The court ruled in this case that the judicial character of the Tax Court required that it follow the traditional judicial practice of

[70] 45 U.S.C. § 153(q) (1970).

[71] System Federation v. Braidwood, 284 F. Supp. 607 (N.D. Ill. 1968).

[72] Id. at 610-11.

[73] 26 U.S.C. § 7441 (1970).

[74] See S. Rep. No. 91-552, 91st Cong., 1st Sess. (1969), reprinted in 1969 U.S. Code Cong. & Ad. News 2027, 2340-44.

[75] Stern v. Commissioner, 215 F.2d 701, 707-708 (3d Cir. 1954).

including in the record the names of the judges who rendered the decision.[76]

The essential nature of the Tax Court was the basis for other decisions which established that it possessed judicial powers and that it had the duty to apply doctrines governing judicial decision-making rather than those applicable to administrative agencies. Thus, in the case of *Reo Motors, Inc. v. Commissioner of Internal Revenue,*[77] the Sixth Circuit found that the Tax Court had jurisdiction to vacate and correct a decision after it became final, similar to the jurisdiction of courts to grant writs of error coram nobis.[78] In another case decided in 1955, the Fourth Circuit ruled that the doctrines of collateral estoppel and estoppel by judgment could be invoked by a party before the Tax Court, even though these doctrines did not apply to administrative actions.[79] Again, the judicial function performed by the Tax Court was determinative:

> [W]hether the Tax Court be regarded as a court or as an administrative agency, it is exercising judicial functions in hearing tax cases of this character; and, when exercising judicial functions, as distinguished from administrative functions, it is bound to apply such fundamental judicial doctrines as res judicata and estoppel.[80]

Notwithstanding the basic differences which exist among the Review Commission, the Tax Court and the National Railway Adjustment Board,[81] the analogy between the Commission and these other bodies is significant for the purpose of determining the party status question. The decisions holding that the Tax Court and the NRAB should exercise the powers and observe the practices of courts rested solely on the fact that their functions and responsibilities were similar to those delegated to the judiciary. The nature of the cases or the parties before them was not considered.

Effects of the Issue's Resolution

A resolution of the Commission party status issue by recognition that OSAHRC is, like the NRAB and the pre-1969 Tax Court,

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[76] Id. at 706-08.

[77] 219 F.2d 610 (6th Cir. 1955).

[78] Id. at 612.

[79] Fairmont Aluminum Co. v. Commissioner, 222 F.2d 622, 627 (4th Cir. 1955).

[80] Id.

[81] The Tax Court determines dollar liabilities between taxpayers and the government, and the tax laws, unlike occupational safety and health laws, do not have a remedial purpose. The National Railway Adjustment Board functions as an arbitration tribunal in a scheme of compulsory arbitration. Its awards are to private parties.

a de facto court would have wide-ranging implications for the manner in which the Commission conducts its internal business and resolves other issues. For example, in January 1973 the Commission ruled in *Wetmore & Parman, Inc.*,[82] that where the Secretary of Labor, as prosecutor, had charged a violation of the Act to be non-wilful, the Commission could not hold the violation to be wilful even if the evidence would support such a finding.[83] This conclusion is consistent with the practice of constitutional courts of refraining from interfering with prosecutorial discretion.[84] The decisions of the Commission on other issues, however, have been inconsistent with judicial practice, and would have to fall in line should the judicial character of the Commission be established. The Commission's insistence that it has authority to supervise settlement agreements after it has issued an order, as in the *Madden* case, is one example.

Lastly, one possibly adverse effect which might result from denial of party status to the Commission should be mentioned. If early experience is a barometer for the future, many petitions for review filed by the Department of Labor will not be defended by employers.[85] The explanation for this phenomenon is that, in most cases, the penalty which could be assessed is only a fraction of the cost of counsel fees for appellate litigation.[86] Consequently, unless the corrective measures which might be ordered in a particular case are very costly, it often will be more practical for him to forego the cost of appellate litigation[87] and await the outcome of the Labor Department's effort to overturn the OSAHRC decision in his favor.[88] Thus, the employer would probably choose not to defend in the court of appeals unless he is imbued with an unusually freeborn spirit and the dogged belief that he is right. Without the benefit of having both sides of the issue fully briefed, the task of the court of

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[82] [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,400, at 20,610 (Review Comm'n 1973) (OSHRC Doc. No. 221).

[83] Id.

[84] That the prosecutor has authority to decide the nature of the charges is a well-established rule, at least in the area of criminal law. See, e.g., United States v. Cox, 342 F.2d 167, 171-172 (5th Cir. 1965).

[85] Two-thirds of the first 50 appeals from OSAHRC decisions were filed by the Secretary of Labor.

[86] 29 U.S.C. § 666 (1970). While citations for wilful or repeated violations can carry a penalty of up to $10,000 for each violation, and those for failure to abate during the prescribed period, a penalty of $1,000 per day, actions under these provisions of the law are rare.

[87] There is no requirement that an employer retain an attorney to contest an OSHA enforcement action. Many in fact proceed pro se before the Commission. An internal tabulation made by OSAHRC during December 1973 showed that employers appeared pro se in 45% of the cases.

[88] This has already occurred in a number of cases. See, e.g., Brennan v. OSAHRC & Brent Towing Co., 481 F.2d 619 (5th Cir. 1973).

appeals in deciding a case will likely be more difficult.[89] The court's convenience or the additional illumination of issues which briefs might supply are, however, hardly a justifiable basis for granting party status to the Commission where such status is inconsistent with the congressional intent or legislative scheme.[90]

CONCLUSION

The congressional purpose in creating the Commission and the judicial functions to which it has been confined are inconsistent with OSAHRC's participation as a party in appellate reviews of its decisions. In recognition of its essential judicial character, perhaps the Commission should be moved to the judicial branch, following the precedent of the Tax Court. Such a move would clarify the present ambiguous status of OSAHRC and would eliminate the thorny problems that are likely to constantly arise because of that ambiguity.[91]

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[89] This may be one reason the Commission has received letters in a few instances from the clerk of the 5th Circuit which could be interpreted as virtual orders to file a brief. The court itself commented upon the Commission's failure to file a brief in Brennan v. OSAHRC & Bill Echols Trucking Co., 487 F.2d 230 (5th Cir. 1973): "Whether out of utter frustration, battle fatigue, or neglect, neither the Commissioner nor Echols saw fit to file a responsive brief, although both had been *solicited and importuned* to do so." Id. at 232 (emphasis added). This kind of approach by the court appears inconsistent with 28 U.S.C. § 516 (1970). It also overlooks the fact that Congress has appropriated no funds to the Review Commission for employing counsel, the preparation and printing of briefs, or the payment of court costs. Funds for such purposes are appropriated to the Department of Justice but the Attorney General has declined to undertake the representation of OSAHRC in the court of appeal.

[90] There is also some question whether the court could properly consider a brief from OSAHRC which offers a rationale for the Commission's disposition of a case which was not set out in its opinion.

[91] On July 29, 1974, as this article was going to press, the Ninth Circuit held, in Madden v. Hodgson that the Review Commission was not entitled to representation in civil litigation.