



10-1980

American Textile Mfrs. Institute, Inc. v. Donovan

Lewis F. Powell Jr.

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PRELIMINARY MEMORANDUM

Summer list 17, sheet 1

No. 79-1583

Cert to CADC (Bazelon, Tamm, Robinson)

NATIONAL COTTON COUNCIL OF AMERICA

v.

MARSHALL (Sec'y of Labor)

Federal/Civil

Timely

Please see Preliminary Memorandum in No. 79-1429, American Textile Manufacturers Institute v. Marshall.

I would hold this case for Republic Steel Corp. v. OSHA, No. 78-918, and American Iron and Steel Institute v. OSHA, No. 78-919.

The SG has filed a response in which the AFL-CIO and the Amalgamated Clothing and Textile Workers Union concur.

8/6/80

Coleman

Opn 617 F2d 636

SG's recommendations:

Hold 79-1429 & 1583 for Republic Steel
v OSHA, 78-918 and Am. Iron & Steel, 78-919
granted 7/2/80. (There are "coke-over" cases.
G.V. & R. 79-1789 on Benzene case, as

In these cases, the Cotton industry Secretary has
attacked OSHA standards for "cotton dust" examine
that causes lung disease, tho not a warehouse
carcinogen. standard

The standards were established after
notice & hearings, & were upheld by CADC.

These petitions were filed prior to our
Benzene decision of July 2nd.

The Petors primarily argue "infeasibility"
under 56(b)(5), & that CADC erred in not
requiring "cost-benefit" analysis.

Petors, responding to SG's suggestion that we
Hold these for Coke Over case (above), argue that
different issues raised

PRELIMINARY MEMORANDUM

Summer list 17, sheet 1

No. 79-1429

Cert to CADC (Bazelon, Tamm, Robinson)

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, et al.

v.

MARSHALL (Sec'y of Labor)

No. 79-1583

NATIONAL COTTON COUNCIL OF AMERICA

v.

MARSHALL

No. 79-1789

COTTON WAREHOUSE ASS'N, et al.

v.
MARSHALL

Federal/Civil

Timely

(Extension in No. 79-1789 by

The Chief Justice)

I would follow the SG's recommendation
holding 79-1429 and 79-1583, and vacating and remanding 79-1789.
ps

SUMMARY: The cotton industry attacks OSHA standards for permissible levels of cotton dust in workplaces on several grounds, one of which, what OSHA must show to establish that its standards are "feasible", is an issue pending before this Court in cases to be argued during the 1980 Term.

FACTS: Section 6(b) of the Occupational Safety and Health Act of 1970 authorizes the Secretary of Labor, after notice and opportunity to comment, to establish mandatory national standards governing health and safety in the workplace. 29 USC § 655(b). Section 6(b)(5) provides in pertinent part:

56(6)(5)

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. [emphasis supplied]

Cotton dust is not a carcinogen, but exposure to the dust for sustained periods causes respiratory problems and has been specifically linked to ^{byssinosis} byssinosis ("brown lung"), a debilitating disease which leads to permanent lung damage. Exposure to cotton dust was [✓] one of the expressly-recognized health hazards that provoked passage of the Act. leg
hust.

In 1978, following publication of a proposed standard, a series of public hearings, and submissions of written data and comments from interested parties, the Secretary issued final standards restricting the amount of cotton dust allowable in the air of workplaces in the cotton industry. The standards include a medical-transfer and income-protection provision [29

C.F.R. § 1910.1043(f)(2)(v)] requiring that, where certain levels of exposure are exceeded, an employee certified by a physician as "unable to wear a respirator" may transfer without loss of pay to any other position in the company that is available and that has an exposure level below the designated level.

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unable to
wear a
respirator,
employer
may
transfer
w/o loss of
pay

Pursuant to 29 USC § 655(f) (allowing pre-enforcement judicial review), the standards were attacked as "infeasible" by representatives of the cotton textile industry and of nontextile industries including the petrs Cotton Warehouse Ass'n and American Cotton Shippers Ass'n. Two minor aspects of the standards were also challenged by employee unions as too lax.

HOLDING BELOW: CADC upheld the standards except for their application to the cottonseed oil industry. The court first held that the proper standard of review for notice-and-comment rulemaking under the Act is the test of "substantial evidence on the record considered as a whole," 29 USC § 655(f), rather than the "arbitrary and capricious" standard applicable to informal rulemaking. Citing two prior concurring opinions of Judge Bazelon, however, the CA stressed that it would not resolve controversies over technical data.

"substantive"
test
rather
than
"arbitrary
& capricious"

On the merits, (1) the CA rejected industry challenges to the feasibility of the exposure level as applied to the latter stages of textile production and to the four-year deadline for compliance. The CA noted evidence that many employers were already in compliance with the standards and held that while the quality of the record on this point might have been

improved with more extensive studies, § 6(b)(5) requires the agency to develop standards based upon "the best available evidence" (emphasis supplied by CA) and that standard had been satisfied.

(2) The CA also rejected the industry's claims that the agency's \$550 million figure grossly understated the actual capital costs required in order for the industry to comply with the standard and that the true cost was unreasonable because it would drive many companies out of business. The CA looked to the agency's analysis of two cost estimates (one by the agency's own economic feasibility contractor) and to the agency's stated reasons for finding both of them excessive, and found the analysis reasonable. The CA then noted that the agency "had evidence in its record that the industry would be able to pass compliance costs on to consumers," citing as "evidence" the fact that one cost consultant had assumed that costs of compliance would be passed on, and added that even if a few firms are forced to shut down, that would not make the standard economically infeasible; the agency had expressly concluded that "the industry as a whole will not be threatened by the capital requirements of the regulation." The CA found significant the fact that the employee unions, by supporting the agency on the economic feasibility issue, had rejected the claim that the standards threatened the industry's survival.

(3) The CA also rejected industry's claim that the standard was invalid because no cost-benefit analysis had been conducted. The CA noted that other statutory schemes such as the Clean Air Act expressly require such analyses, but the Act

does not, and took the view that Congress itself had undertaken a cost-benefit analysis totally in favor of preventing "material impairment of health or functional capacity" of employees. The CA reasoned that under Vermont Yankee Power Corp. v. Natural Resources Defense Council, 435 US 519, 524 (1978), a court may not require an agency to conduct a cost-benefit analysis unless the agency or Congress officially requires this procedure.

(4) The CA also rejected a challenge to the permissible-exposure-level for the non-textile industries covered by the standard.¹ The CA recognized that the types of dust may differ between textile and nontextile industries and that "health effects in the nontextile industries appear to be less prevalent and less severe than in the textile mills", but noted that the agency had concluded that nontextile workers still "run the risk" of material health impairment. The CA concluded:

OSHA thus explained the evidence it used, the reasons for its conclusions, and its responses to the industries' evidence and objections. When agencies are entrusted with regulating risks on the frontiers of scientific and medical knowledge, we cannot ask for more.

(5) The CA upheld the medical transfer and wage guarantee provisions, reasoning that absent such provisions, employees "may refrain from disclosing actual health impairments from the dust exposure" and holding that OSHA is authorized to guard against such problems.

¹. The CA made an exception for the cottonseed oil industry, as to which the court found that the record did not adequately establish economic feasibility of the standard. The industry had estimated that the standard would shut down 52% of its production capacity. The CA remanded that standard.

The CA denied rehearing en banc, but Judge MacKinnon would have held resolution of the cost-benefit question for this Court's opinion in the benzene case, Industrial Union Dep't, AFL-CIO v. Marshall, No. 78-911 (decided 7/2/80).

CONTENTIONS: Separate cert petns attacking the CA's decision have been filed by (1) the American Textile Manufacturers Institute (ATMI) and 13 textile manufacturers, (2) the National Cotton Council of America (NCCA), and (3) the Cotton Warehouse Association (CWA) and the American Cotton Shippers Association (ACSA). These petns were all filed before this Court's decision of the benzene case, and all petrs assert a conflict with the decision of the lower court in the benzene case.

(1) ATMI (represented by Robert Bork) asserts a conflict in the CAs as to what showing OSHA must make in order to establish that its standards are "feasible" within the meaning of the statute. The CA's decision means that the agency need only have concluded that the entire industry will not be put out of business. CA5 has read it to require OSHA to demonstrate that the standard will not cause widespread business failure and consequent unemployment. Florida Peach Growers Ass'n v. Dep't of Labor, 489 F2d 120,130 (CA5 1974). CA6 and CA7 have read it to require a showing that the benefits of a standard are proportionate to its costs. RMI Co. v. Secretary of Labor, 594 F2d 566,573 (CA6 1979); Turner Co. v. Secretary of Labor, 561 F2d 82,85 (CA7 1977). The approach of CA6 and CA7 is correct; otherwise there would be an unconstitutional delegation of authority. National Cable Television v. United

States, 415 US 336,342 (1974).

(2) In this case, CADC has finally surrendered to the "Bazelon heterodoxy", repeatedly condemned by Judge Leventhal and by Professor K.C. Davis for its excessive deference to administrative agencies. The court abdicated its judicial review function by requiring only that the agency have articulated reasons for its conclusions. The CA opinion contains ludicrous examples of deference, such as the treatment of a consultant's assumption as "evidence".

(3) The wage-guarantee provisions exceed OSHA's statutory authority. Whirlpool Corp. v. Marshall, 48 USLW 4189 (US 2/26/80) (upholding regulation allowing an employee to refuse to work when he has a reasonable apprehension of serious injury, but noting congressional rejection of a "strike with pay" provision and stressing that the regulation does not require pay for work not done).

NCCA, identifying itself as a "supplemental petitioner solely on matters of cost and impact", argues that substantial evidence on the record as a whole does not support the OSHA finding that the standard is economically feasible.

CWA and ACSA, the trade associations respectively for the cotton warehouse industry and for cotton classing offices, argue that the CA improperly failed to require an OSHA finding of "material" health impairment in those industries. The court's standard of "risk" of illness is insufficient. There is a lack of medical evidence indicating the existence of material health hazards in warehouses and an absence of any medical evidence at all with respect to classing offices. The

dust encountered in these places is qualitatively different from that in textile plants: it is less respirable. It was improper to allow evidence from the "unrelated" textile industry to override the absence of evidence pertaining directly to these industries.

The SG asks the Court to hold Nos. 79-1429 (ATMI) and 79-1583 (NCCA) for Republic Steel Corp. v. OSHA, No. 78-918, and American Iron and Steel Institute v. OSHA, No. 78-919 (cert. granted, 7/2/80). In these cases, the Court will consider the meaning of the word "feasible" in § 6(b)(5) of OSHA and the standard of judicial review applicable to OSHA "feasibility" determinations. 1

The SG asks the Court to GVR No. 79-1789 (CWA/ACSA) in light of the benzene decision, Industrial Union Dep't, AFL-CIO v. American Petroleum Institute, No. 78-911 (7/2/80). He points out that the Secretary has volunteered to reconsider the standards for cotton warehouses and classing offices. 45 Fed. Reg. 50328-29 (7/29/80). 2

The employee-union resps have concurred by letter in these recommendations of the SG.

With respect to the wage-guarantee provision, the SG stresses that the Act authorizes the Secretary to require "practices, means, methods, operations, or processes [that are] reasonably necessary or appropriate to provide safe or healthful employment" [29 USC § 652(8)] and that wage guarantees are included "practices", "means", or "methods".

DISCUSSION: The SG's recommended disposition appears correct. The issue of the construction of the word "feasible"

in § 6(b)(5) is before this Court in the pending coke-oven emissions cases, and this Court's resolution of the standard of review issue in those cases will presumably cast light on the merits of ATMI's "Bazelon heterodoxy" argument in the OSHA context.

The wage guarantee issue presents an important question, going far beyond the Whirlpool case, and the CA's resolution of the issue is dubious.

I would hold Nos. 79-1429 and 79-1583 for Nos. 78-918 and 78-919, with a view toward ultimately granting cert on the wage-guarantee issue. I would GVR No. 79-1789 in light of Industrial Union Dep't, AFL-CIO v. Marshall, No. 78-911.

The SG has filed a response in which the AFL-CIO and the Amalgamated Clothing and Textile Workers Union concur.

8/6/80

Coleman

Opn in Appendix

Call for Supplemental Response
from SG.

Grant 79-1583
Hold. 79-1429

SG previously recommended that
these OSHA cases (textile industry) - {79-1429
be Held for Coke Oven cases. {79-1583

But Coke Oven cases have now
been dismissed under Rule 53.

GV & R 79-1789
on Benzine cases

SUPPLEMENTAL MEMORANDUM

Summer list 17, sheet 1

Cert to CADC
(Bazelon, Tamm, Robinson)

No. 79-1429 *Held*

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, et al.

v.

MARSHALL [U.S. Secretary of Labor]

No. 79-1583 *Grant*

NATIONAL COTTON COUNCIL OF AMERICA

v.

MARSHALL

No. 79-1789 *GV & R on Benzine cases*

COTTON WAREHOUSE ASS'N, et al.

v.

MARSHALL

Federal/Civil

Timely
(ext'n in 79-1789)

A supplemental response from the SG
should be called for in light of the new
situation. A grant seems appropriate, at least on the

The Preliminary Memorandum for these curve-lined cases suggested that 79-1429 and 79-1583 be held for the OSHA coke oven cases [No. 78-918, Republic Steel Corp. v. OSHA; and No. 78-919, American Iron & Steel Institute v. OSHA]. That option is no longer available because the writs in coke ovens have just been dismissed under Rule 53.

The SG's response with respect to 79-1429 and 79-1583, filed after cert was granted in coke ovens, argued only for a hold. Accordingly, the Court may wish to call for a supplemental response.

Alternatively, the Court should consider a grant on two questions (restated here): (1) whether the CA correctly interpreted the statutory requirement that OSHA standards be "feasible"; (2) whether the CA applied a correct standard of review. These questions encompass issues 1, 2, and 3 in petition 79-1429¹ and both questions in 79-1583. They are important, they were left open in last term's benzene case, and they are identical to issues that would have been presented in the coke oven cases.

Also, and without any further response from the SG, the wage guarantee issue (Issue 4 in No. 79-1429) appears to be independently certworthy.

The coke ovens development appears not to affect No. 79-1789, in which OSHA concedes that a GVR is warranted in light of benzene.

9/18/80

Coleman

Opn in Appendix
of No. 79-1429

1. The "questions presented" in 79-1429 are incredibly biased and it would be confusing to grant on the issues as stated there. The Court may want to limit its grant to the questions presented in 79-1583, which are more neutrally stated.

No. 79-1429

vs.

CG could GV & R
on 79-1789
SG considered 79-1789
should be GV & R
Notice "cost benefit"
No 2 is similar
No 3 is too argumentative to grant
No 4 ~~relates~~ relates to OSHA's implied auth.

Grant
Q 1, 2 & 4
& Consolidate
with 79-1583

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓		June 3									
Brennan, J.		✓		on Qs 1 & 2									
Stewart, J.		✓		"									
White, J.		✓		Qs 1, 2 & 4									
Marshall, J.		✓											
Blackmun, J.			✓										
Powell, J.		✓		Qs 1, 2 & 4									
Rehnquist, J.		✓		Qs 1 & 2									
Stevens, J.		✓		Qs 1, 2 & 4									

September 29, 1980

Court
Argued, 19...
Submitted, 19...

Voted on....., 19...
Assigned, 19...
Announced, 19...

No. 79-1583

NATL. COTTON COUNCIL, ETC.

VS.

MARSHALL, SEC. LABOR

*IPS Hinder
we should Grant
this across Board
9'd marked this to
Held, but will go along.*

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

*Both Q's
relate to "cost
benefit"*

MEMO TO FILE

lfp/ss 1/15/81

79-1419 American Textile Manufacturers Institute v. Marshall

When I got into the briefs on this case, it occurred to me that possibly the Ethyl Corporation was interested in the case. There were two reasons for this thought. This is the "cotton dust" case, and one of the main issues is whether under OSHA the relationship between benefit and cost of complying with regulations must be considered affirmatively in the adoption of a regulations. Then, in look^{ing} at the amici briefs, one is filled~~ed~~ by an association that listed its 137 members. Its members are corporations, one of which is Ethyl.

I called Larry Blanchard, Vice Chairman of the Board and the officer of the corporation who has followed the regulatory problems of the company more closely than anyone else. Larry is a former partner of mine at Hunton & Williams, and we talked frankly. He did not even know the "cotton dust" case was in our Court, nor did he know that an association of which Ethyl was a member had filed a brief. I advised Larry that at least some of the briefs refer to the "lead cases" as also presenting the cost/benefit question. I stayed out of the lead cases because Ethyl - as one of the end product users of lead - might have an interest. But Larry stated that Ethyl has no interest in

the present cotton dust case, and he sees no reason why I should disqualify.

Incidentally, he said that the lead case in which Ethyl was or may have been interested, has been denied by this Court. As I have not followed these cases, I do not know what the status is. In any event, Larry also said that Ethyl - in his view - has lost all of its battles and is complying with OSHA's regulations. He also noted that the cost/benefit question arguably may arise in almost every OSHA regulation controversy. Thus, unless a judge must disqualify himself whenever an issue may affect industry in general, he could not own any securities. Neither the statute nor the Code of Ethics requires such a result.

Before calling Larry, I spoke to Justice Stewart, and discussed this question with him, pointing out that an amicus brief probably included corporations in which he or his family trusts ^{also} own shares. Potter reminded me that the Court has consistently followed the policy that Justices do not disqualify on account of amici briefs. Any other rule, would enable interested persons to manipulate the disqualification of Justices. Nor did Justice Stewart think the possible similarity of the wage/benefit question arising in other industries, justified recusal.

L.F.P., Jr.

ss

pwc 1/19/81

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: Paul Cane

DATE: January 19, 1981

RE: No. 79-1429, ATMI v. Marshall [the "Cotton Dust" case]

Question Presented

The principal question is whether OSHA, before setting a limit on workers' exposure to a toxic substance, must establish that the benefits of that limit exceed the costs that will be incurred to achieve it. The second question is whether OSHA has statutory authority to require by rulemaking that employers in the cotton industry institute certain wage-maintenance programs for their workers.

Background

This is one of several recent cases involving the costs and benefits of environmental and job-safety laws. This case, like the Benzene case from last Term, involves OSHA's authority under its Act to set standards for worker exposure to toxic substances. It is instructive briefly to describe the issues before the Court in Benzene.

The chemical benzene is a carcinogen. OSHA took the point of view that any exposure to a carcinogen is harmful, and such exposure therefore should be made limited. OSHA claimed its authority to do so under section 6(b)(5) of the Act, which provides:

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

The reference to the term "standard" apparently incorporates by reference § 3(8) of the Act, which defines "standard" as

conditions . . . or . . . practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

The Secretary took the position that there is no safe exposure level to a carcinogen such as benzene. He thought, therefore, the § 6(b)(5) required him to set an exposure limit

at the lowest level that would not impair the viability of the industry. That level, he thought, was 1 part per million (ppm).

In reviewing this standard, the Court was badly fragmented. Justice Stevens wrote for three justices reversing and remanding. You joined parts of his opinion and also wrote separately. Justice Rehnquist concurred in the result. Four justices joined a dissenting opinion.

The plurality held that § 3(8) and § 6(b)(5) should be read in tandem. Section 3(8) requires standards that are "reasonably necessary or appropriate to provide safe or healthful employment." According to the plurality, however, "'safe' is not the equivalent of 'risk-free.'" Slip op. at 31. There are many activities that we engage in every day that entail some risk, but that nevertheless are considered "safe." Id. According to the plurality, therefore, the threshold requirement of § 3(8) is to show that, at prevailing exposure levels, the "place of employment is unsafe," id. at 32, by presenting a "significant" risk of health impairment, id. at 41. On the record in this case, the plurality concluded that the Secretary had not done so. His assumption was that any exposure to a carcinogen was harmful and subject to regulation. The plurality, by imposing a threshold test of the significance of risk, required the Secretary to document his assumption. Because the Secretary had failed to adduce evidence meeting the threshold test, the plurality did not need to reach the more

difficult question of whether the Secretary had to undertake "cost-benefit analysis."

You joined parts of the plurality opinion and wrote a short opinion of your own. In it, you noted that OSHA's "fallback" position was that substantial evidence supported the 1 ppm standard even under the plurality's test. You undertook to respond to OSHA's alternative position. "[A]ssum[ing] that OSHA properly met this burden," you concluded that "the statute also requires the agency to determine that the economic effects of its standard bear a reasonable relationship to the expected benefits." An occupational health standard is neither 'reasonably necessary' nor 'feasible,' as required by statute, if it calls for expenditures wholly disproportionate to the expected health and safety benefits." Id. at 4-5 (Powell, J., concurring). You noted that "[t]he cost of complying with a standard may be 'bearable' and still not reasonably related to the benefits expected. A manufacturing company, for example, may have financial resources that enable it to pay the OSHA-ordered costs. But expenditures for unproductive purposes may limit seriously its financial ability to remain competitive and provide jobs." Id. at 5 n.4; see also id. at 6 & n.6, 7. Moreover, if economic considerations are ignored, OSHA's reading of the statute would result in misallocation of resources because the industry would spend too much money to eliminate one risk, and not have enough left to try to eliminate some other one. In sum, the implication of your opinion is that Congress could not possibly have wanted OSHA to

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consider costs to ensure that entire industries would not be ruined, but to ignore costs when the level of regulation is slightly less stringent. See id. at 4-7. "There can be little doubt that Congress intended OSHA to balance reasonably the societal interest in health and safety with the often conflicting goal of maintaining a strong national economy." Id. at 6 n.6.

Discussion

In this case, as you know, OSHA set an exposure standard of 200 micrograms of cotton dust per cubic meter. For "slashing and weaving" aspects of the textile industry, OSHA set the standard at 750 mcgs/cu m. OSHA did so because it believed that a stricter standard, although desirable, would not be technologically "feasible" because it would ruin the industry. The question is whether OSHA should have set even a higher standard in light of the substantial costs of reaching the 200/750 standard. Your opinion in Benzene in dictum anticipated this crucial issue in the Cotton Dust case.

A. Petrs' Arguments

1. Cost Benefit Analysis. OSHA's construction of the statute treats costs as totally irrelevant until they reach the point at which the standard, if implemented, would destroy an entire industry. This cannot be the law. OSHA should have to make a responsible prediction, supported by substantial evidence, of the economic impact of its standard, and to

explain why it believes that a standard having such a burden is worthwhile.

OSHA seems to believe that Congress left it free to impose enormously costly requirements in the context of a single health hazard, as long as compliance with that single standard does not ruin the industry. In Benzene, the plurality sought not to "give the Secretary the unprecedented power over American industry that would result" if he could try to require a risk-free workplace. But the plurality's threshold requirement that OSHA only eliminate "significant health risk[s]" only does half the job. There may be significant health risks that cannot prudently be avoided. Put another way, there may be ways of achieving almost as much health benefit at a drastically reduced cost.

OSHA violated the statute in two ways. First it failed to make a responsible cost estimate. The costs of OSHA's regulation are in dispute. One [the RTI estimate] concluded that the standard would cost \$1.1 billion. OSHA rejected this estimate, and opted for a \$550 million estimate [Hocutt-Thomas]. But this estimate was not based on the exposure standard eventually adopted, but rather on a less stringent one. Thus, OSHA inexplicably based its cost estimate on a study that did not even purport to measure the cost of the standards OSHA eventually adopted. To be sure, OSHA speculated that the Hocutt-Thomas estimate contained biases (failure to subtract for new technology and retrofitting costs) that perhaps made the estimate too large. But only by the most remarkable

*affiant
argues*

coincidence would the amount of the overstatement be equal to the additional costs required to attain the more stringent standards that OSHA actually adopted. Thus, OSHA failed even to produce a cost estimate that could survive the threshold duty, established by the plurality in Benzene, to show that the total cost would not bankrupt the entire industry. As noted, its cost data was flawed. Moreover, its assumption that increased costs could be "passed through" to consumers ignored the fact that constraints imposed by foreign competition made any passing-through difficult.

Second, even if OSHA did meet its threshold burden, the agency failed to explain why the costs of its standards were justified in light of their benefits. The mere fact that compliance costs are not great enough to destroy an entire industry does not mean that a standard comports with the requirements of the Act. On the contrary, "Congress did not intend OSHA to reduce each significant hazard without regard to economic consequences . . . short of serious dislocation." Benzene, slip op. at 5-6 n.5 (Powell, J., concurring). OSHA's standards may require only such conditions, practices, and operations as are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." § 3(8) of the Act. In sum, the standard setting provisions of §§ 3(8) and 6(b)(5) are qualified and relative in nature.

The legislative history confirms this view. Senator Javits, the author of the Administration's original bill, took the position that OSHA standards should be "reasonable" and

"practical" as well as technologically achievable. The Senate Committee, although rejecting Javits' plan to establish an independent review board, agreed that the standards under § 6 should be "feasible requirements." The addition of that term into § 6(b)(5) satisfied Senator Javits. Furthermore, the Senate Committee also substituted the word "material" for "any" impairment of health. This, too, was designed to produce a "balanced" bill, so that OSHA could not try to establish a risk-free utopia regardless of costs.

This concern also was demonstrated in the compromises in the drafting of the judicial review sections of the bill. Congress adopted a hybrid procedure that permitted informal rulemaking but required that a reviewing court look for "substantial evidence on the record as a whole" rather than the more deferential review for "arbitrary and capricious" behavior. In sum, it is clear that Congress believed it was enacting a "fair and reasonable bill that balanced the needs of workers and industry." 94 Harv. L. Rev. at 248.

Petrs thus believe that OSHA must show that its standards address significant health risks or material health impairments, and that the standard is expected to achieve a significant reduction of that risk. According to petrs, whether a reduction in risk is significant depends on the costs necessary to achieve it. Petrs try to make clear, however, that they do not expect OSHA to engage in a rigidly formal cost-benefit calculation that places a dollar value on employee lives or health. Rather, OSHA simply must analyze and evaluate

alternative courses of action to see whether society's limited industrial-hygiene resources are not being squandered or misallocated. It is, of course, up to OSHA to make this assessment in the first instance, Benzene, supra, at 7-8 n.8 (Powell, J., concurring), subject to judicial review. Even though a court might well be reluctant to disturb the agency's judgment, forcing it to identify and weigh the factors will have a salutary effect on the agency's decisionmaking process.

Petrs note that most courts facing OSHA cases have required some analysis along these lines. See cases cited in briefs. Petrs also point out that other statutes with similar language have been construed similarly. *Other statutes.* most courts

OSHA's effort in this case fails because it did not assess the benefits of its standards in light of the costs required to achieve them. OSHA did not seriously analyze the impact that the industry's proposed program (which involved medical surveillance coupled with respirator use and employee transfers) would have. Moreover, OSHA did not differentiate between the varying grades and symptoms of byssinosis in evaluating the benefits of its standards. Most of the grades of byssinosis are reversible if monitored. OSHA, however, treated grade 1/2 byssinosis -- which is simply infrequent chest tightness -- as a grave harm. It is not. Cotton dust is not a carcinogen like benzene.

2. Wage-Maintenance Programs. A separate issue involves OSHA imposition of a wage-maintenance program. Under OSHA's rules, respirators must be provided and used during the

transition period before the new rule is fully in effect. With this requirement petrs have no quarrel. Pursuant to section (f)(2)(v) of the rule, however, employees unable to use respirators (because of facial configuration, for example) must be given an opportunity to transfer to another, safer, job. Such transfers may be made even though the employee shows no symptom of byssinosis. Moreover, employers must ensure that such employees suffer no loss of earnings.

Petrs contends that OSHA doesn't have the authority to do this. The Act contains no express grant of authority for this requirement. The CA concluded that the provision was impliedly authorized by section 3(8) of the Act as a measure "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." Petrs contend this is not correct. The CA's view would invest OSHA with virtually limitless authority to impose almost any imaginable requirement arguably related to health, such as health insurance, food stamps, or health spa retreats. In the course of debate on the Act, Congress rejected a provision that would have permitted an employee to "strike with pay" at his own initiative to avoid a hazardous workplace. As the Court noted in Whirlpool Corp. v. Marshall, 445 U.S. 1, 17-80 (1980), Congress did not want to let employees obtain their regular salary for doing no work. Thus, Congress must have intended that OSHA not accomplish by rule what Congress itself was unwilling to do by statute. Finally, petrs point out that Congress in the Federal Coal Mine Health and Safety Act of 1969

authorized the agency to promulgate wage protection regulations. Congress thus knew how to write such matters into the law. That Congress chose one year later not to do so in this context suggests that OSHA cannot do it by regulation.

B. Resps' Arguments

1. Cost-Benefit Analysis. The Cotton Dust standard plainly meets the threshold inquiry, established by the Benzene plurality, that the prior standard represent a significant risk of material health impairment. The previous standard was approximately roughly 500 to 1000 mcg/cu m. Under this old standard, as the agency found, one worker in four will contract some grade of byssinosis. One in 15 risks a case of grade 2 byssinosis. One in 1000 risks a grade 3 case of the disease.

Under the industry's proposal, a 26% risk of ^{one in four!} byssinosis would remain. The Secretary found this to be unacceptable. There is no bright line separating the mild and chronic forms of the disease. Thus, it simply is incorrect that persons can be identified and taken off the job before their disease becomes irreversible. Second, even those with mild forms of the disease suffer material impairment. Third, medical surveillance (which the industry plan requires) is ineffective as a primary control method. Testing is not always accurate and workers sometimes are afraid to report symptoms. Fourth, there are insufficient openings for transfers for the number of workers that would need them under the industry plan. Finally, respirators simply do not always work, and many workers do not like to use them.

12.
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Under the plan as adopted, 13% of workers would incur the disease. The Secretary declined to impose a more strict standard because he found that doing so would severely injure the financial health of the industry.

If the Secretary met the threshold test established by the Benzene plurality, the question in this case becomes whether the Secretary had to go farther and show somehow that the costs of implementing the standard are less than its benefits. As the CA held, Congress did not intend to impose such a requirement. The statute provides only that the standard be the one that "most adequately ensures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health." § 6(b)(5) of the Act (emphasis added). Thus, Congress itself has done the balancing. It wanted the Secretary to achieve the highest level of protection consistent with industry health. The definition of "feasible" is "capable of being done." The word does not refer to the desirability or benefit of doing something, but only the capacity to do so. OSHA's task, then, is simple. It first determines the level of protection at which no worker will face a significant risk of material harm. Then, OSHA looks to see whether that level of protection is technologically and economically achievable. If it is not, OSHA sets its standard at the level that provides the maximum protection consistent with industry long-term health.

Cost-benefit analysis is simply not part of the inquiry. Congress envisioned no such gloss on the plain

language of the statute. Congress was determined that the benefits of eradicating toxic substances categorically outweighed the costs of doing so, provided that the industry could survive. Senator Dominick noted that the bill required the "best available standards," and Congress knew that these requirements would impose substantial costs. Congress envisioned that these costs would not be avoided by variances or cost-benefit analysis, but rather through government loans. 15 U.S.C. § 636(b)(5). It cannot be overemphasized that Congress demanded the level of protection that "most adequately" protects workers. § 6(b)(5) of the Act. No member of Congress so much as suggested that this language in the statute, or any other language, requires the Secretary undertake cost-benefit considerations. This omission "cannot be deemed inadvertent." Benzene, supra, at 32 (Marshall, J., dissenting).

Nothing cited by Petrs is to the contrary. The modification of the term "any impairment" to "material impairment" has nothing to do with cost benefit analysis. Rather, as the plurality in Benzene recognized, this change was directed at the threshold matter of establishing a significant risk of injury. Congress clearly did not want OSHA to regulate trifling or remote injuries such as mosquito bites.

Petrs also exaggerate to the extent that they argue that OSHA intends to push industry to the brink of ruin. It is true that OSHA wants to set the highest possible standards. But these always must be consistent with the long run health of

the industry. This is the purpose of the "feasibility" requirement. In light of that requirement, the Secretary has construed the Act always to maintain the industry's long-run profitability and competitiveness. In this case, for example, the agency modified the proposed "weaving" standard from 500 to 750 mcgs/cu m because it was clear that the lower limit was not reasonable. There are at least four ways in which the Secretary pays attention to the danger of resource misallocation. First, he sets his own priorities based on the urgency of potential danger to workers. Second, as the Benzene plurality held, he regulates only "significant risks of material harm." Third, he looks to see whether proposed alternative methods would accomplish the same result at lesser cost. Fourth, he gives consideration to costs in deciding how long the compliance period should be. The longer the period, the greater the possibility of inexpensive technological innovations and the greater the likelihood of improving equipment by attrition rather than by retrofit.

In any event, it is not clear what is meant by "cost-benefit analysis." Any such analysis necessarily must attempt to quantify human life. How can this be done? It essentially is arbitrary. Even if cost-benefit analysis means comparing costs against the dollar amount of preserved working capacity and medical bills, still the Secretary would have to make a prodigious undertaking.

2. Wage-Maintenance Programs. The Secretary did not exceed his authority in including the medical transfer and

income protection provisions in the cotton dust standard. These also are "practices, methods, operations, or processes" that are "reasonably necessary or appropriate to provide safe or healthful employment." § 3(8) of the Act. It will take several years for the industry to comply fully with the new standard. These interim procedures are necessary to protect workers. Some employees are unable to wear respirators. They are entitled to preserve their wages in the meantime because the burden of compliance is on the industry, not the worker. Employees will be reluctant to report symptoms unless they are protected by a job-transfer or wage-maintenance option.

Nothing in the Whirlpool case is to the contrary. That case involved a "strike with pay" provision. The job-transfer provisions in this case only are applicable where a doctor has certified that an employee cannot wear a respirator and where there is an alternative job that the employee can perform.

Summary

Your opinion in Benzene seems to control the key issue in this case. Common sense teaches that safety costs money. It always is possible to make things more safe, but incremental safety gains cost money. The law of diminishing returns suggests that incremental safety gains are achieved relatively inexpensively at first, and eventually only at great marginal cost. OSHA construes its statute to require it to set health standards at the most stringent level consistent with

industry survival. In other words, under the OSHA approach, cost is essentially irrelevant until the expense becomes so great that the entire industry's survival is impaired. In Benzene, you rejected this view: Congress cannot be deemed to have intended OSHA to ignore the fact that, at some point, the marginal cost of increased safety exceeds the incremental increase in safety.

The other issue in the case, pertaining to the income-maintenance component of the rule, is not controlled by your opinion in Benzene. It is close. I tend to think the agency has the better of that part of the argument. The income-maintenance provision is reasonably consistent with the authorization that Congress conferred, and probably should be upheld.

P.W.C. 1/19/81

pwc 1/20/81

SUPPLEMENTAL BENCH MEMORANDUM

TO: Mr. Justice Powell
FROM: Paul Cane
DATE: January 20, 1981
RE: No. 79-1429, The Cotton Dust Cases

In this memo, I'll try to answer some of the questions you raised, and also clarify some of the points that may have been unclear in my first memo.

A. The Relationship Between "Feasibility" and "Cost-Benefit"

It is vital to appreciate the distinction between examination of technological/economic feasibility and cost-benefit analysis. OSHA concedes that it must examine the former; petrs would like OSHA also to perform the latter.

1. Cost-Benefit Analysis Under § 6(b)(5) of the Act.

Section 6(b)(5) of the Act instructs OSHA to set the standard at the level that "most adequately ensures, to the extent feasible . . . that no employee will suffer material impairment of health." In OSHA's view, the "feasibility provision" requires only that the standard be (1) technologically capable of achievement, and (2) not so high that it would "put[] . . . employers out of business." Industrial Union Department v. Hodgson, 499 F.2d 467, 478 (CADC 1974) (McGowan, J.). Thus, costs are relevant under OSHA view of the statute to the extent that no standard will be promulgated if it would ruin an industry. That is why the controversy over the cost estimates is relevant. OSHA accepted the "Hocutt-Thomas" \$550 million estimate. In OSHA's view, the industry as a whole (although perhaps not some weak individual companies) could pay that price, particularly in light of the industry's ability to "pass through" cost increases to consumers. [There may be problems with the Hocutt-Thomas estimate. See Bench Memo at 6-7.]

In sum, under OSHA's view of the statute, the "feasibility" requirement of § 6(b)(5) refers only to the industry's financial and technological capability to meet the

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health standard. "Feasibility" does not require cost-benefit analysis.

2. Cost-Benefit Analysis Under § 3(8) of the Act.

Petrs, however, suggest that cost-benefit analysis may be derived from § 3(8) of the statute, which requires that a standard be "reasonably necessary or appropriate to promote safe or healthful employment." OSHA does not now contend, as it did in Benzene, that § 3(8) should not be construed in tandem with § 6(b)(5). OSHA does contend, however, that the language in § 3(8) is directed only at the threshold problem identified by the Benzene plurality: namely, whether the regulation was aimed at reducing a "significant risk of material harm." Plurality op. at 35. In this case, according to OSHA, that threshold problem is long past, because the agency found that its standard would demonstrably diminish the incidence of byssinosis. In sum, the "reasonably necessary or appropriate" language is relevant only to the threshold test of the Benzene plurality: the need to show a demonstrable risk of material harm.

3. Relevance of Costs In OSHA's View.

OSHA strenuously insists that it does not intend to drive "industry to the brink of ruin." There are several ways that OSHA considers cost without employing formal cost benefit analysis. Bench Memo 13-14. There are five principal ways in which cost is relevant to the calculus. First, OSHA always desires to maintain the industry's long-run profitability and competitiveness. In this case, for example, OSHA modified its

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original weaving standard of 500 mcgs/cu m because it was clear that the lower standard was not reasonable. Second, OSHA sets its own timetable of regulatory policies based on the urgency of potential danger to workers. Third, in accordance with the holding of the Benzene plurality, OSHA only seeks to regulate "significant risks of material harm." Fourth, OSHA looks to see whether proposed alternative methods could achieve the same results at less cost. Fifth, OSHA considers compliance costs to be relevant in deciding how long the compliance period should be. The longer the period, the greater the possibility of inexpensive technological innovations and the greater the likelihood of improving equipment by replacement rather than by retrofit.

4. Summary of OSHA's Position on Costs. You inquired whether the Secretary claims authority to set standards "in disregard of their economic impact, with the sole limit being that the cost of a single standard must not be so great as to threaten the destruction of an entire industry." I think the answer to your question is a "qualified yes." As I have shown, OSHA does insist that neither the "feasibility" requirement of § 6(b)(5) nor the "reasonably necessary" requirement of § 3(8) requires cost-benefit analysis. See discussion supra and Bench Memo. It claims this authority because Congress wanted regulations that "most adequately" ensure worker health. OSHA does, however, insist that it is a sensible regulator. The agency considers costs in various ways without engaging in formal cost benefit analysis. Indeed, OSHA

claims that it does not understand the nature of formal cost benefit analysis, because that process would require setting a dollar value on human life and health. See Bench Memo at 14.

B. Findings of Fact

Like you, I cannot find the Secretary's findings and conclusions in the materials that we were given. I have, however, studied the CA opinion in some detail. It referred to the record quite frequently and did not reject any conclusion reached by the agency.

1. Evidence Supporting OSHA's Standards. The CA noted that the agency proposed to adopt, and after hearing evidence did adopt, a "dust control strategy." This approach requires equipment modifications to keep the dust level low. The industry, by contrast, proposed an alternative involving medical surveillance, the use of respirators, and job transfers.

The CA found that, at least in its chronic stages, byssinosis is a material health hazard. Pet. App. 50-51 n.83. The causal nature of the disease is not clear, id. at 51, but it is clear that something in cotton dust induces the disease in some persons. OSHA relied on several witnesses who testified that the control of dust is the only effective way to control the disease. Id. Medical surveillance generally was ineffective because the disease sometimes does not manifest itself until it already has reached the irreversible stage. Indeed, industry's witnesses testified that medical surveillance without dust control was ineffective. Id. at 51 &

n.87. Approximately 25% of the workers would contract byssinosis under the industry's proposed exposure level. Id. at 49 n.79. According to one key study that OSHA apparently credited, only about 12% of the workers would get the disease under OSHA's exposure levels. Brief for Secretary at 8.

The industry apparently introduced evidence suggesting less pessimistic conclusions, but the agency thought the industry studies had been "discredited," Pet. App. 48 & n.76. The CA refused to disturb OSHA's evidentiary weighing. Id. at 49 n.77.

2. Evidence Supporting OSHA's Cost Estimates. I'll not repeat the relevance of this information, which is described above in this memo. Nor will I reiterate at length the dispute over the accuracy of this information. I discussed the RTI and Hocutt-Thomas estimates in my prior memo at pp. 6-7. The only tenable basis for rejecting OSHA's reliance on the latter estimate is that the estimate was based on the expectation of complying with a less stringent standard. OSHA found, however, that any resulting downward bias here was offset by certain upward biases elsewhere in the Hocutt-Thomas figures. The CA refused to disturb OSHA's conclusion. Pet. App. at 62-66. yes

C. Conclusions and Recommendation

Your memo was very perceptive. I did merely "resolve the cost/benefit question . . . in a brief summary, accepting what [you] wrote in Benzene." I did so because--much to my

dismay--I found myself believing that the government had the better of the argument on that key issue.

I found your "broad brush" remarks in Benzene to be persuasive as a policy matter. Though it is uncomfortable to think that it costs too much to save a human life, a rational policy should recognize that society has a great interest in maintaining a strong national economy, and that it sometimes is necessary to take risks--even health risks--to further that interest. See Benzene, slip op. at 6 n.6 (Powell, J., concurring).

Yet, on reviewing the authorities cited, I tend to think that the government may be right that Congress, however foolishly, did not put this policy into the OSHA Act. Consider the legislative history that petrs advanced. See Bench Memo at 7-8. Petrs point to nothing really persuasive that shows that Congress intended cost-benefit analysis. Their citations to legislative history are very vague. They refer to the desire to have a "reasonable" or a "balanced" bill. They also rely on the fact that Congress made the standard of review "substantial evidence" rather than "arbitrary and capricious." If Congress had wanted OSHA to balance costs against benefits, I would have thought that legislators would have made this clear. They did not. Can this omission "be deemed inadvertent?" Benzene, slip op. at 32 (Marshall, J., dissenting).

The government's construction of the statute--while perhaps unwise as a policy matter--seems to conform more closely with the legislative history. See Bench Memo at 12-13.

Congress may well have envisioned that costs be relevant to setting a standard only to the extent that they would not "put[] employers out of business." Industrial Union Department, supra.

Even if you now agree with my tentative inclination, however, I should think that you are bound by your Benzene opinion. If you want to pursue that course, I tend to think that the best language to rely on is the "reasonably necessary" reference in § 3(8). I thought the government's rebuttal on this point, see discussion supra, was probably persuasive, but somewhat less persuasive than its strong rebuttal on the § 6(b)(5) argument.

P.W.C. 1/20/81

P.S. I'll xerox one or two of the better CA opinions on this issue.

lfp/ss 1/20/81

MEMORANDUM

TO: Paul Cane

DATE: Jan. 20, 1981

FROM: Lewis F. Powell, Jr.

Cotton Dust

I dictated the attached memorandum at home Monday evening. It is an unstructured identification of points and questions that we may have to address if asked to write the opinion. Also, your thinking about these will assist me in deciding how to vote at Friday's Conference. Before we discuss this case on Thursday, I hope you will have an opportunity to consider these points and questions.

I am asking Sally to give you the memorandum, unedited and before I have an opportunity to read it.

L.F.P., Jr.

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lfp/ss 1/20/81

MEMORANDUM

TO: Paul Cane DATE: Jan. 20, 1981
FROM: Lewis F. Powell, Jr.

79-1429, 79-1583 Cotton Dust Cases

Your bench memo, written under considerable pressure, is quite helpful in setting forth the arguments presented by petitioners and respondents. You resolve the cost/benefit question - the critical one - in a brief summary accepting what I wrote in Benzene. I was able in that case to paint with a "broad brush". In the present case, however, I am not sure that we could write a persuasive opinion without being more specific.

A puzzling feature of this case, at least for me, is that the briefs on both sides present reasonable arguments - assuming that the facts and findings stated in each case are correct. I still have not been able to locate in the briefs or printed appendix, a copy of the Secretary's findings and opinion. The briefs do not seem to make any specific references to such findings. I have not read CADC's opinion carefully, but it seems to make general findings that - if accepted - might make it difficult for petitioners to win on their cost/basis argument.

In sum, what are the established facts in this case? To what extent does the record justify the factual assertions in petitioners' brief. Or, vice versa, to what extent does the record justify the rather sweeping factual assertions in the government's brief. I am not suggesting at this time that we review the record. Rather, I am wondering whether the Secretary (or OSHA) made findings that were accepted by the Court of Appeals and - if so - what were they.

And apart from findings, does the Secretary, in any opinion, or its brief, concede that it asserts authority to set standards "in disregard of their economic impact, with the sole limit being that the cost of a single standard must not be so great as to threaten the destruction of an entire industry?" See question No. 1 presented in petitioners' brief.

In petitioners' brief, summary of argument, p. 19, it is stated:

"OSHA's approach treats the cost of its standards as being totally irrelevant until they reach some undefined point at which the standard, if implemented, would cause the destruction of an entire industry."

If indeed this is OSHA's "approach", we have a rather easy target. But where is OSHA's "approach" or position on this question, stated, and exactly what does it

claim as being its authority with respect to the cost of standards?

My recollection from the Benzene case is that OSHA took the position that only §6(b)(5) applies, and therefore that it is authorized to "set the standard which most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health" OSHA denies that §3(8)(a), defining the term "standard" limits §6(b)(5) in any way. My recollection, however, is that in the Benzene case the plurality opinion - in which I joined to this extent - held that the two sections must be read together so that the test is not merely one of feasibility (construed by OSHA to mean "technological feasibility" (see p. 13 SG's brief), but in addition that the standard must be "reasonably necessary or appropriate to provide" a safe environment.

Does OSHA accept in this case - or did it accept when the cotton dust standard was adopted - that §3(8) and 6(b)(5) must be read together? Putting it differently in this case that its standard is "reasonably necessary or appropriate" as well as being technologically feasible?

In my brief concurring opinion, I did not undertake to go beyond general language. Assuming the applicability of the necessity to show a standard to be

"reasonably necessary or appropriate", and that this means there must be a demonstration of a reasonable relationship between cost and benefits, what sort of evidence must be considered and what kind of findings would be required?

I notice, for example, in the brief of the American Industrial Health Council (amicus), it is said:

"We do not suggest that OSHA must engage in a strictly quantitative cost/benefit assessment. But as several courts have held, OSHA may not issue a standard until it has evaluated the benefits that will be gained and the resulting costs and has found a reasonable relationship between the two."

Has this been done in this case, or does OSHA claim this is unnecessary?

Briefs supporting reversal of the decision below refer to other decisions of courts of appeals that do require cost/benefit analysis. I would like to have xerox copies of any CA opinions that in fact do this, with your view as to which is the best case.

In sum, Paul, while I have no doubt whatever that OSHA is assuming a virtually unrestricted power to establish standards almost solely in light of perceived health and safety benefit (e.g., the absolutely risk free workplace), the SG's brief seems to argue that OSHA did in fact consider carefully "economic feasibility" (p. 14, et seq.), and relied on the Hocutt-Thomas cost estimates of about

\$543,000,000 for the industry that OSHA considered to be economically feasible. To be sure, the SG speaks in terms of "feasibility" rather than "reasonably necessary or appropriate". Specifically, what do you perceive to be the difference. If OSHA and the SG were arguing that technological feasibility is all that need be considered, why would there be any discussion of the Hocutt-Thomas and other cost estimates? Petitioners say that the answer is that these estimates relate only to the survivability of the industry in its entirety, without considering any of the factors that I mentioned in my concurring opinion.

* * *

No doubt, Paul, you will consider this memorandum to be rather negative and pessimistic from the viewpoint of one who holds my view that Congress must have intended a weighing of costs against benefits. I am not implying any change in the views I expressed in Benzene. Rather, I find few specific answers to the questions in this case, and am hopeful that - with your greater familiarity with the case - you will be able to shed additional light.

L.F.P., Jr.

ANOTHER SUPPLEMENTAL BENCH MEMORANDUM

TO: Mr. Justice Powell
FROM: Paul Cane
DATE: January 21, 1981
RE: No. 79-1429, ATMI v. Marshall [the "Cotton Dust" cases]

The more I think about this case, the more attractive seems your suggestion that we seriously consider Justice Rehnquist's nondelegation argument. Let me try to sketch out a theory of decision based on this argument. Please forgive its rough form. I had no time to make it ornate, and I provide little or no authority for some propositions.

I. Purpose of Administrative Agencies

Delegation to administrative agencies is an inevitable byproduct of complex government. Where Congress undertakes to regulate in a field demanding special expertise, particularly in areas of science, it frequently may be advantageous to delegate much of the detail work to the agency.

In sum,

Congress may wish to exercise its authority in a particular field, but because the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert in the area in which they choose to legislate, the most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, "fill in the blanks," or apply the standards to particular cases.

Benzene, slip op. at 5 (Rehnquist, J., concurring) (emphasis added).

II. Origins of the Nondelegation Doctrine

At all times, however, the administrative lawmaking power must be derived from Congress' article I lawmaking power. The delegation question concerns the extent to which this is constitutionally tolerable. In Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), the Court considered delegation of authority to the President to regulate the flow of "hot oil." In the statute in that case, Congress had made a "declaration of policy," in which it directed the President to act, or not to act, in accordance with various criteria. The criteria

conflicted somewhat. For example, Congress told the President "to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups." In the same section, however, Congress told the President "to eliminate unfair competitive practices." Similarly, at one point the President was instructed "to increase the consumption of industrial and agricultural products" but simultaneously "to conserve natural resources." Id. at 417. In sum, the statute favored any number of good things. However, as Chief Justice Hughes remarked, the constitutionality of "such a delegation of legislative power . . . is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority" Id. at 420. The Court then quoted Congress' legislative power, found in Article I, and said, "The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested." Id. at 421.

Notwithstanding Panama Refining and cases like it, it is plain that Congress does have broad license to delegate. The question in each case is whether the delegation occurs within proper limitations. Chief Justice Hughes identified three factors in evaluating the constitutionality of the delegation. First, Congress in the statute must "declare[] a policy with respect to that subject." Panama Refining, 293

U.S. at 415. Second, Congress must "set up a standard for the [delegatee's] action." Id. Third, Congress must "require[] a[] finding by the [delegatee] in the exercise of" its authority. Id. In another case, the constitutional question is phrased somewhat differently: the stringency of the limitations constitutionally required in each case must be judged "according to common sense and the inherent necessities of the governmental co-ordination." Hampton & Co. v. United States, 276 U.S. 394, 406 (1928).

III. OSHA's Construction and Application of Its Mandate

It is hard to know exactly how Congress wanted the OSH Act to be applied. There are at least four possible interpretations.

The first is something along the lines that you articulated in Benzene. We agree, I think, that it makes no sense to have a policy that treats costs as essentially irrelevant until they loom large enough to threaten "industry survivability." See Benzene, slip op. at 4-7 (Powell, J., concurring). Principles of diminishing returns make it clear that incremental gains in health and safety are accomplished at ever-increasing costs.

The second is the position that the union respondents took at oral argument. According to the union, the threshold question is establishing a significant risk of health impairment, and the ability to reduce that risk significantly. This much is clear from Benzene. Then, according to the union,

OSHA is to set the most effective standard possible. If that standard is not "feasible," it should be relaxed to the point where it provides the greatest possible protection for the worker consistent with the survival of the "industry as a whole."

The third is OSHA's articulated approach. OSHA agrees mostly with the union respondents, but adds kind of a gloss. In its brief and at oral argument, OSHA essentially claimed that it was not an "unreasonable regulator." See, e.g., Bench Memo at 13-14. OSHA pointed out that it is always cognizant of the long-run health of the industry. In setting standards, the Secretary of Labor takes practical realities into account in at least four specific ways. (A) He sets his own priorities based on the urgency of potential harm to workers. (B) As the Benzene plurality held, he regulates only "significant risks of material harm." (C) He looks to see whether proposed alternative methods would accomplish the same result at lesser cost. (D) He has discretion in determining the length of the compliance period.

In this case, OSHA seemed to take an approach different from any of the three articulated above. It is kind of a mishmash involving some of the elements described above. I have read the Final Standard, reprinted in 43 Fed. Reg. 27350 (1978). OSHA seemed to start with a goal of imposing a standard of 200 micrograms per cubic meter on all aspects of the industry. It is plain, however, that this is not the standard that would protect workers the most. Approximately

13% of the work force will suffer from some degree of byssinosis even at the 200 mcgs/cu-m level. Thus, even in commencing deliberations at that level, OSHA already seems to have considered cost to some extent. Then, for the "slashing and weaving" aspects of the job, OSHA raised the standard to 750 mcgs/cu-m, apparently because this standard would provide suitable protection and any lower standard would be too burdensome. Id. at 27360. At this point, however, OSHA still has not reached its official "feasibility" analysis. When it finally did reach that point, it found that the 200/750 standard was appropriate, because "although some marginal employers may shut down rather than comply, the industry as a whole will not be threatened by the capital requirements of the regulation." Id. at 27378. In sum, OSHA concluded that it had set a standard that "assure[d] maximum benefit . . . constrained only by the limits of feasibility." Id.

IV. Nondelegation Problems in this Case

We agree, I am sure, that Congress constitutionally could impose a standard that would put much of an industry out of business. Although an ill-advised policy, this is one on which the Court must rely on Congress' judgment, tempered as it is by public accountability. The problem here is that Congress has not taken a clear position. Instead, it has demanded that OSHA set standards to the extent "feasible." The core of the problem thus is easy to identify: what is "feasible?" Let me struggle briefly with the term.

Two groups must bear the cost that OSHA characterizes in this case as "feasible." The first group, on which everyone's attention focuses, is the industry itself. Some entities will be unable to absorb the cost. Remarkably, however, OSHA ignored the burden on another, perhaps equally important group, that also must pay the cost of worker safety: the consumers of products. OSHA reasoned that only marginal firms would be put out of business because it believed demand for cotton products was "inelastic." [Roughly speaking, that means that companies largely can tack the cost of safety mechanisms onto the price of goods without a substantial decrease in sales.] At oral argument, one attorney pointed out that even a 500% increase in the price of goods would be no burden on companies if demand were inelastic. Justice Stewart correctly observed, however, that consumers then would pay the bill.

As I noted above, the point is not that Congress cannot decree that consumers and corporations pay this price for worker safety. The question is whether Congress has done so. But Congress indicated only that health improvements were to be made if "feasible." Who is to decide what is feasible? Herein lies the delegation problem. Congress has not defined the term. It is tenable to conclude that, consistent with the principles of constitutional delegation, Congress must do a more precise job.

In many respects, this case resembles Panama Refining. Here, as there, Congress did not set a policy and

provide standards with which to implement it. In this case, Congress told the agency to accomplish two good things: protect workers, but do so in a way that is "feasible." Congress did not describe how to strike the balance. OSHA appears to take the point of view that costs passed on to consumers are irrelevant in assessing feasibility. Moreover, the agency is comfortable as long as the health of the "industry as a whole" is not impaired. I recall from oral argument that the government lawyer was very reluctant to put much of a boundary on the precise number of firms that could be destroyed consistent with "industry survivability." Because no standards were given to the agency, a reviewing court cannot know whether the agency complied with its mandate. Finally, and perhaps most important, to permit Congress to abdicate its constitutional responsibility on an important policy choice is to permit it to escape the public accountability for its decision on an issue of broad social significance. Just yesterday I found a newspaper article that identified the problem of "cost benefit analysis" as one of the most important environmental issues of the age. But, the article reported, "direct comparisons [of costs and benefits] are difficult" because it is hard to put a measure on human life. Washington Post, Jan. 21, 1981, at A2, col. 3; see Benzene, slip op. at 29-30 (Marshall, J., dissenting).

This is precisely the reason that Congress should be required to undertake the task. Legitimate delegation to agencies evolved because it was useful to have someone other

than legislators "fill in the gaps." Where the "gap" is an issue of such profound economic and social significance as the tradeoff between health and productivity, it should be Congress, not the agency, that strikes the balance.

V. The Wisdom and Difficulties Associated
With a Return to Nondelegation

Some will argue that the nondelegation doctrine is a discarded relic of the Lochner era of judicial intermeddling. I do not think so. The overzealous judicial review tendencies represented by Lochner denigrated Congress' role because judges substituted their judgment for that of legislators. The nondelegation doctrine does not share this flaw. On the contrary, the nondelegation doctrine reasserts the primacy of Congress as the maker of policy. To be sure, Congress does not always relish that responsibility. Legislators duck hard questions such as cost-benefit analysis by turning their resolution over to administrative agencies, just as legislators can duck "private right of action" questions by turning them over to the courts.

The "cost benefit" question is precisely the kind of hard question that courts ought to demand that Congress answer. As you suggested in Benzene, the cost of regulation--in particular, the cost of safety--has ramifications for employment, inflation, and even national defense and foreign policy. It plainly is an issue on the minds of legislators. During the OSH Act debate, Senator Saxbe said, "When we come to

saying that an employer must guarantee that such an employee is protected from any possible harm, I think it will be one of the most difficult areas we are going to have to ascertain." Benzene, slip op. at 15 (Rehnquist, J., concurring). Later, Senator Saxbe complained, "I believe the terms that we are passing back and forth are going to have to be identified." Id. at 8. The problem in this case is that Congress never did adequately describe the nature of the relationship between health and cost that it envisioned. Because it did not, the three difficulties identified by Justice Rehnquist in Benzene have occurred. First, OSHA has no "intelligible principle" to guide it in its work. Second, reviewing courts are left with no standards to apply to test the exercise of the agency's discretion. Third, and most important, Congress is permitted to evade accountability for decisions that are of great significance to all.

A nondelegation opinion in this case will not be easy to write. I am not unmindful that this Court, and others, in the recent past has permitted Congress to delegate broadly. The WNCN case brings to mind the FCC's statute. That agency is permitted to regulate the airwaves with nothing more to guide it than "the public interest." Yet, it may be that the issue in Cotton Dust is of such profound significance that it differs qualitatively from other cases in which delegation has not been perceived as a problem.

P.W.C. 1/21/81

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

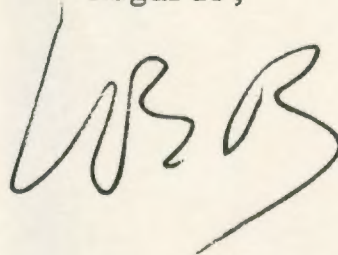
January 21, 1981

Re: (79-1429 - American Textile Manufacturers Institute,
(Inc. v. Marshall
(
(79-1583 - National Cotton Council of America v. Marshall

MEMORANDUM TO THE CONFERENCE:

I am inclined to think we should invite the parties
to comment on the effect, if any, of the change in
Regulations disclosed by Bork in the oral argument.

Regards,



~~Dear~~ Dear chief,
Your suggestion ~~is~~
as to the ~~a~~ change
in Regulations is fine
with me.

79-1429 AMERICAN TEXTILE v. MARSHALL

Argued 1/21/81

Bork (Pett).

industry will
continue to
exist

Ct. applied carcinogen standard -
state that was revoked Monday.

Act is an over-delegation.

Agree that factor found to be
absent in Benzene is present
here.

Consider "cost/benefit analysis"
as "second point."

This is
closest
Bork
came to
defining
"cost/benefit"

OSHA did not consider whether
additional benefits from ~~reducing~~
standard from .5 to .1. OSHA
should have made findings on
the specific benefits that would
result from this reduction.
OSHA says it has weighed all
of this but does not make
findings specific enough to
review correctness of its conclusions.
~~If this is a~~ If statute permits
this type of standard making,
the delegation by Congress is
invalid.

J.P.S. ~~says~~ draws ^a distinction
between - on to applicable ~~the~~ language
of 6(b)(5) & 3(8) - toxic & non-toxic
substances.

Geller (SG)

Denies that "attendant" standard
was based on "benzene" standard.

x x v

Book misquoted record. The is
sub. ev. (as CHDC found) to support
many findings Book rejected. E.g.:

The ~~indus~~ industry's standard
would result in 25% ~~of~~ of workers
suffer health disabilities.

Word "economic" is not in statute
that uses only word "feasible". Word
"Technologically" also is not in act.

Geller simply reads these words into
act

Key issue is "cost-benefit" analysis.
No discussion ⁱⁿ ~~of~~ leg. hist of
this Q. (delegation Q? - ask
WHR).

Cohen (for Union)

Referred me to p 115 of Joint
Appendix

Senator Dominick spoke in terms
of driving an industry out of ~~business~~
business.

Cohen (cont.)

Secretary first must find that proposed standard will reduce substantially health hazards.

Constraints are "technologically" & "economically feasible" * ~~of Sec.~~

Get
transcript
& see
exactly
what he
said →

Thus, if ~~standard is found~~ Sec.
finds these three things: (1) reduce
health hazard, (2) technologically feasible,
& (3) economically feasible, then standard
is valid so long as it does not
~~be~~ destroy the entire industry

3(8)

6(b)5-

~~3(8)~~

Your major contention
is that the Act requires
"cost/benefit" analysis.

What specifically does
this mean?

Brief says OSHA
look only to entire
industry. *

If a standard
would bankrupt
25% of an industry,
do you understand
OSHA would consider
this immaterial?
Entire industry not destroyed

~~Beazline~~ 5 statute

6(b)(5) - "most adequately
insurer, to extent feasible"
no employee will suffer
material health impairment.

3(8) - ^{standard}
reasonably
necessary or appropriate
to promote safe employment."

OSHA, since Beazline,
accepts ~~a rule~~ that
3(8) is relevant. But
reads it to relate only
to whether standard
is reasonably related
to safety & health - not
to cost.

January 22, 1981

79-1429 American Textile v. Marshall
79-1583 National Cotton Council v. Marshall

Dear Chief:

Your suggestion as to the change in Regulations is fine with me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 22, 1981

MEMORANDUM TO THE CONFERENCE

Re: 79-1429) American Textile Mnfg. Institute v. Marshall
79-1583) National Cotton Council of America v. Marshall

I agree with the Chief's suggestion that the parties should be called upon to comment on the effect of the change in Regulations disclosed by Bork in the oral argument.

Sincerely,

WHR

The Chief Justice *Absent (flu)*

Not at rest. Studying "delegation" issue. CJ will vote later.

(There was considerable discussion of possible effect of revocation of Regulation. Decided not to wait, and to vote on merits)

Mr. Justice Brennan

Offim (WGB read a long memo of his views. Nothing to "delegation" issue.

The Benzene issue not involved - as OSHA made finding on "benefits".

As to costs, agree there ~~is~~ is substantial ev. WGB has read

OSHA's ~~own~~ opinion.

OSHA did make "cost/benefit" analysis

Mr. Justice Stewart

Reverse & vacate

Much can be said in favor of WHR's view as to impermissible delegation of power. But wait vote on this now.

Nothing in statute or leg. hist. requires cost-benefit analysis. Agree with Grit on this. But "economically feasible" means there must be a determination of costs. There is no substantial ev. as to what this will cost. ~~OS~~ This is a fatal error.

The showing of a reasonable relationship between intended benefits & costs. OSHA also could require payments of wages.

Mr. Justice White

Affirm - on all issues,

All necessary "cost-benefit" has
been determined. State doesn't
require.

Agree with W.G.B.

Mr. Justice Marshall

Affirm - on all issues.

Better ~~opinion~~ opinion than
Benzene

Mr. Justice Blackmun

Affirm

No need to consider cost.
benefits - but this was done by
O S H A.

Rever

Congress merely adopted a "policy".
The word "feasible" is a "blank check" to OSHA. Indeed, OSHA already has added "technologically" and "economically" to ~~the~~ 6(b)(5).

~~Even~~ Counsel for OSHA conceded, in effect, that the Adm. ~~Agency~~ Agency can do anything it wants short of putting an "entire industry" out of business.

Mr. ~~Justice Rehnquist~~

Only "marginal" cos. will be put out of business. ^{no definition of} "marginal,"

Rehnquist - Rever

Congress could prohibit all unsafe work places. But it has not done this.

OSHA has ~~not~~ tried to save statute ~~but~~ by adding words: ~~notions~~

Mr. Justice Stevens

Offen

The addition of "economic feasibility" was by courts - not by OSHA.

Does not agree with L.F.P. & WHR on delegation.

OSHA has done exactly what Congress intended.

We did not include "substantiality" of evidence in our Grant.

This was rule making - not adjudicating action.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

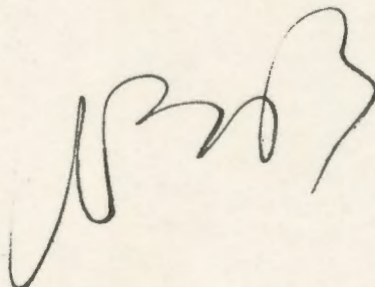
January 26, 1981

RE: 79-1429 - American Textile Institute v. Marshall
79-1583 - National Cotton Council v. Marshall

MEMORANDUM TO THE CONFERENCE:

I will defer voting in this case until some light is shed on the "11th hour" change in the Regulations.

Regards,

A handwritten signature in dark ink, appearing to be 'W. B. B.', is written below the typed signature 'Regards,'.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 30, 1981

Re: (79-1429 - American Textile Manufacturers, Inc. v.
(Marshall
(79-1583 - National Cotton Council of America v.
Marshall

Dear Bill:

I have now reviewed the various exchanges in this case, and I would prefer that you proceed to assign it since my views on the excessive delegation remain just about where they were at the time of the Conference.

Regards,

WEB/pw

Justice Brennan

Copies to the Conference



United States Department of Justice
Office of the Solicitor General
Washington, D.C. 20530

January 30, 1981

Honorable Alexander Stevas
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: American Textile Manufacturers Institute, Inc.,
et al. v. Ray Marshall, et al., No. 79-1429,
and National Cotton Council of America v. Ray
Marshall, et al., No. 79-1583

Dear Mr. Stevas:

We have received petitioners' response to the Court's request concerning the effect on these cases of the recent amendments to the Cancer Policy standard. We will refrain from responding in kind to petitioners' intemperate remarks, but we do believe that petitioners' one substantive point merits a short reply.

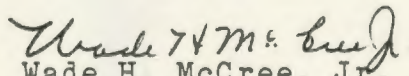
Petitioners contend that the Cancer Policy amendments are relevant to these cases because they represent abandonment by the Secretary of the policy that governed the setting of the cotton dust standard. This contention is incorrect because the stated purpose of the amendment was to conform the Cancer Policy to the significant risk limitation imposed by this Court's decision in Industrial Union Department v. American Petroleum Institute, No. 78-911 (July 2, 1980). The error in the benzene standard identified by the Court in Industrial Union Department, and the defect in the Cancer Policy standard, was that the Secretary, when dealing with a carcinogen, believed that the Act required him to set the standard at the lowest feasible level, even in the absence of evidence that such lowering of the level was necessary to eliminate or reduce a significant risk of material health impairment.

What petitioners have persistently ignored is that the cotton dust record contains substantial empirical evidence (1) that both the previous standard (1000 $\mu\text{g}/\text{m}^3$) and the so-called industry alternative (500 $\mu\text{g}/\text{m}^3$) would continue to create a significant risk of material health impairment to employees; (2) that the new standard (200 $\mu\text{g}/\text{m}^3$) would substantially reduce that risk; and (3) that even under the new standard, there would remain a significant risk of contracting byssinosis (13% according to the Merchant Study) that the Secretary could not eliminate because of feasibility limitations. These findings (which were upheld by the court of appeals as supported by substantial evidence) are set out in the Secretary's statement of reasons accompanying the final standard, and the Secretary relied on these findings in making his decision. 43 Fed. Reg. 27358-27359 (1978).

While the Secretary did set the standard at the "lowest feasible level," that decision was made because the Secretary affirmatively demonstrated on the basis of overwhelming evidence that there is no safe level that could be feasibly achieved. He did not rely on an "assumption" of no safe level for a toxic substance, as was the case for benzene. The recent proposed revisions to the Cancer Policy standard, 46 Fed. Reg. 7402-7408 (1981), simply incorporate the requirement that the Secretary make precisely the same findings of significant risk made in cotton dust before regulating carcinogenic substances. Indeed, it is rather odd for petitioners to suggest that the Secretary would have promulgated a regulation undermining the basis for the cotton dust standard while that standard was undergoing judicial review!

In sum, we reiterate that the Secretary's cancer policy modifications have absolutely no bearing on the disposition of the issues in this case. It is most unfortunate that the textile industry has determined to rely on this irrelevancy in an effort to convince the Court to avoid resolution of the important legal issues raised in these cases.

Sincerely,


Wade H. McCree, Jr.
Solicitor General

cc: Neil King

Office of the Clerk
Supreme Court of the United States

Memorandum

January 30, 1981

Memo to the Conference

Re: American Textile Manufacturers
Institute, Inc. v. Ray Marshall,
No. 79-1429; and National Cotton
Council of America v. Ray
Marshall, No. 79-1583

Subsequent to my memorandum of
January 29, 1981, regarding the above-
entitled cases, I have received the
attached reply by government council.

Al Stevas

Al Stevas
Clerk

✓
MEMORANDUM TO: Mr. Justice Powell

FROM: Paul Cane

DATE: January 30, 1981

RE: Nos. 79-1429, The Cotton Dust Cases

I have read the memos by industry and the SG on the repeal of the "carcinogen policy." The SG says the repeal is irrelevant to this case. Industry says it is "highly relevant" but does not explain how.

I think the SG is right. In repealing the carcinogen policy, OSHA simply was codifying the plurality's holding in Benzene. Thus, the repeal does nothing more than bring the Code of Federal Regulations in line with the case law. } yes

I don't understand what WJB is referring to in this memo, but I don't suppose it could hurt to have the SG file a response.

Paul

P.W.C. 1/30/81

SG now has filed a response, making the same point that I did in this memo.
✓ PWC 1/31

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 30, 1981

RE: Nos. 79-1429 & 1583 American Textile Manufacturers
v. Marshall

Dear Chief:

I had supposed the order of filings in the above was going to be Bork first and then response from the Solicitor General. In any event, it is very clear to me that Bork's position in the Wilmer, Pickering letter is very different from that which he made at oral argument. See Transcript of oral argument at pages 6 and 7.

In the circumstances I wish the Clerk would be requested to telephone the Solicitor General and ask him to file an additional response to the Bork letter.

Sincerely,

Bul

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 2, 1981

RE: No. 79-1429 American Textile Mfrs. Ind. v. Marshall
No. 79-1583 National Cotton Council of America v.
Marshall

Dear Chief:

I'll undertake the opinion for the Court in the above.

Sincerely,

Bill

The Chief Justice

cc: The Conference

February 3, 1981

No. 79-1429 American Textile Mfg., Inc. v. Marshall
No. 79-1583 National Cotton Council v. Marshall

Dear Bill:

Now that Bill Brennan has stated that he will write the Court opinion in these cases, I assume - unless the Chief Justice prefers to write - that you will prepare a dissent that reiterates your "excessive delegation" analysis in Benzene.

Although I did not join you in that case, further consideration of the delegation issue prompted me tentatively to vote with you in the "Cotton Dust" cases. Although I am not entirely at rest, I think the probabilities are that I will end up with you.

As Potter reserved decision on this issue, I am sending a copy of this note to him as well as to the Chief Justice.

Sincerely,

Mr. Justice Rehnquist

LPP/lab

cc: The Chief Justice
Mr. Justice Stewart

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

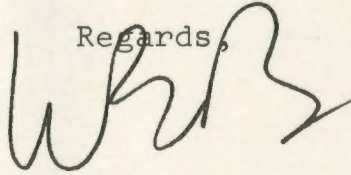
February 3, 1981

Re: 79-1429 - American Textile Manufacturers
Institute v. Marshall

Dear Bill:

Are you willing to undertake a dissent in
this case?

Regards,



Justice Rehnquist

Copies to: Justice Stewart
Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

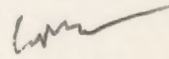
February 4, 1981

Re: No. 79-1429 American Textile Manufacturers
Institute v. Marshall

Dear Chief:

I will be happy to undertake a dissent in this case.

Sincerely,



The Chief Justice

Justice Stewart
Justice Powell

MEMORANDUM TO: Mr. Justice Powell
FROM: Paul Cane
DATE: March 31, 1981
RE: 79-1429, Cotton Dust Cases

Desires
Grant
motion
to file

As I told you last week, a notice in the federal register announced that OSHA is conducting a rulemaking on the feasibility of employing cost-benefit analysis. The SG now has filed a memorandum explaining the action OSHA proposes to take. Although the SG acknowledges that our case is not technically moot, it suggests that the Court vacate and remand to the agency for further development of the record.

-Paul

P.W.C. 03/31/81

March 31, 1981

Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

MEMORANDUM TO THE CONFERENCE

From: Mr. Justice Brennan

Circulated: APR 1 1981

RE: American Textile Manufacturers Institute, Inc. v. Donovan, et
al.

Nos. 79-1429 and 79-1583

As you know, the Government has filed a supplemental memorandum in the above case. The memorandum describes President Reagan's issuance of Executive Order No. 12291, directing all federal agencies to assess potential costs and benefits of major regulatory proposals. In response, the Secretary of Labor filed an "Advance Notice of Proposed Rulemaking" on March 27, 1981. This is the Secretary's first step "to evaluate the feasibility and utility of cost-benefit analysis in the standard setting process, to compare the costs and benefits of the current standard and various alternatives, and to reassess the current standard in light of the findings." Memorandum, at 2. While the Government readily admits that this action does not moot the case, id., at 4, it nevertheless recommends for prudential reasons that we vacate the Court of Appeals decision and remand the case to the agency. I assume that we will not act on the memorandum until all parties have an opportunity to file a response.

In any event, I disagree with the Government's position. My primary reason is that the majority conference vote in this case,

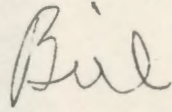
to be reflected in the opinion for the Court now being prepared, is based on the proposition that cost-benefit analysis is prohibited by the statute. This is consistent with the Government's previous argument that "it would be inconsistent with the Act for OSHA to engage in cost-benefit analysis." Memorandum, at 3a. It would surely be best for all concerned to decide that issue and save the Secretary the necessity of engaging in a futile proceeding involving thousands of pages of study; he might better use the time to persuade the Congress to change the statute.

Moreover, there clearly remains an active case or controversy here. The Secretary has taken no action to "promulgate, modify, or revoke any occupational safety or health standard" pursuant to 29 U.S.C. §655. We have no way of knowing whether this "Advance Notice of Proposed Rulemaking" will lead to a recommendation that formal rulemaking modifying or revoking the existing standard be pursued. Certainly the union will fight the Secretary tooth and nail to prevent it. The case eventually would be back here again, brought by the union or the industry depending on future actions of the Secretary. Therefore, the final result of the Secretary's action is highly speculative, and in all events probably would not occur for a substantial period of time. Although the Government intimates that it is maintaining the current cotton dust standard during this re-evaluation for policy reasons, this explanation is misleading, for the Secretary would in no case be entitled to modify or

revoke the standard without conducting a formal rulemaking procedure pursuant to §655.

In sum, I think we should deny the Secretary's application and proceed with decision of the case.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

W.J.B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

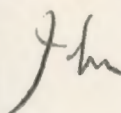
April 1, 1981

Re: 79-1429 & 79-1583 - American Textile
v. Marshall

Dear Bill:

Although I have not yet had an opportunity to re-examine the papers in this case, it is my recollection that my vote in favor of the Government was predicated on the proposition that cost benefit analysis was not required by the statute. I do not recall coming to any conclusion one way or the other on the question whether cost benefit analysis is prohibited by the statute. I did not think it would be necessary to reach that question in order to uphold the standards that are challenged in this case. I also have not come to rest on the question raised by the Secretary's application, but I did think I should clarify my understanding of the reason for my vote.

Respectfully,



Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

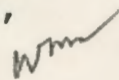
April 2, 1981

MEMORANDUM TO THE CONFERENCE

Re: No. 79-1429 & 79-1583 American Textile
v. Marshall

Although my views as to the constitutionality of the statute at issue here will not in all likelihood be affected by a change in the government's position concerning "the feasibility and utility" of a cost-benefit analysis for the cotton dust standard, I believe that the Solicitor General is correct that the decision by the Court at this time would be tantamount to an advisory opinion. Memorandum, at 4. I, of course, am in the dissent in this case and am in no position to speculate as to the intent of those in the majority. But from my recollection of our conference vote I, like my brother John, am not sure that the majority voted that a cost-benefit analysis is prohibited by the statute.

Sincerely,



MEMORANDUM TO: Mr. Justice Powell

FROM: Paul Cane

DATE: April 2, 1981

RE: 79-1429, Cotton Dust Cases

Inclined to

await this

Response

Petitioners, the cotton companies, have filed a motion to defer consideration of the government's suggestion of a remand. They would like to file something by April 9, and ask that the Court not take action until that time.

I think a delay would be helpful. I understand that WJB's opinion is soon to circulate. Perhaps the Court should defer consideration of the suggestion of remand until it sees WJB's opinion. That would focus the issue.

Paul

P.W.C. 04/02/81

April 3, 1981 Conference
List 3, Sheet 5

No. 79-1583

NATIONAL COTTON COUNCIL
OF AMERICA

v.

DONOVAN, Sec. of Labor

Motion of Federal Respondents
for Leave to File Supplemental
Memorandum after Argument

CADC

See Memorandum No. 79-1429.

4/1/81

Schickele

PJC

APR 3 PAGE 12

RECEIVED

APR 2 1981

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 79-1429 and 79-1583

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., et al.,

Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, et al.,

Respondents.

NATIONAL COTTON COUNCIL OF AMERICA,

Petitioner,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, et al.,

Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

MOTION TO DEFER CONSIDERATION AND EXTEND
THE TIME WITHIN WHICH PETITIONERS MAY
RESPOND TO THE SUPPLEMENTAL MEMORANDUM
FOR THE FEDERAL RESPONDENT

Petitioners in these consolidated cases hereby
request that this Court defer consideration of the Supplemental
Memorandum for the Federal Respondent ("Supplemental
Memorandum") filed on March 27, 1981, and extend until April 9,
1981, the time within which petitioners may file a response to
the Supplemental Memorandum. The grounds for this Motion are
as follows.

The Supplemental Memorandum introduces a radically new development into these cases. It discloses the Secretary of Labor's intention to institute a further rulemaking proceeding to reevaluate and reconsider the Cotton Dust Standard that is at issue in the cases before this Court. This proceeding will include a reexamination of the agency's position on the two most critical issues presented in these cases -- the nature of the cost-related limitations applicable to occupational health standards and the role that cost-benefit assessments should play in the setting of such standards.

Most of the more than one dozen petitioners in these cases received copies of the Supplemental Memorandum only within the last two or three days. The developments described in the Supplemental Memorandum are highly unusual in nature, making it difficult for petitioners to analyze the situation and formulate a joint response to the Secretary of Labor's recommendations. The difficulty of analyzing the Secretary's proposal is complicated by the fact that the challenged Standard apparently is to remain in effect and to be enforced while the further rulemaking proceeding is conducted.

Petitioners believe that their views on the issues raised by the Supplemental Memorandum will be of significant value to the Court. However, a short additional period of time will be required for petitioners to assess the impact of these new developments and to consult with each other regarding an appropriate response.

Accordingly, petitioners request that the Court defer consideration of the developments addressed in the Supplemental Memorandum and extend until April 9, 1981, the time within

which petitioners may file a response setting forth their views on those developments.

Petitioners are authorized to make the following representations: The Federal Respondent does not oppose the present Motion. The Union Respondents were advised by the Clerk's Office that the Court would consider the Secretary's Supplemental Memorandum at its conference on Friday, April 3, 1981, and accordingly are filing their response today. In these circumstances, the Union Respondents take no position on the present Motion.

Respectfully submitted,

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National Cotton Council
of America

April 2, 1981

Dinner

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

*Included
to Grant
SG's motion*

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., ET AL.,
Petitioners,

to file

v.

*supplementary
info.*

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, ET AL.,

Respondents.

NATIONAL COTTON COUNCIL OF AMERICA,
Petitioner,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

RESPONSE OF UNION RESPONDENTS TO SUPPLEMENTAL
MEMORANDUM FOR THE FEDERAL RESPONDENT

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*This supports WJB's view,
but I see that JPS (who is
the majority's 5th vote)
disagrees. Do you
want to talk about
this before Conference?
It is on a list for
tomorrow.*

Paul C.

Dissum

SUPPLEMENTAL MEMORANDUM

April 3, 1981 Conference
List 3, Sheet 5

No. 79-1583

NATL. COTTON COUNCIL OF AMERICA

v.

DONOVAN, Sec. of Labor

Motion of Federal Respondents
for Leave to File Supplemental
Memorandum after Argument

CADC

See Memorandum No. 79-1429

4/2/81

Schickele


PJC

No. 79-1583

[illegible]

Decision

Inclined
to Grant



April 3, 1981 Conference
List 3, Sheet 5

No. 79-1429

AMERICAN TEXTILE MFGS. INST.

v.

DONOVAN, Sec. of Labor

No. 79-1583

NATIONAL COTTON COUNCIL OF
AMERICA

v.

DONOVAN, Sec. of Labor

Motion of Federal Respondents
for Leave to File Supplemental
Memorandum after Argument

CADC

(Same)

SUMMARY: The Secretary of Labor (resp) requests leave to file a supplemental memorandum after argument informing the Court of his decision to reconsider the health standards regulating occupational exposure to airborne concentrations of cotton dust and suggesting possible consequences of this decision.

Grant the motion, but WJB has some cogent
comments, which are attached.

Paul C.

BACKGROUND: In June 1978, resp issued final mandatory occupational health standards regulating occupational exposure to airborne concentrations of cotton dust. On pre-enforcement review, the CADC upheld all major provisions of the standards against petr's. Petr's sought review from this Court, certs were granted and the two cases were argued on Jan. 21, 1981.

On Feb. 17, President Reagan issued an Executive Order directing all federal agencies to assess costs and benefits of major regulatory proposals. In light of this directive, resp has determined to undertake a re-examination of the cotton dust standard and has issued an Advance Notice of Proposed Rulemaking, which was filed with the Federal Register for publication on Mar. 27.

CONTENTIONS: Resp believes that the additional information, data and comments likely to be received through the public proceeding will permit him to make an informed judgment as to the feasibility and utility of the cotton dust standard and may well lead to modifications. Resp suggests that pending his reconsideration, the Court may wish to refrain from further consideration of the issues now before it. While the actions of the resp do not moot the present controversy, resp suggests that a decision by the Court at this time would, to a substantial degree, be tantamount to an advisory opinion.

Resp also suggests that in light of the recent developments, set forth in his supplemental memorandum, "it would be appropriate for the Court to vacate the judgment of the court of appeals and remand the case so that the record may be returned to the Secretary for further consideration and development."

DISCUSSION: Although there may be substantial grounds for disagreeing with resp's opinions as to the effect of his reconsideration, the fact that he is reconsidering the cotton dust standard should be formally brought to the Court's attention. Because the effect of the reconsideration involves some argument, a supplemental memorandum filed with leave of the Court pursuant to Rules 35.5 and 35.6 is the appropriate method for alerting the Court to the recent developments.

The motion and supplemental memorandum were tendered on Mar. 30. Thus, petrs have not had an opportunity to respond either to the motion or the memorandum. Should the Court grant the motion, it is recommended that the Court also allow petrs to file reply memoranda by a date certain. A reply date of Monday, April 13, might allow the Court to consider the cases at the Apr. 17 Conference. An earlier deadline is not recommended because it might not allow counsel sufficient time to prepare considered memoranda.

There is no response.

4/1/81

Schickele

PJC

Relist Schickele

Dissem -

I in am
included to
relist until
April 17.

SUPPLEMENTAL MEMORANDUM

April 3, 1981 Conference
List 3, Sheet 5

No. 79-1429

AMERICAN TEXTILE MFGS. INST.

v.

DONOVAN, Sec. of Labor

No. 79-1583

NATL. COTTON COUNCIL OF AMERICA

v.

DONOVAN, Sec. of Labor

Motion of Federal Respondents
for Leave to File Supplemental
Memorandum after Argument. 1/

CADC

(Same)

I would not
Deny SG's motion

On Apr. 2, the Court received: (1) a motion by the labor union petrs for leave to file a response to resp's supplemental memorandum; and (2) a motion by the manufacturer petrs to defer consideration of resp's supplemental memorandum until after Apr. 9 in order that these petrs may file a response.

I suggest that the Court relist all the motions for its Apr. 17 Conference, by which time all the parties will have had an opportunity to present their views.

4/2/81

Schickele

PJC

1/See Legal Officer's memorandum dated Apr. 1 on resp's motion to file supplemental memorandum after argument.

I would relist all of these motions until WTB's
opinion circulates. Paul C.

<i>Court</i>	<i>Voted on</i>, 19...	
<i>Argued</i>, 19...	<i>Assigned</i>, 19...	No. 79-1583
<i>Submitted</i>, 19...	<i>Announced</i>, 19...	

vs.

DONOVAN, SEC. OF LABOR

Relint
in
WJB

[illegible]

<i>Court</i>	<i>Voted on</i>, 19...	
<i>Argued</i>, 19...	<i>Assigned</i>, 19...	No. 79-1583
<i>Submitted</i>, 19...	<i>Announced</i>, 19...	

vs.

Relisted for Mr. Justice Brennan.

Robert
for
W. J. B.

[illegible]

AM. TEXTILE MFGRS. INST.

vs.

DONOVAN

Relisted for Mr. Justice Brennan.

Relent
for
W & B.

[illegible]

This is a good (although ponderous) opinion. I would await WHR's writing on the nondelegation Q. (At Conference, you voted to find an unconstitutional delegation of legislative authority. See my memo on that subject, which is in the file.) Paul C.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
✓ Mr. Justice Powell
Mr. Justice Renquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 5/14/81

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79-1429 AND 79-1583

American Textile Manufacturers
Institute, Inc., et al.,
Petitioners,

79-1429 v.

Raymond J. Donovan, Secretary
of Labor, United States De-
partment of Labor, et al.

National Cotton Council of
America, Petitioner,

79-1583 v.

Raymond J. Donovan, Secretary
of Labor, United States De-
partment of Labor, et al.

On Writs of Certiorari to
the United States Court
of Appeals for the Dis-
trict of Columbia Circuit.

[May —, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

Congress enacted the Occupational Safety and Health Act of 1970 (the Act) "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ." 29 U. S. C. § 651 (b). The Act authorizes the Secretary of Labor to establish, after notice and opportunity to comment, mandatory nationwide standards governing health and safety in the workplace. 29 U. S. C. §§ 655 (a) (b). In 1978, the Secretary, acting through the Occupational Safety and Health Administration (OSHA),¹ promulgated

¹ This opinion will use the terms OSHA and the Secretary interchangeably when referring to the agency, the Secretary of Labor, or the Assistant Secretary for Occupational Safety and Health. The Secretary of Labor

See my
letter to
W. G. B. saying my
view on
the decision
to "hold" the
"Lead Industry"
cases for these
cases,

I am
remaining
out of this
at least
for present

Z.F.P.

5/20

a standard limiting occupational exposure to cotton dust, an airborne particle byproduct of the preparation and manufacture of cotton products, exposure to which induces a "constellation of respiratory effects" known as "byssinosis." 43 Fed. Reg. 27352, col. 3 (1978). This disease was one of the expressly recognized health hazards that led to passage of the Occupational Safety and Health Act of 1970. S. Rep. No. 91-1282, 91st Cong., 2d Sess., 3 (1970), Legislative History of the Occupational Safety and Health Act of 1970, at 143 (1971) (Legis. Hist.).

Petitioners in these consolidated cases, representing the interests of the cotton industry,² challenged the validity of the "Cotton Dust Standard" in the Court of Appeals for the District of Columbia Circuit pursuant to § 6 (f) of the Act, 29 U. S. C. § 655 (f). They contend in this Court, as they did below, that the Act requires OSHA to demonstrate that its Standard reflects a reasonable relationship between the costs and benefits associated with the Standard. Respondents, the Secretary of Labor and two labor organizations,³ counter that Congress balanced the costs and benefits in the Act itself, and that the Act should therefore be construed to preclude OSHA from doing so. They interpret the Act as mandating

has delegated the authority to promulgate occupational safety and health standards to the Assistant Secretary. See 29 CFR § 1910.4 (1980).

² Petitioners in No. 79-1429 include 12 individual cotton textile manufacturers, and the American Textile Manufacturers Institute, Inc. (ATMI), a trade association representing approximately 175 companies. Brief for Petitioners American Textile Manufacturers Institute et al., at i, 2. In No. 79-1583, petitioner is the National Cotton Council of America, a non-profit corporation chartered for the purpose of increasing the consumption of cotton and cotton products. Brief for Petitioner National Cotton Council of America, at 3-4.

³ The two labor organizations are the American Federation of Labor and Congress of Industrial Organizations, Industrial Union Department, AFL-CIO, and the Amalgamated Clothing & Textile Workers Union, AFL-CIO. In the Court of Appeals, the labor organizations challenged the Cotton Dust Standard as not sufficiently stringent.

that OSHA enact the most protective standard possible to eliminate a significant risk of material health impairment, subject to the constraints of economic and technological feasibility. The Court of Appeals held that the Act did not require OSHA to compare costs and benefits. 617 F. 2d 636 (1979). We granted certiorari, — U. S. — (1980), to resolve this important question, which was presented but not decided in last Term's *Industrial Union Department v. American Petroleum Institute*, — U. S. — (1980),⁴ and to decide other issues related to the Cotton Dust Standard.⁵

I

Byssinosis, known in its more severe manifestations as "brown lung" disease, is a serious and potentially disabling respiratory disease primarily caused by the inhalation of cotton dust.⁶ See 43 Fed. Reg. 27352-27354 (1978); Exhibit

⁴ JUSTICE POWELL, concurring in part and in the judgment, was the only member of the Court to reach expressly the cost-benefit issue. JUSTICE POWELL concluded that the statute "requires the agency to determine that the economic effects of its standard bear a reasonable relationship to the expected benefits." *Industrial Union Department v. American Petroleum Institute*, slip op., at 4 (POWELL, J., concurring in part and in the judgment).

⁵ In addition to the cost-benefit issue, the other questions presented and addressed are (1) whether substantial evidence in the record as a whole supports OSHA's determination that the Cotton Dust Standard is economically feasible; and (2) whether OSHA has the authority under the Act to require that employers guarantee the wages and benefits of employees who are transferred to other positions because of their inability to wear respirators.

⁶ Cotton dust is defined as

"dust present in the air during the handling or processing of cotton, which may contain a mixture of many substances including ground up plant matter, fiber, bacteria, fungi, soil, pesticides, non-cotton plant matter and other contaminants which may have accumulated with the cotton during the growing, harvesting and subsequent processing or storage periods. Any dust present during the handling and processing of cotton through the weaving or knitting of fabrics, and dust present in other operations or

6-16, Joint App. 15-22.⁷ Byssinosis is a "continuum . . . disease," 43 Fed. Reg. 27354, col. 2, that has been categorized into four grades.⁸ In its least serious form, byssinosis produces both subjective symptoms, such as chest tightness, shortness of breath, coughing, and wheezing, and objective indications of loss of pulmonary functions. *Id.*, at 27352, col. 2. In its most serious form, byssinosis is a chronic and irreversible obstructive pulmonary disease, clinically similar to chronic bronchitis or emphysema, and can be severely disabling. *Ibid.* At worst, as is true of other respiratory diseases including bronchitis, emphysema, and asthma, byssinosis can create an additional strain on cardiovascular functions and contributes to death from heart failure. See Exhibit 6-73, Joint App. 72 ("there is an association between mortality and the extent of dust exposure"). One authority has described the increasing seriousness of byssinosis as follows:

"In the first few years of exposure [to cotton dust], symptoms occur on Monday, or other days after absence from the work environment; later, symptoms occur on other days of the week; and eventually, symptoms are continuous, even in the absence of dust exposure." A.

manufacturing processes using new or waste cotton fibers or cotton fiber by-products from textile mills are considered cotton dust." 29 CFR § 1910.1043 (b) (1980) (Cotton Dust Standard).

⁷ References are made throughout this opinion to the Joint Appendix filed in this Court (Joint App.), and to the Joint Appendix lodged in the Court of Appeals below (Ct. of App. J. A.).

⁸ Known generally as the Schilling classification grades, they include: "[Grade] ½: slight acute effect of dust on ventilatory capacity; no evidence of chronic ventilatory impairment.

"[Grade] 1: definite acute effect of dust on ventilatory capacity; no evidence of chronic ventilatory impairment.

"[Grade] 2: evidence of slight to moderate irreversible impairment of ventilatory capacity.

"[Grade] 3: evidence of moderate to severe irreversible impairment of ventilatory capacity." Exhibit 6-27; Joint App. 25; see 41 Fed. Reg. 56500-56501 (1976).

Bouhuys, Byssinosis in the United States, Exhibit 6-16, Joint App. 15.⁹

While there is some uncertainty over the manner in which the disease progresses from its least serious to its disabling grades, it is likely that prolonged exposure contributes to the progression. 43 Fed. Reg. 27354, col. 1 and 2; Exhibit 6-27, Joint App. 25; Exhibit 11, Joint App. 152. It also appears

⁹ Descriptions of the disease by individual mill workers, presented in hearings on the Cotton Dust Standard before an administrative law judge, are more vivid:

"When they started speeding the looms up the dust got finer and more and more people started leaving the mill with breathing problems. My mother had to leave the mill in the early fifties. Before she left, her breathing got so short she just couldn't hold out to work. My step-father left the mill on account of breaching [*sic*] problems. He had coughing spells til he couldn't breath, like a child's whooping cough. Both my sisters who work in the mill have breathing problems. My husband had to give up his job when he was only fifty-four years old because of the breathing problem." Ct. of App. J. A. 3791.

"I suppose I had a breathing problem since 1973. I just kept on getting sick and began losing time at the mill. Every time that I go into the mill I get deathly sick, choking and vomiting losing my breath. It would blow down all that lint and cotton and I have clothes right here where I have wore and they have been washed several times and I would like for you all to see them. That will not come out in washing.

I am only fifty-seven years old and I am retired and I can't even get to go to church because of my breathing. I get short of breath just walking around the house or dressing [or] sometimes just watching T, V, I cough all the time." *Id.*, at 3793.

"... I had to quit because I couldn't lay down and rest without oxygen in the night and my doctor told me I would have to get out of there. ... I couldn't [*sic*] even breathe, I had to get out of the door so I could breathe and he told me not to go back in [the mill] under any circumstances." *Id.*, at 3804.

Byssinosis is not a newly discovered disease, having been described as early as in the 1820s in England, Joint App. 404-405, and observed in Belgium in a study of 2,000 cotton workers in 1845, Exhibit 6-16, Joint App. 15.

C AMERICAN TEXTILE MFRS. INST. v. DONOVAN

that a worker may suddenly contract a severe grade without experiencing milder grades of the disease. Exhibit 41, Joint App. 192.¹⁰

Estimates indicate that at least 35,000 employed and retired cotton mill workers, or 1 in 12 such workers, suffers from the most disabling form of byssinosis.¹¹ 43 Fed. Reg. 27353, col. 3; Exhibit 124, Joint App. 347. The Senate Report accompanying the Act cited estimates that 100,000 active and retired workers suffer from some grade of the disease. S. Rep. No. 91-1282, 91st Cong., 2d Sess., 3 (1970), Legis. Hist. 143. One study found that over 25% of a sample of active cotton preparation and yarn manufacturing workers suffer at least some form of the disease at a dust exposure level common prior to adoption of the current Standard. 43 Fed. Reg. 27355, col. 3; Exhibit 6-51, Joint App. 44.¹² Other studies confirm these general findings on the prevalence of byssinosis. See, *e. g.*, Ct. of App. J. A. 3683; Ex. 6-56, *id.* at 376-385.

Not until the early 1960's was byssinosis recognized in the United States as a distinct occupational hazard associated with cotton mills. S. Rep. No. 91-1282, *supra*, at 3, Legis.

¹⁰ As an expert representing the industry noted:

"[T]he assumption is often made that the disorder progresses from 1/2 to 1 to 2 to 3 and, thus, all grades reflect the progress of the individual's disability. In many instances, however, there is no progression at all. Sometimes Grade 3 seems to appear *de novo*, or there is a jump from 1 to 3. Among those who develop permanent disability, Grade 2 very often never occurs." Exhibit 41, Joint App. 192.

¹¹ The criterion of disability used for the 35,000 worker estimate was a Forced Expiratory Volume (FEV₁) measurement of pulmonary function of 1.2 liters or less. 43 Fed. Reg. 27353, col. 3. An FEV₁ of 1.2 liters "is a small fraction of the pulmonary performance of a normal lung." *Ibid.*; Ct. of App. J. A. 1231.

¹² There are between 126,000 and 200,000 active workers in the yarn preparation and manufacturing segments of the cotton industry. 43 Fed. Reg. 27379, col. 2.

Hist. 143.¹³ In 1966, the American Conference of Governmental Industrial Hygienists (ACGIH), a private organization, recommended that exposure to total cotton dust¹⁴ be limited to a "threshold limit value" of 1,000 micrograms per cubic meter of air (1000 ug/m³) averaged over an 8-hour workday. See 43 Fed. Reg. 27351, col. 1. The United States Government first regulated exposure to cotton dust in 1968, when the Secretary of Labor, pursuant to the Walsh-Healey Act, 41 U. S. C. § 35 (e), promulgated airborne contaminant threshold limit values, applicable to public contractors, that included the 1000 ug/m³ limit for total cotton dust. 34 Fed. Reg. 7953 (1969).¹⁵ Following passage of the Act in 1970, the 1000 ug/m³ standard was adopted as an "established Federal standard" under § 6 (a) of the Act, 29 U. S. C. § 655 (a), a provision designed to guarantee immediate protection of workers for the period between enactment of the statute and promulgation of permanent standards.¹⁶

In 1974, ACGIH, adopting a new measurement unit of

¹³ Indeed the Senate Report on the Act expressly observed:

"Studies of particular industries provide specific emphasis regarding the magnitude of the problem. For example, despite repeated warnings over the years from other countries that their cotton workers suffered from lung disease, it is only within the past decade that we have recognized byssinosis as a distinct occupational disease among workers in American cotton mills." S. Rep. No. 91-1282, 91st Cong., 2d Sess., 3 (1970), Legis. Hist. 143.

¹⁴ "Total dust" includes both respirable and nonrespirable cotton dust.

¹⁵ The Secretary of Labor adopted the threshold limit values contained in a list that had been prepared by the ACGIH.

¹⁶ Section 6 (a) of the Act, 29 U. S. C. § 655 (a), provides in pertinent part:

"[T]he Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard . . . any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees."

respirable rather than total dust, lowered its previous exposure limit recommendation to 200 ug/m³, measured by a vertical elutriator, a device that measures cotton dust particles 15 microns or less in diameter. 43 Fed. Reg. 27351, col. 1, 27355, col. 2.¹⁷ That same year, the Director of the National Institute for Occupational Safety and Health (NIOSH),¹⁸ pursuant to the Act, 29 U. S. C. §§ 669 (a)(3), 671 (d)(2), submitted to the Secretary of Labor a recommendation for a cotton dust standard with a permissible exposure limit (PEL) that "should be set at the lowest level feasible, but in no case at an environmental concentration as high as 0.2 mg lint-free cotton dust/cu. m.," or 200 ug/m³ of lint-free respirable dust.¹⁹ Ex. 1, Ct. of App. J. A. 11; 41 Fed. Reg. 56500, col. 1 (1976). Several months later, OSHA published an Advance Notice of Proposed Rulemaking, 39 Fed. Reg. 44769 (1974), requesting comments from inter-

¹⁷ In many cotton preparation and manufacturing operations, including opening, picking, and carding, 1000 ug/m³ of total dust is roughly equivalent to 500 ug/m³ of respirable dust. Joint App. 464; 43 Fed. Reg. 27361, col. 2; see *infra*, n. 22.

¹⁸ The Act established the National Institute for Occupational Safety and Health as part of the then Department of Health, Education, and Welfare. NIOSH is authorized, *inter alia*, to "develop and establish recommended occupational safety and health standards." 29 U. S. C. § 671 (c)(1). At the request of the Secretaries of Labor or HEW, or on his own initiative, the Director of NIOSH may

"conduct such research and experimental programs as he determines are necessary for the development of criteria for new and improved occupational safety and health standards, and . . . after consideration of the results of such research and experimental programs make recommendations concerning new or improved occupational safety and health standards." *Id.*, § 671 (d).

¹⁹ NIOSH presented its recommendation in a lengthy and detailed document entitled "Criteria for a Recommended Standard: Occupational Exposure of Cotton Dust." Ex. 1, Ct. of App. J. A. 1-160. The report examined the effects of cotton dust exposure and suggested implementation of work practices, engineering controls, medical surveillance, and monitoring to decrease exposure to the recommended level.

ested parties on the NIOSH recommendation and other related matters. Soon thereafter, the Textile Worker's Union of America, joined by the North Carolina Public Interest Research Group, petitioned the Secretary, urging a more stringent PEL of 100 ug/m³.

On December 28, 1976, OSHA published a proposal to replace the existing Federal standard on cotton dust with a new permanent standard, pursuant to § 6 (b)(5) of the Act, 29 U. S. C. § 655 (b)(5). 41 Fed. Reg. 56498. The proposed standard contained a PEL of 200 ug/m³ of vertical elutriated lint-free respirable cotton dust for all segments of the cotton industry. *Ibid.* It also suggested an implementation strategy for achieving the PEL that relied on respirators for the short-term and engineering controls for the long-term. *Id.*, at 56506, col. 2 and 3. OSHA invited interested parties to submit written comments within a 90-day period.²⁰

Following the comment period, OSHA conducted three hearings in Washington, D. C., Greenville, Miss., and Lubbock, Tex. that lasted over 14 days. Public participation was widespread, involving representatives from industry and the workforce, scientists, economists, industrial hygienists, and many others. By the time the informal rule-making procedure had terminated, OSHA had received 263 comments and 109 notices of intent to appear at the hearings. 43 Fed. Reg. 27351, col. 2. The voluminous record, composed of a transcript of written and oral testimony, exhibits, and post-hearing comments and briefs, totaled some 105,000 pages. — U. S. App. D. C. —, 617 F. 2d, at 647. OSHA issued its final Cotton Dust Standard—the one challenged in the instant case—on June 23, 1978. Along with an accompanying statement of findings and reasons, the Standard occupied 69 pages of the Federal Register. 43 Fed. Reg. 27350-27418; see 29 CFR § 1910.1043 (1980).

²⁰ The Act specifies an informal rulemaking procedure to accompany the promulgation of occupational safety and health standards. See 29 U. S. C. § 655 (b)(2), (3), (4).

The Cotton Dust Standard promulgated by OSHA establishes mandatory PELs over an 8-hour period of 200 ug/m³ for yarn manufacturing,²¹ 750 ug/m³ for slashing and weaving operations, and 500 ug/m³ for all other processes in the cotton industry.²² 29 CFR § 1910.1043 (c). These levels represent a relaxation of the proposed PEL of 200 ug/m³ for all segments of the cotton industry.

OSHA chose an implementation strategy for the Standard that depended primarily on a mix of engineering controls, such as installation of ventilation systems,²³ and work practice controls, such as special floor sweeping procedures. Full compliance with the PELs is required within 4 years, except to the extent that employers can establish that the engineer-

²¹ The Standard provides that exposure to lint-free respirable cotton dust may be measured by a vertical elutriator, with its 15-micron particle size cutoff, or "a method of equivalent accuracy and precision." 29 CFR § 1910.1043 (c).

²² The manufacturing of cotton textile products is divided into several different stages. (1) In the operations of *opening, picking, carding, drawing, and roving*, raw cotton is cleaned and prepared for spinning into yarn. Brief for Petitioners ATMI et al., at 7, n. 12. (2) In the operations of *spinning, twisting, winding, spooling, and warping*, the prepared cotton is made into yarn and readied for weaving and other processing. *Id.*, at 7, n. 13. (3) In *slashing and weaving*, the yarn is manufactured into a woven fabric. *Id.*, at 7, n. 14. The Cotton Dust Standard defines "yarn manufacturing" to mean "all textile mill operations from opening to, but not including, slashing and weaving." 29 CFR § 1910.1043 (b). See generally 43 Fed. Reg. 27365, col. 1 and 2.

The nontextile industries covered by the Standard's 500 ug/m³ PEL include, but are not limited to, "warehousing, compressing of cotton lint, classing and marketing, using cotton yarn (i. e. knitting), reclaiming and marketing of textile manufacturing waste, delinting of cottonseed, marketing and converting of linters, reclaiming and marketing of gin motes and batting, yarn felt manufacturing using waste cotton fibers and by products." *Id.*, at 27360, col. 3.

²³ Ventilation systems include general controls, such as central air-conditioning, and local exhaust controls, which capture emissions of cotton dust as close to the point of generation as possible. See 43 Fed. Reg. 27363-27364.

ing and work practice controls are infeasible. *Id.*, § 1910.1043 (e)(1). During this compliance period, and at certain other times, the Standard requires employers to provide respirators to employees. *Id.*, § 1910.1043 (f). Other requirements include monitoring of cotton dust exposure, medical surveillance of all employees, annual medical examinations, employee education and training programs, and the posting of warning signs. A specific provision also under challenge in the instant case requires employers to transfer employees unable to wear respirators to another position, if available, having a dust level at or below the Standard's PELs, with "no loss of earnings or other employment rights or benefits as a result of the transfer." *Id.*, § 1910.1043 (f)(2)(v).

On the basis of the evidence in the record as a whole, the Secretary determined that exposure to cotton dust represents a "significant health hazard to employees," 43 Fed. Reg. 27350, col. 1, and that "the prevalence of byssinosis should be significantly reduced" by the adoption of the Standard's PELs, *id.*, at 27359, col. 3. In assessing the health risks from cotton dust and the risk reduction obtained from lowered exposure, OSHA relied particularly on data showing a strong linear relationship between the prevalence of byssinosis and the concentration of lint-free respirable cotton dust. 43 Fed. Reg. 27355-27359; Exhibit 6-51, Joint App. 29-55. See also Ex. 6-17, Ct. of App. J. A. 235-245; *id.*, at 1492-1839. Even at the 200 ug/m3 PEL, OSHA found that the prevalence of at least Grade 1/2 byssinosis would be 13% of all employees in the yarn manufacturing sector. 43 Fed. Reg. 27359, col. 2 and 3.

In enacting the Cotton Dust Standard, OSHA interpreted the Act to require adoption of the most stringent standard to protect against material health impairment, bounded only by technological and economic feasibility. *Id.*, at 27361, col. 3. OSHA therefore rejected the industry's alternative proposal for a PEL of 500 ug/m3 in yarn manufacturing, a proposal which would produce a 25% prevalence of at least Grade 1/2 byssinosis. The agency expressly found the

Standard to be both technologically and economically feasible based on the evidence in the record as a whole. Although recognizing that permitted levels of exposure to cotton dust would still cause some byssinosis, OSHA nevertheless rejected the union proposal for a 100 ug/m³ PEL because it was not within the "technological capabilities of the industry." 43 Fed. Reg. 27359-27360. Similarly, OSHA set PELs for some segments of the cotton industry at 500 ug/m³ in part because of limitations of technological feasibility. *Id.*, at 27361, col. 3. Finally, the Secretary found that "engineering dust controls in weaving may not be feasible even with massive expenditures by the industry," *id.*, at 27360, col. 2. and for that and other reasons adopted a less stringent PEL of 750 ug/m³ for weaving and slashing.

The Court of Appeals upheld the Standard in all major respects.²⁴ The court rejected the industry's claim that OSHA failed to consider its proposed alternative or give sufficient reasons for failing to adopt it. 617 F. 2d, at 652-654. The court also held that the Standard was "reasonably necessary and appropriate" within the meaning of § 3 (8) of the Act, 29 U. S. C. § 652 (8), because of the risk of material health impairment caused by exposure to cotton dust. 617 F. 2d, at 654-655, 654, n. 83. Rejecting the industry position that OSHA must demonstrate that the benefits of the Standard are proportionate to its costs, the court instead agreed with OSHA's interpretation that the Standard must protect employees against material health impairment subject only to the limits of technological and economic feasibility. *Id.*, at 662-666. The court held that "Congress itself struck the balance between costs and benefits in the mandate to the agency" under § 6 (b)(5) of the Act, 29

²⁴ The court remanded to the agency that portion of the Standard dealing with the cottonseed oil industry, after concluding that the record failed to establish adequately the Standard's economic feasibility. — U. S. App. D. C. —, 617 F. 2d 636, 669, 677 (1979)..

U. S. C. § 655 (b)(5), and that OSHA is powerless to circumvent that judgment by adopting less than the most protective feasible standard. 617 F. 2d, at 663. Finally, the court held that the agency's determination of technological and economic feasibility was supported by substantial evidence in the record as a whole. *Id.*, at 655-662.

We affirm in part, and vacate in part.²⁵

²⁵ At oral argument, and in a letter addressed to the Court after oral argument, petitioners contended that the Secretary's recent amendment of OSHA's so-called "Cancer Policy" in light of this Court's decision in *Industrial Union Department v. American Petroleum Institute*, — U. S. — (1980), was relevant to the issues in the present case. We disagree.

OSHA amended its Cancer Policy to "carry out the Court's interpretation of the Occupational Safety and Health Act of 1970 that consideration must be given to the significance of the risk in the issuance of a carcinogen standard and that OSHA must consider all relevant evidence in making these determinations." 46 Fed. Reg. 4889, col. 3 (1981). Previously, although lacking such evidence as dose response data, the Secretary presumed that no safe exposure level existed for carcinogenic substances. *Industrial Union Department v. American Petroleum Institute*, *supra*, slip op., at 10, 13-14, 25, n. 39-40. Following this Court's decision, OSHA deleted those provisions of the Cancer Policy which required the "automatic setting of the lowest feasible level" without regard to determinations of risk significance. *Id.*, at 4890, col. 1.

In distinct contrast with its Cancer Policy, OSHA expressly found that "exposure to cotton dust presents a significant health hazard to employees," 43 Fed. Reg. 27350, col. 1, and that "cotton dust produced significant health effects at low levels of exposure," *id.*, at 27358, col. 2. In addition, the agency noted that "grade ½ byssinosis and associated pulmonary function decrements are significant health effects in themselves and should be prevented in so far as possible." *Id.*, at 27354, col. 2. In making its assessment of significant risk, OSHA relied on dose response curve data (the Merchant Study) showing that 25% of employees suffered at least Grade ½ byssinosis at a 500 ug/m³ PEL, and that 12.7% of all employees would suffer byssinosis at the 200 ug/m³ PEL standard. *Id.*, at 27358, col. 2 and 3. Examining the Merchant Study in light of other studies in the record, the agency found that "the Merchant study provides a reliable assessment of health risk to cotton textile workers from cotton dust." *Id.*, at 27357, col. 3. OSHA concluded that the "prevalence of

II

The principal question presented in this case is whether the Occupational Safety and Health Act requires the Secretary, in promulgating a standard pursuant to § 6 (b)(5) of the Act, 29 U. S. C. § 655 (b)(5), to determine that the costs of the standard bear a reasonable relationship to its benefits. Relying on §§ 6 (b)(5) and 3(8) of the Act, 29 U. S. C. §§ 655 (b)(5), 652 (8), petitioners urge not only that OSHA must show that a standard addresses a significant risk of material health impairment, see *Industrial Union Department v. American Petroleum Institute*, *supra*, slip op., at 29, but also that OSHA must demonstrate that the reduction in risk of material health impairment is significant in light of the costs of attaining that reduction. See Brief for Petitioners ATMI et al., at 38-41.²⁶ Respondents on the other hand

byssinosis should be significantly reduced" by the 200 ug/m³ PEL. *Id.*, at 27359, col. 3; see *id.*, at 27359, col. 1 ("200 ug/m³ represents a significant reduction in the number of affected workers"). It is difficult to imagine what else the agency could do to comply with this Court's decision in *Industrial Union Department v. American Petroleum Institute*.

²⁶ Petitioners ATMI et al. express their position in several ways. They maintain that OSHA "is required to show that a reasonable relationship exists between the risk reduction benefits and the costs of its standards." Brief for Petitioners ATMI et al., at 36. Petitioners also suggest that OSHA must show that "the standard is expected to achieve a *significant reduction in* [the significant risk of material health impairment]" based on "an assessment of the costs of achieving it." *Id.*, at 38, 40. Allowing that "[t]his does not mean that OSHA must engage in a rigidly formal cost-benefit calculation that places a dollar value on employee lives or health," *id.*, at 39, petitioners describe the required exercise as follows:

"First, OSHA must make a responsible determination of the costs and risk reduction benefits of its standard. Pursuant to the requirement of Section 6 (f) of the Act, this determination must be factually supported by substantial evidence in the record. The subsequent determination whether the reduction in health risk is 'significant' (based upon the factual assessment of costs and benefits) is a judgment to be made by the agency in the first instance." *Id.*, at 40.

Respondent disputes petitioners' description of the exercise, claiming

contend that the Act requires OSHA to promulgate standards that eliminate or reduce such risks "to the extent such protection is technologically and economically feasible." Brief for Respondent Secretary of Labor, at 38; Brief for Respondent Unions, at 26-27.²⁷ To resolve this debate, we must turn to the language, structure, and legislative history of the Occupational Safety and Health Act.

A

The starting point of our analysis is the language of the statute itself. *Steadman v. SEC*, — U. S. —, — (1981); *Reiter v. Sonotone Corp.*, 442 U. S. 330, 337 (1979). Section 6 (b)(5) of the Act, 29 U. S. C. § 655 (b)(5) (emphasis added), provides:

"The Secretary, in promulgating standards dealing

that any meaningful balancing must involve "placing a [dollar] value on human life and freedom from suffering," Brief for Respondent Secretary of Labor, at 59, and that there is no other way but through formal cost-benefit analysis to accomplish petitioners' desired balancing, *id.*, at 59-60. Cost-benefit analysis contemplates "systematic enumeration of all benefits and all costs, tangible and intangible, whether readily quantifiable or difficult to measure, that will accrue to all members of society if a particular project is adopted." E. Stokey and R. Zeckhauser, *A Primer for Policy Analysis* 134 (1978); see National Academy of Sciences, *Decision Making for Regulation Chemical in the Environment* 38 (1975). See generally E. Mishan, *Cost-Benefit Analysis* (1976); Prest and Turvey, *Cost-Benefit Analysis*, in 300 *Economic Journal* 683 (1965). Whether petitioners' or respondent's characterization is correct, we will sometime refer to petitioner's proposed exercise as "cost-benefit analysis."

²⁷ As described by the union respondents, the test for determining whether a standard promulgated to regulate a "toxic material or harmful physical agent" satisfies the Act has three parts:

"First, whether the 'place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices.' [*International Union Department*, slip op., at 32 (plurality opinion)]. Second, whether of the possible available correctives the Secretary had selected 'the standard . . . that is most protective'. *Ibid.* Third, whether that standard is 'feasible.'" Brief for Respondent Unions, at 40-41.

with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.”²⁸

Although their interpretations differ, all parties agree that the phrase “to the extent feasible” contains the critical language in § 6 (b)(5) for purposes of this case.

The plain meaning of the word “feasible” supports respondents’ interpretation of the statute. According to Webster’s Third New International Dictionary of the English Language, “feasible” means “capable of being done, executed, or effected.” *Id.*, at 831 (1976). Accord, The Oxford English Dictionary 116 (1933) (“Capable of being done, accomplished or carried out”); Funk & Wagnalls New “Standard” Dictionary of the English Language 903 (1957) (“That may be done, performed or effected”). Thus, § 6 (b)(5) directs the Secretary to issue the standard that “most adequately assures . . . that no employee will suffer material impairment of health,” limited only by the extent to which this is “capable of being done.” In effect then, as the Court of Appeals held, Congress *itself* defined the relationship between costs and benefits, by placing the “benefit” of worker health above

²⁸ Section 6(b)(5) of the Act, 29 U. S. C. § 655 (b)(5), also provides: “Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria, and of the performance desired.”

all other considerations save those making attainment of this "benefit" unachievable. Further balancing of costs and benefits by the Secretary would be inconsistent with the command set forth in § 6 (b) (5), because it might lead to a different balance than that struck by Congress. Thus, not only is cost-benefit analysis by OSHA not required by the statute, but it is precluded.²⁹ See *Industrial Union Department v. American Petroleum Institute*, *supra*, slip op., at 32 (MARSHALL, J., dissenting).

When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute. One early example is the Flood Control Act of 1936, 33 U. S. C. § 710a.

"[T]he Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the *benefits to whomsoever they may accrue are in excess of the estimated costs*, and if the lives and social security of people are otherwise adversely affected."

A more recent example is the Outer Continental Shelf Lands

²⁹ In this case we are faced only with the issue whether the Act requires or permits OSHA to balance costs and benefits in promulgating a *single* toxic material and harmful physical agent standard under § 6 (b) (5). Petitioners argue that without cost-benefit balancing, the issuance of a single standard might result in a "serious misallocation of the finite resources that are available for the protection of worker safety and health," given the other health hazards in the workplace. Reply Brief for Petitioners ATMI et al., at 10; see Brief for Petitioners ATMI et al., at 38-39. This argument is more properly addressed to other provisions of the Act which may authorize OSHA to explore costs and benefits for deciding between issuance of several standards regulating different varieties of health and safety hazards, *e. g.*, § 6 (g) of the Act, 29 U. S. C. § 655 (g); see *Industrial Union Department v. American Petroleum Institute*, *supra*, slip op., at 33, or for promulgating other types of standards not issued under § 6 (b) (5). We express no view on these questions.

Act Amendments of 1978, 43 U. S. C. § 1347 (b), providing that offshore drilling operations shall use

“the best available and safest technologies which the Secretary determines to be economically *feasible*, wherever failure of equipment would have a significant effect on safety, health, or the environment, except where the Secretary determines that the *incremental benefits are clearly insufficient to justify the incremental costs of using such technologies.*”

These and other statutes³⁰ demonstrate that Congress uses

³⁰ See, e. g., Energy Policy and Conservation Act of 1975, 42 U. S. C. § 6295 (c), (d); Federal Water Pollution Control Act Amendments of 1972, 33 U. S. C. § 1312 (b)(1), (2); § 1314 (b)(1)(B); Clean Water Act Amendments of 1977, 33 U. S. C. § 1314 (b)(4)(B); Clean Air Act Amendments of 1970, 42 U. S. C. § 7545 (c)(2)(B). In the Water Pollution Control Act Amendments of 1972, Congress directed the Administrator to consider “the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application.” 33 U. S. C. § 1314 (b)(1) (“BPT” limitations). With regard to 1987 effluent limitations, the Administrator is directed to consider total cost, but not in comparison with effluent reduction benefits. *Id.*, § 1314 (b)(2)(B) (“BAT” limitations). See *EPA v. National Crushed Stone Assn.*, No. 79-770, slip op., at 5-6, 6, n. 10, 11-12.

In other statutes, Congress has used the phrase “unreasonable risk,” accompanied by explanation in legislative history, to signify a generalized balancing of costs and benefits. See, e. g., the Consumer Safety Act of 1972, 15 U. S. C. § 2056 (a) (“unreasonable risk of injury”); H. R. Rep. No. 92-1153, 92d Cong., 2d Sess., 33 (1972) (where the House stated:

“It should be noted that the Commission’s authority to promulgate standards under this bill is limited to instances where the hazard associated with a consumer product presents an unreasonable risk of death, injury, or serious or frequent illness. . . . Protection against unreasonable risks is central to many Federal and State safety statutes and the courts have had broad experience in interpreting the term’s meaning and application. It is generally expected that the determination of unreasonable hazard will involve the Commission in balancing the probability that risk will result in harm and the gravity of such harm against the effect on the product’s utility, costs, and availability to the consumer.”);

S. Rep. No. 92-749, 92d Cong., 2d Sess., 14-15. See also *Aqua Slide ‘N’ Dive Corp. v. Consumer Product Safety Commission*, 569 F. 2d 831, 839

specific language when intending that an agency engage in cost-benefit analysis. See *Industrial Union Department v. American Petroleum Institute*, *supra*, slip op., at 23, n. 27 (MARSHALL, J., dissenting). Certainly in light of its ordinary meaning, the word "feasible" cannot be construed to articulate such congressional intent. We therefore reject the argument that Congress required or authorized cost-benefit analysis in § 6 (b)(5).

B

Even though the plain language of § 6 (b)(5) supports this construction, we must still decide whether § 3 (8), the general definition of an occupational safety and health standard, either alone or in tandem with § 6 (b)(5), incorporates a cost-benefit requirement for standards dealing with toxic materials or harmful physical agents. Section 3 (8) of the Act, 29 U. S. C. § 652 (8) (emphasis added), provides:

"The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, *reasonably necessary or appropriate* to provide safe or healthful employment and places of employment."

Taken alone, the phrase "reasonably necessary or appropriate" might be construed to contemplate some balancing of the costs and benefits of a standard. Petitioners urge that, so construed, § 3 (8) engrafts a cost-benefit analysis require-

(CA5 1978); *Forester v. Consumer Product Safety Commission*, — U. S. App. D. C. —, 559 F. 2d 774, 789 (1977).

At least one Senator thought that the Occupational Safety and Health Act did not contemplate cost-benefit analysis. In 1973, Senator Chiles introduced an amendment to the Act that, *inter alia*,

"directs the Secretary to recognize the cost-benefit ratio in promulgating a new standard and to publish information relative to the projected financial impact. This provision will promote the development of standards justifiable in terms of the benefits to be derived and afford those to be affected an opportunity to make a reasoned evaluation of the proposal." 119 Cong. Rec. 42151.

ment on the issuance of § 6 (b)(5) standards, even if § 6 (b)(5) itself does not authorize such analysis. We need not decide whether § 3 (8), standing alone, would contemplate some form of cost-benefit analysis. For even if it does, Congress specifically chose in § 6 (b)(5) to impose separate and additional requirements for issuance of a subcategory of occupational safety and health standards dealing with toxic materials and harmful physical agents: it required that those standards be issued to prevent material impairment of health *to the extent feasible*. Congress could reasonably have concluded that *health* standards should be subject to different criteria than *safety* standards because of the special problems presented in regulating them. See *Industrial Union Department v. American Petroleum Institute*, *supra*, slip op., at 38-39, n. 54 (plurality opinion).

Agreement with petitioners' argument that § 3 (8) imposes an additional and overriding requirement of cost-benefit analysis on the issuance of § 6 (b)(5) standards would eviscerate the "to the extent feasible" requirement. Standards would inevitably be set at the level indicated by cost-benefit analysis, and not at the level specified by § 6 (b)(5). For example, if cost-benefit analysis indicated a protective standard of 1000 ug/m³ PEL, while feasibility analysis indicated a 500 ug/m³ PEL, the agency would be forced by the cost-benefit requirement to choose the less stringent point.⁸¹ We cannot believe that Congress intended the general terms of § 3 (8) to countermand the specific feasibility requirement of § 6 (b)(5). Adoption of petitioners' interpretation would effectively write § 6 (b)(5) out of the Act. We decline to render Congress' decision to include a feasibility requirement

⁸¹ In addition, as the legislative history makes plain, see *infra*, at 23-24, any standard that was not economically or technologically feasible would *a fortiori* not be "reasonably necessary or appropriate" under the Act. See *Industrial Union Department v. Hodgson*, — U. S. App. D. C. —, 499 F. 2d 467, 478 (1974) ("Congress does not appear to have intended to protect employees by putting their employers out of business").

nugatory, thereby offending the well-settled rule that all parts of a statute, if possible, are to be given effect. *E. g.*, *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U. S. 609, 633-634 (1973); *Jarecki v. G. D. Searle & Co.*, 367 U. S. 303, 307-308 (1961). Congress eschewed any further balancing by the agency for toxic material and harmful physical agents standards, and we should not "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, *supra*, at 631, quoting *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480, 489 (1947).³²

C

The legislative history of the Act, while concededly not crystal clear, provides general support for respondents' interpretation of the Act. The congressional reports and debates certainly confirm that Congress meant "feasible" and nothing else in using that term. Congress was concerned that the Act might be thought to require achievement of absolute safety, an impossible standard, and therefore insisted that

³² This is not to say that § 3 (8) might not require the balancing of costs and benefits for standards promulgated under provisions other than § 6 (b) (5) of the Act. As a plurality of this Court noted in *Industrial Union Department*, if § 3 (8) had no substantive content, "there would be no statutory criteria at all to guide the Secretary in promulgating either national consensus standards or permanent standards other than those dealing with toxic materials and harmful physical agents." Slip op., at 29-30, n. 45. Furthermore, the mere fact that a § 6 (b) (5) standard is "feasible" does not mean that § 3 (8)'s "reasonably necessary or appropriate" language might not impose additional restraints on OSHA. For example, all § 6 (b) (5) standards must be addressed to "significant risks" of material health impairment. *Id.*, at 32. In addition, if the use of one respirator would achieve the same reduction in health risk as the use of five, the use of five respirators was "technologically and economically feasible," and OSHA thus insisted on the use of five, then the "reasonably necessary or appropriate" limitation might come into play as an additional restriction on OSHA to choose the one-respirator standard. In this case we need not decide all the applications that § 3 (8) might have, either alone or together with § 6 (b) (5).

health and safety goals be capable of economic and technological accomplishment. Perhaps most telling is the absence of any indication whatsoever that Congress intended OSHA to conduct its own cost-benefit analysis before promulgating a toxic material or harmful physical agent standard. The legislative history demonstrates conclusively that Congress was fully aware that the Act would impose real and substantial costs of compliance on industry, and believed that such costs were part of the cost of doing business. We thus turn to the relevant portions of the legislative history.

Neither the original Senate bill, S. 2193, introduced by Senator Williams, nor the original House bill, H. R. 16785, introduced by Representative Daniels, included specific provisions controlling the issuance of standards governing toxic materials and harmful physical agents, Legis. Hist. 1, 6-7 (Williams bill); 721, 728-732 (Daniels bill), although both contained the definitional section now codified as § 3 (8).⁸³ The House Committee on Education and Labor, to which the Daniels bill was referred, reported out an amended bill that included the following section:

"The Secretary, in promulgating standards under this subsection, shall set the standard which most adequately assures, on the basis of the best available professional evidence, that no employee will suffer any impairment of health or functional capacity, or diminished life expectancy even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." H. R. Rep. No. 91-1291, 91st Cong., 2d Sess., 4 (1970) (to accompany H. R. 16785); Legis. Hist. 834.

The Senate Committee on Labor and Public Welfare, reporting on the Williams bill, included a provision virtually

⁸³ Although both versions of the Act contained provisions identical to § 3 (8), 29 U. S. C. § 652 (8), there is no discussion in the legislative history of the meaning of the phrase "reasonably necessary or appropriate."

identical to the House version, except for the additional requirement that the Secretary set the standard "which most adequately and feasibly assures . . . that no employee will suffer any impairment of health." Legis. Hist. 242 (the Senate provision was numbered § 6(b)(5)) (emphasis added). This addition to the Williams bill was offered by Senator Javits, who explained his amendment:

"As a result of this amendment the Secretary, in setting standards, is expressly required to consider feasibility of proposed standards. This is an improvement over the Daniels bill [as reported out of the House Committee], which might be interpreted to require *absolute* health and safety in all cases, regardless of feasibility, and the Administration bill, which contains no criteria for standards at all. S. Rep. No. 91-1282, 91st Cong., 2d Sess., 58; Legis. Hist. 197 (emphasis added).³⁴

³⁴ Petitioners' primary legislative history argument is that Senator Javits "took the position that OSHA standards should be 'feasible' in the sense of being 'reasonable' and 'practical' as well as technologically achievable." Brief for Petitioners ATMI et al., at 32. A review of the record belies this contention. Senator Javits himself had introduced the Administration's bill, S. 2788, which he observed contained no criteria for issuance of standards. Legis. Hist. 31, 39-42. That proposed legislation, which established a National Occupational Safety and Health Board to promulgate standards, required the Board to submit proposed standards to an appropriate national standards-producing organization "to prepare a report on the technical feasibility, reasonableness and practicality of such standard." *Id.*, at 39. Furthermore, either the Secretary of Labor or the Secretary of Health, Education, and Welfare could object to a proposed standard on the basis, *inter alia*, that it "is not feasible," *id.*, at 40, at which point the Board could reaffirm the standard by a majority vote, *ibid.* President Nixon's message accompanying S. 2788, which Senator Javits inserted in the Congressional Record, described the "report on the technical feasibility, reasonableness and practicality of such standard" under the Act as a "report on the feasibility of the proposed standards." 115 Cong. Rec. 22517.

From this slim reed petitioners fashion their legislative history argument. But even if Senator Javits fully subscribed to statements by Presi-

Thus the Senator's concern was that a standard might require "absolute health and safety" without any consideration as to whether such a condition was achievable. The full Senate Committee also noted that standards promulgated under this provision "shall represent feasible requirements," *id.*, at 7; Legis. Hist. 147, and commented that "[s]uch standards should be directed at assuring, *so far as possible*, that no employee will suffer impaired health . . .," *ibid.* (emphasis added).

The final amendments to this Senate provision, resulting in § 6 (b)(5) of the Act, were proposed and adopted on the Senate floor after the Committee reported out the bill. Senator Dominick, who played a prominent role in this amendment process, see Legis. Hist. 526 (comments of Sen. Javits); 527 (comments of Sen. Williams), continued to be concerned that the Act might be read to require absolute safety. He therefore proposed that the entire first sentence of § 6 (b)(5) be struck, explaining:

"This requirement is inherently confusing and unrealistic. It could be read to require the Secretary to ban all occupations in which there remains *some* risk of injury, impaired health, or life expectancy. In the case of all occupations, it will be impossible to eliminate all risks to safety and health. Thus, the present criteria could, if literally applied, close every business in this nation. In addition, in many cases, the standard which might most 'adequately' and 'feasibly' assure the elimination of the danger would be the prohibition of the occupation itself." Legis. Hist. 367 (comments of Sen.

dent Nixon on the proposed legislation, of which there is some doubt, see 115 Cong. Rec. 22512, this hardly supports the view that the Senator's addition of the feasibility requirement to the Williams bill included any such baggage. After all, the Senator described his amendment only with the word "feasible," and specifically distinguished the amended Williams bill from the Administration's, on the basis of the latter's lack of criteria.

Dominick on his proposed amendment No. 1054) (emphasis in original).

In the ensuing floor debate on this issue, Senator Dominick reiterated his concern that "[i]t is unrealistic to attempt, as [the Committee's Section 6 (b)(5)] apparently does, to establish a utopia free from any hazards. Absolute safety is an impossibility. . . ." Legis. Hist. 480.³⁵ The Senator concluded that "[a]ny administrator responsible for enforcing the statute will be faced with an impossible choice. Either he must forbid employment in all occupations where there is any risk of injury, even if the technical state of the art could not remove the hazard, or he must ignore the mandate of Congress. . . ." *Id.*, at 481-482.

Senator Dominick failed in his efforts to have the first sentence of § 6 (b)(5) deleted. However, after working with Senators Williams and Javits, he introduced an amended version of the first sentence which he thought "agreeable to all" and which became § 6 (b)(5) as it now appears in the Act. *Id.*, at 502. This amendment limited the applicability of § 6 (b)(5) to "toxic materials and harmful physical agents," changed "health impairment" to "material health impairment," and deleted the reference to "diminished life expectancy." Significantly, the feasibility requirement was left intact in the statute. Instead of the phrase "which most adequately and feasibly assures," the amendment merely substituted "which most adequately assures, to the extent feasi-

³⁵ Senator Dominick gave several examples. For instance:

"[L]et us take a fellow who is a streetcar conductor or a bus conductor at the present time. How in the world, in the process of the pollution we have in the streets or in the process of the automobile accidents that we have all during a working day of anyone driving a bus or trolley car, or whatever it may be, can we set standards that will make sure he will not have any risk to his life for the rest of his life? It is totally impossible for this to be put in a bill; and yet it is in the committee bill." Legis. Hist. 423. See also *id.*, at 481; 345.

ble," to emphasize that the feasibility requirement operated as a limit on the promulgation of standard under § 6 (b) (5).

Senator Dominick believed that his modifications made clearer that attainment of an absolutely safe working environment could not be achieved through "prohibition of the occupation itself," *id.*, at 367, and that toxic material and harmful physical agent standards should not address frivolous harms that exist in every workplace. The feasibility requirement, along with the need for a "material health impairment," were thus thought to satisfy these two concerns. He explained the effect of the amendment:

"What we were trying to do in the bill—unfortunately, we did not have the proper wording or the proper drafting—was to say that when we are dealing with toxic agents or physical agents, we ought to take such steps as are feasible and practical to provide an atmosphere within which a person's health or safety would not be affected. Unfortunately, we had language providing that anyone would be assured that no one would have a hazard. . . ." *Id.*, at 502.

Senator Williams added that the amendment "will provide a continued direction to the Secretary that he shall be required to set the standard which most adequately and to the greatest extent feasible assures" that no employee will suffer any material health impairment. *Id.*, at 503. The Senate thereafter passed S. 2193. One week later, the House passed a substitute bill for its original bill, which failed to contain any substantive criteria for the issuance of health standards. Legis. Hist. 1094-1096. At the joint House-Senate Conference, however, the House conferees acceded to the Senate's version of § 6 (b) (5).⁸⁶

⁸⁶ In acceding, the House obtained Senate agreement to another amendment, now § 6 (b) (6) (A) of the Act, that allowed employers to petition for a temporary variance from an occupational safety and health standard in certain cases, except that "[e]conomic hardship is not to be a con-

Not only does the legislative history confirm that Congress meant "feasible" rather than "cost-benefit" when it used the former term, but it also shows that Congress understood that the Act would create substantial costs for employers, yet intended to impose such costs when necessary to create a safe and healthful working environment.⁸⁷ Congress viewed the costs of health and safety as a cost of doing business. Senator Yarborough, a cosponsor of the Williams bill, stated: "We know the costs would be put into consumer goods but that is the price we should pay for the 80 million workers in America." Legis. Hist. 444. He asked:

"One may well ask too expensive for whom? Is it too

sideration for the qualification for a temporary extension order." H. R. Conference Rep. No. 91-1765, 91st Cong., 2d Sess., 35; Legis. Hist. 1188. The Conference Report limited the variance procedure to the following cases:

"unavailability of professional or technical personnel or of necessary materials or equipment or because necessary construction or alteration of facilities cannot be completed on time. . . . Such an order may be issued for a maximum period of one year and may not be renewed more than twice." *Ibid.*

⁸⁷ Because the costs of compliance would weigh particularly heavily on small businesses, Congress provided in § 28 of the Act an amendment to the Small Business Act, 15 U. S. C. § 636 making small businesses eligible for economic assistance through the Small Business Administration to comply with standards promulgated by the Secretary. Legis. Hist. 1257. Senator Dominick explained:

"There is a provision in the bill which recognizes the impact that this particular legislation may have on small businesses. . . . It permits the Secretary to make loans to small businesses wherever the standards that are set by the National Government are so severe as to have caused a real and substantial economic injury. Under those circumstances, the Secretary is entitled, through the Small Business Administration, to make loans to those businesses to get them over the hump, because of the need for new equipment, or because of new conditions within the shop, which would permit them to continue in operation.

"I think that is a very significant and important provision for minimizing economic injury which could occur if the bill resulted in situations which would have very serious effects on businesses." Legis. Hist. 525.

expensive for the company who for lack of proper safety equipment loses the services of its skilled employees? Is it too expensive for the employee who loses his hand or leg or eyesight? Is it too expensive for the widow trying to raise her children on meager allowance under workmen's compensation and social security? And what about the man—a good hardworking man—tied to a wheel chair or hospital bed for the rest of his life? That is what we are dealing with when we talk about industrial safety. . . . We are talking about people's lives, not the indifference of some cost accountants." Legis. Hist. 510.

Senator Eagleton commented that "[t]he costs that will be incurred by employers in meeting the standards of health and safety to be established under this bill are, in my view, *reasonable and necessary costs of doing business*." Legis. Hist. 1150-1151 (emphasis added).³⁸

Other Members of Congress voiced similar views.³⁹ Nowhere is there any indication that Congress intended a fur-

³⁸ Congress was concerned that some employers not obtain a competitive advantage over others by declining to invest in worker health and safety:

"Although many employers in all industries have demonstrated an exemplary degree of concern for health and safety in the workplace, their efforts are to often undercut by those who are not so concerned. Moreover, the fact is that many employers—particularly smaller ones—simply cannot make the necessary investment in health and safety, and survive competitively, unless all are compelled to do so." S. Rep. 91-1282, 91st Cong., 2d Sess., 4, Legis. Hist. 144.

³⁹ See, e. g., Legis. Hist. 1030-1031 (remarks of Congressman Dent):

"Although I am very much disturbed over adding new costs to the operation of our production facilities because of the threats from abroad, I would say there is a greater concern and that must be for the production men who do the producing—the men who work in the service industries and the men and women in this country who daily go out and keep the economy moving and make it safe for all of us to live and to work and to be able to prosper in it."

ther balancing by OSHA of the benefits of worker health and safety against the costs of achieving them. Indeed Congress thought that the *financial costs* of health and safety problems in the workplace were as large or larger than the *financial costs* of eliminating these problems. In its statement of findings and declaration of purpose encompassed in the Act itself, Congress announced that "personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payment." 29 U. S. C. § 651 (a) The Senate was well aware of the magnitude of these costs:

"[T]he economic impact of industrial deaths and disability is staggering. Over \$1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is estimated to be over \$8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses," S. Rep., *supra*, at 2; Legis. Hist. 142.

Senator Eagleton summarized, "Whether we, as individuals, are motivated by simple humanity or by simple economics, we can no longer permit profits to be dependent upon an unsafe or unhealthy worksite." Legis. Hist. 1150-1151.

III

Section 6 (f) of the Act provides that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." 29 U. S. C. § 655 (f). Petitioners contend that the Secretary's determination that the Cotton Dust Standard is "economically feasible" is not supported by substantial evidence in the record considered as a whole. In particular, they claim (1) that OSHA underestimated the financial costs necessary to meet the Standard's requirements; and (2) that

OSHA incorrectly found that the Standard would not threaten the economic viability of the cotton industry.

In statutes with provisions virtually identical to § 6 (f) of the Act, we have defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 477 (1951). The reviewing court must take into account contradictory evidence in the record, *Universal Camera Corp. v. NLRB*, *supra*, at 487-488, but "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence," *Consolo v. Federal Maritime Commission*, 383 U. S. 607, 620 (1966). Since the Act places responsibility for determining substantial evidence questions in the Courts of Appeals, 29 U. S. C. § 655 (f), we apply the familiar rule that "[t]his Court will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied" by the court below. *Universal Camera Corp. v. NLRB*, *supra*, at 491; see *Mobil Oil Corp. v. FPC*, 417 U. S. 283, 292, 310 (1974); *FTC v. Standard Oil Co.*, 355 U. S. 396, 400-401 (1958). Therefore, our inquiry is not to determine whether we, in the first instance, would find OSHA's findings supported by substantial evidence. Instead we turn to OSHA's findings and the record upon which they were based to decide whether the Court of Appeals "misapprehended or grossly misapplied" the substantial evidence test.

A

OSHA derived its cost estimate for industry compliance with the Cotton Dust Standard after reviewing two financial analyses, one prepared by the Research Triangle Institute (RTI), an OSHA-contracted group, the other by industry representatives (Hocutt-Thomas).⁴⁰ The agency carefully

⁴⁰ See RTI, Cotton Dust: Technological Feasibility Assessment and

explored the assumptions and methodologies underlying the conclusions of each of these studies. From this exercise the agency was able to build upon conclusions from each which it found reliable and explain its process for choosing its cost estimate. A brief summary of OSHA's treatment of the two studies follows.

OSHA rejected RTI's cost estimate of \$1.1 billion for textile industry engineering controls for three principal reasons.⁴¹ First, OSHA believed that RTI's estimate should be discounted by 30%, 43 Fed. Reg. 27372, col. 3, because that estimate was based on the assumption that engineering controls would be applied to all equipment in mills, including those processing pure synthetic fibers, even though cotton dust is not generated by such equipment. RTI had observed that "[e]xclusion of equipment processing man-made fibers only could reduce these costs by as much as 30 percent." Ex. 6-76, Ct. of App. J. A. 585.⁴² Since the Standard did not re-

Final Inflationary Impact Statement (1976), Ex. 6-76, Ct. of App. J. A. 457, 573-748; RTI, Technological Feasibility and Economic Impact of Regulations for Cotton Dust: Testimony to be Presented by the Research Triangle Institute at Public Hearing (1977), Ex. 16, Ct. of App. J. A. 1320, 1351-1357. The industry estimates were presented by Hovan Hocutt and Arthur Thomas, employees of dust control equipment manufacturers. Statement of Hovan Hocutt, Senior Vice President, Engineering, Pneumafil Corp., Ex. 60, Ct. of App. J. A. 2228-2247; Statement of Arthur Thomas, Senior Vice-President, The Bahnson Co., Ex. 62, Ct. of App. J. A. 2248-2257. OSHA referred collectively to these two statements as the Hocutt-Thomas estimate.

⁴¹ RTI estimated compliance costs of \$984.4 million for yarn production (opening through spinning), Ex. 6-76, Ct. of App. J. A. 473, and \$127.7 million for yarn processing (winding through weaving/slashing), *id.*, at 600. In another part of its study, RTI estimated yarn production costs of \$885.6 million. *Id.*, at 589. The explanation for this discrepancy is not readily apparent from the record, although it may be attributable to cost estimates for different years.

⁴² RTI made what it called a "conservative estimate" that "controls would be applied to all the production equipment in mills processing cotton and cotton-synthetic blends, even if part of their product is pure synthetic." Ex. 6-76, Ct. of App. J. A. 585.

quire controls on synthetics-only equipment, OSHA rejected RTI's assumption about application of controls to synthetics-only machines. 43 Fed. Reg. 27371, col. 3. Second, OSHA concluded that RTI "may have over-estimated compliance costs since some operations are already in compliance with the permissible exposure limit of the new standard." *Id.*, at 27370, col. 2 and 3. Evidence indicated that some mills had attained PELs of 200 ug/m³ or less, while others were below the 100 ug/m³ total dust level.⁴³ Therefore, OSHA disagreed with RTI's assumption that the industry had not reduced cotton dust exposure below the existing standard's 1000 ug/m³ total dust PEL. *Id.*, at 27370, col. 3. Third, OSHA found that the RTI study suffered from lack of recent accurate industry data. *Id.*, at 27373, col. 1; see Ex. 6-76, Ct. of App. J. A. 858; Ex. 16, *id.*, at 1357, 1359.

In light of these deficiencies in the RTI study, OSHA adopted the Hocutt-Thomas estimate for textile industry engineering controls of \$543 million,⁴⁴ emphasizing that, be-

⁴³ RTI's David LeSourd explained that RTI did not have data on the degree of compliance for the industry as a whole, but only for some specific mills. Ct. of App. J. A. 3637-3638. Therefore RTI merely assumed that industry-wide PELs were at a 1000 ug/m³ total dust PEL. Ex. 6-76, *id.*, at 579-580. The record contains conflicting evidence on the actual level of control in the industry. Some evidence suggests compliance by mills substantially better than the 1000 ug/m³ total dust level. See, e. g., Ex. 47, *id.*, at 2037 (66% of Burlington Industries work areas at or below 500 ug/m³, 28% below 200 ug/m³); Ex. 78, *id.*, at 2387. One expert, commenting on another study, observed that "substantial proportions of the industry are, in fact, within compliance of [200 ug/m³]." Ct. of App. J. A. 3637. Other evidence in the record suggests that some segments of the industry are not in compliance with the 1000 ug/m³ total dust PEL. See e. g., *id.*, at 3939 (criticizing RTI assumption of compliance). In any event, OSHA found that the "actual level of controls in the cotton industry could not be determined" on the basis of data available to RTI at the time of its study. 43 Fed. Reg. 27370, col. 3.

⁴⁴ OSHA's cost estimate included \$543 million for engineering controls (the Hocutt-Thomas estimate), \$7 million for monitoring, medical surveillance, and other provisions (the RTI estimate), \$31.5 million for waste

cause it was based on the most recent industry data, it was more realistic than RTI's estimate. 43 Fed. Reg. 27373, col. 1.⁴⁵ Nevertheless OSHA concluded that the Hocutt-Thomas estimate was overstated for four principal reasons. First, Hocutt-Thomas included costs of achieving the existing PEL of 1000 ug/m³, while OSHA thought it likely that compliance was more widespread and that some mills had in fact achieved the final standard's PEL. *Ibid.*, see *supra*, at 30, n. 43.⁴⁶ Second, Hocutt-Thomas declined to make any allowance for the trend toward replacement of existing production machines with newer more productive equipment.⁴⁷ Relying

processing, and \$75 million for seed processing, for a total of \$656.5 million. 43 Fed. Reg. 27380, col. 1.

⁴⁵ The Hocutt-Thomas study based its estimates on data obtained from a recent ATMI survey of cotton mills. Completed questionnaires from 353 mills, which processed 80% of the cotton bales in the United States, were returned. Ex. 60, Ct. of App. J. A. 2231.

⁴⁶ The Hocutt-Thomas study included an allowance for existing compliance efforts, by subtracting from its total estimate the cost of all engineering controls purchased by the industry prior to February 11, 1977. Ex. 60, Ct. of App. J. A. 2232, 2247. Whether this is a sufficient proxy for current industry compliance is not apparent from the record. Hocutt himself admitted that he did not have figures on what portion of the industry was meeting the 1000 ug/m³ total dust PEL. Ct. of App. J. A. 3941.

⁴⁷ John Figh, a vice-president at Chase Manhattan Bank specializing in the textile industry, commented on the trend toward modernizing equipment in the mills:

"[B]y continuing to upgrade plants with the most modern and efficient equipment, the textile manufacturing industry will likely not be required due to demand to add much in the way of new bricks and mortar. There may be some individual cases of out-of-date facilities being replaced by new buildings; but for the most part, I believe we will see *more* in the way of modernization of existing plants. . . ." Ex. 63, Ct. of App. J. A. 2260 (emphasis added).

One study explained why the costs of controls should be lower if a mill converts to new equipment as opposed to retrofitting old machines:

"1) The operating cost of new equipment with controls on that equipment is less than the operating cost of the old equipment with controls

on this "[n]atural production trend[]," 43 Fed. Reg. 27359, col. 1, OSHA concluded that fewer machines than estimated by Hocutt-Thomas would require retrofitting or other controls, *id.*, at 27372, col. 3. Third, OSHA thought that Hocutt-Thomas failed to take into account development of new technologies likely to occur during the four-year compliance period. *Ibid.*⁴⁸ Fourth, OSHA believed that Hocutt-Thomas might have improperly included control costs for synthetics-only machines, *ibid.*, an inclusion which could result in a 30% cost overestimate.⁴⁹

Petitioners criticize OSHA's adoption of the Hocutt-Thomas estimate, since that estimate was based on achievement of somewhat less stringent PELs than those ultimately promulgated in the final Standard.⁵⁰ Thus, even if the Hocutt-Thomas estimate was exaggerated, they assert that "only by the most remarkable coincidence would the amount

necessary for the older, slower equipment to meet proscribed [*sic*] dust levels; and 2) by going to newer equipment with controls there is a likelihood that increased production rates will result in recovery of some or all of the capital cost of control." Ex. 79A, *id.*, at 2532; see Ex. 79C, *id.*, at 2550-2551; Ex. 63, *id.*, at 2261; Ex. 78, *id.*, at 2376-2377.

⁴⁸ Chase Manhattan Bank vice-president Figh noted that "[t]here does not appear to be any vast new technology on the horizon," but that "[a]s for new machinery, evolutionary changes are continuing at what appears to me to be about the same rate as in the last few years." Ex. 63, Ct. of App. J. A. 2660-2661. One study is particularly critical of the assumption of a "static state of technology," Ex. 78, *id.*, at 2380, and documents technological advances that can be expected, *id.*, at 2380-2386. Some experts were less optimistic of the role of technology. See, *e. g.*, *id.*, at 3643-3644 (RTI study).

⁴⁹ Hocutt-Thomas had some information on the "ratio of synthetics to cotton in blends" in the mills, but it is not clear from the record if and how they used this information. Ex. 60, Ct. of App. J. A. 2230.

⁵⁰ The final Cotton Dust Standard calls for PELs of 200 ug/m³ in opening through roving and spinning through warping, and 750 ug/m³ for slashing and weaving. The Hocutt-Thomas study similarly assumed a 200 ug/m³ PEL for opening through roving, but assumed less stringent PELs of 500 ug/m³ for spinning through warping, and 1000 ug/m³ for slashing and weaving.

of that overestimate be equal to the additional costs required to attain the far more stringent limits of the Standard OSHA actually adopted." Brief for Petitioners ATMI et al., at 27; see Brief for Petitioner National Cotton Council of America, at 14-15. The agency itself recognized the problem cited by petitioners, but found itself limited in the precision of its estimates by the industry's refusal to make more of its own data available.⁵¹ OSHA explained that, "in the absence of the [industry] survey data [of textile mills], OSHA cannot develop more accurate estimates of compliance costs." 43 Fed. Reg. 27373, col. 1. Since § 6 (b)(5) of the Act requires that the Secretary promulgate toxic material and harmful physical agent standards "on the basis of the best available evidence," 29 U. S. C. § 655 (b)(5), and since OSHA could not obtain the more detailed confidential industry data it thought essential to further precision, we conclude that the agency acted reasonably in adopting the Hocutt-Thomas estimate.⁵² While a cost estimate based on the standard actually

⁵¹ For example, in questioning before an administrative law judge, Hocutt answered:

"Well, I'm beginning to wish I hadn't said anything about this, which I did, and I have to be helpful. Practically all of this information that I have is confidential and I couldn't reveal any of the sources. You can only take my word for the figures. I can't substantiate it in any manner." Ct. of App. J. A. 3929.

Petitioners note, however, that the industry subsequently provided its survey data to OSHA, and that the only information deleted was confidential information withheld by agreement with the agency in order to prevent identification of specific mills. Reply Brief for Petitioners ATMI et al., at 23, n. 32; see J. A. 388-390. OSHA responds that, "[b]ecause the number of machines was deleted and correlated dust data was not supplied, the data could not be used to support a specific cost adjustment." Brief for Respondent Secretary of Labor, at 64, n. 70. In any event, no contention is made that OSHA had access to Hocutt's own data used to calculate his cost estimate.

⁵² Both petitioners and respondents attempt their own calculations from evidence in the record to show the unreasonableness or reasonableness of OSHA's rough equation between the Hocutt-Thomas overstatement in

promulgated surely would be preferable,⁵³ we decline to hold as a matter of law that its absence under the circumstances required the Court of Appeals to find that OSHA's determination was unsupported by substantial evidence.⁵⁴

costs and the expense of achieving a Standard somewhat more stringent for some operations. See, *e. g.*, Brief for Petitioner National Cotton Council of America, at 9-10; Brief for Respondent Unions, at 14-18. Such manipulation of the data suggests a wide margin of error for any estimate, whether it be OSHA's, the industry's, or the unions'. Viewed in that light, the agency's candor in confessing its own inability to achieve a more precise estimate should not precipitate a judicial review that nonetheless demands what the congressionally-delegated "expert" says it cannot provide.

⁵³ The Secretary originally asked RTI to prepare cost estimates for several PEL levels, including 500, 200, and 100 ug/m³. Ex. 6-76, Ct. of App. J. A. 509. Clearly the Secretary intended to have cost information on the different PELs that he might promulgate. Although RTI provided estimates for these levels in its final report, OSHA found them to be too unreliable to adopt as final estimates. See *supra*, at ———.

Even if the Secretary had wanted to obtain a cost estimate, based on confidential industry data, for the actual PELs in the adopted Standard, it would have been unable to do so. Hocutt had concluded that it was technologically impractical to achieve PELs below 500 ug/m³ for the operations of spinning through warping, Ex. 60, Ct. of App. J. A. 2239-2241, and PELs below 1000 ug/m³ for weaving and slashing, *id.*, at 2241-2243. Therefore, he declined to prepare cost estimates of a 200 ug/m³ PEL for those operations. The Secretary obviously disagreed with his judgment of technological feasibility. We also note that, although petitioners challenged the technological feasibility of the final Cotton Dust Standard in the Court of Appeals, they have abandoned such challenge here. Brief for Petitioners ATMI et al., at 8, n. 16.

⁵⁴ The Court of Appeals observed that "the agency's underlying cost estimates are not free from imprecision," 617 F. 2d, at 662, but that "[t]he very nature of economic analysis frequently imposes practical limits on the precision which reasonably can be required of the agency," *id.*, at 661. We suspect that this results not only from the difficulty of obtaining accurate data, but also from the inherent crudeness of estimation tools. Of necessity both the RTI and Hocutt-Thomas studies had to rely on assumptions the truth or falsity of which could wreak havoc on the validity of their final numerical cost estimates. As the official charged

Therefore, whether or not in the first instance we would find the Secretary's conclusions supported by substantial evidence, we cannot say that the Court of Appeals in this case "misapprehended or grossly misapplied" the substantial evidence test when it found that "OSHA reasonably evaluated the cost estimates before it, considered criticisms of each, and selected suitable estimates of compliance costs," 617 F. 2d, at 661 (footnote omitted).

B

After estimating the cost of compliance with the Cotton Dust Standard, OSHA analyzed whether it was "economically feasible" for the cotton industry to bear this cost.⁵⁵ OSHA

by Congress with the promulgation of occupational safety and health standards that protect workers "to the extent feasible," the Secretary was obligated to subject such assumptions to careful scrutiny, and to decide how they might affect the correctness of the proffered estimates.

⁵⁵ In one of their questions presented, petitioners ATMI et al., ask whether "the statutory requirement that compliance with an OSHA standard must be 'economically feasible' can be satisfied merely by the agency's conclusion that the standard will not put the affected industry out of business." Pet. for Writ of Certiorari of ATMI et al., at 2. However, in argument in their brief, petitioners appear to treat this issue primarily as a substantial evidence question. See Brief for Petitioners ATMI et al., at 24-31. They finally summarize their position as follows:

"... OSHA must present a responsible prediction, supported by substantial evidence, of what its standard will cost and what impact it will have on such factors as production, employment, competition, and prices. And the agency must explain in a cogent manner—on the basis of intelligible criteria—why it concludes that a standard having such an economic impact is 'feasible.'" *Id.*, at 35 (footnote omitted).

As our review of OSHA's economic feasibility determination demonstrates, OSHA presented a "responsible prediction" of what its Standard would cost and its impact on "production, employment, competition, and prices." The agency concluded that its Standard is feasible because "compliance with [it] is well within the financial capability of the covered industries." 43 Fed. Reg. 27379, col. 3. OSHA also found that the industry "will be able to meet the demands for production of cotton products." *Id.*, at 27378, col. 2. We take these findings to mean, as the Secretary

concluded that it was, finding that "although some marginal employers may shut down rather than comply, the industry as a whole will not be threatened by the capital requirements of the regulation." 43 Fed. Reg. 27378, col. 2; see *id.*, at 27379, col. 3 ("compliance with the standard is well within the financial capability of the covered industries"). In reaching this conclusion on the Standard's economic impact, OSHA made specific findings with respect to employment, energy consumption, capital financing availability, and profitability. *Id.*, at 27377-27378. To support its findings, the agency relied primarily on RTI's comprehensive investigation of the Standard's economic impact.⁵⁶

RTI evaluated the likely economic impact on the cotton industry and the United States economy of OSHA's original proposed standard, an across-the-board 200 ug/m³ PEL. Ex. 6-76, Ct. of App. J. A. 626.⁵⁷ RTI had estimated a total

suggests, that "[a]t bottom, the Secretary must [and did] determine that the industry will maintain long-term profitability and competitiveness." Brief for Respondent Secretary of Labor, at 49. See also *United Steelworkers of America, v. Marshall*, No. 79-1048, slip op., at 144, — U. S. App. D. C. —, (1980) ("the practical question is whether the standard threatens the competitive stability of an industry"); *Industrial Union Department, v. Hodgson, supra*, — U. S. App. D. C., at 499 F. 2d, at 478. This interpretation by the Secretary is certainly consistent with the plain meaning of the word "feasible." See *Industrial Union Department v. American Petroleum Institute, supra*, slip op., at 31, n. 30 (MARSHALL, J., dissenting). Therefore, this case does not present, and we do not decide, the question whether a Standard that threatens the long-term profitability and competitiveness of an industry is "feasible" within the meaning of § 6 (b) (5) of the Act, 29 U. S. C. § 655 (b) (5).

⁵⁶ In contrast to the cost estimates prepared by RTI, OSHA did not find any major flaws with RTI's study of the economic impact of compliance costs.

⁵⁷ RTI specifically analyzed the impact of the Standard on the following areas in the cotton industry:

- "1) Additional employment requirements.
- "2) Energy consumption.

compliance cost of \$2.7 billion for a 200 ug/m³ PEL,⁵⁸ and used this estimate in assessing the economic impact of such a standard. *Id.*, at 736-737. As described *supra*, at 31, n. 44, OSHA estimated total compliance costs of \$656.5 million for the final Cotton Dust Standard,⁵⁹ a Standard less stringent than the across-the-board 200 ug/m³ PEL of the proposed standard. Therefore, the agency found that the economic impact of its Standard would be "much less severe" than that suggested by RTI for a 200 ug/m³ PEL estimate of \$2.7 billion. 43 Fed. Reg. 27378, col. 2. Nevertheless, it is instructive to review RTI's conclusions with respect to the economic impact of a \$2.7 billion cost estimate. RTI found:

"Implementation of the proposed [200 ug/m³] standard will require adjustments within the cotton textile industry that will take time to work themselves out and that may be difficult for many firms. In time, however, prices may be expected to rise and markets to adjust so that revenues will cover costs. Although the impact on any one firm cannot be specified in advance, nothing in the RTI study indicates that the cotton textile industry as a whole will be seriously threatened by the impact of

"3) Increases in production costs and consequent price increases by affected industries.

"4) Capital requirements and capital financing problems.

"5) Competition effects on profit and market structure.

"6) Inflationary impact on consumers and U. S. economy.

"7) Employment impact due to the contraction of output demand."

Ex. 6-76, Ct. of App. J. A. 626.

RTI also examined the economic impact of two other across-the-board PELs of 500 ug/m³ and 100 ug/m³. *Ibid.*

⁵⁸ This cost estimate included \$984.4 million for yarn production (opening through spinning), \$1.3879 billion for winding through weaving/slash-ing, \$292.2 million for cotton ginning, and \$32 million for waste processing. Ex. 6-76, Ct. of App. J. A. 737.

⁵⁹ Cotton ginning was the subject of a separate regulation not at issue in this case. 43 Fed. Reg. 27350, col. 1; see 29 CFR § 1910.1046 (1980).

the proposed standard for control of cotton dust exposure." Ex. 60, Ct. of App. J. A. 1380; *id.*, at 3620.

In reaching this conclusion, RTI analyzed the total and annual economic impact⁶⁰ on each of the different sectors of the cotton industry.

For example, in yarn production (opening through spinning), RTI found that the total additional capital requirement per dollar of industry shipment was 7.8 cents, and the the corresponding annual requirement was 1.9 cents. Ex. 6-76, Ct. of App. J. A. 729. Average price increases necessary to maintain pre-standard rates of return on investment were estimated to range from 0.22 cents to 6.25 cents per dollar of industry sales.⁶¹ *Ibid.* Even assuming no price increases,

⁶⁰ RTI's annual cost of compliance figure contained three components: an annualized capital charge, direct operating cost, and energy cost. Ex. 6-76, Ct. of App. J. A. 643. The annualized capital charge consisted of depreciation, interest, administrative overhead, property tax, and insurance. *Ibid.* Depreciation and interest were computed "by use of a capital recovery factor based upon the concept of capital rent, the value of which depends on the operating life of the equipment and the market interest rate." *Ibid.*

⁶¹ Petitioners' primary criticism of OSHA's reliance on the RTI study derives from their disagreement with RTI's assumption that compliance costs would be passed on to the consumers. Brief for Petitioners ATMI et al., at 28-29. This characterization misstates RTI's position. In calculating price increases necessary to maintain pre-standard rates of return, RTI "decided to adopt an extreme assumption of zero price demand elasticity in computing post-control price increases" because of difficulties in obtaining data necessary to compute elasticities for cotton yarns. Ex. 6-76, Ct. of App. J. A. 657. However, RTI carefully tested this assumption to determine "how much bias" it would introduce into the analysis. *Id.*, at 657-659. RTI concluded that, "unless the true demand elasticity for the output of the given sector is substantially greater than unity, our impact analysis based on the assumption of zero price elasticity of demand would not be invalidated." *Id.*, at 659. Therefore, unless a 1% increase in price was met with substantially more than a 1% decrease in demand, RTI's estimates of the price increases necessary to maintain

only one of the six yarn producing operations would experience a negative rate of return on investment, while the five other rates of return would range from 1.4% to 3.9%. *Id.*, at 652.⁶² RTI estimated the average pre-standard rate of return for the yarn producing sector as 4.1%. *Ibid.*

Through an output demand elasticity analysis, RTI determined that price increases necessitated by the 200 ug/m3 standard would result in a 1.68% contraction of cotton yarn consumption.⁶³ *Id.*, at 685; see *id.*, at 680-687. RTI also discussed the effects of such price increases on interfiber and domestic/foreign competition. RTI observed that "non-price factors have probably dominated" the competition between cotton and man-made fibers. *Id.*, at 623; 948-953.⁶⁴ Noting

pre-standard rates of return were valid. Since there was no evidence suggesting such an effect, RTI proceeded with its assumption.

In any event, RTI subsequently investigated short-term price elasticities of demand for 25 cotton consumer products, finding that 19 of them had elasticities less than or equal to unity. *Id.*, at 681.

⁶² RTI found higher price increases and lower rates of return when framing its analysis in pounds of cotton yarn produced. See Ex. 6-76, Ct. of App. J. A. 654, 729-730.

⁶³ Petitioner National Cotton Council of America criticizes RTI's use of short-term price elasticity coefficients, claiming that this underestimates long-term demand responses to price increases. Brief for Petitioner National Cotton Council of America, at 16-17. However, RTI's Dr. Lee, who conducted the elasticity analysis, observed that he used two independent procedures to compute demand contraction, and only one relied on short-term price elasticities. Ct. of App. J. A. 3626-3627. His "main procedure [was] input output table procedures," which produced an even smaller demand contraction estimate than those calculations relying on the short-term coefficients. *Ibid.*

⁶⁴ RTI cited such nonprice factors as "research expenditures, promotion and advertising, fiber and fabric development, fiber properties, and care characteristics of fabric." Ex. 6-76, Ct. of App. J. A. 623. John Figh, Chase Manhattan bank vice-president, observed that "polyester has grown at the expense of cotton over the last 10 years and I think it has penetrated most of the markets it can penetrate; . . . [T]he majority of

that international trade agreements restricting foreign imports of textile products "have tended to smother the effects of a small change in the relative prices of domestic versus foreign textile products," *id.*, at 622. RTI concluded that such small changes have had "very little impact" on domestic industries and markets, *id.*, at 961; see *id.*, at 954-961. In order to measure the ability of different sized textile companies to finance compliance costs, RTI constructed a ratio of capital requirements to profit after taxes. RTI found that two of the six yarn production operations would have financing difficulties, but that such difficulties decreased as company size increased. *Id.*, at 730.⁶⁵ Finally, impacts on energy costs, employment, inflation, and market structure were evaluated. See *id.*, at 728-731.⁶⁶

it, the growth of polyester at the expense of cotton, has been completed." Joint App. 474-475. He noted that some cotton products, such as towels and 100% cotton men's shirts, enjoy the support of consumer preferences. *Ibid.* Although RTI cited the energy crisis without detailing its possible impact on man-made fiber products, Ex. 6-76, Ct. of App. J. A. 948, OSHA observed that changes in petroleum prices, a key ingredient in synthetic products, may have important impacts on the competitive balance, see 43 Fed. Reg. 27370, col. 2.

⁶⁵ Two of the six yarn production operations had ratios less than 1, two had ratios less than 2, and the remaining two were less than 6. Ex. 6-76, Ct. of App. J. A. 665. Chase Manhattan Bank's John Figh agreed with RTI's assessment that financing the \$2.7 billion compliance cost for a 200 ug/m3 PEL standard would be most difficult for smaller textile companies. Ex. 63, Ct. of App. J. A. 2264-2265.

⁶⁶ RTI conducted similar economic impact analyses, although in less depth, for the twisting through weaving and waste processing sectors of the cotton industry covered by the proposed 200 ug/m3 PEL standard. Ex. 6-76, Ct. of App. J. A. 462. RTI found, for example, that price increases per dollar of industry sales ranged from .5 cents to 18 cents for twisting through weaving operations, and that some of these operations would experience "severe" financing difficulties. Ex. 6-76, Ct. of App. J. A. 733-734. To recount in further detail these conclusions would be an irrelevant exercise. RTI calculated that a 200 ug/m3 standard for weaving/slashing would cost \$1.259 billion, *id.*, at 600, and computed the

Relying on its comprehensive economic evaluation of the cotton industry's ability to absorb the \$2.7 billion compliance cost of a 200 ug/m³ PEL standard, RTI concluded that "nothing in the RTI study indicates that the cotton textile industry as a whole will be seriously threatened." Ex. 60, Ct. of App. J. A. 1380.⁶⁷ Therefore, it follows *a fortiori* that OSHA's estimated compliance cost of \$656.6 million is "economically feasible."⁶⁸ Even if OSHA's estimate were understated, we are fortified in observing that RTI found that a standard more than four times as costly was nevertheless economically feasible.

The Court of Appeals found that the agency "explained the economic impact it projected for the textile industry," and that OSHA has "substantial support in the record for its . . . findings of economic feasibility for the textile industry." 617 F. 2d, at 662. On the basis of the whole record,

economic impact based on that figure. But RTI had also estimated that compliance costs for a 500 ug/m³ PEL would be zero. *Ibid.* Since the final Cotton Dust Standard sets a 750 ug/m³ PEL for weaving/slashing, further review of RTI's conclusion with respect to its \$1.259 billion cost is particularly unnecessary.

⁶⁷ Petitioners note that, although RTI estimated that compliance with the Cotton Dust Standard would take 8 or more years, OSHA required compliance within four years. Brief for Petitioners ATMI et al., at 29. RTI chose an 8-year period primarily because of "problems the control industry may have in supplying the required equipment." Joint App. 415; see *id.*, at 415-416. If this proves to be the case, then presumably individual mills will be able to obtain variances from the Standard's requirements because of technological infeasibility. See 29 CFR § 1910.1043 (e)(1); 29 U. S. C. § 655 (6).

⁶⁸ Perhaps in light of this fact, neither petitioners ATMI et al. nor petitioner National Cotton Council of America frame their "economic impact" substantial evidence arguments based on OSHA's estimate of compliance costs. Instead, they adopt as a minimum RTI's \$2.7 billion estimate for compliance costs with the proposed standard's 200 ug/m³ PEL. Brief for Petitioner National Cotton Council of America, at 15-16; Brief for Petitioners ATMI et al., at 29.

we cannot conclude that the Court of Appeal's "misapprehended or grossly misapplied" the substantial evidence test.

III

The final Cotton Dust Standard places heavy reliance on the use of respirators to protect employees from exposure to cotton dust, particularly during the 4-year interim period necessary to install and implement feasible engineering controls.⁶⁹ One part of the respirator provision requires the employer to give employees unable to wear a respirator⁷⁰ the opportunity to transfer to another position, if available, where the dust level meets the standard's PEL. 29 CFR § 1910.1043 (f)(2)(v). When such a transfer occurs, the employer must guarantee that the employee suffers no loss of earnings or other employment rights or benefits.⁷¹ Peti-

⁶⁹ The final Standard, 29 CFR § 1910.1043 (f)(1), provides:

"Where the use of respirators is required under this section, the employer shall provide, at no cost to the employee, and assure the use of respirators which comply with the requirements of this paragraph (f). Respirators shall be used in the following circumstances:

"(i) During the time periods necessary to install or implement feasible engineering controls and work practice controls;

"(ii) During maintenance and repair activities in which engineering and work practice controls are not feasible;

"(iii) In work situations where feasible engineering and work practice controls are not yet sufficient to reduce exposure to or below the permissible exposure limit; and

"(iv) In operations specified under paragraph (g)(1).

"(v) Whenever an employee requests a respirator."

⁷⁰ An employee may be unable to wear a respirator because of facial irritation, severe discomfort, or impaired breathing. 43 Fed. Reg. 27387, col. 1 and 2.

⁷¹ The regulation, 29 CFR § 1019.1043 (f)(2)(v) (emphasis added), provides:

"Whenever a physician determines that an employee is unable to wear any form of respirator, including a power air purifying respirator, the employee shall be given the opportunity to transfer to another position which is available or later becomes available having a dust level at or

tioners do not object to the transfer provision, but challenge OSHA's authority under the Act to require employers to guarantee employees' wage and employment benefits following the transfer. The Court of Appeals held that OSHA has such authority. 617 F. 2d, at 675. We conclude that, whether or not OSHA has this underlying authority, the agency has failed to make the necessary determination or statement of reasons that its wage guarantee requirement is related to the achievement of a safe and healthful work environment.

Respondents urge several statutory bases for the authority exercised here. They cite § 2 (b) of the Act, 29 U. S. C. § 651, which declares that the purpose of the Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions"; § 2 (b)(5), *id.*, at § 651 (b)(5), which suggests achievement of the purpose "by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems"; § 6 (b)(5), *id.*, at § 655 (b)(5), which requires the agency to "set the standard which most adequately assures . . . that no employee will suffer material impairment of health or functional capacity . . ."; and § 3 (8), *id.*, at § 652 (8), which provides that a standard must require "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment." Brief for Respondent Secretary of Labor, at 68. Whatever methods these provisions authorize OSHA to apply, it is clear that such approaches must be justified on the basis of their relation to safety or health.

Section 6 (f) of the Act, 29 U. S. C. § 655 (f), requires that "*determinations of the Secretary*" must be supported

below the PEL. *The employer shall assure that an employee who is transferred due to an inability to wear a respirator suffers no loss of earnings or other employment rights or benefits as a result of the transfer.*"

by substantial evidence. Section 6 (e), 29 U. S. C. § 655 (e), requires the Secretary to include "a statement of the reasons for such action, which shall be published in the Federal Register." In his "Summary and Explanation of the Standard," the Secretary stated: "Each section includes an analysis of the record evidence and the policy considerations underlying the decisions adopted pertaining to specific provisions of the standard." 43 Fed. Reg. 27380, col. 2. But OSHA never explained the wage guarantee provision as an approach designed to contribute to increased health protection. Instead the agency stated that the "goal of this provision is to minimize any adverse economic impact on the employee by virtue of the inability to wear a respirator." 43 Fed. Reg. 27387, col. 3.⁷² Perhaps in recognition of this fact, respondents in their briefs argue that

"[e]xperience under the Act has shown that employees are reluctant to disclose symptoms of disease and tend to minimize work-related health problems for fear of being discharged or transferred to a lower paying job. . . .

⁷² In its specific discussion of the transfer/guarantee provision, occupying more than two-thirds of a column in the Federal Register, OSHA argued that "[i]t is manifestly unfair that employees who are unable to wear respirators suffer . . . economic detriment because their employers have not yet achieved compliance with the engineering control requirements of the standard, but are relying instead on the interim and less effective device of respirators." 43 Fed. Reg. 27387, col. 2 and 3. The agency then stated its judgment that the "protection [the transfer and guarantee regulation] affords should greatly increase the success of the standard's respiratory protection provisions." *Id.*, at 27387, col. 3. Since the Secretary had already stated an impermissible reason for the guarantee provision, we decline to accept this "boilerplate" statement as a sufficient determination and statement of reasons within the meaning of the Act. 29 U. S. C. §§ 655 (e), (f). See *Synthetic Organic Chemical Manufacturers Association v. Brennan*, 503 F. 2d 1155 (CA3 1974); *Industrial Union Department v. Hodgson*, *supra*, — U. S. App. D. C. —, 499 F. 2d, at 475-476. See also Berger & Riskin, Economic and Technological Feasibility in Regulating Toxic Substances Under the Occupational Safety and Health Act, 7 Ecology L. Q. 285, 298-299 (1978).

It may reasonably be expected, therefore, that many employees incapable of using respirators would continue to breathe unhealthy air rather than request a transfer, thus destroying the utility of the respirator program." Brief for Respondent Secretary of Labor, at 67; see Brief for Respondent Unions, at 51.⁷³

Whether these arguments have merit, and they very well may,⁷⁴ the *post-hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action. See *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402, 419 (1971); *Burlington Truck Lines v. United States*, 371 U. S. 156, 168-169 (1962); *SEC v. Chenery Corp.*, 318 U. S. 80, 87 (1943). For Congress gave OSHA the responsibility to protect worker health and safety, and to explain its reasons for its actions. Because the Act in no way authorizes OSHA to repair general unfairness to employees that is unrelated to achievement of health and safety goals, we hold that OSHA acted beyond statutory authority when it issued the wage guarantee regulation.

V

When Congress passed the Occupational Safety and Health Act in 1970, it chose to place pre-eminent value on assuring

⁷³ Although it cited no specific determination or statement of reasons proffered by the Secretary, the Court of Appeals was persuaded by this argument. 617 F. 2d., at 675.

⁷⁴ There is evidence in the record that might support such a determination. Dr. Merchant testified that a medical surveillance program alone would not be sufficient for identifying and relocating employees suffering from byssinosis. Joint App. 440-441. He observed:

"There is reluctance very often among the employee himself to leave his job. I think clearly some guarantees as to wages and opportunities must be an integral part of any recommendation to relocate somebody and it has been the experience in coal mining where miners are allowed, under the Coal Mine Health and Safety Act of 1968, to be transferred, a very low proportion of these men actually exercise their transfer rights. *Id.*, at 441.

employees a safe and healthful working environment, limited only by the feasibility of such an environment's achievement. We must measure the validity of the Secretary's actions against the requirements of that Act. For "[t]he judicial function does not extend to substantive revision of regulatory policy. That function lies elsewhere—in Congressional and Executive oversight or amendatory legislation." *Industrial Union Department v. American Petroleum Institute*, *supra*, slip op., at 2 (BURGER, C. J., concurring); see *Tennessee Valley Authority v. Hill*, 437 U. S. 153, 185, 194 (1978).

Accordingly, the judgment of the Court of Appeals is affirmed in all respects except to the extent of its approval of the Secretary's application of the wage guarantee provision of the Cotton Dust Standard at 29 CFR § 1910.1043 (f)(2) (v). To that extent, the judgment of the Court of Appeals is vacated and the case remanded with directions to remand to the Secretary for further proceedings consistent with this opinion.

We're waiting for WHR's dissent. You, Peter and I should talk soon about the need to recuse in this case. If JPS holds firm, the case will come down 4-1-4, with JPS on the key spot.

Supreme Court of the United States
Washington, D. C. 20543

Paul C.

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 18, 1981

Re: 79-1429 and 79-1583 - American Textile
v. Marshall

Dear Bill:

Over the weekend I reviewed the various papers that have been filed in connection with the Government's suggestion that the Court vacate the judgment of the Court of Appeals without reaching the merits, as well as your fine circulation. I have come to these tentative conclusions:

1. Since the Secretary proposes to leave the present standard in effect during the proposed rulemaking proceeding, the case is certainly not moot and petitioners are entitled to have us decide the merits of the questions they have presented and argued. I do not believe, however, that there is any merit to their suggestion that we should hold the cases in abeyance on our docket while the proposed rulemaking proceeding goes forward.

2. For the reasons set forth in your opinion, the judgment of the Court of Appeals should be affirmed except to the extent that it upholds the wage guarantee provisions.

3. There is nothing in the statute to prohibit the Secretary from doing a cost benefit study for the purposes set forth in the notice of rulemaking of March 27, 1981. Indeed, at page 33 of the slip opinion of the plurality in the Benzene case, after quoting § 6(g) of the Act, we noted:

"The Government has expressly acknowledged that this section requires the Secretary to undertake some cost-benefit analysis before he promulgates any standard, requiring the

elimination of the most serious hazards first."

In footnote 49 we quoted from the Secretary's Reply Brief at page 13:

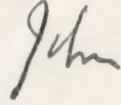
"First, 29 U.S.C. § 655(g) requires the Secretary to establish priorities in setting occupational health and safety standards so that the more serious hazards are addressed first. In setting such priorities the Secretary must, of course, consider the relative costs, benefits and risks."

4. After the reconsideration and re-evaluation of the cotton dust standard is concluded, if the Secretary should adopt a less protective standard, the unions will have an opportunity to raise the question whether the cost benefit analysis has been misused. Now, however, I do not believe we should issue an opinion that would prevent further proceedings that may or may not lead to a change in the standard.

5. In summary, I am prepared to join your opinion if you can modify the language in a few places to conclude merely that the Act does not require OSHA to compare costs and benefits without holding that the Act prohibits such comparisons. In my judgment, the more extreme holding is foreclosed by § 6(g) and, in any event, is not necessary to answer the questions presented by the parties. It may well be true that no cost benefit analysis that the Secretary can make can justify a change in the standard, but I am not persuaded that we have the power to order him not to take a second

look at a standard or not to receive any evidence
comparing costs and benefits during a proceeding
taking such a second look.

Respectfully,

A handwritten signature in dark ink, appearing to be the name "John", written in a cursive style.

Justice Brennan

Copies to the Conference

Supreme Court of the United States
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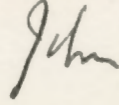
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Copies to the Conference

May 19, 1981

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

RE: Nos. 79-1429 & 79-1583, American Textile Manufacturers Institute, Inc. v. Donovan

Institute, Inc. v. Donovan

Circulated: MAY 19 1981

Recirculated: _____

Dear John,

I very much appreciate your thoughtful comments on my circulated opinion in the above. I think my only difference with you centers on whether Section 6(g) of the Act, 29 U.S.C. §655(g), has relevance for the purposes of our decision in this case. I agree, without deciding, as I said in footnote 29, page 17 of the opinion, that Section 6(g) "may authorize OSHA to explore costs and benefits for deciding between issuance of several standards regulating different varieties of health and safety hazards" (citing your Benzene opinion, slip op. 33), in setting priorities for the issuance of more than one standard, thereby ensuring that the most serious health hazards are addressed first. As Section 6(g) states:

"In determining the priority for establishing standards under [Section 6 of the Act, 29 U.S.C. §655], the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments."

And it is true that the Secretary acknowledged not only in Benzene but also in this case, Brief for Respondent Secretary of Labor, at 56, that Section 6(g) appears to contemplate such an exercise.

But that is not this case. Here, OSHA was not considering and "deciding between issuance of several standards regulating different varieties of health and safety hazards." The Secretary never discussed other health hazards in the cotton industry that the agency would address. Rather OSHA considered and promulgated only one health standard for the industry; therefore Section 6(g) is not implicated by its determinations. Your thought that Section 6(g) is involved here is not shared by the industry petitioners -- they fail to cite Section 6(g) even once in their briefs. I think this indicates industry recognition that we are not faced here with OSHA's setting of priorities for the issuance of several health and safety standards. The industry argument instead is that OSHA must undertake a cost-benefit analysis under Section 6(b)(5) to determine whether and how stringent a single standard should be promulgated, regardless of the existence of any other health hazards in the workplace. Under the industry approach, if preventing 30,000 annual cases of byssinosis would cost \$500 million, and preventing 35,000 annual byssinosis cases would cost \$650 million, OSHA might have to choose the \$500 million standard even if cotton dust exposure were the only health hazard in the workplace and the \$650 million cost were economically feasible. In effect, then, the industry position requires the agency to undertake an analysis of the absolute relation between costs and benefits of a single standard, placing some sort of absolute value on the benefit of reducing byssinosis compared only with the cost of achieving such reduction, without reference to other hazards.

I think the considerations contemplated by Section 6(g) are quite different from the absolute considerations suggested above, emphasizing instead the range of health hazards in the workplace, which ones are most serious, and which should be addressed first. Such considerations might include a comparison of the relative costs and benefits of various standards addressing different health problems in the same industry. Let us assume, for example, that OSHA found two serious health hazards in textile mills -- cotton dust and noise. In addition, let us assume -- although untrue for the real Cotton Dust Standard -- that the agency determined that an expenditure of \$650 million would be the maximum economically feasible expenditure by the cotton industry for all health and safety standards, and that expenditures in excess of \$650 million would result in substantial reduction of material health impairment from cotton dust exposure. OSHA would then have to decide whether to promulgate a single standard regulating only one of the hazards, or whether to issue two standards that would address both hazards.

In choosing what course of action to follow, the agency pursuant to Section 6(g) might compare the reduction in byssinosis resulting from an expenditure of \$650 million for cotton dust engineering controls versus the reduction in worker deafness resulting from an expenditure of \$650 million expenditure for noise controls. In choosing between the two standards, or determining a proper mix of the two, the Secretary could compare the relative costs and benefits of the two

standards in order to maximize total health benefits for the worker. And the Secretary might finally decide that spending the full \$650 million on cotton dust control would be less worthwhile than spending \$500 million on cotton dust control, and \$150 million on noise control. But since a total industry-wide expenditure of \$650 million was economically feasible, the cost of compliance for the two standards combined would have to be \$650 million, given Section 6(b)(5)'s requirement of promulgation of the most protective standard limited only by feasibility. Undoubtedly the industry would be no happier with this outcome using a Section 6(g) balancing of costs and benefits, because the industry's overall expenditure on health hazards would remain the same even as the mix of standards changes. That is why the distinction between absolute cost-benefit balancing, in a vacuum without reference to other health hazards, as opposed to relative cost-benefit balancing, comparing the costs and benefits of different health standards, is not just a technical distinction but one of real substance. The industry's failure to rely on Section 6(g) to buttress its argument, and the Secretary's willingness to accept Section 6(g) balancing while nevertheless arguing against absolute cost-benefit analysis, are telling evidence of this fact.

My opinion deals at length with the industry argument that OSHA must balance, without reference to other health hazards, the absolute costs and benefits for considering and promulgating a single health standard. The basis for my rejection of their argument is that the statute and legislative history show that

Congress itself struck the balance between costs and benefits when it said "to the extent feasible," thereby precluding further balancing by OSHA for the issuance of a single standard, and that Section 6(b)(5) requires promulgation of the most protective standard limited only by feasibility.

While it would be possible, as you suggest, to decide this case by holding merely that Section 6(b)(5) does not require OSHA to compare costs and benefits in promulgating a single standard, I think there is an additional reason that we should not leave open the question whether OSHA is precluded from doing so. It seems to me that OSHA, the industry, and the unions should have the answer now, and not leave the issue in limbo while they go forward with another extensive and costly rule-making (this one took several years and produced at enormous cost a 105,000-page record). The unions would be back here tomorrow arguing that cost-benefit analysis is precluded. If the correct forum to engraft cost-benefit analysis onto Section 6(b)(5) for considering and promulgating a single standard is the Congress, the sooner we tell the parties, the better for all concerned.

The Secretary gives no indication in his post-argument March 27, 1981 Advance Notice of Proposed Rulemaking that, pursuant to Section 6(g), he wants to compare the costs and benefits of the Cotton Dust Standard relative to those of other possible standards addressing different health and safety problems in the cotton industry. On the contrary, the Notice implies that he will engage in cost-benefit analysis in reviewing the Cotton Dust Standard in the abstract, without reference to other hazards.

For instance, he notes that "it is appropriate to evaluate the practicality of cost-benefit balancing by investigating the concept in the context of an actual standard such as cotton dust," Memorandum, at 4a, that the "agency will produce a comprehensive and thorough cost-benefit analysis", id., at 5a, and that as a result "the standard itself may be subject to adjustment," ibid. I think we ought tell him whether he can do that. And even if the Secretary does plan to make comparisons with other health standards, under my proposed opinion, he is not precluded from undertaking, pursuant to Section 6(g), a relative balancing of the costs and benefits of the cotton dust standard with those of other health standards he plans to promulgate. Perhaps I should make this point more explicit in the opinion, for example by bringing parts of footnote 29 into the text and emphasizing that cost-benefit analysis is precluded only for the consideration and issuance of a single health standard without reference to other health hazards. In addition, I can add "for the issuance of a single standard" after the word "Secretary" on page 17, line 3, after the word "analysis" on page 17, line 6, and in other appropriate places throughout the opinion. Of course, I would welcome any other suggestions that may occur to you.

In short, I do feel that it is important to indicate to the Secretary what he can and cannot do in considering and promulgating a single standard, without reference to other health hazards, under Section 6(b)(5). His Advance Notice may be read, I think, as proposing the sort of absolute cost-benefit urged by

petitioners, without reference to other health hazards in the cotton industry. My opinion concludes that he is precluded from doing so.

Sincerely,

Bel

Justice Stevens

Copies to the Conference

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

*Sally - Throw away
Supreme Court of the United States*

Washington, D. C. 20541

of these letters

May 19, 1981

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v. Donovan

Dear Bill:

My point about § 6(g) is not that it is in any way involved in this case as it was argued to us, but rather, as the Solicitor General represented in his memorandum, that one of the purposes of the proposed rulemaking is to determine the effectiveness of cost benefit studies in the context of a particular industry in order to facilitate their implementation of § 6(g) in future cases.

You may very well be correct that an advisory opinion indicating that OSHA is precluded from using any cost benefit analysis in connection with the promulgation of a single standard would shorten future proceedings in this case. As is often true of advisory opinions, however, we really cannot foresee all possible situations in which a cost benefit analysis might be relevant.

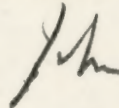
Your hypothetical concerning noise and cotton dust in the textile industry suggests that comparable variables might be involved in a single standard. Suppose, for example, that there are two species of cotton dust, one more harmful than the other. Just as a cost benefit study might help the Secretary to decide on priorities between noise and dust, might not it also be helpful in deciding whether to eliminate dust A entirely before curtailing dust B? In some situations, a choice between spending a great deal of money to reduce the exposure level and incurring a different kind of cost by requiring protective masks or shortening working hours might be made more intelligently with the benefit of a cost benefit

analysis. I do not suggest that the study will necessarily be valuable here, but we must remember that your opinion will apply to other industries which may well present variables of the noise-dust alternative type problem.

In Benzene the standard allowed exposures of 1 ppm averaged over an 8-hour work day with a ceiling of 5 ppm for any 15-minute period. Conceivably a standard of .5 ppm over an 8-hour work day, with a ceiling of 10 ppm for any 15-minute period, might have been an alternative available to the Secretary. In trading off between a lower exposure level for the average 8-hour work day and the higher exposure level for brief periods, should not the Secretary be permitted to compare costs and benefits?

In sum, I do not believe we should try to tell the Secretary what he can or cannot do in future proceedings but should confine our ruling to the validity of the standard that he has already promulgated.

Respectfully,



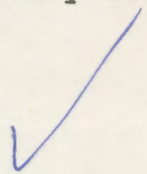
Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 20, 1981

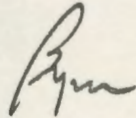


Re: 79-1429 and 79-1583 -
American Textile Manufacturers
Institute, Inc. v. Donovan;
National Cotton Council of America v. Donovan

Dear Bill:

Please join me.

Sincerely yours,



Justice Brennan

Copies to the Conference

cpm

May 21, 1981

No. 79-1429 American Textile Mfg. v. Donovan
No. 79-1583 National Cotton Council v. Donovan

Dear Bill:

At our May 14 Conference, Nos. 80-1134 Lead Industries v. Donovan and 80-1155 South Central Bell Telephone v. Donovan, were held for the Cotton Dust Cases.

This presents a problem for me because my former firm is one of a number of firms representing the lead industry. I, therefore, took no part in the decision to hold these cases.

Although a superficial examination suggests that most of the questions in the present cases differ from those presented in the Lead cases, I think there also may be common questions. Accordingly, I will remain out of the Cotton Dust cases - at least for the present.

As I am not entirely sure that the two cases are close enough for me to disqualify, I suggest that you not mark me out on your circulated drafts. Before the cases are decided, I will make a definite decision on my status.

Sincerely,

Mr. Justice Brennan

LFP/lab

Copies to the Conference

cc: Mr. Alexander L. Stevas

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 21, 1981

No. 79-1429 American Textile Mfg. v. Donovan
No. 79-1583 National Cotton Council v. Donovan

Dear Bill:

At our May 14 Conference, Nos. 80-1134 Lead Industries v. Donovan and 80-1155 South Central Bell Telephone v. Donovan, were held for the Cotton Dust Cases.

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As I am not entirely sure that the two cases are close enough for me to disqualify, I suggest that you not mark me out on your circulated drafts. Before the cases are decided, I will make a definite decision on my status.

Sincerely,

Lewis

Mr. Justice Brennan

LFP/lab

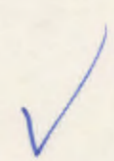
Copies to the Conference

cc: Mr. Alexander L. Stevas

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 26, 1981



Re: Nos. 79-1429 and 79-1583 - American Textile
v. Donovan

Dear Bill:

Please join me.

Sincerely,

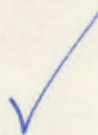
Jm.
T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.



May 26, 1981

MEMORANDUM TO THE CONFERENCE

RE: American Textile Manufacturers Institute, Inc. v. Donovan
Nos. 79-1429 & 1583

You will notice on page 13, note 25, that I have dealt with the post-argument motions of the various parties. This assumes, of course, that there are five or more who agree with this view.

Sincerely,

Bill

The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

✓

May 26, 1981

Re: 79-1429 and 79-1583 - American Textile
v. Donovan

Dear Bill:

Please join me.

Respectfully,

John

Justice Brennan

Copies to the Conference

2, 3, 13, 17, 19, 20, 21, 29, 47, 48

It appears that WJB will get
a Court now that
JPS has joined. Because
your vote now is
not crucial — and
because you
already are
on record on
the cost/benefit
Q — you
may now
wish to
recuse.
Paul C.

P.S. is
discontinued.
So in W.H.R.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: MAY 26 1981

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79-1429 AND 79-1583

American Textile Manufacturers
Institute, Inc., et al.,
Petitioners,

79-1429 v,

Raymond J. Donovan, Secretary
of Labor, United States De-
partment of Labor, et al.

National Cotton Council of
America, Petitioner,

79-1583 v,

Raymond J. Donovan, Secretary
of Labor, United States De-
partment of Labor, et al.

[May —, 1981]

On Writs of Certiorari to
the United States Court
of Appeals for the Dis-
trict of Columbia Circuit.

JUSTICE BRENNAN delivered the opinion of the Court.

Congress enacted the Occupational Safety and Health Act of 1970 (the Act) "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ." 29 U. S. C. § 651 (b). The Act authorizes the Secretary of Labor to establish, after notice and opportunity to comment, mandatory nationwide standards governing health and safety in the workplace. 29 U. S. C. §§ 655 (a), (b). In 1978, the Secretary, acting through the Occupational Safety and Health Administration (OSHA),¹ promulgated

¹ This opinion will use the terms OSHA and the Secretary interchangeably when referring to the agency, the Secretary of Labor, or the Assistant Secretary for Occupational Safety and Health. The Secretary of Labor

I am
now
out

because
the Court
granted
the lead cases
in which

H & W
are
counsel

a standard limiting occupational exposure to cotton dust, an airborne particle byproduct of the preparation and manufacture of cotton products, exposure to which induces a "constellation of respiratory effects" known as "byssinosis." 43 Fed. Reg. 27352, col. 3 (1978). This disease was one of the expressly recognized health hazards that led to passage of the Occupational Safety and Health Act of 1970. S. Rep. No. 91-1282, 91st Cong., 2d Sess., 3 (1970), Legislative History of the Occupational Safety and Health Act of 1970, at 143 (1971) (Legis. Hist.).

Petitioners in these consolidated cases, representing the interests of the cotton industry,² challenged the validity of the "Cotton Dust Standard" in the Court of Appeals for the District of Columbia Circuit pursuant to § 6 (f) of the Act, 29 U. S. C. § 655 (f). They contend in this Court, as they did below, that the Act requires OSHA to demonstrate that its Standard reflects a reasonable relationship between the costs and benefits associated with the Standard. Respondents, the Secretary of Labor and two labor organizations,³ counter that Congress balanced the costs and benefits in the Act itself, and that the Act should therefore be construed not to require OSHA to do so. They interpret the Act as mandating

has delegated the authority to promulgate occupational safety and health standards to the Assistant Secretary. See 29 CFR § 1910.4 (1980).

² Petitioners in No. 79-1429 include 12 individual cotton textile manufacturers, and the American Textile Manufacturers Institute, Inc. (ATMI), a trade association representing approximately 175 companies. Brief for Petitioners American Textile Manufacturers Institute et al., at i, 2. In No. 79-1583, petitioner is the National Cotton Council of America, a non-profit corporation chartered for the purpose of increasing the consumption of cotton and cotton products. Brief for Petitioner National Cotton Council of America, at 3-4.

³ The two labor organizations are the American Federation of Labor and Congress of Industrial Organizations, Industrial Union Department, AFL-CIO, and the Amalgamated Clothing & Textile Workers Union, AFL-CIO. In the Court of Appeals, the labor organizations challenged the Cotton Dust Standard as not sufficiently stringent.

that OSHA enact the most protective standard possible to eliminate a significant risk of material health impairment, subject to the constraints of economic and technological feasibility. The Court of Appeals held that the Act did not require OSHA to compare costs and benefits. 617 F. 2d 636 (1979). We granted certiorari, — U. S. — (1980), to resolve this important question, which was presented but not decided in last Term's *Industrial Union Department v. American Petroleum Institute*, — U. S. — (1980),⁴ and to decide other issues related to the Cotton Dust Standard.⁵

I

Byssinosis, known in its more severe manifestations as "brown lung" disease, is a serious and potentially disabling respiratory disease primarily caused by the inhalation of cotton dust.⁶ See 43 Fed. Reg. 27352-27354 (1978); Exhibit

⁴ JUSTICE POWELL, concurring in part and in the judgment, was the only member of the Court to decide the cost-benefit issue expressly. JUSTICE POWELL concluded that the statute "requires the agency to determine that the economic effects of its standard bear a reasonable relationship to the expected benefits." *Industrial Union Department v. American Petroleum Institute*, slip op., at 4 (POWELL, J., concurring in part and in the judgment). JUSTICE MARSHALL, dissenting, joined by JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE BLACKMUN, indicated that the statute did not contemplate cost-benefit analysis. See *id.*, slip op., at 31 n. 30, 32.

⁵ In addition to the cost-benefit issue, the other questions presented and addressed are (1) whether substantial evidence in the record as a whole supports OSHA's determination that the Cotton Dust Standard is economically feasible; and (2) whether OSHA has the authority under the Act to require that employers guarantee the wages and benefits of employees who are transferred to other positions because of their inability to wear respirators.

⁶ Cotton dust is defined as

"dust present in the air during the handling or processing of cotton, which may contain a mixture of many substances including ground up plant matter, fiber, bacteria, fungi, soil, pesticides, non-cotton plant matter and other contaminants which may have accumulated with the cotton during the growing, harvesting and subsequent processing or storage periods.

6-16, Joint App. 15-22.⁷ Byssinosis is a "continuum . . . disease," 43 Fed. Reg. 27354, col. 2, that has been categorized into four grades.⁸ In its least serious form, byssinosis produces both subjective symptoms, such as chest tightness, shortness of breath, coughing, and wheezing, and objective indications of loss of pulmonary functions. *Id.*, at 27352, col. 2. In its most serious form, byssinosis is a chronic and irreversible obstructive pulmonary disease, clinically similar to chronic bronchitis or emphysema, and can be severely disabling. *Ibid.* At worst, as is true of other respiratory diseases including bronchitis, emphysema, and asthma, byssinosis can create an additional strain on cardiovascular functions and contributes to death from heart failure. See Exhibit 6-73, Joint App. 72 ("there is an association between mortality and the extent of dust exposure"). One authority has described the increasing seriousness of byssinosis as follows:

"In the first few years of exposure [to cotton dust], symptoms occur on Monday, or other days after absence from the work environment; later, symptoms occur on

Any dust present during the handling and processing of cotton through the weaving or knitting of fabrics, and dust present in other operations or manufacturing processes using new or waste cotton fibers or cotton fiber by-products from textile mills are considered cotton dust." 29 CFR § 1910.1043 (b) (1980) (Cotton Dust Standard).

⁷ References are made throughout this opinion to the Joint Appendix filed in this Court (Joint App.), and to the Joint Appendix lodged in the Court of Appeals below (Ct. of App. J. A.).

⁸ Known generally as the Schilling classification grades, they include: "[Grade] ½: slight acute effect of dust on ventilatory capacity; no evidence of chronic ventilatory impairment.

"[Grade] 1: definite acute effect of dust on ventilatory capacity; no evidence of chronic ventilatory impairment.

"[Grade] 2: evidence of slight to moderate irreversible impairment of ventilatory capacity.

"[Grade] 3: evidence of moderate to severe irreversible impairment of ventilatory capacity." Exhibit 6-27; Joint App. 25; see 41 Fed. Reg. 56500-56501 (1976).

other days of the week; and eventually, symptoms are continuous, even in the absence of dust exposure." A. Bouhuys, Byssinosis in the United States, Exhibit 6-16, Joint App. 15.⁹

While there is some uncertainty over the manner in which the disease progresses from its least serious to its disabling grades, it is likely that prolonged exposure contributes to the

⁹ Descriptions of the disease by individual mill workers, presented in hearings on the Cotton Dust Standard before an administrative law judge, are more vivid:

"When they started speeding the looms up the dust got finer and more and more people started leaving the mill with breathing problems. My mother had to leave the mill in the early fifties. Before she left, her breathing got so short she just couldn't hold out to work. My step-father left the mill on account of breaching [*sic*] problems. He had coughing spells til he couldn't breath, like a child's whooping cough. Both my sisters who work in the mill have breathing problems. My husband had to give up his job when he was only fifty-four years old because of the breathing problem." Ct. of App. J. A. 3791.

"I suppose I had a breathing problem since 1973. I just kept on getting sick and began losing time at the mill. Every time that I go into the mill I get deathly sick, choking and vomiting losing my breath. It would blow down all that lint and cotton and I have clothes right here where I have wore and they have been washed several times and I would like for you all to see them. That will not come out in washing.

I am only fifty-seven years old and I am retired and I can't even get to go to church because of my breathing. I get short of breath just walking around the house or dressing [or] sometimes just watching T. V. I cough all the time." *Id.*, at 3793.

"... I had to quit because I couldn't lay down and rest without oxygen in the night and my doctor told me I would have to get out of there. ... I couldn't [*sic*] even breathe, I had to get out of the door so I could breathe and he told me not to go back in [the mill] under any circumstances." *Id.*, at 3804.

Byssinosis is not a newly discovered disease, having been described as early as in the 1820s in England, Joint App. 404-405, and observed in Belgium in a study of 2,000 cotton workers in 1845, Exhibit 6-16, Joint App. 15.

progression. 43 Fed. Reg. 27354, col. 1 and 2; Exhibit 6-27, Joint App. 25; Exhibit 11, Joint App. 152. It also appears that a worker may suddenly contract a severe grade without experiencing milder grades of the disease. Exhibit 41, Joint App. 192.¹⁰

Estimates indicate that at least 35,000 employed and retired cotton mill workers, or 1 in 12 such workers, suffers from the most disabling form of byssinosis.¹¹ 43 Fed. Reg. 27353, col. 3; Exhibit 124, Joint App. 347. The Senate Report accompanying the Act cited estimates that 100,000 active and retired workers suffer from some grade of the disease. S. Rep. No. 91-1282, 91st Cong., 2d Sess., 3 (1970), Legis. Hist. 143. One study found that over 25% of a sample of active cotton preparation and yarn manufacturing workers suffer at least some form of the disease at a dust exposure level common prior to adoption of the current Standard. 43 Fed. Reg. 27355, col. 3; Exhibit 6-51, Joint App. 44.¹² Other studies confirm these general findings on the prevalence of byssinosis. See, e. g., Ct. of App. J. A. 3683; Ex. 6-56, *id.* at 376-385.

Not until the early 1960's was byssinosis recognized in the United States as a distinct occupational hazard associated

¹⁰ As an expert representing the industry noted:

"[T]he assumption is often made that the disorder progresses from ½ to 1 to 2 to 3 and, thus, all grades reflect the progress of the individual's disability. In many instances, however, there is no progression at all. Sometimes Grade 3 seems to appear *de novo*, or there is a jump from 1 to 3. Among those who develop permanent disability, Grade 2 very often never occurs." Exhibit 41, Joint App. 192.

¹¹ The criterion of disability used for the 35,000 worker estimate was a Forced Expiratory Volume (FEV₁) measurement of pulmonary function of 1.2 liters or less. 43 Fed. Reg. 27353, col. 3. An FEV₁ of 1.2 liters "is a small fraction of the pulmonary performance of a normal lung." *Ibid.*; Ct. of App. J. A. 1231.

¹² There are between 126,000 and 200,000 active workers in the yarn preparation and manufacturing segments of the cotton industry. 43 Fed. Reg. 27379, col. 2.

with cotton mills. S. Rep. No. 91-1282, *supra*, at 3, Legis. Hist. 143.¹³ In 1966, the American Conference of Governmental Industrial Hygienists (ACGIH), a private organization, recommended that exposure to total cotton dust¹⁴ be limited to a "threshold limit value" of 1,000 micrograms per cubic meter of air ($1000 \mu\text{g}/\text{m}^3$) averaged over an 8-hour workday. See 43 Fed. Reg. 27351, col. 1. The United States Government first regulated exposure to cotton dust in 1968, when the Secretary of Labor, pursuant to the Walsh-Healey Act, 41 U. S. C. § 35 (e), promulgated airborne contaminant threshold limit values, applicable to public contractors, that included the $1000 \mu\text{g}/\text{m}^3$ limit for total cotton dust. 34 Fed. Reg. 7953 (1969).¹⁵ Following passage of the Act in 1970, the $1000 \mu\text{g}/\text{m}^3$ standard was adopted as an "established Federal standard" under § 6 (a) of the Act, 29 U. S. C. § 655 (a), a provision designed to guarantee immediate protection of workers for the period between enactment of the statute and promulgation of permanent standards.¹⁶

In 1974, ACGIH, adopting a new measurement unit of

¹³ Indeed the Senate Report on the Act expressly observed:

"Studies of particular industries provide specific emphasis regarding the magnitude of the problem. For example, despite repeated warnings over the years from other countries that their cotton workers suffered from lung disease, it is only within the past decade that we have recognized byssinosis as a distinct occupational disease among workers in American cotton mills." S. Rep. No. 91-1282, 91st Cong., 2d Sess., 3 (1970), Legis. Hist. 143.

¹⁴ "Total dust" includes both respirable and nonrespirable cotton dust.

¹⁵ The Secretary of Labor adopted the threshold limit values contained in a list that had been prepared by the ACGIH.

¹⁶ Section 6 (a) of the Act, 29 U. S. C. § 655 (a), provides in pertinent part:

"[T]he Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard . . . any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees."

respirable rather than total dust, lowered its previous exposure limit recommendation to 200 $\mu\text{g}/\text{m}^3$ measured by a vertical elutriator, a device that measures cotton dust particles 15 microns or less in diameter. 43 Fed. Reg. 27351, col. 1, 27355, col. 2.¹⁷ That same year, the Director of the National Institute for Occupational Safety and Health (NIOSH),¹⁸ pursuant to the Act, 29 U. S. C. §§ 669 (a)(3), 671 (d)(2), submitted to the Secretary of Labor a recommendation for a cotton dust standard with a permissible exposure limit (PEL) that "should be set at the lowest level feasible, but in no case at an environmental concentration as high as 0.2 mg lint-free cotton dust/cu. m.," or 200 $\mu\text{g}/\text{m}^3$ of lint-free respirable dust.¹⁹ Ex. 1, Ct. of App. J. A. 11; 41 Fed. Reg. 56500, col. 1 (1976). Several months later, OSHA published an Advance Notice of Proposed Rulemaking, 39 Fed. Reg. 44769 (1974), requesting comments from inter-

¹⁷ In many cotton preparation and manufacturing operations, including opening, picking, and carding, 1000 $\mu\text{g}/\text{m}^3$ of total dust is roughly equivalent to 500 $\mu\text{g}/\text{m}^3$ of respirable dust. Joint App. 464; 43 Fed. Reg. 27361, col. 2; see *infra*, n. 22.

¹⁸ The Act established the National Institute for Occupational Safety and Health as part of the then Department of Health, Education, and Welfare. NIOSH is authorized, *inter alia*, to "develop and establish recommended occupational safety and health standards." 29 U. S. C. § 671 (c)(1). At the request of the Secretaries of Labor or HEW, or on his own initiative, the Director of NIOSH may

"conduct such research and experimental programs as he determines are necessary for the development of criteria for new and improved occupational safety and health standards, and . . . after consideration of the results of such research and experimental programs make recommendations concerning new or improved occupational safety and health standards." *Id.*, § 671 (d).

¹⁹ NIOSH presented its recommendation in a lengthy and detailed document entitled "Criteria for a Recommended Standard: Occupational Exposure to Cotton Dust." Ex. 1, Ct. of App. J. A. 1-169. The report examined the effects of cotton dust exposure and suggested implementation of work practices, engineering controls, medical surveillance, and monitoring to decrease exposure to the recommended level.

ested parties on the NIOSH recommendation and other related matters. Soon thereafter, the Textile Worker's Union of America, joined by the North Carolina Public Interest Research Group, petitioned the Secretary, urging a more stringent PEL of 100 $\mu\text{g}/\text{m}^3$.

On December 28, 1976, OSHA published a proposal to replace the existing Federal standard on cotton dust with a new permanent standard, pursuant to § 6 (b) (5) of the Act, 29 U. S. C. § 655 (b) (5). 41 Fed. Reg. 56498. The proposed standard contained a PEL of 200 $\mu\text{g}/\text{m}^3$ of vertical elutriated lint-free respirable cotton dust for all segments of the cotton industry. *Ibid.* It also suggested an implementation strategy for achieving the PEL that relied on respirators for the short-term and engineering controls for the long-term. *Id.*, at 56506, col. 2 and 3. OSHA invited interested parties to submit written comments within a 90-day period.²⁰

Following the comment period, OSHA conducted three hearings in Washington, D. C., Greenville, Miss., and Lubbock, Tex. that lasted over 14 days. Public participation was widespread, involving representatives from industry and the workforce, scientists, economists, industrial hygienists, and many others. By the time the informal rule-making procedure had terminated, OSHA had received 263 comments and 109 notices of intent to appear at the hearings. 43 Fed. Reg. 27351, col. 2. The voluminous record, composed of a transcript of written and oral testimony, exhibits, and post-hearing comments and briefs, totaled some 105,000 pages. — U. S. App. D. C. —, 617 F. 2d, at 647. OSHA issued its final Cotton Dust Standard—the one challenged in the instant case—on June 23, 1978. Along with an accompanying statement of findings and reasons, the Standard occupied 69 pages of the Federal Register. 43 Fed. Reg. 27350-27418; see 29 CFR § 1910.1043 (1980).

²⁰ The Act specifies an informal rulemaking procedure to accompany the promulgation of occupational safety and health standards. See 29 U. S. C. § 655 (b) (2), (3), (4).

The Cotton Dust Standard promulgated by OSHA establishes mandatory PELs over an 8-hour period of 200 $\mu\text{g}/\text{m}^3$ for yarn manufacturing,²¹ 750 $\mu\text{g}/\text{m}^3$ for slashing and weaving operations, and 500 $\mu\text{g}/\text{m}^3$ for all other processes in the cotton industry.²² 29 CFR § 1910.1043 (c). These levels represent a relaxation of the proposed PEL of 200 $\mu\text{g}/\text{m}^3$ for all segments of the cotton industry.

OSHA chose an implementation strategy for the Standard that depended primarily on a mix of engineering controls, such as installation of ventilation systems,²³ and work practice controls, such as special floor sweeping procedures. Full compliance with the PELs is required within 4 years, except to the extent that employers can establish that the engineer-

²¹ The Standard provides that exposure to lint-free respirable cotton dust may be measured by a vertical elutriator, with its 15-micron particle size cutoff, or "a method of equivalent accuracy and precision." 29 CFR § 1910.1043 (c).

²² The manufacturing of cotton textile products is divided into several different stages. (1) In the operations of *opening, picking, carding, drawing, and roving*, raw cotton is cleaned and prepared for spinning into yarn. Brief for Petitioners ATMI et al., at 7, n. 12. (2) In the operations of *spinning, twisting, winding, spooling, and warping*, the prepared cotton is made into yarn and readied for weaving and other processing. *Id.*, at 7, n. 13. (3) In *slashing and weaving*, the yarn is manufactured into a woven fabric. *Id.*, at 7, n. 14. The Cotton Dust Standard defines "yarn manufacturing" to mean "all textile mill operations from opening to, but not including, slashing and weaving." 29 CFR § 1910.1043 (b). See generally 43 Fed. Reg. 27365, col. 1 and 2.

The nontextile industries covered by the Standard's 500 $\mu\text{g}/\text{m}^3$ PEL include, but are not limited to, "warehousing, compressing of cotton lint, classing and marketing, using cotton yarn (i. e. knitting), reclaiming and marketing of textile manufacturing waste, delinting of cottonseed, marketing and converting of linters, reclaiming and marketing of gin motes and batting, yarn felt manufacturing using waste cotton fibers and by products." *Id.*, at 27360, col. 3.

²³ Ventilation systems include general controls, such as central air-conditioning, and local exhaust controls, which capture emissions of cotton dust as close to the point of generation as possible. See 43 Fed. Reg. 27363-27364.

ing and work practice controls are infeasible. *Id.*, § 1910.1043 (e)(1). During this compliance period, and at certain other times, the Standard requires employers to provide respirators to employees. *Id.*, § 1910.1043 (f). Other requirements include monitoring of cotton dust exposure, medical surveillance of all employees, annual medical examinations, employee education and training programs, and the posting of warning signs. A specific provision also under challenge in the instant case requires employers to transfer employees unable to wear respirators to another position, if available, having a dust level at or below the Standard's PELs, with "no loss of earnings or other employment rights or benefits as a result of the transfer." *Id.*, § 1910.1043 (f)(2)(v).

On the basis of the evidence in the record as a whole, the Secretary determined that exposure to cotton dust represents a "significant health hazard to employees," 43 Fed. Reg. 27350, col. 1, and that "the prevalence of byssinosis should be significantly reduced" by the adoption of the Standard's PELs, *id.*, at 27359, col. 3. In assessing the health risks from cotton dust and the risk reduction obtained from lowered exposure, OSHA relied particularly on data showing a strong linear relationship between the prevalence of byssinosis and the concentration of lint-free respirable cotton dust. 43 Fed. Reg. 27355-27359; Exhibit 6-51, Joint App. 29-55. See also Ex. 6-17, Ct. of App. J. A. 235-245; *id.*, at 1492-1839. Even at the 200 $\mu\text{g}/\text{m}^3$ PEL, OSHA found that the prevalence of at least Grade 1/2 byssinosis would be 13% of all employees in the yarn manufacturing sector. 43 Fed. Reg. 27359, col. 2 and 3.

In enacting the Cotton Dust Standard, OSHA interpreted the Act to require adoption of the most stringent standard to protect against material health impairment, bounded only by technological and economic feasibility. *Id.*, at 27361, col. 3. OSHA therefore rejected the industry's alternative proposal for a PEL of 500 $\mu\text{g}/\text{m}^3$ in yarn manufacturing, a proposal which would produce a 25% prevalence of at least Grade 1/2 byssinosis. The agency expressly found the

Standard to be both technologically and economically feasible based on the evidence in the record as a whole. Although recognizing that permitted levels of exposure to cotton dust would still cause some byssinosis, OSHA nevertheless rejected the union proposal for a 100 $\mu\text{g}/\text{m}^3$ PEL because it was not within the "technological capabilities of the industry." 43 Fed. Reg. 27359-27360. Similarly, OSHA set PELs for some segments of the cotton industry at 500 $\mu\text{g}/\text{m}^3$ in part because of limitations of technological feasibility. *Id.*, at 27361, col. 3. Finally, the Secretary found that "engineering dust controls in weaving may not be feasible even with massive expenditures by the industry," *id.*, at 27360, col. 2, and for that and other reasons adopted a less stringent PEL of 750 $\mu\text{g}/\text{m}^3$ for weaving and slashing.

The Court of Appeals upheld the Standard in all major respects.²⁴ The court rejected the industry's claim that OSHA failed to consider its proposed alternative or give sufficient reasons for failing to adopt it. 617 F. 2d, at 652-654. The court also held that the Standard was "reasonably necessary and appropriate" within the meaning of § 3 (8) of the Act, 29 U. S. C. § 652 (8), because of the risk of material health impairment caused by exposure to cotton dust. 617 F. 2d, at 654-655, 654, n. 83. Rejecting the industry position that OSHA must demonstrate that the benefits of the Standard are proportionate to its costs, the court instead agreed with OSHA's interpretation that the Standard must protect employees against material health impairment subject only to the limits of technological and economic feasibility. *Id.*, at 662-666. The court held that "Congress itself struck the balance between costs and benefits in the mandate to the agency" under § 6 (b)(5) of the Act, 29

²⁴ The court remanded to the agency that portion of the Standard dealing with the cottonseed oil industry, after concluding that the record failed to establish adequately the Standard's economic feasibility. — U. S. App. D. C. —, 617 F. 2d 636, 669, 677 (1979).

U. S. C. § 655 (b)(5), and that OSHA is powerless to circumvent that judgment by adopting less than the most protective feasible standard. 617 F. 2d, at 663. Finally, the court held that the agency's determination of technological and economic feasibility was supported by substantial evidence in the record as a whole. *Id.*, at 655-662.

We affirm in part, and vacate in part.²⁵

²⁵ The post-argument motions of the several parties for leave to file supplemental memoranda are granted. We decline to adopt the suggestion of the Secretary of Labor that we should "vacate the judgment of the court of appeals and remand the case so that the record may be returned to the Secretary for further consideration and development." Supplemental Memorandum for Federal Respondent, at 4. We also decline to adopt the suggestion of petitioners that we should "hold these cases in abeyance and . . . remand the record to the court of appeals with an instruction that the record be remanded to the agency for further proceedings." Response of Petitioners to the Supplemental Memorandum for Federal Respondent, at 4.

At oral argument, and in a letter addressed to the Court after oral argument, petitioners contended that the Secretary's recent amendment of OSHA's so-called "Cancer Policy" in light of this Court's decision in *Industrial Union Department v. American Petroleum Institute*, — U. S. — (1980), was relevant to the issues in the present case. We disagree.

OSHA amended its Cancer Policy to "carry out the Court's interpretation of the Occupational Safety and Health Act of 1970 that consideration must be given to the significance of the risk in the issuance of a carcinogen standard and that OSHA must consider all relevant evidence in making these determinations." 46 Fed. Reg. 4889, col. 3 (1981). Previously, although lacking such evidence as dose response data, the Secretary presumed that no safe exposure level existed for carcinogenic substances. *Industrial Union Department v. American Petroleum Institute*, *supra*, slip op., at 10, 13-14, 25, n. 39-40. Following this Court's decision, OSHA deleted those provisions of the Cancer Policy which required the "automatic setting of the lowest feasible level" without regard to determinations of risk significance. 46 Fed. Reg. 4890, col. 1.

In distinct contrast with its Cancer Policy, OSHA expressly found that "exposure to cotton dust presents a significant health hazard to employees," 43 Fed. Reg. 27350, col. 1, and that "cotton dust produced significant health effects at low levels of exposure," *id.*, at 27358, col. 2. In addition, the agency noted that "grade ½ byssinosis and associated

II

The principal question presented in this case is whether the Occupational Safety and Health Act requires the Secretary, in promulgating a standard pursuant to § 6(b)(5) of the Act, 29 U. S. C. § 655(b)(5), to determine that the costs of the standard bear a reasonable relationship to its benefits. Relying on §§ 6(b)(5) and 3(8) of the Act, 29 U. S. C. §§ 655(b)(5), 652(8), petitioners urge not only that OSHA must show that a standard addresses a significant risk of material health impairment, see *Industrial Union Department v. American Petroleum Institute*, *supra*, slip op., at 29, but also that OSHA must demonstrate that the reduction in risk of material health impairment is significant in light of the costs of attaining that reduction. See Brief for Petitioners ATMI et al., at 38-41.²⁶ Respondents on the other hand

pulmonary function decrements are significant health effects in themselves and should be prevented in so far as possible." *Id.*, at 27354, col. 2. In making its assessment of significant risk, OSHA relied on dose response curve data (the Merchant Study) showing that 25% of employees suffered at least Grade ½ byssinosis at a 500 µg/m³ PEL, and that 12.7% of all employees would suffer byssinosis at the 200 µg/m³ PEL standard. *Id.*, at 27358, col. 2 and 3. Examining the Merchant Study in light of other studies in the record, the agency found that "the Merchant study provides a reliable assessment of health risk to cotton textile workers from cotton dust." *Id.*, at 27357, col. 3. OSHA concluded that the "prevalence of byssinosis should be significantly reduced" by the 200 µg/m³ PEL. *Id.*, at 27359, col. 3; see *id.*, at 27359, col. 1 ("200 µg/m³ represents a significant reduction in the number of affected workers"). It is difficult to imagine what else the agency could do to comply with this Court's decision in *Industrial Union Department v. American Petroleum Institute*.

²⁶ Petitioners ATMI et al. express their position in several ways. They maintain that OSHA "is required to show that a reasonable relationship exists between the risk reduction benefits and the costs of its standards." Brief for Petitioners ATMI et al., at 36. Petitioners also suggest that OSHA must show that "the standard is expected to achieve a *significant reduction in* [the significant risk of material health impairment]" based on "an assessment of the costs of achieving it." *Id.*, at 38, 40. Allowing that "[t]his does not mean that OSHA must engage in a rigidly formal

contend that the Act requires OSHA to promulgate standards that eliminate or reduce such risks "to the extent such protection is technologically and economically feasible." Brief for Respondent Secretary of Labor, at 38; Brief for Respondent Unions, at 26-27.²⁷ To resolve this debate, we

cost-benefit calculation that places a dollar value on employee lives or health," *id.*, at 39, petitioners describe the required exercise as follows:

"First, OSHA must make a responsible determination of the costs and risk reduction benefits of its standard. Pursuant to the requirement of Section 6 (f) of the Act, this determination must be factually supported by substantial evidence in the record. The subsequent determination whether the reduction in health risk is 'significant' (based upon the factual assessment of costs and benefits) is a judgment to be made by the agency in the first instance." *Id.*, at 40.

Respondent disputes petitioners' description of the exercise, claiming that any meaningful balancing must involve "placing a [dollar] value on human life and freedom from suffering," Brief for Respondent Secretary of Labor, at 59, and that there is no other way but through formal cost-benefit analysis to accomplish petitioners' desired balancing, *id.*, at 59-60. Cost-benefit analysis contemplates "systematic enumeration of all benefits and all costs, tangible and intangible, whether readily quantifiable or difficult to measure, that will accrue to all members of society if a particular project is adopted." E. Stokey and R. Zeckhauser, *A Primer for Policy Analysis* 134 (1978); see National Academy of Sciences, *Decision Making for Regulating Chemicals in the Environment* 38 (1975). See generally E. Mishan, *Cost-Benefit Analysis* (1976); Prest and Turvey, *Cost-Benefit Analysis*, in 300 *Economic Journal* 683 (1965). Whether petitioners' or respondent's characterization is correct, we will sometime refer to petitioner's proposed exercise as "cost-benefit analysis."

²⁷ As described by the union respondents, the test for determining whether a standard promulgated to regulate a "toxic material or harmful physical agent" satisfies the Act has three parts:

"First, whether the 'place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices.' [*International Union Department*, slip op., at 32 (plurality opinion)]. Second, whether of the possible available correctives the Secretary had selected 'the standard . . . that is most protective'. *Ibid.* Third, whether that standard is 'feasible.'" Brief for Respondent Unions, at 40-41.

must turn to the language, structure, and legislative history of the Occupational Safety and Health Act.

A

The starting point of our analysis is the language of the statute itself. *Steadman v. SEC*, — U. S. —, — (1981); *Reiter v. Sonotone Corp.*, 442 U. S. 330, 337 (1979). Section 6 (b)(5) of the Act, 29 U. S. C. § 655 (b)(5) (emphasis added), provides:

“The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.”²⁸

Although their interpretations differ, all parties agree that the phrase “to the extent feasible” contains the critical language in § 6 (b)(5) for purposes of this case.

The plain meaning of the word “feasible” supports respondents’ interpretation of the statute. According to Webster’s Third New International Dictionary of the English Language, “feasible” means “capable of being done, executed, or effected.” *Id.*, at 831 (1976). Accord, The Oxford English Dictionary 116 (1933) (“Capable of being done, accom-

²⁸ Section 6(b)(5) of the Act, 29 U. S. C. § 655 (b)(5), also provides: “Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria, and of the performance desired.”

plished or carried out"); Funk & Wagnalls New "Standard" Dictionary of the English Language 903 (1957) ("That may be done, performed or effected"). Thus, § 6 (b)(5) directs the Secretary to issue the standard that "most adequately assures . . . that no employee will suffer material impairment of health," limited only by the extent to which this is "capable of being done." In effect then, as the Court of Appeals held, Congress itself defined the basic relationship between costs and benefits, by placing the "benefit" of worker health above all other considerations save those making attainment of this "benefit" unachievable. Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6 (b)(5). Thus, cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is.²⁰ See *Industrial Union Department v. American Petroleum Institute*, *supra*, slip op., at 32 (MARSHALL, J., dissenting).

When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on

²⁰ In this case we are faced with the issue whether the Act requires OSHA to balance costs and benefits in promulgating a *single* toxic material and harmful physical agent standard under § 6 (b)(5). Petitioners argue that without cost-benefit balancing, the issuance of a single standard might result in a "serious misallocation of the finite resources that are available for the protection of worker safety and health," given the other health hazards in the workplace. Reply Brief for Petitioners ATMI et al., at 10; see Brief for Petitioners ATMI et al., at 38-39; Brief of Chamber of Commerce of United States as *amicus curiae*, at 12; Brief of American Industrial Health Council as *amicus curiae*, at 19. This argument is more properly addressed to other provisions of the Act which may authorize OSHA to explore costs and benefits for deciding between issuance of several standards regulating different varieties of health and safety hazards, *e. g.*, § 6 (g) of the Act, 29 U. S. C. § 655 (g); see *Industrial Union Department v. American Petroleum Institute*, *supra*, slip op., at 33; see also Case Comment, 60 B. U. L. R. 115, 122, n. 52, or for promulgating other types of standards not issued under § 6 (b)(5). We express no view on these questions.

the face of the statute. One early example is the Flood Control Act of 1936, 33 U. S. C. § 710a.

"[T]he Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the *benefits to whomsoever they may accrue are in excess of the estimated costs*, and if the lives and social security of people are otherwise adversely affected."

A more recent example is the Outer Continental Shelf Lands Act Amendments of 1978; 43 U. S. C. § 1347 (b), providing that offshore drilling operations shall use

"the best available and safest technologies which the Secretary determines to be economically *feasible*, wherever failure of equipment would have a significant effect on safety, health, or the environment, except where the Secretary determines that the *incremental benefits are clearly insufficient to justify the incremental costs of using such technologies*."

These and other statutes³⁰ demonstrate that Congress uses

³⁰ See, e. g., Energy Policy and Conservation Act of 1975, 42 U. S. C. § 6295 (c), (d); Federal Water Pollution Control Act Amendments of 1972, 33 U. S. C. § 1312 (b)(1), (2); § 1314 (b)(1)(B); Clean Water Act Amendments of 1977, 33 U. S. C. § 1314 (b)(4)(B); Clean Air Act Amendments of 1970, 42 U. S. C. § 7545 (c)(2)(B). In the Water Pollution Control Act Amendments of 1972, Congress directed the Administrator to consider "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." 33 U. S. C. § 1314 (b)(1) ("BPT" limitations). With regard to 1987 effluent limitations, the Administrator is directed to consider total cost, but not in comparison with effluent reduction benefits. *Id.*, § 1314 (b)(2)(B) ("BAT" limitations). See *EPA v. National Crushed Stone Assn.*, No. 79-770, slip op., at 5-6, 6, n. 10, 11-12.

In other statutes, Congress has used the phrase "unreasonable risk," accompanied by explanation in legislative history, to signify a generalized balancing of costs and benefits. See, e. g., the Consumer Product Safety

specific language when intending that an agency engage in cost-benefit analysis. See *Industrial Union Department v. American Petroleum Institute*, *supra*, slip op., at 23, n. 27 (MARSHALL, J., dissenting). Certainly in light of its ordinary meaning, the word "feasible" cannot be construed to articulate such congressional intent. We therefore reject the

Act of 1972, 15 U. S. C. § 2056 (a) ("unreasonable risk of injury"); H. R. Rep. No. 92-1153, 92d Cong., 2d Sess., 33 (1972) (where the House stated:

"It should be noted that the Commission's authority to promulgate standards under this bill is limited to instances where the hazard associated with a consumer product presents an unreasonable risk of death, injury, or serious or frequent illness. . . . Protection against unreasonable risks is central to many Federal and State safety statutes and the courts have had broad experience in interpreting the term's meaning and application. It is generally expected that the determination of unreasonable hazard will involve the Commission in balancing the probability that risk will result in harm and the gravity of such harm against the effect on the product's utility, costs, and availability to the consumer.");

S. Rep. No. 92-749, 92d Cong., 2d Sess., 14-15. See also *Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Commission*, 569 F. 2d 831, 839 (CA5 1978); *Forester v. Consumer Product Safety Commission*, — U. S. App. D. C. —, 559 F. 2d 774, 789 (1977). The error of several cases finding a cost-benefit analysis mandate in the Occupational Safety and Health Act is their reliance on the different language and clear legislative history of the Consumer Product Safety Act to reach their conclusions. See *Texas Independent Ginners Assoc. v. Marshall*, — F. 2d —, — (CA5 1980); *American Petroleum Institute v. OSHA*, 581 F. 2d 493, 502-503 (CA5 1978), *aff'd* on other grounds, *Industrial Union Department v. American Petroleum Institute*, — U. S. — (1980).

Senator Chiles was sufficiently certain that the Act did not contemplate cost-benefit analysis that he introduced an amendment in 1973 that, *inter alia*,

"directs the Secretary to recognize the cost-benefit ratio in promulgating a new standard and to publish information relative to the projected financial impact. This provision will promote the development of standards justifiable in terms of the benefits to be derived and afford those to be affected an opportunity to make a reasoned evaluation of the proposal." 119 Cong. Rec. 42151 (1973).

argument that Congress required cost-benefit analysis in § 6 (b) (5).

B

Even though the plain language of § 6 (b) (5) supports this construction, we must still decide whether § 3 (8), the general definition of an occupational safety and health standard, either alone or in tandem with § 6 (b) (5), incorporates a cost-benefit requirement for standards dealing with toxic materials or harmful physical agents. Section 3 (8) of the Act, 29 U. S. C. § 652 (8) (emphasis added), provides:

"The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, *reasonably necessary or appropriate* to provide safe or healthful employment and places of employment."

Taken alone, the phrase "reasonably necessary or appropriate" might be construed to contemplate some balancing of the costs and benefits of a standard. Petitioners urge that, so construed, § 3 (8) engrafts a cost-benefit analysis requirement on the issuance of § 6 (b) (5) standards, even if § 6 (b) (5) itself does not authorize such analysis. We need not decide whether § 3 (8), standing alone, would contemplate some form of cost-benefit analysis. For even if it does, Congress specifically chose in § 6 (b) (5) to impose separate and additional requirements for issuance of a subcategory of occupational safety and health standards dealing with toxic materials and harmful physical agents: it required that those standards be issued to prevent material impairment of health *to the extent feasible*. Congress could reasonably have concluded that *health* standards should be subject to different criteria than *safety* standards because of the special problems presented in regulating them. See *Industrial Union Department v. American Petroleum Institute*, *supra*, slip op., at 38-39, n. 54 (plurality opinion).

Agreement with petitioners' argument that § 3 (8) imposes an additional and overriding requirement of cost-benefit analysis on the issuance of § 6 (b)(5) standards would eviscerate the "to the extent feasible" requirement. Standards would inevitably be set at the level indicated by cost-benefit analysis, and not at the level specified by § 6 (b)(5). For example, if cost-benefit analysis indicated a protective standard of 1000 $\mu\text{g}/\text{m}^3$ PEL, while feasibility analysis indicated a 500 $\mu\text{g}/\text{m}^3$ PEL, the agency would be forced by the cost-benefit requirement to choose the less stringent point.³¹ We cannot believe that Congress intended the general terms of § 3 (8) to countermand the specific feasibility requirement of § 6 (b)(5). Adoption of petitioners' interpretation would effectively write § 6 (b)(5) out of the Act. We decline to render Congress' decision to include a feasibility requirement nugatory, thereby offending the well-settled rule that all parts of a statute, if possible, are to be given effect. *E. g.*, *Reiter v. Sonotone Corp.*, *supra*, 442 U. S., at 339; *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U. S. 609, 633-634 (1973); *Jarecki v. G. D. Searle & Co.*, 367 U. S. 303, 307-308 (1961). Congress did not contemplate any further balancing by the agency for toxic material and harmful physical agents standards, and we should not "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, *supra*, at 631, quoting *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480, 489 (1947).³²

³¹ In addition, as the legislative history makes plain, see *infra*, at 23-24, any standard that was not economically or technologically feasible would *a fortiori* not be "reasonably necessary or appropriate" under the Act. See *Industrial Union Department v. Hodgson*, — U. S. App. D. C. —, 499 F. 2d 467, 478 (1974) ("Congress does not appear to have intended to protect employees by putting their employers out of business").

³² This is not to say that § 3 (8) might not require the balancing of costs and benefits for standards promulgated under provisions other than § 6 (b)(5) of the Act. As a plurality of this Court noted in *Industrial Union Department*, if § 3 (8) had no substantive content, "there

C

The legislative history of the Act, while concededly not crystal clear, provides general support for respondents' interpretation of the Act. The congressional reports and debates certainly confirm that Congress meant "feasible" and nothing else in using that term. Congress was concerned that the Act might be thought to require achievement of absolute safety, an impossible standard, and therefore insisted that health and safety goals be capable of economic and technological accomplishment. Perhaps most telling is the absence of any indication whatsoever that Congress intended OSHA to conduct its own cost-benefit analysis before promulgating a toxic material or harmful physical agent standard. The legislative history demonstrates conclusively that Congress was fully aware that the Act would impose real and substantial costs of compliance on industry, and believed that such costs were part of the cost of doing business. We thus turn to the relevant portions of the legislative history.

Neither the original Senate bill, S. 2193, introduced by Senator Williams, nor the original House bill, H. R. 16785, introduced by Representative Daniels, included specific provisions controlling the issuance of standards governing toxic

would be no statutory criteria at all to guide the Secretary in promulgating either national consensus standards or permanent standards other than those dealing with toxic materials and harmful physical agents." Slip op., at 29-30, n. 45. Furthermore, the mere fact that a § 6 (b) (5) standard is "feasible" does not mean that § 3 (8)'s "reasonably necessary or appropriate" language might not impose additional restraints on OSHA. For example, all § 6 (b) (5) standards must be addressed to "significant risks" of material health impairment. *Id.*, at 32. In addition, if the use of one respirator would achieve the same reduction in health risk as the use of five, the use of five respirators was "technologically and economically feasible," and OSHA thus insisted on the use of five, then the "reasonably necessary or appropriate" limitation might come into play as an additional restriction on OSHA to choose the one-respirator standard. In this case we need not decide all the applications that § 3 (8) might have, either alone or together with § 6 (b) (5).

materials and harmful physical agents, Legis. Hist. 1, 6-7 (Williams bill); 721, 728-732 (Daniels bill), although both contained the definitional section now codified as § 3 (8).³³ The House Committee on Education and Labor, to which the Daniels bill was referred, reported out an amended bill that included the following section:

"The Secretary, in promulgating standards under this subsection, shall set the standard which most adequately assures, on the basis of the best available professional evidence, that no employee will suffer any impairment of health or functional capacity, or diminished life expectancy even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." H. R. Rep. No. 91-1291, 91st Cong., 2d Sess., 4 (1970) (to accompany H. R. 16785); Legis. Hist. 834.

The Senate Committee on Labor and Public Welfare, reporting on the Williams bill, included a provision virtually identical to the House version, except for the additional requirement that the Secretary set the standard "which most adequately *and feasibly assures* . . . that no employee will suffer any impairment of health." Legis. Hist. 242 (the Senate provision was numbered § 6 (b)(5)) (emphasis added). This addition to the Williams bill was offered by Senator Javits, who explained his amendment:

"As a result of this amendment the Secretary, in setting standards, is expressly required to consider feasibility of proposed standards. This is an improvement over the Daniels bill [as reported out of the House Committee], which might be interpreted to require *absolute* health and safety in all cases, regardless of feasibility, and the Administration bill, which contains no criteria for stand-

³³ Although both versions of the Act contained provisions identical to § 3 (8), 29 U. S. C. § 652 (8), there is no discussion in the legislative history of the meaning of the phrase "reasonably necessary or appropriate."

ards at all. S. Rep. No. 91-1282, 91st Cong., 2d Sess., 58; Legis. Hist. 197 (emphasis added).³⁴

Thus the Senator's concern was that a standard might require "absolute health and safety" without any consideration as to whether such a condition was achievable. The full Senate Committee also noted that standards promulgated under this provision "shall represent feasible requirements," *id.*, at 7; Legis. Hist. 147, and commented that "[s]uch standards should be directed at assuring, *so far as possible*, that no employee will suffer impaired health . . .," *ibid.* (emphasis added).

³⁴ Petitioners' primary legislative history argument is that Senator Javits "took the position that OSHA standards should be 'feasible' in the sense of being 'reasonable' and 'practical' as well as technologically achievable." Brief for Petitioners ATMI et al., at 32. A review of the record belies this contention. Senator Javits himself had introduced the Administration's bill, S. 2788, which he observed contained no criteria for issuance of standards. Legis. Hist. 31, 39-42. That proposed legislation, which established a National Occupational Safety and Health Board to promulgate standards, required the Board to submit proposed standards to an appropriate national standards-producing organization "to prepare a report on the technical feasibility, reasonableness and practicality of such standard." *Id.*, at 39. Furthermore, either the Secretary of Labor or the Secretary of Health, Education, and Welfare could object to a proposed standard on the basis, *inter alia*, that it "is not feasible," *id.*, at 40, at which point the Board could reaffirm the standard by a majority vote, *ibid.* President Nixon's message accompanying S. 2788, which Senator Javits inserted in the Congressional Record, described the "report on the technical feasibility, reasonableness and practicality of such standard" under the Act as a "report on the feasibility of the proposed standards." 115 Cong. Rec. 22517.

From this slim reed petitioners fashion their legislative history argument. But even if Senator Javits fully subscribed to statements by President Nixon on the proposed legislation, of which there is some doubt, see 115 Cong. Rec. 22512, this hardly supports the view that the Senator's addition of the feasibility requirement to the Williams bill included any such baggage. After all, the Senator described his amendment only with the word "feasible," and specifically distinguished the amended Williams bill from the Administration's, on the basis of the latter's lack of criteria.

The final amendments to this Senate provision, resulting in § 6 (b)(5) of the Act, were proposed and adopted on the Senate floor after the Committee reported out the bill. Senator Dominick, who played a prominent role in this amendment process, see Legis. Hist. 526 (comments of Sen. Javits); 527 (comments of Sen. Williams), continued to be concerned that the Act might be read to require absolute safety. He therefore proposed that the entire first sentence of § 6 (b)(5) be struck, explaining:

"This requirement is inherently confusing and unrealistic. It could be read to require the Secretary to ban all occupations in which there remains *some* risk of injury, impaired health, or life expectancy. In the case of all occupations, it will be impossible to eliminate all risks to safety and health. Thus, the present criteria could, if literally applied, close every business in this nation. In addition, in many cases, the standard which might most 'adequately' and 'feasibly' assure the elimination of the danger would be the prohibition of the occupation itself." Legis. Hist. 367 (comments of Sen. Dominick on his proposed amendment No. 1054) (emphasis in original).

In the ensuing floor debate on this issue, Senator Dominick reiterated his concern that "[i]t is unrealistic to attempt, as [the Committee's Section 6 (b)(5)] apparently does, to establish a utopia free from any hazards. Absolute safety is an impossibility. . . ." Legis. Hist. 480.³⁵ The Senator con-

³⁵ Senator Dominick gave several examples. For instance:

"[L]et us take a fellow who is a streetcar conductor or a bus conductor at the present time. How in the world, in the process of the pollution we have in the streets or in the process of the automobile accidents that we have all during a working day of anyone driving a bus or trolley car, or whatever it may be, can we set standards that will make sure he will not have any risk to his life for the rest of his life? It is totally impossible for this to be put in a bill; and yet it is in the committee bill." Legis. Hist. 423. See also *id.*, at 481; 345.

cluded that “[a]ny administrator responsible for enforcing the statute will be faced with an impossible choice. Either he must forbid employment in all occupations where there is any risk of injury, even if the technical state of the art could not remove the hazard, or he must ignore the mandate of Congress. . . .” *Id.*, at 481-482.

Senator Dominick failed in his efforts to have the first sentence of § 6 (b) (5) deleted. However, after working with Senators Williams and Javits, he introduced an amended version of the first sentence which he thought “agreeable to all” and which became § 6 (b) (5) as it now appears in the Act. *Id.*, at 502. This amendment limited the applicability of § 6 (b) (5) to “toxic materials and harmful physical agents,” changed “health impairment” to “material health impairment,” and deleted the reference to “diminished life expectancy.” Significantly, the feasibility requirement was left intact in the statute. Instead of the phrase “which most adequately and feasibly assures,” the amendment merely substituted “which most adequately assures, to the extent feasible,” to emphasize that the feasibility requirement operated as a limit on the promulgation of standard under § 6 (b) (5).

Senator Dominick believed that his modifications made clearer that attainment of an absolutely safe working environment could not be achieved through “prohibition of the occupation itself,” *id.*, at 367, and that toxic material and harmful physical agent standards should not address frivolous harms that exist in every workplace. The feasibility requirement, along with the need for a “material health impairment,” were thus thought to satisfy these two concerns. He explained the effect of the amendment:

“What we were trying to do in the bill—unfortunately, we did not have the proper wording or the proper drafting—was to say that when we are dealing with toxic agents or physical agents, we ought to take such steps as are feasible and practical to provide an atmosphere

within which a person's health or safety would not be affected. Unfortunately, we had language providing that anyone would be assured that no one would have a hazard. . . ." *Id.*, at 502.

Senator Williams added that the amendment "will provide a continued direction to the Secretary that he shall be required to set the standard which most adequately and to the greatest extent feasible assures" that no employee will suffer any material health impairment. *Id.*, at 503. The Senate thereafter passed S. 2193. One week later, the House passed a substitute bill for its original bill, which failed to contain any substantive criteria for the issuance of health standards. Legis. Hist. 1094-1096. At the joint House-Senate Conference, however, the House conferees acceded to the Senate's version of § 6 (b) (5).³⁶

Not only does the legislative history confirm that Congress meant "feasible" rather than "cost-benefit" when it used the former term, but it also shows that Congress understood that the Act would create substantial costs for employers, yet intended to impose such costs when necessary to create a safe and healthful working environment.³⁷ Congress viewed the

³⁶ In acceding, the House obtained Senate agreement to another amendment, now § 6 (b) (6) (A) of the Act, that allowed employers to petition for a temporary variance from an occupational safety and health standard in certain cases, except that "[e]conomic hardship is not to be a consideration for the qualification for a temporary extension order." H. R. Conference Rep. No. 91-1765, 91st Cong., 2d Sess., 35; Legis. Hist. 1188. The Conference Report limited the variance procedure to the following cases:

"unavailability of professional or technical personnel or of necessary materials or equipment or because necessary construction or alteration of facilities cannot be completed on time. . . . Such an order may be issued for a maximum period of one year and may not be renewed more than twice." *Ibid.*

³⁷ Because the costs of compliance would weigh particularly heavily on small businesses, Congress provided in § 28 of the Act an amendment to

costs of health and safety as a cost of doing business. Senator Yarborough, a cosponsor of the Williams bill, stated: "We know the costs would be put into consumer goods but that is the price we should pay for the 80 million workers in America." Legis. Hist. 444. He asked:

"One may well ask too expensive for whom? Is it too expensive for the company who for lack of proper safety equipment loses the services of its skilled employees? Is it too expensive for the employee who loses his hand or leg or eyesight? Is it too expensive for the widow trying to raise her children on meager allowance under workmen's compensation and social security? And what about the man—a good hardworking man—tied to a wheel chair or hospital bed for the rest of his life? That is what we are dealing with when we talk about industrial safety. . . . We are talking about people's lives, not the indifference of some cost accountants." Legis. Hist. 510.

Senator Eagleton commented that "[t]he costs that will be incurred by employers in meeting the standards of health and safety to be established under this bill are, in my view, rea-

the Small Business Act, 15 U. S. C. § 836, making small businesses eligible for economic assistance through the Small Business Administration to comply with standards promulgated by the Secretary. Legis. Hist. 1257. Senator Dominick explained:

"There is a provision in the bill which recognizes the impact that this particular legislation may have on small businesses. . . . It permits the Secretary to make loans to small businesses wherever the standards that are set by the National Government are so severe as to have caused a real and substantial economic injury. Under those circumstances the Secretary is entitled, through the Small Business Administration, to make loans to those businesses to get them over the hump, because of the need for new equipment, or because of new conditions within the shop, which would permit them to continue in operation.

"I think that is a very significant and important provision for minimizing economic injury which could occur if the bill resulted in situations which would have very serious effects on businesses." Legis. Hist. 525.

sonable and necessary costs of doing business." Legis. Hist. 1150-1151 (emphasis added).³⁸

Other Members of Congress voiced similar views.³⁹ Nowhere is there any indication that Congress contemplated a different balancing by OSHA of the benefits of worker health and safety against the costs of achieving them. Indeed Congress thought that the *financial costs* of health and safety problems in the workplace were as large or larger than the *financial costs* of eliminating these problems. In its statement of findings and declaration of purpose encompassed in the Act itself, Congress announced that "personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payment." 29 U. S. C. § 651 (a). The Senate was well aware of the magnitude of these costs:

"[T]he economic impact of industrial deaths and disability is staggering. Over \$1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product

³⁸ Congress was concerned that some employers not obtain a competitive advantage over others by declining to invest in worker health and safety:

"Although many employers in all industries have demonstrated an exemplary degree of concern for health and safety in the workplace, their efforts are to often undercut by those who are not so concerned. Moreover, the fact is that many employers—particularly smaller ones—simply cannot make the necessary investment in health and safety, and survive competitively, unless all are compelled to do so." S. Rep. 91-1282, 91st Cong., 2d Sess., 4, Legis. Hist. 144.

³⁹ See, e. g., Legis. Hist. 1030-1031 (remarks of Congressman Dent):

"Although I am very much disturbed over adding new costs to the operation of our production facilities because of the threats from abroad, I would say there is a greater concern and that must be for the production men who do the producing—the men who work in the service industries and the men and women in this country who daily go out and keep the economy moving and make it safe for all of us to live and to work and to be able to prosper in it."

is estimated to be over \$8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses," S. Rep., *supra*, at 2; Legis. Hist. 142.

Senator Eagleton summarized, "Whether we, as individuals, are motivated by simple humanity or by simple economics, we can no longer permit profits to be dependent upon an unsafe or unhealthy worksite." Legis. Hist. 1150-1151.

III

Section 6 (f) of the Act provides that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." 29 U. S. C. § 655 (f). Petitioners contend that the Secretary's determination that the Cotton Dust Standard is "economically feasible" is not supported by substantial evidence in the record considered as a whole. In particular, they claim (1) that OSHA underestimated the financial costs necessary to meet the Standard's requirements; and (2) that OSHA incorrectly found that the Standard would not threaten the economic viability of the cotton industry.

In statutes with provisions virtually identical to § 6 (f) of the Act, we have defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 477 (1951). The reviewing court must take into account contradictory evidence in the record, *Universal Camera Corp. v. NLRB*, *supra*, at 487-488, but "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence," *Consolo v. Federal Maritime Commission*, 383 U. S. 607, 620 (1966). Since the Act places responsibility for determining substantial evidence questions in the Courts of Appeals, 29 U. S. C. § 655 (f), we apply the familiar rule that "[t]his Court will inter-

vene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied" by the court below. *Universal Camera Corp. v. NLRB*, *supra*, at 491; see *Mobil Oil Corp. v. FPC*, 417 U. S. 283, 292, 310 (1974); *FTC v. Standard Oil Co.*, 355 U. S. 396, 400-401 (1958). Therefore, our inquiry is not to determine whether we, in the first instance, would find OSHA's findings supported by substantial evidence. Instead we turn to OSHA's findings and the record upon which they were based to decide whether the Court of Appeals "misapprehended or grossly misapplied" the substantial evidence test.

A

OSHA derived its cost estimate for industry compliance with the Cotton Dust Standard after reviewing two financial analyses, one prepared by the Research Triangle Institute (RTI), an OSHA-contracted group, the other by industry representatives (Hocutt-Thomas).⁴⁰ The agency carefully explored the assumptions and methodologies underlying the conclusions of each of these studies. From this exercise the agency was able to build upon conclusions from each which it found reliable and explain its process for choosing its cost estimate. A brief summary of OSHA's treatment of the two studies follows.

⁴⁰ See RTI, Cotton Dust: Technological Feasibility Assessment and Final Inflationary Impact Statement (1976), Ex. 6-76, Ct. of App. J. A. 457, 573-748; RTI, Technological Feasibility and Economic Impact of Regulations for Cotton Dust: Testimony to be Presented by the Research Triangle Institute at Public Hearing (1977), Ex. 16, Ct. of App. J. A. 1320, 1351-1357. The industry estimates were presented by Hovan Hocutt and Arthur Thomas, employees of dust control equipment manufacturers. Statement of Hovan Hocutt, Senior Vice President, Engineering, Pneumafil Corp., Ex. 60, Ct. of App. J. A. 2228-2247; Statement of Arthur Thomas, Senior Vice-President, The Bahnson Co., Ex. 62, Ct. of App. J. A. 2248-2257. OSHA referred collectively to these two statements as the Hocutt-Thomas estimate.

OSHA rejected RTI's cost estimate of \$1.1 billion for textile industry engineering controls for three principal reasons.⁴¹ First, OSHA believed that RTI's estimate should be discounted by 30%, 43 Fed. Reg. 27372, col. 3, because that estimate was based on the assumption that engineering controls would be applied to all equipment in mills, including those processing pure synthetic fibers, even though cotton dust is not generated by such equipment. RTI had observed that "[e]xclusion of equipment processing man-made fibers only could reduce these costs by as much as 30 percent." Ex. 6-76, Ct. of App. J. A. 585.⁴² Since the Standard did not require controls on synthetics-only equipment, OSHA rejected RTI's assumption about application of controls to synthetics-only machines. 43 Fed. Reg. 27371, col. 3. Second, OSHA concluded that RTI "may have over-estimated compliance costs since some operations are already in compliance with the permissible exposure limit of the new standard." *Id.*, at 27370, col. 2 and 3. Evidence indicated that some mills had attained PELs of 200 $\mu\text{g}/\text{m}^3$ or less, while others were below the 100 $\mu\text{g}/\text{m}^3$ total dust level.⁴³ Therefore, OSHA

⁴¹ RTI estimated compliance costs of \$984.4 million for yarn production (opening through spinning), Ex. 6-76, Ct. of App. J. A. 473, and \$127.7 million for yarn processing (winding through weaving/slashing), *id.*, at 600. In another part of its study, RTI estimated yarn production costs of \$885.6 million. *Id.*, at 589. The explanation for this discrepancy is not readily apparent from the record, although it may be attributable to cost estimates for different years.

⁴² RTI made what it called a "conservative estimate" that "controls would be applied to all the production equipment in mills processing cotton and cotton-synthetic blends, even if part of their product is pure synthetic." Ex. 6-76, Ct. of App. J. A. 585.

⁴³ RTI's David LeSourd explained that RTI did not have data on the degree of compliance for the industry as a whole, but only for some specific mills. Ct. of App. J. A. 3637-3638. Therefore RTI merely assumed that industry-wide PELs were at a 1000 $\mu\text{g}/\text{m}^3$ total dust PEL. Ex. 6-76, *id.*, at 579-580. The record contains conflicting evidence on the actual level of control in the industry. Some evidence suggests compliance by mills substantially better than the 1000 $\mu\text{g}/\text{m}^3$ total dust level. See,

disagreed with RTI's assumption that the industry had not reduced cotton dust exposure below the existing standard's 1000 $\mu\text{g}/\text{m}^3$ total dust PEL. *Id.*, at 27370, col. 3. Third, OSHA found that the RTI study suffered from lack of recent accurate industry data. *Id.*, at 27373, col. 1; see Ex. 6-76, Ct. of App. J. A. 858; Ex. 16, *id.*, at 1357, 1359.

In light of these deficiencies in the RTI study, OSHA adopted the Hocutt-Thomas estimate for textile industry engineering controls of \$543 million,⁴⁴ emphasizing that, because it was based on the most recent industry data, it was more realistic than RTI's estimate. 43 Fed. Reg. 27373, col. 1.⁴⁵ Nevertheless OSHA concluded that the Hocutt-Thomas estimate was overstated for four principal reasons. First, Hocutt-Thomas included costs of achieving the existing PEL of 1000 $\mu\text{g}/\text{m}^3$, while OSHA thought it likely that compliance was more widespread and that some mills had in fact achieved the final standard's PEL. *Ibid.*, see *supra*, at 30, n. 43.⁴⁶ Second, Hocutt-Thomas declined to make any allow-

e. g., Ex. 47, *id.*, at 2037 (66% of Burlington Industries work areas at or below 500 $\mu\text{g}/\text{m}^3$, 28% below 200 $\mu\text{g}/\text{m}^3$); Ex. 78, *id.*, at 2387. One expert, commenting on another study, observed that "substantial proportions of the industry are, in fact, within compliance of [200 $\mu\text{g}/\text{m}^3$]." Ct. of App. J. A. 3637. Other evidence in the record suggests that some segments of the industry are not in compliance with the 1000 $\mu\text{g}/\text{m}^3$ total dust PEL. See *e. g.*, *id.*, at 3939 (criticizing RTI assumption of compliance). In any event, OSHA found that the "actual level of controls in the cotton industry could not be determined" on the basis of data available to RTI at the time of its study. 43 Fed. Reg. 27370, col. 3.

⁴⁴ OSHA's cost estimate included \$543 million for engineering controls (the Hocutt-Thomas estimate), \$7 million for monitoring, medical surveillance, and other provisions (the RTI estimate), \$31.5 million for waste processing, and \$75 million for seed processing, for a total of \$656.5 million. 43 Fed. Reg. 27380, col. 1.

⁴⁵ The Hocutt-Thomas study based its estimates on data obtained from a recent ATMI survey of cotton mills. Completed questionnaires from 353 mills, which processed 80% of the cotton bales in the United States, were returned. Ex. 60, Ct. of App. J. A. 2231.

⁴⁶ The Hocutt-Thomas study included an allowance for existing com-

ance for the trend toward replacement of existing production machines with newer more productive equipment.⁴⁷ Relying on this “[n]atural production trend[],” 43 Fed. Reg. 27359, col. 1, OSHA concluded that fewer machines than estimated by Hocutt-Thomas would require retrofitting or other controls, *id.*, at 27372, col. 3. Third, OSHA thought that Hocutt-Thomas failed to take into account development of new technologies likely to occur during the four-year compliance period. *Ibid.*⁴⁸ Fourth, OSHA believed that Hocutt-Thomas

pliance efforts, by subtracting from its total estimate the cost of all engineering controls purchased by the industry prior to February 11, 1977. Ex. 60, Ct. of App. J. A. 2232, 2247. Whether this is a sufficient proxy for current industry compliance is not apparent from the record. Hocutt himself admitted that he did not have figures on what portion of the industry was meeting the 1000 $\mu\text{g}/\text{m}^3$ total dust PEL. Ct. of App. J. A. 3941.

⁴⁷ John Figh, a vice-president at Chase Manhattan Bank specializing in the textile industry, commented on the trend toward modernizing equipment in the mills:

“[B]y *continuing* to upgrade plants with the most modern and efficient equipment, the textile manufacturing industry will likely not be required due to demand to add much in the way of new bricks and mortar. There may be some individual cases of out-of-date facilities being replaced by new buildings; but for the most part, I believe we will see *more* in the way of modernization of existing plants. . . .” Ex. 63, Ct. of App. J. A. 2260 (emphasis added).

One study explained why the costs of controls should be lower if a mill converts to new equipment as opposed to retrofitting old machines:

“1) The operating cost of new equipment with controls on that equipment is less than the operating cost of the old equipment with controls necessary for the older, slower equipment to meet proscribed [*sic*] dust levels; and 2) by going to newer equipment with controls there is a likelihood that increased production rates will result in recovery of some or all of the capital cost of control.” Ex. 79A, *id.*, at 2532; see Ex. 79C, *id.*, at 2550-2551; Ex. 63, *id.*, at 2261; Ex. 78, *id.*, at 2376-2377.

⁴⁸ Chase Manhattan Bank vice-president Figh noted that “[t]here does not appear to be any vast new technology on the horizon,” but that “[a]s for new machinery, evolutionary changes are continuing at what

might have improperly included control costs for synthetics-only machines, *ibid.*, an inclusion which could result in a 30% cost overestimate.⁴⁹

Petitioners criticize OSHA's adoption of the Hocutt-Thomas estimate, since that estimate was based on achievement of somewhat less stringent PELs than those ultimately promulgated in the final Standard.⁵⁰ Thus, even if the Hocutt-Thomas estimate was exaggerated, they assert that "only by the most remarkable coincidence would the amount of that overestimate be equal to the additional costs required to attain the far more stringent limits of the Standard OSHA actually adopted." Brief for Petitioners ATMI et al., at 27; see Brief for Petitioner National Cotton Council of America, at 14-15. The agency itself recognized the problem cited by petitioners, but found itself limited in the precision of its estimates by the industry's refusal to make more of its own data available.⁵¹ OSHA explained that, "in the absence of

appears to me to be about the same rate as in the last few years." Ex. 63, Ct. of App. J. A. 2660-2661. One study is particularly critical of the assumption of a "static state of technology," Ex. 78, *id.*, at 2380, and documents technological advances that can be expected, *id.*, at 2380-2386. Some experts were less optimistic of the role of technology. See, e. g., *id.*, at 3643-3644 (RTI study).

⁴⁹ Hocutt-Thomas had some information on the "ratio of synthetics to cotton in blends" in the mills, but it is not clear from the record if and how they used this information. Ex. 60, Ct. of App. J. A. 2230.

⁵⁰ The final Cotton Dust Standard calls for PELs of 200 $\mu\text{g}/\text{m}^3$ in opening through roving and spinning through warping, and 750 $\mu\text{g}/\text{m}^3$ for slashing and weaving. The Hocutt-Thomas study similarly assumed a 200 $\mu\text{g}/\text{m}^3$ PEL for opening through roving, but assumed less stringent PELs of 500 $\mu\text{g}/\text{m}^3$ for spinning through warping, and 1000 $\mu\text{g}/\text{m}^3$ for slashing and weaving.

⁵¹ For example, in questioning before an administrative law judge, Hocutt answered:

"Well, I'm beginning to wish I hadn't said anything about this, which I did, and I have to be helpful. Practically all of this information that I have is confidential and I couldn't reveal any of the sources. You can only

the [industry] survey data [of textile mills], OSHA cannot develop more accurate estimates of compliance costs." 43 Fed. Reg. 27373, col. 1. Since § 6 (b)(5) of the Act requires that the Secretary promulgate toxic material and harmful physical agent standards "on the basis of the best available evidence," 29 U. S. C. § 655 (b)(5), and since OSHA could not obtain the more detailed confidential industry data it thought essential to further precision, we conclude that the agency acted reasonably in adopting the Hocutt-Thomas estimate.⁵² While a cost estimate based on the standard actually promulgated surely would be preferable,⁵³ we decline to hold

take my word for the figures. I can't substantiate it in any manner." Ct. of App. J. A. 3929.

Petitioners note, however, that the industry subsequently provided its survey data to OSHA, and that the only information deleted was confidential information withheld by agreement with the agency in order to prevent identification of specific mills. Reply Brief for Petitioners ATMI et al., at 23, n. 32; see J. A. 388-390. OSHA responds that, "[b]ecause the number of machines was deleted and correlated dust data was not supplied, the data could not be used to support a specific cost adjustment." Brief for Respondent Secretary of Labor, at 64, n. 70. In any event, no contention is made that OSHA had access to Hocutt's own data used to calculate his cost estimate.

⁵² Both petitioners and respondents attempt their own calculations from evidence in the record to show the unreasonableness or reasonableness of OSHA's rough equation between the Hocutt-Thomas overstatement in costs and the expense of achieving a Standard somewhat more stringent for some operations. See, *e. g.*, Brief for Petitioner National Cotton Council of America, at 9-10; Brief for Respondent Unions, at 14-18. Such manipulation of the data suggests a wide margin of error for any estimate, whether it be OSHA's, the industry's, or the unions'. Viewed in that light, the agency's candor in confessing its own inability to achieve a more precise estimate should not precipitate a judicial review that nonetheless demands what the congressionally-delegated "expert" says it cannot provide.

⁵³ The Secretary originally asked RTI to prepare cost estimates for several PEL levels, including 500, 200, and 100 $\mu\text{g}/\text{m}^3$. Ex. 6-76, Ct. of App. J. A. 509. Clearly the Secretary intended to have cost information

as a matter of law that its absence under the circumstances required the Court of Appeals to find that OSHA's determination was unsupported by substantial evidence.⁵⁴

Therefore, whether or not in the first instance we would find the Secretary's conclusions supported by substantial evidence, we cannot say that the Court of Appeals in this case "misapprehended or grossly misapplied" the substantial evidence test when it found that "OSHA reasonably evaluated the cost estimates before it, considered criticisms of each, and selected suitable estimates of compliance costs." 617 F. 2d, at 661 (footnote omitted).

on the different PELs that he might promulgate. Although RTI provided estimates for these levels in its final report, OSHA found them to be too unreliable to adopt as final estimates. See *supra*, at 31-32.

Even if the Secretary had wanted to obtain a cost estimate, based on confidential industry data, for the actual PELs in the adopted Standard, it would have been unable to do so. Hocutt had concluded that it was technologically impractical to achieve PELs below 500 $\mu\text{g}/\text{m}^3$ for the operations of spinning through warping, Ex. 60, Ct. of App. J. A. 2239-2241, and PELs below 1000 $\mu\text{g}/\text{m}^3$ for weaving and slashing, *id.*, at 2241-2243. Therefore, he declined to prepare cost estimates of a 200 $\mu\text{g}/\text{m}^3$ PEL for those operations. The Secretary obviously disagreed with his judgment of technological feasibility. We also note that, although petitioners challenged the technological feasibility of the final Cotton Dust Standard in the Court of Appeals, they have abandoned such challenge here. Brief for Petitioners ATMI et al., at 8, n. 16.

⁵⁴ The Court of Appeals observed that "the agency's underlying cost estimates are not free from imprecision," 617 F. 2d, at 662, but that "[t]he very nature of economic analysis frequently imposes practical limits on the precision which reasonably can be required of the agency," *id.*, at 661. We suspect that this results not only from the difficulty of obtaining accurate data, but also from the inherent crudeness of estimation tools. Of necessity both the RTI and Hocutt-Thomas studies had to rely on assumptions the truth or falsity of which could wreak havoc on the validity of their final numerical cost estimates. As the official charged by Congress with the promulgation of occupational safety and health standards that protect workers "to the extent feasible," the Secretary was obligated to subject such assumptions to careful scrutiny, and to decide how they might affect the correctness of the proffered estimates,

B

After estimating the cost of compliance with the Cotton Dust Standard, OSHA analyzed whether it was “economically feasible” for the cotton industry to bear this cost.⁵⁵ OSHA

⁵⁵In one of their questions presented, petitioners ATMI et al., ask whether “the statutory requirement that compliance with an OSHA standard must be ‘economically feasible’ can be satisfied merely by the agency’s conclusion that the standard will not put the affected industry out of business.” Pet. for Writ of Certiorari of ATMI et al., at 2. However, in argument in their brief, petitioners appear to treat this issue primarily as a substantial evidence question. See Brief for Petitioners ATMI et al., at 24–31. They finally summarize their position as follows:

“... OSHA must present a responsible prediction, supported by substantial evidence, of what its standard will cost and what impact it will have on such factors as production, employment, competition, and prices. And the agency must explain in a cogent manner—on the basis of intelligible criteria—why it concludes that a standard having such an economic impact is ‘feasible.’” *Id.*, at 35 (footnote omitted).

As our review of OSHA’s economic feasibility determination demonstrates, OSHA presented a “responsible prediction” of what its Standard would cost and its impact on “production, employment, competition, and prices.” The agency concluded that its Standard is feasible because “compliance with [it] is well within the financial capability of the covered industries.” 43 Fed. Reg. 27379, col. 3. OSHA also found that the industry “will be able to meet the demands for production of cotton products.” *Id.*, at 27378, col. 2. We take these findings to mean, as the Secretary suggests, that “[a]t bottom, the Secretary must [and did] determine that the industry will maintain long-term profitability and competitiveness.” Brief for Respondent Secretary of Labor, at 49. See also *United Steelworkers of America v. Marshall*, No. 79-1048, slip op., at 144, — U. S. App. D. C. —, (1980) (“the practical question is whether the standard threatens the competitive stability of an industry”); *Industrial Union Department v. Hodgson*, *supra*, — U. S. App. D. C., at —, 499 F. 2d, at 478. This interpretation by the Secretary is certainly consistent with the plain meaning of the word “feasible.” See *Industrial Union Department v. American Petroleum Institute*, *supra*, slip op., at 31, n. 30 (MARSHALL, J., dissenting). Therefore, this case does not present, and we do not decide, the question whether a Standard that threatens the long-term profitability and competitiveness of an industry is “feasible” within the meaning of § 6 (b) (5) of the Act, 29 U. S. C. § 655 (b) (5).

concluded that it was, finding that "although some marginal employers may shut down rather than comply, the industry as a whole will not be threatened by the capital requirements of the regulation." 43 Fed. Reg. 27378, col. 2; see *id.*, at 27379, col. 3 ("compliance with the standard is well within the financial capability of the covered industries"). In reaching this conclusion on the Standard's economic impact, OSHA made specific findings with respect to employment, energy consumption, capital financing availability, and profitability. *Id.*, at 27377-27378. To support its findings, the agency relied primarily on RTI's comprehensive investigation of the Standard's economic impact.⁵⁶

RTI evaluated the likely economic impact on the cotton industry and the United States economy of OSHA's original proposed standard, an across-the-board 200 $\mu\text{g}/\text{m}^3$ PEL. Ex. 6-76, Ct. of App. J. A. 626.⁵⁷ RTI had estimated a total compliance cost of \$2.7 billion for a 200 $\mu\text{g}/\text{m}^3$ PEL,⁵⁸ and

⁵⁶ In contrast to the cost estimates prepared by RTI, OSHA did not find any major flaws with RTI's study of the economic impact of compliance costs.

⁵⁷ RTI specifically analyzed the impact of the Standard on the following areas in the cotton industry:

- "1) Additional employment requirements.
- "2) Energy consumption.
- "3) Increases in production costs and consequent price increases by affected industries.
- "4) Capital requirements and capital financing problems.
- "5) Competition effects on profit and market structure.
- "6) Inflationary impact on consumers and U. S. economy.
- "7) Employment impact due to the contraction of output demand."

Ex. 6-76, Ct. of App. J. A. 626.

RTI also examined the economic impact of two other across-the-board PELs of 500 $\mu\text{g}/\text{m}^3$ and 100 $\mu\text{g}/\text{m}^3$. *Ibid.*

⁵⁸ This cost estimate included \$984.4 million for yarn production (opening through spinning), \$1.3879 billion for winding through weaving/slash-ing, \$292.2 million for cotton ginning, and \$32 million for waste processing. Ex. 6-76, Ct. of App. J. A. 737.

used this estimate in assessing the economic impact of such a standard. *Id.*, at 736-737. As described *supra*, at 31, n. 44, OSHA estimated total compliance costs of \$656.5 million for the final Cotton Dust Standard,⁵⁹ a Standard less stringent than the across-the-board 200 $\mu\text{g}/\text{m}^3$ PEL of the proposed standard. Therefore, the agency found that the economic impact of its Standard would be "much less severe" than that suggested by RTI for a 200 $\mu\text{g}/\text{m}^3$ PEL estimate of \$2.7 billion. 43 Fed. Reg. 27378, col. 2. Nevertheless, it is instructive to review RTI's conclusions with respect to the economic impact of a \$2.7 billion cost estimate. RTI found:

"Implementation of the proposed [200 $\mu\text{g}/\text{m}^3$] standard will require adjustments within the cotton textile industry that will take time to work themselves out and that may be difficult for many firms. In time, however, prices may be expected to rise and markets to adjust so that revenues will cover costs. Although the impact on any one firm cannot be specified in advance, nothing in the RTI study indicates that the cotton textile industry as a whole will be seriously threatened by the impact of the proposed standard for control of cotton dust exposure." Ex. 60, Ct. of App. J. A. 1380; *id.*, at 3620.

In reaching this conclusion, RTI analyzed the total and annual economic impact⁶⁰ on each of the different sectors of the cotton industry.

For example, in yarn production (opening through spin-

⁵⁹ Cotton ginning was the subject of a separate regulation not at issue in this case. 43 Fed. Reg. 27350, col. 1; see 29 CFR § 1910.1046 (1980).

⁶⁰ RTI's annual cost of compliance figure contained three components: an annualized capital charge, direct operating cost, and energy cost. Ex. 6-76, Ct. of App. J. A. 643. The annualized capital charge consisted of depreciation, interest, administrative overhead, property tax, and insurance. *Ibid.* Depreciation and interest were computed "by use of a capital recovery factor based upon the concept of capital rent, the value of which depends on the operating life of the equipment and the market interest rate." *Ibid.*

ning), RTI found that the total additional capital requirement per dollar of industry shipment was 7.8 cents, and that the corresponding annual requirement was 1.9 cents. Ex. 6-76, Ct. of App. J. A. 729. Average price increases necessary to maintain pre-standard rates of return on investment were estimated to range from 0.22 cents to 6.25 cents per dollar of industry sales.⁶¹ *Ibid.* Even assuming no price increases, only one of the six yarn producing operations would experience a negative rate of return on investment, while the five other rates of return would range from 1.4% to 3.9%. *Id.*, at 652.⁶² RTI estimated the average pre-standard rate of return for the yarn producing sector as 4.1%. *Ibid.*

Through an output demand elasticity analysis, RTI determined that price increases necessitated by the 200 ug/m³

⁶¹ Petitioners' primary criticism of OSHA's reliance on the RTI study derives from their disagreement with RTI's assumption that compliance costs would be passed on to the consumers. Brief for Petitioners ATMI et al., at 28-29. This characterization misstates RTI's position. In calculating price increases necessary to maintain pre-standard rates of return, RTI "decided to adopt an extreme assumption of zero price demand elasticity in computing post-control price increases" because of difficulties in obtaining data necessary to compute elasticities for cotton yarns. Ex. 6-76, Ct. of App. J. A. 657. However, RTI carefully tested this assumption to determine "how much bias" it would introduce into the analysis. *Id.*, at 657-659. RTI concluded that, "unless the true demand elasticity for the output of the given sector is substantially greater than unity, our impact analysis based on the assumption of zero price elasticity of demand would not be invalidated." *Id.*, at 659. Therefore, unless a 1% increase in price was met with substantially more than a 1% decrease in demand, RTI's estimates of the price increases necessary to maintain pre-standard rates of return were valid. Since there was no evidence suggesting such an effect, RTI proceeded with its assumption.

In any event, RTI subsequently investigated short-term price elasticities of demand for 25 cotton consumer products, finding that 19 of them had elasticities less than or equal to unity. *Id.*, at 681.

⁶² RTI found higher price increases and lower rates of return when framing its analysis in pounds of cotton yarn produced. See Ex. 6-76, Ct. of App. J. A. 654, 729-730.

standard would result in a 1.68% contraction of cotton yarn consumption.⁶³ *Id.*, at 685; see *id.*, at 680-687. RTI also discussed the effects of such price increases on interfiber and domestic/foreign competition. RTI observed that "non-price factors have probably dominated" the competition between cotton and man-made fibers. *Id.*, at 623; 948-953.⁶⁴ Noting that international trade agreements restricting foreign imports of textile products "have tended to smother the effects of a small change in the relative prices of domestic versus foreign textile products," *id.*, at 622, RTI concluded that such small changes have had "very little impact" on domestic industries and markets, *id.*, at 961; see *id.*, at 954-961. In order to measure the ability of different sized textile companies to finance compliance costs, RTI constructed a ratio of capital requirements to profit after taxes. RTI found that two of

⁶³ Petitioner National Cotton Council of America criticizes RTI's use of short-term price elasticity coefficients, claiming that this underestimates long-term demand responses to price increases. Brief for Petitioner National Cotton Council of America, at 16-17. However, RTI's Dr. Lee, who conducted the elasticity analysis, observed that he used two independent procedures to compute demand contraction, and only one relied on short-term price elasticities. Ct. of App. J. A. 3626-3627. His "main procedure [was] input output table procedures," which produced an even smaller demand contraction estimate than those calculations relying on the short-term coefficients. *Ibid.*

⁶⁴ RTI cited such nonprice factors as "research expenditures, promotion and advertising, fiber and fabric development, fiber properties, and care characteristics of fabric." Ex. 6-76, Ct. of App. J. A. 623. John Figh, Chase Manhattan bank vice-president, observed that "polyester has grown at the expense of cotton over the last 10 years and I think it has penetrated most of the markets it can penetrate; . . . [T]he majority of it, the growth of polyester at the expense of cotton, has been completed." Joint App. 474-475. He noted that some cotton products, such as towels and 100% cotton men's shirts, enjoy the support of consumer preferences. *Ibid.* Although RTI cited the energy crisis without detailing its possible impact on man-made fiber products, Ex. 6-76, Ct. of App. J. A. 948, OSHA observed that changes in petroleum prices, a key ingredient in synthetic products, may have important impacts on the competitive balance, see 43 Fed. Reg. 27370, col. 2.

the six yarn production operations would have financing difficulties, but that such difficulties decreased as company size increased. *Id.*, at 730.⁶⁵ Finally, impacts on energy costs, employment, inflation, and market structure were evaluated. See *id.*, at 728-731.⁶⁶

Relying on its comprehensive economic evaluation of the cotton industry's ability to absorb the \$2.7 billion compliance cost of a 200 $\mu\text{g}/\text{m}^3$ PEL standard, RTI concluded that "nothing in the RTI study indicates that the cotton textile industry as a whole will be seriously threatened." Ex. 60, Ct. of App. J. A. 1380.⁶⁷ Therefore, it follows *a fortiori* that

⁶⁵ Two of the six yarn production operations had ratios less than 1, two had ratios less than 2, and the remaining two were less than 6. Ex. 6-76, Ct. of App. J. A. 665. Chase Manhattan Bank's John Figh agreed with RTI's assessment that financing the \$2.7 billion compliance cost for a 200 $\mu\text{g}/\text{m}^3$ PEL standard would be most difficult for smaller textile companies. Ex. 63, Ct. of App. J. A. 2264-2265.

⁶⁶ RTI conducted similar economic impact analyses, although in less depth, for the twisting through weaving and waste processing sectors of the cotton industry covered by the proposed 200 $\mu\text{g}/\text{m}^3$ PEL standard. Ex. 6-76, Ct. of App. J. A. 462. RTI found, for example, that price increases per dollar of industry sales ranged from .5 cents to 18 cents for twisting through weaving operations, and that some of these operations would experience "severe" financing difficulties. Ex. 6-76, Ct. of App. J. A. 733-734. To recount in further detail these conclusions would be an irrelevant exercise. RTI calculated that a 200 $\mu\text{g}/\text{m}^3$ standard for weaving/slashing would cost \$1.259 billion, *id.*, at 600, and computed the economic impact based on that figure. But RTI had also estimated that compliance costs for a 500 $\mu\text{g}/\text{m}^3$ PEL would be zero. *Ibid.* Since the final Cotton Dust Standard sets a 750 $\mu\text{g}/\text{m}^3$ PEL for weaving/slashing, further review of RTI's conclusion with respect to its \$1.259 billion cost is particularly unnecessary.

⁶⁷ Petitioners note that, although RTI estimated that compliance with the Cotton Dust Standard would take 8 or more years, OSHA required compliance within four years. Brief for Petitioners ATMI et al., at 29. RTI chose an 8-year period primarily because of "problems the control industry may have in supplying the required equipment." Joint App. 415; see *id.*, at 415-416. If this proves to be the case, then presumably individual mills will be able to obtain variances from the Standard's

OSHA's estimated compliance cost of \$656.6 million is "economically feasible."⁸⁸ Even if OSHA's estimate were understated, we are fortified in observing that RTI found that a standard more than four times as costly was nevertheless economically feasible.

The Court of Appeals found that the agency "explained the economic impact it projected for the textile industry," and that OSHA has "substantial support in the record for its . . . findings of economic feasibility for the textile industry." 617 F. 2d, at 662. On the basis of the whole record, we cannot conclude that the Court of Appeal's "misapprehended or grossly misapplied" the substantial evidence test.

III

The final Cotton Dust Standard places heavy reliance on the use of respirators to protect employees from exposure to cotton dust, particularly during the 4-year interim period necessary to install and implement feasible engineering controls.⁸⁹ One part of the respirator provision requires the

requirements because of technological infeasibility. See 29 CFR § 1910.1043 (e)(1); 29 U. S. C. § 655 (6).

⁸⁸ Perhaps in light of this fact, neither petitioners ATMI et al. nor petitioner National Cotton Council of America frame their "economic impact" substantial evidence arguments based on OSHA's estimate of compliance costs. Instead, they adopt as a minimum RTI's \$2.7 billion estimate for compliance costs with the proposed standard's 200 $\mu\text{g}/\text{m}^3$ PEL. Brief for Petitioner National Cotton Council of America, at 15-16; Brief for Petitioners ATMI et al., at 29.

⁸⁹ The final Standard, 29 CFR § 1910.1043 (f)(1), provides:

"Where the use of respirators is required under this section, the employer shall provide, at no cost to the employee, and assure the use of respirators which comply with the requirements of this paragraph (f). Respirators shall be used in the following circumstances:

"(i) During the time periods necessary to install or implement feasible engineering controls and work practice controls;

"(ii) During maintenance and repair activities in which engineering and work practice controls are not feasible;

"(iii) In work situations where feasible engineering and work practice

employer to give employees unable to wear a respirator⁷⁰ the opportunity to transfer to another position, if available, where the dust level meets the standard's PEL. 29 CFR § 1910.1043 (f)(2)(v). When such a transfer occurs, the employer must guarantee that the employee suffers no loss of earnings or other employment rights or benefits.⁷¹ Petitioners do not object to the transfer provision, but challenge OSHA's authority under the Act to require employers to guarantee employees' wage and employment benefits following the transfer. The Court of Appeals held that OSHA has such authority. 617 F. 2d, at 675. We conclude that, whether or not OSHA has this underlying authority, the agency has failed to make the necessary determination or statement of reasons that its wage guarantee requirement is related to the achievement of a safe and healthful work environment.

Respondents urge several statutory bases for the authority exercised here. The cite § 2 (b) of the Act, 29 U. S. C. § 651, which declares that the purpose of the Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions"; § 2 (b)(5), *id.*, at

controls are not yet sufficient to reduce exposure to or below the permissible exposure limit; and

"(iv) In operations specified under paragraph (g)(1).

"(v) Whenever an employee requests a respirator."

⁷⁰ An employee may be unable to wear a respirator because of facial irritation, severe discomfort, or impaired breathing. 43 Fed. Reg. 27387, col. 1 and 2.

⁷¹ The regulation, 29 CFR § 1019.1043 (f)(2)(v) (emphasis added), provides:

"Whenever a physician determines that an employee is unable to wear any form of respirator, including a power air purifying respirator, the employee shall be given the opportunity to transfer to another position which is available or later becomes available having a dust level at or below the PEL. *The employer shall assure that an employee who is transferred due to an inability to wear a respirator suffers no loss of earnings or other employment rights or benefits as a result of the transfer.*"

§ 651 (b) (5), which suggests achievement of the purpose "by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems"; § 6 (b) (5), *id.*, at § 655 (b) (5), which requires the agency to "set the standard which most adequately assures . . . that no employee will suffer material impairment of health or functional capacity . . ."; and § 3 (8), *id.*, at § 652 (8), which provides that a standard must require "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment." Brief for Respondent Secretary of Labor, at 68. Whatever methods these provisions authorize OSHA to apply, it is clear that such methods must be justified on the basis of their relation to safety or health.

Section 6 (f) of the Act, 29 U. S. C. § 655 (f), requires that "*determinations* of the Secretary" must be supported by substantial evidence. Section 6 (e), 29 U. S. C. § 655 (e), requires the Secretary to include "*a statement of the reasons* for such action, which shall be published in the Federal Register." In his "Summary and Explanation of the Standard," the Secretary stated: "Each section includes an analysis of the record evidence and the policy considerations underlying the decisions adopted pertaining to specific provisions of the standard." 43 Fed. Reg. 27380, col. 2. But OSHA never explained the wage guarantee provision as an approach designed to contribute to increased health protection. Instead the agency stated that the "goal of this provision is to minimize any adverse economic impact on the employee by virtue of the inability to wear a respirator." 43 Fed. Reg. 27387, col. 3. Perhaps in recognition of this fact, respondents in their briefs argue that

"[e]xperience under the Act has shown that employees are reluctant to disclose symptoms of disease and tend to minimize work-related health problems for fear of

being discharged or transferred to a lower paying job. . . . It may reasonably be expected, therefore, that many employees incapable of using respirators would continue to breathe unhealthy air rather than request a transfer, thus destroying the utility of the respirator program." Brief for Respondent Secretary of Labor, at 67; see Brief for Respondent Unions, at 51.⁷²

Whether these arguments have merit, and they very well may,⁷³ the *post-hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action. See *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402, 419 (1971); *Burlington Truck Lines v. United States*, 371 U. S. 156, 168-169 (1962); *SEC v. Chenery Corp.*, 318 U. S. 80, 87 (1943). For Congress gave OSHA the responsibility to protect worker health and safety, and to explain its reasons for its actions. Because the Act in no way authorizes OSHA to repair general unfairness to employees that is unrelated to achievement of health and safety

⁷² Although it cited no specific determination or statement of reasons proffered by the Secretary, the Court of Appeals was persuaded by this argument. 617 F. 2d., at 675.

⁷³ There is evidence in the record that might support such a determination. Dr. Merchant testified that a medical surveillance program alone would not be sufficient for identifying and relocating employees suffering from byssinosis. Joint App. 440-441. He observed:

"There is reluctance very often among the employee himself to leave his job. I think clearly some guarantees as to wages and opportunities must be an integral part of any recommendation to relocate somebody and it has been the experience in coal mining where miners are allowed, under the Coal Mine Health and Safety Act of 1968, to be transferred, a very low proportion of these men actually exercise their transfer rights. *Id.*, at 441.

However, the courts will not be expected to scrutinize the record to uncover and formulate a rationale explaining an action, when the agency in the first instance has failed to articulate such rationale. See *Automotive Parts & Accessories Assn. v. Boyd*, — U. S. App. D. C. —, 407 F. 2d 330, 338 (1968).

goals, we conclude that OSHA acted beyond statutory authority when it issued the wage guarantee regulation.⁷

V

When Congress passed the Occupational Safety and Health Act in 1970, it chose to place pre-eminent value on assuring employees a safe and healthful working environment, limited only by the feasibility of achieving such an environment. We must measure the validity of the Secretary's actions against the requirements of that Act. For "[t]he judicial function does not extend to substantive revision of regulatory policy. That function lies elsewhere—in Congressional and Executive oversight or amendatory legislation." *Industrial Union Department v. American Petroleum Institute*, *supra*, slip op., at 2 (BURGER, C. J., concurring); see *Tennessee Valley Authority v. Hill*, 437 U. S. 153, 185, 187-188, 194-195 (1978).

⁷⁴ In its specific discussion of the transfer/guarantee provision, occupying more than two-thirds of a column in the Federal Register, OSHA argued that "[i]t is manifestly unfair that employees who are unable to wear respirators suffer . . . economic detriment because their employers have not yet achieved compliance with the engineering control requirements of the standard, but are relying instead on the interim and less effective device of respirators." 43 Fed. Reg. 27387, col. 2 and 3. The agency then stated its judgment that the "protection [the transfer and guarantee regulation] affords should greatly increase the success of the standard's respiratory protection provisions." *Id.*, at 27387, col. 3. Since the Secretary had already presented an unauthorized reason for the guarantee provision, we decline to accept this "boilerplate" statement as a sufficient determination and statement of reasons within the meaning of the Act. 29 U. S. C. §§ 655 (e), (f). See *Synthetic Organic Chemical Manufacturers Association v. Brennan*, 503 F. 2d 1155, 1157, 1160 (CA3 1974), cert. denied, 420 U. S. 973 (1975); *Industrial Union Department v. Hodgson*, *supra*, — U. S. App. D. C. —, 499 F. 2d, at 475-476; *Assoc. Industries of New York State, Inc. v. U. S. Dept. of Labor*, 487 F. 2d 342, 354 (CA2 1973); *Dry Color Manufacturers' Assn. v. Dept. of Labor*, 486 F. 2d 98, 105-106 (CA3 1973). See also Berger & Riskin, Economic and Technological Feasibility in Regulating Toxic Substances Under the Occupational Safety and Health Act, 7 Ecology L. Q. 285, 298-299 (1978).

Accordingly, the judgment of the Court of Appeals is affirmed in all respects except to the extent of its approval of the Secretary's application of the wage guarantee provision of the Cotton Dust Standard at 29 CFR § 1910.1043 (f)(2) (v). To that extent, the judgment of the Court of Appeals is vacated and the case remanded with directions to remand to the Secretary for further proceedings consistent with this opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 29, 1981

✓

Re: No. 79-1429 & 79-1583,
American Textile Mfrs. Inst. v. Donovan

*Cotton
Dust*

Dear Bill,

I shall in due course circulate a dis-
senting opinion.

Sincerely yours,

*PS,
11*

Justice Brennan

Copies to the Conference

June 3, 1981

79-1429 and 79-1583 American Textile v. Donovan

Dear Bill:

Please show at the end of the next draft of your opinion that I took no part in the decision of this case.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: The Conference

*Lead Industries case is being held
for this case.*

No.79-1583

[illegible]

Voted on....., 19...
Assigned , 19...
Announced , 19...

No. 79-1429

AM. TEXTILE MFGRS. INST.

vs.

DONOVAN, SEC. LABOR

Relisted for Mr. Justice Brennan.

for Mr. Justice Brennan.

9' in now Out
of there Cattle Dust Cases
We have granted Lead case
& Huntm^t & Wines is covered in
that case

Reli

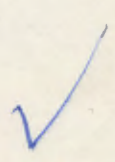
Reluctant

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 8, 1981

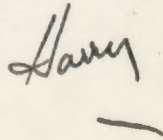


Re: No. 79-1429 - American Textile Manufacturers
Institute, Inc. v. Marshall
No. 79-1583 - National Cotton Council of
America v. Marshall

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

✓

June 10, 1981

RE: (79-1429 - American Textile Manufacturers
(Institute, Inc. v. Marshall
(79-1583 - National Cotton Council of
(America v. Marshall

Dear Bill:

I join your dissent.

Regards,

WRB

Justice Rehnquist

Copies to the Conference

Announced, 19...

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<i>Court</i>	<i>Voted on</i>, 19...	No. 79-1429
<i>Argued</i>, 19...	<i>Assigned</i>, 19...	
<i>Submitted</i>, 19...	<i>Announced</i>, 19...	

vs.

Relisted for Mr. Justice Brennan.

Out

[illegible]

550 N Street, S.W.
Washington, D.C. 20024

*Cotton dust
Cotton Dust
Case file*

June 19, 1981

PERSONAL

Dear Gib:

Lewis III called me this morning to say that Mims was concerned by my failure to participate in the decision of the cotton dust cases, decided this week.

The cotton dust cases were filed here last fall, and were argued January 21. At that time, I did not know about the lead industry cases (Lead Industries Association, et al v. Donovan and two other cases). Indeed these cases did not come to the attention of the Justices until sometime in May. I then learned that Hunton & Williams was counsel for one of the petitioners, the Ethyl Corporation.

When it became apparent that there was an overlap of issues, I concluded that I should not participate further in the cotton dust cases. Thus, although I sat for the argument and had participated in the consideration of those cases up to that time, I then withdrew and did not take part in the final decision.

I can well understand how you and your partners - as well as Mims - may have wondered what happened. I am glad to have the opportunity to explain it.

I am the only Justice who came to the Court directly from the private practice of law. In addition, my firm had an extensive list of clients - many of which were my personal clients. Thus, I have recusal problems that most Justices do not have. Even so, in argued cases, this problem has arisen infrequently.

As normally we do not give details as to recusals, I write this letter for the confidential information of you and your partners.

With best wishes.

Sincerely,

W. Gibson Harris, Esquire
McGuire, Woods & Battle
Ross Building
Richmond, Virginia 23219

lfp/ss

cc: Ms. Mims Powell