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# SCRUTINY OF OSHA REGULATIONS IN THE COURTS: A STUDY OF JUDICIAL ACTIVISM

## I. INTRODUCTION

Little trace of the concept of judicial deference<sup>1</sup> can be found in the Fifth Circuit's recent ruling in *American Petroleum Institute v. Occupational Safety and Health Administration*.<sup>2</sup> Against the background of a slowly emerging body of law regarding the scope of judicial review of Occupational Safety and Health Administration<sup>3</sup> regulations, the Fifth Circuit's decision represents a bold extension of the court's authority to define the parameters of OSHA's regulatory authority. Whether this case in fact signals a new wave of judicial activism will soon be determined by the United States Supreme Court.<sup>4</sup> But regardless of the Supreme Court's ultimate resolution of the issues presented, the *API* case invites analysis as a primary example of judicial involvement in an unsettled and controversial area of law.

In *API*, the role of the judiciary in OSHA's regulatory scheme was stretched beyond existing precedent on two fronts. First, the court held that OSHA had an affirmative obligation to engage in a risk-benefit-cost analysis<sup>5</sup> of its proposed regulations before it could determine that those regulations comported with the requirements of the Occupational Safety and Health Act of 1970.<sup>6</sup> Second, the court applied the "substantial evidence"<sup>7</sup> standard of judicial review to all of the decisions made by the Secretary<sup>8</sup> — both factual determinations and policy conclusions.

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1. For an example of the United States Supreme Court's reasoning for giving great deference to an agency's interpretation of an administrative regulation, see *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965) (finding that the Secretary of the Interior's interpretation of regulations concerning the issuance of oil and gas leases was "not unreasonable," the Court deferred to that interpretation). But, for a more-recent decision in which the Supreme Court exhibited considerably less deference to an administrative agency, see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (the Court, after a "probing" examination of the Secretary of Transportation's decision to authorize highway construction through a public park, reversed and remanded the case for plenary review).

2. 581 F.2d 493 (5th Cir. 1978) (hereinafter cited as *API*), transferred from D.C. Circuit, 570 F.2d 965 (D.C. Cir. 1977).

3. Hereinafter referred to as OSHA.

4. *Industrial Union Dep't v. American Petroleum Inst.*, 99 S.Ct. 1212 (1979) (certiorari granted). Oral argument was on October 10, 1979. 48 U.S.L.W. 3256.

5. For an explanation of the Fifth Circuit's application of the risk-benefit-cost test in *API*, see notes 44-46 *infra* and accompanying text. For a thorough, detailed discussion of risk-benefit-cost analysis, see *Symposium—Risk-Benefit Assessment in Governmental Decisionmaking*, 45 GEO. WASH. L. REV. 901 (1977).

6. 29 U.S.C. §§ 651-78 (1976) (hereinafter referred to as the Act or OSH Act).

7. *Id.* at § 655(f).

8. "The term 'Secretary' means the Secretary of Labor." *Id.* § 652(1) (hereinafter the terms

The Fifth Circuit, in imposing the risk-benefit-cost analysis, and in applying the substantial evidence test as it did, does not attempt to reconcile its decision with the existing body of case law.<sup>9</sup> Whether or not the *API* case can be reconciled with existing case law, this comment will compare the Fifth Circuit's rationale with the opinions of other courts which have considered similar issues, and thereby illustrate the dimensions of the Fifth Circuit's activism. First, the background of the *API* case and some of the special problems raised by the technical and scientific nature of the evidence presented in the case will be discussed. Second, the risk-benefit-cost test will be examined in light of existing judicial and administrative precedent. Third, the scope of substantial evidence review as applied in the *API* case versus its application in previous cases will be analyzed.

## II. THE *API* CASE

### A. *Background of the Case*

Benzene,<sup>10</sup> the subject of regulatory controversy in this case, has been recognized as causing serious non-malignant responses in humans<sup>11</sup> since the turn of the century.<sup>12</sup> As a result of its toxicity<sup>13</sup> (not its potential carcinogenic effects), benzene has been regulated since 1927.<sup>14</sup> In 1971, OSHA adopted the existing national consensus standard<sup>15</sup> limiting the permissible exposure level to ten parts per million (PPM).<sup>16</sup> Subsequent to

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"Secretary" and "OSHA" will be used interchangeably).

9. "We will not attempt to reconcile our decision with the cases from other circuits which uphold other standards regulating exposure to carcinogens." 581 F.2d at 505.

10. The chemical benzene (C<sub>6</sub>H<sub>6</sub>) is a colorless, highly flammable liquid, produced primarily by the petrochemical and petroleum refining industries. Approximately 86 percent of the benzene produced is used as an intermediate in the production of other organic chemicals. Current users of benzene include the chemical, printing, lithograph, rubber cement, rubber fabricating, paint, varnish, stain remover, adhesive, and petroleum industries. 43 Fed. Reg. 5,918 (1978).

11. Acute effects of exposure to benzene at relatively high levels (between 500 parts per million [PPM] and 20,000 PPM) produce symptoms of headache, nausea, euphoria and nervous excitation. Exposure to benzene concentrations near 20,000 PPM is fatal within minutes. *Id.* at 5,921.

12. *Id.* at 5,918.

13. *Id.* at 5,919.

14. *Id.* at 5,918.

15. For a period of two years after the adoption of the OSH Act, the Secretary was authorized by Congress to adopt any national consensus standard without regard to the rule-making procedures set forth in the Act. 29 U.S.C. § 655(a)(1976). National consensus standards are defined as standards "promulgated by a nationally recognized standards-producing organization . . ." *Id.* § 652 (9). For a critical review of OSHA's hasty adoption of these standards, see, Moran, *Occupational Safety and Health Standards as Federal Law: The Hazards of Haste*, 15 WM. & MARY L. REV. 777 (1974).

16. The benzene national consensus standard was a 1969, American National Standards

the enactment of this standard, OSHA initiated a series of rule-making procedures to reduce the ten PPM exposure level<sup>17</sup> as a result of scientific studies suggesting a link between benzene and leukemia.<sup>18</sup> These procedures culminated in the adoption of the one PPM<sup>19</sup> permanent standard<sup>20</sup> challenged by industrial producers and users<sup>21</sup> in *API*.

### B. *The Evidentiary Problems Presented by API*

Before promulgating any toxic substance regulation, OSHA is required to examine the most reliable and most recent scientific evidence available.<sup>22</sup> The obvious policy behind this statutory provision is to prevent OSHA from regulating relatively harmless substances, or regulating dangerous substances by meaningless or arbitrary methods. But this reliance on highly technical, scientific data creates problems for courts called on

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Institute standard. 43 Fed. Reg. 5,919 (1978). This standard permits exposure to 10 parts benzene per million parts of air (PPM), as averaged over an eight-hour day. It also allows the level of benzene to reach 50 PPM for a maximum of 10 minutes over an eight-hour shift. 29 C.F.R. § 1910.1000 (1978) (Table Z-2).

17. In January, 1977, OSHA issued voluntary "Guidelines for Control of Occupational Exposure to Benzene," recommending that the exposure level of benzene be reduced to one PPM. 43 Fed. Reg. 5,919 (1978). In May, 1977 OSHA issued an "Emergency Temporary Standard" for benzene, published in 42 Fed. Reg. 22,516 (1977). The OSH Act authorizes the Secretary to issue "Emergency temporary standards" if "necessary" to protect employees from "grave danger." 29 U.S.C. § 655(c) (1976). The emergency regulation never became effective as a result of a temporary restraining order issued by the Fifth Circuit. 43 Fed. Reg. 5,919 (1978).

18. OSHA received information suggesting that benzene was a suspect leukemogen from the National Academy of Sciences and the National Institute of Occupational Safety and Health (hereinafter referred to as NIOSH). 43 Fed. Reg. 5,919 (1978). NIOSH is a research organization under the Department of Health, Education and Welfare. Under the OSH Act it conducts research and makes recommendations for occupational safety and health standards. 29 U.S.C. § 671 (1976).

19. In addition to the reduction of exposure levels from 10 PPM to one PPM, the standard imposes upon affected industries the duty to monitor benzene concentrations in the occupational environment, implement engineering and work practice controls, utilize respiratory protection, provide protective clothing, institute medical surveillance and employee training programs, and maintain records of the monitoring and medical programs. The standard is designed to protect employees not only from benzene in the air, but also prohibits dermal contact and requires that containers of benzene carry specific labels. 29 C.F.R. § 1910.1028 (1978). This comment will limit its discussion to the one PPM benzene exposure provision of the standard.

20. OSHA is authorized to promulgate permanent toxic substance standards by 29 U.S.C. § 655(b) (1976). OSHA's statement of reasons is published in 43 Fed. Reg. 5,918 (1978), as required by that section of the OSH Act.

21. 581 F.2d at 495 n.1.

22. OSHA is required to examine the "best available evidence," to develop its standards based upon "research, demonstrations, (and) experiments," considering "the latest available scientific data in the field." 29 U.S.C. § 655(b)(5) (1976).

to review OSHA standards. The courts' lack of expertise in scientific matters may have some bearing on their willingness to defer to OSHA's judgments, which are necessarily grounded upon complex technical evidence.<sup>23</sup>

Although the Fifth Circuit does not appear to have been intimidated by the difficulties of analyzing scientific information,<sup>24</sup> its problems were exacerbated by the intermittent dearth of information in the record. Thus the court, in addition to weighing scientific evidence, had to determine the dispositive impact of the lack of scientific information.

*API* presented at least three instances in which the court had to face the issue of inconclusive technical information. First, OSHA's decision to regulate benzene exposure is wholly predicated on its assumption that this substance causes cancer.<sup>25</sup> Since the scientific community has yet to prove that causation,<sup>26</sup> OSHA's assumption is based on epidemiological studies<sup>27</sup> which correlate<sup>28</sup> the incidence of leukemia with exposure to benzene.<sup>29</sup> However, the court did not require OSHA to prove what is beyond the current capabilities of scientific research, and accepted OSHA's premise that benzene is carcinogenic.<sup>30</sup>

Second, the epidemiological study upon which OSHA relied most heavily to support its determination that the ten PPM exposure should be reduced, was conducted in an environment containing 150 PPM benzene.<sup>31</sup> Although the court did not directly discuss the fallibility of this study, its questionable applicability to OSHA's standards was clearly a factor in the court's

23. *Cf.*, *Synthetic Organic Chemical Mfs. Ass'n v. Brennan*, 503 F.2d 1155 (3d Cir. 1974) (See text *infra*, beginning at note 102 for discussion of the Third Circuit's reluctance to apply the stricter standard of review to the factual findings of the Secretary.)

24. "We are not persuaded by OSHA's argument that this standard should be upheld since the lack of knowledge concerning the effects of exposure to benzene at low levels makes an estimate of benefits . . . impossible." 581 F.2d at 504 (footnote omitted in which the court discusses ways in which OSHA *can* estimate benefits).

25. 581 F.2d at 501.

26. See 581 F.2d at 504 n.25; 43 Fed. Reg. 5,930-33 (1978).

27. "The study of the incidence and distribution of physical . . . disorders in a population is referred to as epidemiology. The epidemiological approach serves to indicate both 'high-risk' areas and groups and the . . . conditions that are correlated with a high incidence of given disorders." J. COLEMAN, *ABNORMAL PSYCHOLOGY IN MODERN LIFE* 79 (5th ed. 1964).

28. "The knowledge of a correlation . . . carries with it a strong temptation to conclude that one variable causes the other . . . [I]t is important to note that the existence of a correlation between two variables implies nothing about a causal relationship." G. KIMBLE & N. GARMEZY, *PRINCIPLES OF GENERAL PSYCHOLOGY* 65 (2nd ed. 1963) (chapter on statistical methods).

29. Data regarding the carcinogenic effects of benzene could also be extrapolated from animal studies. 581 F.2d at 504 n.25.

30. *Id.* at 504 (nowhere in its opinion did the court contravert OSHA's premise that benzene is a suspected leukemogen).

31. *Id.* at 498-99 n.13.

determination that the federal agency's justification of the benzene standard was deficient.<sup>32</sup>

Third, OSHA justified its reduction of the permissible benzene exposure level from ten to one PPM based on the fact that no known safe exposure level exists.<sup>33</sup> The court held that the division in the scientific community over the existence of a safe threshold level of exposure provided sufficient evidence of a risk at the ten PPM level.<sup>34</sup> However, this lack of scientific consensus did not support OSHA's finding that the reduction to one PPM was "reasonably necessary."<sup>35</sup>

The court's rationale is anomalous, and demonstrates the hazards of interpreting scientific data (or the lack thereof). Scientists are divided over the safe threshold issue because they have been unable to establish a dose-response curve for benzene.<sup>36</sup> Thus, scientists are unable to determine at which point (safe threshold) a given dose (level of benzene) will or will not produce a given response (leukemia). The irony of the court's position lies in its suggestion that OSHA provide information (*i.e.*, a factual basis for estimating the benefits in reducing the standard<sup>37</sup>) while, at the same time, realizing that the scientific community has been unable to produce that information (the safe threshold is normally determined by the dose-response curve<sup>38</sup>).

OSHA's Congressional mandate to promote more "healthful working conditions"<sup>39</sup> and its amalgam of political and scientific expertise<sup>40</sup> seem

32. The benzene standard was deficient in the court's eyes because of OSHA's failure to show the standard would result in appreciable benefits. *Id.* at 503. Later, the court said OSHA's assumption of benefits is "based only on inferences drawn from studies involving much higher exposure levels . . ." *Id.* at 504 (emphasis added).

33. *Id.* at 501.

34. *Id.* at 503.

35. *Id.*

36. Dr. Kraybill of the National Cancer Institute testified at the benzene hearing:

[W]e don't really know the shape of the dose-response curve . . .

[O]ne might envisage a threshold, but we can't comment about that because we are fixed into the position today . . . of using mathematical models and statistical studies and what is really existing here is we don't have the biological data to tell us what is happening down in that part of the low dose-response curve . . .

Tr. 775-80, reprinted in Brief for Respondents at 40, *API v. OSHA*, 581 F.2d 493 (5th Cir. 1978). See also, Green, *The Risk-Benefit Calculus in Safety Determinations*, 43 GEO. WASH. L. REV. 791, 796 (1975).

37. "OSHA must have some factual basis for an estimate of benefits . . . For example, when studies . . . are sufficient to enable a dose-response curve to be charted . . . then OSHA will be able to make rough but educated estimates of the extent of benefits . . ." 581 F.2d at 504 (footnotes omitted).

38. See *id.* at 503; note 36 *supra*.

39. 29 U.S.C. § 651(b) (1976).

40. NIOSH is OSHA's scientific resource group as established under the Act, note 18 *supra*.

to counsel restraint in judicial review of that agency's decisions. As Dr. Philip Handler, past president of the National Academy of Sciences, comments, "regulatory agencies will repeatedly be confronted with the need for decision-making with an insufficiency of data. At such times, they have no choice; they must then err on the side of conservatism when protection of the public health is involved. That is their role in society . . ."<sup>41</sup>

### III. THE RISK-BENEFIT-COST TEST

#### A. *The Fifth Circuit's Application of the Test*

Although persuasive arguments<sup>42</sup> can be marshalled in favor of curbing judicial intervention in OSHA rule-making procedures, the OSH Act does not require the courts to rubber stamp the agency's decisions, or require OSHA to achieve absolute safety in workplaces. The Act explicitly imposes pragmatic limitations on OSHA's commission to reduce hazards in the occupational environment. The Fifth Circuit found a legislative prescription implicit in the Act with which to judge OSHA's regulations in terms of the risk, benefit, and cost involved.

The policy behind the court's risk-benefit-cost test appears to be that unless OSHA properly assesses and balances these factors, the agency will be unable to allocate its (or, more correctly, industry's) finite resources to "assure maximum benefit . . . and thus carry out Congress' overriding policy . . ."<sup>43</sup>

As employed in *API*, the risk-benefit-cost test directs OSHA to show: (1) that the existing ten PPM exposure level poses a health risk,<sup>44</sup> (2) that the one PPM standard will reduce that risk, *i.e.*, will be of "appreciable" or "measurable" benefit,<sup>45</sup> and (3) that the one-half billion dollar cost of

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OSHA performs a legislative-like function by regulating all businesses affecting interstate commerce. 29 U.S.C. § 651 (1976).

41. Green, *supra* note 36, at 801.

42. See text beginning at note 23 *supra* for a discussion of the problems encountered by the courts in evaluating scientific evidence; text beginning at note 98 *infra*, for a discussion of the cases before *API* which generally refrained from questioning the propriety of the specific methods used by OSHA to protect workers.

43. 581 F.2d at 501. See also *RMI Co. v. Secretary of Labor*, 594 F.2d 566 (6th Cir. 1979). In that case, the Sixth Circuit, reviewing a decision of the Occupational Safety and Health Review Commission [hereinafter referred to as OSHRC], adopted a cost-benefit framework for determining the economic feasibility of an OSHA noise control regulation. The court approved of OSHRC's position that "the costs of the proposed controls were to be balanced against the proposed benefits . . . in order that resources would be allocated in priority to the degree of harm established." *Id.* at 572. OSHRC is an independent, adjudicatory body established by the Act to review post-enforcement, standard violations. 29 U.S.C. §§ 659-61 (1976).

44. 581 F.2d at 503.

45. *Id.*

implementing the one PPM standard bears a reasonable relation to the benefits.<sup>46</sup> In fact, OSHA did estimate benefits<sup>47</sup> and costs,<sup>48</sup> but maintained the position that it could “not substitute cost-benefit criteria for the legislatively determined directive of protecting all exposed employees against material impairment of health . . . .”<sup>49</sup> Although the court found substantial evidence supporting the risk factor,<sup>50</sup> the benzene standard was set aside because OSHA failed to quantify the benefits of reducing the benzene exposure level from ten PPM to one PPM.<sup>51</sup> Since OSHA did not estimate benefits to the court’s satisfaction the reasonableness of the cost could not be determined.<sup>52</sup>

### B. Sources of the Risk-Benefit-Cost Test

Although there is an appealing logic to the Fifth Circuit’s position that OSHA should not be allowed to squander finite resources on *de minimus* health risks, the risk-benefit-cost test must be grounded in more than logic to be legally tenable.

In general support of its test, the Fifth Circuit pointed to a number of “pragmatic limitations”<sup>53</sup> in the Act which manifest Congress’ intent not to give OSHA “unbridled discretion to adopt standards designed to create absolutely risk-free workplaces regardless of cost.”<sup>54</sup> Phrases such as “so far as possible,”<sup>55</sup> “insofar as practicable,”<sup>56</sup> “reasonably necessary or appropriate,”<sup>57</sup> “to the extent feasible,”<sup>58</sup> and “material”<sup>59</sup> are examples.

The “feasibility” requirement under the toxic substance provision of the

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46. *Id.*

47. OSHA asserted the benefits of its standard with the following rationale: benzene is a carcinogen; there is no known safe level of benzene exposure; lower levels of benzene are safer than higher levels; therefore the one PPM standard is safer than the 10 PPM standard. 43 Fed. Reg. at 5,941.

48. OSHA commissioned a study of the economic impact of the benzene standard. The study reported the compliance costs of each segment of the standard for each of the affected industries. The study also examined the regulation’s impact on prices, market structure, energy, employment and productivity. *Id.* at 5,934-40.

49. *Id.* at 5,941.

50. Note 44 *supra*.

51. 581 F.2d at 510.

52. *Id.* at 504.

53. *Id.* at 502.

54. *Id.*

55. 29 U.S.C. § 651(b) (1976).

56. *Id.* at § 651(b) (7).

57. *Id.* at § 652 (8).

58. *Id.* at § 655 (5).

59. *Id.*



Act<sup>60</sup> provides fundamental support for the cost component of this test.<sup>61</sup> The legislative history of this section reveals that the amendment inserting this phrase in the Act was considered an improvement over the previous version "which might be interpreted to require absolute health and safety in all cases, regardless of feasibility . . . ."<sup>62</sup> Moreover, OSHA has recognized that the feasibility provision entails some duty to investigate the economic consequences of its standards.<sup>63</sup> In cases prior to *API*, courts have approved of OSHA's treatment of economic issues under the feasibility provision. In *Industrial Union Dep't, AFL-CIO v. Hodgson*<sup>64</sup> the petitioning unions claimed OSHA improperly delayed the effective date of its asbestos dust standard because it took into account the economic burdens to the industry of immediate enforcement.<sup>65</sup> The court held OSHA's consideration of economic burdens was proper and commented, "practical considerations can temper protective requirements. Congress does not appear to have intended to protect employees by putting their employers out

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60. The OSH Act contains a separate provision for standards regulating toxic substances under the "Procedure for promulgation . . . of standards" subsection. *Id.* § 655(b). The feasibility requirement is unique to the toxic substance provision which reads as follows:

(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. 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. *Id.* § 655(b)(5) (emphasis added).

61. It is suggested that the feasibility requirement is preferable to the "reasonable necessity" language of the Act, as statutory support for the risk-benefit-cost test. See note 78 *infra*. The Fifth Circuit's reliance on the OSH Act's "reasonable necessity" language is subject to serious criticism. See text beginning at note 76 *infra* for a discussion of the court's reliance on this language of the Act. The American Petroleum Institute, apparently recognizing the weakness of the Fifth Circuit's opinion on this issue, emphasizes the "feasibility" requirement in their brief to the Supreme Court to support the validity of the risk-cost-benefit test. Brief for Respondents at 41-47, *Industrial Union Dep't. v. Am. Petroleum Inst., cert. granted*, 99 S. Ct. 1212 (1979) (argued October 10, 1979).

62. S. Rep. No. 1282, 91st Cong., 2d Sess. 58, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 5222 (Individual views of Sen. Javits).

63. 43 Fed. Reg. at 5,934. In addition, OSHRC has consistently held that economic factors are of primary importance in evaluating OSHA regulations. See, e.g., *RMI Co. v. Secretary of Labor*, 594 F.2d 566 (6th Cir. 1979); *Atlantic Steel Co.*, [1977-78] OSHD (CCH) ¶ 22,483, (1978); *Continental Can Co.* [1976-77] OSHD (CCH) ¶ 21,009, (1976).

64. 499 F.2d 467 (D.C. Cir. 1974).

65. *Id.* at 477.

of business."<sup>66</sup> The Third Circuit followed suit in *AFL-CIO v. Brennan*<sup>67</sup> and sanctioned OSHA's consideration of economic feasibility in the agency's decision to eliminate certain provisions in its mechanical power press regulation.<sup>68</sup>

Case law that speaks approvingly of OSHA's attention to the financial burdens of its standards does not, however, provide adequate support for the Fifth Circuit's decision to set aside a standard for OSHA's failure to justify those burdens in terms of quantified benefits. The source of the risk-benefit-cost test applied in *API* is found in *Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Commission*.<sup>69</sup> The court made numerous references to *Aqua Slide* in articulating its test in the *API* case,<sup>70</sup> and drew parallels between the similar purposes<sup>71</sup> and the rule-making procedures<sup>72</sup> of the Consumer Product Safety Act<sup>73</sup> (upon which *Aqua Slide* was based), and the OSH Act. Although the risk-benefit-cost test may be justified on other grounds, the Fifth Circuit's reliance on a case interpreting a different statute is questionable.<sup>74</sup>

The Consumer Act expressly requires the Consumer Product Safety Commission to consider risk, benefit and cost factors in promulgating its rules,<sup>75</sup> whereas the OSH Act merely requires its toxic substance regula-

66. *Id.* at 477-78. The court qualified this comment, however, stating that standards may be feasible even though they are "financially burdensome" or cause the "economic demise of an employer who has lagged behind the rest of the industry . . . and is consequently financially unable to comply with the new standards as quickly as other employers." *Id.* at 478 (footnote omitted).

67. 530 F.2d 109 (3d Cir. 1975).

68. "Undoubtedly the most certain way to eliminate industrial hazards is to eliminate industry. But the congressional statement of . . . policy . . . shows that the upgrading of working conditions, not the complete elimination of hazardous occupations, was the dominant intention." *Id.* at 121 (footnote omitted).

69. 569 F.2d 831 (5th Cir. 1978) (hereinafter referred to as *Aqua Slide*). In this case, the court set aside a standard requiring manufacturers of sliding boards to place warning signs and ladder chain devices on their products. The court concluded:

In evaluating the "reasonable necessity" for a standard, the Commission has a duty to take a hard look, not only at the nature and severity of the risk, but also at the potential the standard has for reducing the severity or frequency of the injury, and the effect the standard would have on the utility, cost or availability of the product.

*Id.* at 844.

70. 581 F.2d at 501, 502, 503, 504, 505.

71. *Id.* at 502.

72. *Id.*

73. 15 U.S.C. § 2051 (1972) (hereinafter referred to as Consumer Act).

74. Note 61 *supra*.

75. "[T]he Commission shall consider . . . the degree and nature of the risk of injury . . . [and] the probable effect [of the standard] upon the utility, cost, or availability of . . . [regulated] products . . . while minimizing adverse effects on competition . . . and other commercial practices." 15 U.S.C. § 2058(c)(1).

tions to be feasible.<sup>76</sup> In addition, the "reasonable necessity" language of the Consumer Act<sup>77</sup> is considerably more forceful than similar language in the OSH Act.<sup>78</sup> Finally, the nature of the hazardous instrumentalities against which the respective statutes seek to protect, defy comparison.<sup>79</sup> Congress made special provisions in the OSH Act for standards relating to toxic substances such as benzene, in apparent recognition of the differences between insidious chemical hazards, and safety hazards<sup>80</sup> (which may be more analagous to hazards protected by the Consumer Act). One commentator has observed that toxic substances "present persistent and severe regulatory problems which defy the use of traditional cost-benefit techniques."<sup>81</sup> Cited illustrations of these particular problems are: unidentified safe exposure levels, increasing costs for each increment of exposure reduction, and the impossibility of making objective, reliable cost-benefit comparisons.<sup>82</sup> In contrast, safety objectives involved in the regulation of tangible instrumentalities may more easily be identified and the costs of implementing more often involve a single, initial alteration of production processes or design.<sup>83</sup>

#### IV. "SUBSTANTIAL EVIDENCE" REVIEW

Although it is clear that OSHA must consider the best available scientific evidence and the feasibility of its regulations,<sup>84</sup> the standard of review the court should apply to the Secretary's conclusions is unsettled. The standard enunciated in the OSH Act simply states that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole."<sup>85</sup> But the simplicity of this

76. Note 60 *supra*.

77. "The Commission shall not promulgate a consumer product safety rule unless it finds . . . that the rule . . . is reasonably necessary." 15 U.S.C. § 2058(c)(2)(A).

78. The "reasonably necessary" language appears in the definition section of the OSH Act, defining an "occupational safety and health standard." 29 U.S.C. § 652(8).

79. The Consumer Act protects against hazardous tangible articles "for sale to a consumer for use in or around a . . . household or . . . school." 15 U.S.C. § 2052(a)(1). In contrast, the toxic substance provision is designed to protect against the insidious effects of chemicals. As with benzene, employees may be unaware of their exposure, or of the long-term effects of exposure. 43 Fed. Reg. at 5,920.

80. Note 60 *supra*.

81. Berger, *Economic and Technological Feasibility in Regulating Toxic Substances Under the Occupational Safety and Health Act*, 7 *ECOLOGY L.Q.* 285, 286 (1978).

82. *Id.* at 287.

83. *Cf.* D.D. Bean & Sons v. Consumer Prod. Safety Comm., 574 F.2d 643 (1978) (the design of a safer matchbook required in part a modification of manufacturing processes so that the staple metal did not touch the flint), with *Aqua Slide*, 569 F.2d 381 (the objective in this case was to prevent improper use of sliding boards).

84. Note 60 *supra*.

85. 29 U.S.C. § 655(f).

language belies the complexity of the standard's application.

Implementation of substantial evidence review poses conceptual problems for the courts because it conventionally follows formal rule-making procedures,<sup>86</sup> and not the informal, "notice and comment" rule-making which characterize OSHA procedures.<sup>87</sup> This "absence of statutory harmony with respect to the nature and scope of review"<sup>88</sup> under the OSH Act has been criticized by courts and commentators alike,<sup>89</sup> as fostering an "uneasy partnership"<sup>90</sup> between administrative agencies and the judiciary.

An additional difficulty arises as the courts try to accommodate<sup>91</sup> the statute's "in the record"<sup>92</sup> requirement with the "sieve-like characteristics"<sup>93</sup> of the record produced by informal procedures. Although OSHA has taken steps to formalize its record,<sup>94</sup> courts are still faced with the incongruent task of applying substantial evidence review to a record "untested by anything approaching the adversary process."<sup>95</sup>

#### A. *Substantial Evidence Review in Cases Before API*

Once apprised of the conceptual and practical inconsistencies built into the OSH Act, it is not surprising that courts before *API* were reluctant to utilize substantial evidence review in full force. The first court to face this

86. See, Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (1976). Formal rule-making procedures under this Act require detailed factual records, provisions for cross-examination and other elements characteristic of the adjudicatory process. Substantial evidence review is applicable.

87. See 29 U.S.C. § 655. The standards under the OSH Act are promulgated after notice is published in the FEDERAL REGISTER, and an informal hearing if one is requested. *Id.* at § 655(b)(2)-(4). This is similar to "notice and comment" rule-making under the Administrative Procedure Act, to which the "arbitrary and capricious" standard of judicial review applies. 5 U.S.C. § 706(2)(A) (1976).

88. *Associated Indus. of N.Y. State, Inc. v. United States Dep't of Labor*, 487 F.2d 342, 345 (2d Cir. 1973) (footnote omitted).

89. *E.g.*, *Society of Plastics Indus., Inc. v. OSHA*, 509 F.2d 1301 (2d Cir. 1975); *Synthetic Organic Chemicals Mfr.'s Ass'n v. Brennan*, 503 F.2d 1155 (3d Cir. 1974); *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974); Berger, note 81 *supra* at 297-99; Taylor, *Reasonable Rulemaking Under OSHA: Is it Feasible?*, 9 ST. MARY'S L.J. 215, 221-25 (1977) [hereinafter cited as Taylor].

90. *Associated Indus. of N.Y. State, Inc. v. United States*, 487 F.2d at 354.

91. One commentator has observed that the courts rely heavily on the statement of reasons OSHA publishes in the FEDERAL REGISTER to delineate the "areas of uncertainty and dispute," and as a source of "available facts." Berger, note 81 *supra* at 298-99.

92. 29 U.S.C. § 655(f).

93. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 228 (1974).

94. Examples of the steps OSHA has taken to formalize its record are: (1) requiring a qualified hearing examiner to preside over oral hearings, (2) permitting cross-examination of witnesses during the hearings, and (3) having a verbatim transcript made. 499 F.2d at 474.

95. *Id.*

issue, in *Associated Industries, Inc. v. United States Department of Labor* professed to apply substantial evidence review to the whole record.<sup>96</sup> A careful reading of the court's opinion, however, reveals that the standard actually applied is more akin to the less strict "arbitrary and capricious" review which is the usual standard of review associated with an informal administrative record.<sup>97</sup> In the following year, the D.C. Circuit, in *Industrial Union Dept., AFL-CIO v. Hodgson*<sup>98</sup> articulated the basic standard of review followed by the courts until *API*.<sup>99</sup> In *Hodgson*, Judge McGowan sustained OSHA's asbestos dust regulation utilizing a bifurcated standard of review. OSHA's factual determinations were subjected to substantial evidence review, but the "inferences of policy drawn from those facts [were weighed] in terms of their freedom from arbitrariness or irrationality".<sup>100</sup>

Although most courts after *Hodgson* have applied the more deferential "arbitrary and capricious" review to OSHA's policy conclusions,<sup>101</sup> at least one court has expanded that notion of policy to include some factual determinations. In *Synthetic Organic Chemicals Mfrs. Ass'n v. Brennan*, OSHA's regulation of ethyleneimine (EI) was challenged because of a lack of scientific evidence supporting OSHA's determination that EI was carcinogenic.<sup>102</sup> In view of this evidentiary void, the Third Circuit treated OSHA's assertion of the chemical's carcinogenicity as a policy matter,<sup>103</sup> applied the "arbitrary and capricious" standard, and sustained the regulation.<sup>104</sup>

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96. 487 F.2d at 349. In this case, the Third Circuit Court of Appeals vacated OSHA's standard which required a minimum number of lavatories for industrial establishments.

97. "The paramount objective is to see whether the agency, given an essentially legislative task to perform has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality." *Id.* at 354 (quoting *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)).

98. 449 F.2d 467.

99. *E.g.*, *American Iron & Steel Inst. v. OSHA*, 577 F.2d 825 (3d Cir. 1978); *AFL-CIO v. Brennan*, 530 F.2d 109 (3d Cir. 1975); *Society of Plastics Indus., Inc. v. OSHA*, 509 F.2d 1301 (2d Cir. 1975); *Synthetic Organic Chem. Mfrs. Ass'n v. Brennan*, 503 F.2d 1155 (3d Cir. 1974).

100. 499 F.2d at 473. The court discussed the problems of applying substantial evidence review to an informal record—a record characterized by inconclusive data to support issues "on the frontiers of scientific knowledge." *Id.* at 474. The court concluded: "Regardless of the manner in which the task of judicial review is articulated, policy choices . . . are not susceptible to the same type of verification or refutation by reference to the record as are some factual questions." *Id.* at 475.

101. See note 99, *supra*.

102. 503 F.2d 1155 (3d Cir. 1974).

103. Taylor, note 89 *supra* at 228.

104. Compare the Third Circuit's treatment of scientific evidence (or lack thereof) with the Fifth Circuit's treatment. See text after note 23 *supra*.

Some commentators have suggested that the distinction between "substantial evidence" and "arbitrary and capricious" review is a mere semantic one.<sup>105</sup> However, in view of the degree of judicial deference afforded OSHA in the cases after *Hodgson* and before *API*,<sup>106</sup> and the consequent wholesale approval of the OSHA regulations reviewed in those cases, it is more likely that the two standards of review "although not theoretically distinct . . . do reflect judicial attitudes which may affect the outcome of the case."<sup>107</sup>

### B. *The Fifth Circuit's Version of Substantial Evidence Review*

Notwithstanding the ramifications of the risk-benefit-cost test, the Fifth Circuit's treatment of substantial evidence review exemplifies the court's judicial activism. Even the proposed risk-benefit-cost test loses its bite unless its elements are required to be supported by substantial evidence. Rather than following the diluted version of substantial evidence review as dictated by precedent, the Fifth Circuit treated the standard as yet another restrictive aspect of the statutory scheme<sup>108</sup> and applied substantial evidence review to all of the "determinations of the Secretary."<sup>109</sup> As translated into the court's analytical framework, this means that OSHA's factual determinations *and* policy conclusions must show by substantial evidence that a risk exists, that the standard will appreciably reduce that risk, and that on balance the costs are justified by the benefits.<sup>110</sup> The benzene standard was set aside because OSHA failed to show by substantial evidence that the reduction of permissible benzene exposure levels from ten PPM to one PPM would result in appreciable benefits to workers.<sup>111</sup>

Despite earlier judicial deference, support for the Fifth Circuit's extensive application of substantial evidence review is found in the OSH Act itself which expressly<sup>112</sup> requires this strict review, and in the legislative history. As initially introduced in the House and Senate, the bill which would eventually become the OSH Act, vested the responsibility for promulgation, investigation, prosecution and adjudication of regulations in the Secretary of Labor.<sup>113</sup> This version of the bill was criticized by numer-

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105. Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. Rev. 899, 935 at n. 138 (1973).

106. See notes 98-102, *supra* and accompanying text.

107. Taylor, note 89, *supra* at 223.

108. *API v. OSHA*, 581 F.2d at 497.

109. 29 U.S.C. § 655(f).

110. 581 F.2d at 503.

111. *Id.* at 510.

112. 29 U.S.C. § 655(f).

113. S. REP. NO. 2193, 92d Cong., 1st Sess. (1971), reprinted in LEGISLATIVE HISTORY OF THE

ous legislators<sup>114</sup> who feared it might result in "frivolous disruptions of industrial production."<sup>115</sup> Eventually a compromise was reached<sup>116</sup> appeasing opponents of the bill. The authority for promulgating regulations was left in the hands of the Secretary in exchange for the stricter "substantial evidence" review.<sup>117</sup> Thus, it appears the legislators attached great weight to the substantial evidence provision of the statute in hopes that it might hedge against "arbitrary and arrogant administration by the U.S. Dept. of Labor."<sup>118</sup> In view of the uncompromised language of the statute and its legislative history it is difficult to quarrel with the Fifth Circuit's application of substantial evidence review to all of the "determinations of the Secretary."<sup>119</sup>

## V. CONCLUSIONS

Seemingly insoluble problems have been raised by *API*. Congress has composed a statute fraught with inconsistencies and conflicts. Courts are required to evaluate informal rule-making, on the record, with a standard of review normally applied to records tempered by adjudicatory-like procedures. OSHA must protect workers from elusive hazards with feasible standards, utilizing the best available scientific evidence. Scientists are unable to supply OSHA with the data it needs to make the practical decisions it must. Industry balks under the enormous costs,<sup>120</sup> and workers petition for protection.

OSH Acr at 729-30, 735-42 (1971) (Congressional Information Service: call number, Y4.L11/2:Sal/5; microfiche accession number, S542-17 (1971)).

114. Senator Cook criticized the arbitrary and capricious standard of review as inadequate to protect employers: "[I]t will be very, very strange if they (employers) ever win a case . . . [T]hey are just not going to win any lawsuits." *Id.* at 344.

115. *Id.* at 420.

116. The compromise was reached in the Conference Committee. *Id.* at 1185.

117. Senator Steiger urged his colleagues to approve the Conference Report since the inclusion of the stricter substantial evidence review would protect employer interests:

The Secretary's standard will only be sustained by the court if it is supported by "substantial evidence on the record considered as a whole." Thus, the Secretary must have a record on which to base his findings and to serve as the basis for judicial review. The act does not provide for an independent board for standard-setting as did the House bill. However, court review based upon substantial evidence provides a sufficient element of fairness to satisfy me that the conference report should be adopted.

*Id.* at 1218.

118. *Id.* at 1080.

119. 29 U.S.C. § 655(f).

120. A recent study reveals that OSHA's regulation of toxic and hazardous substances has caused the highest incremental increase in cost to industry of any area of regulation related to OSHA. In addition, the study reports that the chemical industry is primarily concerned about the reasonableness of specific limits set for exposure to toxic chemicals, although most of the companies studied agreed that some control of worker exposure to these chemicals was

From this quagmire of political, scientific and legal discord, the question rises—what is the role of the judiciary in the resolution of these issues? According to the courts' decisions before *API*, OSHA was given wide latitude to resolve the statutory inconsistencies and interpret scientific data, in formulating its standards. The Fifth Circuit however, more actively participated in the rule-making process, finding that the OSH Act implicitly requires toxic-substance standards to be justified by substantial evidence in terms of risk, benefit and cost.

Outside the ideal of attaining absolute safety in the occupational environment, few would quarrel with the policy behind the Fifth Circuit's opinion. That is, given the constraint of finite resources, OSHA must utilize those resources expediently, by applying them to improve conditions causing the greatest harm to workers. Whether or not the methodology employed by the Fifth Circuit to effectuate this policy is legitimate is the most obvious issue presented to the Supreme Court on review. But indirectly, that Court's opinion will determine the degree to which these pragmatic considerations can temper the goal of a healthy occupational environment, and whether the Fifth Circuit's brand of judicial activism foreshadows the future role of the courts in administrative policy-making.

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necessary. Cost of Government Regulation Study for the Business Roundtable 8-8, 8-20 (March, 1978) (A study of the direct incremental costs incurred by 48 companies in complying with the regulations of six federal agencies in 1977, conducted by Arthur Anderson & Co.).



