The Burger Court Opinion Writing Database

Industrial Union Department, AFL-CIO v. American Petroleum Institute

448 U.S. 607 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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

CHAMBERS OF
THE CHIEF JUSTICE

May 20, 1980

Re: (78-911 - Industrial Union Department v. American
(Petroleum Institute
(
(78-1036 - Marshall v. American Petroleum Institute

Dear John:

I am not fully at rest yet on this case but more with your view than Thurgood's. There is much in what Potter has written that I agree with, and I hope you are working toward an accommodation in that direction.

Regards,

WEB

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 25, 1980

Re: (78-911 - Industrial Union Dept. v. American Petrol. Inst
(78-1036 - Marshall v. American Petroleum Institute

Dear John:

I join. I am circulating some "observations" which may not survive the "strict scrutiny" I apply to my own concurring utterances!

Regards,

WEB

Mr. Justice Stevens

Copies to the Conference

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

From: The Chief Justice

Circulated: JUN 25 1980

Recirculated: _____

June 25, 1980

No. 78-911, Industrial Union Dept. v. American Petrol. Inst.
No. 78-1036, Marshall v. American Petroleum Institute

Mr. Chief Justice Burger, concurring:

This case raises difficult unanswered questions on another of the new frontiers of science and medicine pressed on the courts. The statute and the legislative history give ambiguous signals as to how the Secretary is directed to operate in this area. The opinion by Mr. Justice Stevens takes on a difficult task to decode the message of the statute as to guidelines for administrative action.

To comply with statutory requirements, the Secretary must bear the burden of "finding" that a proposed health and safety standard is "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." This policy judgment entails the subsidiary finding that the preexisting standard presents a "significant risk" of material

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

From: The Chief Justice

Circulated: _____

Recirculated: JUN 26 1980

June 26, 1980

No. 78-911, Industrial Union Dept. v. American Petrol. Inst.

No. 78-1036, Marshall v. American Petroleum Institute

Mr. Chief Justice Burger, concurring:

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

Printed
1st DRAFT

From: The Chief Justice

Circulated: JUN 27 1980

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SUPREME COURT OF THE UNITED STATES

Nos. 78–911 AND 78–1036

Industrial Union Department, AFL–CIO, Petitioner,
78–911 *v.*
American Petroleum Institute et al.

Ray Marshall, Secretary of Labor, Petitioner,
78–1036 *v.*
American Petroleum Institute et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1980]

MR. CHIEF JUSTICE BURGER, concurring.

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To comply with statutory requirements, the Secretary must bear the burden of "finding" that a proposed health and safety standard is "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." This policy judgment entails the subsidiary finding that the pre-existing standard presents a "significant risk" of material health impairment for a worker who spends his entire employment life in a working environment where exposure remains at maximum permissible levels. The Secretary's factual finding of "risk" must be "quantified sufficiently

To: Mr. Justice Brennan
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Mr. Justice Marshall
Mr. Justice Blackmun
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Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JUN 30 80

Recirculated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78–911 AND 78–1036

Industrial Union Department, AFL–CIO, Petitioner,
78–911 *v.*
American Petroleum Institute et al.

Ray Marshall, Secretary of Labor, Petitioner,
78–1036 *v.*
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1980]

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To comply with statutory requirements, the Secretary must bear the burden of "finding" that a proposed health and safety standard is "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." This policy judgment entails the subsidiary finding that the pre-existing standard presents a "significant risk" of material health impairment for a worker who spends his entire employment life in a working environment where exposure remains at maximum permissible levels. The Secretary's factual finding of "risk" must be "quantified sufficiently

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 13, 1980

Re: Nos. 78-911 and 78-1036 - Benzene Cases

Dear Thurgood and John:

Now that I have had a chance to give a preliminary reading to your thoughtful memoranda in these cases, let me echo the gratitude expressed by Potter, Lewis, and Bill for your yeoman efforts. Since I am departing for the First Circuit Conference this afternoon, I leave you my tentative thoughts on these extremely difficult cases.

I am basically in agreement with Thurgood's memorandum and could willingly join a narrow opinion drafted along its lines. As I see it, these cases present only the relatively circumscribed issue of the Secretary's authority to regulate a discrete class of toxic substances when the present unavailability of conclusive scientific evidence makes it simply impossible to quantify with any precision the benefits to be derived from a particular standard. I am unwilling to presume - and, as Thurgood notes, the legislative history refutes any such presumption - that in these circumstances Congress intended the Secretary to wait until definitive information could be obtained. Rather where, as here, the Secretary has reasonably concluded, on the basis of the best available evidence, that exposure to benzene above 1 ppm poses a definite, albeit unquantifiable, risk of material health impairment, Congress has granted the Secretary authority to set standards to eliminate that risk, subject to the constraints of technological and economic feasibility.

As for the need to perform cost-benefit analyses, I believe that with respect to the limited category of "toxic materials or harmful physical agents," Congress itself struck the balance between costs and benefits in § 6(b)(5) by mandating that OSHA "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." In contrast to other legislation in which

Congress has contemplated a cost-benefit requirement, neither the legislative history nor the language of the OSH Act contains any reference to such an analysis.

My objection to John's interpretation of the "reasonably necessary" language of § 3(8) is twofold. First, it does not appear to be grounded on anything in either the language or history of the Act. Although as legislators we might prefer to condition regulation on a threshold finding of a "significant" risk, Congress simply does not appear to have done so here. Second, and perhaps more fundamental, John's interpretation of § 3(8) would override the explicit and more specific directive of §6(b)(5) for toxic substances, when the Act's history suggests that just the opposite effect was intended by Congress. While I concede that I find the relationship between these two statutory provisions problematic when nontoxic substances are involved, I do think that §6(b)(5)'s language demands priority in these cases. And I am inclined to think that the proper construction of the familiar "reasonably necessary and appropriate" language is one which merely requires the Agency to conform its standards to the purposes and policies embodied in the Act.

In sum, I would prefer a narrow dispostion in these cases, one that reserves the question of whether a "significant" risk must be shown in order to regulate toxic substances when the state of scientific knowledge is sufficient to permit the Secretary to quantify the risks of harm and the benefits of regulation. Similarly, I see no need to decide whether a threshold finding must be made, or a cost-benefit analysis conducted, in setting standards for nontoxic substances. If these issues are to be addressed, however, my own views roughly parallel those of Thurgood.

Sincerely,

W.J.B.

Mr. Justice Marshall
Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 23, 1980

RE: Nos. 78-911 and 78-1036 Industrial Union Department v. American Petroleum Institute, et al.

Dear Thurgood:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 15, 1980

Re: No. 78-911, Industrial Union Dept. v. API
No. 78-1036, Ray Marshall v. API

Dear Thurgood,

Not until last night did I finally read your Memorandum thoroughly and with care. It is, I think, a contribution for which we can all be grateful.

Since my own tentative views were at odds with those you express, I shall await John's forthcoming Memorandum with interest.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 12, 1980

Re: 78-911 and 78-1036 - Benzene Cases

Dear John:

Your thorough and painstaking memorandum in these cases, like Thurgood's, is extremely helpful, and I am sure that I speak for all of us in expressing my gratitude.

I am persuaded by everything in your memorandum, except what is said in subsection (5) on pages 47 - 50. That subsection, which basically discusses the meaning of the term "feasible" in § 6 (b) (5), seems to be the only subject of the concerns expressed by Lewis and Bill Rehnquist. It seems to me that Bill may be correct that the term "feasible" is so open-ended as to amount to an unconstitutional delegation of legislative power by Congress. But if he is incorrect, I agree with Lewis that the term cannot be understood to confer carte blanche authority upon the Secretary. If your memorandum were converted to a Court opinion, could not subsection (5) be omitted? Unless I have missed something, your resolution of the other legal issue fully justifies an affirmance of the judgment in this case, without reaching the "feasibility" issue. I could join such an opinion, and I think that the deletion of subsection (5) might allay the concerns of Lewis and Bill Rehnquist as well.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 19, 1980

Re: Nos. 78-911 & &8-1036, Industrial Union Dept. v. American Petrol. Inst.

Dear John,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 13, 1980

Re: 78-911 and 78-1036 - Benzene cases

Dear Thurgood,

Like others, I am indebted to you and John for the memoranda in these cases, and I have been following the ensuing exchanges and comments with some interest. As presently advised, I would adhere to my Conference vote to reverse and would prefer a disposition on the narrow ground that you suggest in your memorandum of May 12.

Sincerely yours,

Byron

Mr. Justice Marshall

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 23, 1980

Re: 78-911 and 78-1036 - "Benzene"Cases

Dear Thurgood,

Please join me.

Sincerely yours,

Mr. Justice Marshall

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 25, 1980

MEMORANDUM TO THE CONFERENCE

No. 78-911 - Industrial Union Dept. v. API
No. 78-1036 - Ray Marshall v. API

John was assigned the task of preparing a memorandum in this case. It is my understanding that the rest of us were also free to express our views. Because of the difficulty of the issues and the disparities of view we expressed at Conference, we might well need a substantial period to decide this case. I, therefore, offer the attached for your consideration.

Sincerely,

T.M.

25 JAN 1980

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78–911 AND 78–1036

Industrial Union Department, AFL–CIO, Petitioner,
78–911 *v.*
American Petroleum Institute et al.

Ray Marshall, Secretary of Labor, Petitioner,
78–1036 *v.*
American Petroleum Institute et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1980]

MR. JUSTICE MARSHALL, memorandum to the Conference.

The question presented is whether, before promulgating an occupational safety and health standard dealing with toxic substances, the Secretary of Labor must make some quantitative estimate of the health benefits of the standard and show that those benefits bear a reasonable relationship to the costs the standard would impose on industry.

This case derives from the efforts of the Secretary of Labor, acting pursuant to § 6 (b)(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § 655 (b)(5) (1976), to regulate occupational exposure to benzene, a toxic substance causally related to chromosomal damage, nonmalignant but sometimes fatal blood disorders, and leukemia, a cancer of the white blood cells. In response to recent studies showing an association between exposure to benzene and leukemia, the Secretary in 1978 promulgated an occupational health and safety standard that reduced the permissible airborne exposure

pp. 2,-27, 31-32

6 FEB 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78–911 AND 78–1036

Industrial Union Department, AFL–CIO, Petitioner, 78–911 *v.* American Petroleum Institute et al. Ray Marshall, Secretary of Labor, Petitioner, 78–1036 *v.* American Petroleum Institute et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1980]

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 6, 1980

Re: Nos. 78-911 and 78-1036, Industrial Union Dep't, AFL-CIO v. American Petroleum Institute et al. Marshall v. American Petroleum Institute et al.

MEMORANDUM TO THE CONFERENCE

I have had an opportunity to give a preliminary reading to John's memorandum in this case. Since I am leaving for the Second Circuit Conference tomorrow, I am circulating at this time a very general--and tentative--discussion of our principal differences.

1. John contends that the "reasonably necessary or appropriate" clause precludes the Secretary from taking regulatory action unless he has been able to establish that the risk he seeks to regulate "threatens a significant number of workers." Memo. at 28. To perform this task, the Secretary must be able to satisfy the "requirement that the risk be quantified sufficiently to characterize it as significant in an understandable way." Id., at 34. This requirement, in turn, imposes a "burden . . . on the Agency to show, on the basis of substantial evidence, that it is at least more likely than not that long-term exposure to 10 ppm of benzene presents a significant risk of material health impairment." Id., at 41. John urges the adoption of this threshold requirement on the ground that, in its absence, the Secretary will be authorized to ensure an entirely risk-free workplace.

John does not "suggest that precise quantification of the risk be required," but he does require "some attempt to demonstrate the existence of a materially greater risk than the normal citizen faces in his everyday affairs . . . ." Id., at 42. He concludes that this standard justifies an affirmance of

the decision of the Fifth Circuit since the Secretary "had no basis whatsoever for making an assessment of the significance of the risks involved," id., at 42, and since--in John's view--there are several methods by which some quantification of the benefits of the 1 ppm standard might have been made. Id., at 43-47.

2. As John properly notes, my difference with him lies primarily in the definition and allocation of the burden of proof concerning the significance of an occupational health risk. I believe that there is nothing in the Act to require the Secretary to show that it is "more probable than not" that the risk he seeks to regulate is a "significant" one threatening a "significant" number of workers. In my view, the Secretary's authority is defined by § 655(b)(5), which provides:

> "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents . . . 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."

Both the language and the legislative history of the Act persuade me that the definition of occupational and safety standards as those "reasonably necessary or appropriate to provide safe or healthful employment" should not be read as imposing an additional requirement that supersedes § 655(b)(5).

John's interpretation is inconsistent with the language and structure of the Act. It would render the first sentence of § 655(b)(5) entirely superfluous. Indeed, it would read that clause out of the Act by making the test for standards regulating toxic substances and harmful physical agents substantially identical to the test for standards generally--plainly the opposite of what Congress intended. And it is an odd canon of construction that would insert in a vague and general definitional clause a threshold requirement that overcomes the specific statutory language placed in the standard-setting provision.

John's interpretation is also irreconcilable with the legislative history of the Act. An earlier version of the Act, discussed in my memorandum on p. 7 n.8, did not embody a feasibility constraint and was not limited to "material impairments." Under this prior version, the "reasonably necessary or appropriate" language was in the bill (as it was at all relevant times). In debating this version, Members of Congress repeatedly expressed concern that it would require a risk-free universe. The definitional clause was not mentioned at all, an omission which would be incomprehensible if the clause were understood of its own force to require the Secretary to quantify the risk he sought to regulate in order to demonstrate that it threatened a "significant" number of workers.

In my view, the "reasonably necessary or appropriate" language means only that safety and health standards must reasonably relate to the authority granted by the standard-setting provision. As I indicate in my memorandum at p. 24-25, this is the interpretation that we have uniformly given to such definitional clauses. It does not superimpose an independent test that renders the standard-setting provision merely hortatory. In short, John's approach may well have been a sensible one for Congress to take, but I see nothing in the statute or its legislative history that authorizes us to give to the definitional clause the content he ascribes to it.

3. John appears to suggest that "the risk [from a regulated substance must] be quantified," id., at 34, in some rough way even if quantification is shown to be impossible. (He does attempt to challenge the Secretary's finding that the benefits could not be quantified, but I think it clear that that finding--which was not overturned by the court of appeals--must be accepted as supported by substantial evidence.) By contrast, I would require the Secretary to attempt to quantify the risk (as the Secretary, and the experts upon whom he relies, ordinarily attempt to do), but I would not prohibit him from taking regulatory action when he is unable to quantify. Despite John's attempt to show that quantification could be performed in this case, it seems to me that on this record, his test would either foreclose the Secretary from taking regulatory action in the foreseeable future or require him "to place a totally arbitrary number on the lives that will be saved by the

standard." McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Georgtown L.J. 729, 806 (1979). But the Secretary "is certainly justified in declining to deceive [him]self and the public by suggesting an accuracy for carcinogen risk assessment that simply does not exist." Ibid.

4. Finally, my review of the record presents a very different picture of the risk of exposure to benzene at levels above 1 ppm. This is simply not a case in which the Secretary has relied blindly on a general carcinogen "policy." Nor is it fair to state that the Court must "decide whether the statute was intended to eliminate all risks of harm from toxic substances." Memo., at 53-54. The record contains some direct evidence of chromosomal damage, nonmalignant blood disorders, and leukemia at exposure levels at or near 10 ppm and below. (The Secretary expressly relied on the Dow study, which showed an excess risk at 2-9 ppm, and concluded that its findings were "statistically significant"; that conclusion is supported by substantial evidence.) Moreover, expert after expert testified that previous tests justified the conclusion that exposure above the 1 ppm level posed a risk, admittedly unquantifiable, of benzene-induced incidence of these diseases. One of the world's leading experts, for example, stated flatly that "[E]ven one ppm . . . causes cancer." Tr. 204.

These aspects of the record--along with the court of appeals' conclusion that some benefits would result from the 1 ppm standard--support the suggestion, at p. 42 of my memorandum, that if the 10 ppm standard is retained, there is "a certainty of some deaths and a risk of a substantial number." The Secretary, in short, has "demonstrate[d] the existence of a materially greater risk than the normal citizen faces in his everyday affairs . . ." If John means to require the Secretary to do more than he has done, he would require him to perform an impossible task. I am able to discern nothing in the statute or its legislative history that would impose such a burden.

5. As I explain in my memorandum, these cases could be resolved in favor of the petitioners on the narrow ground that even if the Secretary is required to identify some significant risk or to show some relation between costs and benefits, the regulatory action at issue here should be upheld, since the Secretary found that the risk could not be quantified and that--discounting for the various scientific uncertainties not susceptible of resolution in the foreseeable future--the benefits of the standard justified its costs. In this case, there is substantial evidence that the benefits of the benzene standard are not quantifiable and that exposure above the 1 ppm level imposes a possibly substantial risk. I would be prepared to author or join a narrow opinion upholding the benzene standard but reserving the question whether the Secretary must show either a "significant" risk or some reasonable relation between costs and benefits when it is possible for him to do so.

Sincerely,

T.M.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 12, 1980

Re: Nos. 78-911 and 78-1036, Industrial Union Dep't, AFL-CIO v. American Petroleum Institute et al.; Marshall v. American Petroleum Institute et al.

MEMORANDUM TO THE CONFERENCE

I have had an opportunity to give another reading to John's memorandum in this case, which prompted the following additional thoughts.

1. The only portions of the legislative history on which John relies, see memo. at 35-37, have nothing whatsoever to do with the "reasonably necessary or appropriate" clause from which his "threshold finding" requirement is derived. (Indeed, nothing in the legislative history suggests what meaning, if any, to ascribe to that clause.) Those portions consisted of criticisms directed toward an earlier version of the bill which already contained the "reasonably necessary" clause. The criticisms, in turn, were met by subsequent amendments which (1) limited application of the "no employee will suffer" clause to toxic substances and harmful physical agents, (2) modified the word "impairment" by the adjective "material," and (3) inserted a clear feasibility constraint.[1] John, of course, does not derive his "threshold finding" requirement from those amendments. I am unable to see how isolated statements in the legislative history, expressing concerns that were satisfied by subsequent amendments not requiring John's "threshold finding", can justify reading such a requirement into a "reasonably necessary" clause that was in the Act all along.

[1]The prior version required the Secretary "most adequately and feasibly [to] assure[] . . . that no employee will suffer any impairment . . ." Senator Dominick thought that this language would in some cases require "elimination of the occupation itself," Legis. Hist. 367, an ambiguity that was evidently cleared up by the "to the extent feasible" language.

2. John places great emphasis on his perception that if the reasonably necessary clause were not given independent content, there would be no guidance for "standards other than those dealing with toxic materials and harmful physical agents." Memo., at 29. I find this argument unpersuasive for two reasons. First, even if the reasonably necessary clause have independent content, and even if that content is as John describes it, it cannot supersede the express language of § 655(b)(5) for toxic substances and harmful physical agents. Accordingly, it is unnecessary to say in this case what standard should guide the Secretary in promulgating standards not relating to toxic substances and harmful physical agents.

If it were necessary to say what test should govern such standards, I would contend that the guidance is to be found in the various factors listed in the third sentence of § 655(b)(5). Congress frequently requires the administrator to balance a variety of factors in setting standards, and such a balancing process is surely no less open-ended than the reasonably necessary clause. (Contrary to John's suggestion, see memo at 2 n.1, the parties are agreed that the last two sentences of § 655(b)(5) apply to all standards. See Tr. of Oral Argument, at 18.)

John's reliance on a perceived gap for non-toxic substances is unpersuasive for another reason. As noted above, an earlier bill applied the "no employee shall suffer . . ." language to all substances. At that time, there was no such "gap," and accordingly it could not be argued that the "reasonably necessary or appropriate" language had the content John ascribes to it. (This point is confirmed by the numerous complaints in the legislative history to the effect that the bill at that time required a risk-free universe.) In this light, John's reasoning must be that when Congress amended bill to apply the strict § 655(b)(5) requirements only to toxic substances, the definitional clause gained an independent meaning which in turn comprehended all standards. But surely this argument has congressional intent upside-down. It reasons that when Congress singled out toxic substances for special protection under the strict test in the first sentence of 655(b)(5), it simultaneously created a more lenient ("reasonably necessary") test for standards generally, and that once that more lenient test was applicable, it somehow superseded the strict requirement for toxic substances. I cannot accept that reasoning.

3. John's other structural arguments also strike me as unconvincing. The fact that a finding of "grave risk" is required for temporary standards, memo. at 29-30, hardly implies that the Secretary must show for permanent standards that it is more likely than not that the substance to be regulated poses a "significant" risk threatening a

"significant" number of workers. Nor is the reference to "toxic substances," memo. at 31, in any way informative. The relativity of Congress' goal (id.)-- "to assure so far as possible . . . safe and healthful working conditions" --is recognized by the feasibility constraint and does not support John's reading of the "reasonably necessary" clause. And the priority-setting provision, memo. at 32, does not condition the Secretary's standard-setting authority on an ability to find that it is more probable than not that "significant" benefits will be derived from a permanent standard.

4. An extremely heavy burden rests on one who would argue in favor of a threshold requirement of a showing of a risk that is "significant" within the meaning of John's memorandum. As we stated in the Whirlpool case, "[o]ur inquiry" into statutory purposes must be "informed by an awareness that the regulation is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act." Slip op., at 9. It is hard for me to see how the Secretary's interpretation can be characterized as "unreasoned" or "unsupportable." And as Whirlpool also stated, "safety legislation is to be liberally construed to effectuate the congressional purpose." Id. at 11. I believe that the language, structure, and history of the statute would compel reversal of the decision below even if these canons of construction were unavailable; their presence makes the case considerably less difficult for me.

5. I understand the concern about the prospect that the Secretary might require vast expenditures of funds in order to regulate insignificant risks. My memorandum leaves room for a conclusion that such an action would be an abuse of discretion under the Administrative Procedure Act or of the Secretary's priority-setting authority. (I would also be willing to reserve the issue under the "feasibility" provision or the definitional clause.)

This case does not, however, involve an insignificant risk. Benzene is relatively unusual (though not unique) in that scientists have been utterly incapable of constructing a dose-response curve to quantify even roughly the benefits to be derived from reducing the exposure level from 10 ppm to 1 ppm.[2] (Such curves have been constructed, for example, for

[2]John's suggestion, memo. at 45-46, that the Secretary could have constructed such a curve on the basis of the curve for blood abnormalities disregards the fact that no such curve could be constructed for blood normalities either.

vinyl chloride and lead.) The Secretary relied on this factor, not on any close-minded carcinogen "policy." Indeed, if the benzene standard had been based on such a policy, it would have been sufficient for the Secretary to have observed that benzene is a carcinogen, a proposition that respondents do not dispute. Instead, he gathered over 50 volumes of exhibits and testimony and offered a nearly 200-page discussion of the relationship between benzene and chromosomal damage, aplastic anemia, and leukemia at all recorded exposure levels; and in that discussion he evaluated and took seriously the respondents' evidence of a "safe" exposure level. (John's memorandum erroneously states that the Fifth Circuit found that substantial evidence did not support the Secretary's conclusion that the benefits "may" be appreciable. Memo., at 26. On the contrary, the court did not challenge that conclusion. Instead it found that the Secretary could not find that the benefits were "likely" to be appreciable. The difference is a highly significant one, since, in my view, the case would be far different if there had not been sufficient evidence to justify the Secretary's conclusion that the benefits "may" be appreciable.)

Moreover, to the extent that the Secretary is required to find only that the risk is "significant" in the ordinary sense of the word, such a finding is at least implicit in the Secretary's assertion that he "has given careful consideration to the question of whether these substantial costs are justified in light of the hazards of exposure to benzene," App., at 163a, and his conclusion that "these costs are necessary in order to effectuate the statutory purpose of the Act and to adequately protect employees from the hazards of exposure to benzene." Ibid. As I stated in my previous memorandum, if the requirement of a "significant" risk means that the Secretary must do more, it means that he must do the impossible.

6. I continue to believe that the Secretary's findings in these cases would justify a narrow ruling for petitioners on the grounds that (1) a reasonable relation between costs and benefits was found and (2) on the basis of the "best available

evidence," the risk of benzene exposure was sufficiently "significant" to justify the Secretary's actions.[3]

I believe that a broader disposition is fully justified and in many ways preferable. But the narrow ruling I propose would leave open the question whether a relation between costs and benefits has to be found, a question about which Lewis and others have expressed concern. It would also reserve the question whether a risk must be shown to be "significant" within the meaning of John's memorandum when quantification of the benefits is possible. Finally, it would emphasize the evidence that justified the Secretary's conclusion that the risk "may be appreciable," and thus leave open any questions that might arise if the Secretary were in a future case to rely on some general carcinogen "policy."

Sincerely,

T.M.

T.M.

[3] As my memorandum suggests, there was a great deal of expert testimony to the effect that the recorded effects of benzene exposure justified the conclusion that exposure above 1 ppm was dangerous. It is therefore misleading to suggest that the Secretary relied solely "on a series of assumptions," memo. at 22. We have stated that "well-reasoned expert testimony--based on what is known and uncontradicted by empirical evidence--may in and of itself be 'substantial evidence' when firsthand evidence on the question . . . is unavailable." FPC v. Florida Power & Light Co., 404 U.S. 453, 466-467 (1972). In this light the hypothetical referred to on p. 33 of John's memorandum would not arise under the approach I have taken.

Nos. 78-911 & 78-1036

Industrial Union Department, AFL-CIO v. American Petroleum Institute, et al.

Marshall v. American Petroleum Institute, et al.

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

From: Mr. Justice Marshall

Circulated: 23 JUN 1980

Recirculated: _____

MR. JUSTICE MARSHALL, dissenting.

In cases of statutory construction, this Court's authority is limited. If the statutory language and legislative intent are plain, the judicial inquiry is at an end. Under our jurisprudence, it is presumed that ill-considered or unwise legislation will be corrected through the democratic process; a court is not permitted to distort a statute's meaning in order to make it conform with the Justices' own views of sound social policy. See TVA v. Hill, 437 U.S. 153 (1979).

Today's decision flagrantly disregards these restrictions on judicial authority. The Court ignores the plain meaning of the Occupational Safety and Health Act of 1970 in order to bring the authority of the Secretary of Labor in line with the Court's own views of proper regulatory policy. The unfortunate consequence is that the Federal Government's efforts to protect American workers from cancer and other crippling diseases will be substantially impaired.

The first sentence of § 6(b)(5) of the Act provides:

> "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this section, 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

pp. 1, 3, 4, 9, 26-28
fm. pp. 10, 11
"plurality" substituted for "Court" where appropriate

2d DRAFT

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

From: Mr. Justice Marshall

Circulated: _____

Recirculated: 25 JUN

Nos. 78-911 & 78-1036

Industrial Union Department, AFL-CIO v. American Petroleum Institute, et al.

Marshall v. American Petroleum Institute, et al.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, AND MR. JUSTICE BLACKMUN join, dissenting.

In cases of statutory construction, this Court's authority is limited. If the statutory language and legislative intent are plain, the judicial inquiry is at an end. Under our jurisprudence, it is presumed that ill-considered or unwise legislation will be corrected through the democratic process; a court is not permitted to distort a statute's meaning in order to make it conform with the Justices' own views of sound social policy. See TVA v. Hill, 437 U.S. 153 (1979).

Today's decision flagrantly disregards these restrictions on judicial authority. The plurality ignores the plain meaning of the Occupational Safety and Health Act of 1970 in order to bring the authority of the Secretary of Labor in line with the plurality's own views of proper regulatory policy. The unfortunate consequence is that the Federal Government's efforts to protect American workers from cancer and other crippling diseases may be substantially impaired.

The first sentence of § 6(b)(5) of the Act provides:

"The Secretary, in promulgating standards dealing with

Stylistic changes throughout
see also pp. 22, 24, 25, 32, 36

30 JUN 1980

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78–911 AND 78–1036

Industrial Union Department, AFL–CIO, Petitioner,
78–911 *v.*
American Petroleum Institute et al.

Ray Marshall, Secretary of Labor, Petitioner,
78–1036 *v.*
American Petroleum Institute et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1980]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN join, dissenting.

In cases of statutory construction, this Court's authority is limited. If the statutory language and legislative intent are plain, the judicial inquiry is at an end. Under our jurisprudence, it is presumed that ill-considered or unwise legislation will be corrected through the democratic process; a court is not permitted to distort a statute's meaning in order to make it conform with the Justices' own views of sound social policy. See *TVA* v. *Hill*, 437 U. S. 153 (1978).

Today's decision flagrantly disregards these restrictions on judicial authority. The plurality ignores the plain meaning of the Occupational Safety and Health Act of 1970 in order to bring the authority of the Secretary of Labor in line with the plurality's own views of proper regulatory policy. The unfortunate consequence is that the Federal Government's efforts to protect American workers from cancer and other crippling diseases may be substantially impaired.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 19, 1980

Re: 78-911; Industrial Union Dept. v. American Petroleum
78-1036; Marshall v. American Petroleum Institute

Dear Thurgood:

With the arrival of Bill Rehnquist's separate opinion, I have given further consideration to the voluminous writings for these cases. Nothing I have seen changes my views as expressed at Conference last October. I am basically with you to reverse, and am willing to do so on the narrow ground that you have suggested.

Sincerely,

H. A. B.

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 23, 1980

Re: Nos. 78-911, 78-1036 - Benzene cases

Dear Thurgood:

Please join me in your dissent in these cases.

Sincerely,

H.A.B.

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 8, 1980

78-911 and 78-1036 Industrial Union v.
American Petroleum Institute

Dear Thurgood:

I will await John's circulation in this case.

You have prepared a most thorough and helpful memorandum. My tentative vote at Conference, however, was to remand or possibly affirm.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 9, 1980

Nos. 78-911 and 78-1036 - Benzene Cases

Dear John:

Although I have been able to take only the most cursory look at your memorandum, I write now to say that I probably will not be able to join an opinion based on it.

May I say, first, that I am impressed by the thoroughness and scholarship of your memorandum, and also recognize the inherent complexity of this case.

The view of the statute that I took at the time of our Conference, contrary to your view, was that the Agency is required to find some reasonable relationship between the benefits and costs before promulgating a health standard. I cannot believe Congress intended to confer virtually carte blanche authority on a bureaucratic agency to ignore cost entirely, short of causing "dislocation throughout an entire industry".

It may be - as I believe Thurgood intimates - that we could decide this case without rejecting cost balancing outright. But it is not clear to me that we can avoid the issue.

Sincerely,

Lewis

Mr. Justice Stevens

Copies to the Conference

LFP/lab

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 20, 1980

78-911 and 78-1036 Benzene Cases

Dear John:

I am trying to write a brief opinion in which I will concur in most of your opinion and in the judgment, but also touch lightly on the cost/benefit issue that you leave open.

As Bill Rehnquist wrote some time ago, although the Secretary relied primarily on his carcinogen policy, he also took a "fall back" position that the regulation was justified by the evidence. I am inclined to accord this argument somewhat more weight than you do, although I do not expect to disagree with your conclusion that the Secretary has not carried the burden of proof that the Act imposes on him.

Even if one took a different view of the evidence, I would favor affirmance because I agree generally with CA5 as to the necessity of a showing of a reasonable cost/benefit relationship.

I admire the thoroughness with which you have addressed this extremely complex case, and hesitate to differ at all. My differences are not, however, necessarily great. If I write a concurring opinion, I will circulate it no later than Monday.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

6/23/80

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

From: Mr. Justice Powell

Circulated: JUN 23 1980

Recirculated: _____

FIRST DRAFT

No. 78-911, Industrial Union Department v. American Petroleum Institute
No. 78-1036, Marshall v. American Petroleum Institute

MR. JUSTICE POWELL, concurring in part and in the judgment.

I join Parts I, II, IIIA-C, and IIIE of the Court's opinion.1/ The Occupational Safety and Health Agency relied in large part on its "carcinogen policy"--which has never been adopted formally--in promulgating the benzene exposure and dermal contact regulation at issue in this case.2/ For the reasons stated by the Court, I agree that §§ 6(b)(5) and 3(8) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 655(b)(5), 652(8), must be read together. They require OSHA to make a threshold finding that proposed occupational health standards are reasonably necessary to provide safe workplaces. When OSHA acts to reduce existing national consensus standards, therefore, it must find that (i) currently permissible exposure levels create a significant risk of material health impairment; and (ii) a reduction of those levels would significantly reduce the hazard.

June 25, 1980

78-911 and 78-1036 Benzene Cases

Dear John:

This refers to the changes made in the draft of your opinion recirculated today.

I have only one comment, which relates to a sentence that was not changed. It is the last sentence in the first paragraph on page 31, in which the word "possible" appears. This might be read as suggesting that no weighing whatever of "cost/benefits" is necessary. In addition, you use the word "feasibility" in a similar context in new note 48 (p. 32). Would it not be desirable to substitute "feasible" for "possible" on page 31?

Although I think it would be desirable to substitute "feasible" for "possible", I do not plan to make any changes in my draft opinion.

Sincerely,

Mr. Justice Stevens
lfp/ss

"Court" changed to "plurality." And pp. 1, 4, 6, FN1, FN3, FN4.

6/27/80

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

From: Mr. Justice Powell

Circulated: _____

Recirculated: 6/27/80

SECOND DRAFT

No. 78-911, Industrial Union Department v. American Petroleum Institute
No. 78-1036, Marshall v. American Petroleum Institute

MR. JUSTICE POWELL, concurring in part and in the judgment.

I join Parts I, II, IIIA-C, and IIIE of the plurality opinion.[1] The Occupational Safety and Health Agency relied in large part on its "carcinogen policy"--which had not been adopted formally--in promulgating the benzene exposure and dermal contact regulation at issue in this case.[2] For the reasons stated by the plurality, I agree that §§ 6(b)(5) and 3(8) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 655(b)(5), 652(8), must be read together. They require OSHA to make a threshold finding that proposed occupational health standards are reasonably necessary to provide safe workplaces. When OSHA acts to reduce existing national consensus standards, therefore, it must find that (i) currently permissible exposure levels create a significant risk of material health impairment; and (ii) a reduction of those levels would significantly reduce the hazard.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 30, 1980

78-911 & 78-1036, Benzene cases

MEMORANDUM TO THE CONFERENCE:

Having reviewed the various opinions since returning from the CA4 Conference, I wish to change two sentences in the text of my concurring opinion, and add two sentences to fn. 4. These are clarifying changes, and the printer assures me that they can be made without delaying the schedule for Wednesday.

I am changing the language of the first two sentences in the paragraph that runs from p. 5 to p. 6 of my printed draft to read as follows:

> "I therefore would not lightly assume that Congress intended OSHA to require reduction of health risks found to be significant whenever it also finds that the affected industry can bear the costs. See supra, at 5, n. 4. Perhaps more significantly, however, OSHA's interpretation of § 6(b)(5) would force it to regulate in a manner inconsistent with the health and safety purposes of the legislation we construe today."

I would add the following at the end of fn. 4:

> "The 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."

L.F.P.
L.F.P., Jr.

ss

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

From: Mr. Justice Powell

6-27-80

Circulated: JUN 30 1980

1st PRINTED DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 78-911 AND 78-1036

Industrial Union Department, AFL-CIO, Petitioner,
78-911 *v.*
American Petroleum Institute et al.

Ray Marshall, Secretary of Labor, Petitioner,
78-1036 *v.*
American Petroleum Institute et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1980]

MR. JUSTICE POWELL, concurring in part and in the judgment.

I join Parts I, II, III A-C, and III-E of the plurality opinion.[1] The Occupational Safety and Health Agency relied in large part on its "carcinogen policy"—which had not been adopted formally—in promulgating the benzene exposure and dermal contact regulation at issue in this case.[2] For the rea-

[1] These portions of the plurality opinion primarily address OSHA's special carcinogen policy, rather than OSHA's argument that it also made evidentiary findings. I do not necessarily agree with every observation in the plurality opinion concerning the presence or absence of such findings. I also express no view on the question whether a different interpretation of the statute would violate the nondelegation doctrine of *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935), and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935). See *post*, at — (REHNQUIST, J., concurring).

[2] The Secretary of Labor promulgated the relevant standard pursuant to his statutory authority. Since OSHA is the agency responsible for developing such regulations under the Secretary's direction, this opinion

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

From: Mr. Justice Powell

6-30-80

Circulated: JUL 1 1980

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-911 AND 78-1036

Industrial Union Department, AFL-CIO, Petitioner,
78-911 *v.*
American Petroleum Institute et al.

Ray Marshall, Secretary of Labor, Petitioner,
78-1036 *v.*
American Petroleum Institute et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1980]

MR. JUSTICE POWELL, concurring in part and in the judgment.

I join Parts I, II, III A-C, and III-E of the plurality opinion.[1] The Occupational Safety and Health Agency relied in large part on its "carcinogen policy"—which had not been adopted formally—in promulgating the benzene exposure and dermal contact regulation at issue in this case.[2] For the rea-

[1] These portions of the plurality opinion primarily address OSHA's special carcinogen policy, rather than OSHA's argument that it also made evidentiary findings. I do not necessarily agree with every observation in the plurality opinion concerning the presence or absence of such findings. I also express no view on the question whether a different interpretation of the statute would violate the nondelegation doctrine of *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935), and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935). See *post*, at — (REHNQUIST, J., concurring).

[2] The Secretary of Labor promulgated the relevant standard pursuant to his statutory authority. Since OSHA is the agency responsible for developing such regulations under the Secretary's direction, this opinion

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 9, 1980

Re: Nos. 78-911 & 78-1036 (Benzene Cases)

Dear Thurgood and John:

I have read both of your painstaking memoranda on these cases, and think the Conference is indebted to you for the light they shed on the legal issues. While both of you argue quite forcefully for a plausible administrative system for regulating carcinogens, I am bound to say that at this stage neither to me breathes sufficient life into the word "feasible" to satisfy our long-dormant rule that Congress may not delegate its legislative authority without giving some indication of the general standards that are to guide the agency in exercising that delegated authority. On page 34 of your memorandum, John, you say that "Unless there is some requirement that the risk be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute makes the kind of 'sweeping delegation of legislative power' that the Court condemned in Schechter Poultry Corp. v. United States, 295 U.S. 495, 539. Although I do not suggest that the delegation would be unconstitutional, a construction of the statute that avoids this kind of open-ended grant should certainly be favored."

I am inclined to think that the delegation in this case is sufficiently "uncanalized" as to justify the invocation of our seldom used constitutional principle that the exercise by Congress of the power delegated to it by the Constitution to regulate commerce may not in turn be delegated to the Secretary of Labor without something more in the way of guidelines than this statute furnishes. This doctrine finds support not merely in Schechter, supra, but in Panama Refining Co. v. Ryan, 293 U.S. 388, 422 (1935), and American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946).

Taken literally, feasibility is a tautological concept. Something is feasible if it can be done; it is not feasible if it can't. While technology and economics are unquestionably two components of feasibility, they are the sole ones. As suggested by the Chief at oral argument, for example, OSHA might consider banning cigarette smoking in workplaces as a potential cause of cancer. Such a ban would be both economically and technologically possible--indeed easy--but we could hardly disagree if the Secretary considered such a ban administratively, or even politically, infeasible.

Perhaps the strongest indication that the word "feasible," as used in this context, is "utterly without meaning," see American Power Co. v. SEC, supra, at 105, is contained in the legislative history itself. As originally drafted, § 6(b)(5) called for the standard that "most adequately" assured that no employee would be harmed. Senator Javits objected in committee that such a standard would require absolute safety in the workplace, and changed the wording to "most adequately and feasibly assures[.]" When the bill reached the Senate floor, Senator Dominick voiced concerns almost identical to those voiced by Senator Javits, even though the bill had supposedly been amended to remedy those concerns. Ultimately, the section was amended to read "most adequately assures, to the extent feasible," a change that I see as purely semantical.

Nor do the other sources traditionally examined in non-delegation cases shed any light on whether Congress wanted the Secretary to balance costs against benefits or simply to regulate carcinogens down to an industry's breaking point. This is not a case where the statutory context clarifies the intent, cf. American Power & Light Co. v. SEC, supra, at 105-106, where a pre-existing administrative practice provides the necessary specificity, cf. Lichter v. United States, 334 U.S. 742, 783 (1948), or where longstanding principles of common law

provide a backdrop to an otherwise general statute. Cf. Standard Oil Co. v. United States, 221 U.S. 1, 45-55, 69-70 (1911). Nor are we dealing with a subject matter, like foreign policy, where the Executive Branch maintains an extra measure of prerogative and where broader delegations of authority have often been approved. See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). Finally, there is nothing whatsoever about the subject matter of § 6(b)(5) that rendered such a precatory grant of authority necessary because it would be "unreasonable and impracticable to compel Congress" to speak more clearly. American Power & Light Co. v. SEC, supra, at 105. Congress could have made, and I believe was obligated to make, the binary choice between the two competing models for regulating carcinogens that, as a result of its default, has now been posed to this Court.

Our holding in this case could be quite limited in impact, both precedentially and practically. We deal here with a conjunction of factors, noted above, that renders repetition quite unlikely. Practically, we need invalidate only the first sentence of § 6(b)(5) as it applies to toxic substances for which there is no known safe level. As for those substances, some of the standards now in place may have been adopted as "national concensus standards" under § 6(a) of the Act and therefore would not be affected. In the remaining cases, the Secretary could, for the time being, adopt "emergency temporary standards" under § 6(c).

The parties to this litigation have asked us to choose between two rather unappealing extremes: a statistical possibility of future deaths due to benzene-induced cancer or, to paraphrase Lewis' letter of today, carte blanche authority for a bureaucratic agency to regulate the profit margins and survival ratios in innumerable industries. While either extreme might be what Congress intended, neither the statutory language nor the legislative history afford the Secretary sufficient guidance in making this choice.

Sincerely,

Mr. Justice Marshall
Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 13, 1980

Re: Nos. 78-911 and 78-1036 (Benzene Cases)

Dear John:

Although I continue to believe that whether we interpret the provisions here as you do or as Thurgood does we will be putting words in the mouth of Congress to give the Secretary guidance that Congress itself never enacted or agreed upon, my earlier suggested view to this effect seems to command the support of only one Member of the Court -- me. Meanwhile, the Term is drawing to a close, and I am willing to explore the possibilities of joining an opinion based on your memorandum as modified along the lines suggested to you in Potter's memorandum of yesterday. There are, however, a few aspects of your present memorandum that concern me which are touched upon lightly, if at all, in Potter's memorandum.

The first is one that does not arise here directly, and could probably be avoided by stressing that we are dealing only with an attempt to lower a pre-existing standard. While I am persuaded that the Secretary ought to have to show that the 10 ppm standard presents a significant risk of material health impairment before he can alter it, I am uncertain what standards you would have the Secretary meet in a case where he discovers a new carcinogen and where there is no standard already in place. Would he be required to survey the industry and to adopt the average exposure level as his standard absent a showing that this level posed a significant danger; would he be required or permitted to adopt the lowest level he found in his survey; or, finally, would he be required or permitted to adopt ab initio the lowest standard technologically and economically feasible? I would be much more comfortable with an opinion that saved these questions for a later day, stressing that this case deals only with an attempt to lower a pre-existing standard.

Second, as your memorandum is presently written, I am left with some uncertainty as to exactly why the Secretary's present showing is insufficient to meet the "substantial evidence" test. The Dow study, as you point out, uncovered two additional deaths in a population of 594 workers exposed to 2 to 9 ppm benzene. I think the government may have taken differing positions in its reply brief

and at oral argument on the weight that the Secretary was entitled to attach to this study. In your memorandum, pp. 21-22 and n. 29, you suggest other convincing reasons for discounting that study, bu I am not sure that it is proper to place the weight that your present memorandum does on the government's reply brief in view of what appears to have been a change of position at oral argument.

Third, and in the same vein, appellees seem willing to concede that, based on Professor Wilson's "conservative" assumptions, reducing the standard from 10 ppm to 1 ppm would prevent one case o leukemia and one other cancer death every six years. In declining to uphold the Secretary on this evidence alone, you are in effect saying that it does not meet the "substantial evidence" requirement imposed by Congress. Whether done in terms of some sort of implici cost/benefit analysis or on some other basis, I think this evidence probably must be met head-on.

None of these seem insuperable obstacles from my point of view, but they may well to other colleagues. I shall try to keep an oper mind, while at the same time working on a more extensive memorandum based on the standardless delegation issue enunciated in Panama Refining Co. v. Ryan, 293 U.S. 388 (1934), which although legally may be based on Latin maxims also has the salutary practical effect of forcing Congress to make the sort of choice that it was clearly unwilling to make here, and in effect dumped on the Secretary and the courts.

Sincerely,

Mr. Justice Stevens
Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78–911 AND 78–1036

Industrial Union Department, AFL–CIO, Petitioner,
78–911 *v.*
American Petroleum Institute et al.

Ray Marshall, Secretary of Labor, Petitioner,
78–1036 *v.*
American Petroleum Institute et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1980]

Opinion of MR. JUSTICE REHNQUIST.

The statutory provision at the center of the present controversy, § 6 (b)(5) of the Occupational Safety and Health Act of 1970, states, in relevant part, that the Secretary of Labor

> ". . . in promulgating standards dealing with toxic materials or harmful physical agents . . . 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." 29 U. S. C. § 655 (b)(5) (emphasis added).

According to the Secretary, who is one of the petitioners herein, § 6 (b)(5) imposes upon him an absolute duty, in regulating harmful substances like benzene for which no safe level is known, to set the standard for permissible exposure at the lowest level that "can be achieved at a bearable cost with

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1980

Re: Nos. 78-911 & 78-1036 ("Benzene Cases")

Dear John:

Lewis' note to you of today has led me to, in language much more familiar to you than to me, I am sure, "review the bidding" in these cases and in the course of doing so have come to realize that the opinion I circulated has no "bottom line". In view of the lateness of the Term, the revisions of your first draft, and not knowing what the Chief or Lewis are going to do, as of now I propose to add to my separate opinion in the case the following last line:

> "Accordingly, for the reasons stated above, I concur in the judgment of the Court affirming the judgment of the Court of Appeals."

Sincerely,

Mr. Justice Stevens

Copies to the Conference

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

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 23 JUN 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78–911 AND 78–1036

Industrial Union Department, AFL–CIO, Petitioner,
78–911 *v.*
American Petroleum Institute et al.

Ray Marshall, Secretary of Labor, Petitioner,
78–1036 *v.*
American Petroleum Institute et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1980]

MR. JUSTICE REHNQUIST, concurring in the judgment.

The statutory provision at the center of the present controversy, § 6 (b)(5) of the Occupational Safety and Health Act of 1970, states, in relevant part, that the Secretary of Labor

> ". . . in promulgating standards dealing with toxic materials or harmful physical agents . . . 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." 29 U. S. C. § 655 (b)(5) (emphasis added).

According to the Secretary, who is one of the petitioners herein, § 6 (b)(5) imposes upon him an absolute duty, in regulating harmful substances like benzene for which no safe level is known, to set the standard for permissible exposure at the lowest level that "can be achieved at a bearable cost with

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

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 26 JUN 1980

8p 2, 5, 6, 10, 12, 13, 17

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-911 AND 78-1036

Industrial Union Department, AFL-CIO, Petitioner, 78-911 *v.* American Petroleum Institute et al. Ray Marshall, Secretary of Labor, Petitioner, 78-1036 *v.* American Petroleum Institute et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1980]

MR. JUSTICE REHNQUIST, concurring in the judgment.

The statutory provision at the center of the present controversy, § 6 (b)(5) of the Occupational Safety and Health Act of 1970, states, in relevant part, that the Secretary of Labor

> ". . . in promulgating standards dealing with toxic materials or harmful physical agents . . . 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." 29 U. S. C. § 655 (b)(5) (emphasis added).

According to the Secretary, who is one of the petitioners herein, § 6 (b)(5) imposes upon him an absolute duty, in regulating harmful substances like benzene for which no safe level is known, to set the standard for permissible exposure at the lowest level that "can be achieved at a bearable cost with

P. 17, 37, 47

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

From: Mr. Justice Stevens

Circulated: MAY 6 '80

1st DRAFT Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 78–911 AND 78–1036

Industrial Union Department, AFL–CIO, Petitioner,
78–911 *v.*
American Petroleum Institute et al.

Ray Marshall, Secretary of Labor, Petitioner,
78–1036 *v.*
American Petroleum Institute et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1980]

Memorandum by MR. JUSTICE STEVENS.

The Occupational Safety and Health Act of 1970, 29 U. S. C. § 651 *et seq.* (the Act), authorizes the Secretary of Labor to promulgate rules designed to provide safe and healthful working conditions for every working man and woman in the Nation. This case concerns the character of the Secretary's duty to evaluate benefits and costs in formulating a standard regulating occupational exposure to benzene, which has been shown to cause cancer at high exposure levels and which is admittedly a "toxic material" within the meaning of the Act.

Section 3 (8) of the Act, 29 U. S. C. § 652 (8), defines an "occupational health and safety standard" as

> ". . . 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."

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

From: Mr. Justice Stevens

Circulated: JUN 17 '80

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

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Ray Marshall, Secretary of Labor, Petitioner,
78–1036 *v.*
American Petroleum Institute et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1980]

MR. JUSTICE STEVENS delivered the opinion of the Court.

The Occupational Safety and Health Act of 1970, 29 U. S. C. § 651 *et seq.* (the Act), was enacted for the purpose of ensuring safe and healthful working conditions for every working man and woman in the Nation. This case concerns a standard promulgated by the Secretary of Labor to regulate occupational exposure to benzene, a substance which has been shown to cause cancer at high exposure levels. The principal question is whether such a showing is a sufficient basis for a standard that places the most stringent limitation on exposure to benzene that is technologically and economically possible.

The Act delegates broad authority to the Secretary to promulgate different kinds of standards. The basic definition of an "occupational safety and health standard" is found in § 3 (8), which provides:

"The term 'occupational safety and health standard'

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

From: Mr. Justice Stevens

Circulated: ~~JUN 17 '80~~

Recirculated: JUN 24 '80

2nd ~~XXX~~DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-911 AND 78-1036

Industrial Union Department, AFL-CIO, Petitioner,
78-911 *v.*
American Petroleum Institute et al.

Ray Marshall, Secretary of Labor, Petitioner,
78-1036 *v.*
American Petroleum Institute et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1980]

announced the judgment of the Court and delivered an opinion in which MR. JUSTICE STEWART joins and in Parts I, II, III-A-C and E of which MR. JUSTICE POWELL joins.

MR. JUSTICE STEVENS ~~delivered the opinion of the Court~~.

The Occupational Safety and Health Act of 1970, 29 U. S. C. § 651 *et seq.* (the Act), was enacted for the purpose of ensuring safe and healthful working conditions for every working man and woman in the Nation. This case concerns a standard promulgated by the Secretary of Labor to regulate occupational exposure to benzene, a substance which has been shown to cause cancer at high exposure levels. The principal question is whether such a showing is a sufficient basis for a standard that places the most stringent limitation on exposure to benzene that is technologically and economically possible.

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"The term 'occupational safety and health standard'

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 24, 1980

MEMORANDUM TO THE CONFERENCE

Re: Cases held for the Benzene cases, No. 78-911 and 78-1036.

There are two cases, both dealing with the validity of the coke oven emissions standard, that are being held for Benzene, Republic Steel Corp. v. OSHA, No. 78-918 and American Iron and Steel Institute v. OSHA, No. 78-919. These cases were consolidated in CA3, which upheld the standard in a unanimous opinion (Rosenn, Higginbotham, and Van Artsdalen).

In its explanation of the permanent coke oven emissions standard, 41 Fed. Reg. 46742, OSHA stated first that coke oven emissions present a carcinogenic risk, relying on the fact that there are several known carcinogens that are constituent elements of these emissions and on epidemiological studies showing increased mortality rates for coke oven workers. After finding that the evidence in the record "conclusively supports the finding that coke oven emissions play a causal role in the induction of cancer of the lung and genito-urinary tract in the exposed population," OSHA went on to consider the industry's argument that benefits must be considered in relation to costs. In the course of this discussion, the Agency noted various estimates of the reduction in mortality rates that could be expected to result from a lowering of the permissible exposure limit. As we note in our Benzene opinion, at page 46, OSHA's own staff had calculated that there was an excess mortality of 200 workers per year out of a population of 21,000 exposed workers and that the proposed standard might well eliminate that risk entirely; the President's Council on Wage and Price Stability estimated that 8-35 lives could be saved each year out of an estimated population of 14,000 workers. Despite these rather significant numbers, OSHA stated that it did not believe that it is