The Burger Court Opinion Writing Database

American Textile Manufacturers Institute, Inc. v. Donovan

452 U.S. 490 (1981)

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

January 21, 1981

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

MEMORANDUM TO THE CONFERENCE:

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

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

January 26, 1981

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

MEMORANDUM TO THE CONFERENCE:

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

Regards,

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

CHAMBERS OF
THE CHIEF JUSTICE

January 30, 1981

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

Dear Bill:

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

Regards,

WEB/pm

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

February 3, 1981

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

Dear Bill:

Are you willing to undertake a dissent in this case?

Regards,

WEB

Justice Rehnquist

Copies to: Justice Stewart
Justice Powell

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

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1981

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

Dear Bill:

I join your dissent.

Regards,

WEB

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 22, 1981

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

Dear Chief:

I agree although I'm inclined to doubt that the abandonment of the policy has any relevance to the issue in this case.

Sincerely,

Bill

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 30, 1981

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

Dear Chief:

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

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

Sincerely,

Bill

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 2, 1981

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

Dear Chief:

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

Sincerely,

The Chief Justice

cc: The Conference

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

March 31, 1981

MEMORANDUM TO THE CONFERENCE

From: Mr. Justice E

Circulated: APR 1

Recirculated: ____

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

Nos. 79-1429 and 79-1583

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

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

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

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

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

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

Sincerely,

Bill

W.J.B. Jr.

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

From: Mr. Justice Brennan

Circulated: 5/14/81

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79–1429 AND 79–1583

American Textile Manufacturers Institute, Inc., et al., Petitioners,
79–1429 *v.*
Raymond J. Donovan, Secretary of Labor, United States Department of Labor, et al.

National Cotton Council of America, Petitioner,
79–1583 *v.*
Raymond J. Donovan, Secretary of Labor, United States Department of Labor, et al.

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

[May —, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

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

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

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

May 19, 1981

From: Mr. Justice Bren

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

MAY 19 19

Circulated: _____

Recirculated: _____

Dear John,

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

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

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

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

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

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

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

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

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

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

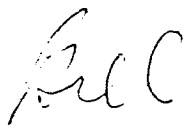
The Secretary gives no indication in his post-argument March 27, 1981 Advance Notice of Proposed Rulemaking that, pursuant to Section 6(g), he wants to compare the costs and benefits of the Cotton Dust Standard relative to those of other possible standards addressing different health and safety problems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

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

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

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

Sincerely,



Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 21, 1981

RE: Nos. 79-1429 and 79-1583, American Textile Manufacturers v. Donovan

Dear John,

Thank you very much for your specification of suggested changes. Your second, fourth, and fifth proposals are entirely satisfactory. I would also like to delete the word "only" in the first line of footnote 29 on page 17 (I assume your fifth suggestion refers to footnote 29). Your third suggestion is also satisfactory if we can insert "by the Secretary" after the words "costs and benefits" in the first sentence, delete "a" in the second sentence, and as mentioned the other day add at the end of the second sentence "because feasibility analysis is."

As for your first, sixth, and seventh suggestions, I would like to propose the following to help meet your concerns. For the seventh suggestion, I can substitute the word "contemplated" for "intended" and the word "different" for "further." This would make this sentence more consistent with your third suggestion. In this sentence, I would not like to add "to require." If the words were inserted, they might be thought to intimate that Congress actually discussed cost-benefit analysis but decided not to mandate it, when this is not at all the case. For similar reasons, on your sixth suggestion, I would substitute the word "different" for "further" to meet your concerns but would prefer not to add "requirement of."

Finally, instead of your first suggestion, I would be happy to make the change you mentioned in our telephone conversation the other day, namely to substitute "not to require OSHA to do so" for "to preclude OSHA from doing so." Frankly, after having checked the Secretary's brief in the Court of Appeals, I think my good friend David Bazelon was guilty of a loose description of the Secretary's position. Certainly the thrust of his whole opinion, as well as that in the Secretary's brief in this Court, is that cost-benefit analysis is inconsistent with the language and legislative history of the Act and that feasibility analysis is required. See Ct. of App. Brief of Secretary of Labor, at 120; Brief for Respondent Secretary of Labor, at 38-39.

I do appreciate this exchange and I hope we are at the point where we can get this difficult case behind us.

Sincerely,

Justice Stevens

Brennan JO

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 26, 1981

MEMORANDUM TO THE CONFERENCE

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

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

Sincerely,

Bill

The Conference

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

2nd DRAFT

MAY 26 1981

SUPREME COURT OF THE UNITED STATES

Nos. 79–1429 AND 79–1583

American Textile Manufacturers Institute, Inc., et al., Petitioners,
79–1429 *v.*
Raymond J. Donovan, Secretary of Labor, United States Department of Labor, et al.

National Cotton Council of America, Petitioner,
79–1583 *v.*
Raymond J. Donovan, Secretary of Labor, United States Department of Labor, et al.

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

[May —, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

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

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

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 2, 1981

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

MEMORANDUM TO THE CONFERENCE

In response to Bill's dissent in the above, I propose to add the following new footnote 75 at the end of the first full paragraph on page 48:

Even had JUSTICE REHNQUIST correctly characterized the Court's opinion, and there were three possible constructions of the phrase "to the extent feasible," post, at 2-3, this would hardly be grounds for invalidating Section 6(b)(5) under the delegation doctrine. After all, this would not be the first time that more than one interpretation of a statute had been argued. See, e.g., Pennhurst State School v. Halderman, __ U.S. __ (1981); Watt v. Alaska, __ U.S. __ (1981).

Sincerely,

Bill

The Conference

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79–1429 AND 79–1583

American Textile Manufacturers Institute, Inc., et al., Petitioners,
79–1429 *v.*
Raymond J. Donovan, Secretary of Labor, United States Department of Labor, et al.

National Cotton Council of America, Petitioner,
79–1583 *v.*
Raymond J. Donovan, Secretary of Labor, United States Department of Labor, et al.

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

[May —, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

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

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

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

From: Mr. Justice Brennan

Circulated: JUN 24 1981

Recirculated: _____

MEMORANDUM TO THE CONFERENCE

HOLDS FOR: AMERICAN TEXTILE MANUFACTURERS, INC. V. DONOVAN
Nos. 79-1429, 79-1583.

There is only one hold for the above:

Lead Industries Assoc., Inc. v. OSHA, No. 80-1134

National Assoc. of Recycling Industries, Inc. v. Secretary of Labor, No. 80-1170

South Central Bell Telephone Co. v. OSHA, No. 80-1155

Various petitioners challenge OSHA's promulgation in 1978 of the so-called "Lead Standard," a health standard setting a permissible exposure level of 50 micrograms of lead per cubic meter of air (50 ug/m3) in such industries as primary lead smelting, battery manufacturing, brass and bronze industries, and pigment manufacturing. OSHA initially proposed a PEL of 100 ug/m3, and conducted public hearings on this proposal. OSHA's final regulation, however, adopted the 50 ug/m3 PEL. All affected employers must meet the 50 ug/m3 PEL immediately through a combination of engineering controls, work practice controls, or

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 22, 1981

Re: No. 79-1429) American Textile Mfg. Institute v. Marshall
No. 79-1583) National Cotton Council v. Marshall

Dear Chief,

I agree with your suggestion that we ask the parties to comment on the effect of the change in Regulations brought to light during the oral argument.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 29, 1981

Re: No. 79-1429 & 79-1583,
American Textile Mfrs. Inst. v. Donovan

Dear Bill,

I shall in due course circulate a dissenting opinion.

Sincerely yours,

P.S.

Justice Brennan

Copies to the Conference

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

From: Mr. Justice Stewart

Circulated: 8 JUN 1981

Recirculated: _____

1st Draft

No. 79-1429 - American Textile Manufacturers Institute, Inc. v. Donovan

No. 79-1583 - National Cotton Council of America v. Donovan

JUSTICE STEWART, dissenting.

Section 6(b)(5) of the Occupational Safety and Health Act provides:

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

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

From: Mr. Justice Stewart
3 JUN 1981
Circulated: _____
Recirculated: _____

printed
1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79-1429 AND 79-1583

American Textile Manufacturers Institute, Inc., et al., Petitioners,
79-1429 *v.*
Raymond J. Donovan, Secretary of Labor, United States Department of Labor, et al.

National Cotton Council of America, Petitioner,
79-1583 *v.*
Raymond J. Donovan, Secretary of Labor, United States Department of Labor, et al.

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

[June —, 1981]

JUSTICE STEWART, dissenting.

Section 6 (b)(5) of the Occupational Safety and Health Act provides:

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

29 U. S. C. § 655 (b)(5) (emphasis added). Everybody agrees that under this statutory provision the Cotton Dust Standard must at least be *economically* feasible, and every-

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 22, 1981

Re: 79-1429 and 79-1583 - American Textile Mfg. Inst. v. Marshall; and, National Cotton Council v. Marshall

Dear Chief,

I agree with your suggestion that we ask the parties to comment on the effect of the change in Regulations brought to light during the oral argument.

Sincerely yours,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 20, 1981

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

Dear Bill:

Please join me.

Sincerely yours,

Justice Brennan

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 28, 1981

Re: Nos. 79-1429 and 79-1583 -

American Textile Manufacturers
Institute, Inc. v. Donovan, etc.

Dear Bill,

I am still with you.

Sincerely yours,

Byron

Justice Brennan

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 26, 1981

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

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 8, 1981

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

Dear Bill:

As I mentioned to you by telephone this morning, my preference would have been to affirm the judgment of the Court of Appeals in its entirety. This means I would be in dissent as to the portions of your opinion that disapproves the Secretary's application of the wage guarantee provision. This, however, is a comparatively minor point, and I certainly do not wish to "rock the boat." I therefore am receding on this point and am giving you a full joinder so that you have a Court.

Sincerely,

Harry

Mr. Justice Brennan

Brennan 80

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 8, 1981

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

Dear Bill:

Please join me.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 22, 1981

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

Dear Chief:

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

Sincerely,

L. Lewis

The Chief Justice

lfp/ss

cc: The Conference

February 3, 1981

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

Dear Bill:

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

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

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

Sincerely,

Mr. Justice Rehnquist

LFP/lab

cc: The Chief Justice
Mr. Justice Stewart

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 21, 1981

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

Dear Bill:

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

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

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

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

Sincerely,

L. Lewis

Mr. Justice Brennan

LFP/lab

Copies to the Conference

cc: Mr. Alexander L. Stevas

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 3, 1981

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

Dear Bill:

Please show at the end of the next draft of your opinion that I took no part in the decision of this case.

Sincerely,

L. Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 22, 1981

MEMORANDUM TO THE CONFERENCE

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

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

Sincerely,

WHR

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 4, 1981

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

Dear Chief:

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

Sincerely,

The Chief Justice

Justice Stewart
Justice Powell

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 2, 1981

MEMORANDUM TO THE CONFERENCE

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

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

Sincerely,

WHR

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 22, 1981

Re: No. 79-1429 American Textile Mfg. v. Donovan

Dear Bill:

In the event that the Conference denies the government's motion to defer consideration of this case, I shall circulate a dissent.

Sincerely,

Justice Brennan

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: JUN 1 198?

Recirculated: _____

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

JUSTICE REHNQUIST, dissenting.

A year ago I stated my belief that Congress in enacting § 6(b)(5) of the Occupational Safety & Health Act of 1970 unconstitutionally delegated to the Executive Branch the authority to make the "hard policy choices" properly the task of the legislature. Industrial Union Department v. American Petroleum Institute, ___ U.S. ___ (1980) (concurring opinion). Because I continue to believe that the Act exceeds Congress' power to delegate legislative authority to non-elected officials, see Hampton & Co. v. United States, 276 U.S. 394 (1928) and Panama Oil Refining Co. v. Ryan, 293 U.S. 388 (1935), I dissent.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1981

MEMORANDUM TO THE CONFERENCE

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

In response to Bill's footnote in the above, I propose to add the following footnote 1 at the end of my opinion:

> Contrary to the suggestion of the Court, ante, at 48, n. 75, I do not argue that the existence of several plausible interpretations of the statute are grounds for invoking the delegation doctrine: I invoke the delegation doctrine because Congress failed to choose among those plausible interpretations.

Sincerely,

WHR

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79–1429 AND 79–1583

American Textile Manufacturers Institute, Inc., et al., Petitioners,
79–1429 *v.*
Raymond J. Donovan, Secretary of Labor, United States Department of Labor, et al.

National Cotton Council of America, Petitioner,
79–1583 *v.*
Raymond J. Donovan, Secretary of Labor, United States Department of Labor, et al.

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

[June —, 1981]

JUSTICE REHNQUIST, dissenting.

A year ago I stated my belief that Congress in enacting § 6 (b)(5) of the Occupational Safety and Health Act of 1970 unconstitutionally delegated to the Executive Branch the authority to make the "hard policy choices" properly the task of the legislature. *Industrial Union Department* v. *American Petroleum Institute*, — U. S. — (1980) (concurring opinion). Because I continue to believe that the Act exceeds Congress' power to delegate legislative authority to nonelected officials, see *Hampton & Co.* v. *United States*, 276 U. S. 394 (1928) and *Panama Oil Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), I dissent.

I will repeat only a little of what I said last Term. Section 6 (b)(5) provides in pertinent part:

"The Secretary, in promulgating standards dealing

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 3, 1981

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

Dear Bill:

Just for the record, I agree entirely with the Solicitor General's analysis of the January 19th amendments to the Cancer Policy.

Respectfully,

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 11, 1981

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

Dear Bill:

After taking another look at the issue, I have even more doubt about OSHA's power to establish a guaranteed minimum wage for employees who must be transferred for medical reasons. I will be most interested in your analysis of the question, but thought I should let you know that I am presently very troubled by this aspect of the cotton dust standard.

Respectfully,

John

Justice Brennan

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 1, 1981

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

Dear Bill:

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

Respectfully,

John

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 18, 1981

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

Dear Bill:

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

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

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

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

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

> elimination of the most serious hazards first."

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

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

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

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

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

Respectfully,

John

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 19, 1981

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

Dear Bill:

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

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

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

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

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

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

Respectfully,

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 21, 1981

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

Dear Bill:

Following our telephone conversation, I went through your draft opinion again and this will confirm my statement that I will join your opinion if you can see fit to make these changes:

1. Page 2, last full sentence: It seems to me that Judge Bazelon's statement of the Government's position is more accurate than the sentence in your draft. At 617 F.2d page 663 he stated:

> "OSHA agrees that a systematic evaluation of costs and benefits is to be encouraged within the limits of available estimation techniques, yet it contends that such analysis is not required. OSHA argues that the OSH Act constrains its regulation of dangerous substances 'only by the limits of feasibility.'"

Perhaps the way you state the point is a correct statement of the union's position but I do not recall the Government making an argument any different than the one that Judge Bazelon described. Accordingly, I would suggest that you modify the sentence to read this way:

> "Respondents counter that although a systematic evaluation of costs and benefits is to be encouraged within the limits of available estimation techniques, the Act contains no such requirement."

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2. On page 16, I think the sentence at the bottom of the page would be more accurate if you inserted the word "basic" or something similar immediately preceding the words "relationship between costs and benefits."

3. At the top of page 17, change the first two full sentences to read this way: "Any standard based on a balancing of costs and benefits that struck a different balance than that struck by Congress would be inconsistent with the command set forth in § 6(b)(5). Thus, a cost benefit analysis by OSHA is not required by the statute."

4. On page 19, line 7, delete the words "or authorized."

5. In note 21, line 2, delete the words "or permits."

6. On page 21, insert the words "requirement of" in between the words "any further" in the first full sentence.

7. On page 28, in the last full line after the words "Congress intended" insert the words "to require."

Respectfully,

Justice Brennan

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 26, 1981

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

Dear Bill:

Please join me.

Respectfully,

John

Justice Brennan

Copies to the Conference

Office of the Clerk
Supreme Court of the United States

Memorandum

January 30, 1981

Memo to the Conference

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

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

Al Stevas

Al Stevas
Clerk

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

January 30, 1981

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

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

Dear Mr. Stevas:

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

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

What petitioners have persistently ignored is that the cotton dust record contains substantial empirical evidence (1) that both the previous standard (1000 ug/m3) and the so-called industry alternative (500 ug/m3) would continue to create a significant risk of material health impairment to employees; (2) that the new standard (200 ug/m3) would substantially reduce that risk; and (3) that even under the new standard, there would remain a significant risk of contracting byssinosis (13% according to the Merchant Study) that the Secretary could not eliminate because of feasibility limitations. These findings (which were upheld by the court of appeals as supported by substantial evidence) are set out in the Secretary's statement of reasons accompanying the final standard, and the Secretary relied on these findings in making his decision. 43 Fed. Reg. 27358-27359 (1978).

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

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

Sincerely,

Wade H. McCree, Jr.
Solicitor General

cc: Neil King

Supreme Court of the United States

Memorandum

February 2, 1981

Memo to the Conference

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

Attached is an additional letter regarding the above-entitled cases.

Al Stevas
Clerk

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February 2, 1981

Honorable Alexander Stevas
Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

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

Dear Mr. Stevas:

On January 27, 1981, you requested that petitioners and respondents each submit a letter to the Court, setting forth their respective views on the relevance of OSHA's recent Cancer Policy amendment to the issues presented in these cases. The Solicitor General responded in a letter dated January 28, 1981, and petitioners responded in a letter filed the following day. On January 30, 1981, the Solicitor General served a second letter on this same question. Petitioners had not understood the Court to be inviting multiple statements by each party. However, in the event that the Solicitor General's letter of January 30, 1981 is accepted for filing, petitioners respectfully request that this letter be accepted for filing as well.

Petitioners' letter of January 29, 1981 pointed out that in the cotton dust proceeding, OSHA applied the same "lowest feasible level" regulatory policy that it had followed in setting standards for benzene and other carcinogens and that it recently deleted from its Cancer Policy as being "inconsistent with the OSHA Act." 46 Fed. Reg. at 4892, col. 1 (January 19, 1981). The Solicitor General's letter of January 30, 1981 appears to concede this point, stating that "the Secretary did set the [cotton dust] standard at the 'lowest feasible level.'"