POLITICS AND POLARITY
The Limits of OSHA Reform

Michael Levin

SINCE ITS BIRTH in 1970, the Occupational Safety and Health Administration (OSHA) has been in the forefront of the growing debate over the costs, benefits, and proper thrust of government regulation. Its supporters soon accused it of not doing enough to protect workers and began to call for more regulations ("standards"), more inspectors, more citations and fines. Its detractors indicted it for capricious and ineffective enforcement, gross ignorance of real-world industrial operations, zealous policing of requirements that bore no relation to genuine job hazards, and a basic lawlessness that caught even employers with exemplary safety records in a tangle of conflicting rules. In 1976, horror stories about OSHA became a staple of the presidential primaries, with President Ford, for example, telling a cheering group of New Hampshire businessmen that he understood their desire to "throw OSHA in the ocean." In July 1977 President Carter endorsed OSHA's mission but said the agency itself was "going to extremes." The next month he created an Interagency Task Force to assess OSHA and explore ways to supplement direct regulation.

Meanwhile Congress was lumbering in similar directions. From 1973 through 1976 over 100 oversight hearings were held before eight different House and Senate committees. The pro-OSHA forces beat back a number of direct attempts to abolish or restrict the agency. But in 1975 Congress began to pass appropriations riders to relieve employers of various paperwork burdens and procedural harassments. A rider adopted in 1976 barred the use of agency funds to inspect small agricultural employers or to fine any employer with fewer than eleven nonserious violations per inspection. And lightning nearly struck in 1978 when the Senate passed a Small Business Act amendment, sponsored by Senator Dewey Bartlett (Republican, Oklahoma), that might have exempted 2.8 million small establishments, almost 70 percent of the worksites covered by OSHA. The amendment was ultimately deleted in the last days of the ninety-fifth Congress. But it left a shaken agency, whose congressional allies were beginning to tire of fights in the trenches with only disapproving mail from home.

Since then the heat in OSHA's kitchen has declined a bit. Under its fourth administrator, Dr. Eula Bingham, the agency has created at least an impression of movement in response to calls for reform. It has deleted about 1,000 unnecessary standards—more accurately, subsections and clauses of standards—including requirements for split toilet seats, coat hooks on lavatory doors, and the maximum number of knotholes in wooden ladders. It has tried to make on-site compliance advice more available to employers. It has shifted inspections to large worksites in high-hazard industries and at-

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tempted to focus on serious dangers rather than trivial ones. It has funded university-based centers to educate workers and managers in hazard recognition and safe work practices. And it has launched an ambitious program to produce several major standards a year in the long-neglected area of occupational health—a program that has generated salutes from unions and public interest groups, along with concern from business, the academy, and the White House as the front-end costs of these standards have begun to be realized.

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OSHA: The Picture of Dorian Gray

Yet the call for reform is not easy to answer, since it masks the sharply different goals held by the agency's opposed publics. In many other regulatory areas, reform is made difficult by the shifting and unpredictable nature of such interest group reaction. Here the difficulty is quite the opposite—the clear, almost petrified, polarization of management and labor.

Unlike the Environmental Protection Agency (EPA) or the Consumer Product Safety Commission (CPSC), OSHA deals with what goes on in a plant rather than what comes out of it—with practices that place the agency smack in the middle of collective bargaining. Whether or not a worksite is unionized, each OSHA standard or inspection threatens to tip the balance between management and labor, to destabilize in-plant relations. Many employers believe that this danger is acute because workers or unions can request an inspection at will. Where no-strike clauses bar a work stoppage over bread-and-butter issues, inspection requests are a tempting way to start or get the most out of labor disputes. And they offer a handy tool for candidates for union office to project leadership and concern.

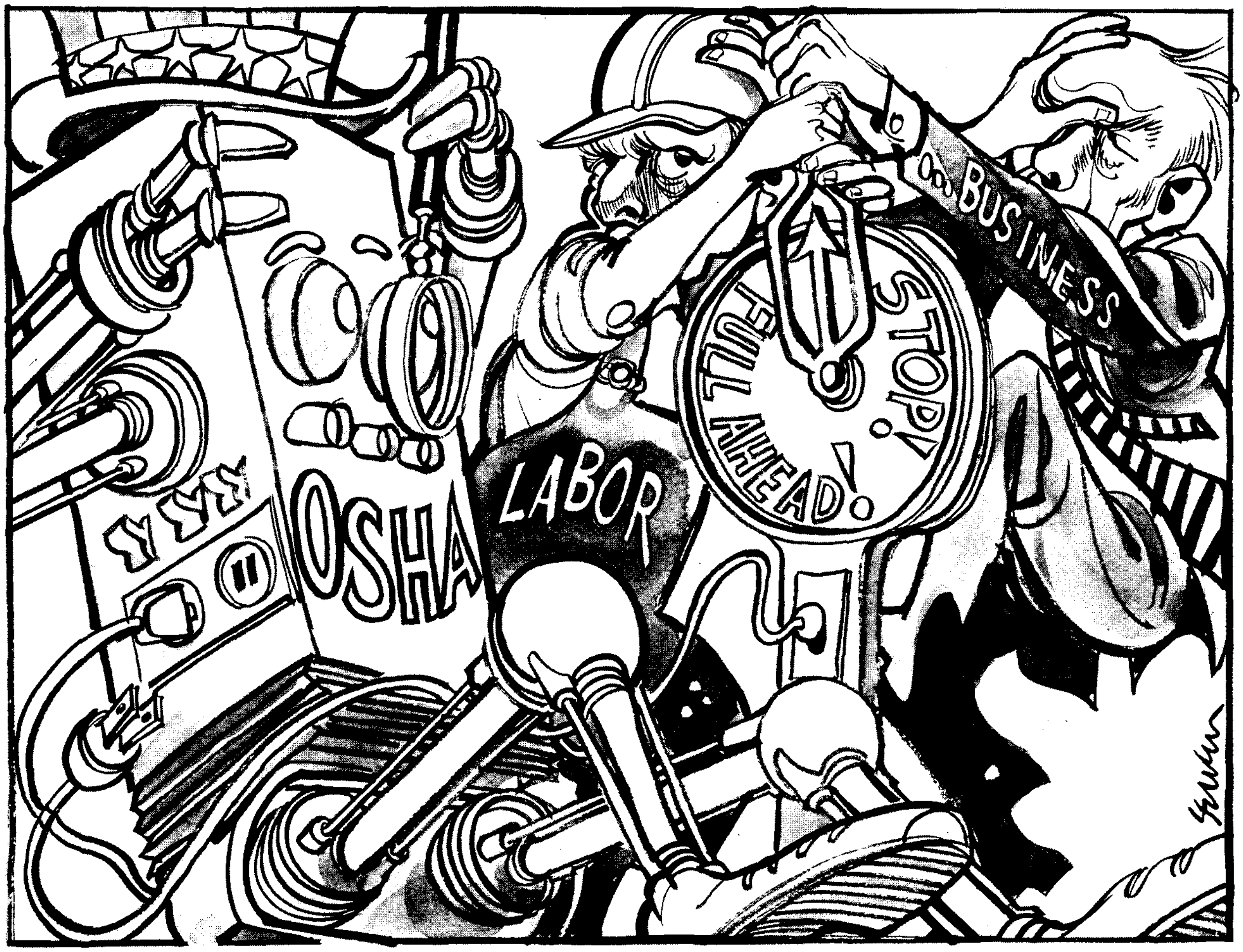
Whatever one thinks of such tactics, they spring from tensions that must be recognized if the agency's actions are to be understood. In this area, as with collective bargaining over wages or pensions, there will never be a natural stopping point at which unions admit benefits are sufficient (safety and health protection is adequate) and employers agree costs are reasonable. There will only be more rhetoric about union arrogance on the one hand and management callousness on the other—with both sides looking to the next clash down the line.

Thus the whole bitter burden of U.S. labor history—the mutual distrust, management's desire to run its business with minimal interference, labor's belief that employers cannot be trusted to do the "right thing" without a gun at their heads—has been loaded on OSHA. That history is the reason for OSHA's being placed in the Labor Department, where labor's influence would be ensured. It is the reason for OSHA's insistence on additional inspectors, higher fines, more detailed standards, more hard-nosed enforcement—goals that coincide with labor's desire for specifications that job stewards can police. It is the reason for OSHA politics that require an extended obeisance to the unions for every departure from past practice. It is why many employers believe their problems with OSHA may be listened to, but not heard.

With all this in it, the OSHA pot may boil over any time. The agency's "internal reforms" have been largely superficial; its basic approach remains unchanged. Despite the defects of detailed standards—their limited subject matter and slow development, their tendencies to freeze technology, jam different workplaces into the same mold, affect small firms more heavily, and draw funds from other efforts that might control hazards better—OSHA is increasingly committed to such standards. Though it will never have enough inspectors to cover its universe of 5 million worksites and 65 million workers, it continues to rely on direct enforcement to make the protection of those standards real. Its field inspectors still visit small firms over half the time, even though these firms account for less than one-fifth of all serious injuries. Moreover, the inspectors still have strong motives to cite long lists of violations as evidence they are doing a "good job." It is unclear how they will rationally enforce dozens of complex health rules when they can barely cope with successive emergencies involving grain elevators, concrete construction, or newly revealed chemical hazards. And it is equally unclear that sending them to large plants in high-hazard industries will measurably improve worker protection, since many large plants already have below-average injury rates.

What is clear is that OSHA must show substantial gains in the safety area—where outcome measurement is at least possible—if the credibility of its health campaign is to be preserved. But available safety data are equivocal, if not perverse. During OSHA's 1972–1975 Target Industries Program, for example, the severity of serious injuries in all five intensively inspected industries actually increased. From 1972 through 1977, the country's overall serious-injury rate went up 15 percent and the *severity* of those injuries rose nearly 30 percent. The most thorough study to date found not only that OSHA had reduced job-related injuries by no more than 5 percent, but that current standards were likely to affect only 25 percent of such injuries even if ideally enforced. Between 1976 and 1977, the occupational fatality rate doubled for firms with under twenty workers, and rose 20 percent for industry as a whole. Finally, between 1972 and 1976, workers' compensation expenses also doubled—rising from $4.9 billion to between $8.5 and $11 billion—while U.S. industry's real capital investment for job safety and health held steady at about $2.5 billion a year. Such figures suggest that OSHA may be redirecting business safety expenditures more than it raises them. But they also suggest that employers are finding it increasingly attractive to pay for injuries when they occur instead of investing in prevention.

These numbers do not tell us whether OSHA's program has "worked," since it is difficult to determine what the injury rates would have been without it. Fatalities are too rare to be reliable indices of agency performance, at least over the short run. And many data are not controlled for exogenous factors—such as busi-



ness upturns and changes in the composition of the work force—which can also raise rates.

But the numbers have bolstered a widespread perception of ineffectiveness that is more abiding than the effect of any "technical" explanations. The fact remains that to attain political legitimacy, OSHA needs to point to significant results and has not yet been able to do so. The question is whether it will keep accumulating citations and penalties that do not demonstrably improve worker protection, or begin moving beyond direct enforcement to achieve the larger goal. For the moment the agency is a kind of Picture of Dorian Gray—it appears pure and shining to its supporters, but seamed with warts to those who view it in a different light.

Present at the Creation

How did OSHA get into this fix, and what are the prospects for moving the real agency towards the ideal picture?

When Richard Nixon proposed a new job safety and health program in 1969 he could scarcely have thought he was creating what has come to be seen as the regulatory straw that broke the camel's back. His aim was to consolidate his New Majority by "doing something" for labor—a goal later reinforced by desire to reward the hard-hats who supported his policies on Southeast Asia. The reward was to be a statute that could be painted as a major effort, a comprehensive bill.

The unions had long sought such a bill, having found job safety difficult to achieve through collective bargaining. For one thing, many workers exposed to visibly severe occupational hazards—especially those in low-pay, entry-level jobs—had little political power within the unions. As a result, few locals were willing to strike over safety issues. For another thing, the presidents of the international unions were tired of being blamed for bargaining away safety and were worried about being ambushed on the issue by their membership's left. A job safety bill, which would remove safety from the bargaining table by making it mandatory, seemed the perfect way to get this monkey off their backs. Besides, that bill would be referred to the labor committees of the Congress—committees that the unions, not the administration, tended to dominate.

To pass a "big bill," however, it was necessary to have a crisis that would generate support for the sustained congressional effort required. Thus it was stated again and again that job-related accidents were causing 15,000 deaths and 2.2 million disabling injuries each year, resulting in an annual loss of $1.5 billion in wages and $8 billion to the gross national product; that the country's serious-injury frequency was 20 percent higher than in 1958; and that job-based health hazards were producing as many as 100,000 deaths and 400,000 new cases of occupational disease every twelve months. Witnesses duly noted that industrial hazards had claimed more American lives since 1965 than Vietnam. The specter of ancient and modern workplace poisons was invoked, and their scope and insidious nature documented in four fat volumes of hearings.

Two efforts were made to provide some perspective for this debate. A group of conservative congressmen asserted that short-term trends were misleading because job-related deaths and injuries had peaked around 1937 and declined steadily since. This argued that there was no crisis—that job safety was a serious problem but states and employers were doing well enough to merit a helping hand rather than the kick in the teeth that sudden federalization would represent. At the same time a liberal congressman, Philip Burton (Democrat, California), questioned whether federal standards and enforcement would produce much change by themselves. Burton noted that present incentives favored the status quo, since the low cost of workers' compensation made it more expensive for employers to prevent injuries in advance than to pay when they occurred. "Therefore," he concluded, "unless and until the basic economics of these disasters are changed, nothing in the working place may change" (*Legislative History of the Occupational Safety and Health Act of 1970*, p. 891).

Congress brushed aside both arguments, whose complexities clouded the chance for decisive action. Instead, it seized on the same kind of intervention it had been using since the creation of the Interstate Commerce Commission in 1887. It never looked at the causes of workplace injuries or asked whether direct regulation was likely to work. Nor did it consider compliance costs, assuming that these could easily be paid by business or passed to consumers. Debate centered on a symbolic issue: whether rulemaking and adjudication powers should be separated from a Labor Department that was also charged with enforcement. This issue, too, was resolved symbolically, with rulemaking and enforcement centralized but adjudication split off.

The statute that was enacted in 1970 relied on direct enforcement of detailed standards based on "the best available evidence." To offset the rulemaking delays inherent in this approach—and at the urging of business interest seeking greater "certainty"—the new agency was required swiftly to adopt several thousand existing safety guidelines developed by private groups. But this involved its own difficulties, for those guidelines had never been meant to be binding and carried their own burden of haphazard development, parochial interests, manufacturers' specifications, and outmoded public health rules.

Beyond this the statute was drastically underfunded for its mission of assuring "every working man . . . in the Nation safe and healthful working conditions." OSHA began with a first-year budget of under $35 million (and 400 inspectors) to cover nearly 5 million worksites —numbers ensuring that many sites would not see an inspector for decades. The statute authorized low penalties—no more than $1,000 for a violation likely to cause death or serious harm—made even lower by discounts for employer size, good faith, and past safety history. The standards would initially be enforced by Labor Department inspectors who had "policed" safety and health in comfortable obscurity under various procurement acts and were ill-prepared for judicial review or the tact needed where advance consent to inspection did not exist. Finally, the agency was allowed only four months to organize itself, to build a nationwide enforcement network, and to assemble a body of enforceable rules.

The results could have been predicted. OSHA adopted an avalanche of standards widely seen as incomprehensible and largely irrelevant. The new inspectors met instant hostility from businessmen whose chief contact with the federal government up until then had been filing tax forms. That hostility was compounded by the tendency of many inspectors to disregard variations between businesses, to cite each defect regardless of the employer's safety record, and to enforce rules with great rigidity. With no agreement on which standards violations required immediate attention, there was little incentive for employers to comply before an inspector's arrival. For most worksites, the chances of being inspected and the present value of future penalties were too small to compel safety investment in advance. There was no assurance that such investment would defer inspection or avert citations when the inspector did arrive. And as Congressman Burton had predicted, the most identifiable bookkeeping cost of workplace injuries—workers' compensation premiums—was too low (under 2 percent of 1977 payrolls on average) to spur corrective action.

To the extent that incentives for voluntary compliance existed, OSHA could not capitalize on them. Because the agency lacked technical depth, it was unwilling to give binding advice on the existence of violations and on acceptable remedies. Because it took literally its charge to protect *all* workers, it tried to cover every class of industry and worksite, protecting few workers well. Without a comprehensive philosophy it was enveloped in cross fires between competing priorities and interest groups. By prodigious effort it swiftly responded to news that vinyl chloride caused liver cancer in plastics workers. But it got snarled in a string of bitter, counterproductive controversies involving pesticides, kepone, noise exposure, farm coverage, and various enforcement practices. Its dominant mode became reaction rather than action. It grew dependent on a narrowing constituency, since the unions were the only ones prepared to defend it, no matter what.

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In the short space of seven years, OSHA developed a carapace—a hardened set of perspectives, processes, and constituent relations—that would put most middle-aged agencies to shame. Many Carter administration acts can be seen as attempts to puncture this carapace, or at least soften it. But these efforts have been impeded by the organized labor's reaction to its recent defeats on common-situs picketing and labor law reform, while the current battles over the Davis-Bacon Act continue to fuel union convictions that each barricade must be manned lest forty years' gains be swept away. As one senatorial expert has remarked off-the-record, "For the unions OSHA is a religion. There is no middle ground."

Pitfalls and Compass Points: A Future Map

Given this polarization, is there any hope for real OSHA reform? The answer is a qualified "yes," turning on whether a middle ground can be forged and on the type of reform being considered.

The market failures often cited to support the creation of OSHA—lack of information, unequal bargaining power, externalities (in which the costs or benefits of one party's action are borne or enjoyed by others)—are real, and still justify intervention. The agency's shift in emphasis from safety to health—where externalities run rampant, invisible hazards limit self-help, and standards lend themselves to the flexible performance requirements of exposure levels—is also justified. Galling as its paternalism may be to some, OSHA seems to have correctly concluded that "informed" worker choices often contravene the general good, since health probabilities are not real to people. And the agency's distrust of unrestrained corporate action has also been confirmed. The power company's post-incident actions at Three Mile Island—like recent revelations of cover-ups by asbestos firms—scarcely warrant a benign faith in free markets here.

But all this does not justify the kinds of standards or enforcement tactics OSHA has adopted. Nor does it justify treating all employers like criminals—an unwarranted approach that is certain to distort policy. Indeed, if it were true that without direct inspection most employers would evade reasonable safety obligations, there would be little point in having OSHA. For as Senator Peter Dominick (Republican, Colorado) noted,

> We could not possibly find enough inspectors to impose upon this vast area . . . a bill which people will not voluntarily comply with in a great majority of the cases. And if the American public . . . feels that the bill . . . is going to inject [an arbitrary] Federal agency into their business . . . we are really going to have bad problems with it (*Legislative History*, pp. 471-472).

Thus, though complete deregulation does not seem desirable, there is much room for improvement in regulation. OSHA clearly needs to give employers greater certainty that good performance will be recognized by reduced intervention. It should provide detailed information on major hazards and acceptable controls—and stand behind its advice. It should accept the fact that broad-scale improvement requires government, business, and workers to share responsibility, since no agency can do the job alone. And it should start measuring employers, as well as its own inspectors, by results rather than by compliance with mandatory procedures—admitting, in other words, that it is not omniscient and that there are many roads to the same end.

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Specifically, OSHA should:

- *Maximize inspection returns* by revising its enforcement priorities and by going where the injuries are. One way to do that is to conduct more accident investigations and focus inspections on individual establishments having high rates of serious injuries—an approach that would create strong incentives for employers to control conditions that cause injuries, even when those conditions do not violate standards. Another is to limit inspections to the ten or fifteen principal hazards in the inspected firm's industry. Another might be to make each inspector permanently responsible for 100 establishments having high rates of serious injuries and to hinge his or her advancement on getting those rates down.
- *Reduce the adversarial nature of standard-setting and enforcement* through greater reliance on cooperative structures and more realistic expectations. Plant or industry-wide worker-management safety committees could

be used to rank hazards by degree of danger, to point OSHA toward regulatory opportunities, to promote cooperative problem solving, and to help make inspections a last resort rather than first-instance reflex. Standards should be focused on core hazards, the unquestionable dangers, where popular perceptions would work for rather than against the agency, with the debatable periphery left alone until a consensus for expanding the rule is formed. OSHA has taken this tack on an ad hoc basis—most recently in deciding to exempt retail gasoline stations from its benzene standard. It should do so across the board, and stop trying to write or enforce "perfect" rules designed to remove every trace of each hazard at a stroke.

• *Create incentives for change.* Firms with exemplary safety records have management tools for attaining those results, and 90 percent of work injuries involve behavioral or supervisory factors which are difficult to affect by direct regulation. Broad improvement may thus require incentives for top management to tackle these problems through organizational change. Two powerful incentives might be mandatory disclosure to shareholders of injury rates above industry norms and extension of the investment tax credit to training and other noncapital safety expenditures. Also, companies might be permitted to deduct as a business expense only the *average* workers' compensation premium for their industry and size class, a rule that would reward firms with low rates of serious injuries and differentially tax those with high rates.

• *Build a broader constituency* by articulating its own view of the public interest and setting concrete goals for which the agency would be accountable. While recent polls show the public continues to favor government regulation of job safety by a majority of 52 percent to 12 percent, they also show that only 35 percent of workers think such regulation important *to them.* For environmental protection the figures are 70 percent and 70 percent. Other polls show citizens willing to spend over $100 more per capita for air and water cleanups, but less than $10 more for job safety and health. These figures imply that commitment to job safety and health does not run deep or wide enough to make the subject a top national priority. They mean OSHA must do a better job of establishing its credibility and the credibility of its mandate with the general populace—by stressing, for example, the benefits of its actions for families and communities as well as for workers themselves.

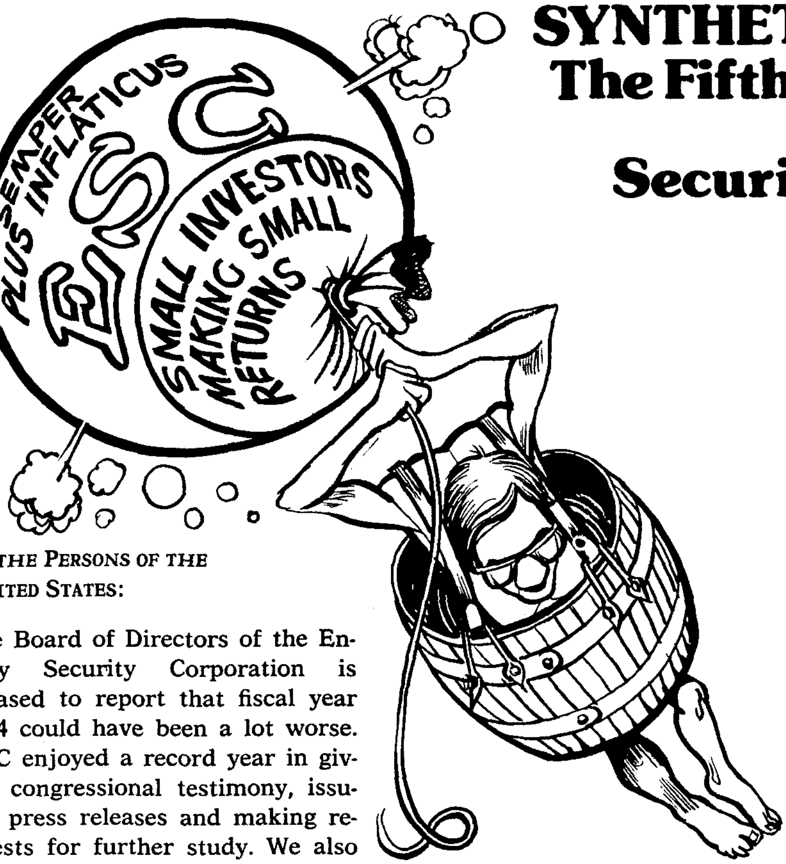
Such reforms seem necessary if OSHA is to defuse apparently perpetual controversies and protect workers better than it has. But to the extent reform is initiated by those seen as OSHA's opponents, it will fail. Those seeking change must admit that standards and inspections are needed to inform workers and keep employers honest. They must agree that increased flexibility for business means stronger sanctions when flexibility is abused. They must build from within, not try to wipe the slate clean. And they must be supporters of OSHA—friends urging constructive change in order to forestall something worse.

This is a tall order. It will be made taller by the fact that many companies and unions prefer confrontation to accommodation—that having learned to use the present system, they will stick with the devil they know. And it is not likely to be lowered by procedural steps like sunset laws or requirements for regulatory analyses. Analyses may delay, but are unlikely to alter, the course of an agency that responds far more to constituent pressures than to analytical determinations. And despite their political weakness, the two agencies that have so far experienced sunset review under enabling statutes—the Consumer Product Safety Commission and the Commodity Futures Trading Commission—emerged with larger budgets and stronger relationships with their respective constituents and congressional committees. The fact is that constituents have powerful stakes in existing systems, however imperfect, while authorizing committees feel their past performance is on the line. That, after all, is the definition of a system: a world that has reached equilibrium and resists any impetus for change.

SERIOUS REFORM of OSHA will come only through the convergent desires of the agency, a significant part of its constituency, and members of Congress who see more political gain in forcing change than in avoiding the issue. That will require time, hard work, and a perception that the current structure is in mortal danger. The most likely prospect is more of what we have—or a gutting amendment whose effects even its sponsors cannot foresee. ■

SYNTHETIC PROGRESS
The Fifth Annual Report of the Energy Security Corporation, July 15, 1984

Gregg Easterbrook



TO THE PERSONS OF THE UNITED STATES:

The Board of Directors of the Energy Security Corporation is pleased to report that fiscal year 1984 could have been a lot worse. ESC enjoyed a record year in giving congressional testimony, issuing press releases and making requests for further study. We also made some synfuel. But since today is your company's fifth anniversary, it seems appropriate to reflect on the hurdles we have surmounted. This will remind us how the philosophy of a common people's oil company—small investors making small returns—came to be.

ESC was conceived five years ago by President Carter. On that day, he declared it intolerable to pay $20 a barrel for oil. Then, unable to find oil for less, he boldly opted for second best. Synfuel could be made for $40 a barrel, which is different from $20. "If we can't pay less," said Carter, "we'll have to pay more." Thus was coined your company's motto, *Semper Plus Inflaticus*.

As you remember, most ESC capital was to have come from taxes on the profits that oil companies made by selling "old" oil as "new" oil—erroneously called a "windfall" tax. But ESC soon came to grips with a heady threat—"old" oil would someday be used up, and thus would end your company's liquidity. So in 1981, laws were passed to impose a true "windfall" tax directly on the oil companies' profits.

Complications, professors of economics were pleased to discover, were unavoidable. ESC quickly realized that funding could be guaranteed—and precious synfuel made—only if oil companies made baronial profits. Otherwise, there would be nothing to tax. The way to ensure this was, of course, to force oil companies to raise their prices.

You may recall that some controversy surrounded passage of the ESC-sponsored Energy Blackmail Act of 1982. Initially consumers were upset when ESC Price Police arrived at gas stations in their baking-soda-powered squad cars, busting discounters and posting weekly price increases as required by the act. They were further dismayed as mass transit subsidies were ended and assembly lines for fuel-efficient cars were closed down. (This fine-tuning of regulatory policy was necessary to keep gas demand high.) But, in time, the public understood that—since windfall profits financed ESC—common people had a vested interest in high prices. "Gas price extortion is good for everybody!" became one of the nice things you could say about America. The great economic experiment continued.

As you, the people, are well aware, ESC also raises capital by selling bonds in the small denominations that interest small investors. Common people drawn into energy investments for the first time were surprised to discover that pieces of other firms were available in small denominations as well. Gulf Oil's common stock was selling at $32, for instance, and Texaco's at $29. Management confesses that, at first, this revelation gave us pause. But transactions in the stock of oil companies proved hopelessly confusing to small investors. They might buy a share at $29 and soon discover it had gone up to $60—no longer the desired small denomination! Investing in ESC poses no such problem.

Small denomination bonds have proved vital to your company because, we soon found out, no one

Gregg Easterbrook is an editor of Washington Monthly.