LABOR & EMPLOYMENT LAW

A BRIEFING*

Hon. Cari M. Dominguez, *Chair, Equal Employment Opportunity Commission*
Hon. Arthur Rosenfeld, *General Counsel, National Labor Relations Board*
Hon. Eugene Scalia, *Solicitor, United States Department of Labor*
David Fortney, *Fortney & Scott, moderator*

MR. FORTNEY: My name is David Fortney. I am the Chair of the Federalist Society's Labor and Employment Section. The Federalist Society is pleased to present this program.

The program today is a good example of the types of ideas that we really want to promote. So we're glad to have you here, and I'd like to tell you a little bit about how we would like the program to run today. We advertised that we will end at noon, and we will end at noon.

With that said, the format will be that we will simply start alphabetically, so there's no priority here by surname with our speakers, nor any priority in agencies or anything. I've asked them to prepare a 10- to 15-minute overview on some of the policy issues that each of their respective agencies are working on at this point. Then from there, we will have some question-and-answer exchange. At that point, we would be delighted to have questions from the audience also. We're a small enough group so that we can easily do that, so don't be shy.

Before I start with the introductions, I would also like to acknowledge and thank John Scalia from the Federalist Society, because this is a great program. It was John's idea to put this program together. This is the first time that we have had these three agencies, the Labor Department, the National Labor Relations Board and the EEOC, all sitting down in this type of presentation. I think it's just super. So, it's a privilege to have that.

Let me briefly introduce the speakers we're going to hear from today. You have detailed bios in your materials, and all of our speakers have bios that are multiple pages, so I won't go through that with you.

The first will be Cari Dominguez. Cari, as I'm sure you know, is Chair of the Equal Employment Opportunity Commission. Cari was confirmed in August of 2001. She's serving a five-year term, and her term will expire in July of 2006. On a personal note, in addition to having her as a good friend, I enjoyed the privilege of having Cari as a client at one time in a former life. She was at the OFCCP and I was at the Labor Department. So, Cari, we're glad to have you.

Our next speaker will be Arthur Rosenfeld. Arthur is the general counsel of the National Labor Relations Board. Arthur is also a former Labor Department junkie, and he and I worked together in the Solicitor's Office there. Prior to his confirmation, Arthur was the senior labor counsel for the Senate HELP Committee; that's Health, Education, Labor and Pensions Committee, and he was senior labor advisor to Senator Jim Jeffords. Arthur was confirmed by the Senate for his current position in May of 2001.

And last, but certainly not least, is Eugene Scalia. Gene, as you know, is the Solicitor of Labor. He was appointed by the President in January 2002, and he has been active on a number of fronts both at the Labor Department, and with respect to the Federalist Society. Gene has co-chaired a chapter in Los Angeles in one of his prior lives and has been very active with us throughout. He is widely published; some of his articles are listed in the biographical materials you have and otherwise.

So, with that, Cari, can I turn to you and ask you to start for us?

CHAIR DOMINGUEZ: Thank you, David, and thank you very much for your warm welcome and introduction. It's a great personal treat to be introduced by someone whom I professionally admire greatly, and had the pleasure of working with. I have to say, it's a great treat that my married name allowed me to move up to the top of the alphabet.

I used to be an S; now I'm a D. This is good.

It's a great pleasure for me to be here, and I feel particularly privileged to be a part of this distinguished panel. Gene's agency, the Department of Labor, and the Commission have been working closely together on a number of issues. We've enjoyed a very close working relationship. Of course, the Commission was modeled after the National Labor Relations Board, and they're sort of our big brother, if you will. So, it's good to have Art Rosenfeld here — his world is very much our own. All of us will be talking about the *Hoffman Plastic* decision, which is a perfect example of how a decision that affects one agency certainly has repercussions throughout all of the employment and labor agencies and the arena.

Let me also just take a moment to say a few words about the Federalist Society. You know, we at the Commission spend a lot of time talking about diversity. And I believe that the Federalist Society provides a forum that allows us to practice the purest form of diversity, and that is the form from which all the other forms of diversity emanate. That is, a

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diversity of views and perspectives and opinions that are forged by our own uniquenesses and individual experiences. So, I just want to commend the Society for creating this forum that encourages diverse points of view to be engaged towards the advancement of sound public policy and legal discourse.

Just as it is with the Federalist Society, it is with this Administration that one finds the word "freedom" at the core of its efforts. The Commission has three main initiatives that promote this very cherished national value. In management, we have the President's Freedom to Manage Initiative. This promotes independence, flexibility, and accountability in how we manage and use the resources that have been entrusted to us by the people of this country as we deliver services and products that are citizen-friendly, citizen-centric, and are responsive to the needs of our citizens and our working men and women.

At the programmatic level, we have two initiatives. We have the President's New Freedom Initiative, which is designed to increase access and employment opportunities for the 54 million Americans with disabilities. This is a government-wide initiative. We all share in that initiative. And in fact, tomorrow we'll be celebrating the 12th anniversary of the enactment of the Americans with Disabilities Act. We're going to be looking at the accomplishments and ways to continue to improve access to this very valuable yet untapped resource in our nation's economy.

And finally, we have a commission-specific initiative, one that I launched shortly after my arrival, which we have called the Freedom to Compete Initiatives. When we peel all of these laws that we're all responsible for administering and enforcing, what is it that this is all about? This really speaks to the value of fairness in the workplace — the freedom to compete in the workplace on a level playing field, without regard to factors as irrelevant or immaterial as race, gender, religious background, national origin, disability status or many of the others you're so intimately familiar with.

So, we are very hard at work at the Commission in promoting these principles in a user-friendly manner through extensive outreach efforts and through consultations. We have our traditional partners, we have our attorneys and the human resources compliance professionals who follow the activities of the Commission. We want to broaden that scope. We want to get to the line executives. We want to get to the managers, the people that are influencing organizational change, and invite them to engage with us in a collaborative spirit.

Just a quick overview for those of you who may not be as intimately familiar with the Commission as some others of you may be. By way of background, the Commission is a five-member commission that was enacted as part of the Civil Rights Act. We became operational in 1965. No more than three members can come from the same party, so at the moment, we have two Republicans, two Democrats, and we have one vacancy. The President has nominated the third Republican Commissioner, who has not yet been confirmed. We also have a Presidentially-appointed, Senate-confirmed general counsel position that has been vacant the whole term that we've been there, and in fact it was vacant during the previous administration, so we're following some positions that aren't necessarily all that helpful to me.

We have 51 district offices throughout the nation. The budget has remained constant over the last several years, about $300 million, with about 2,800 employees. Even with all of these years of experience, we continue to receive a sizeable number of charges. Consistently, we've gotten about 82,000 — a little over 80,000 charges each year.

About 35 percent of those charges are race-related; about 30 percent are gender related. The two fastest growing segments of our activity are age and disability, and I should tell you that we are getting a lot of men filing age discrimination charges. As the economy has taken a downturn, we've seen a higher incidence, particularly related to age. About 10 percent of our activity is national origin. And one to two percent is religious discrimination. That piece of it has taken a huge spike since September 11.

We have had a tremendous increase in charges filed directly related to the September 11 incident. In fact, we've had 577 formal charges of workplace discrimination, and in religious discrimination, we've gone up to 610 charges. That's almost triple the number of charges we historically get, most of which has to do with Arab-American background, being of Muslim or Sheikh faith. So, the Commission has embarked on a very aggressive campaign to make sure that employers prevent misdirected anger to be directed toward innocent working men and women who come from these backgrounds.

When I became Chair — as David mentioned, August 6 will mark my first anniversary — I had a very simple mission but a very difficult mission to implement. That was, take a fresh look at the Commission; see what's working; see what needs to be improved, particular in light of the 21st Century workplace, when you have globalization, shifting demographics, and see how the Commission is positioned to address the issues of the 21st Century.

We quickly launched a strategic review of all of our functional areas, leaving no stone unturned, looking at what can we do better and what can we do to be more responsive to what's happening in the workplace today. From that, we developed what we call a five-point plan, which really sets the strategic framework. There's almost that General Electric model we've all heard about, the work-it-out concept; if it doesn't fit one of our core business objectives, then we have to ask ourselves why are we doing it. We did the same thing at the Commission. We said, "Let's take a look at what's really at the core of our enforcement and outreach responsibilities. And if we're doing things that don't really relate to that, should we continue to do them in light of our limited resources and the current workplace?"

The first point that was very well received and continues to be, is what we call proactive prevention. It is the President's primary mission. In our efforts, we ask: how do we make sure that we prevent charges from being filed in the first

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instance? How can we be far more aggressive in information sharing, in developing a clearinghouse of best practices and other kinds of information, sharing best ideas? We've been toying with the idea of some sort of seal of approval, something that allows employers to understand what are the core components of being EEO-fit and having good programs in place.

Proactive prevention also requires extensive coordination, an example of which is the work we've been doing across agencies on cash-balance pension plans. These are the plans that became famous and popular in the late '90s. And as employers converted from the defined benefit pensions to a cash balance approach, we received close to a thousand charges that raised the issue of age discrimination.

And I'm pleased to have in the audience a couple of experts from our shop, David Frank, who's my legal counsel, and Lynn Clements. If you really want to know all the nitty-gritty, feel free to talk to them because that's been their life's work since they've joined the Commission.

But it's an example of how we need to process these charges, looking and developing a framework that allows us to determine whether in fact there is age discrimination; it's a very difficult issue to address. Are these conversions in fact age-driven? Are they driven by other factors? We can't get into the details of the investigation, but I can ensure that Labor and Treasury and IRS and Pension Benefits Guaranty and many other groups have been quite involved in coordinating our efforts on this.

Quickly, the second point of our plan is called proficient resolution. If we can't prevent a charge from being filed, what can we do to address those charges, those issues, faster, better, cheaper? I cannot take credit for this because it was prior to my arrival, but we launched the priority charge handling process some years back in the Commission, which allows us to look at charges based on the merit-worthiness of the charge, and not necessarily on the timelessness. So, we're looking at that; we're looking at technology and other ways to improve.

Thanks to those efforts, we've gone from 110,000 charges in inventory — which is a fancy word for backlog — down to an all-time low of 32,000 charges. So, we have made tremendous headway and Congress is getting a little happier with us, which is always good.

The third and fourth points are very related, and they really are at the core of our work. That has to do with strategic enforcement and litigation, and with mediation and alternative dispute resolution. At the core of our work, we have continued to have tremendous success at mediation. In fact, about 66 percent of all of the disputes that go to mediation are successfully resolved with over 90 percent satisfaction rate by both sides, the charging parties and the respondents, on mediation. That tells me that they respect the process. They may not necessarily agree with the outcome in the process because usually, when you're in an adjudicatory role, there's always someone who that doesn't feel satisfied. There's a bit of a compromise. But nevertheless, there's a tremendous respect for the process and allowing the members to participate together.

On strategic enforcement, the Commission files anywhere from 300 to 400 lawsuits a year. In the scheme of 80-some thousand charges, it is not a whole lot, so we have to be extremely strategic and selective in how we go about choosing. Are these cases that are novel? Are these cases that are going to advance case law?

Preliminarily, we have just completed a study. It's not yet ready for publication but shows that we have been quite good at selecting the cases. In over 60 percent of the cases that go to trial, the Commission prevails. So, this is a pretty good indicator that we're using those resources fairly cautiously.

On the other hand, I think we need to do a better job of looking at the data, looking at the trends. We sit on a goldmine of information. How do we make sure that that information is in fact being transformed into a more strategic enforcement?

In connection with that, we just launched the national mediation agreements concept. We were dealing with charges and retailers one establishment at a time on the same issue. We said, why don't we go to a centralized model that allows us to connect and have a focal point within the employer organization as well as within the agency and deal with these issues in a more systemic, consistent and uniform manner? That's beginning to take hold. We've had three agreements signed, so that has been a very helpful tool for us.

The final point in the five-point plan is what I call practicing what we preach. I believe that we cannot have credibility with our customers if we ourselves don't apply the same standards. So, we have asked internally to launch the best mediation program we can develop, the best outreach efforts, and apply those standards to ourselves so that we have some credibility when we go out to the employer community.

Very, very quickly, let me just mention three significant Supreme Court decisions that have affected the work of EEOC, and that I know my colleagues are going to talk about very extensively. In *EEOC v. Waffle House,* a six-three decision, the Supreme Court held that an agreement to arbitrate between an employee and an employer does not bar the EECO from pursuing victim-specific relief on behalf of an employee who files a timely charge of discrimination. We believe that this decision acknowledges the role that EEOC plays in the work place, that we have the authority to recover full relief for individual victims of discrimination when it serves the public's interest. We believe there is a role for arbitration, and the courts have reaffirmed that and will continue to endorse that. But at the same time, there may be instances when it is important for the Commission to become involved.

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Hoffman — I'm just going to briefly touch on it because I know that my colleague is going to get very much into that decision. But it is one that we have to look at. Although it's enforced by the National Labor Relations Board, it does have an impact on the Commission's ability to recover certain damages for undocumented workers. I'm pleased to say that we believe that, while back pay awards are not allowed, there are lots of other forms of remedies that are permissible under the decision, and we have been very consistent with the statements made by the Department and the NLRB as it relates to this topic.

And finally, *Chevron USA v. Echazabal*, where the Supreme Court, in a unanimous decision, supported our interpretive regulations on that decision, giving a strong endorsement to our agency's direct threat regulations and rejecting claims that we actually acted in a capricious or arbitrary fashion when issuing these provisions. So, we're pleased with some of the rulings, but we'll take what we get.

Anyway, let me stop here and defer to the "R" in the group. Thank you.

MR. FORTNEY: Arthur.

MR. ROSENFELD: So, the Supreme Court decided *Hoffman*?

CHAIR DOMINGUEZ: Slightly.

MR. ROSENFELD: Good morning. I may have the easiest job of the three of us up here because I came into an agency that's been mission-driven since 1935, with great professionals and career folks. And so, every day I come in and talk to these people, and they tell me the pros and cons of where they think I should be going, and I often follow their advice. But I do what I think is right. What I'll talk about in a few moments is the prosecutorial discretion of the general counsel. But I make a decision. In many cases, the decision would be to not issue a complaint, and for all intents and purposes, that particular labor case is over and the parties can get back to work and if necessary resolve that dispute in some other manner.

But in any case, I have a great job and great folks. I'm sure you all do also. I'm not trying to steal thunder. I'm looking over here — by the way, I know a lot of you here, and it's nice seeing you all again. But the other reason my job is so easy, of course, is that every morning I sit in my office and the phone rings, and I pick up the phone and it's Peter Hurtgen. And he says, "This is the Chairman." He has been nominated to head the federal mediation service and I will miss him.

Let me talk briefly about the status of what's going on in terms of Board seats. Currently, we have four seated members on the five-member Board, three of whom are on recess appointment. The confirmed individual, Wilma Liebman, has a term which expires in December of this year. There have been nominations made to the Board of four people — I'm going to have to stop and think about this — Alex Acosta, Peter Schaumber*, Bob Battista* and Dennis Walsh. We have four nominations pending, and Wilma is in the process.

There will be consideration, I think, of this five-member package sometime this term -- hopefully sometime this term. When your term expires at the Board, unlike, for example, the NMB, you're out, which the White House discovered about a year ago with Peter. There was about a three-day hiatus in Peter's service because the White House was unaware of the fact that when his term expired, so did he.

White House Personnel are on the case, and I have the utmost confidence in White House personnel to get this resolved by the end of the year — I love that.

I was going to read you some stuff on prosecutorial discretion. I'll be very, very brief. Suffice it to say that the statute, in 1947, was amended. Prior to that time, the general counsel was basically the Board's legal officer. In 1947 the statute was amended. Section 3(d) states, "There shall be a general counsel to the board who shall be appointed by the President by and with the advice and consent of the Senate for a term of four years. The general counsel of the Board shall exercise general supervision over all attorneys employed by the Board, other than administrative law judges and legal assistants to Board members, and over the officers and employees in the regional offices." This is the important part, "He shall have final authority on behalf of the Board in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the board, and shall have other duties."

And I have other duties. As general counsel, you wind up being the administrative officer because it's difficult for a five-member agency to make decisions about administrative matters. They'd have to sit down and vote: I mean, they're having sufficient problems getting decisions out. In any case, this provision, this formal authority, was one of the reasons that President Truman vetoed Taft-Hartley. It was overridden by the Congress.

I'm now going to give you an example of what I do. I'm not going to give you numbers. I want to get to the question-and-answer period as quickly as possible because I think that'll be more fun.

I had a case brought to me by my Office of Appeals. We cannot operate unless a party files a charge that the law has been violated. If the charging party files a charge and the regional director refuses to issue a complaint — doesn't find merit to the charge or refuses to issue the complaint for other reasons; —for example, we will not issue complaints, even where there is merit, if it wouldn't effectuate the policies and purposes of the Act. Where the regional director makes that decision

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to dismiss, the charging party has the right to appeal that to the Office of Appeals.

In part, this procedure was devised by the General Counsel as a protection for the individuals who filed the charge and their rights. And of course in part, it's a mechanism for the quality control of our regional offices to make sure the decisions are proper. In any case, we had a case where the regional office decided not to issue a complaint, and it came to Appeals, and it came to an agenda where I sit down with the Office of Appeals and they argue the Region was wrong and that a complaint should issue. In most cases, that's what they do.

Here are the facts. An employer and a union are about to start collective bargaining. The employer wants to bring in a laptop to take notes instead of using a pencil and pad. The union refuses to negotiate if there's a laptop in the room. The employer refuses to negotiate if he can't bring in his laptop. The employer filed the charge, an 8(b)(3) charge saying the union is refusing to bargain. There is Board precedent that you cannot bring in verbatim recording devices, and that's understandable because it would chill the free exchange of information.

Matters in negotiations, like the size of the table, the size of the room, the no. 2 pencils, are preliminary matters, and thus are not mandatory subjects of bargaining. I know I'm losing some of you here; I'm losing me. But it's important to know that items like these are permissive subjects of bargaining. And, you can't insist on a permissive subject of bargaining to impasse. You can ask and even insist, but not to the point of impasse. So, the employer is saying that the union is insisting to impasse on this permissive subject of bargaining — bringing in the laptop.

I get this case. I look at it. Again, we can't operate without charges being filed, and we do not solicit charges.

I'm thinking, the employer is saying the union refuses to bargain on this permissive subject -- the laptop. Couldn't the union say that the employer is insisting on bringing in a laptop, which is a permissive subject of bargaining? We don't solicit charges. I suggested to the region that they talk to the union. What I wanted to do is get a charge from the employer, get a charge from the union — the same facts — and issue both complaints. And I think that would have driven the Board crazy. But importantly it would have presented the issue to the Board in a way that the could consider whether to treat a laptop like a recording device.

Unfortunately, from my perspective, I couldn't get the union to go along because the parties by that time had started negotiations. But Peter, one of these days, we're going to get this issue to you.

PANELIST: With or without the laptop.

MR. ROSENFELD: Oh, you would not believe — I can sometimes go through nine cases in an hour. I have an hour limit. That day, with in the appeals agenda, when this came up we had three cases, one of which we deferred, one of which lasted ten minutes; this laptop case took about two and a half hours of discussion, and it seemed like that's all we talked about for the next three weeks because it was such an interesting topic.

But the impact of this is, I hesitate to use the word, "negligible". It was going back and forth and the arguments were based on, if we issue a complaint on the employer's charge, we're really seeking a change in the status quo and that would mean parties would be in doubt about the state of the law while they waited for a decision from the Board. If the union would have filed the charges, we'd be defending status quo and that would not have presented the same problem. Well, the case has gone away. But, that's what I do for a living, and that's the best part of the job, frankly, these agendas, both appeals and advice.

The statute is an interesting statute. The scheme of the statute is such that we have to determine what phrases such as "good faith bargaining" , and "no interference, restraint or coercion," mean. The NLRA was designed by Congress so that the Board would flesh these concepts out. So, the statute is sort of a living thing, and as the workplace changes — and it has changed — hopefully, the statute will be up to the task. But the agendas are fun because we're always dealing with — laptops aside, because we do have a few luddites in the agency – new issues, things like email and whether a computer is employer property, or is it a work site and on and on and on.

Hoffman Plastic — we just issued a memorandum to the regions on *Hoffman Plastic* last week, I believe. It's on our website. The gist of this memorandum, to my regional directors, is that number one, undocumented workers are still employees as defined in the Act and held in a number of Supreme Court cases. Number two, we're going to seek special remedies for cases where there would otherwise be no remedy. We talked about pushing for formal settlements, which gives us a leg up in terms of contempt — notice reading, for example. We're not sure of what the full extent of these remedies might be, but our regional directors, all 31 or 32 of them, are very creative. We've asked that these creative individuals, when they come across a fact situation wherein they think a creative remedy is warranted, to send it to Washington so we can have a single overall litigation strategy in this important area.

But the third, and I think most important, piece of this memo is that I'm telling the regional directors that we are not the INS. We're not going to willy-nilly investigate these matters when an employer or, in some cases, a union raises allegations as

to the undocumented status of an employee — I emphasize an employee. The memo, again, is on the website, and you might want to take a look at it.

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I think I will now pass the torch to Gene Scalia.

MR. FORTNEY: The EEOC and NLRB are independent agencies, where of course the Labor Department is part of the Executive Branch. So, Gene, are you working on anything beyond laptops over there? What are you doing at Labor?

MR. SCALIA: Thanks, David.

I want to second what's been said earlier about what a good idea this forum is, and I think it exemplifies the value of the Federalist Society, which does a better job than any other organization I know in bringing people together for discussion of legal issues. I'm proud to be included in this panel, and think the Federalist Society's putting it together is a real service.

I'll talk about three subjects today: first some enforcement issues at the Department; second, our approach toward rulemaking; and third, I want to touch on some thematic points suggested by a few Supreme Court decisions this Term.

Let me start by acknowledging, as I'm sure many have pointed out, that there's a similarity between federal law enforcement and the annual Harley-Davidson convention in Sturgis, South Dakota.

I was driving across the West a few years ago when this convention was going on, and I caught a newspaper article about the event. The title was "Dakota Town Shaken by 250,000-Biker Rally." The article reported, "The town now belongs to 250,000 motorcyclists, a virtual occupying army in black leather boots and tattoos here for an annual conclave that has become perhaps the world's largest biker rally...."

The article goes on to say that since the gathering "got underway last weekend, seven bikers have been killed in accidents and more than 150 people have been arrested for drunk driving. Scores more have been jailed for drug possession." The heading to the next part of the article is, "Armed Man Shot to Death." I'll stop with that description of goings-on in Sturgis. But the article hastens to add that there were a variety of people there. The Hell's Angels were there. So was a group called the Banditos, not a very auspicious name. But there were also biker clubs sponsored by Christian groups and the Alcoholics Anonymous. Malcolm Forbes was there. And it's been rumored that the Death Valley chapter of the Federalist Society was there -– with Leonard Leo riding at the front on his Harley.

There's a quote in the article that caught my attention at the time, and it's what I want to focus on. The reporter interviewed somebody who lived in this town, who explained, "It's only a small percentage of bikers that make trouble. But the problem is, a small percentage of 250,000 people is still a lot of troublemakers."

I start with this story for two reasons. Let me be clear. I don't regard it as a complete analogy. There are some resemblances, but I'm sure there are some in business — and probably also some in biking -– who would take offense at the suggestion that bikers and business people are identical.

But I begin with this, first, to make the point that we're approaching our jobs in the Labor Department with the view that most of the people that we regulate — most employers and, for that matter, most unions (we regulate unions to a degree) — do want to comply with the law. That's something I know from having been in private practice representing primarily business for about ten years. Most of my clients were trying to comply with the law. Most employers want to do that, and I think that's an important thing for us to keep in mind as we go about doing our job.

I should add that respect for the law, a desire to comply with the law, is a spirit and an attitude that can be cultivated and instilled. Our Assistant Secretary for OSHA, John Henshaw, speaks eloquently and effectively about the employers out there who really come to take pride in having exemplary safety and health records. I think our going about, John going about, others going about and working to instill that value in companies can do a great deal to promote the safety and health of workers. That's something that John and Secretary Chao have done very effectively.

It's important to do this, in part, because it's just not possible for us to inspect anything approaching a large percentage of those whom we regulate. OSHA, for example, would take 167 years to inspect every worksite that it regulates. That can't be done. It's important, therefore, that those we regulate be given incentives to comply with the law beyond the mere threat of inspection or enforcement.

For these reasons, compliance assistance is something that Secretary Chao has made a great priority during her time as Labor Secretary. She and the agency heads within the Department have been endeavoring to do a better job making information available on our laws' requirements, and on how they can be met.

Secretary Chao has also made efforts to establish career positions within the Department that will remain after this Administration leaves — career positions for compliance assistant officers who are not there to prosecute, to investigate, or inspect, but instead are there to help people do a better job complying with the law.

Of course, the second point I have to make from the quote about the biker convention is that, even though most of those we regulate try to comply with the law, there still is a percentage that is not concerned with complying. That percentage may not be large, but, to paraphrase the Sturgis resident, "a small percentage of the American economy is still a lot of troublemakers." As a result, enforcement remains very important within the Department of Labor, and particularly within my office, the Office of the Solicitor.

For those of you who don't know, the Solicitor's Office is about a 500-lawyer office, about half of us in Washington, DC and the other half in regional offices. Out in the regions, we almost exclusively conduct litigation. We also do some

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litigation in the national office. In the national office, we're also greatly involved in assisting with rulemaking and providing advice and counsel.

I've said that enforcement remains very important to us at the Department. And I've said that knowing that this group would want to hear it, for at least two reasons. First, the Federalist Society is a group that places great emphasis on the rule of law. Part of the rule of law, of course, is enforcement of the law when the law is not respected. Second, law enforcement is something that is important to the Federalist Society. Some of you, maybe even many of you, are Republicans, and certainly law enforcement is something Republicans are often closely associated with.

One of the most effective enforcement mechanisms that OSHA has is something that we call our "egregious policy." I always take pains to emphasize that the policy is not egregious. The policy itself is commendable. The policy is issuing multiple citations — what we call instance-by-instance citations — for each violation of a regulation, rather than issuing a single citation for multiple violations. It's a policy we use when dealing with employers that have shown themselves to be particularly disrespectful of the law. That policy was introduced, I'm told, by George Salem, a Solicitor in a prior Republican administration. It's a policy that's important to me and that we continue to pursue.

The third reason that at least some of you may be interested to hear about our continuing interest in strong law enforcement, is that some of you are in private practice. You're lawyers representing businesses and you are mindful of the maxim of a distinguished former White House counsel who remains involved in the Federalist Society — "God bless the man that regulates my client."

So, as I say, law enforcement does remain important with us. I'm certainly mindful that it's a special responsibility and mission of the Office of the Solicitor. When I consider where the Labor Department has gone wrong in the past, I think that one of the principal sources of its going astray is losing sight of its core mission and forgetting that its core mission is enforcement of workplace standards: ensuring a safe, healthful workplace, and assuring that workers are compensated in accordance with federal law.

The best example of this sort of mission creep, of course, is the threatened home office inspections during the last Administration. That's a policy we've decided not to pursue. We don't currently have a plan to inspect laptops at home.

Another example would be volunteerism. We've been interested in looking for ways the Department is discouraging volunteerism more than is appropriate, and is confusing what is genuine volunteerism with work. We recently issued an opinion letter having to do with volunteer firefighters, many of whom, even in their free time, genuinely do want to help stop fires, and would like the freedom to volunteer to do that. We issued an opinion letter making clear that in appropriate circumstances they do have that freedom to volunteer.

So focusing on work issues is one core part of our mission. Another core part is focusing on low-wage workers. At other times when the Department has gone astray in the past, it may have been because we became too preoccupied with legal issues having to do with higher wage earners, and lost sight of the fact that low-wage earners often are least able to determine when their rights are being violated, and are least able to hire others to help them. Low-wage earners are particularly deserving of our attention and efforts.

We recently brought two cases against poultry processing companies, and we've gotten some criticism from people who in other areas are supportive of what we are doing at the Department. The cases had to do with "donning" and "doffing" practices, putting-on and taking-off sanitary clothing in the workplace. We thought the cases were important to bring for three reasons.

First, because of the rule of law: It seemed clear to us after a close evaluation that the time these workers were spending putting on protective clothes — and the circumstances in which they were doing it in the couple of companies we looked at — was time that needed to be compensated under the law. That seemed fairly clear under the statute, under a Supreme Court decision, and under our own regulations. And so, in the interest of the rule of law, we went forward with the cases.

Second, we thought it was important for the Labor Department to get involved because these were low-wage workers who were somewhat less likely to receive adequate compensation without our assistance.

And third, it is important for us to clarify the law, and this was an area where the law had become unclear and we were seeking to clarify it. In our first day in court, we filed a settlement agreement and consent judgment with one of the two companies providing for back wages that we estimate at $10 million. That is one of the largest recoveries in the history of the Wage and Hour Division.

A third priority in our enforcement efforts is willful and repeat violators of the law. We received a decision two days ago from the D.C. Circuit in a case involving an employer that had knowingly exposed its employees over a period of time to fire hazards due to what's called combustible dust resulting from certain operations the company conducted. There was a federal study indicating the company's practices were hazardous. There was an internal study indicating they were hazardous. The hazards were not adequately addressed; we found 89 violations in our inspections. The employer denied none of the violations, but said they were not willful. We disagreed and just recently prevailed in the D.C. Circuit, obtaining a $600,000 recovery, which is a sizable recovery for OSHA. I'm proud of that. It's important that we vigorously prosecute employers who show what amounts to contempt for the law.

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To round out my discussion of enforcement priorities: I've mentioned low-wage workers, and I want to emphasize that that this is not to suggest that ERISA is not a priority for us as well. It is. I see Bob Davis is here. He's a former Solicitor, and Bob is well aware that ERISA ends up being an area the Solicitor spends a good deal of time on. I have probably spent more of my own time on ERISA matters than in any other single area. We are certainly mindful of the importance of protecting peoples' retirement savings and health plans.

Let me turn to regulatory policy. First, we have reinstituted at the Department what we're calling the Policy Planning Board. It used to be called the Policy Review Board, but was disbanded in the last Administration. As a consequence, until recently, regulations were being issued by individual agencies within the Department with relatively little knowledge and oversight by the Deputy Secretary's Office, for example, or by the Assistant Secretary for Policy.

Secretary Chao has reconstituted what we are calling the Policy Planning Board, which is chaired by the Deputy Secretary and Assistant Secretary for Policy and includes the heads of all the agencies within the Department. Many career and political appointees attend each meeting of the Board. The meetings are an opportunity to review proposed regulations, to discuss them and vet them, before they are sent over to the *Federal Register*. There's an awful lot of experience and knowledge within the building, not necessarily limited to a particular program area. By putting this Board together, we're drawing on that knowledge and experience, but we're also ensuring a degree of central oversight of the Department's rulemaking efforts that is important for a cabinet-level department, and is an appropriate exercise of the Secretary's responsibility for what goes on at OSHA, the Wage-Hour Division, PWBA, and other components of the Department.

In our rulemakings themselves, there are a couple of things we're emphasizing. One is clarity. Another is identifying where we need to change the regulations on the books to make them better comport with the contemporary workplace. The best example of that is the so-called white-collar exemptions to the overtime requirements for executive, professional, and administrative employees. These exemptions have been on the books more or less unchanged for more than 40 years.

To read the job descriptions in these regulations is in some respects to read an encyclopedia of jobs that used to exist. So many of the titles are archaic. To give you a few examples, these regulations are very good at telling you whether or not a "jobber" is exempt or non-exempt. You can look at the regulations and find out whether a "linotype operator" is exempt or non-exempt. You can find out the exempt status of a "straw boss." And my favorite, which may be more a matter for the Justice Department than the Labor Department, you can find out the proper way of compensating a "gang leader."

These regulations don't do as good a job as they need to do in explaining how to compensate some of the jobs that we have in the contemporary workforce. And for that reason, we're taking a look at revising them.

Let me make a few points about this Term's Supreme Court decisions. You heard from Arthur on the *Hoffman Plastic* case. We have taken a view very similar to the NLRB's. I want to concentrate on a theme that I saw in several of the Court's cases this Term, and that is how federal regulation ought to interact with what I'll call private work rules.

As a first example, let me talk about the *Barnett* and *Chevron* decisions. They were both ADA decisions. They were interesting to me because both involved rules put in place by employers that were, at least in part and arguably primarily, rules for employees' benefit. *Chevron*, as Cari has said, involved a rule that prohibited a worker who had a kidney condition from holding a job that would have exacerbated the condition and, doctors said, perhaps threatened the worker's life. The company excluded the worker from the job under its safety policy. That decision was challenged by the worker, but it was upheld by the Supreme Court, unanimously. As I say, this is a workplace rule put in place by the employer primarily for the employee's benefit. Obviously, there were incidental benefits for the employer, and I don't know fully the employer's motive, but the rule was at least in part for the employee's benefit.

The *Barnett* case was an ADA case involving the interaction of the ADA and seniority systems. The question was whether, when you have a seniority system in a workplace, a reasonable accommodation under the ADA can require making an exception to the seniority system and giving a worker a job to which, under the seniority system, the worker would not be entitled. The Supreme Court indicated that in the ordinary course, the seniority system would prevail. It did allow for exceptions under a possible variety of circumstances. But again, the decision was interesting to me because it was the second time this Term that an employer went to the Supreme Court to defend a rule that was in place partly to help employees — again, I'm not saying entirely to help employees; I don't know the employer's motive. Note that this was not a union-negotiated seniority system; it was a company-implemented, company-imposed seniority system.

There was an aspect of the *Barnett* case that was of further interest to me that I'll touch on briefly. That had to do with whether the rule would have been any different if the seniority system had been negotiated with a union. As I said, the seniority system in that case was put in place by the company. The AFL-CIO filed a brief in the Supreme Court saying, whatever you do with this particular seniority system, there are additional reasons why, when a seniority system is negotiated with a union, more deference is due that system under the Americans with Disabilities Act. It's an interesting question, how you take account of the fact that private workplace rules are union-negotiated, if indeed you take account of it at all.

Let me offer the following as food for thought for this group, because I think this is a group that likes to think seriously and creatively about labor and employment policy. What I have to say now really does not have anything to do with our current enforcement of regulatory policies or programs; I offer it for purposes of thought and discussion.

It seems that right now the law takes three different approaches toward union-negotiated workplace rules. In the

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Barnett case, it took what I will call the neutral approach. It didn't seem to matter to the Supreme Court whether or not it was a union-negotiated seniority system. The AFL-CIO said it should matter. I think Justice O'Connor, in her concurring opinion, suggested it might matter. But the Court did not indicate it was important on the whole. That's what I will call the neutral approach to union-negotiated rules, and I think that is the predominant approach.

A second approach that you will find on occasion is what I'll call the deferential approach to union-negotiated workplace rules. One example of that is Section 3(o) of the Fair Labor Standards Act, which has to do with changing clothes in preparation for work. As I've indicated in discussing the poultry cases, in a lot of circumstances, that kind of clothes-changing time is compensable. It does have to be paid. But Section 3(o) of the Fair Labor Standards Act enables a company and union to agree not to pay the time. So, this is a case where the law is deferential and says, "Well, when there's a union negotiating, maybe we'll view the employment terms a little less skeptically."

The third approach one sometimes sees is what I'll call the skeptical approach. The best example of that is the Supreme Court's decision in *Alexander v. Gardner Denver*. The general rule now on agreements to arbitrate statutory claims is that when an employee enters an agreement to arbitrate discrimination claims, for example, that may be a valid agreement and the employee can be held to that agreement and not permitted to go to court. The employee has all the same rights, the Supreme Court has said, but those rights can be subject to mandatory binding arbitration; the rights are resolved in a different forum.

That's the general rule, but the rule for unions is different. The Supreme Court said in *Alexander v. Gardner-Denver* in 1974, that when it's a union-negotiated agreement to arbitrate claims, then there is the opportunity to go to court, as well as the opportunity for arbitration. So, that's a case where the law is a little skeptical toward union-negotiated agreements. The individual employee can enter a binding agreement for the mandatory arbitration of statutory claims, but the union cannot.

I've offered the foregoing as an observation, by way of food for thought. Again, it's not something that has to do with our programs particularly or any items on our agenda at the Labor Department, but I think it is an interesting aspect to labor and employment law currently. You can certainly make arguments for each of the three approaches.

Cari talked about the *Waffle House* case, and I wanted to conclude by referring to that. *Waffle House* was a welcome decision for the Labor Department. It affirmed the government's ability to bring a claim on behalf of an individual employee, notwithstanding the fact that the employee and employer had agreed to arbitrate the claim. The employee would be compelled by that arbitration agreement in most circumstances to arbitrate and would be barred from court. But the Supreme Court said that does not preclude the government from going to court. As a government litigator, I welcome the authority and discretion to be able to proceed to court on a claim, even when the employee has agreed to arbitrate.

That said, for the Supreme Court to say that the federal agencies need not defer to arbitration agreements is not the same as the Supreme Court saying that we may never defer to arbitration. The National Labor Relations Board has a long-standing practice of deferring to arbitration agreements and permitting factual issues, at least, to be resolved in arbitration. If the process was fair and reasonable, the Board often will defer to the outcome.

Likewise, the Labor Department has regulations indicating that, for example, when a worker complains to OSHA that he was terminated for raising a safety concern and that allegation is being arbitrated, the Labor Department may wait, take a look at the outcome, and if the outcome seems reasonable, not proceed. So, I think it's important to be clear that, while *Waffle House* has affirmed our ability to litigate despite an arbitration agreement, there still are policies that are not invalidated by the Supreme Court decision, under which deference to what I'm calling private workplace rules may remain appropriate.

Thank you.

MR. FORTNEY: Thank you, Gene. Let me open it up. We have about 20 minutes. Is there anyone in the audience who has a question that they would like to raise with this panel? Mr. Davis.

AUDIENCE PARTICIPANT: I think this is a question primarily for Cari and Gene. I think one of the very welcome visible parts of this Administration's programs in your agencies is, Cari, as you put it, prevention — you and the Secretary have quoted as compliance.

Let me ask the follow-up. Let's say that our clients take a good, healthy, frank, candid look at what they're doing and whether it is legal. And let's say that we as lawyers get a little nervous about whether that's protected by privilege or work product. What are the chances that our clients are going to have to end up sharing that deliberation with the enforcement people?

MR. FORTNEY: Did everyone hear that question? No? All right. Let me see if I can briefly summarize it. We have a mic, and I will require questioners to use the mic.

In a nutshell, and not as eloquently as Bob Davis stated it, the question deals with the emphasis on compliance, assuming that those of us that represent employers, that our clients take a good, hard look at compliance and do a candid assessment of their strengths and weaknesses, which is part of any assessment. What is the likelihood that those assess-

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ments that are viewed as sort of the crown jewels are ultimately going to be disclosed to the enforcement components of these agencies?

The tension is obvious, and I know there's been a bit of a track record particularly with OSHA, on this issue — the self-assessments. That's one reason why lawyers often get in the loop to try to create the attorney-client privileges, work-product; there's a lot of ways of trying to shield this. But I think on a broader point, from a policy perspective, if we're really now going to talk in terms of compliance, recognizing that responsible self-assessment and self-correction is a key component, how do we balance or deal with that vis-à-vis enforcement? Cari, why don't we start with you?

CHAIR DOMINGUEZ: First of all, thanks, Bob, for the observation. I think I was well trained at the Department of Labor when you were Solicitor, so I'm trying to take your lead at proactive prevention. But I do think that we're working very hard to keep a firewall, if you will, between the enforcement activities that drive the charges that come before the Commission, and the compliance assistance. I think, Gene, that's probably very consistent with Secretary Chao's efforts to create a separate unit that deals with compliance issues. I think it's very, very evident for us that it has a chilling effect.

We're considering separating, even more discretely, the enforcement arm of the Commission from the proactive prevention units, the outreach and the consultation. So, it's something that continues to need work.

I've been having these roundtable discussions all over the country. We continue to have the name recognition — somebody said you need to have a second label, EEOC, because when we come forth, the whole notion of enforcement comes up, as opposed to this consultation. So, it's clear that we have to separate the two.

MR. FORTNEY: To clarify that, the separation is not formal within the agency. It's brought forward preliminarily and it's agreed up front that these results, these discussions, will not be turned over to enforcement. Is that right?

CHAIR DOMINGUEZ: Right.

MR. FORTNEY: Gene?

MR. SCALIA: I think my answer in many respects is similar to Cari's. First, if indeed an employer has conducted a very thorough, good-faith effort to determine the law's requirements and its own compliance with those requirements, that's going to have a great deal of bearing on the exercise of our prosecutorial discretion.

As I've indicated, we're most interested in pursuing employers who show contempt for the law, and employers who are going to the kind of efforts you've described are less likely to be the target of more vigorous prosecution.

I think the answer to your question will depend, in part, on the use that an employer is making of an effort of that nature. If an advice-of-counsel-type defense is raised, if an employer is making an issue of the study and trying to make the study a defense, obviously, then, the privilege itself has been waived. But as a general matter, I think the Department has become more sensitive in recent years to not discouraging those kinds of internal audits and has tried to look for ways, if an action needs to be brought, to bring them in a way that does not punish the employer for having made that kind of assessment. That said, I don't think we can provide in all circumstances a guarantee that those studies won't end up being used.

But I appreciate your raising the point, and I think it is one that we need to be clear about as we go forward.

MR. FORTNEY: Arthur, are there any guarantees from the Board?

MR. ROSENFELD: Yeah, there are guarantees from the Board to go balls-to-the-wall to get everything we can possibly get in an investigation. We don't have the same problems. We don't do this type of outreach. Our type of outreach is to try to work with the local bar so that we can nip in the bud problems that may arise. But when we do conduct an investigation, we're going to go as far as necessary to get the answers.

MR. FORTNEY: Okay. I've got a question here with Roger, then I'm going to come over here to you, John.

AUDIENCE PARTICIPANT: I'm Roger Clegg with the Center for Equal Opportunity. I have a question mostly for Cari and Gene on the widespread consideration of race, ethnicity and sex in the recruitment, hiring and promotion decisions in the private sector.

Gene, the Department of Labor continues to require goals and timetables for companies in the private sector that do contracting with the federal government, and of course those goals and timetables encourage the private sector to take race, ethnicity and sex into consideration in deciding whom to hire. I wanted to ask you about that.

And, Cari, I wanted to ask you what the EEOC is doing and what its policy is going to be with respect to this kind of discrimination.

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MR. FORTNEY: Gene, why don't you start that.

MR. SCALIA: Yes. Roger is referring to the Executive Order 11246, the so-called affirmative action executive order, which is enforced by our Office of Federal Compliance Programs (OFCCP). This obviously is an old debate. The Department is, on the one hand, very anxious to prosecute and discourage discrimination in the workplace, and at the same time it is important that we be careful, in the process, not to encourage so-called reverse discrimination or improper preferences.

Obviously, the Executive Order remains the law. The regulations that have been issued under it remain the law. For our part, among other things, we have been endeavoring to have our regional solicitors' offices work more closely with OFCCP as it conducts its audits and enters agreements with employers. This is an area where the law is often very difficult. We've found that it is helpful to OFCCP to have some early involvement by the Solicitor's Office, which is something we're trying to promote with a variety of program areas. So, that's one way in which we're trying to ensure that what we're doing is encouraging non-discrimination and compliance with the law.

CHAIR DOMINGUEZ: We have a less difficult task because our task really is based on the charges that are filed based on the individuals' allegations of discrimination. So, unlike the Department of Labor, in this role I don't look at goals and timetables or make determinations of under-utilization or any of those factors that are required, as Gene mentioned, by Executive Order 11246 and its implementing regulations.

Our focus is much more individual, which is extremely helpful to our ability to treat each case on its merits, and not based on blanket categories or groups.

MR. FORTNEY: Darren. Step forward, please.

AUDIENCE PARTICIPANT: My name is Darren Zeplin. I'm with the Society for Human Resource Management, which represents over 170,000 individual human resource professionals. My question is for Solicitor Scalia.

The Supreme Court, as you know has, been coming down with a myriad of employment cases. One of them was *Wolverine v. Ragsdale*, in which the Supreme Court, in a 5-4 decision, invalidated the Department of Labor's regulation dealing with the Family Medical Leave Act, specifically, the penalty that is coupled with an employer who fails to give notice designating leave as FMLA. I was curious about your approach, the Department of Labor's approach, to this decision and what you're doing internally and how you will proceed, if so, in changing what the Supreme Court has requested in the regulations.

MR. SCALIA: As you've indicated, the Supreme Court invalidated one part of the FMLA regulations. It's our legal responsibility to take a look at what they did, to see what its effect is for the regulation, and to see if there are any other very similar provisions of the FMLA regulations that may also be affected by that. That's something we're going to do.

MR. FORTNEY: Other questions from the audience? Yes, sir.

AUDIENCE PARTICIPANT: This is directed to Mr. Rosenfeld. Could you explain any major differences between your enforcement of the *Beck* decision compared to your predecessors.

MR. FORTNEY: And Arthur, if you would take 30 seconds for those in the audience who don't know what "*Beck* decision" means, explain that for us.

MR. ROSENFELD: *Beck* has to do with the use of mandatory dues in non-right-to-work states, being used for things other than the collective bargaining process and the representation by the union.

Keep in mind that you don't have to be a member of the union. But if you work in the unit, you're represented by the union; they represent you. You can't compel a unit member who is a non-member of the union to pay full dues, unless those full dues go to those representational categories.

We don't get a lot of *Beck* cases. There are some issues that are pending right now based upon decisions in the circuit courts, which I'm not going to get into now, where we are considering issuing complaints to give the Board a chance to reconsider some of the decisions that have been laid down by the board since California Saw. Does that answer your question? I'm not sure.

I am a Republican appointed by a Republican president. The only hearing on the Hill where I have testified was a hearing on the House side conducted by a Republican questioning the general counsel and the Board on *Beck* enforcement. So, it's a hot-button issue, to say the least.

But my concern has been and will continue to be with the resources of the Agency. For example — I'm going

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beyond your question — I issued recently a memorandum on benefit fund collection cases wherein the parties can have access to district court to enforce the collective bargaining agreements. It's just a matter of resources. I had the same resource problem with *Beck*. There are questions as to what is required of a union at the various stages of the process. We're looking at those.

MR. FORTNEY: Any other audience questions? If not, the prerogative of the Chair is to ask the final question, and that is for all three of the panelists.

Each of your have addressed enforcement with the notion of voluntary compliance being central. And it strikes me that you have somewhat different models of centralized versus decentralized enforcement. At one end of the spectrum, arguably, is the EEOC, which is a fairly decentralized arrangement. Policies are set within the regions, and the hinterlands are out there.

In the middle, it strikes me that the Labor Department has sort of a mixed bag, but Gene has referenced at least in one context OFCCP. His lawyers have become a little more involved in — these are my words — quality control. And presumably, that brings uniformity, which is an important point here.

Perhaps most centralized, although experiences may differ on this, at least historically, would be the labor board. And Arthur made clear, for example, in his most recent issuance on *Hoffman Plastic*, the emphasis that the regions are to check back in, in part to make sure there is uniformity.

Is uniformity important? Is the Labor Board policy a good one? Is this something to aspire to? How do you see your current enforcement mechanisms? Are they working well? Do you envision some changes? What can we look forward to on that front? Cari, we'll just go right down the line.

CHAIR DOMINGUEZ: Well, I think the models you've described are pretty much reflective of the types of agencies and commissions that we're running. You know, on the executive side, clearly, it's a more highly centralized part of the executive branch.

You have an independent commission with five commissioners who guide policy. The model we're operating on was a model that was voted upon by the previous administration, where after 35-some years of experience, they wanted to delegate litigation authority to the field while retaining some centralized activity on matters that may have been novel or may require some additional areas of further refinement from a policy point of view. So, that's the model we're operating on right now.

Whenever you delegate anything, you always run the risk of not having the consistency and uniformity that one would hope for. So, we're looking very closely at that model, and looking to see whether in fact, after these years, we need to make some adjustments to it.

The enforcement focus continues to be one where the effort is, "Let's try to bring these issues to closure pre-litigation." And the number of settlements that we've had, and resolutions under mediation — before litigation, speaks well. Because oftentimes, once you file a lawsuit, then when the judge mandates mediation or when the parties realize that we're serious about this, the majority of the charges become settled at that stage.

So, we're looking at all of these things and making a determination whether there are certain things that once again need to be brought back to a more centralized model.

MR. FORTNEY: Arthur.

MR. ROSENFELD: I guess you could refer to us as a centralized model, although John Irving might agree with me that, although supposedly we're centralized, we have 32 regional directors who often go off on their own. When I came onboard, we had a mandatory submission list of issues that had to be submitted by the regions, if the issues arose, to our Division of Advice. And it contained 64 items.

As a managerial tactic, I took that list and threw it out. I told the regional directors that they are the best and the brightest, and I trust their discretion. Then I issued what I think was a two- or three-page memorandum that says to them, you'd better tell me about anything that's going on, and you'd better call Advice if it's a unique or high profile issue. So, the results are supposedly the same.

I have had, and I will continue to have, and I'm sure John has had in his tenure, things happen wherein, if you were in the region, you might have called Washington. Ninety-five percent of what goes on at the Labor Board never gets to Washington. It's resolved in the region. These are the folks that the charging parties and the people who are impacted by the law see. These are the people that they know as the government, a federal agency.

Talking about *Hoffman*, for example. In *Hoffman*, the secret ballot election that we conduct may be the only time in their lives that persons from other countries get to vote in a secret ballot election. The point I'm getting to is, early on, in the 1930's, when we conducted elections, the Board agent would walk in carrying the American Flag to make it clear that even though the election was on the employer's premises, this was a government-conducted election, and don't mess around.

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Maybe we should get back to something like that. I'm just not sure.

But centralized — yes, but with the freedom to create. Let me put it that way.

MR. FORTNEY: Gene, you get the last word.

MR. SCALIA: I guess I should be clear initially on what I was saying about OFCCP. I wouldn't describe what I was referring to there as centralization. I was trying to make the point that we're trying to have our lawyers out in the field work more closely with that agency, as well as with a variety of agencies. We found that early involvement by lawyers can be very helpful in identifying important, promising cases and also in identifying cases that ultimately will not be pursued, and therefore should receive less investigative effort.

I'm the Solicitor of Labor; my name is on scores of cases that are filed every day, every week, and I'm ultimately responsible for that and I recognize it, and I ought to recognize it. Having said that, I think most of the cases that we bring are brought under fairly clear, plain, non-controversial, circumstances. There's a violation; there's a rule; apply the law to the facts and the case ought to be brought. I could never review every case. Nobody would want me to do that, but what I can do is establish priorities, consult regularly, indicate what I'd like to see pursued more, what seems to be worth less time. And we certainly do all those things.

I meet quarterly with my regional solicitors. I've now visited half the regional offices. My deputy Howard Radzely's here today. Howard's been in place longer than I have, about a year now. I think he's been probably to every regional office, and some more than once.

One of the things Secretary Chao set about doing immediately when she came into office, was putting back in place the Policy Planning Board that I referred to earlier — a centralizing mechanism for review of regulations. And another thing that she told us was that she wanted us out there visiting the Labor Department's regional offices, and we're doing that. There's a senior-level political appointee of the Labor Department visiting every regional office every quarter now.

One of my colleagues was visiting our Philadelphia office and was approached afterward by a career employee with that office, who'd been with the Labor Department a very long time, and told my colleague, "I've been here for 15 years and until this year, I've never met a political appointee in the government. But in the last year, I've met four, including the Deputy Secretary." So, I think the Secretary's made a great effort in that regard, and I think it's been good for morale. As Arthur said, we have some terrifically talented, dedicated career people without whom we could never get our job done, and they like knowing that we appreciate their efforts. But secondly, it's very valuable in getting out the Secretary's message on compliance assistance and enforcement priorities and other things that are of importance to the President.

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