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Dismantle OSHA to Protect American Business

The fourth branch of government: an unofficial term for the collection of federal regulatory agencies that impose fascist, centralized control over every aspect of our lives. Ryan McMaken of the Mises Institute equates it to the Deep State, and adds a befitting if gory aspect, calling it the "headless" fourth branch of government. In a 2019 Mises Wire article, McMaken quotes Garet Garrett's book *Ex America*:

> These agencies have built up a large body of administrative law which the people are obliged to obey. And not only do they make their own laws; they enforce their own laws, acting as prosecutor, jury and judge; an appeal from their decisions to the regular courts is difficult.… Thus the Constitutional separation of the three governmental powers, namely, the legislative, the executive and the judicial is entirely lost.

AP Images

Federal overreach: OSHA cited Amazon last year for failing to properly record workplace injuries per agency dictates.

The Lincoln administration spawned this hydra in 1862 with establishment of the fledgling U.S. Department of Agriculture (USDA), now one of the largest of the 15 federal departments that are part of what should be the smallest branch of government, the executive. Today, the USDA hamstrings our farmers, our food supply, and rural development. Likewise, the Department of Energy, established in 1977, has been stifling science and innovation and burning taxpayer dollars on the altar of environmentalism. And since 1913, the Department of Labor (DOL) has aimed its guns at American business.

President Richard Nixon expanded DOL's control in 1970, when he added to its list of agencies OSHA — the Occupational Safety and Health Administration. Proponents argued that personal injuries and illnesses related to workplace environments imposed a hindrance to interstate commerce. Decreased production, lost wages, and increasing medical expenses were other excuses for stripping away individual companies' constitutionally protected freedoms and imposing bureaucratic fascism.

OSHA regulations resemble those created under the German National Socialist (Nazi) regime, which controlled businesses in Germany. Ralph Reiland of the Mises Institute exposed this socialistic control, stating that businessmen in Nazi Germany, though ostensibly independent, "must be servile to the representatives of the state and must not insist on rights and must behave as if private property rights were still sacred." He added they would "most likely get into trouble with the Gestapo for having

grumbled incautiously."

Economist Günter Reimann agreed in his book *The Vampire Economy: Doing Business Under Fascism*. He revealed that the Nazi business wing of government crushed the private sector with tremendous penalties, ridiculous inspections, and the threat of confiscation for petty offenses.

Such similarities between OSHA and the Nazi regime led author and journalist Alan Stang to dub the U.S. agency "OSHSTAPO." He stated plainly in a 1972 issue of *American Opinion* magazine that OSHA "infringes on Americanism with Communistic opposition to private ownership."

Legalized takeover: President Richard Nixon signed into law the Occupational Safety and Health Act of 1970, ostensibly to protect the nation's workers. In reality it shackled America's business owners. (AP Images)

OSHA's Draconian Power

Since the agency's inception, OSHA inspectors have been granted unlimited authority — without court order, warrant, or any other administrative notice — to enter and inspect workplace environments. OSHA can issue subpoenas and enforce them without trial.

Former FBI agent and author Dan Smoot warned of the dangers of such sweeping control in his 1973 article "Beware of OSHA," reporting onerous fines imposed by the agency. A side-by-side comparison of his historical data and OSHA's currently posted fine schedule evince the ever-increasing overreach of this unconstitutional bureau.

For example, in 1970 OSHA could impose a $1,000 fine against an employer for each citation, whether the violation was classified as "serious" or "not serious." The agency's 2021 Safety Council standards set the same fine at up to $13,653 per violation. (This is more than double the rate of inflation, as the U.S. Bureau of Labor Statistics' online inflation calculator estimates that $1,000 in 1970 would be worth $6,572.41 in 2021.)

Moreover, the $1,000 fine could be repeatedly applied to an employer for the same violation within an incredibly short time frame. In fact, he would have been fined $1,000 per day past an agency-established correction deadline date. The same rules apply today, though the fees have skyrocketed.

If a violation resulted in death, the 1970 employer would be fined $10,000 plus six months in prison.

Repeat convictions would warrant a $20,000 fine and one year in jail. In 2021, the jail sentence was removed, but the fine increased up to $136,532.

OSHA regulations also require informational postings to be displayed in the workplace. In 1970, failure to do so would incur a $1,000 fine; the current penalty is $13,653 per violation.

Working with a national advisory committee, the secretary of labor assigns these dollar amounts. Interestingly, the same secretary of labor appoints all 12 members of the advisory committee.

Rotten at Its Core

Smoot's 1973 book *The Business End of Government* provides other examples of the draconian rule OSHA has imposed since its inception. He writes, "An employer can be penalized for violating an OSHA requirement, even when he can prove that the requirement contributes nothing to the health and safety of his employees."

Instances of this insanity in action included the fact that employers were required to color-code certain equipment according to agency dictates, though they may already have used an alternate coding system that employees understood through years of use. Farmers had to install roll bars on their tractors, whether cost effective or not.

OSHA required a half-inch of protective mesh on all motors and power ventilating equipment, though this regulation crippled industries such as the poultry business, where feathers completely plugged such screen outlets within a few days.

The bureau also ludicrously required open-front toilet seats, under the erroneous assumption that those provided better sanitation. "Toilet seats cannot be kept sanitary if people use them carelessly, regardless of construction," Smoot pointed out.

Have things improved since Smoot published his exposé? Hardly! Between 1970 and 2002, regulators revised OSHA guidelines 18 times. In no instance were rules relaxed. On the contrary, increases in fines and stricter punishments helped solidify the agency's fascist stranglehold on industries, including those not previously held accountable through OSHA. In fact, Section 13(a) of the bureau's regulations even empower it to shut down businesses altogether.

The Excuse

What is the rationale for this excessive bureaucratic overreach? Incredibly, DOL's website states that OSHA's authority derives from the Commerce Clause of the U.S. Constitution. "The reach of the Commerce Clause extends beyond Federal regulation of the channels and instrumentalities of interstate commerce so as to empower Congress to regulate conditions or activities which affect commerce even though the activity or condition may itself not be commerce and may be purely intrastate in character," is the absurd claim.

But that's not all. Hold on to your hat, because we're about to get into some dizzying circular logic. Per DOL: "It is not necessary to prove that any particular intrastate activity affects commerce, if the activity is included in a class of activities which Congress intended to regulate because the class affects commerce."

And what classes might that involve, DOL? "Generally speaking, the class of activities which Congress

may regulate under the commerce power may be as broad and as inclusive as Congress intends, since the commerce power is plenary and has no restrictions placed on it except specific constitutional prohibitions and those restrictions Congress, itself, places on it."

Such deceptive verbiage ignores the fact that the Constitution establishes clearly defined and extremely limited roles for each branch of the federal government. America's Founders designed the commerce clause to be a positive force to ensure barriers to trade are lifted, not a negative imposition of barriers, as we see today.

"Congress shall have the power to regulate commerce with foreign nations, and among several States, and with the Indian tribes," states Article I, Section 8 of the U.S. Constitution. Surely, Congress has used this clause on many occasions to justify liberty-usurping bills such as that which spawned OSHA. The Supreme Court has followed suit, with unconstitutional interpretations of the same clause. Such broadened interpretations fly in the face of the original intent of our nation's Founding Fathers.

It is a principle of common law for a judge to consider the creation of a statute or law and apply it as its framers intended — a concept known as case law. This preserves the integrity of law and prevents individual judges from subverting it to forward a personal agenda.

Solet'sconsult *The Federalist Papers* of James Madison, Alexander Hamilton, and John Jay, a collection of 85 essays explaining the U.S. Constitution and advocating for its ratification. In essay number 42, Madison explains the commerce clause to be a means for the federal government to deter tariffs and tolls between states and allow for commerce to spread between the states and to foreign countries. In essay number 45, Madison further states that while federal taxation is intended to ensure the flow of commerce between states, all power over that commerce is reserved to the states.

Nowhere in the U.S. Constitution is Congress given power to make laws impeding commerce. The intent is support without restriction or interference. OSHA is a clear violation of this purpose. The agency also violates the Eighth Amendment, which protects against excessive fines.

Moreover, the 10th Amendment in the Bill of Rights is unambiguous: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In other words, the federal government is not allowed to do anything our constitutional framers may have forgotten to mention.

Understanding these basic principles highlights the absurdity of the claim to authority stated in the original act that established OSHA:

> The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources … by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce.

What spin! But remember, we're talking about a fascist bureaucracy. The Constitution carries no weight within its dark halls.

OSHA "Justice"

One proof of this is the first U.S. Supreme Court case involving OSHA. The 1977 *Atlas Roofing Co. Inc. v. Occupational Safety and Health Commission* case challenged the agency's authority to fine employers without due process of law. The outcome was burdened by the liberal agenda of justices such as Byron White, who had a distaste for the Fifth and 14th Amendments. The court ruled against Atlas, which unfortunately strengthened OSHA's capabilities to enforce burdensome regulations.

A 1992 case, *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, further expanded OSHA jurisdiction, allowing agency regulations to supersede state safety laws — a blatant violation of state sovereignty.

Another bureaucratic atrocity occurred in 2014 with the case *SeaWorld of Florida LLC v. Perez*. OSHA cited SeaWorld for the unfortunate death of animal trainer Dawn Brancheau, who was killed by an orca at the company's theme park in Orlando. Brancheau was a senior trainer with 15 years' experience and knew the dangers associated with her occupation, yet OSHA illogically punished SeaWorld for its inability to perfectly control a killer whale and remove all risk from the hazardous profession. Incredibly, the court upheld the agency's ruling.

Tragedy upon tragedy: Trainer Dawn Brancheau died at SeaWorld in Orlando, Florida, in 2010. She was killed by an orca, for which OSHA blamed the theme park. (Wikimedia/Ed Schipul/Dawn Brancheau – Riders on the Storm)

Again in 2017 we find evidence of OSHA's sway over courts. The bureau fined Pan Am Railways, Inc. for violating the Federal Railroad Safety Act under the whistleblowers clause. (The railroad maintained that an employee who tried to report an injury was dishonest in his allegation.) According to a 2017 OSHA news release, this amounted to illegal retaliation, so the agency slapped Pan Am with $50,000 in fines. When the company appealed, "an administrative law judge upheld the agency's finding of retaliation and increased the amount of punitive damages to $250,000." Further appeals within the bureaucracy's judicial system and the U.S. Court of Appeals upheld OSHA rulings.

OSHA Defeats

However, all is not lost if agency cases find their way into the U.S. judicial system. On occasion, the courts defend American liberty.

Marshal v. Barlow's Inc. concluded with a significant 1978 ruling that held OSHA's warrantless inspections to be in direct violation of the Fourth Amendment. In defiance of the OSHA act passed by Congress and signed into law by the president, employers can deny access to their businesses to agents who do not have warrants. The case ultimately pitted the judicial branch against both legislative and executive.

A 1980 case limited OSHA's definition of the term "safe." The court ruled in *Industrial Union Dept. v. American Petrol Institute* that "safe" does not mean "risk-free," and that regulations and requirements must be backed by solid factual evidence that indicates death or injury will occur. This posed a blow to OSHA's assertion that its regulations eliminate all industry hazards, but the case obviously did no good in the 2014 *SeaWorld* dispute.

The same year witnessed another suit, *Whirlpool Corp. v. Marshall*, which held that employees may strike because of a perceived safety hazard in the workplace, revealing an agency penchant toward encouraging employee insubordination. The court ruled in OSHA's favor, but did not grant the agency authority to order an employer to pay lost wages due to striking.

A case that bolstered employers' rights occurred in 1981. *American Textile Mfrs. Inst. v. Donovan* involved an employee who was unable to wear a respirator and could therefore not do his job. The court ruled that employers may not be forced to retain workers who are unable or unwilling to work.

The 1990 *Dole v. Steelworkers* lawsuit ironically ruled that government agencies should not impose rules or regulations that are over-burdensome. This hampered OSHA's ability to cripple employers with required reports and paperwork.

In *Chao v. Mallard Bay Drilling, Inc.* of 2002, OSHA attempted to usurp Coast Guard authority by claiming that a drilling barge in navigable waters was a workplace under OSHA jurisdiction. The court upheld Coast Guard control.

The 2018 case of *United States v. Mar-Jac Poultry, Inc.* set a precedent that OSHA agents may not use an employee injury to bully their way into businesses and demand warrantless inspection.

Another 2018 case, *Secretary of Labor v. Angelica Textile Services, Inc.*, constrained OSHA's unreasonable repeat citation process. For example, thanks to this case, OSHA can no longer fine an employer for a handrail that is not high enough, and then issue a repeat citation — with its attendant costlier fine — for a corrected handrail that is the wrong color. The downfall of the case is that it leaves the burden of proof on employers to illustrate abatement actions taken after receiving an initial citation.

Unregulated Regulators

Despite these judicial victories, it must be noted that most OSHA cases never reach U.S. courts. The majority are heard within a separate court system — the Occupational Safety and Health Review Commission (OSHRC) — which bills itself as an "independent federal agency that is not part of the Department of Labor or OSHA." The U.S. president appoints members to the three-man OSHRC, and the required quorum is two members. How do you spell partisanship?

So OSHA continues to wield enormous and stifling power, as its framers intended. "OSHA was carefully designed to create a climate of terror — terror which can be used selectively for political purposes," wrote Robert W. Lee for *The New American*, "to turn businessmen into criminals, to cast them as ogres

who have no interest in safety, to deny their civil rights and eventually those of everybody."

It is evident that U.S. courts are powerless to reverse the ever-broadening reach of bureaucratic fascism and ultimately dismantle OSHA. Over time, its regulations have expanded.

On the other hand, Congress can dismantle this tyrannical agency, and Republican Congressman Andy Biggs of Arizona is working to do so. His NOSHA Act (Nullify Occupational Safety and Health Administration) died in committee last year, but he reintroduced it days after the start of the new Congress this past January. Notable for its refreshing simplicity, the three-sentence bill would repeal the 1970 Occupational Safety and Health Administration Act and abolish OSHA.

Every state "has the constitutional right to establish and implement their own health and safety measures, and is more than capable of doing so," Biggs states in a press release introducing NOSHA. "It's time that we fight back against the bloated federal government and eliminate agencies that never should have been established in the first place."

Indeed, OSHA must be abolished, and states must defend their rights and live up to their responsibilities. All Americans should contact their federal representatives, encouraging them to support Biggs' NOSHA Act and to restore freedom and sovereignty to the states and individual citizens. Our alternative is a continued fascist stranglehold on American business.

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