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Reply to Drapkin

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In his response to our article, Larry Drapkin has missed our main point: that Congress intended the general duty clause to be a limited tool in protecting the safety and health of employees.

Drapkin's assertions that the general duty clause covers "all potentially hazardous exposures" not covered by standards and that "[n]o less could sufficiently implement" the congressional intent, are simply incorrect. Drapkin in effect argues that Congress should have adopted the Daniels provision, which would have required each employer to "furnish to each of his employees employment and a place of employment which is safe and healthful." This language contained no explicit limitation whatsoever on the scope of an employer's obligation. It arguably covered both insignificant risks of harm and risks of insignificant harm. It appeared to require absolute safety and health, regardless of the cost of discovering or eliminating risks of harm. As the broadest requirement imaginable, it eliminated any incentive for OSHA to promulgate specific standards.

But Congress chose not to adopt that open-ended provision. As our discussion of the legislative history shows, a variety of possible restrictions on the Daniels provision were considered. The language approved by the Conference Committee was a compromise between the various formulas offered. Under the clause ultimately adopted by Congress, an employer's duty to protect employees extends only to hazards that are recognized by either the employer or its industry, and that are likely to cause physical harm, which if it occurs, is likely to be serious. Moreover the clause applies only to hazards that are preventable and not covered by a specific standard. This duty is much narrower than the one advocated by Drapkin and rejected by Congress.

In criticizing our view of the general duty clause, Drapkin makes arguments better addressed to Congress. If, as he seems to assert, the provision actually adopted is insufficient to protect employee safety and health, Congress should consider amending it. In doing so, how-

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3. *Id.* at 288.
ever, Congress should carefully weigh both the necessity and the constitutionality of such a change.

Congress should not hastily expand the scope of the general duty clause in response to claims such as those advanced by Drapkin. For example, his assertion that “[t]he United States government has estimated that anywhere between twenty and forty percent of the cancers found in all people are caused by workplace exposures to chemical substances”4 is both alarmist and unsubstantiated. In support of this assertion, Drapkin cites the so-called “Estimates Paper,”5 an unpublished and unsigned report by the Department of Health, Education and Welfare which was never subjected to peer review and which has come under intense scientific criticism. In a 1981 article in the Journal of the National Cancer Institute, the eminent cancer researchers Richard Doll and Richard Peto found the Estimates Paper “indefensible,” with “risk estimates which are more than ten times too large.”6 They went on to state:

It seems likely that whoever wrote the [Estimates Paper] (it has a list of “contributors,” but no listed authors) did so for political rather than scientific purposes, and it will undoubtedly continue in the future as in the past to be used for political purposes by those who wish to emphasize the importance of occupational factors . . . . [W]e would suggest that the [Estimates Paper] should not be regarded as a serious contribution to scientific thought and should not be cited as if it were. (Furthermore, any suggestions which derive directly or indirectly from it that 20, 23, 38 or 40% of cancer deaths are, or will be, due to occupational factors should be dismissed.)7

Drapkin apparently relies on the Estimates Paper with the political purpose of urging an extreme expansion of the general duty clause without regard to actual need.

Moreover, when discussing the purported need for expansion, he fails to note the costs to OSHA of regulating occupational hazards on a case-by-case basis under the general duty clause, apart from the costs to employers. As we have noted, the contest rate for general duty citations is high compared to that for all citations.8 Each challenged gen-

4. Drapkin, supra note 1, at 331.
7. Id. at 1241. See also, for example, What Proportion of Cancers Are Related to Occupation?, LANCET 1238, 1240 (1978) (“It is sad to see such a fragile report under such distinguished names.”).
8. Morgan & Duvall, supra note 2, at 299 (Table I).
general duty citation involves the expenditure of OSHA resources. Besides legal resources, cases involving scientific uncertainty, which Drapkin apparently would like to see brought under the general duty clause, also demand considerable scientific expertise, a not-inexpensive commodity. Yet even when a general duty clause citation is affirmed, OSHA only affects the practices of a single employer. Given the agency's limited resources, it is wrong to assert that OSHA can better protect employees through case-by-case litigation under the general duty clause than through rulemaking.

Drapkin's vehemence stems from his belief that we seek to "gut" the general duty clause of all meaning. That is not our aim at all. Rather, our article addresses the statutory limits of the clause. Recognizing the limits Congress imposed, and arguing that OSHA has at times attempted to exceed those limits, is surely different from trying to excise the general duty clause from the OSH Act.

Drapkin displays an insensitivity to the congressional concerns underlying the limitations placed on the general duty clause. As our article shows, Congress deliberately reduced the scope of the originally-proposed clause because it wished to provide employers with fair notice and to control the discretion of the administering agency. At times OSHA has disregarded these concerns in attempting to bypass the congressional limitations, and Drapkin would have OSHA continue to do so.

Even if Congress were to remove some of the restrictions on the scope of the clause, however, the provision still could not be interpreted as Drapkin would have it. Without a "recognized hazards" requirement, the general duty clause might well be invalid as a violation of due process, because it would fail to give employers constitutionally adequate notice of their legal obligations. If the "likely to cause" requirement of significant risk of serious harm were deleted, the general duty clause would arguably "give the Secretary [such] unprecedented power over American industry..., such a 'sweeping delegation of legislative power' that it might be unconstitutional" under the non-delegation doctrine, as a plurality of the Supreme Court has suggested with respect to another provision of the OSH Act.

While we could respond here at greater length to Drapkin's arguments, we believe our article is a sufficient reply. It explains our thesis.

9. Among other things, those concerns led Congress to differentiate the general duty clause from the common law. Drapkin is thus in error when he suggests, in a novel interpretation of the legislative intent, that the painstakingly-drafted general duty clause be read as analogous to tort law.

that the general duty clause is indeed a powerful tool within its intended scope, but that OSHA has at times contorted the clause to extend beyond that carefully limited scope. The limits placed on the duty implement important congressional concerns which should be respected by OSHA, the Occupational Safety and Health Review Commission, and the courts.