ENERGY EMPLOYEES OCCUPATIONAL ILLNESS COMPENSATION PROGRAM: ARE WE FULFILLING THE PROMISE WE MADE TO THESE COLD WAR VETERANS WHEN WE CREATED THIS PROGRAM? (PART III)

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JULY 20, 2006

Serial No. 109–139

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

28–783 PDF WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., Wisconsin, *Chairman*

HENRY J. HYDE, Illinois
HOWARD COBLE, North Carolina
LAMAR SMITH, Texas
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
DANIEL E. LUNGREN, California
WILLIAM L. JENKINS, Tennessee
CHRIS CANNON, Utah
SPENCER BACHUS, Alabama
BOB INGLIS, South Carolina
JOHN N. HOSTETTLER, Indiana
MARK GREEN, Wisconsin
RIC KELLER, Florida
DARRELL ISSA, California
JEFF FLAKE, Arizona
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TOM FEENEY, Florida
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas

JOHN CONYERS, JR., Michigan
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
LINDA T. SÁNCHEZ, California
CHRIS VAN HOLLEN, Maryland
DEBBIE WASSERMAN SCHULTZ, Florida

PHILIP G. KIKO, *General Counsel-Chief of Staff*
PERRY H. APELBAUM, *Minority Chief Counsel*

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS

JOHN N. HOSTETTLER, Indiana, *Chairman*

STEVE KING, Iowa
LOUIE GOHMERT, Texas
LAMAR SMITH, Texas
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
DANIEL E. LUNGREN, California
JEFF FLAKE, Arizona
BOB INGLIS, South Carolina
DARRELL ISSA, California

SHEILA JACKSON LEE, Texas
HOWARD L. BERMAN, California
ZOE LOFGREN, California
LINDA T. SÁNCHEZ, California
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts

GEORGE FISHMAN, *Chief Counsel*
ART ARTHUR, *Counsel*
ALLISON BEACH, *Counsel*
CINDY BLACKSTON, *Professional Staff*
NOLAN RAPPAPORT, *Minority Counsel*

CONTENTS

JULY 20, 2006

OPENING STATEMENT

Page

The Honorable John N. Hostettler, a Representative in Congress from the State of Indiana, and Chairman, Subcommittee on Immigration, Border Security, and Claims 1

The Honorable Sheila Jackson Lee, a Representative in Congress from the State of Texas, and Ranking Member, Subcommittee on Immigration, Border Security, and Claims 4

WITNESSES

Mr. Austin Smythe, Acting Deputy Director, Office of Management and Budget

Oral Testimony 7

Prepared Statement 10

Mr. Lewis Wade, Ph.D., Senior Science Advisor, Special Assistant to the Director, National Institute for Occupational Safety and Health (NIOSH)

Oral Testimony 13

Prepared Statement 14

Ms. Denise Brock, Director and Founder, United Nuclear Weapons Workers

Oral Testimony 15

Prepared Statement 19

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Sheila Jackson Lee, a Representative in Congress from the State of Texas, and Ranking Member, Subcommittee on Immigration, Border Security, and Claims 41

ENERGY EMPLOYEES OCCUPATIONAL ILLNESS COMPENSATION PROGRAM: ARE WE FULFILLING THE PROMISE WE MADE TO THESE COLD WAR VETERANS WHEN WE CREATED THIS PROGRAM? (PART III)

THURSDAY, JULY 20, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION,
BORDER SECURITY, AND CLAIMS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:13 p.m., in Room 2141, Rayburn House Office Building, the Honorable John Hostettler (Chairman of the Subcommittee) presiding.

Mr. HOSTETTLER. The Subcommittee will come to order.

And we welcome the witnesses today. There has been a little change in rotation here of our hearing, and if you could—thank you for the attendance, and I apologize for the change in the schedule.

Today's hearing is the third in a series of hearings the Subcommittee is holding on the Energy Employees Occupational Illness Compensation Program Act, or EEOICPA.

Just to refresh everybody's memory, the impetus for these hearings was the receipt by the Subcommittee of an internal OMB memo sent to the Department of Labor in late 2005.

The document outlined five policy options to be developed by a White House-led interagency work group to reduce the number of Special Exposure Cohorts, or SECs, as a way to "contain the growth and benefit under the program," including requiring Administration clearance of SEC petitions and altering the composition of the Advisory Board on Radiation and Worker Health.

Special Exposure Cohort status may be applied for and received by sick workers whose radiation dose exposures cannot be estimated adequately with existing records and who worked in an area where it is reasonably likely that they were exposed to enough dose to endanger their health.

If approved, workers in the cohort can receive benefits under the program if they have one of 22 cancers. Prior to the Subcommittee's first EEOICPA hearing on March 1, 2006, document requests were made to the Department of Labor and the Department of Health and Human Services in order to review agency actions with regard to the passback memo on the program.

Until recently, those attempts at performing oversight have been resisted and have added to the concern that these agencies may not wish Congress to adequately execute our oversight obligations.

In the interim, the Office of Management and Budget issued letters to individual congressmen and senators concerning the options outlined in the passback document.

While those communications provide general assurances that there won't be any implementation of the passback items, there is no mention of any steps that are planned to police the program officials within the Administration whose agendas include a reduction in the approval of SECs or mention of what steps have been taken to reverse or rectify actions that have occurred which mirror the principles contained in the passback.

For example, one of the OMB letters states, "The Administration will continue to meet the statutory requirement that the advisory board reflect a balance of scientific, medical and worker perspectives."

Something can't continue when it is not already occurring. At present, the 11-member board only has two worker representatives. The math does not add up.

It is the Subcommittee's understanding that Presidential personnel was provided with a group of suitable candidates for appointment to the board but no action to supplement the lack of worker representatives has been taken to meet the statutory requirement for balance.

While the Subcommittee applauds OMB's general response that it is "not pursuing any program changes to modify benefit costs" or "reduce the amount of SEC approvals in order to minimize benefit costs," until significant steps are taken to clarify the Administration's position, a cloud will remain over this program and those implementing it.

It is encouraging that the Office of Management and Budget, under the leadership of their new director, Rob Portman, is providing a witness for our hearing today. A satisfactory resolution of this controversy is a must in reinstating the program's integrity.

There is an appearance that the document requests made over 4 months ago to the other agencies involved is being partially addressed. Hopefully, the Department of Labor and Health and Human Services' leadership will follow the lead of OMB and thoroughly cooperate in providing documents in their possession pertinent to the Subcommittee's oversight.

There has been a long-running discussion between the Subcommittee and the Administration on what the limitations are on the Administration providing information available to the Committees with oversight over subject matter when suspect actions are taken by executive branch officials with regard to that subject matter.

Some within the Administration have, in the Subcommittee's view and the view of legal experts, invoked protections inappropriately. For example, in the response to follow-up questions after our March 1 hearing, the DOL witness invoked "internal budget discussions" as the reason he couldn't say who created the passback list or answer whether he himself had created the list.

The budget process is over and can't be negatively affected by divulging such information, so that protection is not applicable.

It is unfortunate that no one is willing to be honest about their actions and admit their error or supply their justification for determining that groups of claimants seeking SEC status are not worthy of certification.

The loss of this program's credibility in large part lays at the feet of individuals at senior levels in the Labor Department. Indications are that those officials have been constantly sounding alarms that special cohort approvals were going to open a floodgate of benefit costs.

When NIOSH and the advisory board initiated approval of an SEC for the Mallinckrodt plant in St. Louis, it was asserted that the precedent set by that approval would cause a flood of similar SEC applications from sites throughout the weapons complex, threaten the stability of Part B of the program and possibly cause a $7 billion increase in program costs over 10 years.

Some of those officials, it appears, promoted the view that HHS has, to some degree, let claimants, the advisory board and political pressure control the SEC process. They have accused the advisory board of becoming a worker advocacy organization and making "unwise" decisions in approving SECs.

It appears no effort, however, is made to acknowledge or challenge the real fact that NIOSH found few dose records were available and that the integrity and validity of that data was in serious doubt.

DOL has publicly asserted that they have no role in determining whether SECs should be approved or not. The evidence is strong, contrary to that assertion, that they are heavily involved in the SEC process and apparently seek even more involvement. Perhaps that is how the OMB passback contents came to be in the first place.

DOL's constant hysteria campaign was conveyed to OMB and thus the passback contained the tools for DOL to control SEC decisions, the advisory board composition and the work of its audit contractor.

The United States steps up and provides billions of dollars without a blink when there is a natural disaster and people are harmed throughout the world. We as a government are not to blame for that natural disaster or that harm.

In this case, we as a government did the harm, knew we were doing the harm and intentionally deceived people working to protect this nation from harm.

How can any one of us, including the individuals within the Administration tasked with carrying out the program, take the position that these claimants are unworthy of our assistance?

Unlike assistance programs where millions of dollars are paid out on fraudulent claims of harm, the claimants under this program can't fake cancer. It is true that some of these workers' cancer may not have been caused by their exposures.

But we all should remember that the chance that their cancer may have been caused by their exposures is possible in many cases only because of the Government's willingness to put them in

harm's way to manipulating the record of their exposures or outright deceit about the safety of their workplace.

Having lost my mom and dad to cancer, at least I am assured that these workers did not acquire that dreaded disease in an attempt to scam the program.

We as a government are to blame. And unlike some involved in this program, we should step up and take responsibility for what has happened with integrity and purpose. Pinching pennies never looked so inappropriate as it does when addressing the plight of these workers.

Those who have made it their mission to use any method possible to justify denial of assistance to these workers should be ashamed of themselves.

We should ensure this program works as it should in acknowledging the harm this Government potentially caused these workers without their knowledge so as a Government we can take pride at least in that acknowledgment.

Hopefully the witnesses today will help us take steps toward reaching that goal.

At this time, the Chair recognizes the gentlelady from Texas, Ms. Jackson Lee, for purposes of an opening statement.

Ms. JACKSON LEE. Let me thank you so very much, Mr. Chairman, and I think your remarks are pointed, that we do believe that promises have been broken and promises now need to be kept.

And I would like to just introduce victims who are not in the room to the American public by suggesting that these brave Americans who were engaged in nuclear facilities in the 1940's and 1950's and later were, in fact, there to protect America.

It disappoints me, Mr. Chairman, that we have come to this place where victims are fighting for protection. From the Manhattan Project to the present, tens of thousands of workers have been employed to develop, build and test nuclear weapons for the Department of Energy and its predecessor, the Atomic Energy Commission.

The Energy Employees Occupational Illness Compensation Program Act of 2000 provides compensation if they have contracted a radiation-related cancer, beryllium disease, silicosis from employment-related exposure to radiation. They may be eligible for a lump-sum payment of $150,000 and prospective medical benefits. Fair enough.

But yet some have been denied and the Administration is rumored to be trying to change the formula so that many might be denied. In processing radiation-related cancer claims, the Department of Health and Human Services, acting through the National Institute for Occupational Safety and Health, NIOSH is required to estimate a worker's exposure to radiation which is referred to as a radiation dose.

Sometimes this is not possible. During the early years of the nuclear weapons program, some of the workers were not monitored for radiation exposure and records have been lost, destroyed or altered. We understand. People worked. People were dedicated. Record keeping was not that effective. The Internet didn't work then.

The act provides a remedy for cases in which it is not feasible to estimate a radiation dose but it is clear that the health of the workers may have been endangered by radiation exposure. Workers facing the situation may petition to be administratively designated as members of a special exposure cohort which provides an unrebuttable presumption that certain cancers are related.

Members of a special exposure cohort may be eligible for benefits if they have had one of 22 specified radio-sensitive cancers and they have worked at a covered facility for at least 1 year in a job that exposed them to radiation.

Petitions for a special exposure cohort designation are evaluated by NIOSH. NIOSH's recommendation is reviewed by the Advisory Board on Radiation and Worker Health, and then the petition is sent to HHS for a decision.

In a recent memorandum to the Department of Labor which is referred to as an Office of Management and Budget passback, OMB commends the Employment Standards Administration for identifying the potential for a large expansion of the EEOICPA benefits through the designation of Special Exposure Cohorts.

OMB states that the Administration will convene a White House-led interagency work group to develop options for administrative procedures to contain growth in the cost of benefits provided by the program, which include discussions of the following options.

Mr. Chairman, we do not need cost containment programs. Denise Brock's father did not need cost containment programs when he worked and then he lost his life. Citizens in my home State of Texas City who worked with subcontractors don't need cost containment programs. They need relief.

And Channel 11 KHOU interviewed hundreds of workers who seemingly had been forgotten. I discovered that brave Americans were not being protected by the American Government.

The options require Administration clearance of Special Exposure Cohort determinations, address any imbalance in the membership of the advisory board, require an expedited review by outside experts of NIOSH's recommendations, require NIOSH to apply conflict of interest rules and constraints to the advisory board contractors, and requires NIOSH to demonstrate that its site profiles and other dose reconstruction guidance are balanced.

Notwithstanding that the memorandum—the director of the Department of Labor's compensation program testified at a recent hearing before this Subcommittee that the cost containment is not a factor in deciding which claim to pay.

This did not eliminate my concern that OMB's recommendation will be implemented and that they will have an adverse effect on the independence of the process for evaluating Special Exposure Cohort petitions. The process has worked. We just need to make sure that it continues to work.

Because of that, Mr. Chairman, I have introduced a bill to address this problem, the Energy Employees Occupational Illness Compensation Program Improvement Act of 2006, and I really look forward to this Committee working together to generate bipartisan response.

Particularly this bill adds the subcontractors represented by those in Texas City who have been left out and left alone. Among

other things, it would shift the authority for making advisory board appointments to the Congress.

It would require the HHS Secretary to abide by the recommendations of the advisory board unless there is a clear error and would establish enforceable conflict of interest requirements with respect to NIOSH's dose reconstruction contractors.

And it would eliminate the unfairness by making benefits available to some subcontract employees who work at atomic weapon employer facilities that presently are not covered by the act.

Mr. Chairman, this is a very important hearing. I want to thank you for your interest. And I do want to acknowledge that some categories of subcontractors may be covered, but not all. Let this be an opportunity, Mr. Chairman, to really raise the umbrella of the American safety net, the love and affection we have for the American people.

I would also like to thank Nolan Rappaport on my staff for his commitment and energy behind this legislation.

And, Mr. Chairman, I understand it seems that there may be votes. I just wanted to put on the record that if I depart I have an family emergency at home with one of my children who is in need of medical emergency. And so if I am not returning, I apologize and will work with you, Mr. Chairman, for that. Thank you.

Mr. HOSTETTLER. I look forward to working with the gentlelady, and we will be remembering you and your son in our prayers.

We have been called to votes, and so I ask for the indulgence of the panel. The Subcommittee will reconvene immediately after the conclusion of the votes in the House. And so therefore, we are recessed without objection.

[Recess.]

Mr. HOSTETTLER. The Subcommittee will come to order. We will now turn to our introductions of the witnesses.

Austin Smythe is currently acting in the position of Deputy Director and is the Executive Associate Director at the Office of Management and Budget.

In this senior role, Mr. Smythe assists the OMB director in the development of the budget and other management functions. Prior to joining OMB, Mr. Smythe served as a vice president in Lehman Brothers' Washington, D.C. office for a year and a half. He monitored and analyzed appropriations, budget, energy, natural resources and tax issues for the firm's equity research division.

From 1983 to 1999, Mr. Smythe served on the staff of the Senate Budget Committee under the chairmanship of Senator Pete Domenici. As assistant staff director, he played a key role in the development and implementation of the annual Federal budget.

Lewis Wade is Senior Science Advisor and Special Assistant to the Director at the National Institute for Occupational Safety and Health, or NIOSH.

He serves as the designated Federal official for the Advisory Board for Radiation and Worker Health, or the board, and the technical project officer for the board's contract with Sanford Cohen & Associates for technical support.

Dr. Wade's previous role at NIOSH was the Associate Director for Mining. Prior to NIOSH he worked at the Bureau of Mines, the Department of Energy and the United States Geologic Society. Dr.

Wade received his Ph.D. in civil engineering at Carnegie Mellon University.

Denise Brock is the founder and director of the United Nuclear Weapons Workers and is a workers advocate consultant to attorneys regarding EEOICPA.

Ms. Brock's father worked at the Mallinckrodt facility from 1945 to 1958. He was diagnosed with an oat-cell carcinoma of the lung that was later metastatic to the brain and liver. He passed away when Ms. Brock was still quite young.

Ms. Brock took a keen interest in EEOICPA early in the program, filing a claim on her 78-year-old mother's behalf in July 2001. Finding the claims process a frustrating and arduous task, Ms. Brock resolved to help other nuclear workers and their families deal with the program.

Her mother eventually became the first person compensated in the Mallinckrodt cases.

Members of the panel, will you please stand and take the oath, which is the custom of our Subcommittee and Committee? Will you raise your right hand?

Do you swear that the testimony you are about to give before this Subcommittee will be the truth, the whole truth and nothing but the truth, so help you God?

Thank you very much. And please be seated.

The record will reflect that the witnesses answered in the affirmative.

Mr. Smythe, thank you for being here today.

And without objection, all of your written testimonies will be made a part of the record, and you will see that there is a series of lights in front of you. And if you could summarize within 5 minutes it would be greatly appreciated.

Mr. Smythe?

TESTIMONY OF AUSTIN SMYTHE, ACTING DEPUTY DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Mr. SMYTHE. Mr. Chairman, Members of the Subcommittee, my name is Austin Smythe, and I am the Acting Deputy Director of OMB. At the request of the Subcommittee, I am appearing before you today to discuss the Energy Employees Occupational Illness Compensation Program Act, EEOICPA.

As the Director wrote in his recent correspondence to the Members of the Congress, the Administration deeply appreciates the sacrifices that workers across the nation have made in building the nation's nuclear defense.

We are committed to ensuring that all workers who are entitled to benefits under this program receive their full benefits in accordance with the law.

As a multiagency program, EEOICPA requires coordination among its partner agencies—the Department of Justice, Labor, Energy and Health and Human Services—to make sure the program operates as intended and assists claimants as efficiently as possible.

OMB does not have an operational role in this program but does carry out its responsibilities within the framework of the responsibilities of each agency as designated by statute, regulation and

Executive Order 13179. OMB has performed this role since the program was enacted in 2000.

Since the program began paying benefits in 2001, EEOICPA has paid more than $2 billion to 23,000 claimants. I understand the Subcommittee is concerned about what it believes are Administration plans to change the EEOICPA program structure or cut benefits to workers and their survivors.

The Director has written to Members of Congress on this issue, and I submitted with my written testimony a copy of one such letter.

As the Director has clearly stated in this letter, the Administration is not pursuing any program changes to contain the cost of EEOICPA benefits and is not instituting a White House-led EEOICPA-related interagency work group or any new internal procedures concerning the Advisory Board on Radiation and Worker Health.

In addition, no steps are being taken by the Administration to reduce the amount of Special Exposure Cohort petition approvals in order to minimize benefit payments.

The Administration is working to provide workers with the benefits legally provided in that act in a timely and fair manner and to ensure that all agencies comply with the law as it was written by the Congress and signed into law by the President.

I also want to address specifically the concern that the 2007 budget reflects an expected reduction in approval of SEC petitions. This is not the case. As you know, EEOICPA benefits are an entitlement. We have no budget policy proposals to reduce or otherwise modify these benefits.

Under current law, the Administration is obligated to make these benefit payments. Like other entitlement programs, we are required to estimate the outlays from this entitlement program to determine overall spending levels.

As a result, the budget presents the Administration's best estimates of program cost based on anticipated claims processing under current law. The budget does not impose a ceiling on these benefit payments, nor does it anticipate changes to the SEC process or reflect future HHS actions on pending SEC petitions.

The Subcommittee has also expressed a concern about policy options being used to reduce EEOICPA Part B benefits by limiting the designation of additional SEC classes. Executive Order 13179 delegates the President's responsibility for SEC decisions to the Secretary of HHS.

By law, the advisory board provides recommendations to the Secretary on these petitions and also reviews dose reconstructions to ensure their scientific validity and quality.

The Administration does not intend to take any action to change this arrangement, nor does it intend to pre-clear SEC determinations. These approvals will be made fairly and in accordance with program procedures, guidelines, regulations and the law.

As it has done in the past, the Administration will provide public notice of the regulations and formal procedures issued with respect to this program. And any regulations will follow the notice and comment procedures of the Administrative Procedure Act.

In conclusion, the Administration will continue to faithfully out EEOICPA to provide for timely, uniform and entitled compensation of covered employees and, where applicable, their survivors, suffering from illnesses incurred by such employees in the performance of their duties.

The Administration also will continue to ensure that scientific determinations and the law govern the provision of compensation under this program and will not use budgetary concerns to override those determinations.

With that, Mr. Chairman, I would be happy to answer any questions the Subcommittee may have.

[The prepared statement of Mr. Smythe follows:]

PREPARED STATEMENT OF AUSTIN SMYTHE

STATEMENT OF AUSTIN SMYTHE, ACTING DEPUTY DIRECTOR
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS
U.S. HOUSE OF REPRESENTATIVES

JULY 20, 2006

Mr. Chairman and Members of the Subcommittee, at the request of the Subcommittee, I am appearing before you today to discuss the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). As the Director wrote in his recent correspondence to Members of Congress, the Administration deeply appreciates the sacrifices that workers across the nation have made in building the nation's nuclear defense. We are committed to ensuring that all workers who are entitled to benefits under this program receive their full benefits in accordance with the law.

As a multi-agency program, EEOICPA requires coordination among its partner agencies--the Departments of Justice, Labor, Energy, and Health and Human Services (HHS)--to make sure the program operates as intended and assists claimants as efficiently as possible. OMB does not have an operational role in this program, but does carry out its responsibilities within the framework of the responsibilities of each agency as designated by statute, regulation, and Executive Order 13179 ("Providing Compensation to America's Nuclear Weapons Workers"). OMB has performed this role since the program was enacted in 2000. Since the program began paying benefits in 2001, EEOICPA has paid more than $2 billion to 23,000 claimants.

I understand that the Subcommittee is concerned about what it believes are Administration plans to change the EEOICPA program structure or cut benefits to workers and their survivors. The Director has written to Members of Congress on this issue, and I am submitting with my written testimony a copy of one such letter. As the Director has clearly stated in this letter, the Administration is not pursuing any program changes to contain the costs of EEOICPA benefits and is not instituting a White House-led EEOICPA-related interagency workgroup or any new internal procedures concerning the Advisory Board on Radiation and Worker Health. In addition, no steps are being taken by the Administration to reduce the amount of Special Exposure Cohort (SEC) petition approvals in order to minimize benefit payments. The Administration is working to provide workers with the benefits legally provided in the Act in a timely and fair manner, and to ensure that all agencies comply with the law as it was written by Congress and signed by the President.

I also want to address specifically the concern that the 2007 Budget reflects an expected reduction in approval of SEC petitions. This is not the case. As you know, EEOICPA benefits are an entitlement. We have no budget policy proposals to reduce or otherwise modify these benefits. Under current law, the Administration is obligated to make these benefit payments. Like other entitlement programs, we are required to estimate the outlays from this entitlement program to determine overall spending levels. As a result,

the Budget presents the Administration's best estimates of program costs based on anticipated claims processing under current law. The Budget does not impose a ceiling on these benefits payments, nor does it anticipate changes to the SEC process or reflect future HHS actions on pending SEC petitions.

The Subcommittee also had expressed concerns about policy options being used to reduce EEOICPA Part B benefits by limiting the designation of additional SEC classes. By law, the Advisory Board provides recommendations to the President on SEC petitions, and also reviews dose reconstructions to ensure their scientific validity and quality. Executive Order 13179 delegates the President's responsibility for SEC decisions to the Secretary of Health and Human Services. The Administration does not intend to take any action to change this arrangement, nor does it intend to pre-clear SEC determinations. These approvals will be made fairly, and in accordance with program procedures, guidelines, regulations, and the law. As it has done in the past, the Administration will provide public notice of the regulations and formal procedures issued with respect to this program, and any regulations will follow the notice and comment procedures of the Administrative Procedure Act.

In conclusion, the Administration will continue to faithfully carry out EEOICPA to provide for timely, uniform, and entitled compensation of covered employees and, where applicable, their survivors, suffering from illnesses incurred by such employees in the performance of their duties. The Administration also will continue to ensure that scientific determinations and the law govern the provision of compensation under this program and will not use budgetary concerns to override those determinations. I look forward to answering the Subcommittee's questions.

ATTACHMENT

THE DIRECTOR

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 31, 2006

The Honorable Barack Obama
United States Senate
Washington, DC 20510

Dear Barack,

I am writing to address your concerns about the Administration's implementation of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). EEOICPA was enacted to compensate workers for the illnesses suffered as a result of their efforts to build our Nation's nuclear defense. The Administration shares your desire that EEOICPA's implementation conform to the law and congressional intent. A fair and open process is needed in order to fulfill the promise made to workers who suffered illnesses due to their work in the Department of Energy's nuclear weapons complex.

The Administration is not pursuing any program changes to modify benefit costs of EEOICPA, or instituting any White House-led EEOICPA-related interagency workgroup or any new internal procedures concerning the Advisory Board on Radiation and Worker Health (the Advisory Board). The Administration's goal is to provide workers with the benefits they deserve in a prompt and timely way, and to ensure that all agencies comply with the law and congressional intent.

There will be no steps taken by the Administration to reduce the amount of Special Exposure Cohort petition approvals in order to minimize benefit payments. This Administration will also continue to meet the statutory requirement that the Advisory Board reflect a balance of scientific, medical, and worker perspectives.

Like you, we deeply appreciate the sacrifices that workers in DOE facilities across the nation made in building the Nation's nuclear defense. The Administration will work to ensure that scientific determinations and the law govern which workers receive compensation under this program and will not allow budgetary concerns to override those determinations. All workers who are entitled to benefits under the program will be paid their full benefits.

I appreciate your interest in the program and look forward to working with you in my new capacity.

Sincerely,

Rob

Rob Portman

Mr. HOSTETTLER. Thank you, Mr. Smythe.

The Chair now recognizes Dr. Wade for 5 minutes.

TESTIMONY OF LEWIS WADE, PH.D., SENIOR SCIENCE ADVISOR, SPECIAL ASSISTANT TO THE DIRECTOR, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH (NIOSH)

Mr. WADE. Mr. Chairman and Members of the Subcommittee, my name is Lewis Wade, and I am the Senior Science Advisor at the National Institute for Occupational Safety and Health, or NIOSH. NIOSH is part of the Centers for Disease Control and Prevention within the Department of Health and Human Services.

I bring you warm regards from Dr. John Howard, the NIOSH Director.

I am pleased to appear before you today to provide an update on the status of HHS activities under the Energy Employees Occupational Illness Compensation Program Act of 2000. I consider the work that HHS does in support of the act to be tremendously important.

In fact, in my 30-plus years of Federal service, I have worked on few things as important as my work on this program.

The role of HHS in this program is to focus on the science of doing dose reconstruction and SEC petitions. Other areas of the program, such as processing of claims or payment of claims, are the responsibility of the Department of Labor, which has the lead responsibility for administering this act.

Let me briefly update you on the progress NIOSH has made to date. In October 2001, NIOSH received from the Department of Labor the first cases for dose reconstruction. To date, NIOSH has returned 14,000 cases to the Department of Labor with completed dose reconstructions. That represents about two-thirds of the cases that have been referred to NIOSH by the Department of Labor.

NIOSH leadership, personally led by Dr. John Howard, has focused significant attention on processing dose reconstructions in timely and quality manners. In addition, six classes of workers have been added to the Special Exposure Cohort to date, with another two just about to be added.

At the June meeting of the advisory board, the Department of Labor reported that almost one-half $1 billion has been paid to claimants through completed dose reconstructions or as members of an SEC class. This is as the result of NIOSH's work.

Fourteen thousand completed dose reconstructions, and almost a half billion dollars to claimants—NIOSH is proud of the work that it has done to implement the act. However, we are aware of and understand the concerns of claimants that it takes NIOSH too long to act upon their cases or SEC petitions.

And we as an agency are committed to continuing to improve our processes to address these concerns.

Let me briefly turn to the work of the advisory board. The advisory board focuses on the scientific detail that is necessary to oversee such a program, and it makes use of vigorous peer review in the accomplishment of its work.

Anyone who has attended a board meeting understands the high level of detail that the board brings to its work. As you know, the

board schedules its meetings in close geographic proximity to the workers likely to be impacted by the current work of the board.

Through public comment sessions at these meetings, the board hears firsthand from claimants about their concerns and their frustrations with the program. The board is constantly hearing from a wide variety of involved parties about those parties particular interest in the board's work.

However, I personally have observed that the board's decisions have been driven by the scientific consideration of information before the board.

As evidence of the independence of the board's work in the area of SEC petitions, for example, the board has taken actions consistent with as well as taken actions contrary to the recommendations of NIOSH.

As evidence of the quality of the board's work, the Secretary of HHS has followed board recommendations on SEC petitions in all cases but one, and that involved a circumstantial change in the case following the board's action and before the Secretary's action.

In summary, NIOSH has made significant progress in the 6 years since the inception of this program. However, we recognize that there are still many former energy workers, or in many cases their spouses or children, who are awaiting final decisions on claims, and we are committed to continue to work to improve the program to better serve them and honor their service to the country.

Thank you again personally for the opportunity to testify, and I would be happy to answer questions.

[The prepared statement of Mr. Wade follows:]

PREPARED STATEMENT OF LEWIS WADE

Mr. Chairman and Members of the Subcommittee, my name is Lewis Wade and I am the Senior Science Advisor at the National Institute for Occupational Safety and Health (NIOSH), part of the Centers for Disease Control and Prevention (CDC) within the Department of Health and Human Services (HHS). I bring you warm regards from Dr. John Howard, the Director of NIOSH, who had the opportunity to appear before this Subcommittee in March. My duties at NIOSH include serving as the Designated Federal Official for the Advisory Board on Radiation and Worker Health ("the Board"). In that capacity, I represent the Secretary of HHS on the Board and have the responsibility of overseeing the Board's work to ensure that it meets the needs of the Secretary. I also serve as the Technical Project Officer on the contract with Sanford Cohen and Associates (SC&A), which provides scientific and technical support to the Board on a range of topics, including review of individual dose reconstructions and site profiles and providing recommendations on adding classes of employees to the Special Exposure Cohort (SEC).

I am pleased to appear before you today to provide an update on the status of HHS activities under the Energy Employees Occupational Illness Compensation Program Act of 2000 ("EEOICPA" or "the Act"). I consider the work that NIOSH does in support of the Act to be tremendously important. The role of HHS in this program is to focus on the science of doing dose reconstructions and the related issue of considering and deciding petitions from classes of employees wishing to be added to the SEC. HHS also developed the probability of causation guidelines that are used by the Department of Labor (DOL) in adjudicating claims for compensation. Other areas of this program (e.g., processing and payment of claims) are under the purview of DOL, which has lead responsibility for administering EEOICPA. Let me briefly update you on the progress NIOSH has made to date.

In October 2001, NIOSH received from DOL the first cases for dose reconstruction. To date, NIOSH has returned 14,511 cases to DOL with completed dose reconstructions or for handling under the SEC presumptive rules. That represents 66 percent of the 21,988 dose reconstruction cases that have been referred to NIOSH by DOL. NIOSH leadership has focused significant attention on processing dose recon-

structions in a timely manner, and by aggressively and proactively managing the process we have improved from processing an average of 100 dose reconstructions per week in 2004 to an average of 160 per week thus far in 2006. Six classes of workers have been added to the SEC to date. Two additional classes recently have been approved by the Secretary for addition to the SEC—they were sent to Congress on June 26, 2006 and will be effective on July 26 unless Congress determines otherwise. At the June meeting of the Advisory Board, DOL reported that the SEC classes approved by that date had led to compensation for 468 cases. Overall, DOL reported that more than $472 million has been paid to claimants with completed dose reconstructions or who are members of an SEC class.

The accomplishments are significant especially in light of the fact that of the 325 facilities covered by EEOICPA, many are unique and require a significant amount of time and effort to obtain the information and records—sometimes over 60 years old—necessary to conduct dose reconstructions. We have received claims for 190 of these covered facilities, and of these, NIOSH has completed 80 percent or more of the dose reconstructions for 38 facilities. This includes 14 facilities for which NIOSH has completed 100 percent of the dose reconstructions for the cases received from DOL.

NIOSH is proud of the work it has done to implement EEOICPA. However, we are aware of and understand the concerns of some claimants that it takes NIOSH too long to act upon their cases and SEC petitions, and we as an agency are committed to continuing to improve our processes to address these concerns.

Let me turn briefly to the work of the Advisory Board. The Board focuses on the scientific detail that is necessary to oversee such a program; and it makes use of rigorous peer review in the accomplishment of its work. Anyone who has attended a Board meeting understands the high level of detail that the Board brings to its work. To give you a sense of the Board's involvement in the program, between now and the end of the fiscal year, there are scheduled two Board meetings and four Working Group meetings on issues including site profile reviews, SEC petition reviews, and review of our conflict of interest policy.

As you know, the Board schedules its meetings in close geographic proximity to the workers likely to be impacted by the current work of the Board. Through public comment sessions at these meetings, the Board hears first-hand from claimants about their concerns and frustrations with the program. The Board often finds itself under intense pressure from claimants and their advocates. However, NIOSH has observed that the Board's decisions have been driven by the information before it. In the area of SEC petitions, for example, while the Board has taken actions consistent with NIOSH recommendations to add or deny adding a class, the Board also has taken a position contrary to a NIOSH recommendation to deny adding a class. With one exception, the decisions of the Secretary of HHS have been consistent with all of the Board's recommendations on SEC petitions (the exception being when the Board's recommendation on a facility was followed by a decision by the Department of Energy to remove the facility from the list of covered facilities, thus precluding a Secretarial decision on the petition).

In summary, NIOSH has made significant progress in the six years since the inception of this program in performing the important duties with which it has been charged. However, we recognize that there are still many former energy workers, or in many cases their spouses or children, who are awaiting final decisions on their claims, and we are committed to continuing to work to improve the program to serve them better and honor their service to our country.

Thank you again for the opportunity to testify. I would be happy to answer any questions you may have.

Mr. HOSTETTLER. Thank you, Dr. Wade.

Ms. Brock?

TESTIMONY OF DENISE BROCK, DIRECTOR AND FOUNDER, UNITED NUCLEAR WEAPONS WORKERS

Ms. BROCK. My name is Denise Brock, and I am the founder and Director of the United Nuclear Weapons Workers in St. Louis, Missouri. I would like to thank you for the opportunity to appear before you today.

My father, Christopher Davis, worked for Mallinckrodt Chemical Works in St. Louis from 1945 until 1958. Mallinckrodt was processing an African ore. It was called Belgian Congo pitchblende.

Workers were receiving radiation doses in excess of 1,000 rem to the lung. Today, the maximum allowable dose is five rem per year to the whole body.

When I was about 7 years old, my father was diagnosed with lung cancer that later went to the brain and the liver. Some years later he also was diagnosed with a second primary of leukemia and passed away when I was quite young.

My statement today will relay my experience as a lead petitioner for a Special Exposure Cohort for the Mallinckrodt employees, which cover the years of 1942 through 1957.

I am aware of the OMB passback memo that was the focus of the March 1st, 2006 hearing before this Subcommittee. I am concerned that the policies outlined in that memo are designed to prevent deserving workers from receiving benefits when there are inadequate records to reconstruct radiation dose.

I testify here today as an advocate for claimants, workers and for survivors of former workers. I am not a doctor nor a health physicist nor a Government scientist. I am just a regular person who witnessed firsthand the nearly insurmountable hurdles that ordinary people must endure just to make it through the claims process.

I am a person who has stood by countless bedsides as workers and survivors alike died while waiting for compensation. I am a person who knows quite well that without the remedy of a Special Exposure Cohort and a balanced advisory board, too many deserving claimants with inadequate dose records will be wrongly denied.

In July of 2001, I filed a claim on my mother's behalf. After months of no movement, I began to call meetings, conduct research and videotape workers.

I learned that not one Mallinckrodt claim had been paid nor at that point even dose reconstructed, so I filed FOIA requests and gained access to private archives which yielded thousands of internal company and Government memos and documents.

I was astounded and in utter disbelief at the appalling and horrific conditions that these employees worked in. Some were excreting milligram quantities of uranium per day in their urine and some were showing signs of kidney failure.

The AEC and Mallinckrodt management both saw this as an opportunity for studying the effects of radiation on workers, although simultaneously wary of the liability to the Government and contractor.

There were memos indicating scant if nonexistent monitoring data for the earlier years, documents that questioned the reliability of the exposure data, and there was no individual employee monitoring for actinium, thorium or protactinium.

In October 2003, my mother's claim was dose reconstructed and a positive finding was rendered. I felt deeply that although we were greatly blessed with this decision, in light of what I had found I owed it to my father's co-workers to continue to help them. And I also promised God that it would help these workers.

In July of 2004, I filed an SEC petition for the period of 1942 through 1957 at Mallinckrodt St. Louis plant. NIOSH broke this petition into three parts because they intended to recommend approval for certain years and denial of others.

In February 2005—I am sorry, at the same February 2005 meeting, NIOSH recommended that the board deny the SEC for the 1949 to 1957 time frame. I apologize, I missed one.

In February 2005, NIOSH recommended a partial approval of the SEC covering the 1942 to 1948 time frame. The advisory board concurred in a March 11th, 2005 letter to Secretary Michael Leavitt.

At that same February 2005 meeting, NIOSH recommended that the board deny the SEC for the 1949 to 1957 time frame. However, the board did not vote on NIOSH's recommendation for this time period for several reasons.

First, the board and myself were told that NIOSH had just found five to six additional boxes of monitoring records that covered the post-1949 time frame.

Second, NIOSH stated that the audit contractor's review of the Mallinckrodt site profile was now obsolete, because NIOSH had already developed a revised site profile. The board wanted an up-to-date audit on NIOSH's most recent site profile.

Thirdly, NIOSH announced to us in the midst of deliberations that they had just obtained a 33-page memo which they asserted would indicate that records that had been previously believed to be missing, destroyed or unreliable were now presumed found, preserved and transferred.

The board, as well as myself, demanded to see this memo. It later turned out that the memo had been available to NIOSH for months and that claims NIOSH made regarding this memo were exaggerated.

This seemed to me to be a tactic of sandbagging and to defeat the SEC petition for the latter years. The February meeting was, as it turned out, just the beginning of a board review lasting 6 months.

The board examined the fact that there was no monitoring data for the most radio-toxic substances at that plant. Finally, on August 27th, 2005, the board met in St. Louis.

After 2 years of work on the Mallinckrodt site profile, 6 months of advisory board deliberation, four separate audit reports, four board meetings, four Subcommittee or working group meetings and numerous conference calls, memos and hundreds of hours spent by NIOSH, SCNA, the advisory board members as well as myself, new data continued to emerge, even as late as the day of the advisory board meeting.

The board voted 6-4 to recommend approval for the SEC from 1949 to 1957, noting that a certain point of a decision had to be made with data in hand and not what might be developed in the future.

As I look back, I realized how difficult this process is for a layperson. New data was constantly being discovered. They were changing technical approaches and modified evaluation reports. It was like shooting at a moving target.

Without a balanced advisory board and an audit contractor with unimpeachable scientific integrity, our SEC would have never received a fair hearing. We also had a dedicated support from the Missouri congressional delegation, especially Senator Kit Bond, who spoke at three board meetings and whose staff reviewed every document.

Without a powerful legislator pushing back on our behalf, I fear that we would have been undermined by those who wanted to defeat this Special Exposure Cohort.

Mr. HOSTETTLER. Ms. Brock, could you summarize, as time has expired?

Ms. BROCK. I can. This is the last one.

Mr. HOSTETTLER. Okay.

Ms. BROCK. The entire process requires an enormous amount of effort even from the very beginning, and as a petitioner I was already at an automatic disadvantage.

I was up against others who had enormous resources at their command to defend their view. They brought to the table their own biases, and it is just a terribly difficult process.

And I thank you for the time, and I would be happy to answer any questions.

[The prepared statement of Ms. Brock follows:]

PREPARED STATEMENT OF DENISE BROCK

Testimony of Denise Brock

United Nuclear Weapons Workers

Before the

Subcommittee on Immigration, Border Security and Claims

Committee on the Judiciary

U.S. House of Representatives

"The Energy Employees Occupational Illness Compensation Program Act – Are We Fulfilling The Promise We Made to These Veterans of the Cold War When We Created the Program?"

July 20, 2006

Denise Brock
11230 Veterans Memorial Parkway
Lake Saint Louis, Missouri 63367
636-485-5450
db_dcch@hotmail.com

INTRODUCTION

My name is Denise Brock. I am a co-leader of United Nuclear Weapons Workers, based in St. Louis, Missouri. I thank the Subcommittee for holding a series of hearings on the Energy Employees Occupational Illness Compensation Program and for inviting me to appear here today.

My father, Christopher Davis, worked for Mallinckrodt Chemical Works in St. Louis, Missouri from 1945 until 1958. He worked there during the years when Mallinckrodt processed African pitchblende uranium ores, and workers received radiation doses in excess of 1000 rem to the lung, according to a formerly secret Atomic Energy Commission memo. Today, the maximum allowable dose is 5 rem per year to the whole body.

When I was a small child, my father was diagnosed with an oat-cell carcinoma of the left lung. The cancer was later metastasized to the brain and liver. He also developed leukemia and passed away while I was still quite young.

My statement will relay my experience as a lead-petitioner for a Special Exposure Cohort (SEC) for Mallinckrodt employees, under EEOICPA, which covered the years 1942-1957. I am aware of the OMB Passback memo that was the focus of the March 1st, 2006 hearing before this Subcommittee. I am concerned that the policies outlined in that memo are designed to prevent deserving workers from receiving benefits when there are inadequate records to reconstruct radiation dose.

Although my mother was the first person compensated at the Mallinckrodt facility, I have chosen to continue advocacy on behalf of the workers and their families who were devastated by cancer.

I testify here today as an advocate for claimants, workers, and for survivors of former workers. I am not a doctor, nor a health physicist, nor a government scientist. I am a person who has witnessed first hand the nearly insurmountable hurdles that ordinary people must endure to make it through the claims process. I am a person who has stood by countless bedsides as workers and survivors alike, die while waiting for compensation. I am a person who knows quite well that without the remedy of a Special Exposure Cohort and a balanced Advisory Board, too many deserving claimants with inadequate dose records will be wrongly be denied.

MALLINCKRODT CHEMICAL BECOMES A PRODUCER OF URANIUM FOR THE U.S. GOVERNMENT

In April 1942, Dr. Arthur Holly Compton, Chairman of the National Academy

of Sciences Committee to Evaluate Use of Atomic Energy in War, and a physicist from Washington University, went to Edward Mallinckrodt in St. Louis and asked him if his company would like to sign to a top-secret government project purifying uranium for the use in the atomic bomb. Mallinckrodt agreed and signed a contract with the Manhattan Engineering District—the branch of the military charged with developing the atomic bomb.

By July of 1942, Mallinckrodt was producing a ton of pure uranium a day for the Manhattan Engineering District. Workers were never told what they were working with. Uranium was given code names like "tube alloy," "biscuit," and "juice." In December of 1942, Enrico Fermi triggered the first self-sustaining nuclear reaction in Chicago using uranium purified by Mallinckrodt at the St. Louis plant.

WORKING CONDITIONS AT MALLINCKRODT

Mallinckrodt's downtown St. Louis facility was not originally designed for manufacturing and processing uranium. One uranium facility was formerly a sash-and-door plant, the other was a chemical processing plant. None were expected to operate for more than a few months. Instead, they ran from 1942 until 1957 and processed 50,000 tons of uranium. This was a highly secretive operation, according to memos by a former plant official.

The plant refined Belgian Congo Pitchblende ore, which contained 65% uranium. This was a very rich source of uranium, compared with ores that had as little as 1/10% uranium.

Due to high concentration of uranium, the Belgian Congo Pitchblende ores contained high concentrations of radium, as well as U-235 and U-238 decay chain progeny, including significant amounts of Thorium-230, Actinium-227 and Protactinium-231.

NIOSH has described Mallinckrodt's plant as a sloppy operation. During an October 2003 presentation before the Advisory Board on Radiation and Worker Health (ABRWH), Jim Neton, a senior NIOSH scientist, states:

> *"I would characterize it as a somewhat dirty operation...I would characterize this as a fairly messy operation, even in the '56 time frame."*

A 1950 report by Merrill Eisenbud, the director of the Atomic Energy Commission's (AEC's) Health and Safety Laboratory (HASL), stated:

> *"Early in 1947, the NYOO evaluated the potential hazards in these plants and,*

after finding them to be considerable, recommended the necessary corrective actions."

Eisenbud continued:

"It was recognized that pending the elimination of excessive exposures, here was a unique opportunity to conduct clinical studies on a fairly large size population whose radiation exposure for several years had been in excess of any group for which data are available."

Eisenbud reported that body parts from Mallinckrodt workers were exploited as a resource for study, including two cadavers and a workers' knee. Bone and cartilage were analyzed for uranium uptakes. Workers were excreting milligram quantities of uranium per day, and some were showing signs of kidney failure due to uranium poisoning.

The AEC and Mallinckrodt management both perceived this as an opportunity for studying the effects of radiation on workers, while simultaneously wary of the liability to the government and the contractor. A January 31, 1951 memo from the AEC's Eisenbud revealed that 17 workers had dose rates of 1,000 rem or more to the lung. The memo added:

"About a year ago you asked if it would be possible for us to estimate our potential liability among the long term Mallinckrodt employees. As I explained at that time, you presented a rather knotty problem, one which, in the present state of knowledge, would not be answered to a first approximation."

After he retired from his job, Mallinckrodt's safety manager, Mont Mason, revealed to Tom Mancuso, an AEC researcher, that Mallinckrodt's management was also concerned about its liability from overexposing workers. An October 3, 1972 memo, which I found in the in the basement of a home in St. Louis, discussed a 1949 uranium dust exposure study by Mallinckrodt which led to the forced removal of thirty-four employees from further exposure. Mason's memo noted that this was a "potentially explosive issue" in light of growing employee awareness of the presence of radioactive materials. Mason wrote:

"Carefully drafted explanations and responses were prepared in advance of announcing the transfer of people. Managers, supervisors, medical staff and health department staff were all coached and coordinated."

"As part of the caution and upon advice of attorney, a formal report was never prepared on this (1949 dust) study. Thus, there was no document to

subpoena, only lists of names with numbers, and work sheets. There was no lengthy description of the basis for calculations to be pulled apart by the scientific community, with the possibility that such controversy would undermine employee confidence in the company's safety measures."

This study set a maximum exposure level--called an "I" factor. The "I factor was not publicly revealed until a memo surfaced from the Oak Ridge archives in February 2005 which disclosed that the "I" factor was 600 rem. Mallinckrodt removed workers when they had received a cumulative 540 rem to the lung (or 90% of 600 rem) from uranium dusts. By comparison, during the 1950s, AEC set the allowable annual dose limit of 15 rem to the lung. No wonder Mallinckrodt's lawyers did not want this information released, as it would most certainly have been pulled apart by the scientific community.

The Advisory Board's audit contractor, Sanford Cohen and Associates, interviewed workers about hazards and radiation monitoring as part of the SEC Evaluation process. One site expert described how they made uranium metal "derbies," by packing uranium salts into a "bomb" with magnesium and heating it in a furnace:

"The early Plant 4 was very dirty. At Plant 4 they did everything by hand and by guess and by gosh.

An employee with long experience stated:

"At Plant 4 nothing was done about nothing: live it, breathe it, eat it."

Site experts reported:

- Spills of uranium ore during handling of drums when loading ore into the digesters
- Spills of "raffinate" during or transport of loading of drums
- Overflow of digester tanks after high quality ores were added
- Severe fumes from digester tanks after high quality ores were added
- Uranium fires

One worker was hospitalized after receiving burns from liquid spilling all over his body during a process used for extracting thorium from the raffinate. The raffinate was on the alkaline side. It would foam and boil, spill over and go onto the floor.

1942-1948 SPECIAL EXPOSURE COHORT WAS JUSTIFIED ON LACK OF EXPOSURE RECORDS

In July of 2004, shortly after HHS published its Special Exposure Cohort (SEC)

regulations, I filed an SEC petition for the period from 1942-1957 at Mallinckrodt's downtown St. Louis plant. NIOSH broke the SEC Petition into three parts, because they intended to recommend approval of certain years and denial of the others.

The petition documented that there was non-existent or scant internal radiation monitoring data for the earliest years. It provided documents which questioned the reliability of exposure records, and it demonstrated that there was no individual employee monitoring for some of the most radiotoxic isotopes which were contained in the so called "raffinates" (Thorium-230, Actinium-227 and Protactinium-231).

In February 2005, NIOSH recommended a partial approval of the SEC covering the 1942-1948 time period. The Advisory Board concurred in a March 11, 2005 letter to Secretary Michael Leavitt. They cited four specific factors:

> 1) All employees identified in these petitions worked in one of the earliest industrial environments where multiple forms of uranium were handled and processed at a time prior to establishment of universal radiation safety controls and standards.
>
> 2) There is no record of radiation monitoring or protection programs in this facility from 1942 to 1945.
>
> 3) A limited monitoring program initiated by the contractor in 1945 provides some records, but with inadequate detail to allow development of accurate exposure data for all affected employees prior to 1948.
>
> 4) Following extensive effort seeking, retrieving, and reviewing all available information, NIOSH concluded that it is likely that radiation doses at the Mallinckrodt Chemical Works Destrehan Street Uranium Facility could have endangered the health of members of this class.

1949-1957 SPECIAL EXPOSURE COHORT WAS ULTIMATELY APPROVED AFTER A RIGOROUS 6 MONTH REVIEW OF UNMONITORED EXPOSURES

In February 2005, NIOSH recommended that the Board deny the SEC for the 1949-1957 time period, because NIOSH claimed they had sufficient monitoring data to reconstruct radiation dose. However, the Board did not vote on NIOSH's recommendation for the 1949 -1957 time period at this time for several reasons:

First, the Board was told that NIOSH had just found 5-6 additional boxes of monitoring records that covered the post 1949 time period. The Board wanted to review

these records.

Second, NIOSH stated that the audit contractor's review of the Mallinckrodt Site profile was now obsolete, because NIOSH had already developed a revised site profile. The board wanted an up-to-date audit on NIOSH's most recent site profile.

Third, NIOSH announced to the Board in the midst of deliberations that they had "just" obtained a thirty-three page memo which, they asserted, would indicate that records that had been previously believed to be missing, destroyed or unreliable, were now presumed found, preserved and transferred. The Board and the petitioner demanded to see the memo. It later turned out that the memo had been available to NIOSH for months, and the claims NIOSH made regarding the memo were exaggerated. This last minute maneuver appeared to be a tactic to sandbag this petitioner and defeat the SEC Petition for the 1949-57 time frame. No one has ever been held to account for this unprofessional conduct.

The February meeting was, as it turned out, just the beginning of a Board review lasting 6 months.

Throughout this review, NIOSH argued that the SEC should be denied because they claimed they could extrapolate a "worst case" dose estimate based on data from Mallinckrodt wastes that were stored in silos in Fernald, Ohio. However, this did not answer the question of how NIOSH would reconstruct dose for workers who were never monitored for thorium-230, actinium-227 and protactinium-231, which were concentrated in the so called "raffinates." When inhaled, these compounds delivered several orders of magnitude more radiation to certain organs than uranium exposure.

Leading up to the April 25-27, 2005 Board meeting, there were several teleconferences (April 5 and 11) with Advisory Board members, NIOSH and the audit contractor. While the Mallinckrodt audit was completed before the April Board meeting, there was not enough time to resolve all of the issues, because a previous Advisory Board recommendation supporting approval of a Special Exposure Cohort in at the Iowa Army Ammunition Plant had to be revisited instead. The ABRWH tabled the vote until the July, 2005 Advisory Board meeting.

On July 5-7, 2005, the ABRWH met in St. Louis. The Board expressed concern about the amount of time claimants had been waiting for an answer on the SEC petition and the fact that claims had been held in abeyance. NIOSH asserted that they could have technical issues related to the "raffinates" worked out in a month, and complete all dose reconstructions on the remaining workers within 4 months. Rather than accept this assertion at face value and approve the SEC, the Board asked for "proof of process" using real cases.

On a July 26, 2005 teleconference, NIOSH surprised everyone by jettisoning their previous technical approaches to dose reconstruction, and claimed to have a new method which had not even been evaluated. The shifting explanations raised even more questions as NIOSH alternated methods to demonstrate it was feasible to estimate dose with sufficient accuracy.

At the August 27, 2005 the Board met in St. Louis. After 2 years of work on the Mallinckrodt site profile, 6 months of Advisory Board deliberation on the Mallinckrodt SEC petition, four separate audit reports, four Board meetings, four sub-committee or working group meetings, numerous conference calls and memos, and hundreds of hours spent by NIOSH, SC&A, ABRWH members, as well as the petitioner, new data continued to emerge, even as late as the day of the Advisory Board meeting.

The Board voted 6-4 to recommend approval of the SEC for 1949-1957, noting that at a certain point a decision had to be made with the data in hand, and not what might be developed in the future. Between October 2003, when NIOSH published its initial Site Profile, and August 2005, when the Board concluded it deliberations, there was no validated proof of process to demonstrate the feasibility for reconstructing internal dose for the "raffinates." (There was adequate data to estimate external dose).

When EEOICPA was enacted, Senator Jeff Bingaman, a lead sponsor, explained that "feasibility" in estimating radiation dose with "sufficient accuracy" meant that it could be done in a timely manner; that it would not be excessively costly; and it was technically achievable.

Given the 5 years since the law was passed and the two years of deliberations on Mallinckrodt, the Board had to account for the "feasibility" of estimating dose. NIOSH was ignoring the "feasibility" test, and was spending unlimited resources and unlimited amounts of time trying to develop models to reconstruct dose. These are aging workers, and time was running out to make compensation decisions for the ones who were still alive.

A September 15, 2005 Advisory Board letter to Secretary Leavitt listed the factors supporting approval of an SEC:

> 1) Workers were employed at a facility that processed materials during the early time period for the production of nuclear weapons. Radiation monitoring methods for all isotopes were under development at that time leading to significant gaps in the monitoring of these workers in comparison to current monitoring programs.

2) There is relatively little information available for estimating thorium, actinium, protactinium. NIOSH's approach to dose reconstruction no longer relies on individual monitoring but rather plant-wide air monitoring data, which is, itself, not even isotope specific. These data have to be converted into isotope specific activity using residue fraction values which have not been validated. As such, NIOSH has not demonstrated that it can conduct individual dose reconstructions with sufficient accuracy.

3) While there are many internal exposure monitoring records for uranium and some for radium, there are no individual bioassay records for Plant 6 workers for high consequence isotopes extracted from the Pitchblende ores and contained in the AM-7 and Sperry Cake residues (Thorium-230, Actinium-227, and Protactinium-231). There are only bioassay data for 2 months in March and April 1955 for the Plant 7E workers (Thorium recovery operations) although operations continued in 1956 and 1957.

4) There are concerns about the lack of a method to adjust for the angle of incidence of external dose monitoring. The adjustment has a significant impact on the interpretation of the monitoring data, and a final method needed for individual dose reconstruction is not yet available.

5) There are concerns about the validity of the breath radon data being used for dose reconstruction. Radium intakes based on radon breath data were taken from a secondary data source, and they have not yet been validated against source data. In response to questions about the validity of the data, NIOSH has just started an effort to obtain data from the original records. This effort has not been completed, and the Board has not been able to evaluate the results of this effort.

6) The Board has reviewed data which confirms that radiation exposures at the Mallinckrodt facility during the time period in question could have endangered the health of the members of this class.

As I look back, I realize how difficult this process is for a lay person. New data was constantly being "discovered." NIOSH changed its technical approaches and modified its Evaluation Report. I felt like I was shooting at a moving target. NIOSH expended a lot of money in resisting this SEC petition, as if they were defending litigation. The Advisory Board's vote in support of the SEC petition was viewed by NIOSH and its contractor, Oak Ridge Associated Universities, as a defeat.

Without a balanced advisory board and an audit contractor with unimpeachable

scientific integrity, our SEC petition would never have received a fair hearing on the merits.

In addition, the workers had dedicated support from the Missouri Congressional delegation—especially Senator Kit Bond. Senator Bond spoke at three Board meetings, and his staff reviewed every document. Senator Bond took note as the Department of Labor, the Department of Justice and OMB had meddled with the Iowa SEC Petition several months earlier. Without a powerful legislator pushing back on our behalf, I fear that we would have been undermined by the bureaucrats who wanted to defeat this Mallinckrodt SEC Petition.

THE OMB PASSBACK MEMO

As I see it, the OMB Passback memo was a backlash against the precedent established with respect to the Mallinckrodt SEC approval.

OMB's memo says that "to contain the growth in benefits" from Special Exposure Cohorts, OMB proposes to alter the composition of the Advisory Board, to impose "constraints" on the audit contractor, and ultimately, if they want to deny the SEC, to pre-empt the HHS Secretary.

Is it a coincidence that the OMB's options were released only few months after the Mallinckrodt SEC Petition was approved in October 2005?

Is it coincidental that two of the Advisory Board members, including a prestigious scientist, who voted to approve the Mallinckrodt SEC were removed in January, 2006? Who recommended their removal? Were they deemed unworthy because they might provide the margin of difference in approving SECs in the future?

In the context of the OMB's stated desired to reduce benefit costs, does the OMB's option of "addressing any imbalance" on the Advisory Board mean that the Board will be permanently tilted with appointees who are biased towards denying SECs?

Losing a balance on the Board would surely frustrate the purpose of the Act, and undermine the program's credibility.

We understand that DOL was commended by OMB for highlight the cost of SECs. Why is DOL so concerned about reducing the number of Special Cohorts? DOL's program is funded through mandatory spending, and is not adversely impacted.

RECOMMENDATIONS

1) If the independence of the Advisory Board is going to be "rebalanced" to reduce SEC approvals, or the agency staff responsible for this program can't resist the temptation to turn the Board into a rubber stamp, Congress should amend the law to have Board appointments made by Congress on a bipartisan basis.

2) The DOL proposed to eliminate funding for the work of the Advisory Board and its' audit contractor in their budget request to Congress. Congress may need to ensure funding is provided through appropriations other authorizing legislation. Without an open and well-informed process for Board deliberation, claimants will be disadvantaged.

3) If the Administration is planning to require consultation or clearance on each SEC, and thereby pre-empt the authorities of the HHS Secretary, perhaps Congress can place limits on the Executive Branch through modifications to the law, and through appropriations language barring any such Administration clearance of SEC designations.

4) The DOL Ombudsman's responsibilities should be expanded to cover claimants under Subtitle B, and to assist claimants with their appeals.

5) Taking years to try to recreate industrial history from 60 years ago based upon scant records, and then concluding that a sufficiently accurate radiation dose estimate can be developed based on extrapolations and interpolations, is turning the law on its head. The definition of "feasibility" in the Special Cohort Rule excluded the requirements set forth by Senator Bingaman in the legislative history—that dose reconstruction could be done in a timely manner; that it was not excessively costly; and it is technically feasible. The Rule should be revised to fully incorporate Congressional intent.

Mr. HOSTETTLER. Thank you.

At this time, the Chair, with unanimous consent, recognizes the gentlelady from Texas, Ms. Jackson Lee, for purposes of questioning.

Ms. JACKSON LEE. Mr. Chairman, thank you very much, and I will have to be brief.

But, Ms. Brock, your statement, "the complexity is overpowering and overwhelming"—and it confirms that we must have a fix.

My simple question to you, Mr. Smythe, is a yes or a no, and that is I heard the details that OMB had not planned or was not engaged in changes. Can you affirm, confirm in writing, that the Administration is not in the process of looking for cost containment and therefore, if you will, through that process inhibiting this normal flow of petitions by the special cohorts?

Mr. SMYTHE. I am sorry, I didn't understand, course containment?

Ms. JACKSON LEE. Cost containment.

Mr. SMYTHE. We are not making any changes to achieve cost containment.

Ms. JACKSON LEE. Thank you.

Ms. Brock, it is a question of including everyone, frankly, and the legislation that we have authored includes the atomic workers. My question, is that a good thing to do, to include those who likewise were not able to document their particular exposure because they happened to be subcontractors?

Ms. BROCK. It is a tremendous thing, and I am very excited about that. It is just a matter of equity. And I am very pleased.

Ms. JACKSON LEE. Let me, first of all, express my sympathy for your father. But your detailed explanation will give us a road map to be more effective. And I believe this Committee, as you have determined, is sincere.

And I believe that as the evidence is put forward—and I know there will be more detailed questions for you, Mr. Smythe—that we will find a way to ensure that cost containment is not going to determine who receives benefits under this regulation.

And I hope the legislation will help clarify it and help continue to provide relief to those who need to provide relief.

I yield back to the Chairman.

Mr. HOSTETTLER. I thank the gentlelady.

At this time, I have questions for the panel.

First of all, Mr. Smythe, there are five options to control the cost of benefits under EEOICPA suggested in the passback. I would like to review the OMB's position on each of the five options outlined therein, so I have a series of questions.

Will there be any Administration clearance of SECs?

Mr. SMYTHE. No.

Mr. HOSTETTLER. Has the Administration reviewed the balance of the advisory board in the past 7 months since the passback was developed?

Mr. SMYTHE. By balance, do you mean the membership?

Mr. HOSTETTLER. Yes. Yes, I am sorry.

Mr. SMYTHE. I really can't speak to the membership of the board. That is not something that OMB has a role in.

I can say that as Director Portman wrote to Members of Congress on this issue that the Administration is committed to maintaining the statutory requirement of a balance of scientific, medical and worker perspectives on the board.

Mr. HOSTETTLER. Thank you. Has OMB made presidential personnel aware of the contents of the passback?

Mr. SMYTHE. I don't know the answer to that. I think it is probably useful if I could take a minute to describe what a passback is.

Mr. HOSTETTLER. Sure.

Mr. SMYTHE. I think there has been a great deal of confusion about what is going on here and a misunderstanding that we are trying to clarify. First of all, a passback is not the Administration's policy. It is not the President's budget, not the President's policy, not the Administration's policy.

A passback, just to give the Subcommittee some background—there is a process that we use to put together the budget. That process begins in September when the agencies submit to us their proposals, all of their proposals in terms of what they want to do in the budget.

We review those proposals in the October time frame, and some time usually in late November we pass back our proposals back to them. It doesn't represent the—the agency's submissions to us don't represent Administration policy and our passbacks back to them does not represent Administration policy.

This is a very rigorous process where we go through various options and so forth. In this instance, none of these options were accepted in terms of what the President's ultimate policy was and what was in the President's budget.

So we are not pursuing any of these items that were listed. It was inappropriately leaked. It has now been inappropriately characterized as Administration policy, which it is not.

Our policy is to implement EEOICPA and to make sure that it is implemented pursuant to the law and that sick workers get their full entitled benefits in a timely manner.

Mr. HOSTETTLER. Right. And I appreciate that description, and as you have just said that none of the issues in the passback have been implemented by the Administration, is that—that is true——

Mr. SMYTHE. That is correct.

Mr. HOSTETTLER [continuing]. That you have just mentioned? And you could understand our concern, because it is—although probably possibly inappropriately leaked, as you characterize, it is insight for Congress and the American people to see the process, because we don't see, as a matter of presidential privilege, executive privilege, what happens on either end of that passback situation.

And we did get a glimpse of what was being discussed in that passback. And because of that, because of those concerns, because of concerns arising out of that and the deviation from the intent of the law that could have been—could have resulted from the creation of any of these or all of these suggestions into the administration of the program caused our concern.

And I appreciate your testimony that none of those have taken place. It is very, very helpful.

Dr. Wade, your position must give you a more comprehensive insight into the positive or negative impact any one component of the program has on the success of the program and the confidence of the claimant community in the claims processing system.

Can you share your thoughts about what is wrong and right with the program as it is currently functioning?

Mr. WADE. Yes. I mean, to the issue of claimant confidence within the program, as Congress enacted this program, it is not that people who have cancer would be compensated if they worked at these facilities.

The Congress decided that a scientific determination needed to be made if an employee's cancer was more likely than not the result of that exposure.

And my agency is in the position of trying to reconstruct the exposure or the dose of individuals and then provide that information to the Department of Labor, who would then make a determination as to compensability.

In the work that we have done to this date following the best science that we can, it turns out that, on average, 70 percent of the people who make application are denied. Twenty-seven-plus percent are approved, but a greater percentage is denied.

So the difficulty the program has is that a Government that they believe once lied to them about their exposure and their work and what they were doing is now telling them that the cancer that they suffer from or that their loved ones died from is not the result of that exposure.

And that is an extremely difficult task for us to undertake from a communications point of view. That is one of the major hurdles we face in the program, is to—how to practice the science, but how to communicate the results of the science in a way that is sympathetic and understandable to people who feel that they have been lied to. And that is a huge problem and a huge hurdle that we face within the program.

I think on the positive side of the administration of the program, the process has been extremely transparent. The work of the advisory board is there for all to see and to comment upon.

And the advisory board has made use of a contractor that has supported them in as many ways as possible, picking apart the work that the Government has done, trying to find fault with it, in this way, as you said at the last hearing, representing the best interest of the workers. Somebody is looking out for their best interest and looking at their perspective and bringing those interests forward.

So I do think that the transparency of the program and the use of an aggressive process of peer review is the strength of the program. I also think that the strength of the program is that we have accomplished now 14,000 dose reconstructions. There has been over half a billion dollars of compensation resulting from that.

Hopefully that will show people that the Government is serious about it work and its program. It will never answer the hard questions that were in people's minds when the Government says your cancer was not caused by the exposure based upon a scientific process that is very hard to understand and a Government that has lied to them before.

So we have done a lot of positive things in the program, but this fundamental issue of communicating to workers that have felt that they have been lied to before is a tremendous challenge for the program, and one we need to continue to work to overcome, but it is a very, very difficult challenge that we face.

Mr. HOSTETTLER. Thank you, Dr. Wade.

The Chair recognizes the gentleman from South Carolina for 5 minutes for questions.

Mr. INGLIS. Thank you, Mr. Chairman.

Mr. Smythe, as I understand it, the program has paid benefits of more than $2 billion to date and is projected to spend an additional $4.3 billion, I believe it is, over the next 5 years, which is considerably above the original estimate of $2.3 billion for the same period.

Are those numbers about right?

Mr. SMYTHE. That is correct.

Mr. INGLIS. So I assume it is part of the job of OMB to oversee the implementation of major programs like this. Is that right? I mean, that is what you do.

Mr. SMYTHE. Yes. Yes, we go through the budget, the annual budget cycle. We review all programs and all spending. We both look at various options in terms of how to address those programs and we also are in the process of constantly revising the estimates in terms of what these programs are going to cost.

In this case, this program is an entitlement. So we are constantly taking a look at it and working with the agencies to get a good sense in terms of what the costs are going to be for the program.

Mr. INGLIS. And as I understand it, though, from your testimony here and from other sources, there is no effort by OMB or the Administration to reduce that level of funding.

Mr. SMYTHE. No, sir.

Mr. INGLIS. So having—I suppose your job is you are monitoring the growth of the program, figuring out where to get the dollars to cover it, I suppose, but there is no effort by the Administration to reduce the expenditures.

Mr. SMYTHE. No, the problem has grown. Our current estimates that—the program total outlays are going to be $854 million the year we are in, 2006. We estimate that that will climb in the—pardon me, it is $870 million, climbing to $1.1 billion in 2007 on the program.

Our policy, as I have stated in my testimony, is to—this is an entitlement program. Our policy is to implement it. We have paid during the Bush administration over $2 billion in benefits. We have done 23,000 claims.

This is a program where workers—as Ms. Jackson Lee said, these are workers that helped build the nuclear weapons complex. They helped us win the Cold War. They are due compensation according to the law, and we want to provide them that compensation but in accordance with the law.

Congress specified procedures that Dr. Wade specified, and we want to make sure that those procedures are followed to get people their full compensation in a timely manner.

Mr. INGLIS. And so I am sure it is important to a lot of people, including some people in South Carolina at the Savannah River

site in Aiken, South Carolina, not in the 4th District of South Carolina, but close enough to be very concerned about those folks.

Is the reason for the growth in the program expenditures increased health care cost, maybe people getting into the more expensive phase of the disease of cancer, or is it more awareness of the program or is it all three of the above?

Mr. SMYTHE. I probably ought to defer to Dr. Wade or someone else who would be more familiar with the details of the program. I think the program did—it took a while in terms of getting this program started.

There are at least—there is HHS, and the Department of Labor is involved. They have to gather data from the Department of Energy. There is an advisory board. So it took them a while to get started.

As I understand it, there are lump-sum benefits that can be made, but I believe prospective medical care is also provided. I don't know how that factors into the cost of the program. I would be happy to take a look at that and try to submit something to the record for that.

Mr. INGLIS. And, Dr. Wade, do you have any sense about what is the cause of the growth?

Mr. WADE. I mean, it would be speculation on my part, but I would offer some. I do think that when the specific work of gathering the information, putting the record together and attempting to reconstruct dose was undertaken, I think many of us found that the information that we hoped to find was not as complete as we might have expected.

I think that has led to two things. I think the act itself says to us use science when at all possible, but if science is not available then give the benefit of the doubt to the claimant.

So I think as you encounter situations where the data is not complete or as complete as people might have expected it to be, then giving the benefit of the doubt to claimant might have resulted in a greater level of compensation.

I think it also goes to the issue, then, of the Special Exposure Cohort. If the data is not available that would allow us to estimate the upper limit of dose, then we are brought to the provision of the Special Exposure Cohort.

And I think if you sort of track the history of that process as the board has deliberated and as the HHS Secretary has decided, possibly the data that we thought would be there is not there as completely as might have been hoped. And I think that has led to possibly a greater use of the Special Exposure Cohort than might have imagined.

So I think it is really a byproduct of investigating what data is available and then making the appropriate judgments based upon what was found.

Mr. INGLIS. Thank you.

Thank you, Mr. Chairman.

Ms. BROCK. Mr. Chairman, I am sorry. Could I add something to that?

Mr. HOSTETTLER. I am going to go into a second round of questions and, Ms. Brock, I actually have some questions for you, and you can address that question at that time.

Ms. BROCK. Okay.

Mr. HOSTETTLER. I do have a question for you, Mr. Smythe. Have you just testified that the OMB projected an increase in Part B payments? Because that is what the passback memo that we are discussing today is discussing—is subject to.

ESA, the Employment Standards Administration, is to be commended for identifying the potential for a large expansion of the EEOICPA Part B benefits through the expansion of Special Exposure Cohorts.

Is it your testimony that the Administration and the OMB projected an increase in Part B payments?

Mr. SMYTHE. I just have total data. I can provide for the record in terms of what are assumptions are or our estimates are for the breakup for the various programs.

In our latest—we just sent up to Congress an updated budget forecast. It is called a mid-session review. It was submitted a week or so ago. In that, the most recent actual for total expenditures for this program is $615 million.

In February, we thought that that would grow to $1.6 billion in 2006. It did not reach that. It is now projected to grow to $870 million in 2006, and it is projected to grow to $1.1 billion in 2007.

Mr. HOSTETTLER. And that is for all of EEOICPA.

Mr. SMYTHE. Yes, that is all in. That is all of EEOICPA, yes.

Mr. HOSTETTLER. Right. And you are familiar with the passback memo that we are discussing.

Mr. SMYTHE. Yes. I am very familiar with the passback memo, and again, these numbers aren't associated with the passback memo.

Mr. HOSTETTLER. Right.

Mr. SMYTHE. These numbers are what we think is going to happen under current law and under our current policy, which is not the passback memo.

Mr. HOSTETTLER. Right, and the passback memo does not address those issues. It addresses specifically, and the concerns we have address specifically, one part of it, which is the topic of the hearing, and that is the Part B payments.

And I appreciate your testimony, but if you could provide for us your understanding of the presidential budget projection for this entitlement program initially for Part B, which is the subject of the hearing, and we can get the interim mid-session projection from OMB.

And once again, we appreciate the understanding of the entire—scope of the entire EEOICPA program, but the memo and the subject of the hearing have to do with the Part B that is being—where the concerns are being relayed.

Mr. SMYTHE. I just want to make sure that there is not an issue here. These numbers aren't based on the passback memo. I want to be very clear on that.

Mr. HOSTETTLER. No, no, and——

Mr. SMYTHE. These numbers are based on the Administration's policies which are to fully implement the law, and it just turned out that as we updated those estimates and worked with the various agencies, the cost in 2006 declined. The estimates of what the cost would be in 2006 declined. And they rose in 2007.

Just for the Subcommittee's information, the Congressional Budget Office does the same thing. They make estimates of entitlement programs. Their estimates are lower than ours in terms of what this program's going to cost.

Mr. HOSTETTLER. Yes. Yes. And my concern was the cost for 2006 and the projected cost for 2007.

Mr. SMYTHE. We will get you the Part B estimates, though.

Mr. HOSTETTLER. Yes. Yes.

Ms. Brock, first of all, if you could elaborate on the point that you wished to elaborate on earlier.

Ms. BROCK. And I hope I am understanding this correctly, but the CBO scoring for subtitle B was $1.8 billion for this program over 10 years, and that is including the supplemental payment of $50,000 for the uranium miners and their survivors covered under RECA.

So to date, nearly 6 years after the enactment, Department of Labor has paid out $1.59 billion in lump-sum benefits plus approximately $100 million for medical benefits under subtitle B, and this is including supplemental payments to RECA-covered uranium miners.

Mr. HOSTETTLER. Okay. Thank you. What is your response to the contention that the advisory board made an unwise decision in approving the SEC at Mallinckrodt?

Ms. BROCK. I have not ever heard that, but if that was said I am completely offended. I think it was a very wise decision. As I said, after 2 years going over this, over the site profile—just the timeliness of the second one. I mean, these people were put on hold for months upon months.

And we know that these workers were exposed to things—very highly radio-toxic things they were never monitored for. They were experimented on. And just the whole thought of every time we would go in there were either additional boxes of something, there was new methodology on how to dose reconstruct—it was constantly something.

And I think the board made a wise decision. They didn't do it frivolously. Sometimes people think they hand this out like candy on Halloween. That is not the case, believe me. This was a hard fight. And the board deliberated and just did a wonderful job, and I think they made the right decision.

And I am hurt and offended if anyone would ever think otherwise, not just for myself but for that board.

Mr. HOSTETTLER. Thank you.

My time has expired.

The Chair recognizes the gentleman from South Carolina.

I will now turn to just one last question to Mr. Smythe. A lot of discussion is had about the entitlement status of this program, which is it. With your budget experience, could you relate to the Subcommittee possibly a difference in the type of entitlement that this program is compared to, say, Social Security benefits, whereby an individual is entitled as a result of the determination that they are of a particular age or particular health status for SSI and the like, but especially an entitlement such as Social Security benefits, retirement benefits?

What is the similarities and the differences between the designation of someone being entitled to a benefit?

Mr. SMYTHE. For Social Security, you know, it is first probably important to understand what an entitlement is. Unlike an appropriation for a project or an activity—the appropriation for OMB—we are bound by our appropriation. We cannot exceed the $70 million that is appropriated to operate OMB. So we are bound by that amount.

An entitlement is different. An entitlement is you set specific criteria in law, and if those criteria are met, the Government is obligated to make a payment to you regardless of what the cost is. It is just whatever it costs, that payment is made.

In this particular program—on Social Security, just sort of thinking out loud, you know, Social Security is based on your work history, the amount of time you worked. It is based on your wages, I believe, in terms of what you are paid. It is based on your age when you retire. So those are the factors. And based on those factors, a payment is made.

I think in this program, there are—it involved a number of other issues in terms of your work history—and again, I am not an expert on this. You probably ought to get HHS to speak to it. But again, my sort of understanding of the program is it involves doing dose reconstructions in these special cohorts and so forth.

But once those determinations are made that an individual is entitled to the benefit, the Government is obligated to make that payment. And it doesn't matter what is in a budget. It doesn't matter what level is assumed. Whatever it costs, we make that payment.

Mr. HOSTETTLER. That is an excellent suggestion.

Dr. Wade, let me ask you. And I don't want you to go into the nuances of Social Security, but just me ask you, the level of subjectivity in the process for a Social Security payment versus certification as an SEC—an individual has to, for example, be determined to be 65 years of age, 40 quarters of work experience, and the like.

That is relatively objective data, is it not?

Mr. WADE. Correct.

Mr. HOSTETTLER. For Social Security.

Mr. WADE. Yes.

Mr. HOSTETTLER. Can you compare the level of objectively, subjectivity in the designation of the two entitlement programs? And once again, you don't have to go into the nuance of Social Security. I couldn't do that for you.

But when we talk about entitlement programs, we have to ultimately understand that the Government deems a person entitled. A person is not entitled because they show up and ask for a check. They are entitled as the result of the Government deeming them entitled.

And can you give me a comparison on the level of objectively and subjectivity between the two?

Mr. WADE. Okay. Well, let me talk a little bit about the EEOICPA program and then answer your question very specifically. As I understand the law, it says that a worker's cancer is shown to be more likely than not the result of their exposure.

It is not whether they have cancer or not. That is a given that they have developed cancer. The question is, is that cancer more likely than not the result of their exposure?

So what happens from a scientific point of view is you look at that worker and you try and reconstruct the dose that they were exposed to in their working life. This might come from individual monitoring samples about the worker. It might come from area samples about the location that they worked. It might come from the nature of the radioactive material that was present where they worked.

So a rigorous scientific process is undertaken to estimate the dose that they received. Then there is another step, and that is given that dose, what is the probability of causation that their cancer resulted from that dose.

There you make use of scientific evidence that has been collected through various studies of worker exposure and the occurrence of illness. There is a great deal of the data results from a view of what those people who were exposed to atomic weapons in Japan experienced in terms of the occurrence of disease.

So you have these two steps. First you reconstruct the dose. And then you determine what that dose means in terms of the likelihood that the disease resulted from the dose.

To go back to your question, this adds tremendous levels of complexity—you could use the word subjectivity—uncertainty to the process. It is much more prevalent in the process that we practice than it is in the Social Security process.

Mr. SMYTHE. Mr. Chairman, may I add one thing?

Mr. HOSTETTLER. Sure. Yes.

Mr. SMYTHE. I think Social Security, as you point out, is probably more straightforward in terms of making the benefit determination. But there are other entitlement programs where there are similar challenges in terms of identifying whether someone is entitled to benefits.

Just thinking off the top of my head, the EIPC is a program where there are certain things that have to—standards that have to be met. It is a complicated program for taxpayers to deal with before people are eligible for cash payments under that program.

SSI, food stamps—there are several programs throughout the Federal Government—there is a whole host of them where certain determinations and judgments have to be made. And in some cases, programs are going to run into similar complexity that this program would.

Mr. HOSTETTLER. And that is true. I appreciate that. And in all of those programs that you have mentioned, over the last several years we have determined that there has been high levels of fraud involved in those programs and have resulted in significant overpayments in those programs and conferring of benefits in all those programs.

I don't think that that can—that charge can be made for this program. But you are absolutely right, there is a level of complexity, of uncertainty that is there. And that is—and that is well noted.

And, Ms. Brock, once again, we have heard testimony today that—the OMB has testified that none of the five options that were

discussed in the passback have been implemented, have been put in place.

But the mere discussion of those five options gives some uncertainty to the claimant community that everything—gives heightened uncertainty to the uncertainty that is inherent in the system, inherent in the science, would it not, do you believe?

Ms. BROCK. I believe that completely. They are very mistrusting. And just something even insinuating something of such does exactly that.

And I know my testimony ran over, but I had actually prepared five recommendations just because of that, the fear that that could possibly happen.

Mr. HOSTETTLER. Thank you very much. And we have gone over our time, and I want to thank all of the witnesses for your contributions to the record. It is a very important issue, and you have been very helpful to the record and to the Subcommittee and the Congress.

Mr. SMYTHE. I have some data for you. You asked for some data.

Mr. HOSTETTLER. Yes.

Mr. SMYTHE. Just on the Part B 2006 outlays, our estimate is $485 million. 2007 outlays, our estimate is $551 million.

Mr. HOSTETTLER. Thank you. Thank you very much.

The business before the Subcommittee being complete, without objection, we are adjourned.

[Whereupon, at 3:52 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS

From the Manhattan Project to the present, tens of thousands of workers have been employed to develop, build, and test nuclear weapons for the Department of Energy and its predecessor, the Atomic Energy Commission. The Energy Employees Occupational Illness Compensation Program Act of 2000 (the Act) provides compensation if they have contracted radiation-related cancers, beryllium disease, or silicosis from employment-related exposure to radiation. They may be eligible for a lump sum payment of $150,000 and prospective medical benefits.

In Processing radiation related cancer claims, the Department of Health and Human Services (HHS), acting through the National Institute for Occupational Safety and Health (NIOSH), is required to estimate a worker's exposure to radiation, which is referred to as a "radiation dose." Sometimes, this is not possible. During the early years of the nuclear weapons programs, some of the workers were not monitored for radiation exposure, and records have been lost, destroyed, or altered.

The Act provides a remedy for cases in which it is not feasible to estimate radiation doses but it is clear that the health of workers may have been endangered by radiation exposure. Workers facing this situation may petition to be administratively designated as members of a "Special Exposure Cohort," which provides an unrebuttable presumption that certain cancers are work related. Members of a Special Exposure Cohort may be eligible for benefits if they have one of 22 specified radiosensitive cancers, and they have worked at a covered facility for at least one year in a job that exposed them to radiation.

Petitions for a Special Exposure Cohort designation are evaluated by NIOSH. NIOSH's recommendation is reviewed by the Advisory Board on Radiation and Worker Health, and then the petition is sent to HHS for a decision.

In a recent memorandum to the Department of Labor which is referred to as an, "Office of Management and Budget (OMB) passback," OMB commends the Employment Standards Administration for identifying the potential for a large expansion of EEOICPA benefits through the designation of Special Exposure Cohorts. OMB states that the Administration will convene a White House-led interagency work group to develop options for administrative procedures to contain growth in the cost of benefits provided by the program, which include discussions of the following options.

Require Administration clearance of Special Exposure Cohort determination; address any imbalance in membership of the Advisory Board; require an expedited review by outside experts of NIOSH's recommendations; require NIOSH to apply conflict of interest rules and constraints to the Advisory Board's contractor; and require NIOSH to demonstrate that its site profiles and other dose reconstruction guidance are balanced. Notwithstanding that memorandum, the Director of the Department of Labor's compensation program testified at a recent hearing before this subcommittee that cost containment is not a factor in deciding which claims to pay. This did not eliminate my concern that OMB's recommendations will be implemented and that they will have an adverse effect on the independence of the process for evaluating Special Exposure Cohort petitions. I have introduced a bill to address this problem, the Energy Employees Occupational Illness Compensation Program Improvement Act of 2006.

Among other things, it would shift the authority for making Advisory Board appointments to the Congress. It would require the HHS Secretary to abide by the recommendations of the Advisory Board, unless there is a clear error. It would estab-

lish enforceable conflict of interest requirements with respect to NIOSH's dose reconstruction contractors. And, it would eliminate unfairness by making benefits available to some subcontractor employees who worked at atomic weapons employer facilities but presently are not covered by the Act.