



# The Bush Legacy

an assault on  
public protections



# Acknowledgements

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## ***About OMB Watch***

OMB Watch is a nonprofit government watchdog organization dedicated to promoting government accountability, citizen participation in public policy decisions, and the use of fiscal and regulatory policy to serve the public interest.

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# Chapter I

## Introduction: Dismantling Government

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### A. Historical Overview

Throughout American history, periods of new government regulations protecting worker safety, public health, and natural resources (later to become “the environment”) have alternated with eras of dramatic contraction of government power, during which time these same laws were weakened, subverted, or simply overturned.<sup>1</sup> Early industrialists were accustomed to operating free of oversight and bridled at what they considered government interference in their business. Some believed they were “vice-regents of God,” answerable only to divine authority.<sup>2</sup> When laws were passed over their objections, early industrialists demanded rollbacks, using arguments that still sound familiar today. One 19th century textile mill owner, for example, warned the Massachusetts state legislature that anti-pollution laws would cause widespread harm. The changes, he said, would force him to relocate to a state with a friendlier business environment. In that case, the real victims of the regulations would be “villagers which depend upon the mills for their prosperity.”<sup>3</sup>

In its first century of existence, the rapidly industrializing United States imposed few limits on businesses and extended many benefits. The country quickly became a great world power, developed a strong national infrastructure of waterways and railroads, and experienced a higher standard of living. This system created losers as well as winners. The enslavement of Africans and their descendants and the “racial cleansing” of the native peoples from land they had lived on for thousands of years were the most egregious results of government deference to corporate and private interests. There were other casualties. By the mid-1800s, timber barons had deforested much of the eastern woodlands. As urban tenements swelled with laborers, diseases spread by unsanitary conditions regularly swept through, killing thousands. Hundreds of people at a time died in mine disasters throughout portions of Kentucky, West Virginia, and Pennsylvania, which coal companies ran as virtual fiefdoms. In 1907, twin mine explosions within



1 Mary O. Furner, “Downsizing Government: A Historical Perspective,” (Society for the Advancement of Education), November 1997. Furner identified five cycles of general federal growth and contraction, beginning with Thomas Jefferson’s “crusade against ... Alexander Hamilton’s late-18th-century centralization of power and authority in the national government.” Furner is concerned with issues of political ideology, such as republicanism vs. statism. This current narrative is more focused on the role of the competing self-interests of different groups to explain the rise and fall of regulations.

2 Kathleen Dalton, *Theodore Roosevelt: A Strenuous Life* (New York: Vintage Books, 2004).

3 John T. Cumbler, “Whatever Happened to Industrial Waste?: Reform, Compromise, and Science in Nineteenth Century Southern New England,” *Journal of Social History*, 29, no. 1 (1995).



two weeks of each other and just fifty miles apart killed more than 600 men and boys – some as young as thirteen. The number of miners killed that year was 3,242. During this era, with few regulations protecting workers, 23,000 died annually in job-related accidents.<sup>4</sup>

Surveying the damage done by decades of *laissez-faire* policies, President Theodore Roosevelt asserted the government’s “right of supervision and control as regards the great corporations which are its creatures.”<sup>5</sup> In 1906, one year into Roosevelt’s second term, Upton Sinclair’s *The Jungle* was



published, creating public outrage over the working conditions and safety of food in meat packing plants. Sinclair told of workers falling into rendering tanks and being ground, along with animal parts, into lard, and described horrible working conditions that included the exploitation of children and women. After repeated urging by Sinclair, Roosevelt sent two investigators to assess Sinclair’s claims. They concurred with Sinclair’s assessment: working conditions were deplorable. At the same time, with foreign sales of American meat falling by one-half, the major meat packers

began to lobby government to pass legislation that would pay for additional inspection and certification of meat packaged in the United States.<sup>6</sup> The lobbying by both the meat packers and Roosevelt, coupled with the public outcry, led to the passage of the Meat Inspection Act and the Pure Food and Drug Act of 1906, which established the Food and Drug Administration.

Unfortunately, the new laws did not include dating cans of meat or charging the packers for inspection costs. Nonetheless, this was an important moment for the development of federal regulation. Roosevelt also supported unions and initiated a wave of antitrust prosecutions that reduced big business’ chokehold on consumers, workers, and small businesses.<sup>7</sup> Perhaps Roosevelt’s most important legacy was making conservation a national priority.<sup>8</sup>

“In the United States,” wrote the progressive Republican, “we turn our rivers and streams into sewers and dumping-grounds, we pollute the air, we destroy forests, and exterminate fishes, birds, and mammals.”<sup>9</sup>

4 “From the Centers for Disease Control and Prevention, Improvements in Workplace Safety--United States, 1900-1999,” *JAMA: the Journal of the American Medical Association*, 282, no. 4 (1999). A century later, with worker safety regulated by the government, annual on-the-job-related deaths have been reduced to 5,840, even with a far larger workforce. If workers were still dying at the same rate they were in that earlier era, the annual death toll would be 88,755. See also AFL-CIO, “Death on the Job: The Toll of Neglect,” April 2008, online at [http://aflcio.org/issues/safety/memorial/doj\\_2008.cfm](http://aflcio.org/issues/safety/memorial/doj_2008.cfm).

5 Edmond Morris, *The Rise of Theodore Roosevelt* (New York: Coward, McCann and Geoghegan, 1979).

6 Lawrence W. Reed, “Of Meat and Myth,” *The Freeman*, November 1994, online at <http://www.mackinnac.org/article.aspx?ID=7229>.

7 Lewis Gould, *Grand Old Party: A History of the Republicans* (New York: Random House, 2003).

8 Byron W. Daynes and Glen Sussman, “Spanning the Century: Theodore Roosevelt, Franklin Roosevelt, Richard Nixon, Bill Clinton, and the Environment,” *White House Studies* 4 (2004).

9 Kathleen Dalton, *supra* note 2.

Many of the programs and regulations that Roosevelt created didn't survive the return to *laissez-faire* policies under President Herbert Hoover, whose blind faith in the power of "The Market" to solve all problems collapsed – along with the stock market, the banking system, agriculture, and most of the rest of the economy – in the Great Depression.<sup>10</sup>

Under Democrat Franklin D. Roosevelt's New Deal, the progressive policies begun by his cousin, Theodore Roosevelt, were revitalized and expanded. The minimum wage law, the civilian conservation corps, and even Social Security all had their roots in the political philosophy of the Republican Roosevelt.<sup>11,12</sup>

After World War II, anti-regulatory forces in Congress attacked New Deal policies on many fronts, limiting the role of the federal government in the workplace and in setting economic and employment policies.<sup>13</sup> According to economic historian Mary Furner, for two decades – the 1950s into the early 1970s – the United States experienced a unique, somewhat stable period, during which there was a rough consensus about the role of the federal government in economic and social realms. The Great Society programs of Democrat Lyndon Johnson were modified but not reversed under Republican Richard Nixon's administration. In fact, federal environmental protections grew exponentially under Nixon.

Underneath this image of consensus existed new conservative thinking. A conservative juggernaut was launched when Henry Regnery, Sr. founded a publishing company in 1947 to promote conservative books, and William F. Buckley Jr. published the *National Review* in 1953 to expound conservative ideology and to transform what he saw as "a Liberal world." A key principle in the conservative ideology was voiced by Barry Goldwater, the 1964 Republican presidential nominee, who promised to work to repeal existing laws of big government, not pass new ones. Although Goldwater lost, over the next 40 years, a political offensive was orchestrated that involved, as the Heritage Foundation's Lee Edwards put it, "prescient philanthropists underwriting the thinking of the philosophers, the journals of the popularizers, and the campaigns of the politicians."<sup>14</sup> The core principles were a strong national defense and limited government – and limited government meant less regulation.

The period of regulatory stability started to unravel in the 1970s, as a host of economic and social changes buffeted the country – from de-industrialization to sudden increases in the price of oil to the "the culture wars" over social values. The magnitude of these changes was reflected in Ronald Reagan's 1981 inaugural address warning that Americans should no longer look to Washington for solutions. "Government," said the new president, "is the problem."<sup>15</sup> Reagan concluded, "It is time to check and reverse the growth

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10 Mary O. Furner, *supra* note 1.

11 Online at <http://www.ssa.gov/history/trinfo.html>.

12 Kathleen Dalton, *supra* note 2.

13 Mary O. Furner, *supra* note 1.

14 Online at <http://www.heritage.org/Research/PoliticalPhilosophy/HL811.cfm>.

15 Ronald Reagan, Inaugural Address (1981).

of government, which shows signs of having grown beyond the consent of the governed. It is my intention to curb the size and influence of the federal establishment...”

Fundamentally, what is being waged by the conservative movement today is a war on the public sphere and the very notion of the public good. In the 1954 publication *The Conservative Mind*, widely regarded as the seminal work of American radical conservative thought, Russell Kirk laid out the principles upon which much of the anti-government ideology was based.<sup>16</sup> Employing misguided and moralistic interpretations of history and human nature, Kirk defined civilized societies as those in which the status quo involving rigid class structure is maintained. To Kirk’s mind, the unit of society is the individual, who must constantly check the human nature – fueled by base emotions – which governs him.

Under this worldview, there is no role for community, no role for government beyond law enforcement, no mechanism for progress beyond the profit motive, and what emerges from this chasm is the isolated individual as economic actor, guided by self-interest, negotiating the cut-throat free market. The America such an ideology envisions is one in which, as Theodore Roosevelt so eloquently put it, “our national life brings us nothing better than swollen fortunes for the few and the triumph in both politics and business of a sordid and selfish materialism.”<sup>17</sup>

The Reagan crusaders turned this into what they called “economic” freedom, which translated into completely unrestricted markets and the lowest possible taxes. Economic freedom was directly tied to personal freedom, and personal freedom was linked to “personal responsibility,” a theme echoed again in the 1994 Contract with America and one that remained a key message in the George W. Bush administration. “Personal responsibility” was a euphemism for ending governmental supports to people in need. It provided a justification for cutting school lunches for children from low-income families and wheelchair assistance programs for the poor, for example. It also provided the justification for shifting government responsibilities to the private sector and establishing an anti-regulatory atmosphere. For example, the Reagan administration argued that seat belt and safety glass requirements for car manufacturers were unnecessary and overbearing government intrusions into the private sector.

The Reagan Revolution had begun, and with it, a new era of deregulation.

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16 Russell Kirk, *The Conservative Mind: From Burke to Eliot* (New York: Faber and Faber, January 1, 1954. A 7th edition is available from Regnery Publishing, Inc. as of November 25, 2001).

17 Online at <http://usinfo.state.gov/usa/infousa/facts/democrac/31.htm>.



## B. The Imperial Presidency Meets the Unitary Executive

*When the President does it, that means it's not illegal.*  
Richard Nixon<sup>18</sup>

*No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.*  
James Madison, *The Federalist* 10, 1787<sup>19</sup>

The legitimacy of our government rests uneasily on the ability of each coequal branch to check and balance the power of the other two.<sup>20</sup> The unease arises from the tendency of the White House to claim powers not delegated, or not clearly delegated, by the Constitution. In modern times, this process has taken two main forms. The “imperial presidency,”<sup>21</sup> a term coined by Arthur Schlesinger’s 1973 book with that title, is one. Schlesinger provided a history of presidential power demonstrating that, since Franklin Delano Roosevelt’s New Deal era and the 1939 creation of the Executive Office of the President, the president has enjoyed increased powers. The Vietnam War and the Watergate scandal stimulated enormous concern about the imperial presidency. Christopher Pyle’s revelations in January 1970 of the U.S. Army’s spying on the civilian population resulted in Sen. Sam Ervin’s investigations and passage of the Foreign Intelligence Surveillance Act. The dam broke on December 22, 1974, when *The New York Times* published a lengthy article by Seymour Hersh describing CIA operations over the years that had been dubbed the “family jewels,” covert action programs involving assassination attempts against foreign leaders and covert attempts to subvert foreign governments. In addition, the article discussed efforts by intelligence agencies to collect information on the political activities of U.S. citizens.<sup>22</sup>



This led to formation of the Church Committee, formally called the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, which published fourteen reports in 1975 and 1976 on the formation of U.S. intelligence agencies, their operations, and the alleged abuses of law and of power that they had committed, together with recommendations for reform, some of which were put in place. It was considered the most exhaustive review of the imperial presidency until

18 Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (New York: Little, Brown and Co., 2007).

19 James Madison, “Federalist 10,” *The Federalist Papers*, November 23, 1787.

20 Gary Wills, Introduction to Alexander Hamilton, John Jay and James Madison, *The Federalist Papers* (New York: Bantam Books, 2003).

21 Arthur M. Schlesinger, *The Imperial Presidency* (Boston: Houghton Mifflin, 1973).

22 Seymour Hersh, “Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years,” *The New York Times*, December 12, 1974.

President George W. Bush's administration.

Frederick A.O. Schwarz, the chief counsel of the Church Committee, along with a colleague, Aziz Huq, recently criticized the Bush administration's use of the 9/11 terrorist attacks to make "monarchist claims" that are "unprecedented on this side of the North Atlantic."<sup>23</sup> They noted, "For the first time in American history, the executive branch claims authority under the Constitution to set aside laws permanently – including prohibitions on torture and warrantless eavesdropping on Americans. A frightening idea decisively rejected at America's birth – that a president, like a king, can do no wrong – has reemerged to justify torture and indefinite presidential detention."<sup>24</sup>

Complementary to the unchecked power of the president is the concept of the "unitary executive." The theory is rooted in an interpretation of the separation of powers and of Article II of the Constitution, which holds that only the president is vested with the power to execute the laws. This view would mean that it is unconstitutional for Congress to create "independent" agencies, authorities, or other entities that exercise executive, and sometimes quasi-legislative or quasi-judicial, powers. Taken to its logical extreme, it justifies White House review of agency regulations, even though Congress often delegates such responsibility to the head of regulatory agencies.

No administration sought to dominate so completely the courts and Congress, or pursued power at their expense more deliberately, than that of George W. Bush. After 9/11 and the creation of a permanent wartime footing, and thanks to a supine Congress in Bush's first term and an even more supportive Supreme Court in his second term, Bush pushed claims of presidential power to new heights. Bush basked in the authority of *both* an imperial presidency *and* the unitary executive. Vice President Dick Cheney played a commanding role in the White House assertion of a more powerful presidency. Cheney, of course, built on the work of previous administrations.

### C. Reducing the Role of Government

*The greatest good for the greatest number for the longest time.*  
Gifford Pinchot, Forest Service Chief under President Theodore Roosevelt

Gifford Pinchot was describing the goal of federal conservation programs, but the same standard – at once idealistic and pragmatic – underpins virtually all government regulations from the time Theodore Roosevelt became the first "reform" president of the modern era. Yet there is more involved than just government action – a great deal of effort and constant vigilance on the part of the media, watchdog organizations, and the public are required if government is to pursue the common good. There have always been special interest groups working behind the scenes to shape the regulatory framework

<sup>23</sup> Frederick A.O. Schwarz, Jr. and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (New York: The New Press, 2007).

<sup>24</sup> *Id.*

to their own advantage, regardless of the consequences to the public interest.

President George W. Bush pledged allegiance to the idea that the common good takes precedence over special interests. “There’s no capitalism without conscience,” Bush said in a major address delivered on Wall Street. “With strict enforcement and higher ethical standards, we must usher in a new era of integrity in Corporate America.”<sup>25</sup> These are noble sentiments, but it is fair to question the administration’s commitment to them given that this particular speech was delivered not in 2008 or even 2007, but in 2002, following the Enron scandal. The recent, far more devastating Wall Street financial collapse may have been far smaller if the Bush administration and previous administrations had cracked down on illegal and unethical business activities, if they had honored their promises to strictly enforce existing regulations, and if they had given government regulators the flexibility needed to oversee new and complex financial instruments such as derivatives and credit default swaps. And if the federal government had been serious about the integrity of Corporate America, the recent financial meltdown might never have occurred. Instead, presidential administrations and Congress paid lip service to the virtues of good government in public, while at the same time working behind the scenes to protect the interests of a select few.



Bush packed regulatory agencies with insiders from the industries the agencies were supposed to regulate. Criteria used to calculate the cost-to-benefit ratio for new or existing regulations were revised to inflate the estimated cost and diminish possible benefits. Corporations that donated heavily to the Republican Party or to the Bush campaign were granted frequent meetings with administration officials of the highest levels (including the Office of the Vice President) to discuss major regulations affecting their bottom lines.

The Bush administration also managed to accomplish much by doing little. Millions of American workers were needlessly exposed to toxic chemicals and maimed in workplace accidents that could have been prevented if the institutions created to protect workers had been allowed to do their jobs. The Occupational Safety and Health Administration (OSHA), which was formally organized in 1970, has roots extending back to state laws enacted in 1867 to protect workers from the new hazards of the Industrial Revolution.<sup>26</sup> From the beginning, OSHA has had to battle well-financed opposition from industry groups dead-set against the very idea of “Big Government” telling them what safety and health standards were needed to protect “their” workers. To carry out its mandate, OSHA had to be even more aggressive than other, similar government institutions. In the eight years George W. Bush was president, OSHA

<sup>25</sup> Jim Wallis, *God’s Politics: Why The Right Gets it Wrong and the Left Doesn’t Get it* (San Francisco: HarperSanFrancisco, 2005).

<sup>26</sup> George Thomas Kurian and Joseph P. Harahan, *A Historical Guide To The U.S. Government* (New York: Oxford University Press, 1998).

failed to initiate, create, and issue many crucial regulations.<sup>27</sup>

The administration used another tool when public opinion forced it to give at least the appearance of doing something. In these circumstances, the administration rolled out new regulatory regimens accompanied by a flurry of press releases containing emphatic words and phrases such as “crack-down” and “getting tough,” applied to whatever scandal had been brought to light. One adjective rarely made it into the press releases, even though the word was essential to the success or failure of the regulations’ stated goal: “voluntary.”

The inadequacy of such voluntary regulation was evident when manufacturers were forced to recall imported toys covered with lead-based paint – on twenty-six separate occasions between January and August 2007.<sup>28</sup> Voluntary regulation of financial markets was also largely responsible for the current financial meltdown, or, at least, ensured that the government was unable to intervene until after the disaster occurred. Even Securities and Exchange Commission Chairman Christopher Cox finally said what had been obvious to pragmatic reformers since Teddy Roosevelt’s day: “The last six months,” Cox stated in September 2008, “have made it abundantly clear that voluntary regulation does not work.”<sup>29</sup>

Corruption and cronyism played a major role in creating the Bush legacy on deregulation. They do not, however, tell the full story. Former Federal Reserve Chairman Alan Greenspan was not alone when he confessed that a fundamental “flaw” in his understanding of how the world works had left him in a “state of shocked disbelief” at the recent economic collapse.<sup>30</sup> Greenspan’s flaw was the unquestioned belief in the free – that is, unregulated – market. Behind this ideological flaw, which is itself widely held, is a much larger intellectual error: that government is essentially bad. Reformers like Teddy Roosevelt struggled proudly under the banner of “good government.” The Republican would hardly recognize the movement that today claims to be conservative and marches beneath a banner promoting anti-government rhetoric.

Former Republican Sen. Phil Gramm (TX), most recently the economic advisor to failed presidential candidate John McCain, expressed such an anti-statist worldview when he charged that “Both the economic crisis and the moral crisis have their roots in the explosion of government.”<sup>31</sup>

It may be tempting to blame all our problems on “Big Government,” as Gramm did, but the tactic solves nothing, says Douglas Amy, professor of politics at Mount Holyoke College. In fact, Professor Amy argues, “Scapegoating government ... makes it much harder to solve our pressing social and economic problems.” Not only do we stop searching for solutions, but we “delegitimize the only institutions that are large enough and powerful enough to suc-

27 *The New York Times*, “OSHA Leaves Worker Safety in Hands of Industry,” April 25, 2007.

28 OMB Watch, “Toy Recalls Bring Attention to Commission’s Inadequacies,” August 7, 2007.

29 Security and Exchange Commission, “Chairman Cox Announces End of Consolidated Supervised Entities Program,” News release, September 26, 2008.

30 *The Associated Press*, “Greenspan denies blame for crisis, admits ‘flaw,’” October 23, 2008.

31 Douglas J. Amy, “Why Government Becomes the Scapegoat,” online at <http://www.governmentis-good.com/articles.php?aid=22>.

cessfully take on many of these social and economic problems."<sup>32</sup>

A political ideology that opposes the very idea of regulation is radical by nature, not conservative, and leaves all Americans vulnerable to the many dangers of a modern industrialized society, threatening the stability of capitalism itself. Unfortunately, this is the ideology that guided the actions of many Bush administration officials, and the president himself, during their time in office.

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32 Id.





## Chapter II

### Turning Off the Spigot

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#### A. Rollback of Clinton Rules

*[Bush officials] can hit the ground running.  
They know what they need, and they're out there getting it.*  
Vice President-elect Dick Cheney  
January 5, 2001<sup>33</sup>

The truth behind Cheney's remarks was revealed two weeks later, on January 20, 2001, the day George Walker Bush was sworn in as the 43rd President of the United States. The most important and revelatory indication that this administration was "hitting the ground running" did not come in the president's inaugural address. In what would become a hallmark of the new administration's standard operating procedure, the most significant document of that day was not the president's speech, nor any official proclamation, nor an executive order. It wasn't even signed by the president. It came in the form of a memo issued by a man most Americans hadn't heard of – Andrew Card, the new White House Chief of Staff – just two hours into the new administration.<sup>34</sup>

Under the subject line "Regulatory Review Plan," Card ordered agency and department heads to: 1) place an immediate hold on new regulations, 2) withdraw all regulations not yet published in the *Federal Register*, and 3) postpone implementation of regulations that had already been published but were not yet in effect.<sup>35</sup>

While earlier presidents had certainly tried to steer the ship of state in a new direction early in their administrations, before the Card memo, none had moved so quickly, so completely, and with so little regard for transparency to halt regulations created by their predecessor. An investigation by the Senate Committee on Governmental Affairs found the memo "of questionable legality"<sup>36</sup> since the new administration called for postponing already published rules – without allowing a public comment period as required by law.<sup>37</sup>

"[T]he Bush administration set a dangerous precedent," concluded the report, in words that seem prescient today. "It treated an important legal requirement as an annoyance and an obstacle...."<sup>38</sup>

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33 *The New York Times*, "Cabinet Selections Over, Transition Now Focuses on Those Important No. 2's," January 5, 2001.

34 *The New York Times*, "The Inauguration: The Agenda; To Do: 1. Undo Most Recent Actions of my Predecessor," January 21, 2001.

35 White House, "Memorandum, Subject: Regulatory Review Plan," News release, January 20, 2001.

36 United States Senate Committee on Governmental Affairs, "Rewriting the Rules," October 24, 2002.

37 *Id.*

38 *Id.*

Hundreds of regulations – already reviewed by agencies, opened for public and corporate comment, amended several times, and waiting to be implemented – were thrown into legal limbo.<sup>39</sup> The Bush administration eventually allowed most of the non-controversial, “housekeeping” rules to go into effect. Several regulatory safeguards that were opposed by industries that had funded the Bush campaign, however, met a different fate.



On April 20, 2001, the Bush administration suspended a Clinton-era regulation that mandated a 30 percent increase in energy efficiency for most air conditioners and heat pumps.<sup>40</sup> A few days later in a speech on energy policy, Vice President Cheney downplayed the importance of such measures. Conservation, he said, was merely a “personal virtue.”<sup>41</sup> This viewpoint was reflected in the administration decision (announced after a year’s delay) to cut the mandated efficiency standard by a third. The Bush plan

would have cost families billions of dollars in higher utility bills, added as much CO<sub>2</sub> to the atmosphere annually as two million cars, and required the construction of 13 new electric power plants over the next three decades.<sup>42, 43</sup> (In 2004, a federal appeals court ruled that the Bush administration had acted illegally and forced the government to implement the Clinton regulation.<sup>44</sup>)

Two days after Christmas, 2001, the Bush administration quietly withdrew a regulation that required businesses seeking government contracts to reveal if they had been found liable for violating the law within the preceding three years. The regulation directed government officials to consider, on a case-by-case basis, if the violations were serious enough to disqualify the offender from receiving the specific contract under consideration.<sup>45</sup>

The Bush administration also went after existing regulations. First on the chopping block were health and safety rules primarily protecting blue-collar workers.<sup>46</sup> A 2008 study by the AFL-CIO found that ergonomic injuries – including carpal tunnel syndrome, caused by repetitive motions – are the most common and often the most debilitating of workplace hazards, accounting for a third of all job-related injuries.<sup>47</sup> The process of reducing ergonomic injuries through government regulations actually began in 1990 un-

39 Id.

40 Thomas O. McGarity, “A Review of Implementation of Our Environmental Laws,” testimony before the Subcommittee on Energy, Policy, Natural Resources and Regulatory Affairs, Committee on Governmental Affairs, United States Senate, March 7, 2002.

41 Vice President Richard Cheney, “Remarks by the Vice President at the Annual Meeting of the Associated Press,” White House news release, April 30, 2001.

42 Reece Rushing, *Special Interest Takeover: The Bush Administration and the Dismantling of Public Safeguards*, (Center for American Progress and OMB Watch, 2004).

43 Natural Resources Defense Council, “The Benefits of Reinstating the Clinton Air Conditioner Standard,” Press backgrounder, January 16, 2004.

44 Id.

45 Reece Rushing, *supra* note 42.

46 AFL-CIO, *supra* note 4.

47 Id.

der the first President Bush.<sup>48</sup> After nearly a decade of studies – and delays by Congress – in 2000, the Clinton administration issued new rules to reduce these injuries<sup>49</sup> that cost society as much as \$54 billion a year.<sup>50</sup> The Occupational Safety and Health Administration (OSHA) estimated that the new rules would prevent nearly half a million injuries and save workers and the overall economy \$9.1 billion annually.<sup>51</sup> The protections were particularly important to women, who account for two-thirds of reported carpal tunnel injuries.<sup>52</sup>



The Bush administration, however, successfully lobbied the Republican-controlled Congress to repeal the rules, after being lobbied itself by corporations opposed to ergonomic standards. UPS, FedEx, and the National Beer Wholesalers contributed an average of \$2.5 million each, overwhelmingly to Republicans in Congress, during the 1999-2000 election cycle.<sup>53</sup> The vote to repeal the rule fell largely along party lines.

Although Bush administration officials based their opposition to the ergonomic rules on the grounds that the Clinton plan wasn't "comprehensive" enough, over the next seven years, the administration only issued ergonomic guidelines for four industries (nursing homes, retail grocery stores, poultry processing, and shipbuilding), covering a small fraction of the workforce – even if all the affected employers implemented the purely voluntary measures.<sup>54</sup>

During the 2000 public comment period on the then-proposed plan, researchers at an industry-funded think tank submitted a scathing critique of the measures. The report was significant for two reasons. Its conclusions were extreme, concluding that the economic benefits from the new regulations could be as low as \$0 and might actually result in as many as 733 *additional* deaths per year.<sup>55</sup> And in a breathtaking display of *laissez-faire* exuberance, the report maintained that since these kinds of injuries are costly to industry, one can safely assume that companies are already doing as much as possible to prevent them, out of economic self-interest. "Thus," the report concluded,

48 Reece Rushing, *supra* note 42.

49 Public Citizen, "Public Safeguards at Risk!" online at [http://www.citizen.org/congress/regulations/bush\\_admin/articles.cfm?ID=6142](http://www.citizen.org/congress/regulations/bush_admin/articles.cfm?ID=6142).

50 National Research Council (U.S.), Panel on Musculoskeletal Disorders and the Workplace, "Musculoskeletal disorders and the workplace: low back and upper extremities," 2001.

51 Reece Rushing, *supra* note 42.

52 David Kotelchuck, "OSHA's New Ergonomic Guidelines: A Plan to Develop a Plan?" United Electrical, Radio and Machine Workers of America (UE) News Health And Safety, April 2002, online at <http://www.ranknfile-ue.org/h&s0402.html>.

53 AFL-CIO, "Big Business Influence On Congressional Ergonomics Opponents, Election Cycle 2000 Political Contributions," online at [http://www.aflcio.org/issues/safety/ergo/upload/ergo\\_campaign.pdf](http://www.aflcio.org/issues/safety/ergo/upload/ergo_campaign.pdf).

54 AFL-CIO, *supra* note 4.

55 Susan E. Dudley and Hayden Bryan, "Public Interest Comment, The Occupational Safety And Health Administration's Proposed Ergonomics Program Standard," The Mercatus Center, George Mason University, February 25, 2000.

“our best estimate of the benefits of the rule over and above market forces is zero.”<sup>56</sup>

In addition to its fierce free-market ideology, the report was also significant because the Bush administration later named its lead author, Susan Dudley, to be the nation’s regulatory czar (administrator of the Office of Information and Regulatory Affairs).<sup>57</sup>

## B. Foxes in the Henhouse

*Where you stand depends on where you sit.*  
Anonymous

Like any successful commander in chief, Bush knew putting the right person in the right place was key to winning the war on regulatory protections. This wasn’t just a matter of choosing business-friendly appointees for top positions. What made this administration different from others is the fact that, from the top down, it was filled with anti-regulatory ideologues who were politically savvy and came from the very industries they were charged with regulating, or from the think tanks those industries fund. The result was an administration uniquely effective at implementing its ambitious pro-industry deregulatory agenda – with a minimum of public notice.

Take the case of mountaintop-removal coal mining. As the name implies, this method – the predominant form of strip mining in much of Appalachia – involves blasting away entire mountaintops to get at the coal seams below



and dumping the resulting rubble, called “spoil,” into adjacent valleys. In some cases, valleys two miles long have been completely filled with spoil. Opponents had hoped that a court-ordered environmental impact statement (EIS) would crack down on the practice, which had already buried at least 1,000 miles of Appalachian streams and destroyed tens of thousands of acres of woodland that the EPA described as “unique in the world” for their biological diversity. But when the Bush administration released the

EIS in the spring of 2003, the administration not only gave mountaintop removal a clean bill of health, it also relaxed what few meaningful environmental protections existed and focused on how to help mining companies obtain permits more easily.

How did a process mandated by a federal judge “to minimize, to the maximum extent practicable, the adverse environmental effects” from moun-

<sup>56</sup> Id.

<sup>57</sup> OMB Watch, “White House Tightens Grip on Regulatory Power Grab,” May 1, 2007, online at <http://www.ombwatch.org/article/articleview/3817>.



taintop removal become a vehicle for industry? Meet Steven Griles, an example, *par excellence*, of an industry mole working within the Bush administration. Before coming to work as deputy secretary of the Interior under Secretary Gale Norton, Griles was a powerful lobbyist with a long list of energy industry clients, including the National Mining Association and several of the country's largest coal companies. On Aug. 1, 2001, Griles signed a "statement of disqualification," promising to stay clear of issues involving his former clients. Despite that promise, Griles met repeatedly with coal companies while the administration worked on the mountaintop removal issue. (He also discussed controversial coal-bed methane drilling in Wyoming and offshore oil exploration with former clients.<sup>58</sup>) Three days after signing his recusal letter, Griles told a meeting of the West Virginia Coal Association that he would "fix" rules on mountaintop mining. Two months later, Griles sent a letter to the U.S. Environmental Protection Agency (EPA) and other agencies drafting the EIS, complaining that they were not doing enough to safeguard the future of mountaintop removal and instructing them to "focus on centralizing and streamlining coal mine permitting." While at Interior, Griles continued receiving payments from his lobbying firm, collecting more than a million dollars, in addition to his annual government salary of \$150,000.

Griles left Interior in 2005 under a cloud. The storm broke later that year in the form of the Jack Abramoff corruption scandal, when prosecutors revealed that Abramoff's boast that Griles was "our guy"<sup>59</sup> at Interior had merit. Griles had provided Abramoff and his clients extraordinary access to Department of Interior (DOI) officials, down to approving a dinner party seating chart that placed Abramoff at a table with Norton and the DOI's top lawyer.<sup>60</sup> In exchange, Abramoff and his clients donated \$500,000 to a group headed by Griles' then-girlfriend, Italia Federici.<sup>61</sup> Federici had formed the organization, the Council of Republicans for Environmental Advocacy (CREA), in 1997 with Norton (then attorney general of Colorado)<sup>62</sup> and anti-tax crusader Grover Norquist.<sup>63</sup> Longtime Republican environmentalists pointed out that CREA's steering committee was stacked with lobbyists from oil and gas corporations such as Shell Oil, Amoco, and Texaco. An existing group of Republican environmentalists warned members that CREA was a "pseudo-grassroots organization" created by "anti-environmental party insiders."<sup>64</sup>

Under questioning by a Senate panel, Griles admitted that Abramoff's firm had made him a job offer in September 2003, while decisions that could

58 Bill Berkowitz, "J. Steven Griles did the Crime but Doesn't Want to do the Time," *Media Transparency*, June 19, 2007, online at <http://www.mediatransparency.org/story.php?storyID=199>.

59 Public Employees for Environmental Responsibility, "Griles Seeks to Escape Jail by Working for Disney," News release, June 18, 2007, online at [http://www.peer.org/news/news\\_id.php?row\\_id=873](http://www.peer.org/news/news_id.php?row_id=873).

60 Henry Weinstein, "Griles Deserves Leniency, Ex-Interior Officials Say," *The Los Angeles Times*, June 26, 2007.

61 United States Senate Committee on Indian Affairs, "Gimme Five: Investigation of tribal lobbying matters," September 5, 2006.

62 Susan Schmidt, "GOP activist takes plea," *The Washington Post*, June 7, 2007.

63 Concerning the role of the government in regulations of any kind, Norquist made his views clear when he remarked that his goal was "to get [government] down to the size where we can drown it in the bathtub," Robert Dreyfus, "Grover Norquist, 'Field Marshal' of the Bush Plan," *The Nation*, May 14, 2001.

64 Republicans for Environmental Protection, "GOP Greens and Greenscammers," *The Green Elephant*, Summer 1998.

have netted Abramoff's clients millions of dollars were pending at DOI. Griles, however, insisted he had immediately reported the job offer to ethics officials at DOI, who had advised him that the situation did not require him to take any action such as recusing himself from any cases before the agency.<sup>65</sup>

Griles failed to mention that his chief DOI ethics advisor, Sue Ellen Wooldridge, was also his lover and that their romantic relationship had preceded Abramoff's job offer by seven months.<sup>66</sup> Wooldridge left her position at DOI days after Griles testified before the Senate. She took a job at the Justice Department: assistant attorney general for the environment.<sup>67</sup> Griles was back in private practice by this time, lobbying for oil and gas companies. In April 2006, Griles and Wooldridge bought a 50 percent interest in a million-dollar vacation home;<sup>68</sup> the other half was purchased by Donald Duncan, vice president and chief lobbyist of ConocoPhillips, the third-largest oil company in the U.S. with assets worth \$183 billion.<sup>69</sup> The Justice Department's ethics office approved the arrangement.<sup>70</sup> On Jan. 11, 2007, Wooldridge approved the oil giant's request to delay installing court-ordered air pollution controls that would have cost the company a half-billion dollars; she resigned a week later.<sup>71</sup>

For lying to investigators about his relationship with Jack Abramoff, Griles was charged with obstructing justice. He pleaded guilty. In a letter to the judge overseeing the case, Norton urged leniency because of the "personal sacrifices" Griles had made in choosing "the idealistic path" of government service.<sup>72</sup> Norton was writing as a private citizen, having left Interior in 2005 to be "closer to the mountains we love in the West."<sup>73</sup> And, in fact, she wrote her appeal to the judge from Colorado, where she had recently started a new job as general counsel for exploration and production at Royal Dutch Shell, the second-largest oil company in the world.<sup>74,75</sup>

Unimpressed by Norton's letter, the judge sentenced Griles to serve ten months in federal prison.<sup>76</sup>

According to DOI Inspector General Earl E. Devaney, Norton had allowed a culture of "irresponsibility and lack of accountability" to flourish. Under her watch, he summed up, "short of a crime, anything goes at the highest levels of the Department of the Interior."<sup>77</sup>

65 Steven Griles, "Tribal Lobbying Matters: Hearing before the Committee on Indian Affairs," United States Senate Committee on Indian Affairs, November 2, 2004.

66 Susan Schmidt and James Grimaldi, "Former Interior Deputy Pleads Guilty in Abramoff Case," *The Washington Post*, March 23, 2007.

67 *Id.*

68 John Heilprin, "Gonzales Asked About Prosecutor Deal," *The Associated Press*, February 15, 2007.

69 Online at [http://www.conocophillips.com/about/who\\_we\\_are/index.htm](http://www.conocophillips.com/about/who_we_are/index.htm).

70 John Heilprin, *supra* note 68.

71 Living on Earth, "Getting Cozy with Conoco?" February 23, 2007, online at <http://www.loe.org/shows/segments.htm?programID=07-P13-00008&segmentID=1>.

72 Henry Weinstein, *supra* note 60.

73 John Heilprin, "Interior Secretary Gale Norton Resigns," *The Associated Press*, March 10, 2006.

74 Steve McMillan, "Norton will join Royal Dutch Shell," *Denver Post*, December 27, 2006.

75 David Lee Smith, "Don't Step on this Shell," *The Motley Fool*, August 1, 2008.

76 James Grimaldi, "Ex-Official Sentenced in Abramoff Probe," *The Washington Post*, June 26, 2007.

77 Edmund Andrews, "Interior Official Assails Agency for Ethics Slide," *The New York Times*, September 14, 2006.

The Interior Department was just one henhouse in the collection of federal agencies and departments created over two centuries that the Bush administration treated as if it were some sprawling poultry farm. Norton and Griles had a lot of power, but in the end, they were just two members of a much larger skulk of foxes appointed by the White House. The examples below are meant to be representative rather than exhaustive.

- Jeffrey Holmstead, EPA, in charge of regulating air pollution. Before coming to the EPA, Holmstead was an attorney representing the interests of some of the nation's biggest polluters, including coal-burning power plants (Cinergy), plywood manufacturers (Georgia-Pacific), and the Chemical Manufacturers Association. Holmstead was in charge of the Bush administration's controversial Clear Skies initiative, which, despite its name, would have allowed power plants to *increase* the amount of toxic substances – including mercury and sulfur – released into the atmosphere.<sup>78</sup> In April 2003, Holmstead suppressed an internal EPA analysis documenting the problems with Clear Skies. According to an EPA staffer present at the meeting, Holmstead said, "How can we justify Clear Skies if this gets out?"<sup>79</sup>



A year later, *The Los Angeles Times* reported that Holmstead had approved a plan that would exempt as many as 147 plywood and wood by-product processing plants from laws regulating formaldehyde and had based his decision using a questionable analysis funded by the chemical industry, while at the same ignoring a study by the National Cancer Institute linking formaldehyde to elevated levels of leukemia.<sup>80</sup>

Holmstead resigned from the EPA in mid-2005<sup>81</sup> and later joined the law firm Bracewell & Giuliani, where he serves as chief of the environmental strategy section, representing many of the same corporations he was previously charged with regulating.<sup>82</sup>

- William Wehrum, EPA, chief lawyer for air pollution regulations. Holmstead's departmental lawyer, William Wehrum, was named acting assistant administrator. Wehrum, who had previously represented regulated industries at Holmstead's old law firm,<sup>83</sup> was widely considered Holmstead's anti-regulatory co-conspirator.

78 Reece Rushing, *supra* note 42.

79 Holmstead later said he didn't "recall making any specific remarks." Jennifer Lee, "Critics Say E.P.A. Won't Analyze Clean Air Proposals Conflicting With President's Policies," *The New York Times*, July 14, 2003.

80 *The Los Angeles Times*, "EPA Relied on Industry for Plywood Plant Pollution Rule," May 21, 2004.

81 Jeff Holmstead, "My departure from EPA," online at [http://www.grist.org/pdf/holmstead\\_letter\\_to\\_staff.pdf](http://www.grist.org/pdf/holmstead_letter_to_staff.pdf).

82 Bracewell & Giuliani, "Nation's Leading Air Quality Policy and Compliance Expert Joins Firm," News release, October 26, 2006.

83 Robert Kennedy, Jr., "Texas Chainsaw Management," *Vanity Fair*, May 2007.

“Virtually anything bad that the Bush Administration has done with air pollution,” said Frank O’Donnell, head of the nonprofit Clean Air Watch, “has Bill Wehrum’s fingerprints on it.”<sup>84</sup> The Bush administration’s nomination of Wehrum as Holmstead’s permanent replacement was welcomed by industry and other antiregulatory groups and scorned by others, including *The New York Times*, which ran an editorial against the nomination of the man they called “Holmstead’s doctrinal hit man.”<sup>85</sup>

When it was clear that the Senate would not confirm Wehrum, the White House withdrew his name from consideration.<sup>86</sup> A month later, Wehrum submitted his resignation.<sup>87</sup> Three months after Wehrum left the EPA, the DC law firm Hunton & Williams posted this notice on its website: “Bill Wehrum, the U.S. EPA senior air official who implemented much of the Bush administration’s Clean Air Act reform agenda, has joined ... He will provide legal counsel to industries he once regulated.”<sup>88</sup>

According to his Hunton & Williams profile, Wehrum specializes in “Climate Change Law and Policy.”<sup>89</sup>

- David Lauriski, head of Mine Safety and Health Administration (MSHA). Coal mining has long been one of the most dangerous occupations in the United States, and that’s based solely on the number of workers killed in accidents (electrocutions, roof collapses, above-ground crashes involving giant coal trucks weighing over a million pounds,<sup>90</sup> and disasters such as explosions and fires). But the suffocating disease of black lung – caused by years of breathing coal dust – is the true killer in the mines: 55,000 miners died from black lung between 1968 and 1990.<sup>91</sup> The disease still kills an estimated 1,500 miners annually,<sup>92</sup> which led the Centers for Disease Control and Prevention (CDC) in 1995 to recommend cutting in half the amount of coal dust allowed in mines.<sup>93</sup>

In 1997, Energy West Mining Company of Utah unsuccessfully petitioned MSHA, arguing that, contrary to the CDC’s findings, existing standards were already “overly restrictive.” Dust levels eight times *greater* than the CDC’s recommendations were adequate if miners wore respirators, argued the company.<sup>94</sup>

84 Megan Tady, “White House EPA Pick Decried,” *The New Standard*, April 26, 2006.

85 *The New York Times*, “Dubious Choices,” Editorial, April 24, 2006.

86 *The New York Times*, “Nomination For E.P.A. Post Is Withdrawn,” April 12, 2007.

87 *The Oil Daily*, “EPA’s Wehrum Steps Down,” May 24, 2007.

88 Online at [http://www.hunton.com/bios/news.aspx?id=14635&gen\\_H4ID=14681](http://www.hunton.com/bios/news.aspx?id=14635&gen_H4ID=14681).

89 Online at <http://www.hunton.com/bios/bio.aspx?id=17634&tab=0013>.

90 Christopher Shaw, “Undermining Safety: A Report on Coal Mine Safety,” Center for Study of Responsive Law, 2008.

91 Ken Ward, Jr., “Coal dust proposal factors into presidential race in West Virginia,” *The Charleston Gazette*, September 19, 2004.

92 R.G. Dunlop and Laura Ungar, “Miners keep dying despite federal law,” *The [Louisville, KY] Courier-Journal*, July 1, 2007.

93 *Id.*

94 Ken Ward, Jr., *supra* note 91.

Under the Bush administration in 2003, MSHA proposed new rules on coal dust – permitting far higher levels of coal dust than recommended by the CDC. In explaining his decision, MSHA chief David Lauriski cited the 1997 petition by Energy West. What most Americans didn't know was that Lauriski himself wrote the petition when he was general manager of Energy West, part of a three-decade career in the coal industry.<sup>95</sup> They also didn't know that during a two-year period beginning in January 2002, Lauriski met privately with a lobbyist for Energy West on at least eight occasions. (The meetings became public knowledge only after reporter Ken Ward released MSHA documents he obtained by filing a Freedom of Information Act (FOIA) request.<sup>96</sup>)



When Lauriski was named to the post, he assured his industry colleagues that his regulatory agenda was “significantly shorter” than that of past MSHA heads.<sup>97</sup> In practice, that proved to be accurate only insofar as adding new regulations goes. Lauriski’s *deregulatory* agenda, however, was extremely ambitious. He cancelled a dozen rules proposed by the Clinton administration to protect miners. He slashed the number of mine inspectors.<sup>98</sup> When violations couldn’t be ignored, Lauriski simply lowered the size of the fine imposed.<sup>99</sup> He vetoed a proposal to make video cameras mandatory on giant trucks to eliminate the blind spots that had caused fatal accidents.<sup>100</sup>

Lauriski also staffed MSHA with former executives from mining companies. His second-in-command had worked for Cyprus Minerals, Amax Mining, and Magma Copper.<sup>101</sup> Others in top positions at MSHA came from Peabody Coal, BHP Minerals, the American Mining Congress, and other mining companies and trade associations.<sup>102</sup> Things looked pretty much the same above Lauriski’s pay-grade. He answered directly to Secretary of Labor Elaine Chao, who received high marks from mine owners and failing grades from the United Mine Workers union. Chao waved off suggestions that there was any conflict of interest in the fact that while she oversaw MSHA, her husband, Sen. Mitch McConnell (R-KY), received large donations from the same coal companies she was supposed to regulate. And she had no problem with attending many of her husband’s fundraising events where corporate mining executives

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95 *Id.*

96 *Id.*

97 Ken Ward, Jr., “Shafted,” *Washington Monthly*, March 2007.

98 *Id.*

99 Christopher Shaw, *supra* note 90.

100 Christopher Drew and Richard A. Oppel Jr., “Friends in the White House Come to Coal’s Aid,” *The New York Times*, August 9, 2004.

101 Christopher Shaw, *supra* note 90.

102 Christopher Shaw, *supra* note 90.



had her ear.<sup>103</sup> As of September 30, 2008, McConnell had received more money in campaign contributions – almost \$18 million<sup>104</sup> – than any other member of the Senate not running for the presidency.<sup>105</sup>

On November 12, 2004, David Lauriski resigned from his job at MSHA, stating that he was “heading home at the end of my shift at MSHA to devote more time to my family in Colorado.”<sup>106</sup> Six days later, the John T. Boyd company, a mining consulting firm whose clients operate some of the largest mines around the world, announced that Lauriski was joining their team, where he would be in charge of health and safety issues.<sup>107</sup>

### C. Suppressing Science

*Do you support the president?*

First question asked by Bush administration official of a nominee to the scientific advisory panel on Arctic issues.<sup>108</sup>

Regardless of the issue, how compelling the data or dire the consequences, politics nearly always trumped science during the Bush administration. Some analysts believe that the administration’s antipathy toward science was the product of religious doctrine. While the president maintained that evolution is “just” a theory and that “intelligent design” should be taught in public schools,<sup>109</sup> others believed that the administration’s hostility toward science was grounded less in theology than it was in anti-regulatory fundamentalism. There were likely multiple reasons for this aversion to science, but the result was that corporate America’s bottom line was the Bush administration’s top priority.



By the time George W. Bush moved into the White House, the many severe health problems caused by lead were well understood. Previous administrations – both Democratic and Republican – had consistently supported regulations to reduce exposure to the poisonous heavy metal, especially among children, the group most at risk from lead toxicity.<sup>110</sup>

103 *The Lexington [KY] Herald-Leader*, “Two for the Money,” October 20, 2006.

104 Online at <http://www.opensecrets.org/politicians/summary.php?cid=N00003389>.

105 Irene Kan, “K Street Reveals Its Money Trail to Capitol Hill,” Center for Responsive Politics, July 30, 2008, online at <http://www.opensecrets.org/news/2008/07/k-street-reveals-its-money-tra.html>.

106 Mike Gorrell, “Head of mine safety agency, a Utah native, resigns,” *Salt Lake Tribune*, November 16, 2004.

107 Ken Ward, Jr., “MSHA chief sought industry job for 6 months,” *The Charleston [WV] Gazette*, March 21, 2005.

108 Andrew Revkin, “Bush vs. the Laureates: How Science Became a Partisan Issue,” *The New York Times*, October 19, 2004.

109 Nicholas Thompson, “Science Friction,” *Washington Monthly*, July/August 2003.

110 Environmental Protection Agency, “EPA Requires Phase-Out of Lead in All Grades of Gasoline,” News release, November 28, 1973.

Most Americans would likely agree that when our children's health is at stake, unbiased scientific advice is crucial. Yet the Bush administration allowed politics to taint the work of our primary public health institution, the CDC, in ways that harmed children. When three seats opened on the CDC's Advisory Committee on Childhood Lead Poisoning Prevention (ACCLPP) in 2002, the Bush administration took the unprecedented move of rejecting nominations submitted by the CDC and replacing them with individuals linked to the lead industry.<sup>111</sup> These included Dr. Sergio Piomelli, who, at his first ACCLPP meeting, held months after his appointment, revealed that the lead industry had "nominated" him for the committee.<sup>112</sup> (Piomelli's announcement does not appear in the CDC's official minutes of the meeting.<sup>113</sup>)

Also nominated by the lead industry was Dr. William Banner, who had served as a paid expert witness for Sherwin-Williams, which had made lead-based paint in the past and which was a defendant in a lawsuit concerning lead contamination brought by the state of Rhode Island at the time.<sup>114</sup> Banner claimed that lead is not toxic to children until the blood lead level reaches 70 micrograms per deciliter ( $\mu\text{g}/\text{dL}$ ) – seven times higher than the current action level and a level not considered safe in this country for half a century.<sup>115</sup> A current CDC official, speaking on the condition of anonymity, characterizes Banner's views as being "on the fringes" of science.<sup>116</sup>



A growing body of evidence suggests that even the current standard of 10  $\mu\text{g}/\text{dL}$  may be too lax. Blood lead levels just half that high are "associated with a decline in IQ of between four and seven points," says Dr. Bruce Lanphear, former Sloan Professor of Children's Environmental Health at the University of Cincinnati and an expert in the health effects of lead.<sup>117</sup> In fact, in 2001, the director of the CDC's National Center for Environmental Health, Dr. Richard Jackson, was quoted in the press predicting that the standard would soon be cut in half.<sup>118</sup>

But the standard stayed where it was; it was Jackson who left, after a decade working at the CDC.<sup>119</sup> Lanphear had his invitation to serve on the CDC's advisory board yanked after the lead industry apparently complained

111 Union of Concerned Scientists, "A to Z Guide to Political Interference in Science," 2008, online at [http://www.ucsusa.org/scientific\\_integrity/abuses\\_of\\_science/a-to-z-guide-to-political.html](http://www.ucsusa.org/scientific_integrity/abuses_of_science/a-to-z-guide-to-political.html).

112 Jonathan Cohn, "Toxic: The Lead Industry Gets Its Turn," *The New Republic*, December 23, 2002.

113 Department of Health And Human Services and Centers for Disease Control and Prevention, "Record of the Proceedings, Advisory Committee On Childhood Lead Poisoning Prevention," October 15-16, 2002, online at <http://www.cdc.gov/nceh/lead/ACCLPP/Meetings/Meetings.htm>.

114 House Committee on Oversight and Government Reform, "Politics & Science: Lead Poisoning Advisory Committee," online at [http://oversight.house.gov/features/politics\\_and\\_science/example\\_lead\\_poisoning.htm](http://oversight.house.gov/features/politics_and_science/example_lead_poisoning.htm).

115 *Science*, "Overhaul of CDC Panel Revives Lead Safety Debate," October 25, 2002.

116 Author interview, August 12, 2008.

117 Author interview, August 11, 2008.

118 *Science*, supra note 115.

119 Watsonian newsletter, The Watsonian Society, An Organization for Public Health Advisors, April 2004.

to Department of Health and Human Services Secretary Tommy Thompson's office.<sup>120</sup>

Dr. Mary Jean Brown oversees the CDC's efforts to reduce lead poisoning, especially among children, through a variety of programs including the ACCLPP. Brown, who has written that no level of lead in the blood is "safe," has, nonetheless, argued against lowering the current blood lead standard, for a variety of reasons.<sup>121</sup> Some scientists agree with this decision, while others – such as Dr. Lanphear – do not. Even some of those who agree, however, believe that the Bush administration, at the behest of the lead industry, exerted improper political pressure on Brown to leave the standard unchanged.<sup>122</sup>

Brown "got bushwhacked on lead," says an official with first-hand knowledge of what occurred. According to this source, the Bush administration "terrorized" Brown with regular phone calls threatening to cut funding for virtually all lead poisoning programs if she or the ACCLPP recommended lowering the blood lead standard. The CDC would not allow Brown to be interviewed for this report. According to spokesperson Bernadette Burden, the CDC "is not aware" of any such threats and neither is Brown. But Burden stopped short of denying that Brown was threatened with budget cuts.<sup>123</sup> Asked about the seeming inconsistency – if Brown had been threatened, would she be aware of it? – the CDC spokesperson responded, "That's all we're prepared to say."<sup>124</sup>

The example of Brown and lead is, unfortunately, not an isolated example, as instances of the Bush administration distorting or censoring science to avoid regulations abound. These efforts have had serious consequences for the health and safety of Americans.

- *Ground Zero, New York City*

In the days immediately following the terrorist destruction of the World Trade Center, health experts raised concerns about the air quality around Ground Zero. Three thousand people died outright in the collapse of the Twin Towers. How many others, rescue workers and those living downwind from the catastrophe, were now at risk from breathing air contaminated by toxic dust?

According to the EPA, few or none. The agency reported only low levels of asbestos at Ground Zero, and downwind air samples were pronounced clean. On Sept. 18, 2001, EPA administrator Christine Todd Whitman announced, "I am glad to reassure the people of New York and Washington, DC that their air is safe to breathe."<sup>125</sup>

120 Author interview, August 11, 2008.

121 Mary Jean Brown, "Guest Editorial: Responding to Blood Lead Levels < 10 µg/dL," *Environmental Health Perspectives*, February 2008, online at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=2235202>.

122 Author interview, August 12, 2008.

123 Bernadette Burden, Author phone call, August 14, 2008.

124 Id.

125 Union of Concerned Scientists, *supra* note 111.

Those reassurances were false. An EPA scientist had informed her bosses that the dust in the air was “in some cases as caustic and alkaline as Drano.”<sup>126</sup> The EPA Office of the Inspector General would later report that the White House Council on Environmental Quality pressured the EPA to “add reassuring statements and delete cautionary ones.”<sup>127</sup>

A study by New York’s Mount Sinai Hospital found that nearly 7,000 recovery workers at Ground Zero suffered respiratory damage as a result of breathing contaminated air that the administration had claimed was safe.<sup>128</sup> The number of downwind residents suffering from similar ailments will not be known for several years.

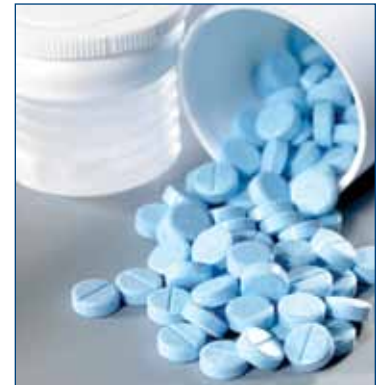
- *Drug Safety*

“[The FDA] views the pharmaceutical industry it is supposed to regulate as its client.”

This damning indictment of the Food and Drug Administration (FDA) under the Bush administration did not come from a consumer advocacy group. It was made in testimony before Congress in 2004 by Dr. David Graham, the associate director for science and medicine in FDA’s Office of Drug Safety, after two decades of experience working within the agency.<sup>129</sup>

While the FDA was originally designed to advocate on behalf of the public interest and protect citizens, Graham’s personal experience working there showed it was anything but that.<sup>130</sup>

He noted, “The FDA, as it is currently configured, is incapable of protecting America” from dangerous drugs.<sup>131</sup> Graham had been invited to testify before the committee specifically about the painkiller Vioxx, which had recently been withdrawn from the market by its maker, Merck. The pharmaceutical giant had taken that step only after studies became public showing that Vioxx users were nearly four times more likely to suffer heart attacks or strokes than users of other similar medicines. According to Graham’s calculations, FDA’s failure to regulate Vioxx had caused the premature deaths of as many as 55,000 individuals.<sup>132</sup>



In another case of FDA collusion with the industry it is supposed to regulate, an administration panel approved the antibiotic Ketek, de-

126 Union of Concerned Scientists, supra note 111.

127 Union of Concerned Scientists, supra note 111.

128 Union of Concerned Scientists, supra note 111.

129 Online at <http://finance.senate.gov/hearings/testimony/2004test/111804dgtest.pdf>.

130 John P. Swann, “The Food and Drug Administration,” from George Kurian, ed., *The Historical Guide to American Government* (New York: Oxford University Press, 1998).

131 Supra note 129.

132 Union of Concerned Scientists, supra note 111.

spite evidence that it caused liver damage. The manufacturer, Aventis, was required to do a follow-up study, which determined that Ketek was safe. According to an article in the *New England Journal of Medicine*, the company hired inexperienced physicians and paid them up to \$400 for each subject in the study.<sup>133</sup> It was later determined that some of the doctors who had declared enrolling the most subjects had fabricated these lists. A significant proportion of subjects who did well on the medicine did not even exist. Despite knowing the study was fraudulent, the FDA presented it to another advisory committee, which approved the continued use of Ketek. Even after the criminal prosecution of several physicians connected with the study, and after the first several reports of deaths caused by Ketek, the FDA continued to cite the fraudulent study as evidence that the drug was safe. As rumors of problems with the drug began to surface, acting FDA Commissioner Andrew von Eschenbach ordered FDA staff not to discuss Ketek outside of the agency.<sup>134</sup>

Ketek remains on the market. On December 7, 2006, von Eschenbach was confirmed as head of the FDA.<sup>135</sup>

#### D. Midnight Regulations<sup>136</sup>

For nearly eight years, health and safety regulation slowed to a trickle, but in his final months, Bush opened the floodgates, issuing a raft of regulations in an attempt to secure an administrative legacy. The rules covered a broad range of policy areas – the environment, worker rights, and health care, to name a few – but most bore a common bond: the abdication of government’s responsibility to oversee and police industry actions that imperil the public.

On environmental issues, most of the new regulations were in fact *de-regulatory*. One EPA rule exempts factory farms from the agency’s regulatory authority under the Clean Water Act; those farms now self-police their runoff, which pollutes nearby bodies of water with excess fertilizer, pesticides, and animal waste. Another rule makes it legal for mining operations to dump the waste generated during mountaintop mining into rivers and streams, turning great peaks and valleys into vast plains of rubble.

The mountaintop mining rule and other last-minute rules only strengthened the Bush administration’s cozy relationship with the energy industry. A rule from DOI opens up millions of acres of western land to oil shale development, a process by which energy companies extract liquid oil from solid rock by heating it. Oil shale development is dirty, requires billions

<sup>133</sup> Union of Concerned Scientists, *supra* note 111.

<sup>134</sup> David B. Ross, “The FDA and the Case of Ketek,” *The New England Journal Of Medicine*, April 19, 2007, online at <http://content.nejm.org/cgi/content/full/356/16/1601>.

<sup>135</sup> Online at <http://www.fda.gov/oc/voneschenbach/bio.html>, accessed December 9, 2008.

<sup>136</sup> OMB Watch, “Watching out for Midnight Regulations,” *Reg•Watch*, online at <http://ombwatch.org/article/blogs/entry/5494/>.



of gallons of water, and will only increase greenhouse gas emissions. Both the mountaintop mining rule and the oil shale development rule were high priorities for the energy industry – priorities made well known to the Cheney Energy Task Force discussed later in this narrative.

Other rules targeted workers. A Department of Labor rule makes it more difficult for workers to take unpaid leave to care for themselves or a family member without risking their pay, benefits, or position. The rule also makes it easier for employers to speak directly to employees' health care providers. A Department of Transportation rule allows trucking companies to force their drivers to drive for 11 consecutive hours and shortens mandatory rest times, despite studies which show that extended hours increase the chances of fatigue and endanger both truck drivers and other motorists.

Bush's flurry of last-minute activity is typical for presidents in their waning days of power. After losing reelection, President John Adams drew the ire of the newly empowered Democratic-Republican Party when he stacked federal courts with his Federalist allies. Just days before leaving office, President Theodore Roosevelt conserved thousands of acres of forest by presidential proclamation.



In modern times, regulations have been the weapon of choice for outgoing administrations. President Bill Clinton generated tomes of *Federal Register* pages with his last-minute rules. As late as Jan. 19, 2001, the Clinton administration was sending rules to the Office of the Federal Register for publication the following Monday, when Bush would have already taken power.<sup>137</sup> Some of Clinton's last-minute rules strengthened energy efficiency requirements for appliances (noted earlier) and tightened the drinking water standard for arsenic.

But Bush's 11th-hour push, pursued with great forethought and shrewdness, may prove more successful than Clinton's. Even after a rule is finalized and published in the *Federal Register*, agencies must wait at least 30 or 60 days (depending on the significance of the rule) before making the rule effective. Since Clinton waited until January 2001 to issue rules reflecting his priorities, Bush administration officials maintained some discretion to reevaluate those rules not in line with their views. The discretion manifested itself in the aforementioned Card memo. As a result, several rules finalized and published under Clinton were killed. But the Bush administration finalized many of its rules in November and December of 2008. For those rules, the 30- or 60-day window will be closed come Jan. 20, 2009. Bush appeared to be trying to prevent President Obama from doing to him what he did to Clinton.

If successful, Bush's careful timing will handcuff Obama's incoming administration. As a result, the Bush legacy will be secure.

<sup>137</sup> OMB Watch, "Midnight at the White House: Bush Using Rules to Cement Legacy," November 4, 2008.

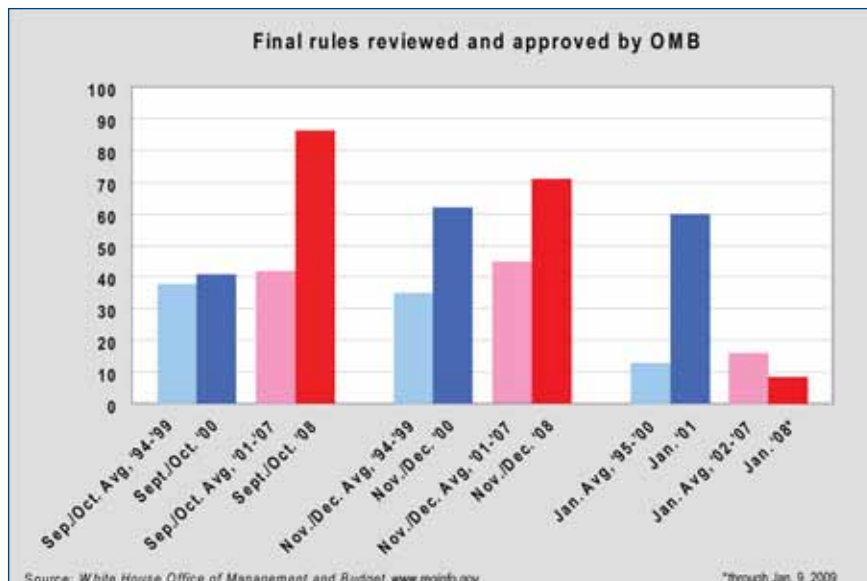


Figure 1

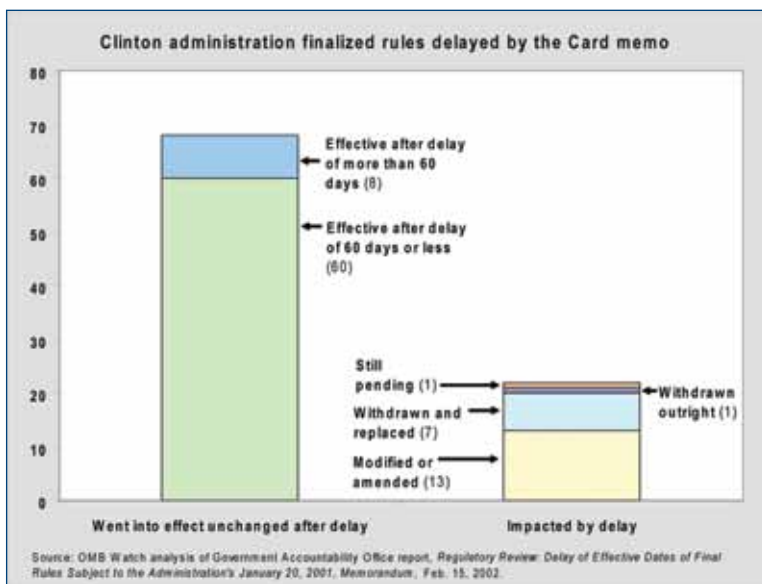


Figure 2

## Chapter III

### Changing the Rules

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#### A. Change How Regulatory Review Is Implemented

Five days before George W. Bush delivered his 2007 State of the Union address, Press Secretary Tony Snow told reporters that the most partisan and divisive president in recent history was going to try something different in his upcoming speech.

“I think it’s important to get a sense of how this government,” said Snow, “with Democrats and Republicans, can ... work together on the issues that are atop the stated concerns for all Americans.”<sup>138</sup>

While Snow was extolling the virtues of bipartisan cooperation to the White House press corps, elsewhere in the White House, President Bush was signing an executive order that fundamentally altered the way in which the United States government issues rules and regulations protecting the health and safety of Americans at home, at school, on the job, on the road, and in the air. Republicans may well have supported the changes more than Democrats, but Executive Order 13422 is less a partisan political attack than a power grab by the executive branch over the constitutionally enumerated powers of Congress.<sup>139</sup> It’s also a back-door attempt at deregulation in general, a point of entry first cracked open by President Reagan.<sup>140</sup>

In 1981 and 1985, Reagan issued executive orders expanding the powers of a little known office in the executive branch – the Office of Information and Regulatory Affairs (OIRA). Under the Reagan administration, agencies had to present OIRA with an annual list of all proposed major rule changes, along with a cost-benefit analysis for each rule. With little or no oversight by Congress, the media, or the public, OIRA could allow a proposed rule to move ahead or kill it on the spot.<sup>141</sup>

Under an executive order issued by the politically moderate Clinton administration, OIRA had to meet a deadline in making its determination (previously, OIRA could sit on a proposed rule indefinitely, effectively killing it). The Clinton executive order also required OIRA and the agencies to disclose certain kinds of information about the review process, such as changes made to the rules during the process and communications between OIRA and outside entities such as lobbyists.<sup>142</sup>

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138 Tony Snow, Press Briefing, White House, Office of the Press Secretary, January 18, 2007.

139 Curtis Copeland, “Changes to the OMB Regulatory Review Process by Executive Order 13422,” Congressional Research Service, February 5, 2007, online at <http://www.fas.org/sgp/crs/misc/RL33862.pdf>.

140 *Id.*

141 *Id.*

142 *Id.*

President Bush’s executive order amended the Clinton order to make OIRA more powerful and ideologically driven. The Bush EO created a new hurdle regulations had to clear. When submitting new regulations to OIRA, agencies now had to identify “the specific market failure” that the proposed rule was created to address.<sup>143</sup> No proof of “market failure” can mean no regulation.

The Bush EO also expanded the authority of presidential appointees to limit the number of proposed rules reaching OIRA. A “regulatory policy officer,” named by the president, was placed in each rulemaking agency, replacing the agency-designated policy officer whose job it was to coordinate agency rulemaking. Under the new system, a political appointee can prevent proposed regulations from ever leaving an agency.<sup>144</sup>

“This is a terrible way to govern,” declared Rep. Henry Waxman (D-CA) at a congressional hearing on the EO, “but great news for special interests.”<sup>145</sup>

## B. Special Access for Special Interests

*If you were King, or Il Duce, what would you include in a national policy, especially with respect to natural gas issues?*<sup>146</sup>  
Senior Energy Task Force advisor Joseph Kelliher

In an administration filled top-to-bottom with industry representatives, you would expect corporate lobbyists and CEOs of regulated industries to have easy access to government officials. Easy, however, doesn’t begin to describe the level of intimacy that existed between industry and the Bush administration. Even nonpartisan critics used far harsher terms. In 2006, a former Inspector General of the Department of Homeland Security told *The New York Times* that during his tenure, he witnessed relationships he considered “almost incestuous.”<sup>147</sup>

One of the most illustrative – and flagrant – examples of how these improper relationships worked was the National Energy Policy Development Group, headed by Vice President Dick Cheney. Formed in the first weeks of the Bush administration, the Energy Task Force (as it was informally known) was charged with developing a comprehensive policy to “promote dependable, affordable, and environmentally sound production and distribution of energy for the future.”<sup>148</sup> That may have been its official mission statement, said environmental lawyer Robert F. Kennedy, Jr., “but it behaved more like a band of

143 Id.

144 Id.

145 Robert Pear, “Bush Directive Increases Sway on Regulation,” *The New York Times*, January 30, 2007.

146 Joseph Kelliher, “national energy policy,” e-mail to Dana Contratto, March 18, 2001.

147 Eric Lipton, “Former Antiterror Officials Find Industry Pays Better,” *The New York Times*, June 18, 2006.

148 National Energy Policy Development Group, *Reliable, affordable, and environmentally sound energy for America’s future*, 2001.

pirates divvying up the booty.”<sup>149</sup>

The task force, like the administration itself, was top-heavy with individuals closely tied to traditional energy and transportation industries. These included Secretary of Energy Spencer Abraham, a long-time supporter of the U.S. auto industry. As a United States senator from Michigan, Abraham worked against more stringent fuel efficiency standards for SUVs, pushed to open the Arctic National Wildlife Refuge (ANWR) to oil drilling, tried to abolish the federal gasoline tax – and the Department of Energy (DOE) itself.<sup>150</sup> Overseeing day-to-day operations of the task force was executive director Andrew Lundquist, whose resumé featured a seven-year stint as legislative assistant to Republican Sen. Ted Stevens of Alaska, a close friend and supporter of oil and gas companies in Alaska and around the country.<sup>151</sup> (Stevens was convicted in 2008 for accepting and then covering up gifts and services worth a quarter million dollars from the oil industry and others.<sup>152</sup>) Secretary of the Interior Gale Norton was represented by Steven Griles (see Chapter II for more on Griles).<sup>153</sup> Joseph T. Kelliher, a former lobbyist for the nuclear power industry, was a senior policy adviser for the task force.<sup>154</sup>



### Members of the National Energy Policy Development Group

Richard B. Cheney, Vice President of the United States  
Colin L. Powell, Secretary of State  
Paul O'Neill, Secretary of the Treasury  
Gale Norton, Secretary of the Interior  
Ann M. Veneman, Secretary of Agriculture  
Donald L. Evans, Secretary of Commerce  
Norman Y. Mineta, Secretary of Transportation  
Spencer Abraham, Secretary of Energy  
Joe M. Allbaugh, Director, Federal Emergency Management Agency  
Christine Todd Whitman, Administrator, Environmental Protection Agency  
Joshua B. Bolten, Assistant to the President  
Mitch Daniels, Director, Office of Management and Budget  
Lawrence Lindsey, Assistant to the President for Economic Policy  
Ruben Barrales, Deputy Assistant to the President  
Andrew Lundquist, Executive Director, National Energy Policy Development Group

149 Robert F. Kennedy, Jr., *Crimes Against Nature*, (New York: HarperCollins, 2004).

150 David Helvarg, "The Three Horsemen," *The Nation*, January 29, 2001.

151 Online at [http://www.sourcewatch.org/index.php?title=Andrew\\_D.\\_Lundquist](http://www.sourcewatch.org/index.php?title=Andrew_D._Lundquist).

152 Manu Raju, "Sen. Ted Stevens Guilty of all 7 Felony Charges," *The Hill*, October 27, 2008.

153 Matt Apuzzo, "Griles Faces Sentencing in Abramoff Case," *The Associated Press*, June 26, 2007.

154 Online at [http://www.progressivegovernment.org/appointee\\_data4.php?title=Commissioner%20FERC2](http://www.progressivegovernment.org/appointee_data4.php?title=Commissioner%20FERC2), accessed December 8, 2008.



From mid-January until the National Energy Policy was published in May 2001, task force members met secretly with scores of individuals and groups. Later, appearing on the television program *Nightline*, Vice President Cheney refused host Ted Koppel's request to provide the names of any outside consultants, while at the same time rejecting the notion that there was anything hidden about the workings of the task force. "It wasn't any more secret than anything else we do,"<sup>155</sup> insisted Cheney with no apparent irony. (See next section: C. Secrecy.) The vice president described a process of evenhandedness, transparency, and openness to all points of view. "We heard from energy people," said Cheney. "We heard from many environment people. We heard from consumer groups."<sup>156</sup>

Six years and several lawsuits later, Americans learned that when the vice president said he "heard from" a group, the precise level of communication could refer to a letter sent to Cheney (but not necessarily read by him), a series of face-to-face personal meetings over the course of several months, and everything in between.

For example, between February and late April 2001, the task force had dozens of meetings with at least 300 "energy people," including representatives from Chevron, Ashland Oil, Peabody Energy, British Petroleum, Reliant Energy, the American Petroleum Institute, Exxon-Mobil, Conoco, Vintage Petroleum, Sinclair Oil, Marathon Oil, Shell Oil, Alyeska Pipeline Service Company, General Electric, the Nuclear Energy Institute, the National Mining Association, the Edison Electric Institute, EXELON, Dynergy, Duke Energy, Kennecott, U.S. Enrichment Corporation, Dow Chemical, the American Farm Bureau, International Paper, and the Independent Gasoline Marketers Association, among others.<sup>157</sup> In several cases, Cheney himself attended the meetings, sometimes privately with a single industry CEO.



The Bush administration's energy task force "heard from environmental people" in a different fashion. On the morning of April 4, 2001, Lundquist met with the heads of thirteen environmental groups. The meeting, which Cheney did not attend, lasted for one hour – half of which consisted merely of making introductions, according to one of the participants.<sup>158</sup>

"Who cares if there were 100 meetings?" vice presidential spokesperson Mary Matalin asked a reporter rhetorically. In the abstract, of course, there is some merit to the argument that *quality* of access is more important than *quantity*.<sup>159</sup>

155 Online at [http://supreme.lp.findlaw.com/supreme\\_court/briefs/03-475/03-475.mer.ja.v1.html](http://supreme.lp.findlaw.com/supreme_court/briefs/03-475/03-475.mer.ja.v1.html).

156 Id.

157 *The Washington Post*, "Energy Task Force Meetings Participants," July 18, 2007, online at [http://www.washingtonpost.com/wp-srv/politics/documents/cheney\\_energy\\_task\\_force.html](http://www.washingtonpost.com/wp-srv/politics/documents/cheney_energy_task_force.html).

158 Michael Abramowitz and Steven Mufson, "Papers Detail Industry's Role in Cheney's Energy Report," *The Washington Post*, July 18, 2007.

159 Bill Press, "The Enron Smoking Gun," Tribune Media Services, February 6, 2002, online at <http://archives.cnn.com/2002/ALLPOLITICS/02/06/column.billpress/>.

But in the all-too-real world of the administration's energy task force, mining and power-generating industries received a disproportionate share of both quantity *and* quality of access.

Consider the different outreach methods used by the task force. The Sierra Club's Dan Becker received a phone call from a DOE staffer on Wednesday, March 21, inviting the Sierra Club to submit in writing any suggestions the environmentalists wanted the task force to consider. There was one catch: the DOE official "said he had to get the information in 24 hours," recalls Becker.<sup>160</sup>

The abbreviated timeline was not the official's idea. He had received an e-mail from his boss at DOE, Margot Anderson, at 12:49 PM on that day; the e-mail contained a list of eleven environmental groups with directions to solicit suggestions from them, review their proposals, and forward only those "we might like to support that are consistent with the administration statements to date." Anderson ended her e-mail by noting: "Need by Friday noon."<sup>161</sup> A year later, in a letter to the General Accounting Office (now the Government Accountability Office), Anderson claimed that environmentalists just didn't seem interested in submitting ideas to the task force.<sup>162</sup>

If industries did a better job providing suggestions to the task force, perhaps it has something to do with the manner in which they were asked. For example, Kelliher sent the following e-mail to energy lobbyist Dana Contratto:<sup>163</sup>

"If you were king or Il Duce," hypothesized Kelliher, "what would you include in a national energy policy, especially with respect to natural gas issues?"<sup>164</sup>

Contratto responded promptly with several ideas, including a suggestion that the Federal Energy Regulatory Commission (FERC) "expedite pipeline certificates substantially."<sup>165</sup>

The correspondence between Kelliher and Contratto was kept secret for nearly a year, until lawsuits brought by Judicial Watch and the Natural Resources Defense Council prompted their release. After the documents were made public, a spokesperson for the Energy Department defended the exchange, praising Contratto's "fine reputation for independent thinking." Besides, the official maintained, the task force didn't adopt any of the lobbyist's suggestions, an argument which seeks to apply the "no harm, no foul" rule to governance.<sup>166</sup> Regardless of the dubious merits of that reasoning, "harm"

160 Susan Cornwell, "Bush Energy Task Force Consulted Environmentalists," Reuters, April 12, 2002.

161 Margo Anderson, e-mail to Peter Karpoff, March 21, 2001, online at <http://www.nrdc.org/air/energy/taskforce/bkgrd2.asp>.

162 Susan Cornwell, *supra* note 160.

163 Online at <http://www.crowell.com/Professionals/Dana-Contratto>.

164 Don Van Natta, Jr., "E-Mail Suggests Energy Official Encouraged Lobbyist on Policy," *The New York Times*, April 27, 2002.

165 Joan Claybrook and Wenonah Hauter, Statement to Senate Committee on Energy and Natural Resources, February 11, 2003.

166 Don Van Natta, Jr., *supra* note 164.

was done: the National Energy Policy called on the president to direct FERC to “expedite pipeline permitting” – just as the lobbyist had asked.<sup>167</sup>

No single company had more access to the Cheney energy task force, or at higher levels, than the corporation whose name is now synonymous with accounting fraud, market manipulation, and political corruption: Enron. As with many other corporations, Enron’s access had an inside component. The year before he was a high-ranking member of the Energy Task Force, with the title “The Assistant to the President for Economic Policy,” Lawrence Lindsey served on Enron’s Advisory Council, for which he received \$50,000.<sup>168</sup>

Enron’s founder and CEO, the late Kenneth Lay, helped lay the foundation for George W. Bush’s political career. Lay and other Enron executives contributed \$146,000 to Bush’s 1994 gubernatorial campaign in Texas.<sup>169</sup> When Bush ran for president, Enron was the campaign’s third-largest donor.<sup>170</sup> This generosity was repaid by extraordinary access to the administration, and to the energy task force in particular. Enron executives met at least six times with the task force, including a private dinner with Cheney and Lay. At that April 2001 dinner, Lay handed Cheney a memo with eight energy policy recommendations. When the National Energy Policy was released a month later, seven of the Enron provisions were part of it.<sup>171</sup>

Given the access granted to some groups at the expense of others, it’s no great surprise that the policy’s conclusions read like a wish-list drawn up by the oil, gas, coal, and nuclear industries (which is a fairly accurate description of the process). Meanwhile, many of those charged with leading the task force have gone on to other pursuits. The former Secretary of Energy, Spencer Abraham, is now CEO of Areva, a nuclear power company.

Kelliher, author of the infamous “Il Duce” e-mail, found a position in which he could follow up on the recommendation that FERC expedite its permitting process. On Nov. 20, 2003, President Bush appointed Kelliher to a spot on FERC. In 2005, Kelliher was named chairman of the agency,<sup>172</sup> and he continued to decide cases involving energy companies represented by Contratto’s firm through the end of the Bush administration.<sup>173</sup>

Lundquist formed his own energy consulting firm, one day after leaving the White House in 2002. His lobbying business soon boasted a client list similar to the list of companies that were granted meetings with the task force.<sup>174</sup> After Griles resigned his government position, he joined Lundquist’s firm as a named partner. Griles resigned from that post on Jan. 10, 2007, the same day that reports appeared in the press stating that Griles was under fed-

167 National Energy Policy Development Group, *supra* note 148.

168 James Toedtman, “Bush’s top economic adviser lead Enron study,” *Newsday*, January 17, 2002.

169 Derek Cressman, “Did Cheney Know About Grandma Millie?” *The San Francisco Chronicle*, June 17, 2004.

170 Reece Rushing, *supra* note 42.

171 Bill Press, *supra* note 159.

172 Federal Energy Regulatory Commission, Website, online at <http://www.ferc.gov/about/com-mem/kelliher/kelliher-bio.asp>.

173 Online at <http://www.ferc.gov/whats-new/comm-meet/2008/022108/C-2.pdf>.

174 Online at <http://www.implu.com/lobbyist/32251>.

eral investigation.<sup>175</sup>

Prior to the Bush/Cheney administration, the Office of the Vice President (OVP) was rarely represented at meetings between government agencies and regulated industries.<sup>176</sup> Logbooks of government meetings and other sources, however, reveal that industry lobbyists had the opportunity to make their case directly to Cheney's OVP on important regulatory issues.

- Greenhouse Gas Emissions – While the EPA was evaluating major rule changes on greenhouse gas emissions, the OVP attended an off-the-record meeting between the Climate Policy Group – a coalition of public power utilities – and government regulators from the EPA and the DOE, among others.<sup>177</sup> At that meeting, the industry group submitted a 13-page memo that included a demand that taxpayers, not industry, assume legal and financial responsibility for any future emissions of CO<sub>2</sub>, from minor to “catastrophic.”<sup>178</sup>
- Smog Standard<sup>179</sup> – The Clean Air Act (CAA), passed by Congress in 1955, was the first federal legislation to reduce air pollution in the modern environmental era.<sup>180</sup> It was a reaction to a crisis so extreme that it could no longer be ignored. In the winter of 1952, “killer fog” killed 12,000 people in London.<sup>181</sup> The following year in New York City, 200 people died in a similar event.<sup>182</sup> Intense smog in 1954 forced Los Angeles officials to close public schools for most of October.<sup>183</sup> Finally, public outrage over deadly air pollution overrode industry objections to government regulation. Laws were passed that made the air safe to breathe, or, more accurately, *safer* to breathe. A 2004 study of just one source of air pollution (coal-fired power plants) determined that 24,000 Americans still die each year from this source.<sup>184</sup>



The authors of the Clean Air Act understood that air quality standards would need to be revised as scientists learned more about what sub-

175 Jason McLure, “Lobbying Firm Cuts Ties to Name Partner Under Investigation in Abramoff Probe,” *Legal Times*, January 18, 2007.

176 OMB Watch, “Vice President Reemerging in Regulatory Review Meetings,” November 6, 2007, online at <http://www.ombwatch.org/article/articleview/4067/1/85>.

177 *Id.*

178 Climate Policy Group, “Climate Policy Development Paper, A Three-Phased Legislative Approach Using a GHD Control Technology Trigger,” August 2007, online at <http://www.whitehouse.gov/omb/oir/2000/meetings/668.pdf>.

179 OMB Watch, “White House Meets with Industry on Smog Standard,” June 12, 2007, online at <http://www.ombwatch.org/article/articleview/3858>.

180 Online at <http://www.epa.gov/apti/course422/apc1.html>.

181 Online at <http://www.portfolio.mvm.ed.ac.uk/studentwebs/session4/27/greatsmog52.htm>.

182 Online at <http://www.runet.edu/~wkovarik/envhist/7forties.html>.

183 *Id.*

184 Conrad G. Schneider, “Dirty Air, Dirty Power: Mortality And Health Damage Due To Air Pollution From Power Plants,” (Washington, D.C.: Clear the Air, June 2004), online at [http://cdm266901.cdmhost.com/cdm4/item\\_viewer.php?CISOROOT=/p266901coll4&CISOPTR=928](http://cdm266901.cdmhost.com/cdm4/item_viewer.php?CISOROOT=/p266901coll4&CISOPTR=928).

stances were harmful and at what levels. These periodic assessments are a fundamental part of the CAA, and polluting industries continue to fight more stringent standards, just as they fought the CAA. With the Bush administration, polluters and their lobbyists had an inside track on anti-smog decisions that are supposed to be based on science and public health. In June 2007, as the EPA was revising its existing standard for ozone pollution (80 parts per billion, or ppb), the White House held a closed-door meeting on the subject. Officials at the meeting included representatives of the Office of Management and Budget and the OVP. Industry representatives included the Chemical Industry Institute and the Auto Alliance. No consumer, public health, or environmental groups were present.<sup>185</sup> (The OVP did not attend a later meeting for these groups.<sup>186</sup>) The EPA issued its new standard in March 2008. Agency science advisers had unanimously recommended lowering the level to 60-70 ppb.<sup>187</sup> The EPA's Children's Health Advisory Committee believed that 60 ppb represented the uppermost limit. In the end, the Bush administration sided with industry and lowered the standard by a token amount – to 75 ppb.<sup>188</sup>

### C. Secrecy

*I'll be long gone before some smart person  
ever figures out what happened inside this Oval Office.*  
President George W. Bush.<sup>189</sup>

The secrecy that marked the 2001 energy task force was a sign of things to come. Even before the terrorist attacks of 9/11, the Bush administration ran the executive branch as if it were a clandestine operation. After 9/11, the administration perverted a legitimate concern for national security into a pretext for withholding information of any kind. A heavy curtain was drawn around the White House. Anyone caught trying to peek inside was accused of disloyalty. The people's right to know – a cornerstone of democracy – was replaced by a presumption that the presidency could be run on a need-to-know basis.

- Weakening FOIA – The Freedom of Information Act (FOIA) of 1966 is the codification of the principle of government transparency. It guarantees the right of all Americans to have access to official records and government-collected data of all kinds. At the same time, FOIA recognizes the legitimate need for government secrecy in special cases by allowing narrowly drawn exceptions to the release of information, especially in cases of national security. By necessity, FOIA assumes a certain

<sup>185</sup> OMB Watch, *supra* note 179.

<sup>186</sup> Online at <http://www.whitehouse.gov/omb/oira/2060/meetings/616.html>.

<sup>187</sup> Clean Air Watch, "EPA Smog Plan Compromises Public Health To Save Industry Money," March 12, 2008, online at <http://www.cleanairwatch.org/Documents%20&%20Reports/revisedcawrelease031208.doc>.

<sup>188</sup> *Id.*

<sup>189</sup> Online at <http://politicalhumor.about.com/library/blbushisms.htm>.



amount of good faith on the part of government in deciding when to claim these exemptions. But, on Oct. 12, 2001, the Bush administration dealt FOIA a staggering blow. Attorney General John Ashcroft directed the heads of all government departments and agencies to withhold all requested documents if a “sound legal basis” existed to do so.<sup>190</sup> In a single short memo, the administration shifted the burden of proof from the government official wanting to suppress information to the citizen or group seeking access to it. The decision to weaken implementation of FOIA was made in the fear-filled weeks after 9/11, but it has been used cynically by the Bush administration to hide evidence of cronyism and to cover up corporate malfeasance.

- Removing Web-Based Information – Online access to government documents and information has been a tremendous boon to advocates of government openness and accountability. Following the terrorist attacks of 9/11, the Bush administration removed thousands of documents from government webpages, citing concerns over national security. In some instances, these actions were reasonable. In other cases, however, the administration clearly overreached, blocking access to information Americans need to keep themselves and their families safe. It is no longer possible for families across the country to determine the potential hazards posed by industries that produce and warehouses that store dangerous chemicals in their neighborhoods. The inspection records of local gas pipelines were removed from Web-accessible databases, as were community emergency response plans that localities are required by law to produce. In the name of protecting the nation from terrorists, the Bush administration’s campaign of censorship made us less safe in many ways.



#### D. Inaction and Delay

*It's a poor bureaucrat who can't stall a good idea until even its sponsor is relieved to see it dead and officially buried.*

Robert Townsend<sup>191</sup>

Based solely on the definition above, the Bush administration has been an extraordinary bureaucracy, nearly perfecting the art of the stall as a tactic in its fight against government regulations of all kinds. Anti-regulatory ideologues in the Bush administration (starting with the president himself) argue that government “interference” is costly for businesses, taxpayers, and consumers. Yet nearly eight years of sitting on the sidelines has cost average Americans plenty, in the form of increased injuries on the job, birth defects from unsafe and unregulated products, chronic and sometimes fatal illnesses,

<sup>190</sup> Online at <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>.

<sup>191</sup> Online at <http://tinyurl.com/6nqrdg>.

and an impoverished natural world.

- *Consumer Safety* – In the face of increased public concern over “mad cow” disease, the Bush Agriculture Department actually went to court to prevent a beef producer from testing all of its cows for the disease, also known as bovine spongiform encephalopathy. The federal government currently tests less than one percent of slaughtered cattle for the disease.<sup>192</sup>
- *Worker Safety* – Speaking at a congressional oversight hearing in 2007, chairwoman Lynn Woolsey (D-CA) condemned the Bush administration’s pattern of neglect when it came to insuring workplace safety. The Occupational Safety and Health Administration (OSHA) “has the worst record of standard setting of any administration,” she charged.<sup>193</sup>

According to its own standards, under the Bush administration, OSHA issued only one significant new regulation in eight years – and it was promulgated only under the threat of a court order.<sup>194</sup> The administration loosened safety regulations already on the books while ignoring a host of well-documented hazards. For example, 5,000 American workers develop silicosis each year, a disabling and potentially fatal lung condition caused by inhaling fine particles of silica dust. The incurable disease primarily strikes miners, construction workers, and foundry workers.<sup>195</sup> Despite the fact that OSHA admitted that its methods for measuring silica in the air were “obsolete,” the Bush administration did not adopt newer, more accurate methods. Nor did OSHA make any move to implement a new draft standard regulating worker exposure to silica dust, developed in 2003.<sup>196</sup>

- *Endangered Species* – The North Atlantic right whale was hunted nearly to extinction in the 19th century. By 1935, so few of the 60-foot-long whales were left that hunting them was prohibited.<sup>197</sup> Even with this protection, whales continued to be killed by accidental boat strikes in the busy shipping lanes off the East Coast of the United States, their numbers dwindling to approximately 350 individuals.<sup>198</sup> A study by marine scientists in 2005 determined that the eight right whales known to have been killed in boat collisions over the previous 16 months likely represented only a fraction of the true number.<sup>199</sup> The scientists called on the federal government to issue emergency rules to stop the boat strikes and save the species from extinction.

192 *The Associated Press*, “U.S. government fights to keep meatpackers from testing all slaughtered cattle for mad cow,” May 29, 2007.

193 OMB Watch, “OSHA’s Lack of Standard Setting under Fire,” May 1, 2007, online at <http://www.ombwatch.org/article/articleview/3818>.

194 *Id.*

195 Scott P. Schneider, Testimony before the Subcommittee on Workforce Protections, Committee on Education and Labor, United States House of Representatives, April 24, 2007, online at <http://edlabor.house.gov/testimony/042407ScottSchneider testimony.pdf>.

196 *Id.*

197 Shaila Dewan, “Even the Whales Have Their Predators: Ships,” *The New York Times*, April 12, 2008.

198 Online at [http://www.nmfs.noaa.gov/pr/pdfs/shipstrike/feis\\_press\\_release.pdf](http://www.nmfs.noaa.gov/pr/pdfs/shipstrike/feis_press_release.pdf).

199 *The Associated Press*, “Deaths of Rare Whales May Be Underreported, Scientists Say,” *The New York Times*, July 24, 2005.

The National Oceanic and Atmospheric Administration (NOAA) promised to act quickly and predicted that the new rules would be in place by early 2006. NOAA, which had been working since 1999 to limit the speed of shipping vessels in the waters inhabited by the whales, published the proposed rule in June 2006.<sup>200</sup> Despite warnings by scientists in 2005 that “we can’t wait to deal with a bureaucratic maze,”<sup>201</sup> the Bush White House began to stall the measure, siding with the shipping industry, which objected that the rule would hurt it economically.<sup>202</sup> After a year-long comment period, OIRA used its full 90-day allotted period to consider the rule. The administration then invoked an optional 30-day extension. When that period ran out, the administration simply sat on the rule, without explanation and in violation of the law, for an additional 453 days.<sup>203</sup>



## E. Voluntary Regulation

*We will prepare spokesmen accordingly.*  
Internal report by the Chemical Manufacturers Association on  
industry response to poison gas leak at Union Carbide plant  
in Bhopal, India, that killed thousands  
December 2-3, 1984<sup>204</sup>

Four years after the Bhopal chemical disaster, it was clear that the platoons of highly prepared industry spokesmen had failed to silence calls for increased government oversight at hazardous chemical plants and waste sites. The American Chemistry Council (ACC) tried a slightly different approach in 1988 by launching the “Responsible Care” program, which continues to operate today. It is designed to allay public concern about toxic chemicals by improving the “environmental, health, safety and security performance” of ACC members. “Participation in Responsible Care is mandatory for ACC member companies,” stresses the chemical trade group.<sup>205</sup>

Critics of the program have pointed out that the word “mandatory” is a bit misleading in this context. Participation may be mandatory, but legally, it is up to the individual companies to decide how they’ll participate. Responsible Care is responsible only to the CEOs of the chemical manufacturing compa-

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200 Id.

201 Id.

202 Shaila Dewan, *supra* note 197.

203 Matt Madia, “Whale Protection Rule Clears White House, 573 Days Later,” *Reg•Watch*, September 25, 2008, online at <http://www.ombwatch.org/article/blogs/entry/5407/38>.

204 Chemical Manufacturers Association, “Report of the President,” January 29, 1985, online at <http://www.chemicalindustryarchives.org/search/search2.asp?cmd=search&request=bhopal&submit1=Search&i=cma&sort=date&stemming=Yes>.

205 Online at [http://www.americanchemistry.com/s\\_responsiblecare/sec.asp?CID=1298&DID=4841](http://www.americanchemistry.com/s_responsiblecare/sec.asp?CID=1298&DID=4841).

nies.<sup>206</sup> It's classic Orwellian newspeak: a mandatory voluntary program.

Ronald Reagan, who was president at the time of the Bhopal disaster, was the ideological godfather of this and many other forms of deregulation in modern times. The push for voluntary regulation did not leave Washington with Reagan; however, Americans turned against *laissez-faire* purists and a less extreme political economy held sway – until George W. Bush arrived on the scene with a pro-industry agenda. The chemical industry had once observed that campaign donations bought influence, “but over the long term, the more important function of PAC’s is to upgrade Congress.”<sup>207</sup> With the anti-regulatory governor from Texas running for president, the industry seized the opportunity to “upgrade” the White House. For every dollar the chemical industry donated to Al Gore’s campaign in 2000, it contributed nine dollars to George W. Bush’s war chest.<sup>208</sup>

The Bush administration’s regulatory formula for the chemical industry’s most lucrative emerging technology suggested that the donations were a wise investment. Nanotechnology – the science of engineering devices or new substances at the molecular level – promises “a revolution in technology and industry for the benefit of society,” according to Bush science advisor John Marburger.<sup>209</sup> Every major U.S. chemical manufacturer has invested heavily in this field,<sup>210</sup> and already more than 600 products incorporating nanotechnology are on the market.<sup>211</sup> Industry analysts predict the sector will be making \$1 trillion in sales annually by the year 2015. Questions about potential dangers to human health and safety posed by nanoparticles have been raised by consumer and environmental groups and by scientific panels, including the National Research Council, which called on the Bush administration to adopt “precautionary measures to protect workers, the public, and the environment.”<sup>212</sup>

It is true that the Bush administration took action on nanotechnology early on, creating the National Nanotechnology Initiative in 2001, but the new government entity was not designed to regulate the technology but to subsidize it. By the time Bush left office, his administration had spent almost ten billion taxpayer dollars on nanotechnology subsidies benefiting the chemical industry.<sup>213</sup>

In 2005, a federal advisory committee recommended that the EPA be-

206 Paul Orum, “Responsible Care Still Lacks Teeth,” Working Group on Community Right-to-Know, 2003, online at <http://www.crtk.org/detail.cfm?docID=219>.

207 John H. Cushman, Jr., “After ‘Silent Spring,’ Industry Put Spin on All It Brewed,” *The New York Times*, March 26, 2001.

208 Center for Responsive Politics, “Chemical & Related Manufacturing: Top Recipients,” OpenSecrets, online at <http://www.opensecrets.org>.

209 Subcommittee on Nanoscale Science, Engineering, and Technology, “The National Nanotechnology Initiative, Supplement to the President’s 2009 Budget,” National Science And Technology Council, September 2008.

210 Jennifer Sass, senior scientist, NRDC, author interview, October 15, 2008.

211 J. Clarence Davies, “Nanotechnology Oversight: An Agenda for the New Administration,” *Project on Emerging Nanotechnologies (PEN)* 13, July 2008.

212 Rick Weiss, “Nanotechnology Risks Unknown, Insufficient Attention Paid to Potential Dangers, Report Says,” *The Washington Post*, September 26, 2006.

213 Subcommittee on Nanoscale Science, Engineering, and Technology, *supra* note 209.

gin a six-month voluntary regulatory program for nanotechnology as a framework for developing mandatory regulations.<sup>214</sup> The administration waited until 2008 to implement this voluntary program. As if to ensure its failure, the voluntary program had no timeline for developing mandatory regulations and included no useful standards for determining if the information submitted by chemical manufacturers helped to assess health and safety risks.<sup>215</sup>

At the end of his final term of office, no example was as calamitous as the Bush decision to stand idly by as banks, investment firms, and mortgage companies speculated wildly with other people's money and drove the economy over a cliff.

The process of deregulating financial institutions was well underway before George W. Bush took office. As in so many other areas, however, under the Bush administration, questionable practices which were once only infrequently encountered became commonplace, and risky policies conducted outside of public view – and with no government oversight – became the norm. In August 2006, Henry Paulson told an audience in New York City that he had come to deliver his first public address as Secretary of the Treasury to underscore the administration's guiding principle that “the solutions to our nation's challenges are not always found in Washington.”<sup>216</sup> This point of view becomes a self-fulfilling prophecy when the people actually running the government view the notion of governance with suspicion. Or, as economist Robert Kuttner put it, “When George W. Bush contends that you can't trust government, his own administration provides the exclamation point.”<sup>217</sup> Paulson was even more specific when, at the end of 2006, he cited the twin threats facing U.S. capital markets: excessive regulation and burdensome litigation.<sup>218</sup> What is needed, said Paulson, is a “greater degree of trust between the regulators and the regulated.”<sup>219</sup>

Blinded by a deregulatory bias, when warning signs of great economic troubles ahead appeared, the administration did not see them or believed them to be untrue. Paulson's concern was largely limited to what he termed “the ongoing housing correction.”<sup>220</sup> Three weeks after giant Merrill Lynch began to implode (taking the largest write-down in Wall Street history),<sup>221</sup> and just four months before the venerable equity trading house, Bear Stearns, was forced to accept a fire sale buyout (\$2 a share for stock that was selling at

214 Richard Denison, “Tired of Waiting ... [with apologies to Ray Davies],” Blog post, *Nanotechnology Notes*, Environmental Defense Fund, August 20, 2008, online at <http://blogs.edf.org/nanotechnology/2008/08/20/tired-of-waiting-with-apologies-to-ray-davies>.

215 *Id.*

216 Henry M. Paulson, “Remarks Prepared by Treasury Secretary Henry M. Paulson for Delivery at Columbia University,” News release, Department of the Treasury, August 1, 2006, online at <http://www.ustreas.gov/press/releases/hp41.htm>.

217 Robert Kuttner, *Obama's Challenge: America's Economic Crisis and the Power of a Transformative Presidency*, (White River Junction, Vt.: Chelsea Green Pub, 2008).

218 Stephen Labaton, “Treasury Chief Urges ‘Balance’ in Regulation of U.S. Companies,” *The New York Times*, November 21, 2006.

219 Henry M. Paulson, “Remarks by Treasury Secretary Henry M. Paulson on the Competitiveness of U.S. Capital Markets Economic Club of New York, New York, NY,” News release, Department of the Treasury, November 20, 2006, online at <http://www.ustreas.gov/press/releases/hp174.htm>.

220 AFP, “Housing Woes Take Bigger Toll On Economy than Expected: Paulson,” October 16, 2007, online at <http://afp.google.com/article/ALeqM5hWSjWmGj4YXTh3PM5kOC7csTT48g>.

221 Bradley Keoun, “‘Startling’ \$8 billion loss for Merrill Lynch,” *Bloomberg News*, October 25, 2007.



\$172 a year earlier), Robert Steel, the Bush Treasury Department official responsible for domestic finance, blamed any problems that *might* exist in our otherwise healthy financial system on “accumulated layers of regulation, act upon act, rule upon rule.”<sup>222</sup>



The administration merely recited their anti-regulatory mantras until it was too late. Only after the stock market plunged thousands of points in just a few days did a Bush administration official acknowledge an essential error behind the worst financial crisis to strike America since the Great Depression.

“The last six months have made it abundantly clear that voluntary regulation does not work,” admitted Christopher Cox, the chairman of the Securities and Exchange Commission (SEC) on Sept. 26, 2008. The SEC’s oversight of investment banks “was fundamentally flawed from the beginning,” he added, “because investment banks could opt in or out of supervision voluntarily.”<sup>223</sup>

Wall Street firms had lobbied hard for the voluntary program.<sup>224</sup> Testifying before the Senate Banking Committee in February 2000, one investment banker warned the senators that failure to implement the program would have dire consequences. “The two words that mean death to any business or industry today,” he intoned, “are ‘status quo.’” The speaker was CEO of investment firm Goldman Sachs – later to become Secretary of the Treasury – Henry Paulson.<sup>225</sup>

Many analysts now believe the regulatory *coup de grace* came in April 2004, when the SEC voted unanimously to allow the largest Wall Street brokers to create the appearance of greater capital holdings, freeing them to take on unprecedented levels of debt.<sup>226</sup> Acting in accordance with the Bush anti-regulatory agenda, Paulson’s firm, Goldman Sachs, claimed that the old rules of figuring debt to asset ratios were “unduly onerous.”<sup>227</sup> Not surprisingly, the SEC agreed with that assessment, stating that the new method “helps us move from our command and control regulatory model to a more efficient and goals-oriented approach.”<sup>228</sup> The Wall Street firms made enormous profits, as

222 Robert K. Steel, “Under Secretary for Domestic Finance Robert K. Steel Remarks before the American Enterprise Institute,” News release, Department of the Treasury, November 13, 2007.

223 Stephen Labaton, “S.E.C. Concedes Oversight Flaws Fueled Collapse,” *The New York Times*, September 26, 2008.

224 Julie Satow, “Ex-SEC Official Blames Agency for Blow-Up of Broker-Dealers,” *The New York Sun*, September 18, 2008.

225 Henry M. Paulson, “Hearing on the ‘Financial Marketplace of the Future,’” United States Senate Banking Committee, February 29, 2000, online at [http://banking.senate.gov/00\\_02hr/022900/paulson.htm](http://banking.senate.gov/00_02hr/022900/paulson.htm).

226 Online at <http://www.sec.gov/rules/final/34-49830.htm>.

227 David Viniar, Letter to Securities and Exchange Commission, February 9, 2004, online at <http://www.sec.gov/rules/proposed/s72103/s72103-11.pdf>.

228 Securities and Exchange Commission, meeting, audio, April 28, 2004, online at [http://graphics8.nytimes.com/packages/audio/national/20081003\\_SEC\\_AUDIO/SEC\\_Open\\_Meeting\\_04282004.mp3](http://graphics8.nytimes.com/packages/audio/national/20081003_SEC_AUDIO/SEC_Open_Meeting_04282004.mp3).

their debt-to-capital ratios swelled from 12-to-1 to as high as 40-to-1.<sup>229</sup> By the time the financial bubble exploded, Paulson had left Wall Street to become Bush's Treasury Secretary, where he created and oversaw a \$700 billion taxpayer-funded plan to bail out Wall Street after disaster struck.

Roderick M. Hills, SEC chairman under Republican President Gerald Ford, cut to the chase when asked by *The New York Times* to help readers understand the tangled roots of the financial meltdown. "The problem with such voluntary programs," said Hills, is "they often don't work."<sup>230</sup>

Of course, for those who regard all government regulation as intrusive, burdensome, and "socialistic," failure of voluntary regulation is not a problem to be solved. It is the mission, accomplished, with some regrettable collateral damage.

## F. Disregarding Congressional Intent: PART

Another way the Bush administration has worked to change the rules of the federal policy and regulatory game is through the use of their Program Assessment Rating Tool (PART). PART was developed by the Bush administration early in its first term, using a select group of federal employees and government management experts that was less than transparent and open.<sup>231</sup> The goal was to institute a mechanism for OMB to evaluate the success or failure of government programs and use those assessments to make more efficient budget decisions. Unfortunately, the tool is a very poor mechanism for measuring program performance and results, introducing biases and a skewed ideological perspective into a model claiming to present consistent and objective performance data and evaluations of government programs. Oftentimes, PART actually decreases the efficiency and effectiveness of government.



The Office of Management and Budget (OMB) has used PART to influence and alter the management of federal programs, particularly regulatory programs, in troubling ways. The PART mechanism allows for OMB perspectives and policy preferences to be inserted into the oversight and management structures of federal programs without congressional approval. Agency staff implementing federal programs are subordinate to OMB within the construction of the PART reviews and experience concrete consequences – such as flat or decreased budget requests and in some cases, even the inability to receive an annual salary increase – if they fail to heed the

229 Julie Satow, *supra* note 224

230 Stephen Labaton, "The Reckoning, Agency's '04 Rule Let Banks Pile Up New Debt," *The New York Times*, October 2, 2008.

231 See OMB Watch's comments on the Program Assessment Rating Tool, sent to OMB on July 8, 2002. Online at <http://www.ombwatch.org/article/articleview/886/1/90/>.

management signals OMB sends through PART. As a result, PART has enormous potential to distort federal regulatory priorities in ways that Congress never intended.

OMB has, unfortunately, taken advantage of that potential. Many of the stated reasons for scoring programs negatively in the PART reflect nothing more than OMB's disagreement with the way Congress designed a program by law. OMB does not merely suggest to Congress ways a program can be, in its view, improved; instead, OMB scores a program negatively and imposes consequences against it, such as reduced budget requests, simply for following the law. OMB then justifies its decision using the rhetoric of results rather than a direct statement of its disagreement with Congress.

In particular, the Consumer Product Safety Commission (CPSC), Occupational Safety and Health Administration (OSHA), and Mine Safety and Health Administration (MSHA) were all penalized for failing to use economic analysis in their rulemaking processes – even though they are forbidden by law and Supreme Court precedent from doing so.

The CPSC is instructed by Congress not to use cost-benefit analysis when issuing rules specifically required by law, such as rules governing garage door openers and bicycle helmets. CPSC (which, despite an otherwise high passing score, was categorized “Results Not Demonstrated”) was penalized for following the law and not conducting cost-benefit analyses for those rules. CPSC was also scored down for not complying with OMB's demand for using net benefits as a criterion for regulatory decisions, even though CPSC's authorizing legislation instructs the agency to take a different approach in order to maximize public safety.

The same is true for OSHA and MSHA; OMB scored these programs negatively for failing to do “cost-benefit comparisons or monetiz[ing] human life,” even though their organic acts and Supreme Court precedent forbid these practices.

Interestingly enough, these examples are not necessary to prove that OMB uses PART to alter the regulatory agendas of federal agencies. During the Bush administration, OMB officials testified that it was possible for a program to receive a low PART score simply because it follows the law.<sup>232</sup> This distortion of priorities is also happening in a host of more subtle and indirect ways. Buried in the small type of the specific program assessments, the standards actually used to measure program “effectiveness” or “results” very often fail to focus on what is most meaningful or relevant about a program.

One particular example is that the Clean Water Revolving Fund was given a low passing score and slated for deep budget cuts, in part because PART measured success based on the “percentage of water miles/acres with

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232 Subcommittee on Federal Financial Management, Government Information & International Security of the Senate Committee on Homeland Security & Governmental Affairs, “Accountability and Results in Federal Budgeting,” 109th Cong (2005), 2005 WL 1409975 (F.D.C.H.) (colloquy between Sen. Carper and Clay Johnson III).

fish consumption advisories removed.” This measure is not a scientifically appropriate measure of actual water quality: as EPA stated, the number of rivers and lakes with mercury fish advisories increased in the last ten years even though the amount of mercury emissions actually declined by 100 tons.<sup>233</sup> An increase in the number of advisories can actually be a sign of *success*, as it could mean the government is doing a better job of monitoring pollution and informing the public.

These conflicts between the statutory mandates imposed by Congress and the willful arbitrariness of OMB are waved away when the assessments are offered to Congress and the public, and the scores and ratings are attributed to the program’s “ineffectiveness” or failure to demonstrate results rather than OMB’s decision to measure programs with inapposite criteria or include subjective political judgments and influence about a program’s worth.

Furthermore, the PART process itself has become a burdensome distraction for many federal employees and program managers. Since the PART was first introduced, the review process has often forced program managers and agencies to alter their existing management and performance review practices, institute new and costly data collection structures and systems, generate independent reviews and analyses from outside the government, and overlay this performance initiative with previous government efforts.

There are significant obstacles to these additional data collection efforts – especially the independent evaluations PART expects programs to rely on, which can be expensive. Yet PART does not excuse programs that cannot collect the expected level of data because of a lack of funding. OMB itself is responsible for these obstacles, even as it penalizes programs for running into them.

These alterations to program management have created an entire compliance system within itself that diverts energy and resources from achieving program goals. This has been particularly problematic at regulatory agencies that are already struggling to keep up with demand for enforcement and public protections with fewer resources.<sup>234</sup>

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233 Susan Bruninga, “Fish Advisories Increase By 9.29 Percent, Despite Decline in Air Pollutants, EPA Says,” *Daily Report for Executives* (BNA), August 25, 2004 at A-28.

234 OMB Watch, *Bankrupting Government*, online at <http://www.ombwatch.org/article/archive/527>.





## Chapter IV

# Getting Government Out of the Way

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### A. Starving Government – Taking the Cop off the Beat

*My goal is to cut government in half in twenty-five years, to get it down to the size where we can drown it in the bathtub.*

Grover Norquist  
Americans for Tax Reform<sup>235</sup>

*If the American people really want to know what George W. Bush is up to, the best place to look is the candor of Grover Norquist.*

Ralph G. Neas  
People for the American Way<sup>236</sup>

Slashing taxes as a backdoor means of incapacitating government's ability to govern started as a strategy under the Reagan administration. Although they did not fully succeed ("We didn't starve the beast," grieved a Reagan official in 1985<sup>237</sup>), Reagan protégé Grover Norquist never gave up the fight. Norquist helped write several of the tax-cutting, beast-starving provisions of Rep. Newt Gingrich's (R-GA) infamous "Contract with America" in the 1990s. In 1998, when then-Governor George W. Bush was first considering a run for the White House, his aide, Karl Rove, knew that the Ivy League-educated son of a moderate Republican former president lacked the credentials needed to win the support of a key constituency – the so-called movement conservatives. Rove invited his old friend, Grover Norquist, to Austin to meet the governor. As journalist Robert Dreyfuss observed, "Norquist came away convinced that Bush, if not an authentic conservative, was at least the right's best hope."<sup>238</sup>

Norquist sold the Republican right wing on the idea of a Bush presidency, and in return, Bush embraced key issues on their agenda, starting with the \$1.35 trillion tax cut in 2001.<sup>239</sup> Promoted as "tax relief," the decrease in government revenue gave the administration political cover to slash regulatory programs opposed by key Bush donors and supporters. (The Bush administration managed to fund programs and initiatives it favored – the war in Iraq, Reading First, and more – by running up the federal budget deficit to record levels.)

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<sup>235</sup> Robert Dreyfuss, *supra* note 63.

<sup>236</sup> Michael Scherer, "The Soul of the New Machine," *Mother Jones*, January/February 2004.

<sup>237</sup> Paul Blustein, "Reagan's Record," *The Wall Street Journal*, October 21, 1985.

<sup>238</sup> Robert Dreyfuss, *supra* note 63.

<sup>239</sup> *The Associated Press*, "Romney Slams McCain for Opposing Bush Tax Cuts," *USA Today*, December 23, 2007.

- Food Safety* – The Food Safety and Inspection Service (FSIS) is responsible for regulating meat, poultry, and egg products. While consumption of these products has steadily risen, government funding for safety and health inspections has not kept pace. In 1981, for example, FSIS spent \$26.44 for each ton of meat and poultry inspected and passed. In 2007, that figure had dropped to \$16.52 per ton.<sup>240</sup>

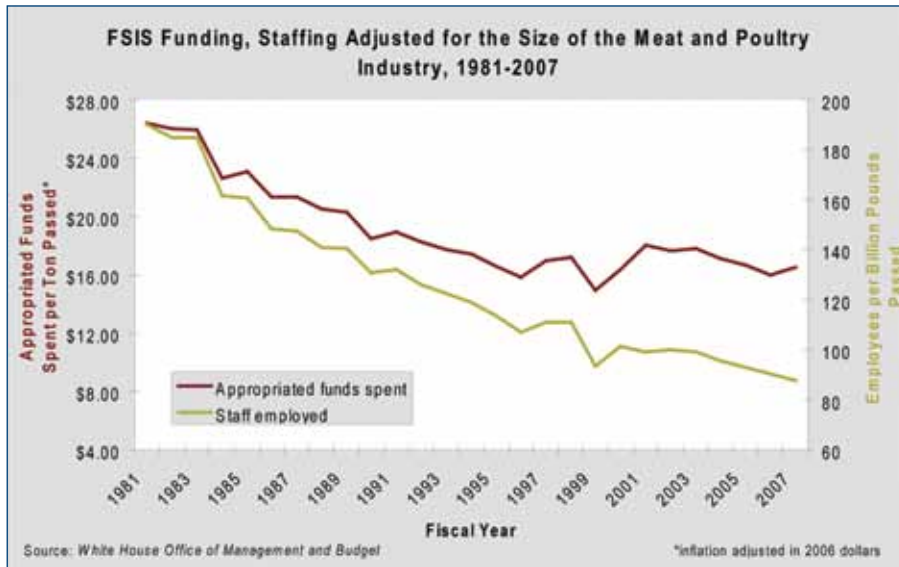


Figure 3

- Mine Safety* – A recent report by the Department of Labor’s Inspector General determined that federal mine inspections have dropped significantly. The IG’s report looked at inspections required by the Mine Act (and not those the Mine Safety and Health Administration (MSHA) chooses to do at its discretion) and found MSHA’s rate of inspection for coal mines to be dropping. According to the report, MSHA’s coal program inspectors missed 147 required inspections at 107 underground coal mines – about 15 percent of the mines within the program’s pur-

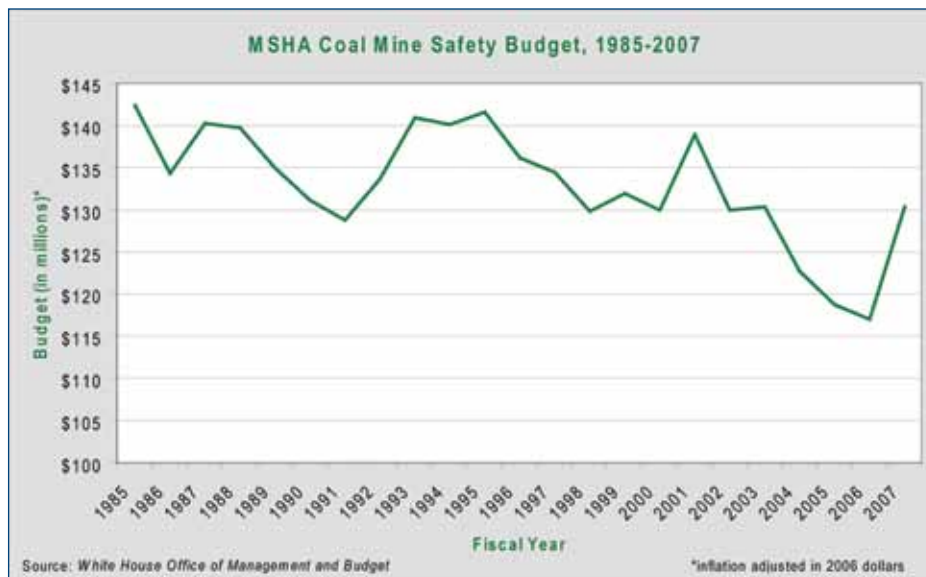


Figure 4

view – in 2006. The IG report noted resource constraints as one reason for the drop in inspections. The report states, “Decreasing inspection resources during a period of increasing mining activity made it more difficult to complete the required inspections.”<sup>241</sup>

## B. Regulatory Preemption & Devolution

When the White Star Line boasted that its new ship, the *Titanic*, was the safest oceangoing vessel ever built, it could cite as evidence the new ship’s full compliance with all the rules and regulations set out by the British Board of Trade. Should the *Titanic* encounter any problems while crossing the Atlantic, the ship carried the requisite number of lifeboats, built to strict legal specifications, mounted on hoists that had passed rigid inspections at the world-class Harland and Wolff shipyards in East Belfast, Ireland. Despite the company’s compliance with the pertinent regulations, why did more than 1,500 passengers and crew members die when the *Titanic* hit an iceberg and sank in 1912? Because, as law professor David Vladeck points out in a recent journal article, the regulations specifying the number of lifeboats required were enacted twenty-eight years before the *Titanic* was built, when the largest ship was just a fourth the size of the doomed ocean liner.



“The *Titanic* example,” Vladeck notes, “demonstrates the perils of relying on regulatory standards alone to define the appropriate level of care.”<sup>242</sup>

Fortunately, there is a parallel state system of law that protects individuals when manufacturers knowingly or recklessly exploit loopholes or gaps in federal regulations: they can sue. As Vladeck explains, the system, known as tort law, “compensates those injured through the fault of others, alerts the public about unforeseen hazards, and deters excessive and unwarranted risk taking.”<sup>243</sup>

At least, that’s how our legal system is supposed to work. And, for the most part, it has. The Bush administration, however, began a campaign to undermine these protections by inserting seemingly innocuous language into the preambles to regulations, denying citizens the right to sue manufacturers who knowingly put consumers’ lives at risk – if the companies have met the barest of regulatory standards. The Bush administration has used this strategy, known as regulatory preemption, to undercut consumer protections in agencies as diverse as the Federal Railroad Administration, the National Highway

<sup>241</sup> Id.

<sup>242</sup> David Vladeck, “The Emerging Threat of Regulatory Preemption,” American Constitution Society for Law and Policy, January 16, 2008, online at <http://www.acslaw.org/node/5908>.

<sup>243</sup> Id.

Traffic Safety Administration, and the Food and Drug Administration (FDA).

In January 2006, the FDA published a new rule in the *Federal Register* asserting that once the agency approves a pharmaceutical company's wording on a drug warning label, that company cannot be sued in state court for failing to warn consumers of potential side effects, even fatal ones, even if the manufacturer *should* have known a threat existed.<sup>244</sup> This heavy-handed intrusion by the federal government to nullify state law was all the more bizarre coming from an allegedly conservative administration that took office – and won reelection to it – in part by promising a smaller, less intrusive federal government.

Another “values” clash revealed the real priorities of the Bush administration. In his second term of office, President Bush addressed participants gathered in Washington for the annual “March for Life.” The president praised the tens of thousands of marchers for their work “to promote a culture of life, to promote compassion for women and their unborn babies.”<sup>245</sup>

“We come from different backgrounds,” the president said, “but what unites us is our understanding that the essence of civilization is this: The strong have a duty to protect the weak.”<sup>246</sup> The line drew cheers from those who had traveled from across the country to show their support for the values expressed by the president.

The same people hailed a major new rule by the FDA in May 2008, which reflected these values. The regulation called for a new labeling system for drugs taken by pregnant or lactating women, a group that, as the FDA pointed out, “has very, very special needs.”<sup>247</sup>

The proposed labels required information about known risks to the fetus posed by drugs, as well as potential hazards to breastfed babies who ingest the medicine through their mothers' milk.

Thirty-one pages into the proposed 38-page rule, sandwiched between sections on the Paperwork Reduction Act of 1995 and requests for comments, was a short section that received almost no notice. Titled “Federalism,” the section protected drug manufactures by abandoning the legal protections of tort law for mothers, fetuses, and breastfed babies harmed by prescription medicines covered by the new law. Overturning an 80-year tradition of consumer protection at the FDA, pharmaceutical firms were made immune from lawsuits brought by mothers whose babies had been harmed, permanently and severely, by medicines labeled safe by an underfunded agency forced to rely on the manufacturers themselves for health and safety data.

244 Food and Drug Administration, “Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products,” 71 *Federal Register*, 3922, January 24, 2006.

245 George W. Bush, “President Bush Calls ‘March for Life’ Participants,” News release, White House, January 24, 2005, online at <http://www.whitehouse.gov/news/releases/2005/01/20050124-7.html>.

246 *Id.*

247 Dan Childs, “FDA Proposes New Drug Labeling for Women,” *ABC News*, May 28, 2008, online at <http://abcnews.go.com/Health/ReproductiveHealth/Story?id=4948097&page=1>.

Soaring rhetoric about protecting the weak, the unborn, and pregnant mothers brought cheers at pro-life/anti-abortion rallies and votes on Election Day. The fine print of rules and regulations buried deep in the *Federal Register*, where those protections were abandoned, pleased large drug companies who showed their appreciation in the form of campaign contributions. For the Bush administration, it was a win-win situation.

The Bush administration used other methods to make life easier for corporations while undercutting public protections and infringing upon citizens' ability to hold their government accountable. One of the most drastic approaches was to simply remove services from direct federal control through privatizing government.

The Bush administration wasted little time taking steps to expand contracting and make it easier. Within months of taking office, President Bush suspended a rule that would have blocked certain law-breaking contractors from obtaining contracts with the federal government. The rule, known as the Contractor Responsibility Rule, required federal agencies to take into account whether a bidding contractor was complying with tax, labor, employment, environmental, antitrust, and consumer protection laws before awarding a federal contract.<sup>248</sup> The suspension – and ultimate repeal – of this common-sense measure is emblematic of the administration's attitude toward federal contracting: The merits of outsourcing and concern for the quality of the contractor should take a backseat to placing governmental functions into the hands of private contractors as quickly and as often as possible.



This attitude has been dangerously successful. Under the Bush administration, federal government contracting increased a startling 134 percent, rising from \$219.8 billion in FY 2001 to \$513.6 billion in FY 2008.<sup>249</sup> With that increase has come little regulation of what products and services are outsourced and even less oversight of whether the government is spending taxpayer dollars wisely. While the government contracts with over 150,000 companies each year, the top 25 corporations controlled over 40 percent of contracting dollars in FY 2008 – more than \$200 billion.<sup>250</sup> In addition, two-thirds of all contract dollars awarded in FY 2008 were given out with less than full and open competition<sup>251</sup> – the de facto justification for outsourcing government in the first place: competition yields lower costs and better products.

248 OMB Watch, "Administration Kills Contractor Responsibility Rule," January 7, 2002, online at <http://www.ombwatch.org/article/articleview/292/1/80>.

249 Contracting figures are according to USASpending.gov at <http://www.usaspending.gov>.

250 Figures according to USASpending.gov, online at <http://www.usaspending.gov/fpds/tables.php?tabtype=t2&subtype=t&year=2008>.

251 Figures according to USASpending.gov, online at <http://www.usaspending.gov/fpds/tables.php?tabtype=t1&rowtype=a&subtype=p&sorttype=2008>.



The singular focus of the Bush administration on outsourcing government services has not just swelled the size of government contracting, it has also expanded its scope. The Bush administration stretched both the legal definition of what products and services can be privatized as well as the logical explanations for why some functions are privatized in the first place.

In 2004, Congress enacted – and in September 2006, the IRS implemented – a program to outsource the responsibility of collecting small tax debts to private debt collection firms. The Private Debt Collection (PDC) program moved tax collection, an essential government function, behind the opaque walls of a private company. Since the program's inception, allegations arose that PDC contractors employed abusive tactics while sensitive taxpayer data was transferred to private data stores.<sup>252</sup>

In addition to potentially mistreating delinquent taxpayers, the PDC program is a waste of government resources. In testimony before the House Ways and Means Subcommittee on Oversight, National Taxpayer Advocate Nina Olson indicated that the program would lose \$81 million annually and could lose almost half a billion dollars over the next six years. Based on data from the program's first year of operation, Olson calculated the private debt collection program created a dismally small return on investment (ROI) of 1.45:1. She further testified that if the IRS used the funds appropriated by Congress to administer the program (\$7.65 million in FY 2008) on its Automated Collection System (ACS) program, it would yield between \$91.8 million and \$145.35 million in net revenue for the government each year. This is at least \$81 million more than the private debt collection program is generating, which is around \$11 million annually.<sup>253</sup>

The president's decision to foster an atmosphere where proper oversight of contracting was discouraged had consequences in other agencies, including the General Services Administration (GSA). Under the direction of Administrator Lurita Doan (who was later found to have also violated the Hatch Act<sup>254</sup>), the agency outsourced "pre-award" audits of prices submitted by companies bidding for long-term government-wide contracts.<sup>255</sup> While this work had traditionally been conducted by GSA's Inspector General (IG), Doan believed that even the auditing of government contracting should be moved out of the purview of transparent and accountable government institutions. And in a bid to further diminish the role of the GSA's IG, the agency's most effective blocker of contractor waste, fraud, and abuse, Doan subsequently undercut the IG office's FY 2008 budget request – an unprecedented action for an agency head.<sup>256</sup>

252 Online at <http://murray.senate.gov/news.cfm?id=295698>.

253 OMB Watch, "House Panel Hears Testimony on IRS Policies," March 18, 2008, online at <http://www.ombwatch.org/article/articleview/4198/1/82/?TopicID=2>.

254 Robert O'Harrow, Jr. and Scott Higham, "GSA Chief Violated Hatch Act, Special Counsel's Report Alleges," *The Washington Post*, May 24, 2007, online at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/24/AR2007052401130.html>.

255 David Perera, "GSA to Minimize Auditors' Role in Pre-Contract Award Reviews," *Government Executive*, October 19, 2006, online at [http://governmentexecutive.com/story\\_page.cfm?articleid=35302&ref=relink](http://governmentexecutive.com/story_page.cfm?articleid=35302&ref=relink).

256 David Perera, "GSA Chief At Odds With Agency Auditors," *Government Executive*, December 4, 2006, online at [http://www.govexec.com/story\\_page.cfm?filepath=/dailyfed/1206/120406d1.htm](http://www.govexec.com/story_page.cfm?filepath=/dailyfed/1206/120406d1.htm).

Similar steps were taken by the Justice Department, where Bush administration appointees had full faith in the honesty and capability of all federal contractors to conduct inherently governmental oversight work. Rather than seek indictments for corporations that were suspected of breaking the law, the Justice Department settled with these firms and employed private contractors to make sure the companies abided by the terms of the settlements. Known as “corporate monitorships,” these contracts relied on private companies to enforce the terms of the settlements on behalf of the government. Along with a massive increase in the use of these monitorships – sevenfold since 2001 – came a short-circuiting of the procurement process, as most of those contracts were awarded through a non-competitive process. The result was that such monitorships were often awarded to politically connected companies and individuals. A number of former Bush administration officials appear to have received such deals over the past eight years, including former Attorney General John Ashcroft.<sup>257</sup>

### C. Neglecting Agency Vacancies

*We have capable people in place to provide leadership.*

Emily Lawrimore  
White House spokeswoman  
Oct. 14, 2007<sup>258</sup>

*You’ve got almost two years of pure chaos. The civil servants don’t know who they’re supposed to be talking to. They’re receiving no direction. Congress isn’t being talked to. The president isn’t really doing anything.*

Professor Paul C. Light  
New York University  
May 28, 2008<sup>259</sup>

*Please stay in touch.*

Emily Lawrimore  
Former White House spokeswoman  
Farewell e-mail, Sept. 24, 2008<sup>260</sup>

After Attorney General Alberto R. Gonzales resigned on Aug. 27, 2007, the top three positions in the U.S. Justice Department were filled by appointees unconfirmed by the Senate, according to an Oct. 15, 2007, *New York*

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257 Carrie Johnson, “Ex-Officials Benefit From Corporate Cleanup,” *The Washington Post*, January 15, 2008, online at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/14/AR2008011402939.html>. See also Philip Shenon, “Ashcroft Deal Brings Scrutiny in Justice Dept.,” *The New York Times*, January 10, 2008, online at <http://www.nytimes.com/2008/01/10/washington/10justice.html?pagewanted=1&hp>.

258 Philip Shenon, “Interim Heads Increasingly Run Federal Agencies,” *The New York Times*, October 15, 2007.

259 Dan Eggen and Christopher Lee, “Late in the Term, an Exodus of Senior Officials,” *The Washington Post*, May 28, 2008.

260 Online at [http://www.mediabistro.com/fishbowlDC/west\\_wing\\_reportage/lawrimore\\_leaves\\_the\\_white\\_house\\_95492.asp](http://www.mediabistro.com/fishbowlDC/west_wing_reportage/lawrimore_leaves_the_white_house_95492.asp).

*Times* article.<sup>261</sup> Peter D. Keisler was the acting Attorney General in charge of running Justice until Bush's new nominee, Michael Mukasey, was confirmed by the Senate to replace Gonzales. Craig S. Morford was the acting Deputy Attorney General, the department's second in command, and Gregory G. Katsas was acting Associate Attorney General. Sen. Arlen Specter (PA), the ranking Republican on the Judiciary Committee, was quoted by the *Times* as saying, "In the long history of the country, I don't think the Justice Department has been in such disarray."

In August 2007, President Bush signed into law S. 4, the Implementing Recommendations of the 9/11 Commission Act of 2007. The bill contained a provision which extended the voting quorum of the Consumer Product Safety Commission (CPSC) by six months. CPSC lost its voting quorum in January 2007 due to a commissioner vacancy. In July 2006, Chairman Hal Stratton quit, leaving CPSC with only two of its three commissioners. By law, CPSC may conduct formal operations with two commissioners for only six months. Subsequently, its quorum expired. When the agency lost its quorum, CPSC had been able to negotiate recalls but had been unable to force them. Additionally, CPSC had not produced a final rule in over a year.

President Bush finally got around to nominating a new chairman in March 2007. Unfortunately, his nominee was former executive vice president of the National Association of Manufacturers Michael Baroody, who was later forced to withdraw his nomination after intense opposition.

At the time, senior positions in many agencies, including the Cabinet positions of the secretaries of Agriculture and Veterans Affairs, were filled by acting secretaries, acting deputies, acting general counsels, and the like. The *Times* article quoted Professor Paul C. Light of New York University, an expert in government operations, as saying, "In my 25 years of studying these issues, I've never seen a vacancy rate like this."

Senior presidential appointees in federal agencies make important decisions on a wide array of issues, including agency regulatory activity. By staffing these positions with interim appointees who have not been subject to Senate confirmation, the Bush administration was able to escape congressional oversight and public accountability to a certain extent. The acting status of so many officials also weakens agencies, according to Light: "One of the things we know is that they just aren't as effective as Senate-confirmed appointees. They just don't have the standing in their agencies. Acting people are very shy about making decisions," he told the *Times*.

When Bush needed to fill vacancies to advance his policies, he relied on a controversial practice of using recess appointments. On April 4, 2007, for example, Bush used his power to appoint people during a congressional recess.<sup>262</sup> That day, he used recess appointments to name four officials, the most

261 Philip Shenon, "White House Is Leaning on Interim Appointments," *The New York Times*, October 15, 2007, online at <http://www.nytimes.com/2007/10/15/washington/15cnd-interim.html>.

262 OMB Watch, "Recess Appointment Makes Dudley Head of White House Regulatory Policy Office," April 17, 2007, online at <http://www.ombwatch.org/article/articleview/3806>.

controversial of which was Sam Fox. Senate Democrats criticized Fox for funding attack ads aimed at Sen. John Kerry (D-MA) during the 2004 presidential campaign and appeared unlikely to confirm Fox. Bush withdrew the nomination hours before a scheduled vote, only to recess-appoint him on April 4. Another appointee was Andrew Biggs, named as the new deputy commissioner of the Social Security Administration. Biggs, who had been a lower ranking official in the Social Security Administration, was at the center of Bush's past push for privatization. Sen. Max Baucus (D-MT), chair of the committee with Social Security oversight, objected to the Biggs nomination, but Bush went ahead anyway.

The fourth appointee that day was Susan Dudley to head OIRA, the White House's regulatory policy office. Dudley's new position gave her power over the federal regulatory process. The appointment came despite strong opposition from public interest groups concerned about her views on regulation. The recess appointment of Dudley, along with that of other controversial officials, provoked anger in the Senate and raised questions about the constitutionality of the method.

Norm Ornstein, a scholar at the conservative American Enterprise Institute, questioned the legality of the Dudley appointment. In an essay in *Roll Call*, Ornstein argued the recess appointment provision was included in the Constitution because early Congresses met for only a few weeks a year. According to Ornstein, the explicit language of the Constitution allows the power to be used only when the vacancy occurs during the recess and necessity obliges the president fill the vacancy immediately.<sup>263</sup>

The result of Bush's extensive use of recess appointments was that the Senate started to remain in *pro forma* session – forgoing formal recess periods – in order to limit the strategy of appointing nominees unlikely to be confirmed. This practice continued until the end of Bush's tenure.

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263 Norman J. Ornstein, "Time for Congress to Stand Up to Bush on Recess Appointments," *Roll Call*, April 11, 2007, online at [http://www.aei.org/publications/filter.all,pubID.25940/pub\\_detail.asp](http://www.aei.org/publications/filter.all,pubID.25940/pub_detail.asp).





# Chapter V

## Conclusions and Recommendations for Change

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### A. Calls for Change: Public and Business Reactions

It seems nearly everyone loves to hate government regulations – except when they face a crisis and then want government protections. With the growth of 20th century regulatory government, many politicians and social commentators took aim, flinging inflammatory rhetoric at regulation: “red tape,” “burdensome paperwork,” “bureaucrats run amok,” “Big Government,” and “intrusive federal agencies” are just some of the invectives used. Yet the majority of the public expects our government to ensure that the food we eat, the water we drink, the air we breathe, the items we buy, and the places we work are safe.<sup>264</sup>

The ability of the U.S. government to protect the quality of products has come into serious question over the last several years. The rising tide of imported products – toys, tires, toothpaste, pet food, infant formula, and more – compounds agencies’ budget cuts and loss of skilled people. The number of recalled products in 2007 increased nearly six-fold compared to 2006.<sup>265</sup>



As the problems and recalls continued into 2008, the public continued to support public protections and castigate the government’s failure to provide them. According to a November 2008 Gallup poll, fully 87 percent of Americans were dissatisfied with the direction of the country.<sup>266</sup> In what is largely considered a referendum on the Bush presidency, Americans elected Barack Obama, who campaigned on a platform of changing Washington.

Another indication of the Bush administration’s anti-regulatory overreaching is the surprising trend of businesses beginning to call for increased regulation. The trend began in late 2007 amidst the boom in product recalls. Business associations such as the Toy Industry Association and the Grocery Manufacturers’ Association called for greater support of federal agencies, ranging from the Consumer Product Safety Commission to the Food and Drug Administration to the Occupational Safety and Health Administration. The massive federal bailout of Wall Street, however, illustrated dramatically how dependent we all are on government regulation.

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264 See, for example, a nationwide Harris poll of adults taken October 16-23, 2007, which found 53 percent believed there was too little government regulation around environmental protection; only 21 percent thought there was too much regulation. In another Harris poll of adults, from October 9-15, 2007, a majority of Americans believed oil, drug, and health insurance companies should be more regulated. At least 41 percent wanted more regulation of HMOs, gas and electric utilities, and tobacco.

265 OMB Watch, “A Year for Failure: Regulatory Policy News in 2007,” December 18, 2007, online at <http://www.ombwatch.org/article/articleview/4120/1/85/?TopicID=2>.

266 Gallup Poll, Nov. 13-16, 2008, online <http://www.pollingreport.com/right.htm>.

State and local governments are reacting to the federal government's failure to protect its citizens by picking up the responsibility for protecting the public by putting in place their own regulations to protect against contaminated meat, to increase energy availability and efficiency, to guard against toxic chemical exposure, and to reduce greenhouse gas emissions through regional initiatives. These different regulatory approaches require different responses by the businesses being regulated. Businesses want to overcome those separate state standards with national standards that allow them to respond in a more efficient, uniform fashion. As in the 1970s, business interests are once again putting pressure on Washington to produce national regulatory standards.

## B. Congressional Reaction



When Congress changed hands after the November 2006 elections, the Bush administration faced a newly resurgent legislative branch intent upon congressional oversight if not legislative victories. From 2001 through 2006, the Republican-controlled Congress was a willing partner in the Bush strategies to dismantle, delay, and roll back public protections. Few challenges were issued to White House attempts to implement Bush's belief in the unitary theory of government. Congressional leaders were ac-

complices in the abdication of legislative power and the elevation of executive branch control over federal agencies.

The number of days Congress spends in session has been dropping for decades, but during the first six years of the Bush presidency, Congress surpassed the record of the Truman-era "do-nothing 80<sup>th</sup> Congress."<sup>267</sup> From 2001 through 2006, the average number of days Congress was in session was 153 for the Senate and just under 125 days for the House.<sup>268</sup> This compares poorly with the 323 days in session during the 1960s and 1970s, and even with the 278 days in session during the 1980s and 1990s.<sup>269</sup>

Although Democrats had little power to enact legislation after they took control of Congress in January 2007, there was at least a change in the degree to which the 110<sup>th</sup> Congress paid attention to what the administration was doing. Congress held oversight hearings on a range of environmental, public health and safety, workplace safety, civil rights, and national security

<sup>267</sup> Norman Ornstein, "Part-Time Congress," *The Washington Post*, March 7, 2006, online at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/06/AR2006030601611.html>. See also OMB Watch, "Congress Commits More Time to Doing Its Job," January 23, 2007, online at <http://www.ombwatch.org/article/articleview/3692/1/475>.

<sup>268</sup> The Capitol.Net, *FAQs: Congress by the Numbers*. By contrast, the number of session days during 2007 was 190 in the Senate and 164 in the House. Online at [http://www.thecapitol.net/FAQ/cong\\_numbers.html](http://www.thecapitol.net/FAQ/cong_numbers.html).

<sup>269</sup> Norman Ornstein, *supra* note 267.

issues. The almost-daily stories of unregulated or uninspected products and services drove many of these hearings, allowing Congress to build a record of Bush's dismantling of public protections. Bush administration officials faced tougher questioning about why their agencies had failed to address the rise in imported products and the sources of food-borne illnesses, for example. Congress often asked agency witnesses what it would take to restore their agencies to serviceable levels; the questions were seldom answered.

There were a few legislative victories in 2007 and 2008. For example, in August 2008, Congress passed and Bush signed the Consumer Product Safety Improvement Act of 2008,<sup>270</sup> which reforms the Consumer Product Safety Commission (CPSC). The law enables the agency to better enforce safety standards in a market dominated by cheap imports and requires new standards for dangerous substances like lead and phthalates. Congress also substantially increased the budget for CPSC, allowing the agency to increase a staff that had been reduced to almost half of what it had been in 1980.

The fact that there were any legislative victories that helped restore agencies' regulatory functions, however, is testament to how much damage had been done. Pressure from the public, businesses, and state and local governments challenged the Bush anti-regulatory philosophy. Republicans in Congress began to lend support to some efforts to mitigate the catastrophe. This shift in support created a political dynamic that pressured Bush to sign legislation like the Consumer Product Safety Improvement Act.

Then the financial meltdown occurred. Once the extent of the crisis became clearer to Congress, President Bush, and those who oversee the economy, the importance of the federal government's role in regulating the economy became evident. Stories about "What Went Wrong"<sup>271</sup> and the magnitude of the economic crisis became the daily regulatory story. Treasury Secretary Henry Paulson and Federal Reserve Chairman Ben Bernanke worked with congressional leaders to find solutions and stem the collapse of the world economy. Bush had delegated the responsibility and was on the sidelines.

Facing the biggest economic crisis since the Great Depression, political leaders and the public began to question the ideology that has governed since the 1980s when Ronald Reagan proclaimed, "Government is the problem." It remains to be seen whether the acknowledgement of the need for financial regulation will increase public support for social regulation. Certainly, the stage is set for a new era.

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270 P.L. 110-314, Consumer Product Safety Improvement Act of 2008, Aug. 14, 2008, online at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_public\\_laws&docid=f:publ314.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ314.110.pdf).

271 Anthony Faiola, Ellen Nakashima, and Jill Drew, "What Went Wrong," *The Washington Post*, October 15, 2008, online at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/14/AR2008101403343.html>.

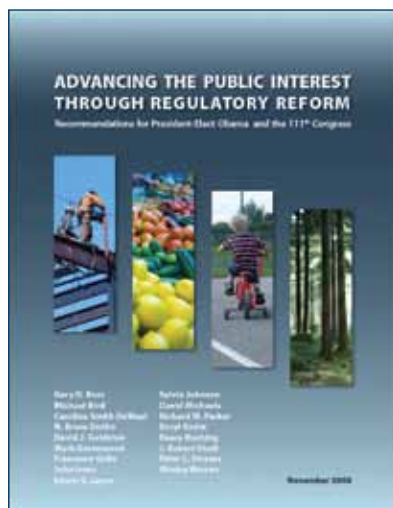
## C. What's Next: Recommendations for Renewing Government

The beginning of a new presidential administration brings with it the ritual of receiving memos and reports from scores of organizations suggesting issues for the new president's agenda. The crises the Obama administration will face upon taking office on Jan. 20, 2009, make the efforts to influence the agenda even more critical. Eight years of starving, rolling back, delaying, and dismantling government cannot be quickly undone. Recommendations to the Obama administration will cover nearly every policy area in which the federal government plays a role.<sup>272</sup>

OMB Watch initiated several projects to make recommendations to the new presidential administration. Some of the projects are briefly described here, and the full list of recommendations and the project descriptions are available at [www.ombwatch.org](http://www.ombwatch.org).

### ***Regulatory Reform Recommendations***

OMB Watch initiated a project called *Advancing the Public Interest through Regulatory Reform* in Spring 2007 to develop recommendations to improve the U.S. regulatory system. A steering committee of experts in the regulatory system and specific regulatory policy areas guided the project and produced recommendations. Although these 17 experts brought various perspectives to the problems afflicting the federal regulatory process, they worked to produce a report of consensus recommendations to fix a dysfunctional regulatory system.



The recommendations in the report, entitled *Advancing the Public Interest through Regulatory Reform: Recommendations for President-Elect Obama and the 111<sup>th</sup> Congress*, are premised on six principles the Committee believes government should embrace: 1) regulatory decisions should be timely and responsive to public need; 2) the regulatory process must be transparent and improve public participation; 3) regulatory decisions should be based on well informed, flexible decision making; 4) authority to make decisions about regulations should reflect the statutory delegation granted by Congress; 5) agencies must have the resources to meet their statutory obligations and organizational missions; and 6) government must do a better job of encouraging compliance with existing regulations and fairly enforce them.

The Steering Committee's 49 recommendations include actions the president and Congress should take in the first 100 days of the new administration, and longer-term actions that both restore and prepare regulatory agencies for the challenges of a new century. These recommendations address ways to improve regulations, restore accountability and integrity to the infor-

<sup>272</sup> Online at [http://change.gov/open\\_government/yourseatatthetable](http://change.gov/open_government/yourseatatthetable).

mation used in regulatory decision making, improve implementation and enforcement, and increase transparency and public participation in the process.

The highest priority recommendations include:

- Urging the president to establish a blue ribbon commission to recommend ways to make the regulations more timely by reducing unnecessary analytical and procedural impediments, including, if necessary, changes to executive orders and directives. The commission should also address changes to the relationship between regulatory agencies and the White House Office of Information and Regulatory Affairs, the office currently responsible for reviewing and approving all major regulations.
- Reducing the emphasis on quantification in regulatory decision making, reestablishing the importance of statutory mandates to guide agency actions, and limiting the use of cost-benefit analysis to determine regulatory outcomes unless mandated by statute.
- Urging the president to send a clear message to regulatory agencies that they should adhere to the highest principles of scientific integrity and independence. Political interference in the generation and analysis of essential information has increased dramatically in recent years and should be replaced with efforts to collect the best available information.
- Urging the Congress and the president to begin restoring desperately needed resources so agencies can hire staff, reinstate programs, and effectively provide public protections.

The Steering Committee's full report and other project materials are available online at the Renewing Government page on OMB Watch's website.<sup>273</sup>

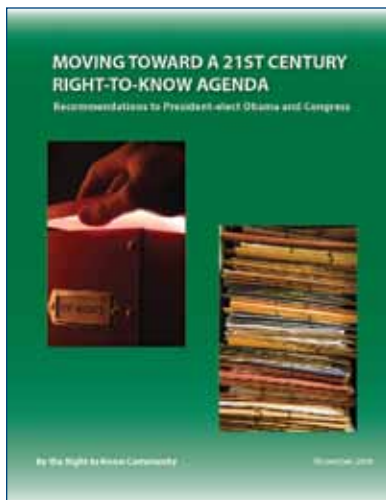
### ***The 21st Century Right to Know Project***

At the beginning of 2007, OpenTheGovernment.org began to highlight the importance of making recommendations to the next presidential administration and Congress on improving government transparency. Working with OpenTheGovernment.org and its partners, OMB Watch directed a project to develop those recommendations. An extremely diverse group of individuals representing good government groups, professional associations, the journalism community, unions, philanthropy, and academia all participated. Included among these right-to-know experts were people from the left and right; activists and bloggers; and technology and policy experts.

The hundreds of people involved in developing these recommendations on government transparency had two things in common – a strong belief in the public's right to know and a recognition that government secrecy had grown to intolerable levels.

<sup>273</sup> Online at <http://www.ombwatch.org/article/archive/551>.





The report, entitled *Moving Toward a 21<sup>st</sup> Century Right-to-Know Agenda: Recommendations to President-elect Obama and Congress*, calls for “a transformational role for government. It calls for reconnecting our government with all of us, ‘We, the people.’ It calls on government to move its methods for serving the public’s right to know into the 21st century; for adopting Web 2.0 thinking and strategies. And it calls on government to make itself more open than any past administration in order to rebuild trust and accountability in our government.”

The project’s vision included the belief that government’s decisions should be made in a manner that builds the public’s trust and that the current, major vehicles for public access, such as the Freedom of Information Act (FOIA) and whistleblower protection laws, should be vehicles of last resort. True transparency means that the public has access to information in both timely and easily accessible manners, and in searchable formats so that citizens can find information they need without searching through endless reams of material.

The report notes that President Obama will be the first president to have the potential to fully capitalize on the power of the Internet. There are many things he and a new Congress can do to help realize the vision of an open and transparent government. Among the principles that should drive a right-to-know policy agenda are: 1) government should commit to openness as a principle, complying with both the letter and the spirit of transparency laws; 2) government information should be defined broadly and include multiple formats, including electronic communications, audio, videos, and photographs; 3) exemptions to disclosure of information should be narrow and specific, with the burden of proof resting with the government when exemptions are used; 4) when it cannot provide full disclosure, government should increase the use of redacting material rather than withholding entire documents; 5) information should be accurate, complete, authentic, and made available in a timely manner; and 6) interactive technologies can improve access and use of information while reducing the long-term costs of information management.

The report consists of 70 recommendations organized according to current problems and opportunities to change government transparency; actions that the president can take in the first 100 days of the new administration; and recommendations regarding national security and secrecy, usability of information, and creating a climate for government transparency. Highlights of the recommendations include:

- Urging the president to use his bully pulpit, beginning with his inaugural address, to signal a new era of government openness. The president should instruct his agency heads to actively and affirmatively disseminate information and instruct the new attorney general to provide guidance for increasing FOIA disclosure.

- Launching a new initiative to disclose searchable information on government integrity, such as data about lobbyists, who receives direct and indirect federal funding, how that money is spent, and who is lobbying for federal money.
- Increasing funding to implement these programs and recognizing the improvements in government efficiency that transparency can bring. The Office of Management and Budget should assess all aspects of the budgetary requirements necessary to implement the new openness era.
- Bringing the government's use of the Internet into the Web 2.0 world. The president should encourage agencies to work with the public to create pilot projects for increased citizen participation and collaboration to develop a culture of transparency and disclosure.
- Creating a 21<sup>st</sup> century information infrastructure so that the public can find government information without having to know where it is located within a vast government structure.
- Changing the use of "sensitive but unclassified" labeling that allows so much information to be withheld. The president should issue a memorandum that instructs agencies to reduce the use of information control markings and establishes a presumption against labeling government information.

The coalition's full report and other information about the 21st Century Right to Know project are available online at OMB Watch's website.<sup>274</sup>

#### **D. Traveling the Long Road Ahead**

One of the first steps in addressing any problem is acknowledging that a problem even exists. Another important step is informing others of the situation so that those with knowledge and expertise can work toward constructive solutions.

The damage wrought by the eight years of the George W. Bush administration is massive, far beyond the scope of this narrative, and will take many months for a variety of governmental and nongovernmental entities to examine. Indeed, it was never the intent of this narrative to comprehensively document the assault on our public protections – and our democracy – by officials in the Bush administration and their special interest allies. Instead, the examples showcased in this narrative, and its recommendations for change, can be used to inform our nation's next steps and can provide a good starting point for those who have been charged with the responsibility to fix the many things that have been broken since Jan. 20, 2001.

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<sup>274</sup> Online at <http://www.ombwatch.org/article/archive/551>.

The examples cited in this narrative and in other publications also clearly show that an anti-government approach to governing does not work. An anti-regulatory approach to formulating public protections is, in fact, utterly untenable. As we have seen over the past eight years of our history and the previous pages of this narrative, the anti-regulatory fervor adopted by officials throughout the Bush administration has resulted in direct threats to our democratic system of government and has put Americans in harm's way by failing to adequately address air and water pollution, allowing dangerous contamination of food and children's toys, and trashing our natural resources.

America has a long road to travel, and the restoration of our country will not be easy. It will involve dedication, perseverance, and patience. However, if we are to put our country back on track, we cannot shy away from these crucial responsibilities. It's now time to roll up our sleeves and get to work.







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