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NOMINATION OF SUSAN E. DUDLEY

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON THE

NOMINATION OF SUSAN E. DUDLEY TO BE ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

NOVEMBER 13, 2006

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NOMINATION OF SUSAN E. DUDLEY

MONDAY, NOVEMBER 13, 2006

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:32 p.m., in room SD–342, Dirksen Senate Office Building, Hon. Susan M. Collins, Chairman of the Committee, presiding.

Present: Senators Collins, Warner, Levin, Akaka, Carper, and Pryor.

OPENING STATEMENT OF CHAIRMAN COLLINS

Chairman COLLINS. The Committee will come to order.

Good afternoon. Today, the Committee will consider the nomination of Susan Dudley to be the Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget. With the nominee to lead OIRA before us, this Committee will continue a longstanding debate: When should the government regulate and when should government rely on market forces to produce desirable outcomes?

Regulations affect virtually every part of our lives. They make us safer and healthier. They help keep our air and water clean. They protect consumers from abusive practices. At the same time, excessive regulation can impose real burdens, from mere inconvenience to significant costs. The government must consider these trade-offs as it deliberates the need for and the extent of regulations. How the government weighs competing interests often depends in part on the methodology used to calculate costs and benefits, on the accuracy of the data that informs decisionmakers, and on the way alternative regulatory approaches are developed and compared.

OIRA plays a significant role in the Federal rulemaking process. OIRA is one of those alphabet-soup agencies that few people would recognize. Its lack of name recognition, however, contrasts with the impact that its work has on the lives of all Americans. The office was created by the Paperwork Reduction Act of 1980 and has specific statutory responsibilities, such as reviewing the amount of paperwork generated by Federal agencies and assessing the costs and benefits of Federal rules.

For the past 25 years, OIRA has also been responsible for reviewing the substance of proposed and final rules before agencies publish them in the *Federal Register*. The agency staff thus plays an important role in the rulemaking process. They advise agencies on an informal basis as regulations are developed and formally review

proposed rules to ensure that proper cost/benefit principles have been followed.

Let me be clear. Technically, OIRA does not approve or reject regulations. Individual agencies must ultimately decide whether or not to accept OIRA's suggested changes or proceed with the publication of a rule as drafted by the agency. But OIRA has significant influence over the regulatory process. Its officials ask some important and sometimes challenging questions, such as: Is the science behind the regulation sound? Do these cost/benefit calculations make sense? Is this regulation the best alternative to achieve our goals?

I am particularly interested in the influence that OIRA has on the development of environmental regulations. The work of the Environmental Protection Agency is vital to the protection of our lakes, rivers, and the air we breathe. The regulations that the EPA drafts often involve calculating benefits that can be difficult, if not impossible, to quantify. At times, these regulations may be based on conflicting data that spark fierce debate in the scientific community.

The President's nominee, Susan Dudley, has had considerable experience working with OIRA. After earning a master's degree from the Sloan School of Management at MIT, Ms. Dudley worked for a time with the EPA and then on the staff of OIRA itself. She spent 8 years as a consultant doing environmental analysis before joining the Mercatus Center at George Mason University, where she served as a senior research fellow and later as director of the Regulatory Studies Program. While with the Mercatus Center, Ms. Dudley has filed numerous public comments in regulatory proceedings concerning a broad spectrum of issues. The Committee has closely reviewed these comments and numerous other published articles in its consideration of Ms. Dudley's nomination to this important position, and I am certain that the Committee members today will explore many of these writings in some detail.

For my part, I intend to discuss with the nominee some of her comments on safety and environmental standards. I also want to explore her advocacy of "regulatory budgets" to cap the costs that can be imposed on any one industry as a result of regulation. Ms. Dudley, your views on these and other matters are most important for the Committee to fully understand as we deliberate on your nomination, and I look forward to exploring these and other issues with you today.

Senator Akaka.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you very much, Madam Chairman. It is good to be back here with you again and with the Committee. And I join you in welcoming Ms. Dudley, the President's nominee to head the Office of Information and Regulatory Affairs, to our Committee today. Ms. Dudley, I notice your family sitting in back of you, and I want to welcome them to this hearing.

This position is far more important than is generally recognized. Those who understand the inner workings of the Federal Government know the critical nature of this office. OIRA, created as part of the Paperwork Reduction Act (PRA), has wide-ranging responsi-

bility for the collection of government information under the PRA—reviewing draft regulations, developing and promoting government-wide policies on information technology, privacy, and statistics.

The influence of OIRA is truly substantial. The office affects the daily life of every citizen, from the distribution of government benefits to privacy rights, to regulations affecting the environment. That is why these decisions cannot be left to political whim or individual political preferences. If OIRA disregards the technical expertise of and decisions made by Federal agencies, then public health and safety is at risk.

Unfortunately, I have several concerns with Ms. Dudley's nomination. Madam Chairman, I would like to ask that my full statement be placed in the record, and I will finish off with an abbreviated statement.

Chairman COLLINS. Without objection.

[The prepared statement of Senator Akaka follows:]

PREPARED STATEMENT OF SENATOR AKAKA

Thank you Madam Chairman. I join you in welcoming Ms. Dudley, the President's nominee to head the Office of Information and Regulatory Affairs (OIRA), to our Committee today. I also welcome her family this afternoon.

This position is far more important than is generally recognized. Those who understand the inner workings of the Federal Government know the critical nature of this office. OIRA, created as part of the Paperwork Reduction Act (PRA) in 1980, has wide-ranging responsibility for collecting government information under the PRA, reviewing draft regulations, and developing and promoting government-wide policies on information technology, privacy, and statistics.

The influence of OIRA is substantial. The office affects the daily life of every citizen—from the distribution of government benefits to privacy rights to regulations affecting the environment. That is why these decisions cannot be left to political whim or individual political preferences. If OIRA disregards the technical expertise of and decisions made by Federal agencies then public health and safety is at risk. Unfortunately, I have several concerns with Ms. Dudley's nomination.

First, Ms. Dudley has written in opposition to regulations preserving the environment, protecting individual privacy, and promoting public safety and workers' rights. For example, since 2001, OIRA sought public comment three times for suggestions on regulations that should be modified or repealed. Twice, Ms. Dudley and her colleagues at the Mercatus Center submitted proposals that, if implemented, would benefit industry over the environment, public health, and workers' rights. In 2001, Ms. Dudley submitted to OIRA 44 different regulations for repeal or modification—most of which impacted the environment. OIRA should not become a place where environmental regulations go to die.

Second, I am concerned that Ms. Dudley may expand upon Mr. Graham's risk assessment and peer review proposals and set impossibly high scientific evidence standards before accepting agency proposals for regulatory action. Too stringent a criteria, in my opinion, would lead to unnecessary delay which would only endanger the public. I expect the OIRA Administrator to trust agencies to use the scientific evidence available, instead of requiring irrefragable proof before a regulation is implemented.

Third, a number of respected organizations have raised additional concerns about Ms. Dudley's inconsistent approach to applying common economic principles in a manner that is outside of mainstream economic usage. According to her writings, the one constant is that Ms. Dudley always seems to find regulations onerous or without need. I want to know how Ms. Dudley would apply common economic principles to ensure, should she be confirmed, that OIRA operates in a fair and transparent manner.

Again, Madam Chairman I appreciate your holding today's hearing, and I look forward to our discussion with Ms. Dudley.

Senator AKAKA. It is very important that we have regulations preserving the environment, protecting individual privacy, and promoting public safety and workers' rights. As such, peer review and risk assessment programs cannot set scientific evidence standards

so high that OIRA cannot accept agency proposals for regulatory action.

Also, I am concerned about an issue raised by a number of respected organizations. They claim that Ms. Dudley uses common economic principles in a manner that is outside of mainstream economic usage. I want to know how Ms. Dudley would apply common economic principles to ensure that OIRA operates in a fair and transparent manner.

Again, Madam Chairman, I appreciate your holding today's hearing and look forward to our discussion with Ms. Dudley.

Thank you very much.

Chairman COLLINS. Thank you. Senator Levin.

Senator LEVIN. Madam Chairman, I don't have an opening statement. I do share a number of the concerns of Senator Akaka, which we could explore during questions. I notice that our dear colleague, Senator Warner, is here to introduce Ms. Dudley, and I think on our side we would be willing to yield to him before any other opening statements are made because of his time schedule, if that would be desirable from his perspective.

Chairman COLLINS. If that is OK with my two colleagues, we will——

Senator CARPER. Madam Chairman.

Chairman COLLINS. Senator Carper.

Senator CARPER. I have been yielding to John Warner since he was Secretary of the Navy and I was Lieutenant Tom Carper in the U.S. Navy 7th Fleet. So I am happy to yield again.

Chairman COLLINS. And, Senator Pryor, thank you.

Senator Warner, we are very pleased to have you with us today as a Member of this panel and also the distinguished chairman for a little while longer of the Senate Armed Services Committee and, of course, as the senior Senator from the Commonwealth of Virginia. We welcome you to introduce the nominee.

Senator WARNER. Thank you, Chairman Collins, my colleagues on the Committee, and I appreciate the courtesy, Senator Levin, that you have always extended me and other colleagues.

I was sorry to be a few minutes late. This Committee is known for punctuality. The Armed Services Committee somehow does not have the same reputation. [Laughter.]

First, may I inquire, have you introduced the members of your family?

Chairman COLLINS. Not yet.

Ms. DUDLEY. No.

Senator WARNER. I wonder if we might invite the nominee to introduce her family.

Chairman COLLINS. I was planning to do that in a few moments, but now would be a fine time as well.

Ms. DUDLEY. OK. With me I have Brian Mannix, my husband, and my two children, Christopher Mannix and Gregory Mannix.

Chairman COLLINS. We welcome all of you.

Ms. DUDLEY. Thank you.

OPENING STATEMENT OF SENATOR WARNER

Senator WARNER. Thank you. We are delighted that you have accepted this nomination by the President. You have brought your

family, and you now appear before this Committee of the U.S. Senate. The Senate is not an unfamiliar institution to you because of your extensive background.

Madam Chairman, you recited much of her biography, but I would like to just add another perspective. Without a doubt, the nominee has accumulated a wealth of experience in the regulatory process as she has held several positions in regulatory-related fields.

After receiving her B.S. *summa cum laude*—that is a plateau that I never achieved, nor will I ever in my lifetime—from the University of Massachusetts and her M.S. from the Sloan School of Management at MIT, she began a career that spanned almost 8 years within the Federal Government serving in various agencies: served in the Environmental Protection Agency as a financial consultant; in the Department of Energy Office of Environment, Safety, and Health, assisting the Assistant Secretary; in the Commodity Futures Trading Commission as an economic adviser to Commissioner Albrecht; and more recently she has already served the OIRA for almost 4 years as both a senior economist and a deputy chief of the Natural Resources Branch. And you recited what she has done in the interim, so I will not go further except to ask to have my entire statement put in the record.

Chairman COLLINS. Without objection.

[The prepared statement of Senator Warner follows:]

PREPARED STATEMENT OF SENATOR WARNER

Chairman Collins and Senator Lieberman, I thank you for holding this confirmation hearing today and allowing me the courtesy of introducing a fellow Virginian, Susan Dudley. Ms. Dudley has been nominated to serve as Administrator for the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). She is joined today by her husband, Brian Mannix and her two sons, Gregory and Christopher Mannix.

The Office of Information and Regulatory Affairs was first established under President Ronald Reagan through the Paperwork Reduction Act of 1980. This Act required the office to manage information and statistical policy while enforcing paperwork reduction controls. In addition, subsequent Presidential Executive Orders have further refined the Office's role in the regulatory process, providing OIRA the responsibility to review the substance of agencies' regulatory actions before publication in the *Federal Register*.

Without a doubt, Susan Dudley has accumulated a wealth of experience in the regulatory process as she has held several positions in regulatory related fields.

After receiving her BS, *summa cum laude,* from the University of Massachusetts and her MS from the Sloan School of Management at MIT, Ms. Dudley began a career that spanned almost 8 years within the Federal Government serving in various agencies. She has served in the Environmental Protection Agency as a financial consultant; in the Department of Energy Office of Environment, Safety and Health assisting the Assistant Secretary; in the Commodity Futures Trading Commission as an Economic Advisor to Commissioner Albrecht. And more importantly, she already has served in OIRA for almost 4 years as both a Senior Economist and a Deputy Chief in the Natural Resources Branch.

Subsequent to her public service, Ms. Dudley has worked in different facets of the private sector from financial and environmental consulting to working as an Adjunct Law Professor at the George Mason University School of Law teaching regulatory studies. Most recently, Ms. Dudley served as Director of the Mercatus Center at George Mason University, which focuses its research efforts on the conditions that enable good governance and successful economies.

In my view, Susan Dudley's impressive credentials makes her highly qualified to serve as Administrator of OIRA.

I am pleased to introduce her today, and I look forward to the Committee's favorable consideration of her nomination.

Senator WARNER. I am aware of concerns about her background in the positions she has held in public service, but I would only say that any individual worth their salt who has served in various public positions has engendered some controversy in their lifetime. And I would accept willingly, hopefully, that controversy in exchange for the extraordinary record of public service. Were I to ever stand—and it is most unlikely—for a public office again, not in the Senate—that is likely to happen, but I mean in other avenues, there would be thunder directed at me as a consequence of my previous positions in the Executive Branch of our government. So accept it with the bravery that you have shown in the past, and look them in the eye and tell it as it is, and be responsibe. And I wish you luck, and you're on your own. [Laughter.]

Chairman COLLINS. Ms. Dudley, I am not sure you should take great confidence in that.

Thank you, Senator Warner, for that introduction.

We now will resume opening statements. Senator Levin, were you finished?

Senator LEVIN. Yes. Thank you.

Chairman COLLINS. Senator Carper.

Senator CARPER. No, thank you.

Chairman COLLINS. Senator Pryor.

Senator PRYOR. No, thank you.

Chairman COLLINS. Thank you.

I do want to thank Senator Warner for his introduction of Ms. Dudley. Susan Dudley has filed responses to the biographical and financial questionnaires, answered pre-hearing questions submitted by the Committee, and had her financial statements reviewed by the Office of Government Ethics. Without objection, this information will be made part of the hearing record with the exception of the financial data, which are on file and available for public inspection at the Committee offices.

Our Committee rules require that all witnesses at nomination hearings be sworn in and give their testimony under oath, so, Ms. Dudley, if you would please stand and raise your right hand. Do you swear that the testimony you are about to give to the Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. DUDLEY. I do.

Chairman COLLINS. You may be seated.

Ms. Dudley, please proceed with your statement.

TESTIMONY OF SUSAN E. DUDLEY[1] TO BE ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Ms. DUDLEY. Thank you, Chairman Collins, Senator Lieberman, and Members of the Committee for the opportunity to be here to answer your questions this afternoon. I am honored to be President Bush's nominee to be Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget. And if I am confirmed, I look forward to working with each Member of this Committee.

[1] The prepared statement of Ms. Dudley appears in the Appendix on page 27.

I came to Washington almost 25 years ago as a newly minted MBA from MIT's Sloan School of Management, deeply committed to environmental issues and interested in learning how government policy can foster environmental and economic prosperity. At the Environmental Protection Agency, I observed how incentives matter when it comes to promoting compliance with environmental policy.

To provide incentives for compliance with environmental regulation, I developed the BEN model, still in use today, to estimate the economic benefit of noncompliance for civil penalty assessments and used it to help negotiate the largest civil penalty for a water quality violation at that time. I went on to work as a career staff economist at OIRA and later at the Commodity Futures Trading Commission.

For the last 8 years, I have studied and written on regulatory process and policy at the Mercatus Center at George Mason University. I also teach courses on regulation as an adjunct professor at the George Mason University School of Law. I believe my years working with, studying, and teaching about regulation will serve me well if I am confirmed as administrator of OIRA. But I also recognize that my role will be very different from what it is now.

As a researcher and an academic, I have written extensively, both in scholarly journals and the popular press. Those writings have sometimes been provocative with the goal of challenging the way people think about the consequences of regulation. If confirmed, however, I will have a different role. The OIRA Administrator is responsible for implementing the laws of the land as Congress has written them. I will lead a team of talented and dedicated career analysts at OMB in working with agencies, Congress, and the public on issues regarding regulation, information technology and policy, privacy, paperwork review, and statistical policy. One thing I will continue to do is foster debate. As my students will attest, I am fair and open-minded and will listen to all who want to have a say in the public process.

OIRA was created when President Carter signed into law the Paperwork Reduction Act of 1980. It is guided by several statutory authorities, such as the Privacy Act, the Unfunded Mandates Act, and the E-Government Act, as well as President Clinton's Executive Order 12866 governing regulatory review.

The common theme in these different authorities is the need for a central office to coordinate, oversee, and guide executive branch agencies to ensure their activities are consistent with statutory and executive objectives and accountable to Congress, the President, and the American people.

OIRA plays a vital role in ensuring that this process is transparent, open, and accountable, not to special interests but to the broader public interest, and I am committed to that role. Throughout my career, I have endeavored to conduct myself with honesty and integrity and to treat others with respect and openness. If I am confirmed, I look forward to working with you to fulfill the important functions of OIRA.

Thank you for giving me the opportunity to make this statement, and I look forward to your questions.

Chairman COLLINS. Thank you for your statement. I am now going to ask you three standard questions that we ask of all nominees.

First, is there anything that you are aware of in your background that might present a conflict of interest with the duties of the office to which you have been nominated?

Ms. DUDLEY. Not that I am aware of, Senator.

Chairman COLLINS. Second, do you know of anything, personal or otherwise, that would in any way prevent you from honorably and fully discharging the responsibilities of this office?

Ms. DUDLEY. No, Senator.

Chairman COLLINS. And, third, do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted Committee of Congress if you are confirmed?

Ms. DUDLEY. Yes, Senator, I do.

Chairman COLLINS. We will now proceed to the first round of questions limited to 6 minutes each, but I would inform my colleagues that we will be doing a second round as well.

Ms. Dudley, I have read many of your writings, and many of them are quite provocative in the approach that you have taken. I kept in mind as I read your many writings and comments that you were writing from a more academic perspective rather than as a public official with broader responsibilities.

But if you read some of your writings, one could get the impression that you think that all regulatory matters can be boiled down to a hard dollar-and-cents calculation of the costs and the benefits. And yet it is very difficult to put a dollar value on many benefits. What is the value of being able to go outside and see an unpolluted sky? I am not talking about the health benefits. I am talking about the scenic value of being able to see a sparkling, unpolluted river or clean skies. What is the value of just knowing that our rivers and lakes are clean enough to swim in and to fish in?

It is difficult to quantify everything. I think of that overplayed television ad about some things in life are priceless, but I am not sure you see it that way. I think you see everything as being quantifiable, that for everything else there is OIRA to calculate the cost and the benefit.

What is your response to that? Does your approach to regulations take into account the nonquantifiable benefits?

Ms. DUDLEY. Yes, indeed, I agree with everything that you said because I also enjoy a clear stream. I love going out and enjoying a clean environment, and a lot of these things are hard to quantify.

I have actually never advocated for a strict benefit/cost analysis, and indeed, in my writings, in the comments that we file with Federal agencies we have a checklist that has seven elements, and cost/benefit is just one of seven. Other things include—and certainly there are a lot of nonquantifiable effects. So what kind of scientific information do we have? What are the distributional effects? Who is paying the cost? Who is getting the benefit?

So there are a lot of different issues that need to be factored in, and cost/benefit analysis is not something that I would think is the—it certainly would not be a deciding factor.

Chairman COLLINS. I want to follow up further on this theme. At one point you were quoted in the *Washington Post* as saying that

a rule to increase fuel economy standards for light trucks was "the worst rule of 2003." I personally believe that it is absolutely essential that we increase corporate average fuel economy standards, the so-called CAFE standards, because doing so would have important benefits for consumers, those are dollar-and-cents benefits, but also for our national security and for our environment. In the case of national security, I think it is very important that we decrease our dependence on foreign oil, so I have supported proposals that would save more than a million barrels of oil per day by raising CAFE standards.

If you are confirmed, would you take into account the national security implications, the environmental benefits, as well as the more quantifiable consumer savings of reduced oil consumption in any future rulemakings on CAFE standards?

Ms. DUDLEY. Well, it is interesting that my criticism of that rule in 2003 was just that, that it looked at the consumer savings but it didn't look at the externalities, the energy security, the energy independence, the environmental benefits, the fact that—the unintended consequence, the size of the cars. So that was precisely my criticism of the analysis behind that regulation was that it didn't, because indeed fuel economy is important to me, too. My husband and I bought—we drive two hybrid cars, and we had to wait in line for 6 months for the very first Prius that came out in the United States. So I believe in fuel efficiency, and I agree with you, those are all the reasons why we should be making those moves.

And, in fact, the CAFE rule in 2006—I was not critical of that one because I think it did address specifically those issues that you mentioned.

Chairman COLLINS. But why would you call it "the worst rule of 2003" if it had additional benefits that weren't recognized?

Ms. DUDLEY. The criticism was really of the analysis, that the analysis was a one-size-fits-all analysis that didn't recognize that some consumers may bear more—or have more or less benefits from that regulation, depending on how much they drove. So I thought rather than focusing on the consumer savings, which I think is a decision consumers can make for themselves, the whole purpose of a CAFE rule would be these things that are external, that are, in economic terms, external to the consumer's pocketbook decision.

Chairman COLLINS. Senator Akaka.

Senator AKAKA. Thank you very much, Madam Chairman.

Ms. Dudley, in "The Primer on Regulation" that was published in 2005 by the Mercatus Center, you wrote, "It is important to limit regulatory activity to identified market failures. In the absence of a significant market failure, individuals are better able to make decisions regarding trade-offs in their lives than Government regulators."

In many instances, individual citizens are not in a position to act in the manner that you advocate. The power and financial leverage of businesses and government can leave individuals at a distinct disadvantage. Government regulation is often the only recourse to protect the interests of citizens, and so I would like to ask you to share with us what you mean by the concept of market failure?

Ms. DUDLEY. Yes, Senator. Market failure is a standard economic concept that really refers to what is the root cause of a problem that we observe. And the reason that I think it is important and the reason that it is widely accepted to be an important first step in looking at and understanding regulation is that if you don't know what the root cause of the problem is, it is hard to address it in a way that actually targets the problem and doesn't end up having unintended effects.

So a market failure could include pollution because that is a cost that the company that is putting something up its smokestack does not bear, so that is an externality that would need regulation. Another is a common resource, like fishing. Nobody owns the fish until you take it out of the water, so you need to have some regulations so that we don't overfish. And perhaps what you were speaking to is information asymmetry. If certain groups have information that others do not have, that is a market failure, and that can be addressed through regulation by providing that information.

So I think understanding the root cause is the purpose of market failure. And, by the way, this is not something that is unique to me. I think standard textbooks will refer to it, and indeed, the guidelines issued by both President Clinton and President Bush refer to that as the first step in understanding regulation.

Senator AKAKA. Thank you. Ms. Dudley, the Davis-Bacon Act requires that prevailing wages are paid to workers on public works projects. All Federal Government construction contracts over $2,000 must include a provision for paying workers no less than the prevailing wages and benefits paid for similar projects. On the record, you have criticized the Davis-Bacon Act imposing costs that fall disproportionately on young and minority workers. You also said that Davis-Bacon does not offer net benefits to society, that there is no economic justification for the act, and that alternative standards were not adequately explored.

Now, given your comments about the Davis-Bacon Act, what assurances can you provide this Committee that, if confirmed, you will issue regulations related to the Davis-Bacon Act in an unbiased manner?

Ms. DUDLEY. I have actually never suggested that the Davis-Bacon Act shouldn't exist. I commented on a rule back in 1999 on a provision to implement one aspect of it—the helper rule, or how to define "helper" under the Davis-Bacon Act. And my concern with that particular regulation was that the proposed definition would harm young, lower-skilled minority and female workers. The quote that you said, I was actually quoting a GAO study there, so those were not my words, but rather the GAO statement about the Davis-Bacon Act. So I have not—it was almost 10 years ago that I wrote that, and it was about a very specific proposal.

If I am confirmed, I have every intention of following the laws of the land as they are written, Senator. I would like to assure you that.

Senator AKAKA. Ms. Dudley, as I mentioned in my opening statement, I am concerned about the value you will place on scientific evidence in determining whether regulatory action is necessary. Science can be extremely helpful in showing the consequences of actions and offer solutions to address resulting problems. However,

science can have a degree of uncertainty, and I am concerned that you may require absolute scientific proof before relying on scientific evidence.

If scientific evidence provides inconsistent results, how should agencies proceed with regulatory action?

Ms. DUDLEY. There are guidelines that agencies rely on that talk about how to deal with uncertainty, and I have no intention to change those guidelines. I agree with you. We will never have perfect scientific information.

Senator AKAKA. Thank you very much. Thank you for your responses. Thank you, Madam Chairman.

Chairman COLLINS. Thank you. Senator Levin.

Senator LEVIN. Thank you, Madam Chairman.

In your answer to Senator Akaka, I think you said that the words that there is no economic justification for a Federal role in defining construction practices and determining wages as required by the Davis-Bacon Act were these not your words?

Ms. DUDLEY. Oh, I am sure they were my words, Senator, but they were referencing a GAO study, peer-reviewed economic journal article and GAO.

Senator LEVIN. Well, because I am looking at what purports to be your words.

Ms. DUDLEY. Yes, I am saying——

Senator LEVIN. Did you believe that there is no economic justification for a Federal role in defining construction practices and determining wages as required by the Davis-Bacon Act? Did you believe that when you wrote it?

Ms. DUDLEY. Yes. I examined the GAO study, and yes, I cited from the GAO study.

Senator LEVIN. All right. And that is your current position?

Ms. DUDLEY. I have not studied the Davis-Bacon Act at all except for that one regulation on helper rules, and my concern there was that it harmed the very people that I thought it was intended to protect.

Senator LEVIN. Is there an economic justification for the Federal Government setting a minimum wage?

Ms. DUDLEY. I have never studied the minimum wage.

Senator LEVIN. Back in 2000, you wrote relative to the public's right to know about chemical plant risks that if there is a public demand for this information, as EPA's benefit assessment argues, nongovernmental organizations would find value in deriving it. How would a nongovernmental organization derive information from chemical plants?

Ms. DUDLEY. I am not in detail familiar with that comment. I am not sure I could answer that part of the question.

Senator LEVIN. OK. And then you went on to say, "The fact that they don't suggests that the value of the information to the public is less than the cost of the information." How do you value that information about the risks that people face from chemical plant accidents or attacks?

Ms. DUDLEY. I think it is very important to inform people about hazards that are in their community, and I think that is very important because you cannot make decisions for yourself and your family if you do not have that information.

I believe my general comment on that regulation was that we needed to consider what the trade-offs were, and I was concerned that—well, terrorists—this was in 2000 so we didn't have evidence yet, but that terrorists might be able to access. That was information that developed scenarios for what is the worst-case thing that could happen if this chemical is released.

Senator LEVIN. Is there always a nongovernmental organization out there to obtain information or to take action? That is the assumption of your comment.

Ms. DUDLEY. With the Toxic Release Inventory, we certainly see a lot of nongovernmental organizations——

Senator LEVIN. Is there always a nongovernmental organization that you can rely on to protect the public interest?

Ms. DUDLEY. Absolutely not. I definitely see a role for government in protecting the public and informing the public.

Senator LEVIN. Because that statement says that nongovernmental organizations would find value in deriving that information. The fact that they don't suggests what I just quoted; in other words, if there is value in obtaining it, there will be some nongovernmental organization that will obtain it. But isn't it true that there is not always a nongovernmental organization that has either the resources or the priorities to pursue a particular cause and you need to have a government to protect the public interest?

Ms. DUDLEY. Yes, you are certainly right.

Senator LEVIN. In 2002, you commented on an SEC rule to protect consumer privacy by limiting financial institutions' ability to share customer financial information without proper consent, and here is what you wrote about protecting the privacy of consumers' financial information: "The implicit premise of the rule is that individuals and firms cannot come to a mutually satisfactory agreement as far as privacy is concerned without resort to government assistance." Is that the premise of the rule?

Ms. DUDLEY. Actually, I did not comment on that rule. That was another scholar at the Mercatus Center.

Senator LEVIN. I see. So those are not your words?

Ms. DUDLEY. I believe what that is, is in OMB's Annual Report to Congress, they asked for recommendations for regulations, and what we did is we provided summaries of regulations we had researched. So I think that is where that came from. But I did not do that analysis, so I can't——

Senator LEVIN. Those, then, were not your thoughts or words at the time.

Ms. DUDLEY. Right.

Senator LEVIN. You suggested that OIRA conduct independent assessments, that they have an outside organization to come up with an independent cost/benefit analysis separate from OIRA, rather than just having OIRA do the independent analysis, cost/benefit analysis. So you would have a nongovernmental organization to operate above or alongside of OIRA to review and analyze regulations. You have said that OIRA from inside the Executive Branch cannot "provide the necessary check or independent assessment of costs and benefits."

Do you believe that?

Ms. DUDLEY. I am not exactly sure where that is from, but I believe that was my recommendation for a congressional office of regulatory analysis.

Senator LEVIN. According to my notes, outside of the Executive Branch you wanted independent analysis, outside of the government, not just the Executive Branch.

Ms. DUDLEY. I would love to follow up on this if I am wrong about this, but I believe that is testimony before Congress where I recommended a congressional office—or supported the congressional office.

Senator LEVIN. In any event, my last question here, because I am out of time, would be to close that thought. What would be the cost of that independent analysis?

Ms. DUDLEY. I don't know, sir.

Senator LEVIN. Well, shouldn't you make a cost/benefit analysis before you propose that?

Ms. DUDLEY. It was a recommendation to Congress, and I assumed that the Members that I made the recommendation to could analyze it.

Senator LEVIN. You have a lot of confidence in us. [Laughter.]

Thank you, Madam Chairman.

Chairman COLLINS. Senator Carper.

Senator CARPER. Thank you, Madam Chairman.

Ms. Dudley, would you tell us again the names of your sons and how old they are?

Ms. DUDLEY. Gregory, who is behind me—who shouldn't be, because every time I go back, I get his long legs. Gregory is 16, and he is in the 11th grade. And Christopher is 13 and in the 8th grade.

Senator CARPER. OK. My sons are 16 and 18, and our oldest boy is actually a freshman engineering student at a school up in Massachusetts where you spent some time.

Ms. DUDLEY. Very impressive.

Senator CARPER. He is a lot more impressive than his father, I can assure you of that.

I wanted just to start off by—every now and then I say to my sons, "There is nothing wrong with making a mistake. We all make mistakes. And sometimes we learn the most from the mistakes that we make. The key is not to make the same mistakes over and over and over again."

Senator Pryor and I, along with Senators Voinovich and Alexander, have sort of encouraged the Senate to start sponsoring every 2 years right after the election something we call "orientation for new Senators and spouses." And the idea is for the new guys and gals coming here to learn from our mistakes and the faculty of current Senators and spouses, to say these are the ways that we messed up and you don't want to make our mistakes, to learn from our mistakes.

If you had to talk about some mistakes that you have made of a professional nature with respect to really some of the issues that we are talking about here today and looking back in hindsight, what are some of the mistakes that you have learned from that would guide you maybe a bit differently in this new role?

Ms. DUDLEY. I actually am proud of the things that I have written. If I had known I was going to be nominated for a position, I might have written less. But I think if you read—don't just look at things pulled out of context, but if you read what I have written, I have always tried to be thoughtful and careful—and provocative, yes, challenge the way people think about things. But I have tried to do it openly, transparently, and with integrity. So I am sure I have made lots of mistakes, but in terms of the things that I have written, I think that they are sound.

Senator CARPER. All right. We all have probably our own set of core values to guide us as we approach a particular job or an issue. My own core values are pretty basic. It is to figure out the right thing to do and just do it; to treat other people the way I want to be treated; to be committed to excellence in everything that I do; to use some common sense; and when I think I am right, just not to give up. And I call them sort of like my moral compass, and when I look at an issue or a challenge, I sort of look at the issue through that prism of those core values to help me figure out the way to go forward. And when I get off on the wrong track, these kind of help get me right back on track.

Would you just take a minute and talk with us about your core values and how they guide you in approaching an issue or a regulation or whatever?

Ms. DUDLEY. OK. I would say some of my core values are like yours. They are honesty and integrity and doing—I am a wonk; I am a nerd. I like to do the research, and I do not like to know the answer before I have done the research. But to back up from there, core values, I would say I care deeply about the environment. That is a core value. And I always have. When I came to Washington to try to do environmental policy that improves the environment, I was concerned that some of the policies did not have the intended effects. So what I have become is what I have seen written in the newspaper, "She is a free market environmentalist." And I think that is true, and that is going back to the question I think Senator Akaka said. You need to look at what is the root cause of the problem and then address it. And often, if you look at the root cause, you can find there are ways to harness people's incentive, harness market forces in order to respond to that, and really have the effects that we want on such issues as health care, worker safety, and the environment.

But back to core values, honesty and openness, and I hope that is one message I can share with all of you, that I really am open and would really like to work with all of you and anybody who is interested in regulatory issues.

Senator CARPER. All right. What I have read about you and what you have said here and what others have said about you suggests that you have spent a lot of your life and your career working on and studying regulatory issues. I believe you spent some time working at OIRA itself, and I think that has been spoken to today.

Based on your experience and your work, what do you think we do right when it comes to regulations? And what do you think we do wrong? And if confirmed, how would you seek to address some of the problems that you see?

Ms. DUDLEY. I think there are lot of things that we do right. I think that the analytical framework that President Clinton put in place with Executive Order 12866, which has been continued, I think that shows that it is not partisan. There is a nonpartisan approach to understanding regulations to make sure that they are having the intended effects. So I think we are doing that right.

I think that we are doing a better and better job of understanding these hard-to-understand benefits and costs. And we are doing better and better in the environment area. We have new challenges that this Committee is very aware of, I am sure, in homeland security. They are all new challenges there for costs and benefits that we have to really understand how to measure those. And transparency, I think we are getting better and more open in transparency, not just in the review process, which the Office of Information and Regulatory Affairs I think has become better and better at being open and transparent in their review. But also with e-rulemaking, the general public has a much better opportunity now to get involved in this process.

Senator CARPER. All right. Thanks. Thanks, Madam Chairman.

Chairman COLLINS. Thank you. Senator Pryor.

Senator PRYOR. Thank you, Madam Chairman.

Chairman COLLINS. Senator Pryor, I would note that with the new Congress you are going to move up substantially on this Committee.

Senator PRYOR. I know. I won't have to do long-distance phone calls to you now. [Laughter.]

Thank you so much. Let me ask, if I may follow up on Senator Levin's question from a few moments ago, about financial information and privacy and the mutually satisfactory agreement that you talked about, and you said those were not your words, that someone else at the institute had written that?

Ms. DUDLEY. That comment on SEC's financial privacy was not mine, no.

Senator PRYOR. But as I understand it, in that same analysis you did write to OPM under your name that the regulation in question was overly burdensome and should be withdrawn. Is that right?

Ms. DUDLEY. I would have to check. I don't think we suggested that it be withdrawn. But I can get back to you on that, Senator.

Senator PRYOR. Yes. My research says that you did, but I just wanted to make sure and clarify that because in response to Senator Levin's question, you almost indicated that you did not agree with that or you did not really comment on that. But I was sensing that you were distancing yourself from that. Do you agree with what he said when it comes to financial privacy?

Ms. DUDLEY. I care a lot about privacy, but I am basically a nerd, and it is hard for me to comment on something when I have not done the research. So I did not—but I will get back to you this afternoon on that.

Senator PRYOR. OK. And the center that you have been working for, is it called Mercatus?

Ms. DUDLEY. Mercatus, yes, sir.

Senator PRYOR. Do you generally agree with the positions that Mercatus takes?

Ms. DUDLEY. The scholars at Mercatus are independent scholars. It is an academic environment, so we have the academic freedom of being independent scholars. But we do share a feeling that market-based processes can be more effective at achieving people's needs and meeting social goals. So in that sense, yes, I would share——

Senator PRYOR. Generally?

Ms. DUDLEY [continuing]. That basic value, yes, that generally—yes.

Senator PRYOR. Now, you have written something that I think is somewhat controversial on the senior death discount where you talked about this.

Ms. DUDLEY. I have never written on a senior death discount.

Senator PRYOR. OK. Do you agree that there is or should be such a thing as the senior death discount?

Ms. DUDLEY. I think that what we all want for ourselves and our families and our children is to live long, healthy, and happy lives. So what I have recommended and what I have used is, in addition to—so this is what is—it is all coming down to whether you are measuring lives. I have recommended looking at the number of years of lives. I think it is important to understand longevity. That is not—there is something else that people have referred to as a senior death discount, and it is not the life years approach, which is what I have recommended, and it is in the guidelines.

Senator PRYOR. Is it fair to say that you think that an older person's life is worth less in an economic sense than a younger person's life?

Ms. DUDLEY. I think what I would say is that, regardless of how old you are, you would like to live longer. So if you are 60 and there are two options, two alternatives you could have—one that provides one more year of life and one that adds 10—you would like to have that piece of information. You would like to have it if you are 60 and looking at your own life. You would like to have it if you are looking at your 6-year-old's life. You would like to know how much you are extending it.

So I don't think it is related to age, but it tells you if this rule will provide me 10 more years of life, that is better than a rule that provides me 5 years.

Senator PRYOR. All right. Well, I am puzzled, then, because as I understand it, you wrote something called "How Not to Improve Public Health," and you wrote something called "Arsenic Comments," Public Interest Comment on the Environmental Protection Agency's request for comments on national drinking water regulations for arsenic, and you are commenting on arsenic. And as I understand it, what you are saying, as I read your comments, is that these stricter standards for arsenic, you basically say, are "an unwelcome distraction." I have that in quotes. It is "an unwelcome distraction." And as I understand it, arsenic disproportionately harms older people, people who are advanced in age, and, therefore, if they had the information that you say they shouldn't have, their life might be prolonged. But you are saying we shouldn't have these regulations and people shouldn't know about the arsenic in the water, so they might not be able to add that year to their life.

How am I misunderstanding what you are writing?

Ms. DUDLEY. Well, on that, I don't know that it is true, but I don't think that was the point of—I don't think that it is true that arsenic disproportionately affects older people. I am not sure. Probably not because the concern is cancer, so it would be younger people.

The point of that, because, of course, we all want safer drinking water, but there are small communities, particularly in the Southwest, that have higher natural levels of arsenic. They would have had to expend large amounts of money to meet those regulatory standards for their drinking water systems. And the unwelcome distraction was because it was at a time when we were all worried about whether terrorists might be attacking our water systems.

So looking at a small community that has limited resources, how are they best to address those limited resources, and that was my concern. So it was not please do not give them information. I never suggested that, and I never suggested that we do not care about it because it is elderly people. It was really a question of how do we deal with the priorities given the different risks, public health risks with drinking water systems that we face.

Senator PRYOR. OK. Well, maybe your writings are not clear or maybe I have not read them thoroughly enough, but as I understand your writings, basically you look at the age as a factor when you look at regulation. Is that not right? Is that not fair?

Ms. DUDLEY. What I have recommended is that, in addition to looking at how many lives are saved, which is one standard metric, we should also use the second standard metric, which is life years. And that really just tells you how many years are we extending life by. I think both of them are valid, and I think they both provide valuable information, and that looking only at one does not tell you enough information.

Senator PRYOR. Well, I am out of time, but I assume if you are going to have that second metric, as you call it, then you are making a judgment call on the number of years left as it relates to regulation.

Ms. DUDLEY. I think that is information that we have, and so providing that information to make the decision, I think it does help you decide, will this regulation extend lives longer than that regulation? And I think that is an important piece of information to have.

Senator PRYOR. Thank you, Madam Chairman. I have overstayed my time.

Chairman COLLINS. Thank you.

Ms. Dudley, I know it is difficult to go back and look at comments or writings that you made several years ago, but you have commented extensively in your academic role, and I want to go back to some comments that you made that were published in 1998 in an issue of the magazine *Regulation.*

In these comments, you suggested that a jurisdiction that expects ozone levels to exceed the standard might offer to compensate an upwind jurisdiction in order to reduce ozone pollution. I have to tell you, coming from a State that is downwind of almost all power plants in the United States, this seems completely backwards to me. Just one of these power plants can cause more pollution of the

type that produces smog and acid rain than all of the automobiles, factories, and businesses in Maine combined.

In other words, if you took every car off the road in Maine and closed down every factory, Maine would still have a pollution problem, including in beautiful sites such as Acadia National Park, because of the effect of the prevailing winds.

So when I read that you are suggesting that a State like Maine might need to compensate a polluter's State, I just don't understand those comments. Could you explain what you meant by that and whether you still hold to that viewpoint?

Ms. DUDLEY. Well, this is a time when I wish Senator Carper were still here because that would be one that I wish I had not said. This is one I wish I had taken back.

This is a perfect example of you can be an academic theorist and you can talk, "Well, in theory, we could get the same result by the polluting State compensating the downwind State or vice versa." That is not the way our statutes are written, and if I were confirmed as Administrator of OIRA, I assure you that is not the kind of proposal I would suggest.

Chairman COLLINS. So is this more of an academic exercise to talk about the theoretical possibilities?

Ms. DUDLEY. Yes. I mean, it is applying the Coase theorem. Coase was a Nobel Prize-winning economist, and that was his theorem. But it clearly does not work from an equity perspective or a fairness perspective.

Chairman COLLINS. Exactly.

Ms. DUDLEY. And I agree with you, and equity and fairness are definitely something I think are important to understand in regulation.

Chairman COLLINS. Let me turn to another clean air issue that concerns me. In October of this year, just recently, the EPA's Clean Air Scientific Advisory Committee unanimously recommended that air quality standards for ozone need to be substantially strengthened to protect human health, particularly in sensitive subpopulations, for example, children with asthma.

This Committee found that the health impacts in healthy individuals at ozone levels below even the current standard were significant and were cause for concern, and it is already well known that sensitive individuals, such as the elderly with breathing difficulties or children with asthma, are even more susceptible than healthy individuals. Again, I recognize that this was sometime ago, but in 1997, you argued that the ozone standard should be set at a weaker level than even the current level, which has now been shown to be insufficient to safeguard the health of vulnerable populations.

In light of this new evidence—and I realize it is new evidence since you wrote your comments—do you now believe that there is enough evidence to support an ozone standard at least as strong as, if not stronger than, the current standard?

Ms. DUDLEY. You are right, it was 10 years ago when I wrote about ozone. And I do care about the air, having a son who has suffered from asthma. I understand those issues. I have looked at that. I have seen that, the Clean Air Science Advisory Committee's

letter, and I think it will certainly weigh in to EPA's decision, particularly under the Clean Air Act.

Chairman COLLINS. I have talked a lot this morning about the benefits of regulation, particularly in the environmental arena. There are times, however, when excessive regulations, costly regulations have a detrimental effect, and I want to bring to your attention an example that affects the State of Maine.

As you know, for centuries Maine has had a fishing industry that is very important to our economy, to our way of life, and to our heritage. And yet the fishing industry is endangered in Maine because of excessive regulation that often seems to be grounded in the desire to avoid lawsuits rather than in sound scientific knowledge and expertise.

Currently, the National Marine Fisheries Service is drafting a rule that could well have a detrimental effect on Maine's lobster industry. I don't want to go into exhaustive detail, and I realize this is not something that has probably been on your radar screen. But it is a good example of a regulation that has a noble goal, but would impose a tremendous burden on the lobster industry in our State. The regulation would require some gear modifications by requiring fishermen to replace their current floating ground lines with sinking ground lines. This is a costly change. Again, it has a worthwhile purpose. It is intended to help reduce the risk of interaction between fishermen and certain whales, and that is something that we all care about. But there may well be a better way to achieve that goal. The approach that the National Marine Fisheries Service is taking is using outdated cost estimates that do not reflect the true impact on our lobster industry.

Now, I realize this is probably a new issue to you, but it seems to me that this is where OIRA could play an important role of ensuring that there is a full analysis and in-depth consideration of alternative methods of achieving the same goal without imposing such an onerous burden on our lobster industry.

If you are confirmed, do you pledge to take a look at this rule and at any reasonable alternatives given the potentially detrimental impact on our lobster industry?

Ms. DUDLEY. Yes, Senator, you are right. It is inappropriate for me to comment specifically, but if I am confirmed, I will definitely look at this and would love to talk to you about it if you are interested.

Chairman COLLINS. Thank you. Senator Akaka.

Senator AKAKA. Thank you, Madam Chairman.

Ms. Dudley, I would like to clarify one of your earlier responses when I asked you about market failure. I looked up "market failures," which is an economic term to describe when markets do not allocate goods and services efficiently. And normally the term is applied when the inefficiency is particularly dramatic. The term may also be used to describe situations where market forces do not serve the perceived public interest.

When I asked you that question, you said that a lack of information can lead to a market failure.

Ms. DUDLEY. Right.

Senator AKAKA. I'd like to discuss this matter further. What about inability to act because of economic factors? Can the lack of economic resources lead to a market failure?

Ms. DUDLEY. I don't think it would fit the traditional definition of market failure. Certainly, that is a role for the government, but it probably does not fit the definition of market failure.

Senator AKAKA. Ms. Dudley, in May 2004, GAO issued a report at my request on the number of data-mining activities in the Federal Government. At that time, GAO found 36 agencies using personal information obtained from the private sector in data-mining activities. What policies and safeguards do you believe should be in place to ensure the accuracy of information obtained from the private sector?

Ms. DUDLEY. Well, there are several statutes that guide OMB as well as agencies on those issues, including the Privacy Act, the Paperwork Reduction Act itself, and if I am confirmed, I would like to work with the other offices within OMB as well as the agencies to make sure that if we are collecting information, especially that is personally identifiable, we need to make sure that we are consistent with the framework set up in the Privacy Act and the specifics laid out in these other acts.

Senator AKAKA. Ms. Dudley, in 2001 and 2002, you and your colleagues in the Mercatus Center submitted numerous regulations to OIRA that you believed needed to be modified or repealed. What methodology was used to determine whether these existing regulations should be repealed, rescinded, or modified? And would you use the same methodology if you are confirmed as OIRA Administrator?

Ms. DUDLEY. Well, in 2001, when OMB asked for comments on regulations that could be improved, we actually had already filed comments with agencies. We had our Public Interest Comment project operating for several years and had filed comments with agencies. So we had done research on particular rules, had suggestions for how to improve those rules, alternatives that could make them better.

So when OMB asked for recommendations, we just sent one-page summaries of all the rules on which we had done research. So our list was not necessarily a priority list. It was a list of here is some information that we have already done some research on, and they were not necessarily saying you should repeal it. They were saying there are smarter ways to deal with it, and here is our research.

So that was the methodology in both of those cases. We didn't scratch our heads and say, "Gee, what could it be?" We really just supplied a list of what analysis we had already done.

Senator AKAKA. And you feel that if you head up OIRA, you would use the same method?

Ms. DUDLEY. Actually, I would like to use the method that is codified in President Clinton's Executive order and statute. I do not plan to use any different methods.

Senator AKAKA. Ms. Dudley, the Privacy Act and the E-Government Act are the primary mechanisms for protecting the privacy of citizens and legal residents. Do you believe that the Privacy Act and the E-Government Act provide adequate privacy protections?

Ms. DUDLEY. Well, the Privacy Act, as you know, is getting pretty old. It is over 30 years old now, and yet from what I understand, the framework that is in the act, which is collect information and use it only for the purpose for which it was collected, unless somehow otherwise authorized, that general framework still seems to be working. And then as you have mentioned, the E-Government Act, as with FISMA, the Clinger-Cohen Act, several other statutes have updated it.

I think the bottom line is it is a constant challenge, and privacy concerns are dynamic and ever-changing. And within the framework provided by those acts, I think memoranda and working with the CIOs in the agencies and OMB may be the best way to deal with that. But I don't have all the answers and would love to talk to you if you have some thoughts on that.

Senator AKAKA. I thank you so much for your responses. Thank you, Madam Chairman.

Chairman COLLINS. Thank you. Senator Carper.

Senator CARPER. Sometimes when we have had people who have been nominated by the President to serve as judges, Federal judges, I have tried to understand where they are coming from, especially if they do not have much of a judicial history, by saying, well, whose decisions, who on the court do you admire, and who do you see yourself sort of following in the footsteps of.

Now, you are not going to have judicial decisions, but you have a lot out there in terms of where you are coming from, but I still want to ask a similar question, and maybe a two-parter.

In your view, what should the role of the Director of OIRA be? How should it work and how should it play in the regulatory process? And how might the approach that you take in this job be different from the person who is not the incumbent, who I believe is there as an interim, but his predecessor, John Graham? So if you could take those on, I would appreciate it.

Ms. DUDLEY. I see the role of OIRA as coordinating across agencies to make sure that one hand knows what the other hand is doing in the regulatory world, providing the guidance and the oversight. The agency has the ultimate authority for issuing the regulations, as Senator Collins said at the outset. So the OIRA role is more review and coordination.

My style tends to be more collaborative, just by nature, and so I think—that is how I imagine that would be one thing that would maybe—I don't know if I should say distinguish me from the previous administrator because he was very effective. But actually I know and actually have worked with all but one of the administrators. I am teaching with Sally Katzen at George Mason University, and I have worked with the others either in OIRA or elsewhere. So I think there are some big shoes to fill and a lot to build on, and so I hope to be able to take characteristics from each of them if I am confirmed.

Senator CARPER. All right. Sometimes I like to say, one of my favorite sayings—Senator Collins has heard me say this a time or two—in politics our friends come and go, but our enemies accumulate. [Laughter.]

Senator CARPER. You have had a chance, as we all have up at this table, to collect a few enemies. When my enemies criticize me,

in some cases they are totally without any validity, but sometimes they strike tellingly true. And folks have been critical of your nomination and of your suitability for this position. When some folks are critical of you, which of the criticisms do you think come closest to being maybe true or have some basis in fact? How would you rebut those or address them?

Ms. DUDLEY. I think generally I would say please look at my writing and please meet me. I mean, that is one thing. I guess I would rebut them by saying if people are concerned that I will not be open and transparent, I can assure you that is not true because if I am confirmed as Administrator, I would invite—there was a letter that was signed against me. I haven't met anybody who signed that letter, but the letters that have been signed for me, I know all those 50 academics. I know the Nobel Prize winner; I know the OIRA Administrators who have all written supportive letters. I don't know anybody on the other letter, and I hope to change that if I am confirmed.

Senator CARPER. I wonder if I could just restate my question. When people criticize you, when you read criticisms people have made of you, which of the criticisms that you have heard have some basis in fact? How would you speak to those?

Ms. DUDLEY. I guess a criticism that I believe that market forces work. It is true. I believe in people. I believe in people's ability to make decisions. I respect diversity, and I respect people. And so I resist one-size-fits-all standards that do not understand that diversity and that people have different needs.

Senator CARPER. OK. Let me ask a question with respect to your philosophy. What is your philosophy when it comes to when an agency should step in and propose a regulation? I serve on the Environment and Public Works Committee. We have been very much involved with the President's Clear Skies proposal, which we defeated in Committee. EPA responded by issuing regulations to try to do through regulations what Clear Skies would have otherwise done or not done.

But what kind of things do you think an agency like EPA ought to consider before putting forward regulations on clean air, for example? And assuming they are authorized to act, when would it be appropriate for them to do so, in this case, EPA? And if confirmed, how would you apply this philosophy to your work?

Ms. DUDLEY. I would say the first criteria should be the statutory mandate and what does the statute require. And then actually my philosophy really fits very well with the guidelines that have been issued by the past several Presidents, and that is, first understand why we are seeing the problem, and it is this notion of root cause. What is the root cause? I really do think you need to know what the root cause of the problem is before you can address it because otherwise you may be just putting on a Band-Aid and actually having unintended consequences.

The third step would be let's look at some alternatives. Now, I will admit that as a writer, I think out of the box, but I promise not to think that far out of the box (if confirmed). You missed my apology to you in response to a question of Senator Collins earlier.

Senator CARPER. An apology to me? I hate to miss those.

Ms. DUDLEY. She identified something that I wished that I hadn't said, but it was thinking out of the box. And I think as regulators we need to challenge our ideas, but obviously that box has to be constrained with what the statutory constraints are. And then the next step would be let's try to look and see what we think the consequences are under different scenarios, then understand who is bearing the costs and the benefits. And I have run you out of time.

Senator CARPER. All right. Thanks very much.

Ms. DUDLEY. Thank you.

Chairman COLLINS. Ms. Dudley, we haven't talked very much this afternoon about the critical role that OIRA plays in helping to safeguard the confidentiality and the security of private information. This is a less visible role of OIRA, but in this electronic age, it is an incredibly and increasingly important role.

Many Federal agencies in the course of carrying out their missions must have access to or store personal identifying information of citizens, including birth dates, addresses, Social Security numbers. In the past year, we have seen serious breaches in agencies that have exposed citizens to identity theft. Probably the most widespread one that affected millions of American citizens occurred at the Veterans Administration, and I am sure you are somewhat familiar with that.

OMB has issued some guidelines to improve information security, but what more do you think can be done to ensure that personal information that is shared by the citizens of this country with Federal agencies, whether it is Social Security or Medicare or the IRS or the VA, is truly protected from an unauthorized release?

Ms. DUDLEY. You are right, I mean, this is important, and there is certainly room to improve. As I understand it, this is a responsibility within OMB that is shared within different parts of OMB. The Deputy Director issued a memo about a year ago requiring agencies to look at not just the information that they use but how they store it, evaluate how well it is working. I believe their responses are due soon, if they are not already in. I think that might give the office a better look at understanding how do we do this and understand that it is a life-cycle approach. When you gather that personal information, you need to know how it is going to be stored and how it is going to be used to try to avoid situations like the VA laptops that you mentioned. And so I would like to work with the other parts of OMB as well as the agencies to try to do better, if I am confirmed.

Chairman COLLINS. Another challenge that Federal agencies and departments, particularly the Department of Homeland Security, have is striking the right balance between privacy and security. We are seeing the Department of Homeland Security try to implement new programs at the border, the secure flight program, that require the collection of considerable amounts of private information.

In general, what is your philosophy about how we strike the right balance between gathering information that we need about individuals and yet not creating vast government databases that could be used for inappropriate purposes?

Ms. DUDLEY. I think it is a difficult challenge, and it is not a new challenge, but it is additionally challenging in recent years. So I think it is something that needs to be faced more.

As I say, I think that the framework that is set up in pre-existing acts recognizes the need for those balances. So I imagine it requires a lot of serious case-by-case analysis about specific choices that we have and whether you can achieve the same security with less breach of privacy or understand what the trade-offs are, because there are serious trade-offs, and Americans want both.

Chairman COLLINS. It is a very difficult trade-off because, obviously, the 9/11 Commission and other experts have pointed out that we did not do a good enough job with information sharing and with collecting as much information as possible and disseminating that information about those who would do us harm.

The problem becomes figuring out who are the individuals who would do us harm versus law-abiding individuals for whom there is no need to collect information that involves a certain breach of privacy. And I think that is going to be a tremendous challenge throughout the Federal Government in the coming years.

I do have a number of additional questions on everything from how the OIRA Director would interact with the E-Government Director and other more technical issues, which I am going to submit for the record. I would like to turn to my colleagues and give them an opportunity for any closing questions that they might have.

Senator Akaka.

Senator AKAKA. Thank you very much, Madam Chairman.

Ms. Dudley, you said that you have always tried to be open and transparent and you would like to continue that. I appreciate that since I believe OIRA should operate in an open and transparent manner.

In 2003, the GAO reported that the changes agencies made to regulations at OIRA's request were not always available. In addition, although OIRA has said it can have its greatest impact on agencies' rules during informal reviews, agencies are only required to disclose changes made at OIRA's request during formal review.

If confirmed, would you institute a policy whereby agencies disclose changes recommended by OIRA during informal review?

Ms. DUDLEY. One of the things I have complimented OIRA on is its increased transparency because I do think sunshine makes for better government, and I think the work that it does is positive, and it should be open. So if I am confirmed, I am willing to discuss any reasonable request to see if there is a need to actually increase that transparency. So I am definitely willing to talk with you if I am confirmed.

Senator AKAKA. Do you have any ideas to further improve the transparency of OIRA's review process?

Ms. DUDLEY. I am not at OIRA now and I have not been at OIRA in a long time, so I am not familiar with exactly how things work. But what I have appreciated is the posting on the website and the ability to track a regulation to see where it is in the review process. But I am sure there are more things that can be done. I just do not have specific suggestions.

Senator AKAKA. It is well known that the former OIRA Administrator, John Graham, sent what are called "prompt letters" to agen-

cies to suggest that the agency develop regulations in a particular area or to encourage ongoing regulatory efforts. If confirmed, would you issue prompt letters? And if so, which areas of regulation would you encourage?

Ms. DUDLEY. I actually do not have something specific in mind, as I mentioned in response to a question earlier. My personality tends to be more collaborative, but I know—the prompt letters were something that I thought actually were a good thing that Administrator Graham did. One in particular that I thought was important was to FDA on a trans fat regulation, and the prompt encouraged FDA to provide more information to consumers on trans fats. And that was one that I thought was a positive step.

Senator AKAKA. Thank you, Ms. Dudley. Madam Chairman, I have other questions that I may submit for the record. Thank you very much.

Ms. DUDLEY. Thank you.

Chairman COLLINS. Thank you, Senator. Senator Carper.

Senator CARPER. Just maybe one or two things in closing. In Senator Akaka's comments, he mentioned the word "transparent" and presented it in a way that I think a lot of us think of transparency today. When we say someone is transparent or a process is transparent, we think of it in positive terms. I am old enough to remember whenever accused of being transparent, it was not a compliment. It is interesting how things change.

I was sitting here watching you respond to these questions, Ms. Dudley, and it is hard not to see your boys here sitting behind you, and I know that if my sons at their age had to be here and sit—this is worse than church. [Laughter.]

Senator CARPER. You could not pay them to endure this for a couple of hours. At least in church you get to stand up from time to time and maybe sing or pray or close your eyes, or whatever. But they have done a very fine job in holding up their end of the bargain in all of this.

Gentlemen, I don't know if your mom is going to be confirmed or your wife is going to be confirmed, but if she is, we thank you for your willingness to share your mother and your wife with the people of our country.

You have held a number of important and responsible positions to date, but if you end up in this one, you are going to be what I call "shooting with real bullets." And that is not to say you have been shooting with blanks for the earlier part of your life, but you will have a fair amount of say as to the direction that we are able to take.

We pass laws, and they are kind of like a skeleton, if you will, and then meat on the bones is the regulations that are adopted in response to those laws. What you have been nominated to do here is an important thing, and we appreciate your time and responses to our questions. But you may be in a position to decide what kind of air these guys have to breathe and what kind of fish they are going to have to eat and what kind of oceans they are going to have to swim in and what kind of pollution is going to be coming out of the cars or trucks or vans that they drive. It is important stuff, and I would just ask that you keep that in mind.

You mentioned collaboration, you are into collaboration. Frankly, I would like to think that is one of my strong suits as well. My colleagues might deny that, but that is one of the things I try to do. And in the nature of the job that you might some day hold, that is a quality you do not want to let go.

Thanks very much.

Ms. DUDLEY. Thank you, Senator.

Chairman COLLINS. Thank you.

Ms. Dudley, I want to thank you for appearing before the Committee today and for your cooperation with the Committee's process. I very much appreciate your frank responses to the many questions that you have been asked throughout this process. I know it is a long and involved one, and certainly your many writings have given us a lot to ponder.

I do want to thank my staff for their hard work and the Minority staff for their hard work on this nomination. Given that the nominee did have voluminous writings, it was a great deal of work for the staff to read through all of them, and they probably could write a book on your writings at this point.

I also do appreciate your willingness to serve. I think that many people looking at the contentious nomination process that too often seems to occur these days would decide that they were better off staying in an academic environment. Not to say that academia is not contentious, but I know it is very different to have a public nomination process, and I appreciate your willingness to put yourself forward and to consider serving in this role.

Without objection, the hearing record will be kept open until 5 p.m. on Wednesday. I do anticipate the submission of additional questions for the record. Senator Lieberman was not able to be here today, but as you know, he has a great interest in your nomination, and I suspect that he will have some follow-up questions, as will I and some of the other Members.

I, too, want to join Senator Carper in thanking your family for being here and thanking them for their willingness to endure this process as well and for your commitment to public service.

This hearing is now adjourned.

[Whereupon, at 4:01 p.m., the Committee was adjourned.]

APPENDIX

Opening Statement of Susan E. Dudley
Nominee for Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
November 13, 2006

Thank you, Chairman Collins, Senator Lieberman, and members of the Committee for the opportunity to be here to answer your questions this afternoon. I am honored to be President Bush's nominee to be Administrator of the Office of Information and Regulatory Affairs at OMB and, if I am confirmed, I look forward to the opportunity to work with each member of this Committee.

I came to Washington almost 25 years ago as a newly minted MBA from MIT's Sloan School of Management, deeply committed to environmental issues and interested in learning how government policy can foster environmental and economic prosperity. At the Environmental Protection Agency, I observed how incentives matter when it comes to promoting compliance with environmental policy. To provide incentives for compliance with environmental regulations, I developed the BEN model, still in use today, to estimate the economic benefit of noncompliance for civil penalty assessments and used it to help negotiate the largest civil penalty for a water quality violation. I went on to work as a career staff economist at OIRA and later at the Commodity Futures Trading Commission.

For the last eight years, I have studied and written on regulatory process and policy at the Mercatus Center at George Mason University. I also teach courses on regulation as an adjunct professor at the George Mason University School of Law.

I believe my years of working with, studying, and teaching about regulation will serve me well if I am confirmed as Administrator of OIRA. I also recognize that my role will be very different from what it is now. As a researcher and academic, I have written extensively, both for scholarly journals and the popular press. Those writings have sometimes been provocative, with the goal of challenging the way people think about the consequences of regulation.

If confirmed, however, I will have a different role. The OIRA administrator is responsible for enforcing the laws of the land as Congress has written them. I will lead a team of talented and dedicated career analysts at OMB in working with agencies, Congress, and the public on issues regarding regulation, information technology and policy, privacy, paperwork review, and statistical policy. One thing I will continue to do is foster debate. As my students will attest, I am fair and open minded and will listen to all who want to have a say in the public process.

OIRA was created when President Carter signed into law the Paperwork Reduction Act of 1980. It is guided by several statutory authorities, such as the Privacy Act, the Unfunded Mandates Act, and the e-Government Act, as well as President Clinton's Executive Order 12866 governing regulatory review. The common theme in these

different authorities is the need for a central office to coordinate, oversee and guide executive branch agencies to ensure their activities are consistent with statutory and executive objectives, and accountable to Congress, the President, and the American people.

OIRA plays a vital role in ensuring that this process is transparent, open, and accountable—not to special interests, but to the broader public interest—and I am committed to that role. Throughout my career, I have endeavored to conduct myself with honesty and integrity, and treat others with respect and openness. If I am confirmed, I look forward to working with you to fulfill the important functions of OIRA.

Thank you for the opportunity to make this opening statement and I look forward to the responding to your questions.

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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
ROOM SD-340
(202) 224-4751

WASHINGTON, D.C. 20510-6250

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES

A. BIOGRAPHICAL INFORMATION

1. **Name:** Susan Elaine Dudley

2. **Position to which nominated:** Administrator, Office of Information and Regulatory Affairs

3. **Date of nomination:** July 31, 2006.

4. **Address:** 7980 Buckland Mill Rd, Gainesville, VA 20155-1904

5. **Date and place of birth:** May 27, 1955, Newton, Massachusetts

6. **Marital status:** Married to Brian F. Mannix, Associate Administrator, Environmental Protection Agency.

7. **Names and ages of children:** Gregory B. Mannix (16) and Christopher J. Mannix (13)

8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.

   S.M. Sloan School of Management, Massachusetts Institute of Technology, 1981 (September 1979—May 1981). Concentrations in applied economics and finance. Thesis on economic incentives for pollution control.

   B.S. (*summa cum laude*) Resource Economics, University of Massachusetts, 1977 (September 1973—May 1977). Senior honors thesis on the land application of sewage effluent.

   High School diploma, Lincoln-Sudbury Regional High School 1973 (September 1969—May 1973).

9. **Employment record:** See attachment.

10. **Government experience:** List any advisory, consultative, honorary or other part-time service or positions with federal, State, or local governments, other than those listed above.

Member and Working Group Chair, Virginia Environmental Education Advisory Committee. Appointed by Governor Jim Gilmore (2000 to 2002). Chaired the working group responsible for making recommendations to the Governor regarding resource allocation for environmental education in the Commonwealth.

Member, Administrative Law Advisory Committee. Appointed by the Virginia Code Commission (2000 to 2003). The committee advises the Commission and the Virginia General Assembly on matters related to administrative law.

Member, Virginia Waste Management Board. Appointed by Governor George Allen. (1996 to 2001) The Board is responsible for promulgating and enforcing waste management regulations for the Commonwealth of Virginia.

11. **Business relationships:** List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.

I am and will remain a general partner of Buckland Mill Enterprises. The primary source of income for this husband-wife partnership is the patronage dividend paid by Farm Credit of Virginia which holds the mortgage to the property on which I reside. I will not be involved in any management activities or activities relating to producing income for the partnership throughout the duration of my government service. Furthermore, pursuant to 18 U.S.C. § 208, I will not participate personally and substantially in any particular matter that will have a direct and predictable effect upon Buckland Mill Enterprises, unless I first obtain a written waiver pursuant to Section 208(b)(1) or qualify for a regulatory exemption pursuant to Section 208(b)(2).

12. **Memberships:** List all memberships, affiliations, or and offices currently or formerly held in professional, business, fraternal, scholarly, civic, public, charitable or other organizations.

Board of Directors, International Foundation for Research in Experimental Economics (Spring 2006 to present). Unpaid

Executive Committee Member, Association of Private Enterprise Education (Spring 2005 to present). Unpaid

Board Member, National Federation of Independent Businesses Legal Foundation (Spring 2005 to present). Unpaid

Member, U.S. Chamber of Commerce Regulatory Affairs Committee (2003 to 2006) Unpaid

Den Leader, Boy Scouts of America (2000-2001) Unpaid

13. **Political affiliations and activities:**

(1) List all offices with a political party which you have held or any public office for which you have been a candidate. ***NONE***

(2) List all memberships and offices held in and services rendered to any political party or election committee during the last 10 years. ***NONE***

(3) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $50 or more during the past 5 years. See attachment.

14. **Honors and awards:** List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements. OIRA division award 1986, OMB Special Award 1988. Bachelor of Science, summa cum laude (University of Massachusetts 1977).

15. **Published writings:** Provide the Committee with two copies of any books, articles, reports, or other published materials which you have written. See attachment.

16. **Speeches:**

(1) Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated. I have given many presentations during the last 5 years, but I don't think any qualify as "formal speeches." I use notes and don't have copies or transcripts of these informal talks. Several recent remarks were videotaped and are available electronically, including those I made as moderator of a November 2005 George Mason University *Journal of Law, Economics and Policy* Lecture Series panel on "The Impact of Federal Regulation on the Economy and Small Business," http://www.gmu.edu/org/jlep/lectures_2005Nov29.shtml), a June 2005 American Enterprise Institute panel discussion on "What do Regulations Cost?" http://www.aei.org/events/eventID.1091,filter.all/event_detail.asp) (this link includes a copy of slides, as well as a video), and the December 2004 White House Conference on the Economy (http://www.mercatus.org/publications/pubID.2663/pub_detail.asp). I would be happy to provide more detail, if desired, on these or other informal talks I have

given.

Provide copies of any testimony to Congress, or to any other legislative or administrative body. *Attached.*

(2) Provide a list of all speeches and testimony you have delivered in the past 10 years, except for those the text of which you are providing to the Committee. Please provide a short description of the speech or testimony, its date of delivery, and the audience to whom you delivered it. See attachment.

17. **Selection:**

(1) Do you know why you were chosen for this nomination by the President?

I believe the President chose me for my background and experience in regulatory matters (see below).

(2) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

I have studied regulation since receiving my masters degree from MIT-Sloan in 1981. I worked as a staff economist in the Office of Information and Regulatory Affairs from 1985-1989, as well as at regulatory agencies, including the Environmental Protection Agency (1984) and the Commodity Futures Trading Commission (1989-1991). At EPA, I developed the BEN model, still in use today, to estimate the economic benefit of noncompliance for civil penalty assessments and used it to help negotiate the largest civil penalty for a water quality violation at that time. As director of the Regulatory Studies Program at the Mercatus Center at George Mason University, I have studied and written on regulatory process and policy since 1998. As adjunct professor of law at George Mason University School of Law, I have taught courses on regulation since 2002.

B. EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate? **YES.**

Although I will remain a general partner of Buckland Mill Enterprises, I will not be involved in any management activities or activities relating to producing income for the partnership throughout the duration of my government service. The primary source of income for this husband-wife partnership is the patronage dividend paid by Farm Credit of Virginia which holds the mortgage to the property on which I reside. Furthermore, pursuant to 18 U.S.C. § 208, I will not participate personally and substantially in any particular matter that will have a direct and predictable effect upon Buckland Mill

Enterprises, unless I first obtain a written waiver pursuant to Section 208(b)(1) or qualify for a regulatory exemption pursuant to Section 208(b)(2).

2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain. **NO**

3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization, or to start employment with any other entity? **NO**

4. Has anybody made a commitment to employ your services in any capacity after you leave government service? **NO**

5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable? **YES**

6. Have you ever been asked by an employer to leave a job or otherwise left a job on a non-voluntary basis? If so, please explain. **NO**

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated. **NONE.** (I previously taught courses on risk management for electric utilities during the 1990s. However, these courses did not concern regulations and so would not constitute any conflict of interest with the position for which I have been nominated.)

2. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity. I have submitted public comments to regulatory agencies during the public comment period on proposed regulations. (See attached response to A.15.) I served on the Virginia Waste Board, with responsibility for issuing state regulations, and the Virginia Administrative Law Advisory Council, with state law process guidance responsibilities.

3. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position? **YES**

D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details. **NO**

2. Have you ever been investigated, arrested, charged or convicted (including pleas of guilty or nolo contendere) by any federal, State, or other law enforcement authority for violation of any federal, State, county or municipal law, other than a minor traffic offense? If so, provide details. **NO**

3. Have you or any business of which you are or were an officer, director or owner ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details. My husband and I were plaintiffs in a medical malpractice lawsuit (settled) on behalf of our minor son.

4. For responses to question 3, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity. **NONE**

5 Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination. **NONE**

E. FINANCIAL DATA

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

AFFIDAVIT

Susan E. Dudley being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

Subscribed and sworn before me this 30 day of August 2006
20____

comm exp 3/31/2009

Notary Public

United States Senate

COMMITTEE ON
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BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES

Susan Elaine Dudley

Attachment

A. 9. Employment record: List all jobs held since college, and any relevant or significant jobs held prior to that time, including the title or description of job, name of employer, location of work, and dates of employment. (Please use separate attachment, if necessary.)

Job title/description	Employer	Location	Dates
Distinguished Senior Scholar *Director*, Regulatory Studies Program *Senior Research Fellow & Deputy Director*	Mercatus Center at George Mason University	Arlington, Virginia	8/06 – present 10/03 – 7/06 10/98 – 10/03
Adjunct Professor of Law	George Mason University School of Law	Arlington, Virginia	2002-2006
Adjunct Professor	Bryce Harlow Institute on Business and Government Affairs (at Georgetown University)	Washington, DC	Summer 2003, 2004
Instructor (Taught 1- and 2-day courses to utility executives on managing energy risks)	ExNet Utility Management Programs, and individual electric utility companies	Various locations	1996 – 2002
Vice President and Director of Environmental Analysis (consultant)	Economists Incorporated	Washington, DC	1991 – 1998

Economist Advisor to Commissioner Albrecht	Commodity Futures Trading Commission	Washington, DC	1989 – 1991
Assisted Assistant Secretary designate	Department of Energy, Office of Environment, Safety and Health (on detail from OMB).	Washington, DC	1989
Deputy Chief Natural Resources Branch Senior economist	Office of Information and Regulatory Affairs, Office of Management and Budget	Washington, DC	1987 – 1989 1985 – 1987
Financial Consultant	Environmental Protection Agency	Washington, DC	1984 – 1985
Associate (consultant)	Putnam, Hayes and Bartlett, Inc.	Washington, DC	1981 – 1984
Financial Analyst (summer intern)	General Electric Company	Fairfield, CT	Summer 1980
Research Associate	Temple, Barker & Sloane, Inc.	Lexington, MA	1978 – 1979
Research Assistant	Charles River Associates	Cambridge, MA	1977 – 1978

A. 13 (3). **Political affiliations and activities:** Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $50 or more during the past 5 years.

Date	Payee	Contribution ($)
7/06	Americans for Prosperity	50
4/06	Friends of George Allen	1000
4/06	Mannix for Oregon	500
11/05	Mannix for Oregon	250
9/05	Virginians for Jerry Kilgore	1000
6/05	Friends of Bob Marshall	200
5/05	Friends of George Allen	200
5/05	Mannix for Oregon	250
9/04	The Libertarian Party	25
6/04	Mannix for Oregon	200

6/04	Tom Davis for Congress	40
6/04	Friends of George Allen	1900
6/04	Virginians for Jerry Kilgore	1000
6/04	McDonnell for Virginia	100
6/04	Bolling for Lieutenant Gov	100
4/04	Bush-Cheney 04	500
2/04	Republican Party of Virginia	45
2/04	Tom Davis for Congress	50
11/03	Bush-Cheney 04	500
10/03	The Libertarian Party	25
10/03	Virginians for Jerry Kilgore	500
10/03	McDonnell for Virginia	250
10/03	Friends of George Allen	2000
10/02	Mannix for Oregon	500
10/02	Club for Growth	100
9/02	Friends of George Allen	100
7/02	The Libertarian Party	25
7/02	VA Club for Growth	100
7/02	Mannix for Oregon	500

A. 14. Published writings: Provide the Committee with two copies of any books, articles, reports, or other published materials which you have written.

Publications

"Defining What to Regulate: Silica & the Problem of Regulatory Categorization," *Administrative Law Review,* Vol. 58, No.2 (Spring 2006). With Andrew P. Morriss.

Moderating Regulatory Growth: An Analysis of the U.S. Budget for Fiscal Years 2006 and 2007, a joint report of the Mercatus Center at George Mason University and the Weidenbaum Center at Washington University in St. Louis. May 2006. With Melinda Warren.

Primer on Regulation, Mercatus Policy Series; Policy Resource No. 1. Mercatus Center at George Mason University. November 2005.

Upward Trend in Regulation Continues: An Analysis of the U.S. Budget for Fiscal Years 2005 and 2006, a joint report of the Mercatus Center at George Mason University and the Weidenbaum Center at Washington University in St. Louis. June 15, 2005. With Melinda Warren.

eRulemaking: A Case Example of eGov Transformation, Working Paper in Regulatory Studies, Mercatus Center at George Mason University. June 13, 2005. With Richard D. Otis.

"It is Time to Reevaluate the Toxic Release Inventory," *Missouri Environmental Law & Policy Review*, Volume 12, Number 1 (2005)

"Regulatory Review," in *Report Card 2004: Bush Administration's Environmental Policy*, Property and Environment Research Center. Bruce Yandle & Jane Shaw ed. October 2004.

Regulator's Budget Continues To Rise: An Analysis of the U.S. Budget For Fiscal Years 2004-2005, a joint report of the Mercatus Center at George Mason University and the Weidenbaum Center at Washington University in St. Louis. July 2004. With Melinda Warren.

Regulatory Spending Soars: An Analysis of the U.S. Budget for Fiscal Years 2003 and 2004, a joint report of the Mercatus Center at George Mason University and the Weidenbaum Center at Washington University in St. Louis. July 2003. With Melinda Warren.

A Day in the Life of a Regulated American Family, Mercatus Center at George Mason University. December 2002.

Is 9/11 a Crisis to be Followed by a Leviathan? Mercatus Center Policy Essay. With Bruce Yandle. September 2002.

Regulatory Response: An Analysis of the Shifting Priorities of the U.S. Budget for Fiscal Years 2002 and 2003, a joint report of the Mercatus Center at George Mason University and the Weidenbaum Center at Washington University in St. Louis. June 2002. With Melinda Warren.

President Expands Oversight Of Federal Agency Rulemaking, Washington Legal Foundation *Legal Backgrounder,* November 16, 2001. With Ernest Gellhorn, and Wendy L. Gramm.

"OSHA's Ergonomics Program Standard and Musculoskeletal Disorders: An Introduction," with Bradford DeLong, *J. Labor Research,* Volume XXII, Number 1 Winter 2001.

"The Benefits and Costs of OSHA's Proposed Ergonomics Program Standard," *J. Labor Research,* Volume XXII, Number 1 Winter 2001.

Risk and Risk Management in Electricity Markets: A Primer, Alliance of Energy Suppliers, Edison Electric Institute (July 2001).

"A Fuel and Your Money" *Regulation,* Vol. 23, Number 3. 2000.

"EPA's Proposed Expansion of Noncompliance Benefit Estimates," *Environmental Claims Journal,* Volume 12, Number 2, Winter 2000, with Kent W Mikkelsen.

"Overstressing Business: OSHA and Ergonomics," *Briefly,* NLCPI. October 1999.

"The EPA Relies on Faulty Market Incentives," *Regulation,* 1998, Vol. 21, No. 3.

"Economic Impact Analyses," *Pace Environmental Law Review,* Vol. 16, Number 1, Winter 1998.

"EPA's National Ambient Air Quality Standard for Ozone May be Hazardous to Your Health," *Environmental Law* (Illinois State Bar Association). March 1998, Vol. 28, No. 3.

"Congress and the Clinton OMB: Unwilling Partners in Regulatory Oversight?" *Regulation*, 1997, Vol. 20, No. 4 with Angela Antonelli.

"Shining a Bright Light on Regulators: Tracking the Costs and Benefits of Federal Regulation," *Backgrounder.* No. 1142. The Heritage Foundation. September 30, 1997 with Angela Antonelli.

"OIRA's Conflicting Double Role," *Regulation,* 1997, Vol. 20, No. 3.

"EPA's Ozone Standard May Harm Public Health and Welfare," *Risk Analysis.* Vol. 17, Number 4. (August 1997).

Using Derivatives to Manage Risk. Edison Electric Institute 1997.

"EPA's Proposed Air Standard Would Do More Harm Than Good," *Economists Ink* Spring/Summer 1997.

Electricity Futures: Potential Impact on Utilities. Edison Electric Institute 1995.

"A Future for Electricity Futures?," *Economists Ink,* Winter 1995.

"Discounting Risky Environmental Remediation Costs," *Environmental Claims Journal.* Vol. 7, No. 2. Winter 1994/95.

"Discounting Cash Outflows of Environmental Remediation," *Economists Ink.* Fall 1994.

"Costs and Benefits of Pesticide Ban," *Economists Ink,* Winter 1994.

"Pesticide Problems," *Bio/Technology,* Vol. 11, April 1993.

"Understanding the Clean Air Act: Implementation Issues for Electric Utilities," *Maine Policy Review*, April 1993, Vol. 2/No. 1.

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"Smarter Regulators Required," with Wendy Gramm. *Washington Times*, December 2, 1998.

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I wrote a regular column on regulation in Heartland Institute's quarterly magazine, *Intellectual Ammunition,* for several years. These are available at: www.Heartland.org.

A. 16 (1). Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated. Provide copies of any testimony to Congress, or to any other legislative or administrative body.

Attached testimony:

Testimony before the House Subcommittee on Regulatory Reform and Oversight of the Committee on Small Business, United States House of Representatives, on "Reforming Regulation to Keep America's Small Business Competitive." May 20, 2004. http://www.mercatus.org/Publications/pubID.2649/pub_detail.asp

Testimony before the Committee on Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, United States House of Representatives, on "Regulatory Accounting." February 25, 2004. http://www.mercatus.org/Publications/pubID.2652/pub_detail.asp

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Testimony before the Committee on Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, United States House of Representatives, on regulatory accounting. March 12, 2002. http://www.mercatus.org/Publications/pubID.2653/pub_detail.asp

A. 16 (2). Provide a list of all speeches and testimony you have delivered in the past 10 years, except for those the text of which you are providing to the Committee. Please provide a short description of the speech or testimony, its date of delivery, and the audience to whom you delivered it.

Testimony before the Committee on Government Reform, United States House of Representatives, on the effect of the Army Corps of Engineers approach to wetlands protection on overall social welfare. October 6, 2000. http://www.mercatus.org/Publications/pubID.2656/pub_detail.asp

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United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

August 10, 2006

The Honorable Susan M. Collins
Chair
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Madam Chair:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Susan E. Dudley, who has been nominated by President Bush for the position of Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.

We have reviewed the report and have also obtained advice from the Office of Management and Budget concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is a letter dated August 4, 2006, from Ms. Dudley to the agency's ethics official, outlining the steps which she will take to avoid conflicts of interest. Unless a specific date has been agreed to, the nominee must fully comply within three months of her confirmation date with the actions she agreed to take in her ethics agreement.

Based thereon, we believe that Ms. Dudley is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

Robert I. Cusick
Director

Enclosures

U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-Hearing Questionnaire for the Nomination of Susan E. Dudley,
to be Administrator of the Office of Information and Regulatory Affairs

I. Nomination Process and Conflicts of Interest

1. Why do you believe the President nominated you to serve as Administrator of the Office of Information and Regulatory Affairs (OIRA)?

I believe the President chose me for my background and experience in regulatory matters. (See answer to 3 below.)

2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

No.

3. What specific background and experience affirmatively qualify you to be Administrator of OIRA?

I have studied regulation since receiving my masters degree from MIT-Sloan in 1981. I worked as a staff economist in the Office of Information and Regulatory Affairs from 1985-1989, as well as at regulatory agencies, including the Environmental Protection Agency (1984) and the Commodity Futures Trading Commission (1989-1991). At EPA, I developed the BEN model, still in use today, to estimate the economic benefit of noncompliance for civil penalty assessments and used it to help negotiate the largest civil penalty for a water quality violation at that time. As director of the Regulatory Studies Program at the Mercatus Center at George Mason University, I have studied and written on regulatory process and policy since 1998. As adjunct professor of law at George Mason University School of Law, I have taught courses on regulation since 2002.

4. Have you made any commitments with respect to the policies and principles you will attempt to implement as Administrator of OIRA? If so, what are they and to whom have commitments been made?

No.

5. If confirmed, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.

No, I do not foresee any such conflicts. If issues should arise, I would work them out with OMB's General Counsel and the appropriate ethics officials at OMB.

II. Role of the Administrator, OIRA

Role and Responsibilities of OIRA Administrator

6. What do you consider to be the mission of OIRA and what would you consider to be your basic role and responsibilities if you are confirmed as the OIRA Administrator?

Congress established OIRA in the 1980 Paperwork Reduction Act. In addition to reviewing collections of information under the Paperwork Reduction Act, OIRA reviews draft regulations under Executive Order 12866 issued by President Clinton in 1993 and develops and oversees the implementation of government-wide policies in the areas of information technology, information policy, privacy, and statistical policy. OIRA also has responsibility for implementing or overseeing other statutory requirements, such as the Information Quality Law, the Unfunded Mandates Reform Act, and the Congressional Review Act, among others.

If confirmed, my role as OIRA Administrator would be to implement these statutory and executive mandates, and ensure that OIRA provides support for the President developing regulatory, information, and statistical policy. I would serve as a key advisor to the Director and the President and members of the cabinet. I would work closely with heads of other agencies and Congress to achieve results.

7. What are the major challenges facing OIRA? What objectives would you like to achieve in your tenure as Administrator of OIRA? How do you propose to address these challenges and objectives?

I believe the major challenges facing OIRA are to meet its tasks in a transparent and timely manner, with constructive, quality analysis. If confirmed, I would address these challenges by working closely with the Director and knowledgeable career staff in OIRA to understand the individual projects underway, and how they are being carried out. I would also consult with other agencies and Congress to determine what kinds of improvements may need to be made or new initiatives undertaken.

8. What is your understanding of the role of the OMB Director, and the OMB Deputy Director for Management, with regards to the role and responsibilities of the OIRA Administrator?

The OIRA Administrator reports to the OMB Director and Deputy Directors.

9. What are your views on the organization of OIRA and the allocation of resources among the various activities undertaken by the office? Do you have any plans to reorganize or reallocate resources of the office? Do you believe OIRA has sufficient resources with which to perform its statutory and executive functions?

I have no plans for reorganizing or reallocating resources of the office, but if confirmed, I would work with the Director and the staff to review OIRA's organization and resource needs. I would also welcome the views of this Committee on how to strengthen OIRA's paperwork, information, statistical and regulatory analysis and review functions.

III. Policy Questions

Information Resources Management

10. What are your views on the adequacy of the information resources management (IRM) approach currently used to manage government information activities?

The Electronic Government Act of 2002 amended the Paperwork Reduction Act and created within OMB an Office of Electronic Government and Information Technology (E-Government & IT). The Act updated and added a number of new OMB responsibilities in the areas of information resource management, information access and dissemination, security, privacy, and records management. My understanding is that the Administrators of OIRA and E-Government & IT work closely together on these issues. If confirmed, I will work to ensure the adequacy of agency government information activities.

11. What are the major IRM challenges facing OIRA specifically and the Federal government more generally?

I understand from OMB staff that it focuses on three areas – the security of information systems and the data managed in them, the privacy of the data managed by systems, and the overall process it uses to ensure investments in technology are well planned and well executed by the agencies. If confirmed, I would work to understand the individual projects underway in OMB, and how OMB is carrying these out, and whether other challenges need to be addressed.

12. How would you describe the relation among the various IRM functions assigned to OIRA and the manner in which you would apportion resources for these functions?

The Electronic Government Act of 2002 created within OMB an Office of Electronic Government and Information Technology and added a number of new OMB

responsibilities in the areas of information resource management, information access and dissemination, security, privacy, and records management. If confirmed, I would continue to work closely with the Administrators of E-Government & IT under the direction of the Deputy Director for Management to ensure adequate resources are devoted to the various requirements under each Act.

13. What are your views on the roles and responsibilities of agency Chief Information Officers (CIOs)?

The roles and responsibilities of agency CIOs are clearly defined in law. Citizens are expecting a more accessible and more efficient government that cuts across agency boundaries. The CIO is accountable for the agency's entire portfolio of information resources. CIOs are also responsible for partnering with other executives within their own agency and other agencies in an effort to re-design business processes and offer better services to citizens.

Paperwork Reduction

14. What are your views on the major purposes of the Paperwork Reduction Act (PRA)?

The Paperwork Reduction Act's underlying goals are to reduce government reporting burdens, improve the quality and usefulness of the information that the Federal Government collects, and improve the management of agency information resource activities. The PRA governs all government information activities, including collection, dissemination, security and privacy, and management of information technology. The PRA emphasizes that agencies need to strike a balance, collecting the right information in order to perform their missions effectively, while not requiring information that is unnecessary, has little practical utility, or is unreasonably burdensome. OIRA is to review and approve or disapprove agency efforts in this regard.

15. What are your views on the adequacy of policies and guidance issued by OMB to implement the PRA and is there a need to revise them?

If confirmed, I will work with OIRA staff and other agencies to understand the adequacy of existing policies and guidance, and determine whether they need to be revised.

16. Under the PRA, OIRA determines whether agency information collection activities are "necessary for the proper performance of the functions of the agency, including whether the information will have practical utility." What are your views on the meaning of these terms and the manner in which OIRA should perform this paperwork clearance function?

I understand these terms to mean that agencies should collect or create only information that is needed to effectively perform agency functions, which requires that the information have a practical use. Accordingly, OIRA's paperwork clearance function should seek to maximize the usefulness of information collected, used and disseminated by the Federal government, while minimizing the Federal and private costs of providing and managing that information.

17. What are your views on the role of calculating information collection burdens and relating those burden calculations to an assessment of the proper performance of agency functions?

Given the PRA's emphasis on minimizing reporting burdens, it is essential that agencies be able to measure these burdens. I believe only by measuring burden can agencies and OIRA be held accountable for changes in burden and assessing the government's performance in achieving the key goals of the PRA. Moreover, burden measurement is necessary to assess the balance between the costs imposed on the public of providing information to the government and the practical utility of that information to the government and U.S. citizens.

18. What is your understanding of the areas of federal government information collection activities that pose the greatest burdens on the public and what might OIRA do to address burden reduction in those areas?

OMB works with agencies across the Federal Government to minimize the burden of information collection and maximize the utility of the information collected. However, I understand from OIRA staff that the Internal Revenue Service (IRS) is responsible for about three-fourths of the entire paperwork burden imposed by the Federal government. Accordingly, OMB has worked with the IRS to reduce burden to the maximum extent practicable given the agency's statutory role. I understand from OIRA staff that the IRS has established an office that is dedicated to identifying ways to reduce the paperwork burden on taxpayers, and that the IRS in recent years has succeeded in reducing the paperwork burden of a number of its collections. If confirmed, I would support continued efforts by OMB to work with Treasury and IRS to achieve burden reductions whenever practical.

19. What are your views on activities, other than form-by-form review of information collection proposals, which might be undertaken by OIRA to eliminate duplicative information collection activities among agencies, and otherwise improve coordination among agencies with regard to common or overlapping information collections?

The PRA calls upon the agency CIOs and OIRA to work together to reduce the aggregate paperwork burden on the public from federal collection of information, increase the

public benefit from the usefulness of such information, and minimize the cost of the collection of such information. If confirmed, I would continue to encourage a coordinated effort to produce better results in this regard, and would welcome input from Congress.

20. What are your views on improving the ability of the public to comment on proposed information collections?

The PRA requires that agencies publish notices in the Federal Register seeking public comment for 60 days on proposed information collections, and the information collection forms themselves provide additional opportunity for comment. I am committed to ensuring the public's ability to comment on proposed information collections, and, if confirmed, I will work with OIRA staff and other agencies to explore additional opportunities for public input, and I welcome Congress's input in this regard.

21. OIRA has been criticized for using its paperwork clearance process to control substantive agency decision-making. What are your views on the line between OIRA's management authority under the PRA and the authority of agencies to carry out their substantive missions?

Through the PRA, I believe OIRA must help agencies meet their obligation to the public by striking the proper balance. The PRA should not be used as grounds for denying the government the ability to collect from the public the information that it needs to perform its mission. On the other hand, OIRA must work to prevent the collection of unnecessary or duplicative information, which imposes unjustified costs on the businesses or individuals that must respond, on the taxpayer, and on the economy as a whole.

22. Among the PRA provisions, aimed at helping to achieve the goals of minimizing burden while maximizing utility, is the requirement for CIO review and certification of information collections. In testimony before the Congress, GAO identified 12 case studies at four agencies in which CIOs certified collections proposed by program offices despite missing or inadequate support (GAO-06-974T). How would you improve the guidance that OMB provides to agencies, in order to improve the information collection process and minimize burden to the public?

My understanding is that, when OMB reviews and approves an agency's information collection request, it takes into account the certification and the information provided by agencies in their 83-I Supporting Statements, as well as information obtained through conversations and meetings with agencies. If confirmed, I will assess this aspect of OMB's review of agency information collection requests to determine whether modifications are warranted, and I would welcome Congress's input in this regard.

Information Dissemination

23. What is your understanding of OIRA's information dissemination function as set forth in 44 U.S.C. 3504(d), the extent to which OIRA has fulfilled this mandate, and your plans for ensuring that it would be fulfilled under your direction?

44 U.S.C. 3504(d) directs OMB to develop and oversee the implementation of policies, principles, standards, and guidelines regarding Federal agency dissemination of public information, and promoting public access to public information. The President's December 2005 Executive Order concerning the Freedom of Information Act, OMB's recent policies for improving agency information dissemination and use of agency public websites, and related policies have strengthened the public's access to government information.

I am committed to providing effective dissemination of government information to the public, and, if confirmed, I will explore with OIRA staff, the Director and agencies ways to ensure OIRA fulfills that mandate.

24. What steps would you take at OIRA to develop improved guidance for insuring the "quality, objectivity, utility, and integrity" of information disseminated by federal agencies?

I understand OMB has already issued two guidelines implementing the Information Quality Act (the IQ Act) (governing information quality and peer review), and a third set of guidelines (addressing risk assessment) was published earlier this year for public comment and is undergoing peer review at the National Academies of Sciences.

If confirmed, I will work with the Director, OIRA staff, and agencies to incorporate the results of the NAS peer review, as well as comments from the public and agencies, and issue a bulletin that will provide guidance to agencies to improve the quality and transparency of agency risk assessments. If confirmed, I will also determine whether further guidance is necessary to ensure the "quality, objectivity, utility, and integrity" of information disseminated by federal agencies. I welcome Congress's input on this issue.

25. What are your views on the need to develop policies beyond those provide in 44 U.S.C. 3504(d) and 3506(d) to govern federal agency information dissemination decisions?

I understand that, since the enactment of the E-Government Act, OMB has reviewed and modified policies to disseminate effectively and provide access to government information. If confirmed, I would like to evaluate how effectively agencies implement the existing policies before I make any judgments on what more should or could be done.

26. What are your views on steps OIRA can take to improve public access to government information, whether through traditional dissemination functions or through more advanced information access and disclosure means?

If confirmed, I will ensure OIRA continues to work with the Administrator of E-Government and IT and the agencies to take advantage of all information dissemination channels, and use innovative practices to improve public dissemination and access to government information.

Records Management

27. What is you understanding of OIRA's records management function as set forth in 44 U.S.C. 3504(f), the extent to which OIRA has fulfilled this mandate, and your plans for ensuring that it would be fulfilled under your direction?

Records management directly supports agency dissemination programs by providing adequate and proper documentation of agency activities and ensuring access to records regardless of form or medium. If confirmed, I will ensure that OMB continues to work collaboratively with the Archivist and agencies to develop and apply policies necessary for the effective implementation of records management programs.

28. NARA is currently developing an Electronic Records Archive system with the goal of more effectively managing records in an increasingly electronic environment. How should OIRA support the efforts of NARA and federal agencies to improve records management activities?

Agencies use OMB and NARA policies to develop and implement records management programs, and incorporate records management functions into IT investments. If confirmed, I will explore ways for OIRA to continue to support agency activities to preserve and make accessible Federal records in an increasingly electronic environment.

29. The federal government is faced with more complicated goals that require improved management and integration of information assets within agencies. What guidance do you believe OIRA should provide to agencies regarding the integration of information processes such as information collection, records management, and information dissemination?

OMB's policies and oversight activities are designed to ensure agencies plan in an integrated manner for managing information throughout its lifecycle. I believe agencies

must consider the effects of decisions and actions on other stages of the lifecycle, particularly those concerning information dissemination. If confirmed, I will work to ensure that OMB continues to review agency information resources management programs to determine whether any additional policies or guidance are necessary.

30. OMB's FEA Program Management Office, NARA, and the CIO Council's Architecture and Infrastructure Committee recently issued *Version 1.0 of the Records Management Profile of the Federal Enterprise Architecture* as a means for agencies to apply records management practices and policies, as well as define records management at each stage of the systems development lifecycle. How do you believe OIRA should support such efforts to integrate records management into each agency's enterprise architecture? How do you believe OIRA should address the developing need to integrate records management processes and practices into agencies' business practices?

The records management profile is a useful resource for agencies to apply when implementing records management programs and incorporating records management functions into IT investments. If confirmed, I will work to ensure that OMB continues to work with NARA and agencies to apply the records management profile and improve records management at agencies.

Privacy, Security and Disclosure

31. What is your understanding of OIRA's responsibilities for privacy, confidentiality, security, disclosure, and sharing of information, as set forth in 44 U.S.C. 3504(g), and of the extent to which OIRA has fulfilled this mandate; and what are your plans for ensuring that it would be fulfilled under your direction?

OMB fulfills its responsibilities under Title 44 by providing guidance and oversight to agencies in a number of ways. For example, OMB develops policies for and oversees implementation of the Federal Information Security Management Act (FISMA), the Privacy Act, and the E-Government Act of 2002. I understand from OIRA staff that OMB regularly engages in formal and informal communications, both written and oral, with agency Chief Information Officers. If confirmed, I will work with OMB officials and staff and agencies to continue to address proper agency privacy and security measures regarding individuals' personal information, and determine whether additional procedures or guidance are needed to protect the privacy, confidentiality and security of information.

32. What are your views on the extent of OIRA's formal authority and practical ability to foster compliance with the Freedom of Information Act (FOIA), the Privacy Act, the Federal

Information Security Management Act of 2002 (FISMA), and related information management laws?

My understanding is OMB has responsibilities in many areas of information resource management, information access and dissemination, security, privacy, and records management. With respect to FOIA, the Department of Justice is the lead agency; however, OMB works closely with it to promote more effective agency FOIA programs through implementation of the President's Executive Order on FOIA issued in December of 2005. If confirmed, I will work closely with the Administrator of E-Government & IT to understand our ability to foster compliance with the various requirements under each Act.

33. What are your views on the sufficiency of the Privacy Act?

Section 552a of title 5 of the United States Code, better known as the Privacy Act, advances key principles regarding information privacy, including maintaining timely, accurate, and complete records for use only for the purpose for which it was collected unless otherwise authorized by law or consent. I understand these key principles provide the framework within which the federal government manages and protects personal information. If confirmed, I will work with OMB officials and staff and Congress to understand whether existing requirements under the Privacy Act are sufficient.

34. What are your views on the role of OIRA in addressing privacy concerns?

I understand that, because OMB is charged with implementation of the Privacy Act, FISMA, and E-Gov Act of 2002, it is in a unique position to provide key oversight and guidance to the federal community regarding federal privacy issues.

35. Agencies' annual reports, submitted to OMB in response to FISMA, reveal a wide range of IT security weaknesses among agencies. These reports also show that while some agencies have improved their performance, others continue to do poorly. What obstacles inhibit agencies from implementing effective security? What are your views on the role of OIRA in helping improve the security of federal information, and what steps do you see OIRA taking to aid agencies in fixing the security problems that they describe in their FISMA reports?

The Committee raises important issues that I will want to address if confirmed - in consultation with Congress, the Director, agencies, and OMB staff. One challenge that agencies face is the ever-changing nature of IT security threats and vulnerabilities. Through its various authorities, OMB is positioned to help them share knowledge on effective procedures and to ensure that agencies proactively build security and privacy policies and protections into their systems as part of the planning process, rather than as

an afterthought.

36. What actions do you see OMB taking to improve information sharing across the agencies, especially in the area of critical infrastructure protection and information security?

I understand that OMB is involved in different initiatives to improve information sharing across agencies, including participating in the DHS-led initiative to develop the IT Sector Specific Plan required by HSPD-7 "Critical Infrastructure Identification, Prioritization and Protection," and OMB's Information Systems Security Line of Business initiative. If confirmed, I look forward to getting involved in these initiatives and determining whether more actions are needed.

37. Information security continues to be listed on GAO's high risk list, in spite of new statutes and guidance. How do you see OMB proceeding in the future to improve this area?

OMB, in coordination with DHS, has prepared an action plan to address Federal information security and the Nation's critical infrastructures. I understand that this action plan has been shared with GAO. If confirmed, I will work with Congress and agency officials to address concerns over information security.

38. Given technological advances that make it easy to mine databases for personal information, aggregate that information, and make it widely available to government personnel, what are your views on whether the Privacy Act's provisions remain adequate to protect the privacy rights of Americans? Should the Privacy Act be revised? Should OMB's Privacy Act guidance be revised?

I understand that since May 2006, OMB has released three memoranda addressing privacy and security issues which are responsive to recent current events. If confirmed, I will evaluate these guidelines and evaluate whether additional actions are necessary to address the important issue of protecting American's privacy. Also, as I noted above (in the answer to question 33), if confirmed I will work with staff and Congress to understand whether existing requirements under the Privacy Act are sufficient.

Information Technology Management

39. What is your understanding of OIRA's responsibilities for IT management, as set forth in 44 U.S.C. 3504(h), and of the extent to which OIRA has fulfilled this mandate; and what are your plans for ensuring that it would be fulfilled under your direction?

OMB establishes policies for and oversees agencies' investments in information technology through the capital planning and investment control process established by the Clinger-Cohen Act of 1996. If confirmed, I will work with the Administrator of E-Government and IT to ensure OMB fulfills its responsibilities in this area.

40. What are your plans for maximizing the resources and skills of OIRA personnel to oversee agency IT investment plans and analyses?

If confirmed, working with the Director, I will review OIRA's resource needs. I also welcome the views from this Committee on how to strengthen OMB's information resources management analysis and review functions.

41. What are your views on the importance of IT and enterprise architectures?

IT is important in the provision of government services, and enterprise architecture is essential for aligning information technology with agencies core goals and strategic plans.

42. What are your views on the role of NIST in establishing standards and guidelines for federal IT functions, and OIRA's oversight of that role?

I understand that OMB works closely with NIST on a variety of issues regarding establishing standards and guidance and, if confirmed, I welcome views from this Committee on how to make OMB's role as effective as possible.

43. The budget Exhibit 300 has evolved significantly over the past few years to become a significant source of information on each major information technology project. However, it is not clear what OMB has done to validate the information being provided. What would you do at OMB to ensure that the information is accurate?

If confirmed, I would work closely with the Administrator for E-Government & IT, agencies, and the CIO Council to help improve agency employee understanding of their Information Resource Management (IRM) responsibilities.

44. OMB has developed processes and criteria for including IT investments on its Management Watch List. However, in testimony before Congress (GAO-06-1099T), GAO stated that the Management Watch List "may be undermined by inaccurate and unreliable data," and that the "criteria for identifying high risk projects were not always consistently applied and projects that appeared to meet the criteria were not identified as high risk." In the same testimony, GAO restated its recommendation for the development of a single, aggregate list for both the Management Watch List and high risk projects. How would you improve the use of the

Management Watch List in order to track the progress of IT projects and identify potential deficiencies?

If confirmed, I would work closely with the Administrator of E-Government & IT to understand GAO's concerns and improve the reliability and accuracy of the management watch list.

Information Quality

45. In general, please discuss your philosophy regarding the Information Quality Act (IQA) and its place among related statutes (PRA, etc.)?

One of the main purposes of the PRA is to "improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society." This is consistent with the IQ Act's goals to ensure and maximize the quality, objectivity, utility, and integrity of information that is disseminated by the Federal government. If confirmed, I would work to support these goals.

46. The most recent OIRA administrator has publicly stated that OIRA has, in the past, focused largely on cabinet-level and regulatory agencies and not taken up data quality issues (and regulations) at the Department of Homeland Security. What is your opinion of this approach, and what, if anything, would you do differently?

All Agencies are required to meet the standards of the Information Quality Act, however DHS did not exist as a Department when implementation was initiated. I will continue to work with DHS and other agencies that do not have IQ guidelines to ensure they have transparent, effective policies in place as soon as is practical.

47. What changes, if any, would you recommend to the IQA and regulations that implement it?

If confirmed, I will explore collaboratively with the Director, agencies and Congress to understand how the IQA and its implementing regulations work in practice, and whether changes would be advisable.

48. Implementation of IQA is fundamentally the responsibility of OMB and other executive branch agencies. How would you coordinate your IQA projects with those of other agencies?

I understand that OIRA worked closely with agencies as they developed IQ guidelines, and OIRA staff continue to be in close communication with agency staff working on IQ implementation. If confirmed, I look forward to continuing to work closely with implementing agencies on IQA projects.

Regulatory Issues

49. Presidential oversight of federal regulation, primarily through the mechanism of OMB reviews of agencies' draft rules, has been conducted under successive administrations over the past 25 years. However, views on how OMB should carry out its role in the rulemaking process have varied, for example, shifting from a "counselor" to a "gatekeeper" role under the past Administrator of OIRA.

a. How would you characterize the role of OMB and OIRA in regulatory oversight?

Executive Order 12866 directs OIRA to review agency draft regulations before publication to ensure agency compliance with the Order. OIRA review also serves to ensure adequate interagency review of draft rules, so that agencies coordinate their rules with other agencies to avoid inconsistent, incompatible, or duplicative policies.

b. What role do you believe OMB and OIRA should have in the rulemaking process?

The President has the basic responsibility to take care that the laws of the land are faithfully executed. In its regulatory review function, OMB-OIRA has a crucial process role to play in making sure that agencies, the President, and Congress have relevant information about promising policy options and their associated risks, costs, and benefits. Where there are uncertainties about risks, costs, and benefits, OMB-OIRA has a responsibility to make sure that important uncertainties are disclosed to agency heads, the President, Congress, and the public.

50. OIRA is a relatively small office within OMB, but it has many responsibilities under various statutes and executive orders. Administration initiatives in recent years have also added more oversight duties to OIRA's staff, in areas such as oversight of information quality, peer review, and reviews of regulatory agencies' guidance documents.

1. Do you believe OIRA has sufficient staff to carry out all of these tasks effectively?
2. Alternatively, do you believe any of these tasks can or should be eliminated, reduced, or delegated to other federal officials?

If confirmed, I plan to work closely with OIRA staff and the Director of OMB to understand the demands on the office and how resources are allocated. Working with the Director, I will review OIRA's staffing needs. I also welcome this Committee's views on how to strengthen OIRA's ability to conduct its oversight functions as effectively as possible.

51. OMB divides regulation into two types, budgetary rules (where the costs are paid by taxpayers) and unfunded mandates (where the costs of regulations are incurred by nonfederal parties).

a. What is your opinion of this categorization and characterization of regulations by OMB?

In its annual report to Congress on the costs and benefits of Federal regulations, OMB distinguishes between (1) "budget rules" that govern Federal spending programs (and impose costs on the public primarily through the collection of taxes), and (2) rules that impose costs primarily through mandates on the private sector or on State, Local, or Tribal governments. Executive Order 12866 and OMB Circular A-4 require agencies to understand the anticipated costs and benefits of rules, particularly those that are economically significant. These standards apply to both "budget rules" and rules imposing mandates. Agencies also must conduct cost-benefit analysis for certain non-budgetary rules under the Unfunded Mandates Reform Act, as well as an appropriate small business impact analysis under the Regulatory Flexibility Act.

b. Do you have any views on the circumstances under which it is more appropriate for the federal government to use each type of regulation?

It is my understanding that the laws governing a particular program determine whether an agency has discretion to change or allocate the cost of that program through the budget or through regulation.

52. OMB and OIRA have sometimes been criticized for insufficient communication with Congress (e.g., not consulting with appropriators on the funding of the eRulemaking initiative; GAO's recommendation that more could be done to work with congressional committees to design PART reviews to be more useful for congressional oversight and appropriations activities). How can OMB and OIRA improve communications and consultations with Congress?

Effective communications with Congress is essential to OMB-OIRA's performance of its statutory and executive responsibilities. If confirmed, I will engage in regular communication with Congress and seek to work together to address issues of mutual concern.

53. The prior OIRA Administrator updated or proposed new guidance for agencies in a number of areas, including those informing agencies' economic analyses of forthcoming regulations, information quality and peer review guidance, and even "good guidance" guidance.

a. Are there areas where you see a need for new or updated OMB guidance to regulatory agencies?

If confirmed, I will coordinate with the Director and agencies in improving the quality and transparency of agency guidance documents and risk assessments. I do not have plans for new or updated guidance; however I am open to considering the possibility if the need arises and would welcome input from Congress.

b. Will you be evaluating the effect of these guidance documents on the performance of regulatory agencies? If so, in what ways? If not, why not?

The Committee raises an important question. If confirmed, I would like to work with the Director, OIRA staff, and agencies to understand the effect of these guidelines on agency performance and determine whether additional steps should be taken.

c. How do you believe OMB and OIRA should evaluate their guidance and requirements for agencies, so that OIRA does not encroach on the appropriate scope of agency expertise and does not contribute to the so-called "ossification" of the rulemaking process?

An important objective of OIRA's statutory and executive mandates is to ensure coordination and consistency across government agencies, and ensure that regulations and accompanying paperwork are accountable to American citizens. If confirmed, I will take care that guidelines and other agency requirements achieve these goals without hindering agencies from using their expertise to carry out their statutory missions.

54. There have been improvements in the timeliness of OMB/OIRA reviews of regulatory "transactions" (reviews of specific rulemaking issues) as well as the transparency of the documentation of some aspects of OMB/OIRA reviews. However, GAO has identified gaps in the documentation of OMB/OIRA involvement in agencies' rulemaking, especially as such involvement increasingly occurs earlier in the rulemaking process.

a. What are your views regarding when OMB/OIRA and regulatory agencies should have to document and disclose their communications regarding OMB-suggested changes that affect regulations?

I believe the disclosure requirements of E.O. 12866 are in the public interest. The public disclosure of information, when properly balanced with the Executive Branch's legitimate constitutional interests to maintain the confidentiality of its internal deliberations, can improve government accountability and accessibility.

b. Are there areas where you believe more transparency or better documentation would help the public to better understand OMB/OIRA's role in regulatory policy?

I am committed to ensuring that OIRA complies with Executive Order 12866's

requirements concerning regulatory transparency. While I would need to study this issue further before supporting specific steps to improve transparency, I would, if confirmed, be willing to consider any reasonable proposal.

55. Recent OMB and OIRA regulatory initiatives have imposed new scientific and analytic requirements for most agency rulemaking, but the previous OIRA Administrator acknowledged that the same level of requirements has not yet been imposed for the evaluation of regulatory activity associated with homeland security and disaster response. How would you improve the evaluation of such regulations? How would you balance the needs for secrecy regarding some homeland security regulations with the need to provide public understanding and accountability regarding the level evaluation of benefits and costs associated with those regulations?

Evaluating homeland security regulations raise new issues and challenges for Federal agencies. Not only do the needs of secrecy need to be balanced with the need for accountability, but the outcomes of different actions are potentially more uncertain than for many regulations. However, the same general framework should apply to the development of homeland security regulations as have applied over the years to other types of regulations. Federal agencies that address homeland security matters can apply the same general steps in deciding whether Federal action is needed and desirable and, if so, in determining what course of action to pursue. If confirmed, I would encourage these agencies, to the extent possible, to use the standard tools of regulatory analysis that have been developed over the years to inform decision makers about the anticipated benefits and costs of the various policy options that they are considering.

56. The eRulemaking initiative has promise for improving the public's timely access to information about federal rulemaking activities. However, there have been delays in implementing the planned phases of this initiative (e.g., in migrating agencies' regulatory dockets into a central docket), and some functions have not worked well during roll-out of eRulemaking.

a. If confirmed, how will you work to ensure that all phases of the eRulemaking initiative are implemented in a timely and cost-effective fashion and at reasonable cost?

E-rulemaking provides real promise for engaging a broader public in the rulemaking process and improving federal regulation as a result. If confirmed, I will work closely with relevant staff and agencies to encourage timely implementation of this important initiative.

b. How will you work to ensure that agencies with existing electronic dockets and regulatory management systems do not suffer any loss in functionality when migrating to a centralized system as well as have sufficient budgetary resources to both contribute to the new systems and maintain their existing systems, for as long as it is necessary?

The Committee raises an important issue. If confirmed, I will evaluate the migration procedures in place, and welcome recommendations for ensuring a seamless migration for the citizens and internal rule making sub-entities.

IV. Relations with Congress

57. Do you agree without reservation to respond to any reasonable request or summons to appear and testify before any duly constituted committee of the Congress, if confirmed?

Yes.

58. Do you agree without reservation to reply to any reasonable request for information from any duly constituted committee of the Congress, if confirmed?

Yes.

59. How do you plan to communicate and work with Congress in carrying out your responsibilities as Administrator?

Effective communications with Congress is essential to OIRA's performance of its statutory and executive responsibilities and Director Portman has made communication with the Congress an agency priority. If confirmed, I look forward to a constructive and open relationship with Congress to address issues of mutual concern.

V. Assistance

60. Are these answers your own? Have you consulted with OMB or any other interested parties? If so, please indicate which entities.

The answers are my own. Since receiving questions from the Committee, I sought background information from the OMB staff.

Additional Pre-Hearing Questions Submitted by
Senator Joseph I. Lieberman for the Nomination of Susan E. Dudley
to be Administrator of the Office of Information and Regulatory Affairs

I. Regulatory Review

1. What is your opinion of OIRA's track record in the area of regulatory review? If confirmed, in detail what, if anything, would you plan to do differently?

   I believe OIRA's record under regulatory review has been positive. I have no plans for doing anything differently, if confirmed.

2. Please describe the guiding principles that you think should govern regulatory review. For example, if the agency head to whom Congress assigned responsibility for issuing a regulation has decided that a particular rule is appropriate or required under criteria specified or permitted by law, under what, if any, circumstances should OIRA be able to delay or reject the regulation?

   I believe Executive Order 12866, issued by President Clinton in 1993, should govern regulatory review.

3. Will you support and assure continuation of the transparency and disclosure requirements in E.O. 12866, and the 90-day time-frame and dispute-resolution process for regulatory review set forth in E.O. 12866?

   Yes.

4. E.O. 12866 states that one of its goals is to "reaffirm the primacy of Federal agencies in the decision-making process." Do you agree that the regulatory agency to which Congress delegated responsibility for formulating and adopting the rule, rather than OMB, should have primacy in decision-making? If you agree, what assurances can you give that OMB will honor the primacy of agencies in the decision-making process? If you do not agree, what do you believe should be the respective roles of the agency and OMB?

   I agree that regulatory agencies authorized by Congress have responsibility for rulemaking, and that the President has the authority to oversee rulemaking issued by the Executive Branch generally. Recent Presidents have accomplished this oversight through Executive Orders and OMB review of agencies' proposed and final rules. The proposed and final rules are issued by the rulemaking agency, not OMB, and, if confirmed, I have no intention to change that.

5. What changes, if any, to E.O. 12866 or to applicable policies and guidance for implementing it do you believe are desirable?

I have no plans for making changes to E.O. 12866 or applicable policies and guidance, if confirmed.

6. Would you commit to notifying and working with interested members of this Committee before the Administration makes any changes to E.O. 12866?

The only change this Administration has made to President Clinton's E.O. 12866 is the appeals procedure, and I am aware of no plans for additional changes.

II. Cost Benefit Analysis

7. E.O. 12866 requires: "Each agency shall assess both the costs and the benefits of the intended regulations and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."

   a. Do you support this formulation, or do believe that it should be changed?

I support this formulation.

   b. How do you believe this provision should be applied to statutory mandates under which Congress has directed that regulations should not be based on agencies' cost-benefit analysis? Will you in any way apply this provision to challenge the agency's policy judgments implementing such mandates?

I believe regulations should be consistent with their statutory mandates, and if confirmed as OIRA Administrator, I will strive to enforce the law as effectively as possible.

   c. What costs and benefits cannot or should not be quantified, and how do you believe those costs and benefits should be addressed and accounted for by agencies? (Please provide representative examples.)

I believe benefits and costs should be understood and quantified to the extent possible, but many costs and benefits are not readily quantified in dollar terms, including privacy, ecological and natural resource impacts of decisions.

8. At a White House conference on the economy held on December 15, 2004, you said: "But there are still regulatory statutes that prohibit the agencies from examining the full impacts of

regulation. Congress should correct these statutes and stop putting blinders on agencies, to make sure that they can do their job." Is that an accurate statement of your current views?

Yes.

a. To what extent is your approach consistent with the statutory mandates established in the environmental laws implemented by EPA? Please review the major EPA statutes in this regard. Exactly what standards will you apply in reviewing regulations under environmental statutes that require "technology standards," or protection of public health with an adequate margin of safety, or "feasibility" standards, or protection of the environment? What assurance can you provide that you will support rulemaking activities that satisfy the standards under applicable environmental statutes, even if you believe those statutes put "blinders" on EPA and prevent the agency from being able to "do their job"?

I recommended that Congress allow the agencies it authorizes to implement legislation to consider all relevant information. I did not suggest that agencies violate their statutory mandates. If confirmed, I intend to follow the law and encourage agencies to do the same.

b. To what extent is your approach consistent with the statutory mandate established in the Occupational Safety and Health Act, which requires the Secretary of Labor to set the standard that "most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity. The paramount consideration under the Act is "the highest degree of health and safety protection for the employee." Exactly what standards will you apply in reviewing regulations under that Act? Likewise, what standards will you apply in reviewing regulations under the related Mine Safety Act? What assurance can you provide that you will support rulemaking activities that satisfy the standards under applicable workplace health and safety statutes, even if you believe that (as you said at the White House conference) those statutes put "blinders" on the regulatory agencies and prevent them from being able to "do their job"?

I recommended that Congress allow the agencies it authorizes to implement legislation to consider all relevant information. I did not suggest that agencies violate their statutory mandates, and, if confirmed, I intend to follow the law and encourage agencies to do the same.

c. Will you advocate for Congress to change environmental statutes, workplace safety statutes, consumer product safety statutes, and other statutes that emphasize health, safety, and environmental protection rather than strict reliance on cost-benefit analysis?

I am not aware of any discussions of the Administration's plans on this matter, and have not yet determined what I would recommend, if I am confirmed. Please note that I have never advocated "strict reliance on cost-benefit analysis," but rather a consideration of relevant information, including likely costs and consequences. Indeed Chapter 8 of my Primer on Regulation[1] describes seven factors to consider in evaluating regulatory proposals, and benefit-cost analysis is but one. Others include: the need for the regulation (e.g., externalities, information asymmetries, natural monopoly, etc), alternative approaches, state and local impacts, available scientific information, distributional impacts, and impact on individual choice.

d. Generally, how can you provide assurances that, in providing guidance and oversight to EPA, OSHA, and other agencies, you will support all applicable statutory mandates, however much you may personally disagree with them?

I have never intentionally suggested that agencies violate their statutory mandates, and if confirmed, I will work with agencies to respect existing law.

9. Generally, how would you assign monetary value to the benefits of regulations that protect public health? To what extent can such benefits not be monetized or quantified?

If confirmed, I would continue to encourage agencies to apply accepted analytical approaches to understand the benefits and costs of regulations designed to protect public health. These approaches have been articulated in various OMB guidelines issued by the past four Presidents (most recently in Circular A-4), and recognize explicitly that benefits and costs can not always be quantified.

10. Some costs and benefits remain difficult to quantify, for example, ecological consequences and impacts on privacy and personal freedom.

a. Would OIRA under your leadership work towards having all or most values affected by regulations, including ecology, privacy, and personal freedom, quantified and monetized? Will you work towards applying a strict cost-benefit test to them?

No. I believe that benefits and costs should be quantified to the extent possible, but benefit-cost analysis is but one component of a good regulatory analysis, and that a strict benefit-cost test is not the only relevant factor for policymakers to consider in setting policy.

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[1] Susan E. Dudley, *Primer on Regulation*, Mercatus Policy Series; Policy Resource No. 1. Mercatus Center at George Mason University. November 2005. http://www.mercatus.org/pdf/materials/1465.pdf

b. How do you believe values that cannot be monetized, or even quantified, should be taken into account in developing regulations?

There are various ways to take into account qualitative factors in developing regulations, and if confirmed, I would encourage decision-makers to understand the likely consequences of different actions, regardless of whether those consequences are amenable to quantification or valuation in monetary terms.

11. On July 15, 2003, the Scripps Howard News Service carried "EPA Dodges a Rule," a piece authored by you and Daniel Simmons. In it, you and he suggested that EPA was wrong to try to monetize the benefit to Americans of fish not being needlessly injured, because, you wrote, "there is no market value for feeling fondly about fish." Also, in comments that you submitted to the agency, you argued against using a survey to ask the public for its assessment of the value to them of preserving aquatic life, saying that "if fish are being as rapidly depleted as the EPA suggests, we should see their per-pound price rising proportionately to reflect the rising scarcity. Such scarcity would clearly be captured in use values, and would unlikely be measured in a survey."[2]

This question inaccurately characterizes my criticism of the analysis EPA used to estimate benefits in its cooling water intake structures rule as suggesting "EPA was wrong to try to monetize the benefit to Americans of fish not being needlessly injured."

Rather, we questioned the results of the contingent valuation techniques which estimated that the "nonuse" value of fish harmed by cooling water intake structures were three orders of magnitude larger than the "use" value ("nonuse" values of between $14 and $27 billion, compared to "use" values of under $1 million). The implausible implication of this estimate is that Americans could experience benefits of between $500 billion and $1 trillion per year, simply by not eating fish.

EPA abandoned this analysis in the final rule.

a. Under what circumstance, if any, do you believe agencies should measure the anticipated beneficial values of regulation by surveying the public rather than by identifying actual market impacts?

As articulated in President Clinton's "Best Practices"[3] and the current Administration's

[2] Susan E. Dudley & Daniel Simmons, *Reply to the Environmental Protection Agency's Response to Mercatus Center Willingness to Pay Survey: Phase III Cooling Water Intake Structures* 2 (April 25, 2005).

[3] Office of Management and Budget and Council of Economic Advisors, *Economic Analysis of Federal Regulations Under Executive Order 12866*, January 11, 1996.

Circular A-4, it is generally accepted that revealed preference methods are more reliable than stated preference methods for quantifying values. Stated preference methods, which rely on surveys, must be carefully designed to avoid widely recognized problems. When a regulation largely deals with non-market goods (e.g., goods that are not directly traded in the market) surveys or approaches that rely on indirect use of market data may be appropriate and necessary.

b. If there is an actual market for fish endangered by, for example, a coolant water intake structure subject to regulation, should the anticipated impact on market price be the sole measure of the benefits of regulation that reduces destruction of the fish?

No, but I believe the market value should be considered when calibrating estimates derived from other techniques. Further, if the existence of the fish does not significantly affect the water quality or existence of other species, the value of the fish should be largely reflected in the market price.

c. If Americans value fish and fish stocks not being needlessly injured, but if monetizing that value is difficult or impossible, how do you believe the value should be considered in evaluating such a regulation?

I believe such value should be considered qualitatively as described in OMB Circular A-4. Circular A-4 provides guidance for circumstances where (1) benefits and costs are difficult to monetize; (2) benefits and costs are difficult to quantify; and (3) benefits and costs that are not quantified affect the policy choice. Under these cases, all relevant information should be presented, and clear explanation of the policy choice should be provided. This includes the nature, timing, likelihood, location, and distribution of the anticipated effects.

d. Do you believe that the difficulty of monetizing the benefit to Americans of a fish not being needlessly injured reveals a limitation in the utility of cost-benefit analyses in evaluating the reasonableness of regulations? Please explain.

I believe benefit-cost analysis is one important factor in informing regulatory decision making, but it is not the only factor, and should not be considered to the exclusion of other information.

Your comment to EPA stated that you believed the agency's willingness-to-pay survey did not meet the requirements of the Paperwork Reduction Act, because, you wrote, they were not necessary for the proper performance of the Agency's function, and EPA's justifications were inadequate.

e. If confirmed as OIRA Administrator, would you object to EPA using a survey to

measure the benefits of a regulation in a situation such as that presented in the regulation on cooling water intake structures?

If confirmed, I would ensure the agency followed the requirements of the PRA, its other statutory mandates, and the criteria laid out in Circular A-4.

f. Generally, what limits and other changes would you require in EPA's current practices regarding the use of surveys to measure the benefits of environmental regulation?

If confirmed, I would ensure that OIRA reviewed each information collection request on its own merits, in the context of the statutory requirements, PRA mandates and the criteria laid out in Circular A-4.

12. How do cost-benefit analyses account for fundamental facts about "whose cost" and "whose benefit"?

Benefit-cost analysis does not account for distributional effects, which is why, in my Primer on Regulation, I discuss the importance of understanding the distributional impacts of regulatory alternatives, in addition to benefit-cost analysis. OMB's Circular A-4 recognizes the importance of distributional impacts as well.

a. Many believe that fairness and justice considerations may persuade us to adopt some rules that would fail a strict net-benefit test. Do you believe there will be times when it makes sense to impose pollution controls that may not pass a cost-benefit test, in order to correct a social injustice, such as when a factory is responsible for causing high levels of toxic emissions next to a residential neighborhood even if the number of people in the neighborhood is not large? In fact, don't many environmental safeguards seek to protect people from exposures such as this?

I believe benefit-cost analysis is an important factor in regulatory decision making, but have never advocated for a strict net-benefit test as the exclusive determinant of regulatory policy. Indeed, understanding the distributional effects of different policies is essential to developing sound public policy. As Circular A-4 explains, "regulatory analysis should provide a separate description of distributional effects (i.e., how both benefits and costs are distributed among sub-populations of particular concern) so that decision makers can properly consider them along with the effects on economic efficiency."

b. In your opinion, how should a cost-benefit analysis take into account a statute based on the proposition that the costs of installing control technology should be borne by the industry that may be polluting, rather than allowing the public to bear the costs of breathing the polluted air?

If confirmed, I would apply regulatory analysis in ways consistent with statutory mandates. In economic terms, I believe entities should "internalize" the costs of "externalities," such as pollution. Further, I believe that regulatory analysis should include a discussion of distributional impacts and that the decision makers should take those impacts, as well as other considerations, into account.

13. In considering the value of reducing a risk or harm to the public, do you believe it matters whether the risk or harm is under a person's control, or whether it is forced on a person involuntarily or even without the person's knowledge? There are other matters associated with risk and risk-reduction, such as equity, human rights, privacy, and community preservation. Some essential values affected by regulation remain unquantifiable. Do you believe all of these different kinds of risks and values should be ranked on a single benefit scale?

I believe it matters whether a risk is undertaken voluntarily and whether a person knows about the risk. I also agree that the other factors mentioned are important considerations and should be taken into account by policymakers when setting actual priorities.

14. Some of these issues of equity and of "whose right" and "whose benefit" were raised in articles you wrote in *Regulation* a few years ago regarding regulation of ground-level ozone. In your article entitled "A Fuel and Your Money: EPA's New Tier 2 Standards," published in *Regulation* in 2000, you suggested an alternative strategy for implementing the national ambient air quality standards for ground-level ozone "that could achieve public health goals at much lower costs." Specifically, you wrote, "Because only vulnerable populations experience health effects at the ozone concentrations under consideration, the simplest and perhaps cheapest alternative strategy is the recommendation that vulnerable people avoid extended exposure outside during the few days a year when ozone levels are high." In 1999 and 2000, daily ozone concentrations in the Houston-Galveston area exceeded the one-hour national ambient air quality standard 45 and 44 times, respectively. The Los Angeles area registered a similar number of violations.

The focus of the article in question was that EPA's analysis did not adequately recognize that its proposed approach would disproportionately impose costs on consumers in some regions without corresponding benefits, because smog problems are regional. In my analysis, filed as a public interest comment with EPA, I disaggregated the nation-wide data EPA provided (see question 15 below on the importance of disaggregating information to understand the impacts) to understand the distributional effects of the proposal. EPA data revealed that consumers in certain regions of the country (particularly in the west) would pay as much as a ten times more per ton of NOx emissions removed than EPA's estimated national average. Furthermore, according to EPA data, these very consumers would receive no benefit (and could actually experience

an increase in ozone levels) as a result of these emission reductions.

a. Why did you refer to "the few days of the year when ozone levels are high," when such days occurred a few dozen times per year?

As the article says, the suggestion that EPA consider public health advisories was offered by EPA's Clean Air Science Advisory Committee:

> *"As EPA's Clean Air Science Advisory Committee (CASAC) has recommended, public health advisories issued on days designated as "ozone action days" could encourage sensitive individuals to take appropriate "exposure avoidance" behavior and make voluntary emission reductions."*

Data on the number of nonattainment days in Houston in 1999 and 2000 were not available in EPA's rulemaking record, on which I based my analysis. I am also not aware that these data were available elsewhere at the time I conducted my analysis.

b. Please explain whether you believe it would be fair and just to adopt an alternative environmental strategy based on the premise that certain vulnerable individuals would need to avoid extended exposure, on average, on more than 10% of the days?

The article pointed out that it would not be fair and just to impose costs on individuals throughout the country to address a problem that is regional. The section of the article that discusses alternative approaches that EPA did not consider mentions several alternatives, in addition to the one recommended by CASAC (and selected in this question). These alternatives included regional solutions for the fuel component of the rule, fuel-only or vehicle-only standards.

The Summer 1998 issue of *Regulation* carried a piece by you, entitled "The EPA Relies on Faulty Market Incentives." In it, you wrote: "Market incentives that encourage temporary measures to reduce ozone concentrations on peak days in key areas would be more effective at targeting the health risks of concern than the EPA's cap-and-trade approach based on region-wide NOx emissions. For example, on days designated ozone alert days, a jurisdiction that expects ozone levels to exceed the standard might offer to compensate an upwind jurisdiction to reduce its emissions of ozone forming compounds (NOx and volatile organic compounds). It might do that in tandem with incentives to reduce ozone formation within its own boundaries, such as market measures to discourage emissions from a variety of sources on ozone alert days."

c. Do you believe it would be just and fair – and preferable to EPA's NOx trading program or its Clean Air Interstate Rule – to institute a system whereby an upwind state whose emissions contribute significantly to a downwind state's ozone problem is not

required to eliminate the significant contribution unless the downwind state compensates the upwind state for the cost of doing so? Please explain.

My analysis at the time suggested that EPA's NOx trading program would not be as effective at reducing the risks of concern as more targeted approaches. I have not evaluated EPA's Clean Air Interstate Rule and cannot comment on it. In the article, I explained:

> *The EPA has apparently patterned its NOx cap-and-trade rule on its successful sulfur dioxide emissions trading program. But NOx differs from SO2 in some important respects. Emissions of SO2 are a reasonable proxy for the impacts of concern (acid precipitation). SO2 emissions are national and so are the environmental effects, making distinctions about locations of source and receptor points less important. The timing of SO2 emissions is not an important factor in their ultimate environmental effect. As a result, a ton of SO2 is a uniform, fungible "commodity" that is well suited to trading. In contrast, NOx concerns are based on alleged public health risks associated with high ozone concentrations that are localized both in space and time. The relationship between NOx emissions and ozone concentrations is not linear. In the presence of heat and sunlight NOx can react to form ozone, but each unit of NOx emitted does not form an equivalent unit of ozone. Furthermore, ozone concentrations in a particular area are more heavily affected by NOx emissions from nearby sources than from distant ones. Finally, ozone has been linked to acute, rather than chronic health risks that result from a few high ozone days that occur during certain weather conditions in the summer months. (The EPA defended its ozone standard based on acute respiratory attacks during high ozone episodes.) As a result, region-wide NOx emissions, which are the focus of the proposal, are not a good proxy for the public health effects that are of concern with ozone.*
>
> *Clearly, tons of NOx emitted are not uniform and fungible "bads," yet the EPA's proposed cap-and-trade rule would allow them to be exchanged freely as if they were. Given the difference in ultimate impacts (peak ozone concentrations and health effects) of emissions in different parts of the country at different times of year, unlimited trading across the whole ozone transport region could have undesirable health consequences. For example, EPA modeling data suggest that if a source in North or South Carolina were to sell excess allowances to a source in Connecticut or New Jersey, air quality in the major nonattainment areas of the northeast would actually get worse. Similarly, the exchange of a ton of NOx emitted in May for a ton of NOx emitted in August could make summer ozone*

episodes, which are the sole public health concern articulated by the EPA, more severe.

Market incentives that encourage temporary measures to reduce ozone concentrations on peak days in key areas would be more effective at targeting the health risks of concern than the EPA's cap-and-trade approach based on region-wide NOx emissions. For example, on days designated ozone alert days, a jurisdiction that expects ozone levels to exceed the standard might offer to compensate an upwind jurisdiction to reduce its emissions of ozone forming compounds (NOx and volatile organic compounds). It might do that in tandem with incentives to reduce ozone formation within its own boundaries, such as market measures to discourage emissions from a variety of sources on ozone alert days. An "open market" trading program that allowed the trading of discrete emission reductions with limitations on trading among geographic areas and seasons, could also be more flexible than the EPA's approach and provide stronger market incentives to reduce emissions during peak ozone periods.

Even the EPA's cap-and-trade proposal could be improved if the EPA defined the cap, not in terms of tons of NOx removed at the source, but in terms of the health benefits from reducing ozone. It would require the development of nonuniform caps tailored to the impacts attributable to individual jurisdictions. The EPA could also better target the risks of concern by adopting a trading approach that limits trades between subregions.

d. If confirmed as OIRA Administrator, will you advocate that individuals and communities that are subject to environmental pollution be required to directly reimburse the pollution source for the cost of pollution control under certain circumstances?

No.

15. The Harvard Group on Risk Management Reform stated that, although they believed that monetizing all costs and benefits makes the analysis more systematic, "the analysis can simultaneously be impaired because the diverse outcomes at stake might best be seen for themselves, rather than be converted into a unitary scale. For example, some of the goods involved in environmental policy — aesthetic values, the quality of life in a community, ecological values, health values, and distributional concerns — are qualitatively diverse, and should be allowed to be expressed as such. This point does not mean that cost-benefit analysis should not be undertaken, but it does mean that any good cost-benefit analysis should offer a

disaggregated as well as monetized picture of the goods at stake."[4] Do you agree or disagree with the importance of offering a disaggregated picture of the values at stake in environmental and other regulatory policy?

I agree.

16. In your writings, you have advocated measuring the benefits of life-saving regulation in terms that give more credit for saving the life of someone with a long life-expectancy, and less credit for saving the life of someone with a short life expectancy. On September 30, 1997, Heritage Foundation Reports published a piece by you and Angela Antonelli, entitled "Shining a Bright Light on Regulators: Tracking the Costs and Benefits of Federal Regulation." In it, you and she praised FDA's use of "value discounted life years," because that approach "reflects the life expectancies of the beneficiaries of an action." You likewise criticized EPA for measuring benefits in terms of statistical lives saved, which gives the same credit for saving any person's life, regardless of the person's life expectancy. More recently, in 2001, in formal comments submitted to EPA criticizing stricter standards for arsenic in the drinking water, you argued that "EPA's value [per statistical life] likely overstates the benefits of the rule. . . . This can be addressed with sensitivity that estimates benefits based on a value per life-year saved, or an age-adjusted value per life."[5]

    a. Do measures like those that you advocated, which reflect the life expectancies of the beneficiaries of regulatory actions, tend to give relatively less credit to protective regulations that prevent the death of persons who are old and frail, and relatively more credit to protective regulations that prevent the death of the same number of people who are younger and healthier?

I think it is important to know whether a life-saving intervention will prolong a person's life for 10 years or 10 days. When evaluating the health benefits of proposed alternative regulations, I have encouraged agencies to understand their influence on life expectancy, in addition to or in lieu of other measures which do not estimate the extent to which regulations extend lives. I have argued specifically against *adjustments based on age or "quality of life," observing:*

> *While the "life-years" metric has advantages over the "lives-saved" metric, it would be a mistake to try to use quality adjusted life-years (QALYs). In the*

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[4] Harvard Group on Risk Management, Special Report, "Reform of Risk Regulation: Achieving More Protection at Less Cost," in Human and Ecological Risk Assessment, vol. 1, no. 3 (1995), pages 183, 194-195.

[5] Susan E. Dudley, *How Not to Improve Public Health*, Jan. 11, 2001.

context of making public decisions about regulations, it will be difficult to persuade the public that it should accept age-based or health-based "quality adjustments." Rather, it should encourage agencies to use simple longevity as the measure of benefit through the use of the life-years metric.[6]

b. In 2003, OMB stopped supporting use of methodology that discounted the value of saving the lives of the elderly, which had been based on discredited studies purporting to show that seniors evidenced a lower "willingness to pay" for mortality reductions than the young. New research indicated that, in the words of one researcher, "Life as you get older is more precious."[7] Congress also passed legislation in 2003 forbidding use of the "senior death discount" methodology. What is your current view on whether life-saving protective regulation should be evaluated in terms that give less credit to saving the life of a senior than to saving the live of a younger person?

I believe a life-year metric, which rests on the premise that preserving 10 years of life is more valuable than saving one year of life, provides valuable information for policy makers. An age-adjustment factor, such as that first used by the Clinton Administration and continued in the current Administration until 2003, is, in my mind, less defensible.

c. Do you believe that the decision whether to employ a measure that treats all lives equally, versus a measure that takes account of life expectancy, is a value judgement that should be based on the goals and purposes of a regulatory statute, or do you believe it is an objective economic judgement? Who in government should make the decision? For example, as OIRA Administrator, would you instruct EPA to begin evaluating its regulations using a methodology that assigns lower value to saving the life of someone with a shorter life expectancy?

If confirmed as OIRA Administrator, I would encourage agencies to follow the guidelines in OMB Circular A-4, unless a statute directs otherwise. I believe Circular A-4 promotes cost-effectiveness analysis, in part to avoid the necessity of applying monetary values to life-saving measures. It also encourages agencies to "consider providing estimates of both VSL [value of statistical life] and VSLY [value of a statistical life year], while recognizing the developing state of knowledge in this area."

17. A decision to discount the value of future benefits, and, if so, the decision to apply a steep discount rate, can very significantly reduce the estimated benefits of certain regulations, like

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[6] Comment on "RIA Guidelines," submitted to the Office of Management and Budget. *Public Interest Comment Series*, Regulatory Studies Program, Mercatus Center at George Mason University (2003-13) May 5, 2003.

[7] Cindy Skrzycki, "Under Fire, EPA Drops the 'Senior Death Discount'" Washington Post, May 13, 2003, page E01.

many environmental regulations, that prevent long-term ecological harm and long-latency diseases like cancer. Discounting generally has much less downward effect on the calculated benefits of safety regulations, which tend to prevent more immediate injuries. Do you agree?

I agree that discounting is a standard practice that reduces the present value of benefits or costs that accrue in the future.

a. What are your views about whether to discount and what discount rate to use? Please describe the range of mainstream economic opinions on this subject, and where your own views fit within the range?

I believe my views on whether to discount and what discount rates to use are consistent with mainstream economic opinions, and the guidelines developed by both the Clinton Administration ("Economic Analysis of Federal Regulations Under Executive Order 12866," January 1996), and the current Administration (Circular A-4).

b. How would you apply discounting to regulations that protect future generations? Should we apply a method for calculating benefits under which the preservation of the lives of our children counts for less than preserving our own lives?

If confirmed, I have no intention to alter the guidelines presented in OMB Circular A-4.

c. Do you believe the decisions whether to discount and, if so, what discount rate to use, involve judgments regarding what the goals and values of the regulatory program should be?

I believe Circular A-4 provides sound guidance as to how and when to apply discounting in examining the impact of different regulatory alternatives.

d. Considering the profound effect the discount rate can have on the calculated benefits of environmental and other regulations, who should decide on the discount rate, and on what basis, and through what administrative process? As OIRA Administrator, would you attempt to require that all agencies use the same discount rate for all programs?

OMB's guidance on the discount rate is provided in OMB Circular A-94, and its guidance on the use of discounting is provided in OMB Circular A-4. If confirmed, I have no plans to alter those guidelines.

18. How should cost-benefit analysis reflect the judgment made by Congress in some statutes that pollution-control technology should be "forced" — that is, that a pollution-control requirement will cause industry to devote its ingenuity to finding technological solutions? In these and other situations, how can current cost estimates reflect the changes that technological advances will bring?

If confirmed, I will work with agencies to respect existing law. I believe market-based regulation provides the best incentives for technological innovation. In my mind, a good regulatory analysis involves not only estimating benefits and costs, but understanding the incentives provided under different alternatives, and the likely behavioral consequences of those incentives.

19. Overall, exactly what changes have you contemplated or would you intend to make (in addition to any discussed above) in the guidance, policies, and practices issued or employed by OIRA with respect to cost benefit analysis in agency rulemaking?

I do not have plans to make changes to the guidance, policies, and practices issued or employed by OIRA, if confirmed. However, if confirmed, I would be open to considering the possibility if the need arises and would welcome input from Congress.

20. What does the record of the air toxics program tell us about the relative advantages of a risk- or cost-benefit-based approach as compared to a program based on technology standards? From 1970 to 1990, the Clean Air Act included an air toxics program that required that risk assessments be done as part of the development of any regulation, and during those 20 years EPA managed to issue standards for just 7 hazardous air pollutants. During the 10 years after the 1990 Clean Air Act amendments, EPA has issued technology standards to control air toxics from dozens of industries, resulting in large reductions in hazardous air emissions. Do you agree with this description of the history, and what, in your opinion, does it tell us about the value of a technology-based approach compared to a risk-based approach?

I am not aware of any studies assessing the benefits and costs of the hazardous air pollutant provisions in the 1990 amendments to the Clean Air Act.

21. In your writings, you have criticized regulations for imposing standards on products or contractual relationships that differ from what would result if the parties were left on their own. For example –

- On December 30, 2003, you were quoted in *The Washington Post* ("2003's Bouquets and Brickbats (The Envelope Please)," by Cindy Skrzycki) identifying the National Highway Traffic Safety Administration's corporate average fuel economy standards for light trucks as the "[w]orst rule of 2003," because the rule would "force vehicle manufacturers to achieve higher miles per gallon than the market would offer, or consumers would choose, in the absence of the regulation."

- You have criticized the SEC's efforts to protect consumer privacy by requiring consent before financial institutions can distribute private information about their customers, saying: "The implicit premise of the rule is that individuals and firms cannot come to a mutually satisfactory agreement

as far as privacy is concerned without resort to government assistance. Indeed, if individuals truly value their privacy, and firms desire to maximally satisfy their customers, then a meeting of the minds ought to be achievable without resort to compulsory regulations."[8] You seem to have been challenging these regulations by arguing that the lack of privacy controls were signs that consumers had not demanded these safeguards in the course of their market interactions with financial institutions.

- You have also argued against the need for regulations to mandate air bags in passenger vehicles: "If air bags protect lives, and consumers demand them, it is reasonable to assume that automobile manufacturers would have installed air bags in the absence of federal requirements to do so."[9] Again, you seem to have been challenging these regulations by arguing that the lack of air bags were signs that consumers had not demanded these safeguards in the course of their market interactions with automakers.

- You were very critical of OIRA when, in 2003, it published guidelines for agency implementation of the cost-benefit analysis that the White House demands under Executive Order No. 12,866. Specifically, you opposed the idea that there can be reasons for regulations other than correcting market failure. "The new guidelines cite 'other possible justifications' for regulatory action, including 'promoting privacy and personal freedom,'" you observed. "It provides no example of when regulation (which, almost by definition, restricts personal freedoms) would be necessary to promote personal freedom."[10]

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[8] Susan Dudley, Brian Mannix & Jennifer Zambone, *Public Interest Comment on the Office of Management and Budget's Draft Report to Congress on the Costs and Benefits of Federal Regulation*, at A-14 (May 28, 2002).

[9] Susan E. Dudley, *Regulatory Studies Program Comments: Advanced Air Bags* 7 (Dec. 17, 1998).

[10] Susan E. Dudley & Brian F. Mannix, *Public Interest Comment on the Office of Management and Budget's Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations* 10 (April 29, 2003).

a. Please explain under what circumstances you believe it is appropriate to establish regulatory standards for products or contractual relationships.

I believe that regulatory standards are appropriate when "externalities" or "asymmetric information" exist that prevent voluntary contractual relationships from capturing social effects. With regard to the specific quotes above:

- *Mercatus comments (I was not the author) criticized NHTSA's analysis because it did not account for externalities, but rather estimated benefits on the assumption that its preferences were superior to consumers'.*
- *I was not the author of comments filed with the SEC regarding consumer privacy. The footnote refers to an appendix that summarized Mercatus comments, not to my analysis.*
- *As a researcher and a parent, I was concerned that NHTSA's one-size-fits-all air bag standard (designed for an average-weight unbelted male) had devastating unintended consequences. In my comment to NHTSA on its advanced airbag rule, I warned of further unintended consequences. NHTSA estimated that the vast majority of estimated benefits from the revised rule (72%) would accrue to occupants who do not wear seat belts; and the revised standards still did not allow consumers to make informed decisions based on an evaluation of their unique, individual circumstances. I pointed out that permitting the installation of manual on-off switches would allow consumers to determine when an air bag was not appropriate for them and their families.*
- *Contrary to the suggestion, I was generally supportive of OIRA's draft guidelines.*

b. Much of environmental, health, and safety, and consumer-protection regulation is premised on the concepts of limiting externalities and the "tragedy of the commons," meaning that if we leave everything to each individual's selfish calculus rather than imposing regulatory standards, innocent third parties may be unfairly harmed, and, is some cases, we will all be worse off. Moreover, certain consumer-protection and anti-discrimination regulation is based on the premise that vulnerable populations deserve protection against potentially abusive market power. What is your opinion of these justifications for regulation, and when do you believe regulation based on these justifications is appropriate?

Externalities, common resources (aka "tragedy of the commons"), natural monopolies and inadequate information are legitimate justifications for regulation, as described in chapters 2 and 8 of my Primer on Regulation, written to introduce law students and

undergraduates to the theory, process, and analysis of regulation.

22. As discussed in the preceding question, you have questioned the desirability of federal air bag requirements, federal fuel economy standards, and SEC consumer privacy requirements.

a. What is your current opinion of these requirements and standards?

I am not opposed to airbags or other vehicle safety measures, but I still think the deaths of children and small adults from air bags designed to meet the standard of protecting an unbelted, average-size male was a tragedy. I have not studied either the fuel economy standards nor the SEC consumer privacy standards myself and do not have an opinion on them.

c. If confirmed, will you advocate for the modification or the elimination of federal air bag requirements? Will you advocate for the loosening or elimination of federal fuel economy standards? Will you advocate for the loosening or elimination of SEC consumer privacy requirements? Why or why not?

These standards are required by law, and I would not advocate violation of law (either if confirmed as OIRA Administrator or in my capacity as an American citizen).

23. On June 9, 1997, *The Wall Street Journal* published "The Human Costs of EPA Standards," a piece authored by you and Wendy Gramm. The piece concerned EPA's then-proposed rule to tighten the national ambient air quality standards for ground-level ozone. In the piece, you and she wrote: "We estimate that the negative health consequences of this proposal will exceed the EPA's most optimistic estimate of the health benefits by more than $300 million per year. . . . If our estimate of the full costs is accurate the financial costs of this rule could result in more than 7,000 deaths per year."

a. In the article, you stated that you "estimate that the full costs of implementation could exceed $80 billion per year . . . ." Do you now, in retrospect, believe that your estimate of the implementation costs of the regulation was accurate? Do you also now believe that the rule has, in fact, resulted in more than 7,000 deaths per year"? If your views have changed, please explain.

To my knowledge, the country is still not in compliance with the 1997 standard, nor has an ex post analysis of the standard, and its consequences, been undertaken, so the full costs are not known. I am not aware of any new credible estimates of the cost that would lead me to re-evaluate my estimate of 10 years ago, though I welcome more information on that subject.

b. Please explain how you came to the estimate that the financial costs of the rule could result

in more than 7,000 deaths per year.

As explained in detail in Appendix C to my 1997 public interest comment on EPA's proposed ozone rule[11], EPA did not present an estimate of the cost of full compliance with the proposed standard. It did however, provide estimates of (1) the cost of partially achieving compliance with the standard, (2) the incremental cost per unit of emissions avoided, and (3) the number of units of emission reductions not accounted for in its partial compliance estimate. Multiplying (2) X (3) and adding that to (1) yielded a conservative (lower bound) estimate of $80 billion for the cost of achieving full compliance. To quantify the health effects of these costs, I referred to the substantial literature establishing a clear relationship between wealth, health and longevity. The more money individuals are required to spend on regulatory compliance, whether it be through higher prices or some other means, the less they have available to spend on other goods, including things that affect their health and longevity. The most current peer-reviewed, published study available at that time linking income and mortality found that every $9 million to $12 million decline in income induces one statistical death.[12]

c. If confirmed as OIRA Administrator, will you insist that EPA use the kind of methodology that you used, so that EPA will have to generate estimates of excess deaths per year that could result from the compliance costs of proposed EPA regulations?

If confirmed, I will advise agencies subject to Executive Order 12866 to make use of the best available scientific, economic and other data in compliance with OMB Circular A-4 to assess the effects of their regulatory actions.

In the same piece, you and Ms. Gramm wrote: "Even the EPA's own rosy estimates suggest that the proposal will result in only small improvements in health for a small population of sensitive individuals. For everyone else, the proposal will mean onerous financial costs, a greater risk of skin cancer and perhaps even an increase in the prevalence of asthma."

d. Do you now, in retrospect, believe that the rule has resulted in only small improvements in health for a small population of sensitive individuals? Do you also now believe that, for everyone other than a small population of sensitive individuals, the rule has, in fact, meant a greater risk of skin cancer and an increase in the prevalence of asthma? If your views have changed, please explain.

To my knowledge, no one has conducted an ex post analysis of the impact of the rule to understand the positive or negative consequences. The Committee raises an important question, though, and it may be worth investigating the impact of the regulation on asthma cases. As the mother of one child with childhood asthma and another with

[11] Comment on "National Ambient Air Quality Standard for Ozone," submitted to the Environmental Protection Agency. *Public Interest Comment Series*, Regulatory Studies Program, Mercatus Center at George Mason University (1997-2), March 12, 1997. Available at www. Mercatus.org.

[12] Lutter & Morrall. *Journal of Risk and Uncertainty*, 8:43-66 (1994)

cataracts, I was and remain very interested in the positive and negative impacts of this regulation.

The Clean Air Scientific Advisory Committee (CASAC) Ozone Review Panel, meeting on August 25 of this year in Research Triangle Park, N.C., tentatively called for further reducing the standard for ozone. According to an article in the Bureau of National Affairs publication Environment Reporter (August 28, 2006), the Panel called for further reductions of as much as 1/3, and there was no support expressed by the panel members for keeping the standard at its current level or for relaxing it.

e. If confirmed as OIRA Administrator, and considering your views expressed in your 1997 *Wall Street Journal* article, will you seek to stave off promulgation of EPA rules to further tighten national ambient air quality standards for ground-level ozone; indeed, will you advocate for relaxing the current standards; or will you be open to the very real possibility that further tightening is justified?

Much scientific research has emerged since 1997 when I last analyzed ozone regulation. If confirmed, I will support EPA in making decisions that reflect the available scientific understanding of the risks and tradeoffs involved in regulating ozone.

24. On December 18, 1999, Knight Ridder/Tribune News Service carried "EPA Speeds Ahead With Ill-Conceived Vehicle and Gasoline Standards," a piece that you authored with Wendy Gramm. In it, you and she wrote that "if EPA has its way, and moves forward with Tier 2 regulations, driving might become a rare luxury only the well-to-do can afford."

a. In retrospect, and taking account of any amendments that have been made to these regulations, do you believe that your cost estimates were accurate?

To my knowledge, no one has conducted an ex post analysis on which to base estimates of the costs or benefits of the rule.

b. Obviously, driving has not "become a rare luxury only the well-do-do can afford," which you in 1999 predicted might happen Why do you believe that this did not, in fact, occur?

A provocative phrase in an op ed was not meant to constitute a "prediction." Nevertheless, gasoline and vehicle prices have increased since 1999. I do not know the extent to which these regulations are responsible.

c. If confirmed, will you advocate for the modification or elimination of the Tier 2 vehicle and gasoline standards?

I have no intention of advocating for the modification or elimination of the Tier 2 rules if

I am confirmed.

III. Regulatory Process Changes

25. On September 30, 1997, Heritage Foundation Reports published a piece by you and Angela Antonelli, entitled "Shining a Bright Light on Regulators: Tracking the Costs and Benefits of Federal Regulation." In it, you and she wrote: "The President and Congress should establish a federal regulatory budget that places a ceiling on the total estimated cost that can be imposed on the economy each year by all federal regulations. If the budget total was reached by existing regulations, an agency wishing to add a regulation with additional costs would have to repeal or modify an existing regulation imposing the same or greater cost."

a. Please explain how this recommendation would work, and what are its advantages and disadvantages.

I have not studied in detail how a regulatory budget would work in practice. However, I have suggested that, by adding the discipline of budgeting that is missing from the current process for regulation-enabling legislation, Congress could make implicit expectations of costs and benefits more explicit, and provide much needed guidance to Executive branch agencies to whom responsibility for promulgating regulations are delegated.

b. As OIRA Administrator, would you propose such legislation?

My understanding is that there is a formal legislative review process that reviews and approves legislative proposals on behalf of the President. I have no plans for proposing such legislation, if confirmed, nor have I discussed it with the Director or other Administration officials.

c. To what extent could your recommendation be implemented without new legislation? Do you intend to do so, or to recommend that the Administration do so?

My suggestion for including an appropriations function in new legislation to give Congress more oversight in the regulatory process would require Congressional action.

26. Some have argued that estimating cumulative costs and benefits provides little of value for policymaking. Decisions about regulatory programs should be made rule-by-rule, and estimates of aggregate costs and benefits of other regulations should not alter the decision of whether a particular rule is warranted. Why do you believe that a proposed rule, even where the benefits of the rule clearly outweigh the costs, should be blocked or made conditional on the basis of whether other rules from the same agency impose costs reaching some aggregate ceiling? What is your response to that argument?

I believe the reason to care about aggregate regulatory costs is the same reason we care about aggregate fiscal spending: its impact on the economy. Requiring spending on public purposes whether it be through the budget or through regulation uses scarce resources that may have an aggregate impact on economic growth, jobs, and inflation. The idea mentioned in the 1997 article cited above was to give Congress a role similar to the one it currently has in the budgetary process.

27. Furthermore, some believe that large gaps in data and lack of agreement on methodology make aggregate cost analyses of limited use for decisions. What is your reaction and response to this argument?

This is valid argument. OMB's annual Report on the Costs and Benefits of Federal Regulations is an attempt to keep track of the expected costs of new regulations. It reports that even for major regulations, the agencies were not able to estimate the costs of all of the rules they issued last year. I think further work in estimating the costs of regulation regulations is probably warranted.

28. How would you determine the compliance costs that agencies would look to when assessing their regulatory budgets? For example, estimates of compliance costs based on industry estimates before a regulation is on the books often exceed the actual costs of compliance. Would you expect agencies to use before-hand estimates or costs of actual compliance in compiling their budget numbers?

I believe agencies should use the methodology for estimating costs outlined in OMB Circular A-4. The estimates would have to be ex ante to be useful to Congress in its decision making. Studies of actual compliance costs are useful in helping agencies refine these prospective estimates, but even ex post estimates may not accurately capture the extent to which cost changes reflect regulatory or other factors.

29. Do you believe a regulatory budget should be imposed on all regulatory agencies of the government? For example, should regulations promulgated by the Department of Homeland Security be subject to a budget? Should the cost of paperwork requirements issued by the IRS, for example, impose budgetary conditions that the FTC must meet before it can issue a regulation against consumer fraud? What is the economic justification for such linkages?

My suggestion for a regulatory budget envisioned statute-by-statute constraints, so that Congress, when establishing regulatory goals, can establish expected costs of achieving those goals.

30. In reviewing an agency rule, do you believe OIRA now has authority, or would you seek authority, to consider whether the rule is consistent with OIRA's views about appropriate priorities? For example, if EPA proposes regulations to further reduce air pollution emissions

from power plants, do you think it would be appropriate for OIRA to decide whether to reject such regulations in favor of: (i) A program to control indoor air pollution? (ii) A program to build better treatment centers for asthma-related illnesses? (iii) An increase in funding for asthma-related prevention research? (iv) An alternative risk-reduction plan such as violence prevention programs?

OIRA's executive oversight authority is guided by Executive Order 12866, issued by President Clinton. EO 12866 outlines policies for planning and setting priorities, but states: "these procedures shall be followed, to the extent permitted by law." I do not believe OIRA has authority to establish priorities that are inconsistent with agencies' statutory mandates. If confirmed, I intend to follow the law.

31. On May 20, 2004, before the House Committee on Small Business, Subcommittee on Regulatory Reform and Oversight, "Reforming Regulation to Keep America's Small Businesses Competitive," you testified: "It is not clear that the Office of Information and Regulatory Affairs, from its location within the Executive branch, is in a position to provide the necessary check or independent assessment of costs and benefits." You suggested that Congress establish a "Congressional or other outside review body . . . to report benefits and costs honestly and without deliberate bias."

    a. Your testimony seems to imply that OIRA does not "report benefits and costs honestly and without deliberate bias." Did you intend that implication? If so, in what direction is that bias and dishonesty, what is its source, and how has it influenced OIRA's work?

I intended no implication beyond the statement I made. My testimony recognized that OMB reports to the President, as do heads of agencies charged with regulation, which necessary (and appropriately) affects its actions. My testimony went on to say that a Congressional review body "could provide Congress and U.S. citizens with an independent assessment of the total costs and benefits of regulation, and also help ensure that statutes are being implemented so that the benefits to Americans outweigh the costs."

    b. If confirmed, will you propose the creation of such a new entity? If so, please describe what sort of new entity you will propose.

My testimony specifically referred to the Congressionally authorized Congressional Office of Regulatory Analysis, to be housed in the General Accounting Office. It would be beyond the scope of OIRA Administrator to propose such an entity.

    c. The idea of an executive-branch body outside of OMB calls to mind the Council on Competitiveness set up during the first Bush Administration to monitor agency rulemakings. What is your opinion of the Council on Competitiveness, and is that the sort of new body

that you would contemplate being established?

My testimony very specifically referred to a "legislative branch oversight body." The Council on Competitiveness was an executive branch body, and would not meet that definition, nor would a similar body be consistent with my recommendation in the 2004 testimony.

d. Many came to see the Council on Competitiveness, which did not have to disclose its dealings, as a backdoor conduit for regulated interests seeking to stop agency action. What means would you recommend to maintain transparency and accountability, so that any regulatory-review entity or official outside of OIRA would not become a "conduit" by which outside parties interested in a rulemaking could affect the regulatory process off the record and without disclosure?

In the testimony, I suggested a "legislative branch oversight body." I would not presume to advise Congress on how to maintain transparency and accountability for any office it establishes.

32. On December 7, 2004, you were quoted in The Washington Post ("Charting Progress of Rule Reviews Proves Difficult," by Cindy Skrzycki) stating, "The administration has an opportunity in its second term to establish procedures for 'sunsetting' rules that have outlived their purpose."

a. Please describe how your proposed sunsetting procedures would operate. For example, how would the determination be made whether a rule has outlived its purpose?

As I said in the testimony cited in question 31 above, "making retrospective analysis of the impacts of regulations a standard practice, rather than an exceptional exercise, would inform the policy debate in beneficial ways. Policy makers would have information with which to eliminate or modify ineffective rules, expand more effective rules, and design future regulations that meet the needs of American citizens."

In remarks at the White House Conference on the Economy in December 2004, I noted that Congress establishes sunset dates for most major authorizing legislation, and suggested a similar concept for regulations, whereby authorizing statutes could encourage regular reviews of regulations to determine whether they are having their intended effects, and aren't outdated or having unintended consequences.

b. If confirmed, do you expect to prepare and implement a proposal for establishment of such sunsetting procedures?

I have no plans for preparing or implementing a proposal for establishing sunset procedures if confirmed. However, I am open to working with Congress and other

Administration officials, if they believe the concept has merit.

33. There are two proposals for government-wide process changes which were initiated by the previous OIRA Administrator, John Graham. One would impose new requirements for the production of "guidance" – interpretive rules, general policy statements, and other public advisories. The other would impose rules for risk assessments.

a. What is your opinion of these proposed process changes? Would you, as Administrator, pursue the proposals initiated by Graham, or would you modify them in any way? If so, how?

If confirmed, I will work with the Director, OIRA staff, and agencies to fully consider public comment, and, in the case of the risk assessment guidelines, the results of the NAS peer review, to issue bulletins that will provide guidance to agencies to improve the quality and transparency of agency guidelines and risk assessments.

b. What government-wide process changes (other than what you have discussed above) would you recommend should be made, or would you anticipate will be made, if you are confirmed as Administrator?

I have no plans for recommending or making any government-wide process changes, if confirmed.

IV. Orientation Towards Regulation

34. You have spent much of your career evaluating proposed or final agency rulemakings and publishing your findings or submitting your findings to the agency. Please identify several of the most significant instances in which you publicly praised and supported a proposed or final agency rulemaking that increased the stringency of environmental, health, or safety requirements.

While I have filed comments on a number of federal regulations, my comments have covered a miniscule fraction of the thousands that are issued each year. Thus, my filings with agencies have focused on regulations that are most likely to benefit from consideration of additional alternatives and further analysis, rather than those where regulatory proposals are likely to serve the public interest. Still, I have supported agency actions, such as EPA's proposals for targeting enforcement efforts more effectively, and its revised drinking water regulations that would encourage water efficiency and water conservation. Furthermore, the majority of my comments have not argued for deregulation. Rather, they suggest ways to address regulatory goals more effectively. The "regulatory checklist," provided as an appendix to most of my public interest comments, often supports some aspects of agencies analyses, while it suggests ways to

improve others.

Most recently, the lead article in the spring 2006 issue of the Administrative Law Review (coauthored with Andrew P. Morriss) expresses the need for regulation of crystalline silica.

> *We also face the danger of under-regulation. Prolonged exposure to free crystalline silica is associated with scarring of the lungs (silicosis). Silicosis is a progressive, incurable disease that impairs respiratory function. It takes years to develop, seldom exhibiting symptoms in under five years. Not controlling exposure to harmful forms of silica thus risks irreparable damage to exposed individuals' lungs. As described below, the regulatory history of silica includes frequent, incorrect assertions that the problems of silica exposure had been solved by regulatory measures that subsequent knowledge revealed to be less effective than promised. In the early 1990s, 200 to 300 silicosis deaths per year were reported. Further, research has recently associated chronic exposure to high levels of certain forms of free crystalline silica with lung cancer. Delay in addressing silica exposure thus also has its costs, and there is now reason to believe that those costs are larger than previously thought.*

35. On August 14, 2004, *The Washington Times* published a letter by you, entitled "Modern-Day Bootleggers." In it, you wrote that Richard Rahn's essay, entitled "Why Do We Regulate," and published in *The Washington Times* on August 11, 2005, "convincingly lays out the reasons why we don't need to regulate." In his essay, Mr. Rahn had written that, in "a world without government regulation, . . . the judicial system, coupled with private standard setting associations, would likely give us an equal, if not a higher, level of protection than we have now."

    a. Please explain how you reached your conclusion that federal and state regulations are unnecessary because, in their absence, litigation and private standard setting associations would likely give Americans an equal, if not a higher, level of protection than they enjoy now.

I don't believe I have concluded "regulations are unnecessary." Indeed, I believe rules are necessary in a civil society. My views on regulation are articulated in my Primer on Regulation, attached to these questions (and available from the Mercatus Center at George Mason University). My views have evolved over 25 years during which I have studied the effects of regulation (positive and negative) and the role well-organized groups play in influencing regulation to serve their special interests. (See response to question 37 (c)).

b. How will your view that regulation is unnecessary affect you evaluation of draft proposed and final regulations, if you are confirmed as OIRA Administrator?

I do not hold the view that regulation is unnecessary. My sincere interest in understanding the consequences of regulatory alternatives— both beneficial and negative, intended and unintended—combined with my commitment to openness and transparency, would, if confirmed, ensure regulations I evaluate are accountable to the American people and consistent with Congressional intent.

36. Over the past years, you wrote critiques of a number of environmental regulations. For example

- The Fall 1997 issue of *Regulation* carried a piece by you and Angela Antonelli, entitled "Congress and the Clinton OMB: Unwilling Partners in Regulatory Oversight?" In it, you and she wrote that "[s]erious attention to opportunity costs might have headed off" the "ozone and particulate matter air quality standards."
- In January 11, 2001, the Mercatus Center published your piece, "How Not to Improve Public Health." In it, you wrote that then-EPA Administrator Whitman's decision to "reaffirm the Clinton administration's standards requiring drastic reductions in the levels of arsenic in public drinking water . . . may have been politically expedient, but it is more likely to endanger the public health than to help it, as it will divert scarce resources to combating the negligible threat instead of letting communities focus on pertinent ones."
- On January 1, 2004, *Regulation* published "The Bush Administration Regulatory Record," a piece authored by you. In it, you wrote that, under the Bush Administration, "[r]egulations that claim to reduce fine particulate matter seem to get a free pass through OIRA."
- In the same piece, you wrote that the faith of OIRA, under then-Administrator John Graham, "in the ability of smarter regulators to analyze problems and achieve socially optimum results . . . has led . . . to the present situation with the mercury emissions rule where the EPA need only suggest ancillary reductions in particulate matter to calculate health benefits that dwarf its estimated costs and justify any regulation."

a. Do you still object to the air quality standards for ozone and particulate matter that you wrote about in 1997?

I still believe the data presented in EPA's 1996 ozone proposal did not support the proposal, because EPA's data revealed that the negative health consequences outweighed the positive health benefits. I did not conduct an analysis of the particulate matter proposals.

b. Do you still object to the EPA standards requiring reduction in the levels of arsenic in public drinking water, and do you still believe these standards are more likely to endanger public health than to help it?

I still believe the data presented in EPA's arsenic proposal did not support the proposal, because it failed to account for the burden the rule would impose on small communities where arsenic is naturally occurring.

c. Which regulations regarding fine particulate matter, in particular, were you referring to in your January 1, 2004 article? By using the word "claim," were you expressing doubt whether those regulation would actually reduce fine particulate matter, and, if so, why? Do you still object to those regulations, whether because you do not believe they would actually reduce fine particulate matter or for other reasons?

EPA did not justify its mercury rule based on reductions in mercury. Rather the benefits of the rule stemmed from ancillary reductions in particulate matter.

d. Do you still believe that EPA failed to justify the costs that its mercury emissions rule would impose on regulated facilities? If so, what more do you believe EPA should have done to justify those costs? Do you still object to those regulations on these or other grounds?

The Regulation article does not discuss the costs of the mercury rule directly. Rather it was intended to point out that the bulk of the estimated benefits do not derive from mercury reductions (those estimated benefits were less than the costs of the rule).

e. If you are confirmed as OIRA Administrator, will you work to have the environmental standards on ground-level ozone, particulate matter in ambient air, arsenic in drinking water, and mercury emissions reconsidered and made less stringent? Please explain why or why not.

If confirmed, I have no plans to undo existing regulations. To the extent that it becomes advisable to revisit an existing regulation, any changes would be subject to public notice and comment as required by the Administrative Procedure Act.

37. In the Summer 2003 issue of *Regulation*, in a piece entitled "Unmasking the Regulators" in which you noted that a book by Cindy Skrzycki, entitled *The Regulators: Anonymous Power Brokers in American Politics*, made "no mention of the incentives so-called public interest groups face to expand their funding by publicizing (some might say fabricating) crises." You also refer in the article to "pro-regulatory groups who lobby for ever-greater state control over people's lives, such as Public Citizen, the Natural Resources Defense Council, etc. . . ."

a. What are the organizations that you refer to as "so-called public interest groups," and what are some of the specific instances in which you believe they may have publicized or fabricated crises in response to incentives to expand their funding?

I do not point fingers at individuals or groups. In the book review cited in the question, I comment on the authors use of adjectives to label some political perspectives and not others. Here is the quote:

> *My main complaint about this otherwise engaging book is its slant, which is probably unintentional, as Skrzycki takes some pains to be objective in her reporting. Nevertheless, organizations that espouse classical liberal views, believe in liberty and free enterprise, or are interested in increasing the accountability of regulators to the American public ...are invariable slapped with a label of "conservative," "pro-business" ... Yet, pro-regulatory groups who lobby for ever-greater state control over people's lives, such as Public Citizen, the Natural Resources Defense Council, etc., are never burdened with a corresponding adjective. In fact, while the "conservative" adjective is applied unfailingly to organizations to the right of center, I can recall only a few uses of the word "liberal" in the book.*

b. Please explain in what ways and instances you believe that Public Citizen, the Natural Resources Defense Counsel, and other "pro-regulatory groups" have lobbied "for ever-greater state control over people's lives."

I respect the rights of private entities to pursue their own agenda. I did not then, and will not now, point fingers at individuals or organizations. The context of the quote was a comment on the author's use of adjectives to label some political perspectives and not others, not an accusation.

c. You mentioned that you believe some organizations have financial incentives to publicize, or even fabricate, crises. Looking at the other side of the coin, do you believe that there are organizations that have financial incentives to downplay such risks, or to fabricate reassurances against the severity of such risks, in order to expand their funding? If so, what kinds of organizations? Have you ever written about such organizations and the incentives they face, as you did the "so-called public interest organizations" in the article cited above?

Yes. Chapter 2 of my Primer on Regulation discusses theories of regulation that explain the incentives and behavior of different groups. It summarizes the implications of the theory of interest group behavior as follows:

> *The implication of this theory is that regulation is likely to be biased toward benefiting interest groups that are better organized and have more to gain from*

the wealth redistribution. Hence, regulation is likely to benefit small interest groups with strongly felt preferences at the expense of large interest groups with weakly felt preferences.

The Primer provides a case example of how washing machine manufacturers supported revised standards:

A 2000 Department of Energy regulation banned the sale of low-priced washing machines under the guise of increasing energy efficiency. Who were the biggest supporters of the ban? It was not the consumers, who by a margin of six-to-one preferred to purchase lower-priced machines. It was the washing machine manufacturers—because now they would be able to sell expensive "front-loading" models at an average price of $240 more than the banned machines—who worked behind the scenes to draft the regulations.

38. In January 11, 2001, the Mercatus Center published your piece, "How Not to Improve Public Health." In it, you wrote, among other things, that then-EPA Administrator Whitman's decision to reaffirm the Clinton administration's standards requiring drastic reductions in the levels of arsenic in public drinking water was "a winner for those whose bread and butter are slick ads, fake scares, and finger pointing." Please specify what organizations or individuals you were you referring to. Also, please describe the relevant slick ads, fake scares, and finger pointing.

I respect the rights of private entities to pursue their own agenda. I did not then, and will not now, point fingers at individuals or organizations.

39. A critical part of OIRA's function is to solicit and receive comments and suggestions from a wide spectrum of organizations, and it is essential that OIRA be seen as openly and honestly evaluating and considering the submissions that it receives from all parties. How can you provide assurances that, if you are confirmed as Administrator of OIRA, you will give full and unbiased consideration to the information and opinions that you will receive from organizations that you have referred to (in articles quoted in the preceding few questions) as "pro-regulatory groups who lobby for ever-greater state control over people's lives," from organizations that you have characterized as "so-called public interest groups" with financial incentives to "publicize" or "fabricate" crises, and from "those whose bread and butter are slick ad, fake scares, and finger pointing"?

In my career as a professor and researcher, as well as my personal life, I have always been respectful of different perspectives and open to a variety of views. Furthermore, I respect the regulatory process, which engages public comment on complicated issues. If confirmed, I will continue to follow the procedures required by law and executive order, and continue to treat everyone – the Administration, Congress, interest groups, and citizens – with respect and openness.

40. On July 27, 2000, *The Atlanta Journal* published "Something Wicked This Way Comes," a piece by you and Wendy Gramm. In it, you and she criticized the Clinton Administration for conducting what you characterized as a rush to complete rulemakings tightening environmental, health, and safety rulemakings in its waning months, in an effort to prevent the incoming Bush Administration from extinguishing those rulemakings. You and Ms. Gramm wrote that when regulations "are rushed into effect without adequate thought, they are likely to do more harm than good."

If you are confirmed as OIRA Administrator, and if in the waning months of this administration there is a rush to complete rulemakings (perhaps to loosen environmental, health, and safety regulations), do you commit that you will closely scrutinize the regulatory proposals and will sharply criticize and object if you determined that they were being rushed into effect without adequate thought?

Yes. If confirmed, I will work closely with Administration officials to ensure new regulations are based on the best analysis allowed by statute and sincere attention to public comment.

V. Information and Technology Management

41. Regarding information technology policy, how do you understand the respective roles of OIRA and the Office of E-Government and Information Technology? How should they effectively coordinate their efforts to encourage agencies to use information technology to accomplish their mission? What is the unique contribution each makes to OMB's mission?

The strength of OIRA lies in its understanding of regulation and paperwork process—the fundamental data that drive the processes with which agencies accomplish their missions. The strengths of the Office of E-Gov and IT is its understanding of the technology and reengineering that needs to take place. The strengths of both offices, coupled with the knowledge of the resource management offices, allow OMB to find the right leverage managing agency investments in information technology.

42. How would you and the E-Government Administrator expect to work with the federal Chief Information Officers (CIO) Council? What do you see as the primary role of the agency Chief Information Officers created by the Clinger-Cohen Act?

It is my understanding that OMB consults with agencies on an as-needed basis throughout the year as it prepares various reports as well as the information technology sections of the President's Budget. If confirmed, I would work closely with the Administrator for E-Government & IT, agencies, and the CIO Council to help improve agency employee understanding of their Information Resource Management (IRM)

responsibilities.

43. What are your views on the use of the budget process to improve information technology management? What other incentives does OMB have at its disposal to encourage good management practices? How would you enhance coordination between OIRA and the Resource Management Offices in order to improve the adoption of OMB policies and guidance across government?

I understand that there is close coordination with the Resource Management Offices and other management offices throughout the year on all IT issues, and not just during budget season. Because Resource Management Offices work most closely with individual agencies, they are in a good position to see the benefits of the IT initiatives. If confirmed as Administrator, I would work to support and strengthen the cooperative relationship between the Resource Management Offices, OIRA, and other statutory and management offices within OMB to strengthen agency's use of IT to enhance service delivery.

VI. Information Security and Privacy Issues

44. How do you think policies and programs to protect the privacy of personal information can be better coordinated across the federal government?

I understand from OIRA staff that OMB regularly engages in formal and informal communications, both written and oral, with agency Chief Information Officers. If confirmed, I will work with OMB officials and staff and agencies to continue to address proper agency privacy and security measures regarding individuals' personal information, and determine whether additional procedures or guidance are needed to protect the privacy, confidentiality and security of information.

45. Do you believe that government in its actions should continually strive to preserve individuals' privacy rights? What are your thoughts regarding the balancing of individuals' privacy interests against the use of personal information by federal agencies entrusted with homeland security missions?

I believe the government has a responsibility to protect the privacy of the personal information it gathers on Americans. The Committee raises an important point about the need to balance the desire for privacy against other goals, but I have not evaluated the tradeoffs involved. If confirmed, I look forward to working with OMB officials and staff, agencies, Congress, and others to understand these difficult tradeoffs and help develop solutions in the best interests of American citizens.

46. Federal agencies' use of data mining techniques has raised privacy concerns. In August 2005, GAO described its review of five data mining initiatives. It reported that agencies hadn't met

key privacy and security requirements. GAO concluded that individual privacy rights weren't being appropriately protected in the implementation of the data mining initiatives. What would you do to ensure that the public's right to privacy is protected in data mining initiatives and programs?

I understand that OMB provides guidance and oversight to the agencies through many channels at both the staff and executive levels. If confirmed, I would examine the issues raised by GAO, and work with OMB officials and staff to employ these channels to develop a workable solution desirable by both privacy advocates and information brokers.

47. In April 2006, GAO described ambiguities in OMB guidance on how privacy requirements apply to federal agency uses of information obtained from commercial resellers of personal data. GAO found that agency practices in this area were uneven and did not fully comply with Fair Information Practices. GAO recommended that OMB revise privacy guidance and develop specific policies for the use of personal information obtained from commercial resellers. What would you do to ensure agencies comply with Fair Information Practices when they use personal information obtained from commercial resellers?

If confirmed, I will study the GAO findings and recommendations, and work with OMB officials, agency Chief Information Officers, members of the federal privacy community, and others to understand this issue, and if needed, develop revised guidance to address problems.

48. The E-Government Act of 2002 requires agencies to conduct privacy impact assessments (PIAs) whenever they develop or buy new information technology systems and whenever they initiate new collections of personal information. How would you ensure that agencies comply with this mandate? How would you ensure that PIAs are promptly made available to the public, as required by the E-Government Act?

I understand that OMB has existing oversight mechanisms to improve agency and government-wide IT privacy management. If confirmed, I will work with the Administrator of E-Government and IT to examine how PIAs are developed, the extent to which they comply with the requirements of the E-Government Act, and whether existing mechanisms are adequate..

VII. E-Government

49. What do you see as OIRA's role in ensuring the successful governmentwide implementation of the E-Government Act of 2002?

I understand that OIRA and the Office of E-Government coordinate their activities closely to support the Director of OMB in fulfilling his responsibilities under the E-Government Act and ensure successful government-wide implementation.

50. The E-Government Act of 2002 requires federal agencies to establish electronic dockets so that agency rulemaking can be publicly accessible over the Internet. Some agencies have objected to standardized online rulemaking; Congress has threatened funding for the initiative; and many users complain the web site is not well designed. How would you move past these difficulties to allow more efficient online interaction and tracking of public rulemaking?

It is my understanding that the E-Rulemaking initiative, lead by EPA, is a centralized rulemaking site that provides citizens the best use of their tax dollar and is a helpful tool to understand how their government is serving them. If confirmed, I will continue OMB's oversight role to ensure effective implementation of the initiative.

51. Under the Paperwork Reduction Act, the Electronic amendments to the Freedom of Information Act, the E-Government Act, and current OMB circulars, there is a general policy that supports disseminating government information, and encourages use of the Internet for dissemination purposes. The other approach to making information accessible is for the public to request records from agencies through the Freedom of Information Act. What criteria should be applied in deciding when it is better for government to be more proactive in its dissemination of information to the public or when to release information only in response to specific requests, such as under the Freedom of Information Act?

It is my general belief that agencies have a responsibility to provide information to the public consistent with their missions and with the constitutional and statutory prerogatives and obligations of the Executive Branch. When managing information dissemination programs, agencies must consider the effects of their efforts on the public, State and local governments, and industry to avoid undue burden and inappropriate competition.

In determining whether and how to disseminate information to the public, I believe agencies must determine the best balance between the goals of maximizing the usefulness of the information and minimizing the cost to the government and the public.

Post-Hearing Questions
For the Nomination of Susan E. Dudley
to be Administrator of the Office of Information and Regulatory Affairs
Submitted November 15, 2006

Questions from Chairman Collins

Question 1

You were highly critical of OMB under President Clinton because of what you perceived was a failure to serve as a substantive reviewer of potential regulations. In one report from the Heritage Foundation you stated:

> OMB's failure to provide any independent evaluation of the quality and reliability of agency benefit and cost estimates would be much less worrisome if there were persuasive evidence that agencies in fact developed these estimates in compliance with OMB economic analysis guidance.

According to a recent CRS report, currently about 30 OIRA desk officers and branch chiefs review about 3,000 agency information collection requests each year and about 700 significant rules each year. Do you believe that it is possible for a staff this size to "independently evaluate" all of the information that comprises an agency cost-benefit estimate?

ANSWER

From my tenure as a career OIRA staffer, I agree they review a large number of regulations and information collections, and I agree that it would be impossible for them to know all of the details the issuing agency staff know about those rules. However, only a small fraction of those 700 new rules are defined under President Clinton's Executive Order 12866 as "economically significant" (45 final regulations each in 2005 and 2004, and 37 in 2003)[1] *and it is that subset that is covered by the Stevens-Levin Appropriations language (now called the Regulatory-Right–to-Know Act) which was the subject of the 1997 article referenced above. In their reviews of draft proposed regulations, I understand that OIRA staff devote much of their attention to these economically significant regulations, and I believe that is appropriate. Those are the regulations that have the potential for the largest impacts, in terms of both benefits and costs.*

Question 2

You have proposed using regulatory sunsets to prompt reviews of regulations that might become outdated. OIRA already reviews approximately 700 significant proposed rules per year. Regulatory sunsets would only increase that number – and it might create tight

[1] See at http://www.whitehouse.gov/omb/inforeg/regpol-reports_congress.html

deadlines to complete the review before the regulations expire. How could we justify using already limited resources to review regulations that are final and that have not prompted any citizen to petition for their change?

ANSWER

Though I commented generally on the value of retrospective analysis, including sunsets, in 2004,[2] I have not made specific recommendations for how sunsets would work, and I do not have any plans for developing a proposal for sunsetting any regulations. I do agree that in considering any proposal, it would be essential to understand the resource implications.

Questions from Sen. Warner

Question 1

Critics of your work have charged that your cost-benefit models used to analyze specific proposed regulations have mischaracterized the potential long-term benefits of some regulations and marginalized the value of some human lives.

(a) Can you explain your models, including the "BEN" model, by telling the Committee of a specific instance where they have helped to modify a proposed regulation to enhance public health and/or safety?

(b) Would these tools be of valuable use for you to use if confirmed to the position you are nominated today?

ANSWER

(a) I have not developed my own models to analyze the benefits and costs of regulation. Rather, I rely on a framework for examining regulations that involves 7 elements which match the regulatory analysis steps spelled out in guidelines issued by both President Clinton[3] and President Bush,[4] as well as earlier presidents.[5] These seven steps are: (1) identification of a significant market failure, (2) identification of federal role, (3) examination of alternative approaches, (4) examination of benefits & costs, including those that cannot be quantified, (5) understanding of available scientific and technical data, (6) distribution effects (whose costs, whose benefits?), and (7) impact on choices, and

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[2] *I made these comments in testimony before the House Subcommittee on Regulatory Reform and Oversight of the Committee on Small Business, United States House of Representatives, on "Reforming Regulation to Keep America's Small Business Competitive." May 20, 2004, available at http://www.mercatus.org/pdf/materials/709.pdf; and as a panelist at White House Conference on the Economy, "Securing Our Economic Future: Tax and Regulatory Burdens" panel chaired by Treasury Secretary John Snow. (December 15, 2004). available at http://www.mercatus.org/regulatorystudies/article.php/1231.html*

[3] *Available at http://www.whitehouse.gov/omb/inforeg/riaguide.html*

[4] *Available at http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*

[5] *For an objective 3rd-party analysis of my criteria compared to that described in the U.S. Government's regulatory analysis guidelines, please see www.NeutralSource.org.*

rights.[6]

The majority of my comments on proposed health, safety and environmental regulations are designed to enhance their effectiveness at achieving their goals. For example, providing consumers information on trans fats on the product label (rather than hiding that information under the category of saturated fats) provides real information consumers can use to improve their health. Recognizing local differences in conditions for improving water and air quality will also enhance public health and safety. Resisting one-size-fits-all standards for air bags could also have saved the lives of children killed by mandatory air bags that deflated with the force required to protect an unbelted adult male. Very few of the comments I have filed argue for deregulation or no regulation; the majority argues for smarter regulation that will provide greater benefits at lower costs.

The BEN model I designed while at EPA in 1984 did not examine benefits and costs of regulation, but estimated the economic gain a firm derived by avoiding or delaying compliance with environmental regulations. The purpose of the model was to make sure civil penalties captured—at a minimum—any ill-gotten gain derived from non-compliance, so that non-compliant companies would find themselves worse off financially for having violated environmental laws. I don't have any estimates of the amount violating companies have paid as a result of the BEN model over the last 22 years, but I recall that the first penalty negotiation that used the model, where I served as expert witness for EPA, resulted in the largest environmental penalty levied for a water quality violation at that time.

(b) The approach I have used to analyze regulations are the same widely accepted principles that have guided regulatory analysis in both Democrat and Republican administrations for the last 25 years. If I am confirmed, I intend to conduct regulatory reviews that are consistent with statutory mandates, President Clinton's Executive Order 12866, and existing guidelines. I have no plans for altering procedures or analytical tools, if I am confirmed.

Question 2

You have advocating weighing costs and benefits for different levels of governments, regions of the country, categories of citizens, and sizes of businesses before promulgating a national rule. This philosophy has been articulated with respect to several public safety regulations from clean water standards to passenger vehicle requirements.

(a) Do you feel that these questions are always necessary to answer prior to the issuance of a regulation in the interest of public safety?

(b) Can you think of an instance of a regulation you may have studied that did not warrant a detailed cost-benefit analysis of this sort?

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[6] *Note that this last element does not have a direct corollary in the U.S. Government guidelines, but is intended to address civil liberties, privacy, etc.*

ANSWER

I have advocated understanding whether the federal government is the appropriate level for promulgating regulation, consistent with federalism principles in our Constitution, and articulated in President Clinton's Executive Order on Federalism. (This is element 2 of the 7-element checklist described in my Primer on Regulation and attached to Mercatus Public Interest Comments on agency rulemakings.) I have also advocated understanding the distributional impacts of regulation – who bears the costs, and who receives the benefits (element 6 in the checklist). I have not advocated conducting benefit-cost analysis for each of these factors, however.

(a) I think these questions, which are reflected in the principles of President Clinton's Executive Order 12866 that has guided regulatory analysis for the last 13 years, are necessary steps to understanding the best way to address a problem. If the root cause of a problem is not understood, attempts to address the problem may be ineffective or have unintended negative consequences for public health and safety. Understanding the impact of alternative approaches on different people and groups is also important to ensure regulations are fair.

(b) Not all regulations demand the same level of analysis. Some regulations respond to an emergency situation, and others are unlikely to have impacts that are significant enough to warrant an extensive analysis. Nevertheless, addressing these issues in less depth can be informative and important for avoiding undesirable outcomes. To illustrate, in comments on EPA's proposal to encourage water conservation in submetered apartment buildings, I commended the analysis for understanding the implications of the proposal on these different factors, even though EPA did not conduct a detailed benefit-cost analysis.

Question 3

An important part of OIRA has been the transparency of its review process. What would you say about the transparency of today's OIRA review process? If you see areas in need of improvement, what would you do to implement improvements to the transparency of information in the review process if you were to be confirmed?

ANSWER

I strongly support transparency in the regulatory process, including the disclosure requirements in President Clinton's Executive Order 12866. I have commended this Administration for increasing transparency in numerous ways. If confirmed, I would be committed to preserving and, where possible, building on this transparency.

Questions from Sen. Akaka

Question 1

Too many government agencies and private companies have failed to adequately protect

personal privacy. As administrator of the Office of Information and Regulatory Affairs (ORIA), you would oversee numerous regulations that protect the privacy rights of millions of Americans. Given the many recent data breaches, how would you protect privacy as OIRA Administrator?

ANSWER

The Administrator of OIRA has great responsibility associated with upholding the tenets of personal privacy embedded within, for example, the Privacy Act of 1974, Federal Information Security Management Act of 2002 (FISMA), Health Insurance Portability and Accountability Act of 1996 (HIPAA), Electronic-Government Act of 2002 (E-Gov Act), and others. OIRA oversees these tenets through agency oversight, gathering of government-wide privacy and security program review, and agency-specific regulatory review.

If confirmed as the Administrator of OIRA, working with the Administrator of the Office of Electronic Government and Information Technology, I would ensure agency individuals who write the regulations are aware of Federal policies which govern the information the federal government collects, maintains, and transmits through regulatory actions. Furthermore, from an oversight perspective, I would ensure significant regulatory actions which come through OIRA for review consider existing privacy and security laws and policies throughout the review process -- specifically, appropriate information handling and protection for sensitive information within agencies (including personal information), appropriate mechanisms for contractor oversight and review, and coordinated incident handling and response.

Moreover, if confirmed as the Administrator of OIRA, I would steward a common approach to breaches of personal information that is both retrospective, such as notification and remediation, as well as prospective, such as emphasis on the importance of privacy training and awareness for all federal employees. I would also ensure federal policies in this arena benefit from and reflect industry best practices.

Question 2

A number of your writings and statements appear to demonstrate that you believe that most government regulations are ill-advised or unnecessary. Your writings also demonstrate a great deal of concern over how agencies and OIRA justified regulatory action.

A. Do you believe that most government regulation is unnecessary?
B. What methodology would you employ at OIRA to approve regulations proposed by agencies? Please describe the guiding principles that you think should govern regulatory review. For example, if the agency head to whom Congress assigned responsibility for issuing a regulation has decided that a particular rule is appropriate or required, under what, if any, circumstances should OIRA be able to delay or reject the regulation?

ANSWER

(a) I do not believe most regulation is unnecessary. My analyses are not intended to suggest that regulations are ill-advised or unnecessary, but rather recommend ways to make regulation more effective.

(b) If confirmed, I would employ standard methodologies, as used by Democrat and Republican administrations over the last 25 years and articulated in Circular A-4.[7] I believe the principles expressed in President Clinton's Executive Order 12866, which continues to guide regulatory review today, should govern regulatory review.

Agency heads who are delegated authority by statute have the final say in regulations implementing statutory mandates. The President has the authority to oversee rulemaking issued by the Executive Branch. Within that branch, agencies have the in-depth expertise, and OIRA's role is that of coordination, guidance and review.

Question 3

In 2001 and 2002, you and your colleagues at the Mercatus Center submitted numerous regulations to OIRA that you believed needed to be modified or repealed. Do you still believe those regulations need to be modified or repealed?

ANSWER

Most of the Mercatus submissions suggested ways to improve the regulations, rather than rescind them. Some of that research is still valid, while some has been superseded by newer information. In any case, I have no intention of initiating a new review of any of the final regulations on which Mercatus filed comments if I am confirmed.

By way of background, the information Mercatus provided for each of the rules allowed OMB and agencies to judge their merits. Mercatus scholars responded to OMB's requests in 2001 and 2002 by providing one-page summaries of most of the public interest comments we had submitted since our regulatory studies project began in 1997. Rather than a prioritized list of regulations that "need to be modified or repealed," the summaries presented highlights of the regulation-specific research Mercatus scholars had conducted and provided publicly to agencies through the regulatory process.

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[7] The *framework I have applied to examining regulations involves 7 elements which match the regulatory analysis steps spelled out in guidelines issued by both President Clinton (available at http://www.whitehouse.gov/omb/inforeg/riaguide.html) and President Bush (available at http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf) as well as earlier presidents. These seven steps are: (1) identification of a significant market failure, (2) identification of federal role, (3) examination of alternative approaches, (4) examination of benefits & costs, including those that cannot be quantified, (5) understanding of available scientific and technical data, (6) distribution effects (whose costs, whose benefits?), and (7) impact on choices, and rights.*

The issuing agencies are considering some of those regulations, and have completed review of others. For example, one Mercatus recommendation criticized FDA's proposal to incorrectly label trans fats as saturated fats, when they are not saturated fats. It recommended instead that FDA encourage actions to inform consumers about the harmful health effects of trans fats. FDA has since issued a final regulation that informs consumers about the presence of trans fats on food labels.

Question 4

I strongly believe that Occupational Safety and Health Administration (OSHA) regulations are critical to ensuring a safe work environment for all Americans. However, you have publicly questioned the benefits of OSHA regulations and claimed that such regulations cost too much. Are there particular OSHA regulations that you believe should be repealed?

ANSWER

No.[8] *Indeed in a recent law review article, I highlighted the need to address the problem of exposure to hazardous forms of crystalline silica in the workplace:*

> *We also face the danger of under-regulation. Prolonged exposure to free crystalline silica is associated with scarring of the lungs (silicosis). Silicosis is a progressive, incurable disease that impairs respiratory function. It takes years to develop, seldom exhibiting symptoms in under five years. Not controlling exposure to harmful forms of silica thus risks irreparable damage to exposed individuals' lungs. As described below, the regulatory history of silica includes frequent, incorrect assertions that the problems of silica exposure had been solved by regulatory measures that subsequent knowledge revealed to be less effective than promised. In the early 1990s, 200 to 300 silicosis deaths per year were reported. Further, research has recently associated chronic exposure to high levels of certain forms of free crystalline silica with lung cancer. Delay in addressing silica exposure thus also has its costs, and there is now reason to believe that those costs are larger than previously thought.*[9]

Question 5

I am deeply concerned about some of your writings on air quality issues. For example, in 2000 you wrote, "Because only vulnerable populations experience health effects at the ozone concentration under consideration, the simplest and perhaps cheapest alternative strategy is the recommendation that vulnerable people avoid extended exposure outside during the few days a year when ozone levels are high." It is always cheaper to do nothing and warn people to stay clear of a hazard. But that perspective ignores the fact

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[8] *I filed comments on OSHA's proposed ergonomics regulation in 2000, recommending alternative approaches that my analysis suggested would be more effective at addressing ergonomics injuries. That regulation was appealed by Congress under the Congressional Review Act in 2001.*

[9] *"Defining What to Regulate: Silica & the Problem of Regulatory Categorization," Administrative Law Review, Vol. 58, No.2 (Spring 2006). With Andrew P. Morriss.*

that a number of metropolitan areas experience many days of poor air quality every year and telling people to stay in doors all the time is not a viable or fair solution. You testified that you have some regrets about some of your previous statements. Is your position today the one you advocated in 2000?

ANSWER

Various new data have become available since I last studied these issues over five years ago, on the frequency of high ozone days, and on the health effects of ozone as well. As I said in response to Chairman Collins' question at my confirmation hearing, I am aware of EPA's Clean Air Science Advisory Committee's new findings, and believe they should and will play an important role in EPA's next ozone rulemaking.

I have researched and commented on regulations as an academic, and I recognize that my role will change if I am confirmed as OIRA Administrator. If confirmed, I will be responsible for implementing the laws of the land as Congress has written them, and I commit to you that I will not recommend alternatives that are inconsistent with federal law.

Question 6

Many believe OIRA returned as a gatekeeper entity under Administrator Graham and moved away from the more consultative and collaborative entity OIRA became during the previous Administration. In your opinion, what is the proper role of OIRA?

ANSWER

By nature, I am a collaborative person, and would hope to lead a collaborative office, if confirmed. With respect to the proper role of OIRA, I believe that regulatory agencies authorized by Congress have responsibility for rulemaking, and that the President has the authority to oversee rulemaking issued by the Executive Branch generally. Recent Presidents have accomplished this oversight through Executive Orders and OMB review of agencies' proposed and final rules. The proposed and final rules are issued by the rulemaking agency, not OMB, and, if confirmed, I have no intention to change that.

Question 7

In response to the comments submitted on the Office of Management and Budget's (OMB) proposed bulletin on peer review, OMB said that it would give agencies additional discretion to determine the level of peer review required for any particular document. However, according to the final OMB bulletin, OMB can decide what constitutes "highly influential scientific assessments," which, in turn, imposes a more rigorous form of peer review on proposed regulatory action. Under what circumstances do you believe OMB should override an agency's decision on the appropriate level of peer review?

ANSWER

Section III, subsection 1 of the final Peer Review Bulletin regarding "Applicability" defines influential scientific information as follows:

> *This section applies to influential scientific information that the agency or the Administrator determines to be a scientific assessment that:*
>
> *(i) could have a potential impact of more than $500 million in any year, or*
>
> *(ii) is novel, controversial, or precedent-setting or has significant interagency interest.*

In my view, the definition provided suggests that identifying a "highly influential scientific assessment" will be fairly straightforward for the Agency and the Administrator. In the event of a difference of opinion in how to designate a particular document, I foresee a collegial conversation between the Agency and OMB, with focus on the context in which that information will be used.

Further, even within the category of "highly influential scientific assessments," the final Peer Review Bulletin allows the agency significant discretion. For instance, it does not dictate the type of peer review mechanism to be used. Rather, Section II, subsection 4 provides that "the choice of a peer review mechanism (for example, letter reviews or ad hoc panels) for influential scientific information shall be based on the novelty and complexity of the information to be reviewed, the importance of the information to decision making, the extent of prior peer review, and the expected benefits and costs of review..."

Indeed, I note that the additional requirements associated with "highly influential scientific assessments" pertain to transparency and independence, which I would characterize as good government. And even these sections (Section III(3)(d), III(5) and III(7)) use terms like "avoid" and "whenever feasible" and "may," which make it clear that the final Peer Review Bulletin does not envision a one-size fits all peer review plan for "highly influential scientific assessments."

Question 8

In the Primer on Regulation, published in 2005 by the Mercatus Center, you wrote, "It is important to limit regulatory activity to identified market failures. In the absence of a significant market failure, individuals are better able to make decisions regarding trade-offs in their lives than government regulators." Do you believe that there are any reasons beyond correcting a market failure that would justify an agency's decision to regulate?

ANSWER

I believe the Executive Branch has a Constitutional duty to issue regulations that implement the laws as Congress has written them, even if those laws do not explicitly correct a market failure, and if confirmed as OIRA Administrator, I commit to take that

duty seriously. My views on this are consistent with those expressed by President Clinton in Executive Order 12866, which states: "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people."

Question 9

At your nomination hearing you discussed the need to analyze the costs and benefits associated with regulations. Are there costs and benefits that cannot or should not be quantified? If so, how do you believe those costs and benefits should be addressed and accounted for in regulatory analysis?

ANSWER

I believe benefits and costs should be understood and quantified to the extent possible, but many costs and benefits are not readily quantified in dollar terms, including those related to privacy, ecological, and natural resource impacts of decisions. Nevertheless, I believe those less-quantifiable impacts should be addressed and accounted for qualitatively as described in OMB Circular A-4. Circular A-4 provides guidance for circumstances where (1) benefits and costs are difficult to monetize; (2) benefits and costs are difficult to quantify; and (3) benefits and costs that are not quantified affect the policy choice. Under these cases, it recommends that all relevant information be presented, and a clear explanation of the policy choice should be provided. This includes the nature, timing, likelihood, location, and distribution of the anticipated effects.

Question from Senator Pryor

Question 1

In comments you submitted concerning the Environmental Protection Agency implementing stricter standards for arsenic in drinking water, you said at the time the agencies' analysis "likely overstates the benefits of the rule" and further said "this can be addressed with sensitivity that estimates benefits based on a value per life-year saved, or age adjusted value per life."

As OIRA Administrator would you give consideration to cost benefit analysis that would result in less of a value being placed on the lives of older Americans compared to younger Americans?

ANSWER

I commit that, if I am confirmed, I will not encourage benefit-cost analyses that discriminate against older Americans. Specifically, I will not apply, or encourage agencies to apply, an age-adjusted value of life (and I apologize for not recalling the

above quote when you discussed it at the hearing). I have never used an age-adjusted metric in my own analysis, and in more recent comments on government regulatory analysis guidelines, I specifically discouraged age-adjusted or quality-adjusted life metrics, in favor of a simple longevity measure.[10]

When evaluating the health benefits of proposed alternative regulations, I believe it is important to understand their influence on life expectancy, in addition to or in lieu of other measures which do not estimate the extent to which regulations extend lives. I think it is important to know whether a life-saving intervention will prolong a person's life for 10 years or 10 days. This is consistent with OMB Circular A-4, which guides agencies to estimates of the number of life-years as well number of lives expected to be saved through regulation.

[10] *Comment on "RIA Guidelines," submitted to the Office of Management and Budget. Public Interest Comment Series, Regulatory Studies Program, Mercatus Center at George Mason University (2003-13) May 5, 2003.*

Additional Post-Hearing Questions
For the Nomination of Susan E. Dudley
to be Administrator of the Office of Information and Regulatory Affairs
Submitted November 17, 2006

Questions from Sen. Lieberman

I. Regulatory Review

Question 1

Critics of your nomination have claimed that you have very frequently criticized federal rulemakings that would increase the stringency of environmental, health and safety standards. Written questions that I submitted to you before the hearing (Lieberman Pre-Hearing Questions) asked about several instances of that, but question number 34 also gave you an opportunity to "identify several of the most significant instances in which you publicly praised and supported a proposed or final agency rulemaking that increased the stringency of environmental, health, or safety requirements."

In your written response, you referred to three regulations that you supported, and you provided a fourth example orally to Committee staff:

a. In your response, you cited your support of EPA's proposals for targeting enforcement activities more effectively. You did not identify a particular publication of yours, but, in comments dated April 1999, you urged EPA to target its enforcement actions to achieve greatest net public health and environmental benefits. In those comments you argued that most federal regulations impose costs with little corresponding benefit to health and the environment, you criticized "excessive internal record-keeping and reporting requirements," you faulted federal reporting requirements for not granting legal immunity to the regulated entity, you urged EPA to leave actual enforcement to the States unless cross-border issues are involved, and you criticized EPA for imposing large penalties where violations do not harm health or the environment. You did not seem to identify any particular area of EPA's regulatory or enforcement program where you advocated increased stringency. *See* S.E. Dudley, "Comments on EPA's Environmental Enforcement and Compliance Assurance Activities: Request for Comments" (Mercatus Center, April 16, 1999). Is that foregoing description of your article accurate? Why did you cite your support of EPA's enforcement-targeting proposals as an example where you supported an agency proposal "that increased the stringency" of regulatory requirements?

Answer (1.a)

A more complete summary of the comment is provided on the Mercatus Web site:

> *RSP commends the Office of Compliance and Enforcement Assurance for its thoughtful examination of its programs and its recognition that it needs to target its enforcement efforts more effectively. There is wide variation in risk reduction benefits across different environmental regulations, so effective targeting of finite enforcement resources could achieve significant improvements in the protection of public health and the natural environment.*[1]

The summary goes on to recommend that EPA:

- *Target its enforcement and compliance assurance efforts on violations that pose real health or environmental risks, with a goal of maximizing the net benefits to human health and the environment,*
- *Clearly articulate compliance expectations, and link those expectations to reductions in real health and environmental risks, but leave actual enforcement of environmental regulations to the states,*
- *Provide communities and consumers objective and risk-based information that can aid in decision-making without causing unnecessary alarm, and*
- *Respond objectively and appropriately to public concerns about perceived risks, and Evaluate market-based ways to better align the goals of the regulated community with social goals.*[2]

I believe better targeting of enforcement efforts will improve environmental outcomes. I did not interpret Senator Lieberman's Pre-Hearing Question #34 as being focused on stringency for its own sake, without regard to environmental results. Rather, my answer provided examples of where I supported agency requirements to improve environmental, safety or health outcomes. In my comments, my focus has been on devising approaches that are effective at improving public health and environmental outcomes, and I believe the comment you cite supports EPA's efforts to do that.

b. In your response, you also cited your support for EPA's revised drinking water regulations that would encourage water efficiency and water conservation. You did not identify a particular publication of yours, but in 2003 you wrote a piece supporting a revised EPA policy under which an apartment owner who installs sub-meters to accurately track water usage by tenants would not thereby become subject to Safe Drinking Water Act regulations. Your article also stated that EPA's proposal did not go far enough, in that EPA's published proposal entertained the possibility of granting local water companies access to buildings where tenants' usage was separately metered. *See* S.E. Dudley, "The Price is Right" (Mercatus Center, November 24, 2003). Thus, your article appears to have supported an EPA

[1] http://www.mercatus.org/publications/pubID.1298/pub_detail.asp
[2] http://www.mercatus.org/publications/pubID.1298/pub_detail.asp

proposal to deregulate, and criticized EPA for not deregulating further. Is that foregoing description of your article accurate? Why did you cite your support of EPA's revised drinking water regulations that would encourage water efficiency and water conservation as an example where you supported an agency proposal "that increased the stringency" of regulatory requirements?

Answer (1.b)

I supported EPA's proposal to increase incentives for water conservation, and recommended that it encourage sub-metering more broadly (in commercial, as well as residential units). My comment supporting EPA's proposal,[3] as well as the op ed you cite, support policies that will effectively increase water conservation.

c. Your response also quoted from a recent article in which you and a co-author expressed the need for additional regulation of exposure to crystalline silica. The article opposed the idea of unblocking OSHA's regulatory process and speeding up the issuance of new standards unless OSHA's regulatory approach is transformed. In particular, you proposed a three-prong approach: *(1)* OSHA should first ascertain whether generation and dispersion of better information would enable market forces to adequately protect health and safety in the workplace; *(2)* Interest groups should be enabled to compete in the establishment of private standards; and *(3)* The tort system needs to be controlled. *See* A.P. Morriss and S.E. Dudley, "Defining What to Regulate: Silica and the Problem of Regulatory Categorization," 58 *Administrative Law Review* 260 (Spring 2006). Your article does support greater regulations of silica exposure, but does not appear to support any particular "proposed or final agency rulemaking," as called for in question 34, or to urge the promulgation of more stringent exposure standards by OSHA. Is that foregoing description of your article accurate?

Answer (1.c)

The article concluded that existing final OSHA regulations were inadequate and urged OSHA to develop more effective regulations to improve health outcomes for workers working with crystalline silica. OSHA has not yet proposed a new regulation, though the Unified Agenda lists it as a priority.

There is much more to my research contained in the 70 page article, which examines the history of silica regulation, and its continued failure to protect workers from exposure. The conclusion does recommend a 3-pronged approach. The first, however, is for OSHA to clearly define the market failures that have impeded efficient solutions to address health risks from silica exposure. It suggests that lack of information, particularly due to long latencies for cancers, may be the root cause of the continuing health hazard. I believe this recommendation is entirely consistent with the first three principles set forth in President Clinton's Executive Order 12866:

[3] The 2003 public interest comment in support of EPA's proposal is available at: http://www.mercatus.org/publications/pubID.1195/pub_detail.asp

1. *Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.*

2. *Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.*

3. *Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.*

The 2nd prong recommended in the article is that "any regulatory action must recognize the diversity in exposure and response across the varied workplaces. Given the varying forms of silica to which workers may be exposed, and the problems of characterizing those forms and their associated health risk, a uniform national standard would unlikely be optimal in all situations." I believe this is consistent with the 4th and 5th principles articulated in President Clinton's Executive Order 12866

4. *In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.*

5. *When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.*

The 3rd prong recognizes that, while the tort system can be a substitute for regulation, experience with silica exposure is not encouraging for the courts' ability to sift through the complex issues to provide just compensation for victims and the proper incentives for reducing health risks in the future. The article cites the massive fraud exposed recently in a multi-district silicosis litigation proceeding in federal district court.[4]

d. You stated to Committee staff that you had publicly praised the FDA's recent labeling requirement for trans fat in food, and you testified at your nomination hearing that you supported OIRA Administrator Graham's "prompt letter" encouraging the FDA to expedite labeling requirements for trans fat. You did not identify a particular publication or public statement, but, you did publish an article expressing no opinion of FDA's trans fat rule except to praise the agency's decision to abandon, in its final rule, its original proposal to force

[4] David Hechler, *Silica Plaintiffs Suffer Setbacks,* NAT. L. J. (Feb. 28, 2005)

food producers to label trans fats as saturated fats. The article also expressed no opinion of the "prompt letter," except to criticize that it "did not acknowledge that the lack of consumer information" about trans fat "was due to federal prohibitions under health claims rules . . . ." S.E. Dudley, "The Bush Administration Regulatory Record," *Regulation* 4, 6 (Winter 2004-2005). Is that foregoing description of your article accurate? Did you ever publish an article or statement supporting the FDA trans fat rule for its increased stringency of regulatory requirements, or supporting the trans fat "prompt letter" for encouraging FDA to expedite a regulation requiring labeling information on trans fat?

Answer (1.d)

I believe the article you cite supports the final trans fats rule, which was not only more stringent than the proposed rule in terms of the requirements it imposed, but also more effective in terms of outcomes. The final rule required a separate line on food labels identifying trans fat content, compared to the proposal which would have simply required trans fats to be classified – expediently, but incorrectly – as saturated fats. More importantly from my perspective, however, is that the ***outcome*** *is superior, in that the label will provide consumers valuable information for their health – information that would have been hidden if the rule had become final as proposed.*

e. Generally, over the years you have written numerous publications commenting on, or expressing your opinion of, numerous specific regulatory initiatives to establish more stringent regulatory standards intended to protect health, safety, and the environment. It would appear that in the great majority of instances you have argued that the increased stringency is not justified, and that in very few instances have you argued in favor of the more-stringent regulatory standards, or criticized them for being insufficiently stringent. Please comment on whether this is an accurate description of your published record, and, to the extent it is, please explain why you have taken this approach in your writings.

Answer (1.e)

I have taken a careful and principled approach in my writings, one that attempts to understand the root cause of problems in order to develop effective regulatory strategies that will achieve real outcomes. I believe that not only is the approach reflected in my writing consistent with the guidelines for regulatory analysis articulated by Democrat and Republican administrations for the last 25 years, but it is reinforced by policy and economic textbooks that cover policy analysis. I believe the support my nomination has received from a large community of scholars and former government officials attests to the scholarship, quality and integrity of my work.

Question 2

In response to several of the Lieberman Pre-Hearing Questions asking about your published criticisms of existing regulatory statutes, you provided assurance that you have never intentionally suggested that agencies violate their statutory mandates and that, if confirmed, you would work with agencies to respect existing law. However, there is concern that in some instances you may have published criticism of agencies for not considering or evaluating options that they had no authority to adopt.

a. In question 14 of the Lieberman Pre-Hearing Question, you were asked about your article advocating that "vulnerable people avoid extended exposure outside during the few days a year when ozone levels are high." In response to the question, you pointed out that EPA's Clean Air Science Advisory Committee had recommended that advisories be issued to encourage sensitive populations to avoid exposure when pollution levels are high. However, in your article, which discussed EPA's standards for implementing the national ambient air quality standard for ground-level ozone, you faulted EPA because it "refused to consider" lower-cost alternatives to the regulations, including having vulnerable people stay indoors on certain days. Do you believe that the Clean Air Act would authorize EPA to adopt a strategy for meeting ambient air quality standards by having vulnerable individuals stay indoors on days of high-pollution, and, if not, why did you fault EPA for not considering this alterative in promulgating its regulations?

Answer (2.a)

Writing as an academic, I have the freedom to think outside the box, and explore approaches for achieving public health goals that may not be consistent with statutory constraints.

I fully recognize that, if confirmed as OIRA Administrator, my role will be very different from what it is now. As I said in my opening statement at my confirmation hearing:

> *As a researcher and academic, I have written extensively, both for scholarly journals and the popular press. Those writings have sometimes been provocative, with the goal of challenging the way people think about the consequences of regulation.*
>
> *If confirmed, however, I will have a different role. The OIRA administrator is responsible for implementing the laws of the land as Congress has written them. I will lead a team of talented and dedicated career analysts at OMB in working with agencies, Congress, and the public on issues regarding regulation, information technology and policy, privacy, paperwork review, and statistical policy.*

b. That same question 14 also asked you about your article criticizing EPA's cap-and-trade approach based on region-wide NOx emissions. In the article, entitled "The EPA Relies on Faulty Market Incentives," you criticized the agency's approach, and advocated alternative approaches such as having a jurisdiction that expects ozone levels to exceed the standard to compensate an upwind jurisdiction to reduce its emissions." You testified at your nomination hearing that you have now recognized that this proposal was a mistake. However, when you made the proposal, did you believe that it was a permissible approach for EPA to adopt under the Clean Air Act, and, if not, why did you criticize EPA's approach and advocate having downwind jurisdictions compensate upwind jurisdictions as an approach that was preferable to EPA's?

Answer (2.b)

In my testimony, I recognized that while Nobel laureate Ronald Coase's theorem—that, in the absence of transaction costs, the initial allocation of property rights will not inhibit negotiations from achieving optimal levels of pollution—may be theoretically correct, it is not a feasible solution in this debate. I recognize that while theoretically accepted, such an approach is unacceptable when considering equity and polluter pays principles—both of which I think should be considered in rulemaking.

As noted in response to question 2.a above, if confirmed as OIRA Administrator, my role will be very different from that of an academic. The OIRA administrator is responsible for implementing the laws of the land as Congress has written them, and if confirmed, I would be committed to that role.

Question 3

Generally, under what circumstances, if any, do you believe that agencies developing regulations should be encouraged or required to evaluate regulatory alternatives that they have no statutory authority to adopt? If confirmed as OIRA Administrator, under what circumstances, if any, would you encourage or require them to do so? Please explain.

Answer (3)

My understanding is that, in order to increase transparency, OMB Circular A-4, "Regulatory Analysis," does encourage agencies to evaluate regulatory alternatives that may best satisfy the philosophy and principles of Executive Order 12866 even if the agency may not have the statutory authority to adopt such alternatives. The Circular recommends that agencies identify such legal constraints, if any, and estimate their "opportunity costs." The reasoning, with which I agree, is that such information may be useful to Congress under the Regulatory Right-to-Know Act. I would note that I view this recommendation not as a strict requirement but rather as a "best practice" based on professional judgment.[5]

[5] "You should also discuss the statutory requirements that affect the selection of regulatory approaches. If legal constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles

I believe this is consistent with President Clinton's Executive Order 12866, which states:

> *(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.*

Question 4

In response to question number 21a of the Lieberman Pre-Hearing Questions, you wrote that "regulatory standards are appropriate when 'externalities' or 'asymmetric information' exist that prevent voluntary contractual relationships from capturing social effects." However, in at least certain situations when you have commented on actual proposed regulatory standards, you have not discussed externalities or informational asymmetries and have seemed to cite the existence of a contractual relationship as obviating the need for regulatory standards. For instance, on April 27, 2000, EPA and the Department of Justice jointly published in the Federal Register a proposed rule "that would provide for access to information concerning the potential off-site consequences of hypothetical accidental chemical releases from industrial facilities." 65 Fed. Reg. 24834 (Apr. 27, 2000). It would "provide for access by the members of the public and government officials to this information in ways that are designed to minimize the likelihood of accidental releases, the risk to national security associated with posting the information on the Internet, and the likelihood of harm to public health and welfare." Id. On June 8, 2000, you and Daniele Schiffman (a Mercatus Center Research Associate) submitted comments on the proposed rule. You two wrote that "the proposed approach will offer little in the way of public benefits . . . ." You explained: "If there is a public demand for this information, as EPA's benefit assessment argues, non-governmental organizations would find value in deriving it. The fact that they don't suggests that the value of the information to the public is less than the cost of the information."

But might there not have been other explanations for the absence of non-governmental organizations providing the public with information on off-site consequences of accidental chemical releases? For instance, chemical plants tend to be sited in poor neighborhoods whose residents cannot afford to pay for such information even though they would very much like to have it. Moreover, how could you be sure that non-profit public health organizations would have the wherewithal to obtain this type of information from hundreds of individual chemical plants were the information not aggregated in the way set forth in the proposed rule?

On reflection, would you agree that the absence of businesses or non-profit organizations providing the information in question to the public might be explained by these alternative explanations, rather than by your conclusion that the information held little value for the public?

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of Executive Order 12866, you should identify these constraints and estimate their opportunity cost. Such information may be useful to Congress under the Regulatory Right-to-Know Act." Circular A-4, page 17, available at: http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf

Answer 4

The cited comment examined a proposal from EPA and the Department of Justice in response to a Congressional mandate to strike a balance between concerns that too much information disclosure would facilitate terrorist activities, and that too little would deny the public a vehicle for encouraging companies to reduce the risk of accidental release. The comment questioned whether the compromise information that EPA and the Attorney General were proposing to share on the Internet would be valuable to the public:

> *How will knowing the physical state and concentration of a chemical educate and inform people if they do not know what the chemical is? How does knowing the statistical model, assumed atmospheric conditions, and duration of release inform someone who does not know the chemical involved, or the outcome hypothesized?*[6]

Under these circumstances, I believe it is very relevant to question whether the public would find the proposed information valuable. Further, since the proposal recognized that "the substance of OCA [off-site consequence analysis] information could be derived from other available data," data sources which would provide the key information missing from the proposed data set, I think it is relevant to question whether the aggregation proposed would add value to the public's knowledge of potential chemical hazards in their communities.

Question 5

Generally, could you please identify any instances in which your comments on actual proposed regulatory standards stated that such standards were justified notwithstanding the presence of a contractual relationship between the regulated entity and the proposed beneficiary of the regulation?

Answer 5

I believe that contractual relationships between consenting parties are superior to one-size-fits-all command-and-control solutions. I respect diversity and individual choice and do not recall having supported a regulation that would have overridden agreed-upon mutual contracts between consenting parties.

Question 6

Questions number 36c and 36d of the Lieberman Pre-Hearing Questions asked you about your article published in *Regulation* on January 1, 2004, entitled "The Bush Administration Regulatory Record," in which you wrote that the faith of OIRA, under then-Administrator John Graham, "in the ability of smarter regulators to analyze problems and achieve socially optimum results . . . has led . . . to the present situation with the mercury emissions rule where the EPA need only suggest ancillary reductions in

[6] Available at: http://www.mercatus.org/publications/pubID.1302/pub_detail.asp

particulate matter to calculate health benefits that dwarf its estimated costs and justify any regulation." The questions asked whether you object to the regulations on those grounds, and, in response, you explained that EPA did not justify its mercury rule based on reductions in mercury, but that, rather, the benefits in the rule stemmed from ancillary reductions in particulate matter. Could you explain why that is objectionable? If the equipment used to control mercury emissions at power plants also reduces substantially the plants' emissions of particulate matter, why shouldn't the benefits of controlling both pollutants be considered together in justifying the rule?

Answer 6

I believe that all benefits of and costs of regulations should be understood to the extent possible. My concern was that mercury regulations ought to produce benefits associated with mercury reductions. EPA is statutorily authorized to address particulate matter (PM), so if further reductions in PM are warranted, EPA need not address it under the guise of a mercury rule, but can do so directly.

Question 7

Question 6 of the Lieberman Prehearing Questions asked whether you would commit to notifying and working with interested members of this Committee before the Administration makes any changes to E.O. 12866. You responded that you are aware of no plans for additional changes to this Executive Order. Would you commit to providing advance notice and to working with interested Committee members if any additional changes to the Executive Order, that you are not now aware of, come under consideration in the future?

Answer 7

I am committed to open communication with Congress, and if confirmed, I will do everything in my power to facilitate that. Ultimately, decisions about whether to issue or revise an Executive Order are a matter of Presidential prerogative, so I cannot make promises about how that process will work. That said, if I am confirmed, I would be pleased to meet with you or your staff about the current review process under the Executive Order, and I would be happy to hear any ideas you may have about the current process.

Question 8

Your husband Brian Mannix is Associate Administrator of the Office of Policy, Economics, and Innovation at EPA. According to EPA's website, this office is the "Agency's focal point for regulatory analysis." If confirmed as OIRA Administrator, do you expect that you would be reviewing regulations created by this office? Do you believe that any steps are necessary to ensure that any evaluations and decisions made by OIRA relating to EPA are impartial? If so, what steps? Please explain.

Answer 8

I expect to review regulations from EPA if I am confirmed as OIRA Administrator. I am prepared to take the steps necessary to avoid any conflict of interest or even the appearance of a conflict of interest due to my husband's work at EPA. I would insist that OIRA treat EPA regulations no differently than those of other agencies.

II. Information and Technology Management

Question 9

The Paperwork Reduction Act (PRA) makes agencies responsible for carrying out sound information dissemination practices. One of the major goals of the PRA is to encourage a diversity of sources for information based on government information.

a. What are the values of making government information available to the public? Do you have any general concerns about making government information available to the public?

Answer 9a

I have no general concerns with making government information available to the public.

I believe the free flow of government information to the public is essential to a democratic society. It provides the public with knowledge of the government, society, and economy – past, present, and future. It is also a means to ensure transparency in government, to effectively manage the government's operations, to maintain the healthy performance of the economy, and is itself a commodity in the marketplace.

If confirmed, I will work with the Administrator of E-Government and IT to ensure agencies continue to take advantage of the various information dissemination channels available.

b. How will you implement the information dissemination mandates in the PRA?

Answer 9b

If confirmed, I will work with the Administrator of E-Government and IT to assess agency information dissemination practices. OMB reviews agency budget submissions, Information Resources Management Strategic Plans, agency enterprise architecture activities, annual reports required under the E-Government Act, and other materials to promote continued improvements in public access to government information, identify cost-effective opportunities to reduce duplicative processes, and promote more efficient and effective information resources management.

c. In what circumstances, if any, should federal agencies restrict public access to government information that is not explicitly protected from disclosure (for example, information protected because it is classified, personal information,

proprietary, or relates to an ongoing criminal investigation)? Please explain your answer.

Answer 9c

I believe that, as a general matter, access to and dissemination of government information should not be restricted except that which is sensitive (e.g., exempt from disclosure under one or more of the exemptions from the Freedom of Information Act). Agencies have a responsibility to provide information to the public consistent with their missions, in a cost-effective manner that achieves the best balance between the goals of maximizing the usefulness of the information and minimizing the cost to the government and the public.

Question 10

Both the PRA and OMB's implementing guidance set the basic standard that agencies shall not charge user fees for government information which exceed the cost of dissemination. According to OMB guidance, including Circular A-130, the cost of dissemination does not include the cost of initially collecting and processing the information. How will you implement this policy?

Answer 10

These PRA requirements were included in OMB's Memorandum M-06-02, "Improving Public Access to and Dissemination of Government Information and Using the Federal Enterprise Architecture Data Reference Model," found at: http://www.whitehouse.gov/omb/memoranda/fy2006/m06-02.pdf.

Agencies must avoid exclusive or restrictive dissemination arrangements (e.g., establishing user fees for government information exceeding the cost of dissemination) that would interfere with the availability of information dissemination products on a timely and equitable basis.

OMB staff inform me that to help achieve this policy, agencies work to understand the marketplace in which their information dissemination products are placed by establishing and maintaining communications with and providing adequate notice to the public, State and local governments, industry, and specific user groups.

Sometimes, statutory requirements are at variance with this policy, and agencies are required to charge user fees higher than the cost of dissemination. Other times, agencies can set user fees higher than the cost of dissemination where the agency collects, processes, and disseminates the information for the benefit of a specific identifiable group beyond the benefit to the general public.

Alternatively, agencies can set user fees at less than cost of dissemination because of a determination that higher charges would constitute a significant barrier to properly performing the agency's functions, including reaching members of the public whom the agency has a responsibility to inform.

If confirmed, I will work with the Administrator of E-Government and IT to ensure agencies effectively disseminate government information to the public by reviewing agency budget submissions, Information Resources Management Strategic Plans, agency enterprise architecture activities, annual reports required under the E-Government Act, and other materials.

Questions from Sen. Lautenberg

Question 1

A recent report by Nicholas Stern, the former Chief Economist of the World Bank, called Global Warming "the greatest and widest-ranging market failure ever seen." Do you agree or disagree with his assessment? If you disagree, please explain why.

Answer 1

I have not read the report referenced in the question, nor have I studied global warming. I have written, however, that "Environmental pollution is the classic example of an 'externality,'"[7] which is an important form of market failure.

Question 2

Although you may disagree with Mr. Stern's assessment, please assume for the purpose of this question that he is correct. If that were the case, what do you think should be done by the United States and other governments to address this global failure of the market?

Answer 2

I do not feel qualified, without having conducted any inquiry into global warming, to make recommendations for action by U.S. or other governments.

Question 3

Please provide your views on the current changes to the TRI program that have been proposed by EPA.

Answer 3

While I have studied TRI rules in the past, I am not familiar with the current changes to the TRI program that have been proposed by EPA. Without having read them, I do not have any views on them.

---

[7] S.E. Dudley, *Primer on Regulation,* p. 33. November 2005. Available at http://www.mercatus.org/Publications/pubID.2331/pub_detail.asp.

Question 4

Please provide four instances where you have supported adopting or strengthening environmental or health and safety regulations that the business community opposed?

Answer 4

Nearly every regulation will attract some support and some opposition from businesses and other interest groups. As an independent researcher, my focus has been on the broader public interest, and I have not kept track of the positions taken by special interests.

The costs of regulation are not ultimately borne by business entities, but by people. Higher costs translate into higher prices, lower wages, lower returns on investment, lower tax receipts, and/or the absence of products (e.g., new medicines), jobs, or other opportunities from the marketplace. These costs are born by consumers, workers, retirees and other investors, and taxpayers. Regulations also have benefits that accrue to the same people. The positions I have taken are neither pro- nor anti-business, but pro-people. At least that has been my honest objective.[8]

I have written most of my analyses of regulation while at the Mercatus Center at George Mason University, an independent, non-profit research center that does not conduct directed donor-sponsored research. Our policy to ensure the independence of research states, in part:

> *Mercatus financial supporters have absolutely no influence or control over the research design, methodology, analysis, or findings of Mercatus research projects, nor do they have influence or control over the content of educational programs. Offers of financial support predicated on such expectations are not accepted.*[9]

Question 5

If confirmed, will you require OIRA to document and make publicly available all substantive edits made during both formal and informal reviews of rules, guidance and other agency documents, and not give editorial directions orally without written documentation of those directions?

[8] I believe letters of support from regulatory scholars attest to the quality and independence of my work, including my ability to look beyond the special interests to understand the broader public interest.
[9] For the full policy on the independence of research , please visit www.Mercatus.org and click on "About."

Answer 5

If confirmed, I will be committed to preserving and, where appropriate, building on the transparency and disclosure requirements in President Clinton's Executive Order 12866, as well as the increased transparency introduced in this Administration.

I believe in the importance of government transparency. OIRA is governed by disclosure procedures that are contained in Executive Order 12866 and in a Memorandum that former OIRA Administrator John Graham issued in October 2001. If confirmed, I will review the existing requirements and be open to considering areas in which modifications would be appropriate. In this regard, I would be happy to receive and consider suggestions for possible changes.

Question 6

If the answer to question five is no, what specific proposals do you have to ensure transparency at OIRA, so that the public will know what changes to rules, guidance and other agency documents OIRA is recommending or requiring, during formal and informal reviews?

Answer 6

See answer to Question 5, above.

October 20, 2006

The Honorable Susan Collins
Chairman
Committee on Homeland Security and Government Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Collins:

The National Association of Home Builders (NAHB) would like to express its strong support for the nomination of Susan E. Dudley to be Administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). Ms. Dudley has shown herself to be a rigorous analyst of regulations, their implications, and their effects.

Known as "The Voice of the Housing Industry," NAHB is a federation of more than 850 state and local home builder associations nationwide, encompassing 236,000 members. Our members include individuals and firms engaged in land development, single and multifamily construction, multifamily ownership, building material trades, and commercial and industrial projects. Over 95 percent of our members are classified as small businesses, and our members collectively employ over eight million people nationwide. NAHB members build 80 percent of the new home construction every year.

Housing may be the most heavily regulated industry in the country, considering local, state, and federal regulations. Since housing is such a huge industry–approximately 12 percent of Gross Domestic Product (GDP) for construction alone–regulations that affect housing can have very large consequences for households, businesses, and workers, whether those consequences were intended or unintended. Ms. Dudley has established a history of rigorous analysis of regulations for their effectiveness in accomplishing their stated goals, as well as the unintended consequences of those regulations.

Susan Dudley can be expected to use her office to mold regulations to achieve their statutory purposes, executing the law regardless of personal opinions about the statute's wisdom. However, she can also be expected to see that regulatory proposals are examined thoroughly, so that they are not only effective, but also efficient.

Thank you for your careful consideration of this nomination and for considering NAHB's reasons for support. If you have any questions, or if I can assist you in any way, please feel free to contact me.

Best regards,

Gerald M. Howard

GMH/ajh

Center for Science in the Public Interest • Clean Air Watch • Clean Water Action • Defenders of Wildlife • Earthworks • Friends of the Earth • Greenpeace USA • National Environmental Trust • Natural Resources Defense Council • Physicians for Social Responsibility • Southern Utah Wilderness Alliance • Union of Concerned Scientists

Re: Oppose Susan Dudley's nomination for OIRA administrator

October 23, 2006

The Honorable Members
Committee on Homeland Security and Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator:

On July 31, 2006, the Bush administration nominated Susan Dudley for administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). If confirmed, Dudley would wield enormous power over how our nation's landmark environmental, health, and safety laws are implemented, because the administrator of OIRA plays an extremely powerful role in establishing regulatory safeguards for every government agency.

After carefully reviewing Dudley's extensive public record, we are deeply troubled by the paucity of evidence indicating any support for the laws and regulations that protect the environment and public health. In fact, Dudley's writings consistently demonstrate that her views are radically outside the mainstream on important public policy issues. We urge you to oppose this nomination. As the director of regulatory studies at the industry-funded Mercatus Center, Dudley has promoted policies that have ignored the law, science, and public opinion. Instead, she has consistently advanced an anti-regulatory agenda that would do more to protect corporate polluters than the public's health and safety.

For instance, in 2001 Dudley publicly advocated against a stronger health standard for arsenic, siding with the Bush administration, which, at the behest of the mining industry, withdrew an EPA rule that would have reduced the amount of toxic arsenic in our nation's drinking water. Both the U.S. House and Senate disagreed with this stance, voting overwhelming to block the Bush administration from delaying or softening the new arsenic rule. In a unanimous opinion issued in 2003, the U.S. Court of Appeals for the D.C. Circuit upheld the arsenic standard despite a vigorous challenge from industry. Only after public outcry, a lawsuit, and a National Academy of Sciences report confirming arsenic's cancer risks did the Bush administration finally reverse course and allow the new arsenic rule to stand.

Dudley has further flaunted her disregard for public health and sound science by opposing clean air protections. Dudley criticized the 1997 ozone standard by claiming that ozone — the main component of urban smog — is actually beneficial because it protects us from skin cancer.

Dudley wrote that the "standard would harm public health. Ozone protects against harmful ultra-violet radiation, and the detrimental health effects of increased UV-B penetration are likely to be greater than the projected health benefits of lowering ozone concentrations. When costs are considered, the ozone standard looks worse." While that may be true for stratospheric ozone found many miles above the earth's surface, ground-level ozone causes thousands of emergency room visits, hundreds of thousands of asthma attacks, and other illnesses each year.

Dudley would have merely required the federal government to issue more health advisories rather than require reductions in ozone pollution. When testifying before Congress, she stated that "public health advisories and other targeted approaches may be an effective alternative to standard setting" and that "an expanded air pollution warning system [should] be initiated so that sensitive individuals can take appropriate 'exposure avoidance' behavior."

Dudley is also far outside the mainstream when it comes to our nation's energy policies. Increasing the fuel economy performance of our vehicles is the cleanest, fastest and most reliable way to reduce America's oil dependence and give consumers lasting relief at the pump. According to a 2002 report by the National Academies of Sciences, we have the technology today to substantially increase car and truck fuel economy levels without compromising consumer choice or vehicle safety. Recent studies have even suggested that U.S. automakers need to increase fuel economy standards in order to stay competitive. Despite overwhelming public support for improved gas mileage, Dudley called a decision by the National Highway Traffic Safety Administration to raise fuel economy standards for light trucks the "Worst rule of 2003." President Bush has existing legal authority to increase passenger fuel economy standards, but to date he has failed to exercise this authority. Based on her past comments, it is likely that if Dudley became OIRA's chief, she too would advise Bush to resist any urge to increase our nation's fuel economy standards despite the public's desire for a new direction.

On behalf of our millions of members, we urge you to oppose Susan Dudley's nomination. Moreover, we urge you to ask President Bush to withdraw her nomination, unless her views can receive a full airing. Little time remains before Congress adjourns, yet President Bush took nearly 10 months to nominate Susan Dudley after the former OIRA administrator, John Graham, announced his departure. Thus, it is highly likely that the President's only strategy for securing her controversial appointment is to subvert the Senate's will by seeking a recess appointment. As administrator of OIRA, Susan Dudley would pose a grave threat to our nation's public health and the environment.

Sincerely,

Michael Jacobson
Executive Director
Center for Science in the Public Interest

Frank O'Donnell
President
Clean Air Watch

Paul Schwartz
National Policy Coordinator
Clean Water Action

Mary Beth Beetham
Director of Legislative Affairs
Defenders of Wildlife

Lauren Pagel Nason
Policy Director
Earthworks

Sara Zdeb
Legislative Director
Friends of the Earth

Rick Hind
Legislative Director, Toxics Campaign
Greenpeace USA

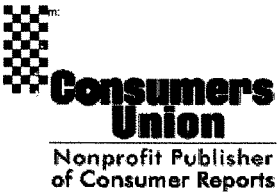
Karen Steuer
VP of Government Affairs
National Environmental Trust

Karen Wayland
Legislative Director
Natural Resources Defense Council

Will Callaway
Legislative Director
Physicians for Social Responsibility

Pete Downing
Legislative Director
Southern Utah Wilderness Alliance

Alden Meyer
Director of Strategy and Policy
Union of Concerned Scientists



Re: Susan Dudley's nomination for OIRA administrator

October 30, 2006

The Honorable Susan Collins
Committee on Homeland Security and Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Madam Chairman:

On July 31, 2006, the Bush administration nominated Susan Dudley for administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). As administrator for OIRA, Dudley would wield considerable power over how our nation's environmental, health, and safety laws are implemented. The administrator of OIRA plays an extremely powerful role in establishing regulatory safeguards for every government agency.

Consumers Union (CU), publisher of *Consumer Reports*, has a longstanding history of working to improve health and safety protections for consumers, and has worked to ensure that consumer protection laws are properly implemented and enforced. After carefully reviewing Ms. Dudley's extensive record, we are deeply troubled by a number of her past statements and positions. For example,

- Despite overwhelming public support for improved gas mileage, Dudley called a decision by the National Highway Traffic Safety Administration (NHTSA) to impose a very modest increase in fuel economy standards for SUVs, minivans and pickup trucks - standards that had not been increased for years - the "Worst rule of 2003." Dudley argued that NHTSA "continues to force vehicle manufacturers to achieve higher miles per gallon than the market would offer, or consumers would choose, in the absence of the regulation. Absurdly,

Consumers Union
Headquarters Office
101 Truman Avenue
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(202) 462-6262
(202) 265-9548 (fax)

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(512) 477-4431
(512) 477-8934 (fax)

its economic model shows large net benefits to consumers even if markets are assumed to operate perfectly, i.e., without counting any externalities. We know this must be false, because any regulatory constraint that forces consumers away from their preferred choices must have negative net benefits (i.e., make Americans worse off)."

- In spite of deaths and injuries to children and short-statured women from air bags, and after a Congressional mandate in 1998 ordered NHTSA to improve air bag safety and minimize those risks, Dudley, in comments submitted by her organization, Mercatus, opposed NHTSA's rulemaking. She argued that the market would maximize safety, suggested elimination of the air bag rule altogether, and voiced general opposition to all safety standards. Ironically, it was precisely the lack of adequate safety standards for air bags that led to the air bag tragedies.
- Dudley opposed a rule to maintain the public's right to know about the risks they would face from a chemical plant accident or attack: "If there is a public demand for this information, as EPA's benefit assessment argues, nongovernmental organizations would find value in deriving it. The fact that they don't suggests that the value of the information to the public is less than the cost of the information."

Ms. Dudley's views on the role of heath and safety agencies clearly appear far outside the mainstream – on fuel efficiency, protection from air bags that injure children, or the public's right to know about a chemical plant accident. We are concerned that an OIRA administrator with Dudley's apparent ideological hostility to regulation could have a devastating impact on these safeguards.

Given the likely very short timetable anticipated in the post-election Senate session and the grave importance of this nomination, we ask that you refuse to vote on the nomination until concerns about Susan Dudley's past statements and record have been adequately addressed. Thank you for your attention to these concerns.

Sincerely,

Sally Greenberg
Senior Product Safety Counsel
Washington Office

Ann Wright
Senior Policy Analyst
Washington Office

Wed, 11/01/06 10:12:02AM From: US Chamber To: Susan Collins

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
Government Affairs

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

November 1, 2006

TO THE MEMBERS OF THE U.S. SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, strongly urges you to confirm Susan Dudley as the next Administrator of the Office of Information and Regulatory Affairs (OIRA), in the Office of Management and Budget.

Susan Dudley is a nominee with great integrity, personal warmth, and relevant work experience. She is an author, an educator, and an economist, with a long work history in regulatory matters in both the public sector—as a former employee of the U.S. Environmental Protection Agency and OIRA—and private sector. Susan Dudley understands the importance of transparency in the rule making process, and recognizes the detrimental impact excessive regulation can have on both the U.S. economy and American competitiveness in the global marketplace.

The Office of Administrator of OIRA is dedicated to ensuring that federal rules provide the maximum benefit to the American public. Susan Dudley has spent most of her career focusing on just that, and she is committed to the objective evaluation of regulations.

The U.S. Chamber understands that this Committee will give Ms. Dudley a fair and impartial nomination hearing, focusing on her stellar record of achievement and career accolades. She is a very qualified candidate and the obvious successor to this important post.

Based on the foregoing, the U.S. Chamber strongly urges you to confirm Susan Dudley as the next Administrator of OIRA.

Sincerely,

R. Bruce Josten

JOINT CENTER
AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES

November 8, 2006

The Honorable Susan M. Collins
Chairman
Senate Committee on Homeland Security and Governmental Affairs
340 Senate Dirksen Office Building
Washington, DC 20510

The Honorable Joseph I. Lieberman
Ranking Member
Senate Committee on Homeland Security and Governmental Affairs
340 Senate Dirksen Office Building
Washington, DC 20510

Dear Chairman and Ranking Member:

We are writing to urge your expeditious consideration and approval of the nomination of Susan Dudley to be Administrator of the Office of Information and Regulatory Affairs. We are scholars and practitioners working in the areas of environmental policy, regulation, economics and law. We are Democrats, Republicans, and Independents; liberals, moderates, and conservatives[1].

OIRA is located at a juncture in Washington where the din of special interests, on all sides, is particularly loud. The Administrator needs to be able to hear all these voices, but not be unduly swayed by them. He or she should have the ability to discern the often much softer voice of broader public interest, and to bring it to the fore. Susan Dudley has the training, the experience, and the temperament to do that.

Susan Dudley's superb qualifications for the position of OIRA Administrator reflect twenty-five years of experience in federal regulatory policy. She has worked for two federal regulatory agencies (CFTC and EPA), and as an OIRA staff economist. Coupled with this hands-on experience in government is her accomplished record as a teacher and researcher at George Mason University.

[1]The views expressed in this letter represent those of the signatories and do not necessarily reflect those of the institutions with which they are affiliated.

A bipartisan consensus exists over the last twenty-five years that economic analysis at OIRA has an important role to play in improving public policy. The proper debate is about how to conduct such analyses and how much weight to give them. Susan Dudley's knowledge and experience qualify her to engage in that debate as Administrator of OIRA.

Given her track record, we are confident that Susan Dudley is committed to an open and transparent regulatory process that relies on careful, objective analyses of the consequences—intended and unintended—of regulatory alternatives. She examines policy questions in a thoughtful, principled, and objective manner. We believe her experience, commitment, and integrity make her well-suited for the challenging position of OIRA Administrator.

Very truly yours,

Jonathan H. Adler
Professor of Law
Co-Director, Center for Business Law and Regulation
Case Western Reserve University School of Law

William P. Albrecht
Professor of Economics
The University of Iowa

Donald R. Arbuckle
Clinical Professor
Economic, Political and Policy Sciences
The University of Texas at Dallas
Acting Administrator, OIRA, OMB (1998-1999; 2001, 2006)

J. Howard Beales III, Ph.D.
Associate Professor
Department of Strategic Management and Public Policy
The School of Business
The George Washington University

Donald J. Boudreaux
Chairman and Professor
Department of Economics
George Mason University

Henry N. Butler
Professor of Economics and Law
Chapman University

John E. Calfee
Resident Scholar
American Enterprise Institute for Public Policy Research

Tyler Cowen
Professor of Economics
George Mason University

W. Mark Crain
William E. Simon Professor of Political Economy
Department of Economics and Business
Lafayette College

Robert Crandall
Senior Fellow
Brookings Institution and AEI-Brookings Joint Center

Christopher DeMuth
President
American Enterprise Institute for Public Policy Research
Administrator, OIRA, OMB (1981-1984)

Harold Furchtgott-Roth
President
Furchtgott-Roth Economic Enterprises
Commissioner, FTC (1997-2001)

Gerald D. Gay
Chairman and Professor of Finance
Georgia State University

Rick Geddes
Associate Professor and Director of Undergraduate Studies
Department of Policy Analysis and Management
College of Human Ecology
Cornell University

John Graham
Dean
Pardee RAND Graduate School
Administrator, OIRA, OMB (2001-2006)

Wendy Gramm
Distinguished Senior Scholar
Mercatus Center
George Mason University
Administrator, OIRA, OMB (1985-1988)

Robert Hahn
Executive Director
AEI-Brookings Joint Center

Thomas W. Hazlett
Professor of Law and Economics
George Mason University

Thomas D. Hopkins
Professor of Economics
Rochester Institute of Technology

Daniel Houser
Professor of Economics
George Mason University

Peter G. Klein
Associate Director
Contracting and Organizations Research Institute
University of Missouri

Thomas A. Lambert
Associate Professor of Law
University of Missouri--Columbia

Laura Langbein
Professor and Director, SPA PhD Programs
Department of Public Administration and Policy
School of Public Affairs
American University

Kenneth M. Lehn
Samuel A. McCullough Professor of Finance
University of Pittsburgh

Robert Litan
Director
AEI-Brookings Joint Center

James B. MacRae, Jr.
Adjunct Professor
George Mason University School of Law
Acting Administrator, OIRA, OMB (1989-1992)

Steven Manaster
Professor of Finance
Leeds School of Business
University of Colorado at Boulder

Kevin A. McCabe
Professor of Economics and Law
George Mason University

James C. Miller III
Distinguished Fellow
Center for Study of Public Choice
George Mason University
Director, OMB (1985-1988)
Chairman, FTC (1981-1985)

John H. Moore
President Emeritus
Grove City College

Andrew P. Morriss
H. Ross and Helen Workman Professor of Law and Professor of Business
University of Illinois

Michael C. Munger
Chair, Political Science
Duke University

Timothy J. Muris
Foundation Professor
George Mason University School of Law
Chairman, FTC (2000-2004)

Albert L. (Nick) Nichols
Director
LECG Consulting

Bruce M. Owen
Morris M. Doyle Centennial Professor in Public Policy and Director
Public Policy Program
School of Humanities and Sciences
Stanford University

Daniel D. Polsby
Dean and Professor of Law
George Mason University School of Law

Robert S. Raucher
Executive Vice President
Stratus Consulting Inc.

Larry E. Ribstein
Mildred Van Voorhis Jones Chair
University of Illinois College of Law

Paul Rubin
Samuel Candler Dobbs Professor of Economics and
Law Department of Economics
Emory University

Thomas R. Saving
University Distinguished Professor of Economics
Texas A&M University

David Schoenbrod
Trustee Professor of Law
New York Law School

Lee M. Silver
Professor of Molecular Biology and Public Affairs
Woodrow Wilson School of Public and International Affairs
Princeton University

Randy T. Simmons
Department of Political Science
Utah State University

Benn E. Smith, M.D.
Associate Professor of Neurology
Mayo Clinic College of Medicine

Robert D. Tollison
Professor of Economics
Clemson University

W. Kip Viscusi
University Distinguished Professor of Law, Economics and Management
Vanderbilt University

Scott Wallsten
Senior Fellow
AEI-Brookings Joint Center

Melinda Warren
Director, Weidenbaum Center Forum
Washington University

Murray Weidenbaum
Mallinckrodt Distinguished University Professor
Washington University
Chairman of the Council of Economic Advisers (1981-1982)

Bruce Yandle
Dean Emeritus, College of Business and Behavioral Science
Clemson University

Todd J. Zywicki
Professor of Law
George Mason University School of Law

November 9, 2006

The Honorable Susan Collins
The Honorable Joe Lieberman
Committee on Homeland Security & Government Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairwoman Collins and Ranking Member Lieberman,

I am pleased to commend to you Susan Dudley, a nominee before your committee for the position of Administrator of the Office of Information & Regulatory Affairs (OIRA) in the White House Office of Management & Budget, who is an excellent candidate and a constituent of Virginia's 11th District.

Susan has been a strong champion throughout her career of research and debate on regulatory issues. She believes that the more information that government officials and the public have about regulatory decisionmaking, the better the outcomes for the country. Her work at the Mercatus Center at George Mason University is a testament to that belief. Openness and transparency about costs are the hallmark of her work. Just as taxpayers expect us to account for the efficient use of every one of their dollars spent on government programs, consumers and investors expect us to account for increased costs to businesses from regulation. Susan's advocacy for greater transparency in regulatory costs is a simple, good government approach. We all deserve to know what the real costs of our mandates are.

John Graham, the past administrator of OIRA, has been praised for increasing the transparency of the office and its inputs on regulation. Susan Dudley will be a strong advocate for that continued openness and sunshine on the often hidden process of rulemaking.

One area of OIRA's responsibility is often overlooked – paperwork. When Congress created this office in 1980, we made its primary function the review and approval of all government forms and information collections. This office recently released its annual Information Collection Budget which shows us an ever increasing paperwork burden on

the American public now standing at 8.4 billion hours per year. The overwhelming majority of that burden comes from recordkeeping and compliance with our complicated tax code. I know Ms. Dudley will take this part of her responsibility seriously. Finding ways to reduce the paperwork burden without eliminating vital information for the government requires the creativity and talent that Susan Dudley has demonstrated in her career.

Susan's credentials are also impeccable. She served in career positions in the federal government at OIRA and at the EPA. She holds degrees from the University of Massachusetts and the MIT Sloan School of Management in resource economics and management.

Susan and her family also maintain a personal commitment to environmental stewardship. Like many Northern Virginians she and her husband drive hybrid cars. They also own 40 natural acres in Northern Virginia and are working with their neighbors to preserve the historic and ecological integrity of their 18th century mill town through private conservation.

No one who has dedicated themselves so fully to improving the regulatory process can be fairly called "anti-regulation." In fact, the improvements that she has recommended in her career would only serve to strengthen the case for government regulation. If regulations can be universally acknowledged as smart, efficient, sensitive to small businesses, and with alternatives thoroughly reviewed; then how could they be questioned. Susan Dudley, if confirmed, will be a credit to her office and a credit to the 11th District of Virginia.

Sincerely,

Tom Davis
Chairman

Susan Dudley, Part 8

Summing Up

8 Nov 2006 in Regulatory Policy, People & Institutions

This has been a long series. Thanks to our faithful readers who have kept up throughout. A quick review:

- Monday, October 30: Background on OIRA
- Tuesday, October 31: Public Citizen and OMB Watch, the Authors of the Opposition Report
- Wednesday, November 1: An Introduction to Opposition Report
- Thursday, November 2 The Case of Airbags
- Friday, November 3: Dudley's Impossible Requirements
- Monday, November 6: Dudley's Views on Consumer Sovereignty, Nonuse Value, and Lifesaving
- Tuesday, November 7: Dudley's "Radical Ideas"

Public Citizen and OMB Watch say Susan Dudley is unfit to serve as Administrator of OMB's Office of Information and Regulatory Affairs. We began this series assuming that they had assembled the best case against her and presented it in their report "The Cost Is Too High."

Today we briefly summarize our review.

The Report says that it provides documentation why Dudley is "unfit to serve" as Administrator of OIRA, but the evidence for that is limited. Given Dudley's extensive paper trail, consisting of 33 public interest comments submitted from her post at Mercatus, the Report cites or references just 12 of them. It's not clear why the authors do not mention, much less analyze, the other 22. Dudley's comments on specific proposed regulations should provide an outstanding, and highly revealing, window into her expectations for regulatory design and regulatory impact analysis.

For the 12 public interest comments cited in the Report, in no instance did the authors present her arguments objectively and explain why they are wrong. The Report quotes a small portion of text, and typically these snippets are selective (i.e., lacking in context) or inaccurate (e.g., missing crucial text necessary to understand the argument). In one case we discovered that the

Authors
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Topics
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HUD

authors of the Report had stitched together snippets from different documents addressing different issues in a way that clearly implied a seamless thought, then skewered that thought as nonsensical.

It's possible that a clear picture of Dudley's regulatory philosophy doesn't come through after reading all 33 public interest comments. For example, each of these documents refers to a specific proposed regulation, or other set of technical documents, that is hundreds of pages long. Those who lack sufficient background knowledge in each of these 33 specific areas, or the patience to wade through it all, might find it daunting to just to get up to speed.

For people in this awkward position of technical ignorance, the one publication that clearly explains Dudley's regulatory philosophy in non-technical terms is her *Primer on Regulation*. This short document, which takes less than an hour to read, is nowhere cited in the Opposition Report.

Dudley's Regulatory Philosophy: Six Parts Executive Order 12866, One Part Moderate Libertarianism

Dudley's writings on regulation, in both specific cases and her *Primer*, make her regulatory philosophy transparent. This regulatory philosophy is dominated by the text of Executive order 12866. In our review of Dudley's "impossible requirements," we provided a crosswalk between six of Dudley's seven criteria for evaluating regulation and the criteria set forth in the EO. The authors of the Opposition Report might have an empirical case that Dudley doesn't consistently her regulatory philosophy -- though if they have such a case, they did not present it -- but they cannot have had any difficulty locating it.

Dudley's seventh criterion is the one part moderate libertarianism in the mixture. Dudley is transparent in her view that government ought to respect individual choice and private property. Quoting from her *Primer:*

> Government actions that undermine individual liberty and responsibility, and do not respect private property are not likely to improve the welfare of American citizens. The fifth amendment of the U.S. Constitution provides that private property shall not be taken for public use without just compensation (p. 43).

We've characterized this as *moderate* libertarianism. A strict libertarian would say that it is impossible for government to "undermine individual liberty and responsibility" but still make people better off. Dudley's view is skeptical but empirical. We've given at least one significant example in which this empirical test could be met: a situation in which regulators are much more knowledgeable than the public about the facts of a specific risk and thus able to craft rules that achieve greater social welfare than what uninformed citizens would accomplish making their own decisions. (This example is empirical in

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Archives
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September 2006
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two respects. First, regulators must actually possess superior factual knowledge; and second, the regulation they craft must actually succeed in making people better off. The first empirical test by itself is a necessary but insufficient condition.)

Certainly more than her critics, Dudley appears to be acutely sensitive to *governmental* failure, the problems which arise from every attempt to remedy a *market* failure through regulatory means. Regulation is no easier to perfect than markets. In 1988 Charles Wolf neatly summarized the trade-off between markets and regulation (a subset of what he called "nonmarket systems"):

> [T]he choice between markets and governments is not a "pure" choice but a matter of degree. Yet the degree that is chosen matters a great deal from the standpoint of both the economic and social performance of the resulting system: The more the systemic choice favors the market, the more the system confronts the pitfalls and shortcomings of market failure; and the more the systemic choice favors the nonmarket, the more the resulting system confronts the pitfalls and shortcomings of nonmarket failure. From the standpoint of effective economic performance, the record strongly suggests that the shortcomings of nonmarket failure overwhelm those associated with market failure. Market systems simply and decisively perform better than nonmarket systems in static as well as dynamic terms, and in terms of both short-run allocative efficiency and long-term economic growth.
>
> Advocates of nonmarket systems, however, rebut this conclusion by arguing that other dimensions of system performance -- for example, social equity, public participation, and accountability -- are at least as important in evaluating system performance as the efficiency and growth dimension. According to these criteria, the contention is that nonmarket systems compete with market systems on much more favorable terms, in both an absolute as well as a relative sense...
>
> The effective functioning of market systems can be seriously jeopardized by pluralistic, democratic processes. The jeopardy arises because of the incentives that these processes create fr steadily increasing encroachment by nonmarket forces on the effective functioning of the market. These incentives result from the separation or "decoupling" between those who receive the benefits and those who pay the costs of government programs (pp. 171, 173).

Dudley doesn't cite Wolf in her *Primer* -- that's not surprising, as it is a somewhat dated work. But her *Primer* suggests broad agreement with Wolf's two thesis: (1) the choice between markets and governments is always an

imperfect one, but the imperfections of markets are typically less severe that those of governments, and unlike governments they they are often self-correcting; and (2) democratic politics create a certain amount of entropy that, if left unresisted, will lead to the slow abandonment of market systems. Institutionally, the role of OIRA is to serve as the final bulwark against that entropy.

Public Citizen's and OMB Watch's Regulatory Philosophy: The Benefits of Regulation Are Rights, the Costs of Regulation Are Benefits

Public Citizen and OMB Watch oppose the regulatory principles set forth in Executive order 12866 (and embraced by Dudley). Section 1 establishes a somewhat minimalist ideal for the role of government ("Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need").

Indeed, these advocacy organizations so clearly dislike the regulatory philosophy and principles of Executive order 12866 that it's entirely possible that they would oppose any nominee who agreed to uphold them. Documents from the early 1990s are limited on the Internet, but our recollection is that Public Citizen opposed Sally Katzen's nomination as OIRA Administrator in 1993 because she did not promise to abandon these principles. Since its establishment in 1983, OMB Watch always has been an opponent of OMB.

The Benefits of Regulation Are Rights

For Public Citizen and OMB Watch, there is nothing special about the market system that justifies its protection, preservation, or improvement. Markets will never achieve their goals, so it is essential for them to oppose market systems and support regulation and other nonmarket systems. Through regulation -- and regulation alone -- is the achievement of their goals feasible. "Regulatory protections," they believe, "are entitlements in the truest sense of the word:"

> Regulatory protections of the public health, safety, civil rights, environment, and the costs imposed on corporate special interests when the federal government finally forces them to do the right thing as corporate citizens. They are, instead, entitlements in the truest sense of the word. Through the democratically controlled federal government, the public pools its resources to create institutions and policies strong enough to counter the forces we are otherwise powerless to face as isolated individuals. FDR explained it best in a July 1933 fireside chat: "It goes back to the basic idea of society and of the nation itself that people acting in a group can accomplish things which no individual acting alone could even hope to bring about." In the face of harmful pollution, unsafe products released into the national marketplace, and other hazards that corporate special

> interests expose us to without otherwise being forced to internalize the attendant public costs, we are entitled to regulatory safeguards. Our government owes us nothing less (pp. 33-34).

In short, Public Citizen and OMB Watch have a dramatically different, perhaps maximalist, view of government's role. From reviewing their web sites, it's hard to identify any regulatory intervention that they consider an unnecessary or inappropriate constraint on markets and individual choice. The only examples we can find are cases in which they believe a regulatory action does not go far enough.

> *The Costs of Regulation Borne by People We Don't Like Are Benefits*

We also have had trouble finding examples in which Public Citizen or OMB Watch have expressed concern that proposed regulations are too costly. The examples we did find involve regulations restricting how nonprofits conduct voter registration drives, regulations requiring voters to show photo identification, and laws requiring US citizenship to vote. OMB Watch also opposes the Federal Election Commission's "electioneering communications" rule, which restricts (if not bans) indirectly partisan political advertising by nonprofits. The unifying theme among these regulations is that they impose costs either on nonprofits such as Public Citizen and OMB Watch or on their supporters.

The Opposition Report does not deal with regulations in which Public Citizen or OMB Watch would bear regulatory costs. It concerns only the subset of regulations in which regulatory costs are borne by others. The Report makes clear the distinction:

> [N]ot all costs have the same moral or ethical value. Some regulatory costs represent the cost to industry of what it should have done as a good corporate citizen in the absence of regulation (p. 34).

Yesterday we noted that there is no support in the economics literature for making this moral distinction. That's not because of the political conservatism of economists because economists are not politically conservative. The economics profession is a Democratic one, and its leaders are the most Democratic of all. A Republican or conservative economist is by definition an outlier.

We think this moral distinction supports the existence of a Cost Theory of Benefit -- that is, some people hold the notion that the greater the cost that a regulation imposes on someone else (especially "industry"), the greater they perceive the benefits to themselves. If altruism is the gain in utility one

experiences by making someone else better off, this is its opposite. The Cost Theory of Benefit says that making some people worse off directly makes others better off.

There is every indication from reviewing the Opposition Report that its authors believe in the Cost Theory of Benefit. Of course, theories are made to be refuted, so we will continue looking for evidence that contradicts it. Reader submissions are welcome.

Is There a Right to Impose Regulatory Costs on People We Don't Like?

The logic of the Opposition Report suggests the answer is "yes." If the benefits of regulation are rights, and the costs of regulation borne by people we don't like are benefits, then inductive logic implies that the ability to impose costs on others is itself a right. Rights exist independent of utilitarian social welfare maximization and cannot ethically be denied through the normative application of tools such as benefit-cost analysis. It is the obligation of government to protect and secure rights, and that would include the right to impose costs on people we don't like.

We're not sure how far to take this logical argument. For now, we're satisfied to report that reviewing the Opposition Report has provided great insight into the perspectives of at least some of Dudley's opponents. Her confirmation hearing is scheduled for next Tuesday.

NATURAL RESOURCES DEFENSE COUNCIL

November 14, 2006

RE: VOTE NO ON SUSAN DUDLEY'S NOMINATION

Dear Senator:

Susan Dudley has been nominated to serve as the administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget. The Natural Resources Defense Council (NRDC) joins over 100 environmental, labor, health, consumer, and other organizations opposing the nomination because Dudley has promoted policies that have ignored science and the will of Congress.

As OIRA's administrator, Dudley would be in a position to block a wide range of health, safety, and environmental protections with the potential to better the lives of millions of Americans. This position requires an individual who can be extremely fair and objective in reviewing regulatory policy. After carefully reviewing Dudley's extensive public record, we are deeply troubled by her nomination. Dudley's writings consistently demonstrate that her views are radically outside the mainstream on important public policy issues. As the director of regulatory studies at the industry-funded Mercatus Center, Dudley has promoted policies that have ignored the law and science so as to advance an anti-regulatory agenda that would do more to protect corporate polluters than the public's health and safety. NRDC strongly encourages you to vote "no" on Dudley's nomination.

This NRDC information packet provides detailed information on Dudley's positions on specific environmental issues that demonstrate how her provocative views are far outside the mainstream. Please contact Chris Murray at (202) 289-6868 for more information.

Attachments:

1. Environmental community letter of November 14, 2006 opposing Dudley's nomination
2. AARP letter in support of the Senate amendment banning the use of the senior death discount

www.nrdc.org 1200 New York Avenue, NW, Suite 400
Washington, DC 20005
202 289-6868 • 202 289-1060

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The Importance of OIRA

OIRA's administrator has a profound impact on a wide range of environmental issues because OIRA is the office in the Executive Office of the President through which all major federal regulations and many other policies must pass for review before they become final. The office has great leeway in shaping proposals it reviews or in holding rules up indefinitely. Even in those cases in which the decision is driven by a lawsuit, OIRA can help build the record in a way that would undercut the defense of the final rule. For this reason, it is imperative that OIRA's administrator be objective and fair.

Susan Dudley's views, however, are far outside the mainstream on issues of health, safety, and environmental protections such as safe drinking water, air quality, and energy efficiency. In her numerous public writings, Dudley has exhibited a disregard for sound science and the prior decisions of Congress. Additionally, in her November 13, 2006 nomination hearing before the Senate Committee on Homeland Security and Governmental Affairs, she gave a highly misleading response on at least one occasion that warrants further scrutiny. Even so, her numerous writings paint a consistent and troubling picture that Susan Dudley cannot be reasonably expected to execute her responsibilities as OIRA administrator in an objective and fair manner. Below are some case studies that illustrate how Susan Dudley's views are far outside the mainstream.

I. Safe Drinking Water – the Arsenic Standard

Background

According to the National Academy of Sciences (NAS), arsenic in drinking water causes bladder, lung, and skin cancer. In a definitive 1999 report by the NAS, it determined that the Environmental Protection Agency's (EPA) existing 50 parts per billion (ppb) standard, set in 1942, did not protect public health against this potent carcinogen and that a stricter standard should be developed as "promptly as possible."[1]

In January 2001, EPA issued a new 10 ppb standard but the Bush administration suspended it on March 22 in an attempt to block it. The Bush administration initially argued that the rule was not based on sound science, despite the findings of several previous NAS reports that supported a lower standard. A public furor ensued and Congress rebuked the administration.

On August 1, 2001, the Senate voted 97-1 explicitly calling for the administration to immediately impose a new arsenic regulation for drinking water.[2] Indeed, Congress had already directed EPA on three previous occasions, in the mid-70s, 1986 and again in 1996 to develop a stricter arsenic

[1] *See* http://newton.nap.edu/books/0309063337/html/9.html

[2] *See* S. Amdt. 1219 to H.R. 2620 in the 107th Congress introduced on August 1, 2001 (stating in part that the "Administrator of the Environmental Protection Agency, pursuant to the Safe Drinking Water Act, shall immediately put into effect a new national primary drinking water regulation for arsenic that (1) establishes a standard for arsenic at a level providing for the protection of the population in general, fully taking into account those at greater risk, such as infants, children, pregnant women, the elderly and those with a history of serious illness . . .").

standard. For instance, amendments to the Safe Drinking Water Act in 1996 required EPA to promulgate a national primary drinking water regulation for arsenic by January 2001.[3]

Dudley's Views

Despite the science and Congress's mandate to issue a new, more protective arsenic standard, Susan Dudley sided with the Bush Administration in its attempt to rollback EPA's new 10 ppb arsenic rule. In official public comments, Dudley stated that the "EPA is justified in delaying the effective date of the arsenic rule . . ."[4] In another public statement, Dudley wrote that EPA's arsenic rule was "unlikely to enhance public health" and called it "an unwelcome distraction."[5] Dudley's comments are troubling because it appears she willfully disregarded decades of scientific research on a rule that had been over twenty years in the making.

Moreover, Dudley suggested in her official public comments that EPA overstated the benefits of the arsenic rule, because its cost benefit calculations had valued all human life *equally* instead of placing a lower value on the lives of seniors.

Putting a price on human life makes most people uncomfortable and is unacceptable to virtually all religions and moral philosophies. Nonetheless, putting a price on human life has become routine in OMB's and other advocates' approach, such as Dudley's, in determining the costs and benefits of proposed public protections. Generally, when an agency calculates the benefits of a public protection it uses the same numerical value for a person's life, regardless of age, and tries to determine how many lives the protection would save. For the arsenic rule, the statistical value for each individual was $6.1 million. Dudley wrote, however, that EPA's use of $6.1 million "likely overstates the benefits of the rule. . . . This can be addressed with sensitivity that estimates benefits based on a value per life-year saved, or an age-adjusted value per life."[6]

Put simply, "value per life-year saved" and "age-adjusted value per life" are two different methods for calculating the benefits of a rule depending the age of a person, which critics have dubbed the senior death discount. Someone over 70, for instance, generally has fewer years of life to live than a teenager. Consequently, the benefits of a rule can be reduced by looking at the number of *life-years saved* by the rule. Additionally, the benefits of a rule can be reduced if one puts a lower value on the life of an elderly person by using a lower *age-adjusted value per life* for seniors, instead of using a $6.1 million figure for everyone.

In the past, Congress and the public have found the use of the senior death discount abhorrent. In 2002, OMB sparked a scientific and ethical controversy when it suggested that the life of a senior citizen – someone 70 years or older – is worth considerably less than a younger person's life and therefore warrants less protection under federal regulation. OMB ordered the EPA to

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[3] *See* Pub. L. No. 104-182, § 109(a)(12)(A), 110 Stat. 1613, 1627-28 (1996).

[4] *See* http://www.mercatus.org/repository/docLib/MC_RSP_PIC2001-05EPA_ArsenicNewSourceContaminants_010507.pdf.

[5] *See* http://www.mercatus.org/publications/pubID.2630/pub_detail.asp

[6] *See* http://www.mercatus.org/repository/docLib/MC_RSP_PIC2001-14EPA-Arsenic_01I031.pdf

apply the discounted value of 63 percent for senior citizens when assessing whether to impose new clean air safeguards on polluting industries. When the number of senior citizens' lives saved was assigned a dollar value using this cut-rate 63 percent standard, the proposed clean air safeguards were judged to have lower benefits.

In May 2003, a coalition of 22 environmental, health, and religious groups along with AARP derided the "senior death discount" and accused the administration of skewing the calculations to claim that benefits are much lower in order to relieve industry from complying with stricter antipollution safeguards.[7] The next day, EPA Administrator Christine Whitman, who bore the brunt of the criticism due to the ramifications for air pollution standards, said her agency would stop using the calculation. Congress itself found the practice so objectionable that it passed a law on January 23, 2004 preventing any agency from using the senior death discount.[8]

Despite the public's and Congress's strong opposition, Susan Dudley stated in her confirmation hearing on November 13, 2006 that she supports the use of the senior death discount, where age is used as a basis for calculating the benefit of a public protection. When asked by Senator Mark Pryor whether it was accurate to suggest that Dudley's writings call for analyzing rules on the basis of age, Dudley responded:

> What I have recommended is that in addition to looking at how many lives are saved, which is one standard metric, that we should also use the second standard metric which is life years. And that really just tells you how many years are we extending life by. I think both of them are valid and I think they both provide valuable information and that looking only at one doesn't tell you enough information.

Dudley's revealing comment on life years came at the end of a line of questioning where she suggested that she has never written on the senior death discount. Though this may be technically accurate in that Dudley may never have used those terms in her writings, both her public comments on arsenic and her testimony clearly reveal that she supports using cost benefit methods that discount the lives of seniors, instead of valuing all life equally.

II. Air Quality Standards – Ozone

Background

EPA is currently in the process of reviewing the national ambient air quality standards (NAAQS) for ozone, which EPA last revised in July 1997. At the request of the Agency, EPA's Clean Air Scientific Advisory Committee, supplemented by expert panelists – collectively referred to as the

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[7] *See* Congressional Record S14924, Nov. 17, 2003 attached to this memo for a copy of AARP's letter.

[8] *See* Pub. Law 108-199, 118 Stat. 416 (stating that "[n]one of the funds provided in this Act may be expended to apply, in a numerical estimate of the benefits of an agency action prepared pursuant to Executive Order No. 12866 or section 312 of the Clean Air Act (42 U.S.C. 7612), monetary values for adult premature mortality that differ based on the age of the adult"). "). Available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ199.108

CASAC Ozone Review Panel (Ozone Panel) – met in a public meeting in August 2006 to conduct a peer review of the current ozone rule. The 23-member Ozone Panel in an October 24, 2006 letter to EPA Administrator Stephen Johnson stated that it "unanimously" recommended that the current 8-hour ozone standard "be substantially reduced" to protect public health and that there is "no scientific justification" for retaining the current standard.[9]

Dudley's Views

Dudley criticized the existing 1997 ozone standard when EPA first proposed it. In a Wall Street Journal op-ed, Dudley suggested that ozone was beneficial because it acts like a sunscreen. She stated that EPA's rule "ignores the health benefits of ozone. Due to ozone's screening effect on harmful ultraviolet-B radiation, the proposed reduction in ozone levels would increase malignant and nonmelanoma skin cancers and cataracts, as well as other UV-B related health risks."[10]

Moreover, she stated that the ozone standard "would harm public health. Ozone protects against harmful ultra-violet radiation, and the detrimental health effects of increased UV-B penetration are likely to be greater than the projected health benefits of lowering ozone concentrations. When costs are considered, the ozone standard looks worse."[11]

The reality is that ground-level ozone is a main component of smog, and has a variety of devastating health impacts, especially for children with asthma. The American Lung Association says that ozone's health effects are "like a sunburn inside your lungs," making Dudley's idea that ozone is great for reducing sunburns tragically ironic.

The upside-down quality of Dudley's unscientific position was widely recognized when she published it in the Wall Street Journal in 1999. "Just as surely as a well-placed bullet will prevent someone from having a heart attack, then, daily doses of tropospheric ozone could keep you from getting a killer melanoma. Providing your lungs don't collapse first," scoffed an op-ed by T.H. Watkins in the New York Times.

Based on her backwards economic and scientific ideas, Dudley would have substituted mere health advisories for actual reductions in ozone pollution. When testifying before Congress, she stated that "public health advisories and other targeted approaches may be an effective alternative to standard setting" and that "an expanded air pollution warning system [should] be initiated so that sensitive individuals can take appropriate 'exposure avoidance' behavior."[12]

Given that the EPA is expected to issue revised ozone NAAQS in 2007, Dudley's prior positions suggest she might challenge any scientific findings by EPA's scientists that suggested strengthening the standard.

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[9] http://www.earthjustice.org/library/reports/epa-science-panel-calls-for-stronger-standards-limiting-ozone-pollution.pdf

[10] http://www.mercatus.org/publications/pubID.2651/pub_detail.asp

[11] http://www.mercatus.org/publications/pubID.1379/pub_detail.asp

[12] http://epw.senate.gov/105th/dud_4-24.htm

III. Energy Efficiency

A. Fuel Economy Standards

Background

Congress enacted the Energy Policy and Conservation Act (EPCA) (Pub. L. 94-163) in response to the energy crisis created by the oil embargo of 1973-1974 to promote conservation and ensure energy security. Under EPCA, Congress created the corporate average fuel economy program, or CAFE program to address the leading role of inefficient vehicles in making the country increasingly dependent on oil. Congress set a specific goal for passenger cars of 27.5 mpg by 1985 from the 13.5 mpg level in 1975 and provided authority for increasing the fleetwide standard. Congress set no specific goals for light trucks. However, Congress gave the National Highway Traffic Safety Administration (NHTSA) clear authority to set annual fuel economy standards for light trucks. EPCA directed NHTSA to consider the nation's need to conserve energy, economic practicability, safety impacts, and technological feasibility in setting fuel economy standards.[13]

The agency began setting fuel economy standards for light trucks in 1979, specifying a level of 13.7 mpg. In 1996, when Congress began a five-year freeze on any changes to the passenger car or light truck standards, the light truck standard had reached 20.7 mpg. The freeze was lifted in late 2001 and was closely followed in January 2002 by the release of a National Academy of Sciences (NAS) report on fuel economy standards. The NAS concluded that we have the technology today to substantially increase car and truck fuel economy levels without compromising consumer choice or vehicle safety. Analysis of the report by the Union of Concerned Scientists demonstrated that the combined fuel economy level for passenger cars and light trucks could be increased to at least 37 miles per gallon over the next decade.[14]

In February 2002, NHTSA began acting within its existing statutory obligations to set light truck standards by gathering and analyzing up-to-date information on fuel economy technology and capability.

On March 19, 2003, our country went to war in Iraq. A few weeks later, on April 7, 2003, NHTSA published a rule establishing light truck standards at 21 mpg for model years 2005-2007 and rising to 22.2 mpg for model year 2007.[15] This amounted to a very modest increase of 1.5 mpg over the 1996 standard phased in over four years.

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[13]For a general discussion on CAFE, go to: http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/Vehicle%20Safety/Studies%20&%20Reports/Associated%20Files/StudyOfFeasibility-Report-to-Congress.pdf

[14] Union of Concerned Scientists, http://www.ucsusa.org/clean_vehicles/cars_pickups_suvs/nas-report-cafe-effectiveness-and-impact.html

[15] *See* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2003_register&position=all&page=16868

Further recognizing the need to reduce our dependence on foreign oil, the Senate voted 99-1 on June 10, 2003 to direct the President to develop and implement measures to conserve petroleum usage in the United States sufficient to reduce total demand by 1,000,000 barrels per day.[16]

Dudley's Views

Even though the 1.5 miles increase for light trucks was the first time the standard rose in nearly a decade and the Senate voted 99-1 to reduce our domestic oil consumption, Susan Dudley called the Bush administration's light truck CAFE standard the worst rule of 2003. In a December 2003 Washington Post column by Cindy Skrzycki entitled *2003's Bouquets and Brickbats (The Envelope, Please)*, Dudley is quoted as saying:

> Worst rule of 2003: The National Highway Traffic Safety Administration corporate average fuel economy (CAFE) standards for light trucks. NHTSA continues to force vehicle manufacturers to achieve higher miles per gallon than the market would offer, or consumers would choose, in the absence of the regulation. Absurdly, its economic model shows large net benefits to consumers even if markets are assumed to operate perfectly, i.e., without counting any externalities. We know this must be false, because any regulatory constraint that forces consumers away from their preferred choices must have negative net benefits (i.e., make Americans worse off).

Increasing the fuel economy performance of our vehicles is the cleanest, fastest and most reliable way to reduce America's oil dependence and give consumers lasting relief at the pump. Others, however, may view CAFE standards as highly controversial. Regardless of one's views on CAFE standards, a close analysis of Susan Dudley's rationale for calling the 2003 light truck CAFE rule the "worst rule" illustrates how far outside the mainstream she really is.

In official public comments submitted by Dudley and prepared by Ronald Sutherland on the light truck CAFE rule,[17] we learn that Dudley and Sutherland disagree with NHTSA's cost benefit analysis showing net benefits to consumers because "the link between increased fuel economy and energy security is not well defined . . . and the likely increase in energy security is close to zero. The risk of fuel price spikes is borne mostly by owners of light trucks who would pay the cost." Such a statement defies common sense.

Apparently in Dudley's and Sutherland's view, reduced oil consumption has almost no bearing on our nation's energy security. Even President Bush would likely disagree. In his State of the Union address he stated "We have a serious problem: America is addicted to oil, which is often imported from unstable parts of the world." Bush then stated that relying on switchgrass and other forms of fuel to power our vehicles would help America replace more than 75 percent of its Middle East oil imports by 2025.

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[16] *See* S.Amdt.871 to S.14 in the 108th Congress proposed on June 10, 2003.

[17] *See* http://dms.dot.gov/search/document.cfm?documentid=231634&docketid=11419

Equally troubling is Dudley's view of whether Congress and the administration should have any role in setting fuel economy standards. In the appendix to comments Dudley submitted (and thus implicitly endorsed) it states that the fuel economy program "is not an appropriate federal activity." Such a comment calls into question whether Dudley, as OIRA administrator, would objectively deal with future fuel economy rulemakings in a fair manner.

B. **Washing Machine Efficiency Standards**

Background

When Congress passed EPCA in 1975 it also sought to improve the energy efficiency of home appliances that contributed to domestic energy demand. Initially, the Act sought to achieve this goal through voluntary market-based approach, requiring labels that disclosed appliances' energy efficiency. Upon determining that the labeling program would not result in achieving energy efficiency "targets," Congress provided for the creation of mandated energy efficiency standards, setting strict deadlines for establishing the "targets" for covered appliances, including clothes washers.

In October 2000, the Department of Energy published a proposed rulemaking to update nearly a ten-year old energy efficiency standard for clothes washers. Before DOE issued the final rule, clothes washer manufacturers and energy efficiency advocates jointly agreed to negotiate and propose a standard that all parties could support. The stakeholders included among others, GE, Whirlpool, Maytag, the Alliance to Save Energy, NRDC, and Pacific Gas and Electric. Eventually the parties agreed to a standard that consisted of two stages: On January 1, 2004, all new residential clothes washers needed to be 22% more efficient than the current models and on January 1, 2007, they needed to be 35% more efficient.

DOE reviewed the Joint Proposal and agreed to issue the proposal as the final rule.[18] DOE concluded that the proposed standard was both technologically feasible and economically justified as required by law. It further concluded that the rule would still allow consumers to choose between both top and front-loading washing machines because already-existing models met the new standards.

In calculating the benefits of the rule, DOE concluded that the new standards would eliminate the need to construct 15 power plants (four 400 megawatt coal-fired plants and eleven 400 megawatt gas-fired plants) and reduce carbon emissions by 95.1 millions pounds, which is equal to the amount produced by three million cars in a year. DOE also concluded that it would eliminate 28.1 thousand metric tons of sulfur dioxide emissions from 2004-2030. Such emissions are a main component of acid rain, especially in the Northeast.

Dudley's Views

The new standard that was nearly a decade in the making, mandated by Congress, and voluntarily negotiated by industry and energy efficiency advocates was, according to Dudley, a rush to judgment that would eliminate top-loading washing machines and threaten our freedom and prosperity.

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[18] *See* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=3314&dbname=2001_register

In 2001, Dudley wrote:

> the U.S. Department of Energy is hurriedly writing regulations . . . that would force all American consumers to buy front-loading washing machines and would render the more popular top-loading machines obsolete. . . . Its rule . . . moved at lightning speed through the regulatory process . . . Americans might be better served if the government slowed down and allowed its fellow citizens to make their own choices. Real threats to freedom and prosperity come not only from foreign agents, but from zealous agencies that think Americans must be required to make the "right' choices."[19]

Mercatus also cooked up a poll to try to buttress its point, stating that "respondents rejected the proposed standard by nearly 3 to 1, even when they were told the required machines would save them money."[20] Unfortunately, the poll was highly misleading. The question that produced this result reads as follows: "The U.S. government has proposed a regulation that would effectively eliminate top-loading washing machines and require consumers to purchase side-loading machines. Do you favor or oppose this regulation?" Not surprisingly, 62.1% of the respondents opposed, 10.3% were in favor, and 27.6% were not sure.

An inconvenient fact for Dudley is the fact that the rule did not eliminate top-loaders. DOE had even stated in the rulemaking that there were existing top-loading machines in the marketplace that met the stricter standard.

In Dudley's view, rules are justifiable, not when Congress mandates them and industry makes a proposal, but when there is a market failure. Dudley wrote, "In order to establish the need for the proposed action, the analysis should discuss whether the problem constitutes a significant market failure. . . . Our review of the clothes washer standards finds no evidence of a market failure."[21]

DOE's response to Dudley and Mercatus on this point is instructive. The DOE wrote:

> [m]uch of the Center's comment is a philosophical argument against the use of Federal energy efficiency standards as a means of modifying consumer product choices or behavior. In its comment, the Center grades the Department on issues such as whether the Department has identified a significant market failure . . . and has understood individual choice and property impacts. Most of these issues had been resolved by the Congress when enacting [EPCA]. . . . Furthermore . . . the [D.C. Circuit] court stated that "the entire point of a mandatory program was to change consumer behavior. . . . The act requires the Department to 'establish

[19] *See* http://www.mercatus.org/publications/pubid.2657/pub_detail.asp

[20] *See* http://www.mercatus.org/publications/pubID.1278/pub_detail.asp and http://www.mercatus.org/repository/docLib/MC_RSP_PIC2000-23DOE_ClothesWashersAddendum_001127.pdf

[21] http://www.whitehouse.gov/omb/inforeg/comments/comment73.pdf

> standards designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. . . Most of the analysis presented by the Center assumes that the standards would eliminate top-loading, vertical-axis clothes washers. . . . manufacturers have already begun offering top-loading, vertical axis clothes washers that would meet the 2007 standard. Thus, a key assumption made by the Center is incorrect.[22]

Conclusion

Susan Dudley's writings form a disturbing pattern that makes it very difficult to imagine how she could effectively run OIRA with the public good in mind. Her extreme ideological interpretations of regulations as evidenced in her writings raises serious questions about whether she would be an objective analyst of regulatory policies. In cases involving arsenic pollution in our drinking water, ozone pollution in our air, and our nation's energy security, she disregarded inconvenient scientific facts and ignored express Congressional directives, while basing her analysis on reckless and faulty assumptions. NRDC therefore strongly urges you to oppose the nomination of the Dudley nomination to be administrator of OIRA.

[22] http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=3325&dbname=2001_register

Center for Science in the Public Interest • Clean Air Watch • Clean Water Action • Defenders of Wildlife • Earthworks • Friends of the Earth • Greenpeace USA • League of Conservation Voters • National Environmental Trust • Natural Resources Defense Council • Physicians for Social Responsibility • Sierra Club • Southern Utah Wilderness Alliance • Union of Concerned Scientists

Re: Oppose Susan Dudley's nomination for OIRA administrator

November 14, 2006

The Honorable Members
Committee on Homeland Security and Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator:

On July 31, 2006, the Bush administration nominated Susan Dudley for administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). If confirmed, Dudley would wield enormous power over how our nation's landmark environmental, health, and safety laws are implemented, because the administrator of OIRA plays an extremely powerful role in establishing regulatory safeguards for every government agency.

After carefully reviewing Dudley's extensive public record, we are deeply troubled by the paucity of evidence indicating any support for the laws and regulations that protect the environment and public health. In fact, Dudley's writings consistently demonstrate that her views are radically outside the mainstream on important public policy issues. We urge you to oppose this nomination. As the director of regulatory studies at the industry-funded Mercatus Center, Dudley has promoted policies that have ignored the law, science, and public opinion. Instead, she has consistently advanced an anti-regulatory agenda that would do more to protect corporate polluters than the public's health and safety.

For instance, in 2001 Dudley publicly advocated against a stronger health standard for arsenic, siding with the Bush administration, which, at the behest of the mining industry, withdrew an EPA rule that would have reduced the amount of toxic arsenic in our nation's drinking water. Both the U.S. House and Senate disagreed with this stance, voting overwhelming to block the Bush administration from delaying or softening the new arsenic rule. In a unanimous opinion issued in 2003, the U.S. Court of Appeals for the D.C. Circuit upheld the arsenic standard despite a vigorous challenge from industry. Only after public outcry, a lawsuit, and a National Academy of Sciences report confirming arsenic's cancer risks did the Bush administration finally reverse course and allow the new arsenic rule to stand.

Dudley has further flaunted her disregard for public health and sound science by opposing clean air protections. Dudley criticized the 1997 ozone standard by claiming that ozone — the main component of urban smog — is actually beneficial because it protects us from skin cancer. Dudley wrote that the "standard would harm public health. Ozone protects against harmful ultra-violet radiation, and the detrimental health effects of increased UV-B penetration are likely to be greater than the projected health benefits of lowering ozone concentrations. When costs are considered, the ozone standard looks worse." While that may be true for stratospheric ozone found many miles above the earth's surface, ground-level ozone causes thousands of emergency room visits, hundreds of thousands of asthma attacks, and other illnesses each year.

Dudley would have merely required the federal government to issue more health advisories rather than require reductions in ozone pollution. When testifying before Congress, she stated that "public health advisories and other targeted approaches may be an effective alternative to standard setting" and that "an expanded air pollution warning system [should] be initiated so that sensitive individuals can take appropriate 'exposure avoidance' behavior."

Dudley is also far outside the mainstream when it comes to our nation's energy policies. Increasing the fuel economy performance of our vehicles is the cleanest, fastest and most reliable way to reduce America's oil dependence and give consumers lasting relief at the pump. According to a 2002 report by the National Academies of Sciences, we have the technology today to substantially increase car and truck fuel economy levels without compromising consumer choice or vehicle safety. Recent studies have even suggested that U.S. automakers need to increase fuel economy standards in order to stay competitive. Despite overwhelming public support for improved gas mileage, Dudley called a decision by the National Highway Traffic Safety Administration to raise fuel economy standards for light trucks the "Worst rule of 2003." President Bush has existing legal authority to increase passenger fuel economy standards, but to date he has failed to exercise his authority. Based on her past comments, it is likely that if Dudley became OIRA's chief, she too would advise Bush to resist any urge to increase our nation's fuel economy standards despite the public's desire for a new direction.

On behalf of our millions of members, we urge you to oppose Susan Dudley's nomination. Moreover, we urge you to ask President Bush to withdraw her nomination, unless her views can receive a full airing. Little time remains before Congress adjourns, yet President Bush took nearly 10 months to nominate Susan Dudley after the former OIRA administrator, John Graham, announced his departure. Thus, it is highly likely that the President's only strategy for securing her controversial appointment is to subvert the Senate's will by seeking a recess appointment. As administrator of OIRA, Susan Dudley would pose a grave threat to our nation's public health and the environment.

Sincerely,

Michael Jacobson
Executive Director
Center for Science in the Public Interest

Frank O'Donnell
President
Clean Air Watch

Paul Schwartz
National Policy Coordinator
Clean Water Action

Mary Beth Beetham
Director of Legislative Affairs
Defenders of Wildlife

Lauren Pagel Nason
Policy Director
Earthworks

Sara Zdeb
Legislative Director
Friends of the Earth

Rick Hind
Legislative Director, Toxics Campaign
Greenpeace USA

Tiernan Sittenfeld
Legislative Director
League of Conservation Voters

Karen Steuer
VP of Government Affairs
National Environmental Trust

Karen Wayland
Legislative Director
Natural Resources Defense Council

Will Callaway
Legislative Director
Physicians for Social Responsibility

Debbie Sease
Director National Campaigns
Sierra Club

Pete Downing
Legislative Director
Southern Utah Wilderness Alliance

Alden Meyer
Director of Strategy and Policy
Union of Concerned Scientists

adopted. Senator GRAHAM feels strongly about this issue, as do I. I ask that the Senate approve the amendment.

The PRESIDING OFFICER. Is there further debate?

If not, the question is on agreeing to amendment No. 2194.

The amendment (No. 2194) was agreed to.

Mr. REID. I move to reconsider the vote.

Mr. BOND. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. BOND. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MCCONNELL. I ask unanimous consent that I be permitted to speak as in morning business for 10 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The remarks of Mr. MCCONNELL are printed in today's RECORD under "Morning Business.")

Mr. MCCONNELL. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. DURBIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DURBIN. Mr. President, are we on the VA-HUD appropriations bill?

The PRESIDING OFFICER. We are.

Mr. DURBIN. It is my understanding that at 4:30 we are going to move to the FAA reauthorization bill. Understanding that deadline faces us, with the approval of the chairman of the subcommittee—I hope to have his attention before I make this request—if I might ask the Senator from Missouri, would it be acceptable for me to divide the time between now and 4:30 so that I would use 15 minutes and then yield to Senator DAYTON for 15 minutes, who also has an amendment to offer? That way, we would reach the 4:30 deadline by dividing the time equally. If that meets with the approval of the chairman of the subcommittee, I would like to make a unanimous consent request along those lines.

Mr. BOND. Mr. President, to respond to my good friend, No. 1, we are ready to accept his amendment. If we could have some more time to handle other business, I would like to. If, perhaps, the Senator—each Senator could take 5 minutes or 10 minutes?

Mr. DURBIN. Let me thank the chairman for accepting my amendment. I will take 5 minutes and that is all. I would like to give 15 minutes, if it is acceptable, to Senator DAYTON to offer his amendment, and then I think that leaves you a balance of 10 minutes before 4:30.

Let me say I accept the offer of the Senator from Missouri. I will speak for 5 minutes.

Mr. BOND. I thank the Chair.

AMENDMENT NO. 2195

Mr. DURBIN. Mr. President, I send an amendment to the desk.

The PRESIDING OFFICER (Mr. CHAMBLISS). Without objection, the pending amendment is set aside. The clerk will report.

The legislative clerk read as follows:

The Senator from Illinois [Mr. DURBIN], for himself Ms. SNOWE, Mr. JEFFORDS, Mrs. BOXER, Mr. LAUTENBERG, Ms. CANTWELL, and Mr. LIEBERMAN, proposes an amendment numbered 2195.

Mr. DURBIN. I ask unanimous consent the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the appropriate place insert the following:

None of the funds provided in this Act may be expended to apply, in a numerical estimate of the benefits of an agency action prepared pursuant to Executive Order 12866 or section 812 of the Clean Air Act, monetary values for adult premature mortality that differ based on the age of the adult.

Mr. DURBIN. Mr. President, I ask the following Senators be added as cosponsors of this amendment: Senators SNOWE, JEFFORDS, BOXER, LAUTENBERG, CANTWELL, and LIEBERMAN.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DURBIN. In 5 minutes, I will try to describe very briefly what this amendment does.

This amendment will stop the Environmental Protection Agency and other agencies funded in this bill from using the discriminatory method known as the senior death discount. Right now, heart disease, cancer, and strokes are the leading causes of death of people over 65. According to CDC, air pollution can be particularly devastating to the health of seniors.

The EPA should be creating regulations to protect everybody. However, now we are in the cost-benefit era, and that means each regulation has to be costed out. In other words, we must determine the burden regulations have on the private sector of our economy, including what will it cost them. We must also determine the benefit regulations have for all Americans.

In order to reach the proper evaluation of any regulation, you have to determine the cost of the harm that is being done. That is why this amendment is being offered.

Right now, the EPA is discounting the lives of senior citizens. You may have seen this ad in magazines and newspapers showing this forlorn senior. This lady has been told that since she is over the age of 70, she is only worth 63 percent of any other person, say someone age 69. You can understand her sadness, and a sadness that might be shared, incidentally, by some 19 Senators who are 70 years old or older. Try to tell these Senators they are worth only two-thirds of those younger, and you are in for a fight—and rightly so. Their lives are as important to them and to our Nation as anyone else's life.

We need to try to establish the cost to America in honest terms, to determine, for example, the real cost of the regulation relating to heavy diesel equipment, and not say senior citizens are worth less today than others.

I ask unanimous consent that a letter in support of my amendment from the AARP be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

AARP,
Washington, DC, November 14, 2003.

Hon. RICHARD J. DURBIN,
Senate Dirksen Office Building,
U.S. Senate, Washington, DC.

DEAR SENATOR DURBIN: AARP commends you for your efforts to amend H.R. 2861, the Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations bill for Fiscal Year 2004, to prohibit the use of funds to "apply numerical values for adult premature mortality that differ based on the age of the adult in a numerical estimate of the costs and benefits of an agency action. . . ." We urge that you continue your efforts as the bill is folded into an omnibus appropriations measure.

AARP submitted comments in May to the Office of Management and Budget in response to its Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations. In them, we expressed our deep concerns regarding the arbitrary 37 percent discount to the life value of adults aged 70 and over incorporated by the Environmental Protection Agency in its cost-benefit analysis of the Administration's Clear Skies Initiative. We noted that the discount lacked a sound scientific basis, and we voiced concerns regarding its ultimate impact not only on older persons, but on the rest of the population as well.

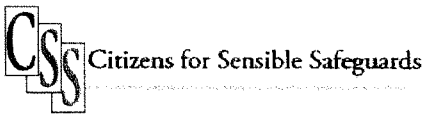
OMB's Office of Information and Regulatory Affairs subsequently called upon EPA to discontinue use of the age adjustment factor cited above, and advised other federal agency analysts that they should not use it either. At the same time, the agency appeared to encourage other methodologies that might assign monetary values for adult premature mortality that differ based on the age of the adult. Application of age-related analytical methodologies or others involving population subgroupings—particularly when monetary assessments are assigned to life value—hold great risks. We are concerned that there may be insufficient science to justify such action.

Again, AARP strongly supports your efforts as well as those of Representative Thomas Allen, to ensure that the lives of older people not be devalued, and that needed protections not be shortchanged by the application of biased analytical approaches. We urge your colleagues in conference to do the same.

Should you have any questions, please contact me or have your staff contact Jo Reed or Tim Gearan in our Federal Affairs office at 202-434-3800.

Sincerely,

MICHAEL NAYLOR,
Director of Advocacy.



November 15, 2006

The Honorable Susan Collins
Chair, Senate Committee on
Homeland Security and Governmental
Affairs
Washington, DC 20510

The Honorable Joseph Lieberman
Ranking Member, Senate Committee on
Homeland Security and Governmental
Affairs
Washington, DC 20510

Dear Senators:

We are writing to oppose the nomination of Susan Dudley to become the administrator of the Office of Information and Regulatory Affairs (OIRA) for the Office of Management and Budget, and we call upon you to reject this nomination.

Susan Dudley's record is one not merely of controversial, provocative statements but of something much more troubling: a consistent, unrelenting hostility to protective standards of the public interest. We have documented this record in the attached report, *The Cost Is Too High: How Susan Dudley Threatens Public Protections*. The only consistency in her intellectually inconsistent statements has been an abiding opposition to regulatory safeguards of the public health, safety, privacy, and the environment.

Dudley's responses to the committee's questions in the November 13 hearing did not dispel our concerns and, instead, exacerbated them. Some of her statements were quite misleading; among them:

- She tried to avoid responsibility for asserting that there is no justification for the Davis-Bacon Act.[1] When confronted with such a controversial position on this major protection for workers, Dudley tried to evade her statements about Davis Bacon overall by attributing them to the GAO. Only after repeated question did Dudley concede that she actually believed what she had written.

- She evaded questioning about her support for the "senior death discount," or measures of regulatory benefits that assign lower values to the lives of the old than to the lives of the young. Dudley denied having supported any senior death discount measure other than using life-year measures. The facts are different: in her comments to EPA on its rule to lower the levels of arsenic in the drinking

[1] John Charles Bradbury & Susan E. Dudley, *Regulatory Studies Program Comments on Department of Labor, Employment Standards Administration, Wage and Hour Division Procedures for Predetermination of Wage Rates; Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts; Proposed Rule* at App.I-1 ("There is no economic justification for a federal role in defining construction practices and determining wages, as required by the Davis-Bacon Act."), *available at* <http://www.mercatus.org/repository/docLib/MC_RSP_PIC1999-05_DOL-Davis-Bacon_990608.pdf>.

water, she argued that its benefits were "overstate[d]," and that EPA could correct that overstatement with "sensitivity that estimates benefits based on a value per life-year saved, *or an age-adjusted value per life*."[2] An "age-adjusted value per life" means precisely assigning different cash figures to lives based on age.

- She downplayed her criticism of NHTSA's historic decision in 2003 to raise fuel economy for light trucks — a decision she called "the worst rule of 2003" — by adding that she had criticized only NHTSA's *analysis* of the rule, not the larger enterprise of improving fuel economy. In fact, her comments in a *Washington Post* column raised objections to the fuel economy program in its entirety: "NHTSA *continues to force vehicle manufacturers to achieve higher miles per gallon than the market would offer*, or consumers would choose, in the absence of the regulation."[3]

We point out these inconsistencies not to catch her in a mere mistake but, instead, to emphasize our concerns that Dudley's anti-regulatory record is an unmistakable portent of the radical agenda that Dudley would bring to OIRA. As Senator Durbin memorably put it during the 2001 confirmation hearing for previous OIRA administrator John Graham, many nominees with long records of hostility to the public interest experience "confirmation conversions," in which they see the light and recognize the errors of their past positions just in time for the hearing. We learned from the painful experience of Graham's tenure that such conversions are all too often short-lived. Dudley notably could not identify any criticisms of her record that came closest to being true other than her belief that markets work. If that is the extent of her recognition of the problems we have identified from her record, we must repeat our insistence that the cost to the public of a Dudley-led OIRA would be much too high.

Aside from acknowledging to a committee led by a senator from Maine, which is downwind of the nation's pollution, that she was probably wrong in writing that downwind states could compensate upwind polluting states as an alternative to federal pollution controls, Dudley has not given any indication that she could truly set aside the radical ideology she has espoused for years if confirmed to the powerful role of OIRA administrator. We call on members of this committee to reject her nomination.

Sincerely,

American Federation of State, County, and Municipal Employees

Natural Resources Defense Council

OMB Watch

Public Citizen

United Auto Workers

CC: Members of the Senate Committee on
Homeland Security and Governmental Affairs

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[2] Susan E. Dudley, *Public Interest Comment on the Environmental Protection Agency's Request for Comments on National Drinking Water Regulations for Arsenic* 4 (Oct. 31, 2001), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC2001-14EPA-Arsenic_011031.pdf> (emphasis added).

[3] Cindy Skrzycki, *2003's Bouquets and Brickbats (The Envelope, Please)*, WASH. POST (2003).

THE COST IS TOO HIGH

How Susan Dudley Threatens Public Protections

A Report by Public Citizen and OMB Watch

September 2006

Acknowledgments

The principal authors of *The Cost Is Too High: How Susan Dudley Threatens Public Protections* are Public Citizen policy analysts Gwynneth Anderson and Matt Pelkey and OMB Watch policy analyst Genevieve Smith, with additional contributions and editorial supervision from Robert Shull, who began the project as Director of Regulatory Policy for OMB Watch and concluded it as Deputy Director for Auto Safety and Regulatory Policy for Public Citizen. The authors gratefully acknowledge Gary Bass, Angela Bradbery, Joan Claybrook, Barbara Holzer, Laura MacCleery, Chris Murray, Rachel Pleatman, Lena Pons, Brian Wolfman, and Robert Yule for their insightful questions, attentive readings, and astute comments.

The section "Where Does She Get These Radical Ideas?" was originally the product of a 2003 investigation conducted by Public Citizen's Congress Watch, with contributions from Neal Pattison, Andrew Benore, Wendy Keegan, John Kruger, Alex Knott, April Greener, Tyson Slocum, and Frank Clemente. It was updated and significantly revised by Anderson, Pelkey, and Shull.

Public Citizen is a 150,000-member nonprofit organization based in Washington, D.C. protecting health, safety, and democracy through lobbying, litigation, research, and public education. Since its founding by Ralph Nader in 1971, Public Citizen has fought for consumer rights in the marketplace, safe and affordable health care, campaign finance reform, fair trade, clean and safe energy sources, and corporate and government accountability. Public Citizen has five divisions and is active in every public forum: Congress, the courts, governmental agencies, and the media.

Public Citizen
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

OMB Watch is a nonpartisan, nonprofit organization based in Washington, D.C. dedicated to promoting an open, accountable government that is responsive to the public's needs. Founded in 1983, OMB Watch at first focused on lifting the veil of secrecy from the obscure but powerful White House Office of Management and Budget. Since then, OMB Watch has grown to address in depth the issues it originally covered in the context of monitoring the OMB. Its main issue areas are federal budget and tax policy, information and access, nonprofit advocacy rights, and regulatory policy.

OMB Watch
1742 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 234-8494

THE COST IS TOO HIGH
How Susan Dudley Threatens Public Protections

Introduction

On August 1, 2006, the Bush administration nominated Susan Dudley to the position of administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). As head of OIRA, the White House office charged with reviewing draft regulations, Dudley would be in a position to cripple critical safeguards that protect the public from such dangers as unsafe products and environmental toxins. And Dudley, an anti-regulatory zealot with close ties to corporate interests, is certain to do just that as OIRA administrator.

Prior to her nomination, Susan Dudley worked as the director of the Regulatory Studies Program at the Mercatus Center, an industry-funded, anti-regulatory advocacy organization. While at Mercatus, Dudley attacked proposed regulations in formal submissions to government agencies and orchestrated campaigns to derail other safeguards already on the books. Displaying an extreme anti-regulatory ideology, she questioned the merit of regulation altogether in congressional testimony and regulatory comments, and she has urged weakening, if not eliminating entirely, public safeguards. If confirmed as OIRA administrator, Dudley would continue her anti-regulatory agenda from a position with enormous power over federal health, safety, and environmental protections, and the public would be forced to pay the price.

Dudley's nomination signals the latest chapter in the administration's war on public safeguards. OMB's so-called "review" process has been used to block the issuance of key health and safety standards. The strategic position of OMB in the assault on regulations is summed up in the statement of Bruce Josten, the U.S. Chamber of Commerce's executive vice president for government affairs, that "[i]f you fix [OMB], you rein in all the agencies."[1] The previous OIRA administrator, John Graham, whose controversial 2001 nomination was opposed by 37 senators, used his position to undercut regulations developed by agencies ranging from the Occupational Health and Safety Administration (OSHA) to the Food and Drug Administration (FDA) to the National Highway Traffic Safety Administration (NHTSA), weakening their policies and diminishing their ability to develop new safety and health standards. Graham also pursued policy-level changes such as risk assessment guidelines and a regulatory hit list — tools that will slant the playing field and roll back essential protections for years to come. But compared to Dudley, Graham looks like a moderate.

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[1] Cindy Skrzycki, *Lining Up to Lobby for Rule Rescission*, WASH. POST, Feb. 6, 2001, at E1.

There are three reasons why Susan Dudley should not be OIRA administrator:

Ideological opposition to regulation. First, her ideological opposition to regulation precludes her from making unbiased decisions concerning public safeguards. As is apparent from the regulatory comments she wrote while at Mercatus, Dudley's hostility to regulation is so deep-seated that she is blind to the critical role they play in protecting the public and environment from harm. In her analyses of regulations, Dudley fails to employ neutral policy tools; rather, she adopts shifting and sometimes contradictory reasoning that is only consistent in that it always leads to the conclusion that a regulation should be rejected or weakened. Dudley has also explicitly expressed fundamental opposition to safety standards, attacking a proposed advanced air bag rule because it "attempts to make all vehicles equally safe for occupants."[2] It is apparent from her record that Dudley would demand impossible requirements that regulatory agencies could never satisfy. An OIRA administrator with such an extreme ideological hostility to regulation would clearly have a devastating effect on safeguards needed to ensure the health and safety of the public and to protect the environment, thus undermining the purpose and intent of safety and health statutes and putting the public at unnecessary risk of harm.

Paralysis by analysis. Dudley also supports radical regulatory policies that would cripple public safeguards — another reason why she should not be OIRA administrator. Dudley has, for instance, advocated regulatory sunsets, or mandatory expiration dates for all protective standards, which would force agencies to plead for the continuation of critical regulations. If confirmed, Dudley would almost certainly use the political clout of the White House to push sunset legislation, which she would then enforce zealously. Dudley has also called for embedding cost considerations in all laws that authorize agencies to protect the public, including laws that Congress has declared should be "safety first" laws under which cost-benefit analysis is forbidden in decision-making. And perhaps even more appallingly, Dudley has supported a senior death discount that counts the lives of seniors for less than the lives of the young. Dudley's radical ideas also include proposals that would consume vast amounts of taxpayer dollars on navel-gazing analyses that would tie up agency money, resources and time on increased analysis of regulatory costs while doing little to inform the public about the life-

[2] Susan E. Dudley, *Regulatory Studies Program Comments: Advanced Air Bags* 7 (Dec. 17, 1998), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC1998-04_NHTSA-AirBags_981130.pdf>.

saving benefits of sensible safeguards. For Dudley, the goal is a regulatory clear-cut, and she is well-acquainted with the tools to achieve it.

Ties to corporate special interests. The third reason why she should not serve as OIRA administrator is her ties to regulated industry. Prior to her nomination, Susan Dudley worked for the corporate-founded and -funded Mercatus Center, whose donors have included companies with long records of pushing for deregulations, such as BP Amoco, Exxon Mobil Corporation, General Motors, JP Morgan Chase, Merrill Lynch, Pfizer, and State Farm Insurance Companies, as well as individuals from the corporate world such as David Koch, an executive vice president of Koch Industries,[3] who personally provided $100,000 in 2005.[4] Such ties to regulated industry suggest that Dudley, like Graham before her, would use OIRA as corporate special interests' private backdoor for influencing policy.

If Dudley is made OIRA administrator, she will sit in the catbird seat, overseeing the entire executive regulatory process. Only the independent regulatory agencies will be outside her direct regulatory reach. No significant safety, health, environmental, or any other proposed or final rules can be issued without OIRA's approval. Nor, under the Paperwork Reduction Act, can any government agency gather information from ten or more entities, a move which is often essential for the research that justifies regulation, without approval from OIRA. Through these mechanisms, OIRA can slow, stall, weaken or stop regulatory proposals and final rules that the regulated industry opposes.

Like John Graham, Dudley is well acquainted with the regulation-stalling techniques that induce "paralysis by analysis." As demonstrated by her writings, Dudley wants federal agencies to wait to impose rules until near-perfect estimates of the precise causes and effects of the hazards to be regulated are known. But regulators often know that a substance or product is dangerous long before they can measure the exact magnitude of the harm, extent of the exposure, or exact mechanism by which a substance acts on the human body or environment. Collecting this secondary information can take years — years during which the public will continue to be exposed.

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[3] David H. Koch Charitable Foundation, IRS Form 990, 1999 and 2000.

[4] The Campaign for George Mason University, *Fast Facts*, Oct. 27, 2005, *available at* <http://www.gmu.edu/development/pubs/fastfacts/October_2005/email.htm> (last accessed Feb. 23, 2006).

And Dudley even goes a step farther than Graham, who relied primarily on cost-benefit analysis (CBA) to stall regulations by demanding that their benefits outweigh their costs. Dudley believes that an agency must do more than prove that a regulation's benefits outweigh its costs. Dudley has stated that "[e]ven policies supported by the best benefit-cost analysis are not likely to be socially optimal substitutes for market forces unless they correct a market failure."[5] With her skepticism about whether regulation can serve any goal other than correcting a market failure (which, as she has defined it, would be an impossibility), Dudley would bog the agencies down in endless analysis, stalling regulations and leaving the public at risk. Paralysis by analysis is just one way in which Dudley could cripple public and environmental safeguards as OIRA administrator.

Susan Dudley's nomination is a threat to the health and safety of the public and the protection of the environment. Her extremist anti-regulatory ideology served well the Mercatus Center's corporate funders, but it would not serve well the American public. For the reasons detailed in this report, Susan Dudley should not be OIRA administrator. In words Dudley herself would surely understand, the cost is too high.

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[5] *See* Susan E. Dudley, *2005 Draft Report Comments: Public Interest Comment on the Office of Management and Budget's 2005 Draft Report to Congress on the Costs and Benefits of Regulation* 11 (June 20, 2005), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC2005-06OMBBCReport_050620.pdf >.

Get to Know Susan Dudley: A Case Example

One case example epitomizes all the reasons that Susan Dudley is unfit to be given power over regulatory policy: Dudley's opposition to improved standards for life-saving air bags in passenger vehicles.

After Congress ordered the National Highway Traffic Safety Administration (NHTSA) to issue a general performance standard requiring frontal air bags in all passenger cars by fall 1996 and in light trucks by fall 1997, the automakers responded by installing cut-rate air bags that proved dangerous. Congress subsequently acted in 1998 to require NHTSA to improve the standard by minimizing risks to children and small-statured adults, and the result was the 1998 proposed rule for advanced air bags.

Mercatus, in comments prepared by Susan Dudley, opposed NHTSA's rulemaking. Revealing an extreme anti-regulatory ideology, Dudley argued that the market would maximize safety, suggested elimination of the air bag rule altogether, and voiced general opposition to all safety standards. Ironically, it was precisely a lack of regulation that led to the air bag tragedies Congress required NHTSA to address in the advanced air bag rulemaking, as manufacturers chose to install cut-rate air bags in the absence of a stringent regulation requiring advanced designs.

Dudley's blind adherence to anti-regulatory principles even in the face of specific congressional requirements puts her out of touch with both reality and the values and beliefs of Americans. It did, however, make her a perfect fit for Mercatus and placed her and Mercatus in the corner with manufacturers in their fight against tougher air bag regulations. Also, it may not be a coincidence that Mercatus has received significant funding from automakers.[6]

Manufacturers Fail to Provide Safe Air Bags; NHTSA Takes Action

In September 1998, NHTSA proposed upgraded performance requirements for air bags that would reduce air-bag related risk to infants, children, and small-statured persons.[7] At the time of the 1998 notice of proposed rulemaking (NPRM), air bags had demonstrated significant safety benefits in crashes, but certain shoddily

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[6] Email from Mercatus staff member, March 24, 2006.

[7] Federal Motor Vehicle Safety Standards: Occupant Crash Protection, 63 Fed. Reg. 49,958 (Sept. 18, 1998).

designed air bags had contributed to injury and death of occupants, most notably children and some small women drivers.

The agency noted, in fact, that "[a]ir bag fatalities are not a problem inherent in the concept of air bags," and listed air bag design features — such as higher deployment thresholds before any inflation, dual-stage inflators, upward deployment, and deployment suppression — that would reduce or eliminate the fatalities that had been occurring.[8] Such features, the agency explained, were permitted by the air bag standard, and a number of them were identified by the agency in 1980 and again in 1984 as ways in which manufacturers could minimize potential dangers of air bags.[9] Notably, Honda's early front passenger air bag deployed upward rather than directly at the passenger, minimizing risk of deployment-related injuries.[10] Few manufacturers, however, used such safety features, and instead exploited the breadth of NHTSA's performance standard to equip vehicles with less expensive, less protective designs (such as using mechanical rather than electronic sensors). NHTSA's 1998 NPRM proposed upgraded testing requirements intended to ensure that all manufacturers used safe air bag designs. The agency estimated that its proposed rule would save between 226 and 239 lives annually.[11]

Leave it to the Market...

The issue was simple: manufacturers had failed to use safe air bag designs, so regulatory action was needed to ensure that manufacturers equipped vehicles with safe air bags. But Susan Dudley opposed regulatory action in comments to the proposed rulemaking submitted on behalf of Mercatus.[12] In fact, displaying characteristic anti-regulatory zealotry, Dudley argued for the elimination of the air bag requirement altogether.

Dudley would have preferred to leave safety to the unsteady hand of the market, hypothesizing that "[i]f air bags protect lives, and consumers demand them,

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[8] *Id.* at 49,963.

[9] *Id.*

[10] Honda, *available at* <http://corporate.honda.com/safety/details.aspx?id=airbag>.

[11] 63 Fed. Reg. at 49,983.

[12] *See* Dudley, *Advanced Air Bag Comment*, *supra* note 2 (also available at <http://dmses.dot.gov/docimages/pdf32/48314_web.pdf>).

it is reasonable to assume that automobile manufacturers would have installed air bags in the absence of federal requirements to do so."[13] According to Dudley, federal action requiring air bags in cars was unnecessary, as the market would have provided air bags to the public absent regulation.

But the history of air bags shows that Dudley's naïve advocacy of anti-regulatory principles is misplaced. If not for regulation, manufacturers might not have equipped vehicles with air bags at all. In fact, they fought air bag installation for 20 years, during which hundreds of thousands of highway users needlessly died or suffered severe injuries. Moreover, leaving air bags to the market priced out many who might otherwise have demanded the safety feature: Dudley assiduously failed to mention that consumers were forced to pay five times more for air bags as optional features than for air bags as standard equipment.

Regulation Prompted Resistant Manufacturers to Install Air Bags

Without regulation, public access to air bags might have been delayed indefinitely. General Motors installed air bags on 10,000 1974 and 1975 production vehicles even though President Nixon had delayed the 1970 safety standard requiring air bags to meet passive restraint requirements, but the other U.S. manufacturers fought them tooth and nail. For instance, following issuance of the 1970 rule, Ford launched a multi-million dollar ad campaign intended to instill in the public skepticism about air bags.[14] The Supreme Court, in a 1983 suit by insurers and consumers challenging the Reagan administration's revocation of the air bag standard, characterized manufacturer opposition to air bags as "the regulatory equivalent of war," although by that time the war was "lost — the inflatable restraint was proven sufficiently effective.... [T]he industry was not sufficiently responsive to safety concerns."[15]

Manufacturers Manipulate Information to Boost Sales

Even if manufacturers would have equipped vehicles with air bags absent regulation, consumers might not have been made aware of the safety benefits they

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[13] *Id.* at 5.

[14] RALPH NADER, UNSAFE AT ANY SPEED lxxv (New York: Knightsbridge, 1991).

[15] *Motor Vehicle Manufs. Assoc., Inc., v. State Farm,* 463 U.S. 29, 49 (1983).

offer — especially in light of Ford's smear campaign — and thus would not have demanded them. Dudley, however, claimed in her comments that "[a]utomobile manufacturers have every incentive to inform consumers ... of the safety features of their vehicles," believing that this incentive will ensure that consumers are provided with accurate information about vehicle safety.[16]

The real world works much differently than Dudley's hypothetical one. While manufacturers might be able to make air bags a selling point, they also do not want to dissuade customers from purchasing one of their models not equipped with air bags. Manufacturers do promote air bags today — now that they are mandated in all vehicles. After President Reagan revoked the air bag rule in 1981, only Mercedes installed air bags voluntarily in vehicles for sale to the public. Even then, Mercedes' advertisement of the safety feature was minimal.

Moreover, manufacturers commonly manipulate information in the interest of sales. For another example, look no further than Ford's handling of the hazards posed by weak roofs when SUVs roll over. For decades, Ford has done its best to downplay the dangers of roof crush in rollovers, and has recently continued to do so even while Volvo, a subsidiary of Ford, equips its XC90 SUV with a roof designed to resist intrusion (the inward crushing of the roof that intrudes on the space the vehicle occupant needs to survive the crash) in rollover crashes. In spring 2005, a number of news stories brought attention to internal industry documents showing that Ford weakened the roof of the Explorer while Volvo designed the XC90 to protect occupants from the dangers of roof crush in rollover crashes.[17]

The hypocrisy of Ford's actions could not be more obvious: Ford has insisted for decades that a crushing roof does not cause injury in rollover crashes;

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[16] Dudley, *supra* note 2, at 5.

[17] Ford has actually fought to keep the public in the dark on this evidence. The documents were introduced in a Florida wrongful death case in which Ford was ordered to $10.2 million in damages to the husband of a woman who was killed when her Ford Explorer rolled over and the roof collapsed. After the documents were temporarily placed in the court's public record, they were submitted to NHTSA's public docket of comments concerning the agency's roof crush rulemaking. Ford successfully moved to have the court seal the documents and then requested NHTSA to remove the documents from the docket, which the agency promptly did. Public Citizen and Trial Lawyers for Public Justice have filed a motion to unseal the documents on the grounds that keeping them sealed violates Florida's Sunshine Act, which forbids court orders that conceal "public hazards," and the First Amendment of the U.S. Constitution, which creates a strong presumption of public access to information brought to light in civil trials.

reduced vehicle roof strength, selling rollover-prone SUVs with roofs that barely exceed the government's paltry roof strength standard; and covered up engineering documents tying roof crush to injury in rollover crashes. Volvo, Ford's subsidiary, on the other hand, designed the XC90 SUV with increased roof strength on the premise that preventing roof intrusion is critical to ensuring occupant protection in rollovers, and it used the XC90's roof strength to market the vehicle to consumers, boasting in a promotional video that it has a roof that "exceeds the legal requirements in the U.S.A. by more than 100 percent."[18]

As this case demonstrates, manufacturers will manipulate information to downplay the risks of their vehicles, even while touting the exact same safety features those vehicles lack when equipped on other models. The incentive to publicize safety features, which Dudley believes ensures that consumers are provided with information sufficient to make informed purchasing decisions, is often absent or, at best, negligible.

Manufacturers May Use Inferior Safety Designs

Dudley's anti-regulatory convictions also neglect whether, even if manufacturers voluntarily install safety features absent regulation, the safety features that manufacturers install will provide a sufficient level of safety. It is not surprising that Dudley neglected to address this question in her comments to the advanced air bag rulemaking, as, in the absence of a stringent air bag regulation requiring advanced features, many manufacturers installed cut-rate air bags and did not use available technology to minimize the risk air bags can pose to small-statured adults and children.

Before Congress required an improved standard in 1998, NHTSA relied on broad performance requirements that allowed manufacturers to use a number of designs in complying with the standard. As NHTSA noted, the "standard has always permitted, but not required, vehicle manufacturers to use a variety of design features that would reduce or eliminate the fatalities that have been occurring."[19] The 1998 advanced air bag rulemaking was initiated precisely because many

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[18] *See* Danny Hakim & Jeremy W. Peters, *Ford and Volvo Clash Over Automobile Safety: Dispute Centers on Role Crushed Roofs Play in Nearly 40,000 Rollover Accidents*, INT'L HERALD TRIB., May 14, 2005. The video is available for download at <http://www.citizen.org/autosafety/images/XC-90Video.avi>.

[19] Notice, 63 Fed. Reg. 49,958, 49,963 (Sept. 18, 1998).

manufacturers did not use those technologies, leading to unnecessary deaths and injuries. Even at the time of the rulemaking, in the face of the controversy surrounding air-bag related deaths and injuries, many manufacturers still neglected to adopt technologies to address the risks presented by their poorly designed air bags.[20]

Manufacturer Self-Interest Is Unreliable

Dudley's belief that supply and demand will provide safety to consumers assumes that manufacturer self-interest can be relied upon to provide the public with safe vehicles. Such is not the case. Though public safety can be lucrative for manufacturers, some may not recognize opportunities to boost sales through safety. A 2004 poll, for instance, found that 81 percent of consumers favor stronger vehicle roofs and 83 percent want "the government to require a major upgrading of roof safety standards to withstand the weight of the car when it rolls over."[21] Yet despite clear consumer demand for stronger roofs, by and large, manufacturers have failed to produce vehicles with roofs strong enough to protect occupants in rollover crashes. The history of automobile production is full of cases in which manufacturers skimped on safety, even though consumers rate safety the second most important factor (behind reliability) when purchasing a vehicle.[22]

In addition, manufacturer self interest and public safety can conflict. For example, manufacturers often offer optional safety equipment only in pricey packages, apparently finding it more lucrative to group a safety feature with add-ons such as leather seats and sunroofs. But this practice places safety features financially out of reach for many customers, depriving lower- and middle-income consumers and their families the safety afforded to the wealthy. And even when offered independently of other features, safety technologies may still be out of the financial reach of many consumers.

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[20] *See id.*

[21] Louis Harris and Peter Harris Research Group, Inc., "Survey of the Attitudes of the American People on Highway and Auto Safety," June 2004, *available at* <http://www.saferoads.org/polls/harrispoll04.htm>.

[22] Harris Interactive, "National Survey Shows 29% of Those Who Intend to Acquire a New Vehicle in the Next Year Will Seek Fuel-Efficiency If Gas Prices Hit $2 Per Gallon," April 14, 2003, *available at* <http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=607>.

Regulation, however, significantly reduces the cost of safety technologies to consumers[23] and ensures that all consumers are provided with a base level of safety.

Dudley Imagines a World Without Safety Standards

But Dudley's hostility to regulation runs even deeper. In her comments to the advanced air bag rulemaking she stated that "[m]andating a certain level of protection in all new vehicles is unlikely to meet the diverse demands of different consumers,"[24] and attacked the proposed rule because it "attempts to make all vehicles equally safe for occupants."[25]

This fundamental opposition to essentially *any* safety standard sets Dudley apart from even the Bush administration's notoriously anti-regulatory policies. It also conflicts with the duties Congress carved out for NHTSA as a safety agency, providing it with the authority to issue motor vehicle safety standards and noting that "it is necessary...to prescribe motor vehicle safety standards" to reduce traffic deaths and injuries.[26]

Conclusion

With similar anti-regulatory zealotry, Mercatus and Susan Dudley were a perfect fit for each other. But the extreme market ideologies revealed in Mercatus's comments to the advanced air bag rule place both Mercatus and Susan Dudley out of step with the American people, Congress, and even the anti-regulatory Bush administration. The effort to deflate air bags was only the beginning.

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[23] Side air bags, if sold as standard equipment, cost automakers $76. (*See* Advocates for Highway and Auto Safety, "Cost/Price Comparison of Vehicle Technologies." If sold as optional equipment equipment, the cost to consumers of side air bags on the 2004 Mazda 6 was $390. (Source: Edmunds.com)

[24] Dudley, *supra* note 2, at 6.

[25] *Id.* at 7.

[26] 49 U.S.C. § 30101.

Dudley's Impossible Requirements

If allowed to assume the role of administrator of the OMB Office of Information and Regulatory Affairs, Dudley would be granted enormous powers over the regulatory standards that agencies are currently developing. Although OIRA has no such power under the Paperwork Reduction Act, the law that actually created that office, the White House extralegally empowered it to review significant regulations before they are published in the *Federal Register*. Previous regulatory czars have used this power to, among other things, delay a required warning label on aspirin informing parents of the risks of Reye's Syndrome[27] and weaken a proposed rule for electronic signals in automobiles warning drivers when their tires are dangerously underinflated.[28]

Dudley's background reveals someone who would set expectations that would be impossible for any agency submitting proposed regulations to OIRA to satisfy. In her tenure at Mercatus, Dudley has authored comments on a host of environmental, health, and safety regulations. While her tactics vary from case to case, the bottom line is always the same: a call for less regulation of industry.

Rather than applying consistent, neutral policy tools to analyze regulatory decisions, Dudley employs ever-shifting criteria that are consistent only in their outcome: rejecting the need for regulation that protects public health, safety, or the environment. If Dudley really did work as a neutral policy analyst, employing the tools at her disposal to determine sound policy decisions, then we would expect to see analysis supporting the need to regulate as well as analysis determining that regulation is not necessary. Rather, Dudley's analysis acts as a one-way ratchet, proclaiming that the costs are too high and the benefits too low.

Dudley's analysis generally begins by discrediting the very need for regulation, claiming that the agency has not shown that there is a market failure warranting regulatory intervention. If the harm could not be fixed without intervention into the market, then Dudley asserts that there is not enough evidence to substantiate the claim that a harm has been or will be incurred. In Dudley's view, the market almost never fails. Faced with ample evidence of harm, Dudley will then assert that the federal government is not in the best position to address the harm and local communities are in a better position to address the problem. With

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[27] *See* PUBLIC CITIZEN, RISKING AMERICA'S HEALTH AND SAFETY: GEORGE BUSH AND THE TASK FORCE ON REGULATORY RELIEF 8 (Oct. 1988).

[28] *See* OMB Watch, *In Rejecting NHTSA Rule, Graham Shows True Colors*, OMB WATCHER, May 15, 2002, *available at* <http://www.ombwatch.org/article/articleview/739>.

this ever-shifting terrain, it is difficult to see how any agency would ever be able to justify the need to regulate.

The Market Never Fails

Dudley insists, with a slavish devotion to the market, that regulation is only justified when it is used to correct a market failure. In textbook economics, a market failure is "a situation in which a market left on its own fails to allocate resources efficiently."[29] It is a macroeconomic term of art that notably does not mean that markets fail to exist altogether or have broken down in some way.[30]

Dudley has apparently redefined the term *market failure*. In her work, she has repeatedly invoked the term to mean a breakdown in market relations, and she has even insisted that the contrast between a problem for the public interest and the absence of any absolute breakdown in markets must mean that the public has chosen an unsafe and less healthy world. Dudley uses this redefined market failure as a threshold test for all regulations: her main line of attack is to claim that the agencies have failed to show that a market failure has truly occurred, thereby undercutting the need for regulatory intervention. Dudley believes agencies must prove that a market failure has occurred before they can act, but then she denies the validity of evidence claiming a need for regulatory intervention. Agencies must prove a market failure, but markets never fail.

In this shift from economics to Dudleynomics, the very need for regulation to correct important public health, safety, environmental, or consumer problems is

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[29] N. GREGORY MANKIW, PRINCIPLES OF MACROECONOMICS 10 (1998). *See also* DAVID L. WEIMER & AIDAN R. VINING, POLICY ANALYSIS: CONCEPTS AND PRACTICE 13 (2d ed. 1992) (defining market failure as "a circumstance where the pursuit of private interest does not lead to an efficient use of society's resources or a fair distribution of society's goods").

[30] *See, e.g.*, Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only Part of the Story*, 50 J. COPYRIGHT SOC'Y OF THE U.S.A. 149, 150-51 (2003) ("The point of 'market failure' as a category is not to catalogue individual buyers' and sellers' private frustrations. Rather, the concept of 'market failure' provides tools for economists and other observers to assess when privately motivated deals can or cannot be relied upon to suit public ends."); *Market Failure*, Wikipedia, *available at* <http://en.wikipedia.org/wiki/Market_failure> (last accessed Aug. 23, 2006) ("The word 'failure' here is not intended to mean an economic collapse, or a breakdown in market relations. *Market failure* is a claim that the market is failing to create maximum efficiency. It doesn't mean that the market has broken down or ceased to exist.").

itself proof that there is no market failure and thus no need for regulation. That is, *the need for regulation is proof that there is no need for regulation.* The examples are plentiful:

- *Rejecting standards to improve air bags, after manufacturers installed cut-rate airbags and bottom-shelf technology that endangered vehicle occupants:* "If air bags protect lives, and consumers demand them, it is reasonable to assume that automobile manufacturers would have installed air bags in the absence of federal requirements to do so."[31]

- *Rejecting the Clinton administration's proposed standards for ergonomics, to protect workers from musculoskeletal disorders and repetitive stress injuries*: "OSHA offers no evidence that employers and employees do not have adequate incentives to provide the optimal level of workplace protection against MSD hazards. On the contrary, OSHA provides evidence that . . . MSDs impose significant costs on employers, which should offer ample incentives to reduce their occurrence . . . ."[32]

- *Rejecting an SEC rule to protect consumer privacy by limiting financial institutions' ability to share customer financial information without proper consent*: "The implicit premise of the rule is that individuals and firms cannot come to a mutually satisfactory agreement as far as privacy is concerned without resort to government assistance. Indeed, if individuals truly value their privacy, and firms desire to maximally satisfy their customers, then a meeting

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[31] Dudley, *supra* note 2, at 7.

[32] Susan E. Dudley & Hayden G. Bryan, *Ergonomics Comment: Public Interest Comment on the Occupational Safety and Health Administration's Proposed Ergonomics Program Standard* 28 (Feb. 25, 2000), *available at* <http://mercatus.org/publications/pubID.1505/pub_detail.asp>.

> of the minds ought to be achievable without resort to compulsory regulations."[33]
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> - *Rejecting a rule to maintain the public's right to know about the risks they would face from a chemical plant accident or attack*: "If there is a public demand for this information, as EPA's benefit assessment argues, nongovernmental organizations would find value in deriving it. The fact that they don't suggests that the value of the information to the public is less than the cost of the information."[34]

Although markets apparently never fail, Dudley nonetheless considers her unique view of market failure as the essential precondition for any regulation. In commenting on OIRA's 2003 guidelines for regulatory impact analyses (the economic rationales for regulations, required extralegally under Executive Order No. 12,866), Dudley took the unusual approach of blasting the guidelines for allowing agencies to justify regulations for reasons other than a market failure. "The new guidelines cite 'other possible justifications' for regulatory action, including 'promoting privacy and personal freedom.' It provides no example of when regulation (which, almost by definition, restricts personal freedoms) would be necessary to promote personal freedom," Dudley commented.[35] To the extent that Dudleynomics still resembles economics, it is worth noting that Pareto efficiency criteria are blind to equity considerations or distributive justice. Given Dudley's hostility to "other possible justification" for regulations beyond market failure, such important goals as environmental justice, civil rights, and fairness will be systematically rejected by a Dudley-led OIRA.

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[33] Susan Dudley, Brian Mannix & Jennifer Zambone, *2002 Draft Report Comments: Public Interest Comment on the Office of Management and Budget's Draft Report to Congress on the Costs and Benefits of Federal Regulation*, at A-14 (May 28, 2002).

[34] Susan E. Dudley, *RMP Comments: Public Interest Comment on EPA's and DOJ's Proposed Distribution of Off-Site Consequence Analysis Information* 9 (June 8, 2000).

[35] *See* Susan E. Dudley & Brian F. Mannix, *2003 Draft Report Comments: Public Interest Comment on the Office of Management and Budget's Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations* 10 (April 29, 2003), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC2003-11OMBBCReport_030429.pdf>.

Even a clear economic case supported by a cost-benefit analysis will not be enough for Dudley. Dudley opposed Department of Energy efforts to set energy conservation standards for appliances, claiming that "[i]n the absence of a significant market failure (which DOE does not identify to justify its regulations), it is implausible that restricting consumer choices will increase net benefits."[36] She put the matter more plainly last year: "Even policies supported by the best benefit-cost analysis are not likely to be socially optimal substitutes for market forces unless they correct a market failure."[37]

We Can Never Know Enough

Even when the agencies' cost-benefit analysis justifies the regulatory action, Dudley's tactic is to attack the underlying science on which the regulation is based. E.O. 12,866 requires agencies to rely on the best available scientific and technical information to justify regulating, but Dudley's approach seems to require agencies to base regulatory decisions on a nearly unachievable level of certainty.

In just one example, Dudley questioned the use of science in setting National Ambient Air Quality Standards (NAAQS) for ground-level ozone (O_3) emissions. As EPA noted in its proposed rule, "Ozone and related pollutants have long been recognized, in both clinical and epidemiological research, to affect public health." In fact, two major medical research studies in 2004 linked ozone to premature death.[38]

Dudley, meanwhile, argued that ground-level ozone is actually beneficial, repeating the instantly-discredited[39] claim that it protects us from skin cancer.[40]

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[36] *Id.* at 5.

[37] *See* Dudley, *supra* note 5, at 11.

[38] *See* M.I. Bell, A. McDermott, S.L. Zeger, J.M. Samet & F. Dominici, *Ozone and Short-term Mortality in 95 US Urban Communities, 1987 to 2000*, 292 JAMA 2,372 (2004). *See also* A. Gryparis, B. Frosberg, K. Katsouyanni et al., *Acute Effects of Ozone on Mortality from the "Air Pollution and Health: A European Approach" Project*, 170 AM. J. RESPIRATORY & CRIT. CARE MED. 1080 (2004).

[39] *See* T.H. Watkins, *Pollution Can Save Your Life*, N.Y. TIMES, June 17, 1997, at A21 (dismissing the Dudley/Mercatus/industry claim).

[40] *See, e.g.*, Susan E. Dudley, *Ozone NAAQS Comments: Comments on the U.S. Environmental Protection Agency's Proposed National Ambient Air Quality Standard for Ozone*, at ES-1 (Mar. 12, 1997) ("EPA's proposal may *harm* public health and welfare,

Dudley also argued that there was not enough information to justify the regulation. In her opposition statements, Dudley argued that while "EPA has a responsibility for setting [National Ambient Air Quality Standards for Ozone] that protect public health and welfare,"[41] EPA's evidence of a problem was too limited, showing only "health threats to certain individuals with pre-existing respiratory conditions in a few urban areas on certain summer days when atmospheric conditions combine to create elevated ozone levels."[42] (In other words, a minority of poor, inner-city children with asthma.)

Dudley frequently makes the case that agencies have not provided enough information to prove the need for a regulatory protection. For instance, the Army Corps of Engineers issued a proposed rule that would limit the use of a single nationwide permit (NWP) for contractors seeking to build on wetlands. The regulation would increase the scenarios under which more specific, in-depth analysis was required before such permits could be issued. The measure would help to ensure that building projects would limit the possible negative impact on surrounding aquatic life.

Dudley opposed the regulation, claiming that the Army Corps of Engineers needed substantially more information before it could justify the change. Dudley suggested that the Corps provide copious additional analysis including "an analysis of the extent of acreage affected by its proposed revisions, as well as the benefits and costs expected from the modifications" and "examin[ation of] alternative approaches to protecting valuable wetlands, including those that rely on private incentives and state and local controls."[43] Dudley also recommended that the Corps

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regardless of cost. For example, the potential for a change in the ozone standard to increase people's exposure to ultraviolet radiation raises serious questions about the net health and welfare effects of this proposal. Taking into consideration the beneficial screening effects of ozone on ultraviolet radiation, we estimate that the impact of attaining the proposed standard would be to *increase health risks by over $280 million per year.*"); *id.* at II-10 ("*The proposed change in the ozone standard will increase malignant and non-melanoma skin cancers and cataracts, as well as other health risk from ultraviolet radiation.*") (emphasis in original).

[41] Susan E. Dudley, *Testimony Before the Subcomm. on Clean Air, Wetlands, Private Property & Nuclear Security of the Senate Comm. on Envt. & Pub. Works*, April 24, 1997, at Exec. Summ. § A, available at <http://epw.senate.gov/105th/dud_4-24.htm>.

[42] Dudley *et al.*, supra note 33, at A-3.

[43] *See* Susan E. Dudley, *ACE Nationwide Permits Comments: Comments on the Army Corps of Engineers' Proposal to Issue and Modify Nationwide Permits* 4 (Nov. 30, 1998), *available*

examine "the burden the increased case-by-case review will have on its own resources, as well as the increased delays and costs that will be borne by landowners. In addition, the Corps should articulate and quantify the benefits expected from reducing reliance on NWPs. It must address the question of what negative impacts have been attributed to NWPs, and how those impacts would be avoided with the proposed modifications."[44] And if this wasn't enough, Dudley also asked that the Corps "present for public discussion estimates of the increased Corps budget requirements, increased permitting delays, and expected benefits of the proposed floodplain exclusion."[45] Though Dudley complained that the case-by-case permit reviews will take more time and resources, she put forward a swath of suggestions for further analysis needed before the Corps can act.

Dudley demands a degree of scientific certainty that would require any situation to become truly dire before an agency could act, even in cases when scientific evidence clearly justifies intervening sooner. Consider, for example, her comments regarding EPA's efforts to develop its "fish kill rule" — standards to protect the trillions of fish and other aquatic life destroyed annually by industrial plants that suck in water from natural bodies of water to cool their systems. Dudley essentially argued that it is not enough that EPA can show that the population of fish are significantly depleted by cooling water intake systems; rather, she believes we have to wait until the fish population is depleted enough to cause a rise in the price of fish.

In multiple comments to EPA, Dudley opposed an EPA survey to collect information on the public's "willingness to pay" to save fish. Instead, Dudley argued, "if fish are being as rapidly depleted as the EPA suggests, we should see their per-pound price rising proportionately to reflect the rising scarcity. Such scarcity would clearly be captured in use values, and would unlikely be measured in a survey."[46] In Dudley's sophistic view, the only value that a fish has is monetary

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at <http://mercatus.org/repository/docLib/MC_RSP_PIC1998-03_USACoE-Wetlands_981130.pdf>.

[44] *Id.* at 5.

[45] *Id.* at 7.

[46] Susan E. Dudley & Daniel Simmons, *Fish Kill WTP Reply: Reply to the Environmental Protection Agency's Response to Mercatus Center Willingness to Pay Survey: Phase III Cooling Water Intake Structures* 2 (April 25, 2005), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC2005-04EPACVSurvey_050425.pdf>.

and the government has no justification for protecting fish until they are practically extinct.

As any high school biology student might have guessed, not all fish that are of environmental significance are marketed as food (or another product), and threats to the population of fish that are sold for food can manifest long before there are any market effects. "Boom and bust" relationships in ecosystems often mean that population depletion in fish and other species lower in the food chain can produce a sudden and severe depletion in larger species, where the diminution will not be noticed until it is far too late. By her logic, an agency would have to wait for the death of an ecosystem, an epidemic of foodborne illness, or the widespread emergence of a rare cancer associated with a probable carcinogen before it would be allowed to step in and regulate.

Leaving It to the States

When all else fails, Dudley trots out a killer argument: regulation is someone else's job — namely, the state and local governments. Dudley's stark choice between federal and state regulation is mostly fictional. In the typical case, federal standards are not the only available protective standards: in the absence of preemption, federal standards are minimum standards that guarantee a basic level of protection that individual states are free to exceed with their own, higher levels of protection. The result is that federal standards set a floor for safeguards, and the states elect to set their own ceilings.

There are many well-established reasons for this federal role and not leaving the entire job of public protection up to the states. Among others: the existence of a national marketplace, beyond the capacity of any single state or local government to regulate; the comparatively weaker capacity in state and local governments to research the scientific basis for needed standards; the existence of problems, such as air pollution, that transcend state borders; and the threat of a race to the bottom, in which states vying for a corporation's decision to site its plants compete by lowering the levels of protection afforded to workers, the public, or consumers.

These well-known rationales are all conspicuously absent from Dudley's writings. Dudley has repeatedly claimed that regulations are not warranted because the federal government is not in the best position to impose a regulation and that, instead, regulating should be left completely to state and local governments. Some examples:

- Commenting on the arsenic rule, Dudley dismissed the agency's ability to make judgment calls on matters of public health: "While [EPA] should share information about arsenic levels and hazards, it should not impose its judgment, based on national average costs and benefits, on individual communities as to how best to invest in their own public health."[47]

- About the regulation for Tier 2 motor vehicle emission standards, Dudley claimed that "[g]iven state and regional track records for instituting necessary controls[,] EPA should leave decisions regarding the sulfur content of gasoline to individual states . . . ."[48]

- The regulation controlling toxic runoff from animal feed provides another striking example: "While EPA does report incidents that reveal . . . water quality

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[47] Dudley *et al.*, *supra* note 33, at A-8. See also Susan E. Dudley, *Arsenic Comments: Public Interest Comment on the Environmental Protection Agency's Request for Comments on National Drinking Water Regulations for Arsenic* 8 (Oct. 31, 2001), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC2001-14EPA-Arsenic_011031.pdf> ("[I]t is important that EPA recognize the variation in costs and benefits across systems sizes, and regions of the country. While it should share information about arsenic levels and hazards, it should not impose its judgment, based on national average costs and benefits, on individual communities as to how best to invest in their own public health.").

[48] Dudley *et al.*, *supra* note 33, at A-3. *See also* Susan E. Dudley & Wendy Gramm, *EPA Speeds Ahead With Ill-Conceived Vehicle and Gasoline Standards*, REPUBLICAN AMERICAN, Dec. 20, 1999, *available at* <http://mercatus.org/publications/pubID.2661/pub_detail.asp> ("Our recommendation is that this issue be addressed not by EPA, but by the states or regional councils, such as the Ozone Transport Assessment Group (OTAG), which have been remarkably successful at designing innovative solutions to their own pollution problems."); Susan E. Dudley, *Tier 2 Standards for Ozone NAAQS Compliance: Comments on EPA's Provision of Supplemental Information and Request for Comment Regarding Attainment of the 1-hr Ozone NAAQS Standard in Support of Proposed Tier 2 Vehicle Emissions and Gasoline Sulfur Standards*, *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC1999-11_EPA-Tier2_991201.pdf>, at App.1-1 ("[G]round level ozone concentrations that exceed the NAAQS are regional problems, which do not justify a federal solution.").

> problems in certain watersheds [caused by factory farms], these do not support uniform nationwide regulation."[49]

Perhaps the most interesting example is the roadless area conservation rule (to protect certain wild areas of national forests by keeping them "roadless"), about which Dudley insisted, "The Forest Service has failed to show that a blanket, nationwide prescription is needed for roadless lands."[50]

If it is not the federal role to establish national standards for *national forests owned by the federal government*, it is unclear what, if any, reason would justify federal regulation for Dudley.

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[49] Dudley *et al.*, *supra* note 33, at A-20.

[50] *Id.* at A-4.

Case in Point: Dudley's Impossible Requirements in Action

Dudley's commitment to disproving regulation is obvious through her inconsistent and often contradictory statements and analytical methods. She applies criteria only when they are convenient to debunking regulation or weakening public protections. Intellectually incoherent, the only consistency is her unrelenting hostility to regulation. Case in point: her views of the public's ability make its own choices.

The public's ability to make its own rational decisions is the crux of the Dudleynomics version of public choice theory. It is the background assumption that makes possible the rhetorical legerdemain mentioned above[51] in which the need for regulation is the proof that we do not need a regulation. For example, as she argued when deriding a fuel economy increase for light trucks as the "worst rule of 2003," "[the National Highway Transportation Safety Administration] continues to force vehicle manufacturers to achieve higher miles per gallon than the market would offer, or consumers would choose, in the absence of the regulation."[52] Dudley dismissed NHTSA's finding of net benefits from the increase, writing, "We know this must be false, because any regulatory constraint that forces consumers away from their preferred choices must have negative net benefits (i.e., make Americans worse off)."[53]

In addition to using this background assumption as a basis for criticizing regulations, Dudley has also used it to form alternatives to regulations: instead of regulating, why not give the public information, and let it make choices?

For instance, Dudley opposed a NHTSA regulation requiring advanced air bag technology, claiming that NHTSA could never have enough information to justify the need for advanced air bag technology in automobiles: "[R]egardless of how sophisticated NHTSA makes its tests, or how sophisticated manufacturers make air bags, this one-size-fits-all approach will not meet the preferences or protect the safety *of all consumers under all conditions*."[54] Instead, Dudley argued

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[51] *See* pages 16-19 *supra*.

[52] WASH. POST, Dec. 29, 2003, *available at* <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contented=A40140-2003Dec29&notFound=true> (last accessed Feb. 8, 2006).

[53] *Id.*

[54] *See* Dudley, *supra* note 2, at 1 (emphasis added).

that NHTSA should provide consumers with information on the benefits and potential problems with various air bag technologies and then let consumers decide whether to buy automobiles with advanced air bag technology: "Rather than requiring air bags to pass additional elaborate crash tests, which can never fully reflect real world conditions, NHTSA should consider options that allow informed consumers to make their own personal risk tradeoff decisions."[55]

Dudley also proffered informed consumer choice as the alternative to a regulation intended to reduce smog-related health hazards by reducing ground-level ozone. Testifying before Congress against EPA's standards, she insisted that "public health advisories and other [geographically] targeted approaches may be an effective alternative to standard setting" and that "an expanded air pollution warning system [should] be initiated so that sensitive individuals can take appropriate 'exposure avoidance' behavior."[56] In other words, the public should be informed of days when ozone-related health risks are at their highest, and then choose to stay indoors. (Where, incidentally, Dudley believed poor asthmatic children are probably being exposed to the pest droppings that induced their ailments in the first instance.[57])

Although she has advocated giving information to the public as an alternative to regulation, she has actively opposed agency proposals to do just that. Her argument: that the public is too irrational to make sound choices based on the information.

For example, Dudley opposes requiring industry to provide information on toxic releases and chemical hazards. Dudley opposed regulations to increase reporting requirements under the Toxic Release Inventory, claiming that the general public was too ill-informed to make good use of such information. On a rule that would have required more reporting of lead and lead compounds, Dudley

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[55] *Id.*

[56] *See* Dudley, *supra* note 41.

[57] *See id.* ("While asthma is a disturbing health problem, particularly since (a) reported cases have been increasing in recent years (45 percent in the last decade), (b) one-third of its victims are children, and (c) it is most severe among the urban poor, this trend cannot be explained by ozone levels; air quality has been improving over the last decade and ozone levels in particular declined 6 percent between 1986 and 1995. Recently, the National Institute of Allergy and Infectious Diseases funded a study that revealed that 'the leading cause of asthma by far was ... proteins in the droppings and carcasses of the German cockroach.'").

wrote, "Even if we determine that information on the release of certain chemicals has a net social value, we cannot assume that more frequently reported information, or information on a broader range of chemicals, would be *more* valuable. Only when the social costs of information are weighed against the social benefits can a determination be made regarding what and how much information is optimal."[58]

Any such cost-benefit analyses of TRI information would likely fail the Dudleynomics test of market failure. As Dudley argues, "Information is a good, and like other goods, it is costly to produce. Markets generally function well at determining the optimal level of production for different goods, including information. Absent some market failure that results in a sub-optimal production of information, a federal mandate requiring the production of information is likely to divert scarce resources from other, more valued, social goals."[59]

Never mind that since the TRI program began in 1988, disposal and releases of TRI chemicals have decreased by 57 percent. These reductions include decreases in the release of chemicals hazardous to human health such as lead, mercury, dioxin, and other persistent bioaccummulative toxic (PBT) chemicals.[60] Instead, such results may actually be signs of irrational behavior: "Even if the information TRI provided conveyed important information on potential risk, *the recipients of the information may not interpret it correctly or rationally*."[61]

Dudley also opposed regulations that would require chemical and industrial facilities to provide public information about the worst case scenarios that could arise if chemicals or toxic substances were accidentally released. Dudley insisted that this information "is unlikely to be of any public value."[62] Dudley's proof: the

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[58] Susan E. Dudley, *TRI Lead Comments: Comments on the Environmental Protection Agency's Lead and Lead Compounds; Lowering of Reporting Thresholds; Community Right-to Know Toxic Chemical Release Reporting; Proposed Rule* 3 (Dec. 15, 1999), available at <http://mercatus.org/repository/docLib/MC_RSP_PIC1999-13_EPA-TRI_991215.pdf>.

[59] *Id.* at 6.

[60] *See* EPA, "TRI Public Data Release eReport: Summary of Key Findings" 16 (April 2006), *available at* <http://epa.gov/tri/tridata/tri04/ereport/KeyFind.pdf>.

[61] Dudley, *supra* note 58, at 3 (emphasis added).

[62] Susan E. Dudley & Daniele Schiffman, *RMP Comment: Public Interest Comment on EPA's and DOJ's Proposed Distribution of Off-Site Consequence Analysis Information* 11 (June 8, 2000), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC2000-12EPADOJ_Off-siteInfo_000608.pdf>.

public had not already demanded it. Dudley also whipped out the catch-all argument for government secrecy after September 11: that TRI amounted to "terrorist right to know."[63] Of course, Dudley did not stop there: she argued that our right to know is a right that we do not have the intellectual capacity to exercise. "How will knowing the physical state and concentration of a chemical educate and inform people if they do not know what the chemical is?" Dudley asked. "How does knowing the statistical model, assumed atmospheric conditions, and duration of release inform someone who does not know the chemical involved, or the outcome hypothesized?"[64] Her answer: it does not inform the public. Dudley approvingly quoted a research paper finding that, "[g]iven different information on potential environmental risks from hypothetical industrial facilities, participants in the experimental analysis systematically believed — and made irrational choices based on — the worst-case scenario presented, regardless of information source, and despite careful caveats as to actual expected risks."[65]

While these positions seem inconsistent prima facie, there is a certain logic to Dudley's approach. If the information forces greater disclosure and accountability from industry, then Dudley isn't interested. But if the need for more information can delay action by federal agencies, then Dudley claims more information is the answer we need.

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[63] *See* Susan E. Dudley, *It is Time to Reevaluate the Toxic Release Inventory: Testimony before Subcomm. on Reg. Reform & Oversight of House Comm. on Small Bus. on "The TRI Lead Rule: Costs, Compliance, and Science"* (June 13, 2002), *available at* <http://mercatus.org/repository/docLib/20060804_RSP_Dudley_Testimony_TRI_020613.pdf>. *See also* Susan E. Dudley, *Terrorist Right-to-Know?*, Nov. 1, 2001, at <http://mercatus.org/publications/pubID.2629/pub_detail.asp>.

[64] Dudley & Schiffman, *supra* note 62, at 8-9.

[65] *Id.* at 8.

Dudley's Radical Ideas

If she is confirmed to head the Office of Information and Regulatory Affairs, Susan Dudley will be in a position not just to interfere with specific regulations as they go through the rulemaking process but also to develop government-wide policies that could undermine the federal government's very capacity to protect the public. The most recent occupant of that office, John Graham, used his power to develop a number of government-wide policies to undermine health and safety protections with procedural minutiae:

- A circular standardizing cost-benefit analysis and calling for cost-effectiveness analysis — two tools that, in Graham's hands, have been used to tilt the rulemaking process in favor of corporate special interests;[66]

- Guidelines for burdensome "peer review" to delay the release and circulation of important scientific information;[67]

- New requirements for general policy statements, interpretations, and guidance to the public, which will result in the public being left in the dark about important agency matters;[68] and

- A one-size-fits-all straightjacket on risk assessments and other risk-related assessment activities, which will continue the Bush administration's agenda of tainting science with special interest politics.[69]

Through government-wide policies such as these, OIRA complements its rule-by-rule oversight with across-the-board distortions of the regulatory process itself,

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[66] *See* Circ. A-4, Sept. 17, 2003, *available at* <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>.

[67] *See* OMB, FINAL INFORMATION QUALITY BULLETIN FOR PEER REVIEW, Dec. 16, 2004, *available at* <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-03.pdf>.

[68] *See* OMB, PROPOSED BULLETIN FOR GOOD GUIDANCE PRACTICES, Nov. 23, 2005, *available at* <http://www.whitehouse.gov/omb/inforeg/good_guid/good_guidance_preamble.pdf>.

[69] *See* OMB, PROPOSED RISK ASSESSMENT BULLETIN, Jan. 9, 2006, *available at* <http://www.whitehouse.gov/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf >.

which can burden, weaken, and delay the development of all kinds of needed public safeguards.

Dudley comes to this nomination with an agenda of her own. We know from her many writings and other public pronouncements that she takes a dim view of the federal role in protecting the public. We also know that, like Graham before her, Dudley has a radical vision for distorting regulatory policy in ways that serve corporate special interests at the public's expense. The following are some of Dudley's dangerously radical ideas.

Regulatory Sunsets

How could a "sunset" be a bad idea? Look no further than Susan Dudley's radical vision of "regulatory sunsets." The basic concept of regulatory sunsets is that all the protective standards on the books — all of them, ranging from the ban on lead in gasoline, to safeguards against arsenic and other poisons in the drinking water, to protections for miners as they engage in their dangerous work — should be given mandatory expiration dates. At the end of that drop-dead date, an agency would have to stop everything and prove the case for that regulation yet again, or else it would be stripped from the books.

Even though we know, for example, that the ban on lead in gasoline is a proven protection that has prevented vulnerable children from losing IQ points, Dudley would put that safeguard at risk with regulatory sunsets. In her own words:

> [W]e have to . . . look back at that 20 feet of shelf space [dedicated to the Code of Federal Regulations]. Are all those regulations still necessary? Are they having their intended effects? Are they outdated? If not, it's time to start thinking about ways to revise them. One way to do that would be through sunset provisions, which would shift the burden of proof for those existing regulations and require us to demonstrate that they're still needed.[70]

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[70] Susan Dudley, White House Economic Conference, Panel on Tax and Regulatory Burdens, Dec. 15, 2004, *formerly archived online at* <http://www.mercatus.org/video/041215-dudleytestimony.ram> (now removed from Mercatus website).

Note that apparent slip of the tongue: "Are they outdated? *If not*, it's time to start thinking about ways to revise them." It may be even more revealing of Dudley's agenda than any affirmative declaration.

Forcing agencies to re-justify all the rules on the books would be an enormously wasteful enterprise that would leave them little or no time to look forward, to the unmet needs for protection that need to be addressed. There is nothing inherently wrong — and much worth applauding — about agency efforts to collect data on continuing and emerging problems, including assessing whether regulatory safeguards actually are addressing the public's needs. A mandate for regulatory sunsets, however, would be a one-size-fits-all edict, sweeping in not only rules worth assessing but also rules for which there is no legitimate question of their value. Moreover, sunsets are entirely unnecessary: the public already has the option of identifying rules that are out of date and bringing them to the agencies' attention through petitions for rulemaking under the Administrative Procedure Act. The virtues of continuing to rely on the APA process include turning to the public to focus attention on the rules worth addressing instead of forcing agencies to plow through every single rule they have ever issued, as well as offering a vehicle that is neutral to more or less regulation (given that petitions for rulemaking can be used to demand new rules in addition to revisions or eliminations of existing rules), as opposed to the one-way ratchet of regulatory sunsets.

Additionally, regulatory sunsets raise the difficult question of timing. What time is the right time to force a regulation to plead for its life? In the case of air bags, for example, the early response from auto makers was fatally inept, but the evidence from that period was immediately used as fodder for junk science pieces arguing against the value of air bag requirements.[71] Even absent the intervening malfeasance of recalcitrant manufacturers, auto safety requirements can take as long as ten years after a regulation's effective date to be fully realized in vehicles on the road, given the general rate at which people retire their vehicles in favor of new ones — and the effective date can itself be some time off from the publication of a rule, in order to give manufacturers time to gear up for the new requirement.

Whatever the time horizon, regulatory sunsets would be at odds with precautionary protections. The very purpose of precautionary regulations is to address potential harms before they manifest. Agencies under the gun of a

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[71] *See, e.g.*, Kimberly M. Thompson, Maria Segui-Gomez & John D. Graham, *Validating Benefit and Cost Estimates: The Case of Airbag Regulation*, 22 RISK ANAL. 803 (2002).

regulatory sunset deadline to defend and re-justify a precautionary standard could be forced into the impossible situation of having to prove a negative.

Regulatory sunsets could not be implemented by executive fiat (even if such separation-of-powers concerns have not troubled Graham much in recent years). Still, a bill offered in both the House and Senate during the 109th Congress would take current law and advance it incrementally in the direction of regulatory sunsets.[72] Moreover, during the House's consideration of bills to create sunset commissions (sunset dates not for regulations but for programs in their entirety), the House Committee on Government Reform reported out one bill with language adding regulatory sunsets.[73] If Dudley is confirmed, she would undoubtedly apply the political pressure of the White House to promote legislative developments for regulatory sunsets, which she would enforce with zeal.

Regulatory Rationing

Dudley has also promoted the radical idea of rationing the government's ability to produce protective standards that the public needs. Dudley would impose "regulatory budgets": fictional budgets of industry compliance costs, with a cap. Once an agency has hit its cap, it would be forced to stop promulgating any new protective standards, no matter how great the need.

Others before Dudley have advocated regulatory budgets. Dudley's modest contribution to the corporate-sponsored campaign for these rationing tools is a rhetorical one: importing language from fiscal policy debates. As Dudley recently explained, her approach is

> to treat regulatory expenditures in a manner similar to on-budget expenditures. I keep using this analogy to federal spending. For federal spending to be dedicated, Congress

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[72] Two bills would amend the Regulatory Flexibility Act, which requires agencies to periodically review regulations promulgated since passage of the RFA with a significant economic impact on a substantial number of small entities, by expanding the scope of those reviews to cover all regulations on the books and explicitly forcing agencies to consider whether or not the rules are still needed. *See* Regulatory Flexibility Improvements Act, H.R. 682; Regulatory Flexibility Reform Act, S. 1388.

[73] *See* Government Efficiency Act of 2006, H.R. 5766 (post-markup version available at <http://www.ombwatch.org/regs/2006/sunset-hr5766-markup.pdf>).

> has to first authorize an activity and then appropriate the necessary resources. For regulatory spending (the compliance costs to all of us as consumers, and workers, and employers), it's authorized in statute, often in broad terms, but then there are no limits on the spending. Congress could make regulations more accountable by adding that element to the statute — to regulatory statutes.[74]

In Dudley's world, regulatory protections are best understood as "off-budget costs" that need to be reined in, just as "on-budget" costs can be.

Dudley's mangled analogy betrays a misunderstanding of the fiscal policy from which she has borrowed these terms. The term "off-budget" refers to entitlements and other government spending excluded by law from budget caps, pay-as-you-go, sequestration, and other elements of the federal budget process.[75] The Congressional Budget Office gives the following definition:

> Spending or revenues excluded from the budget totals by law. The revenues and outlays of the two Social Security trust funds (the Old-Age and Survivors Insurance Trust Fund and the Disability Insurance Trust Fund) and the transactions of the Postal Service are off-budget. As a result, they are excluded from the totals and other amounts in the budget resolution and from any calculations necessary under the Deficit Control Act.[76]

So, although Dudley has taken the phrase "off-budget" from fiscal policy discourse, she has misunderstood it entirely. "Off-budget" costs are not expenditures that have failed to be accounted for; they are, instead, entitlements, like Social Security and Medicaid, which have dedicated funding streams and a trust fund from years of surplus income and thus need not be included in the regular annual budget.

Dudley's gaffe reveals an even more significant misunderstanding. Regulatory protections of the public health, safety, civil rights, environment, and

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[74] Dudley, White House Economic Conference, *supra* note 70.

[75] *See* OMB Watch, *Glossary of Important Budget Terms, available at* <http://www.ombwatch.org/article/articleview/1932/1/197/>.

[76] CBO, *Glossary of Budgetary and Economic Terms, available at* <http://www.cbo.gov/showdoc.cfm ?index=3280&sequence=0>.

other public interests are not a species of fiscal activity, meaningful only in terms of the costs imposed on corporate special interests when the federal government finally forces them to do the right thing as corporate citizens. They are, instead, *entitlements* in the truest sense of the word. Through the democratically-controlled federal government, the public pools its resources to create institutions and policies strong enough to counter the forces we are otherwise powerless to face as isolated individuals. FDR explained it best in a July 1933 fireside chat: "It goes back to the basic idea of society and of the nation itself that people acting in a group can accomplish things which no individual acting alone could even hope to bring about." In the face of harmful pollution, unsafe products released into the national marketplace, and other hazards that corporate special interests expose us to without otherwise being forced to internalize the attendant public costs, we are entitled to regulatory safeguards. Our government owes us nothing less.

Aside from being morally and politically obtuse, regulatory budgeting runs into the problem of how to actually measure the industry compliance costs that would feed the fictional "budgets." For a regulation that is not yet on the books, agencies produce *ex ante* estimates of the costs that industry will bear by asking for estimates from the soon-to-be-regulated industries (which have clear incentives to inflate the numbers), often using biased samples of industry representatives, failing to anticipate technological innovations that will drive down actual costs, and making other conservative assumptions that routinely overestimate actual compliance costs significantly.[77] A recent major study of compliance cost estimates has revealed that these *ex ante* estimates are systematically biased in an upward direction.[78] Agencies forced to work within these "budgets" would be arbitrarily forced to stop protecting the public long before companies had actually expended the amounts allocated, given the routine inflation of *ex ante* estimates.

Moreover, the use of cost estimates as dispositive factors in policy decisions ignores a crucial equity consideration: not all costs have the same moral or ethical value. Some regulatory costs represent the cost to industry of what it should have done as a good corporate citizen in the absence of regulation. Compliance cost estimates, already suspect, become even more meaningless if they are not offset by

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[77] *See* Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2030-33 (2002).

[78] *See* RUTH RUTTENBERG & ASSOCS., PUBLIC CITIZEN, NOT TOO COSTLY AFTER ALL: AN EXAMINATION OF THE INFLATED COST-ESTIMATES OF HEALTH, SAFETY, AND ENVIRONMENTAL PROTECTIONS (Feb. 2004), *available at* <http://www.citizen.org/documents/Not%20Too%20Costly.pdf>.

the illicit profits earned by companies (such as a factory illegally dumping hazardous toxic waste, or an auto company aware that strengthened car roofs are key to preventing injuries and saving lives in rollover crashes all the while telling government and public the opposite[79]) during the time that they knew of the harms they were creating but failed to act. Dudley's moral world, the world of regulatory budgeting, is a depraved one in which industry can knowingly expose the public to grave harms, enjoy the financial benefits of failing to take the steps necessary to protect the public, and then use compliance costs — the costs of finally doing the right thing — as a shield against being forced to comply with new protective standards.

Dudley's radical vision has antecedents in legislative proposals. After the failure of the anti-regulatory components of the Contract With America, corporate special interests have prodded some members of Congress to back a measure that comes just short of regulatory budgeting by calling for a pilot study of regulatory budgeting, which OIRA would implement in several key agencies (such as the Environmental Protection Agency, Food and Drug Administration, and Occupational Safety and Health Administration). The evidence from Dudley's public statements is that she would back such proposals and then implement the resulting "pilot study" in ways that would put the public at risk.

More Costs, Fewer Benefits

Her insistence on making industry compliance cost estimates the crux of regulatory policy informs other radical ideas that would sink the federal government into a mire of endless analysis and meaningless justifications for failing to protect the public.

The End of "Safety First" Laws

For example, Dudley has called for Congress to dramatically reorder the nation's protective priorities by embedding cost considerations in all laws that authorize agencies to protect the public, even some laws that Congress has declared

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[79] *See* Press Release, Public Citizen, "New Report on Auto Industry Data Shows Automakers Misled NHTSA and Public When Denying Link Between Roof Strength and Injuries" (March 30, 2005), *available at* <http://www.citizen.org/pressroom/release.cfm?ID=1909>.

should be "safety first" laws.[80] In some of these laws, such as the laws that establish the Mine Safety and Health Administration and the Occupational Safety and Health Administration, Congress has forbidden the use of cost-benefit analysis in decision making.[81] In others, even if cost-benefit analysis is not explicitly forbidden, Congress has nonetheless called upon the agencies to put a thumb on the scale in favor of safety.[82]

Dudley's hostility to precautionary laws is particularly noteworthy given that the Mine Safety and Health Administration is currently working on several new regulations to protect miners.[83] Congress required these new rules in the aftermath of the Sago mine disaster, as the public became aware that the tragedy could have been averted or at least mitigated had the Bush administration not abandoned work on several regulatory safeguards planned by previous administrations.[84] Although there is nothing Dudley can do to amend MSHA's statutory authority by herself, she can nonetheless exert tremendous influence over the resulting regulations. Her hostility to safety-first laws and her blind devotion to minimizing industry compliance costs should give miners and all other members of the public cause for concern.

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[80] *See* Dudley, White House Economic Conference, *supra* note 70 ("But there are still regulatory statutes that prohibit the agencies from examining the full impacts of regulation. Congress should correct these statutes and stop putting blinders on agencies, to make sure that they can do their job.").

[81] *See, e.g.*, *American Textile Manufs. Inst. v. Donovan*, 452 U.S. 490 (1981) (interpreting OSH Act to forbid cost-benefit analysis).

[82] *See, e.g.*, *Public Citizen v. Mineta*, 340 F.3d 39, 58 (2d Cir. 2003) ("[W]hen NHTSA issues standards under the Safety Act, *State Farm* requires that the agency weigh safety benefits against economic costs; moreover, *State Farm* instructs the agency to place a thumb on the safety side of the scale.").

[83] *See* Mine Improvement and New Emergency Response Act of 2006, Pub. L. No. 109-236, 120 Stat. 493.

[84] For information about the items eliminated from MSHA's rulemaking agenda which were implicated in the Sago tragedy, see Robert Shull, *Failing to Protect the Public: Mine Safety & Beyond*, REG•WATCH, Jan. 21, 2006, *available at* <http://www.ombwatch.org/article/blogs/entry/1452/6>.

Telling Us More about Costs (But Not Benefits)

Dudley repeatedly insists that the benefits of regulations are better understood, qualitatively if not quantitatively, than the costs.[85] Accordingly, she has proffered several radical proposals that would consume vast amounts of taxpayer dollars on navel-gazing analyses that would increase the reported estimates of regulatory costs while doing little to inform the public about the life-saving benefits of sensible safeguards. Among her proposals:

- *Analysis of the analysis of the analysis.* Dudley has proposed that OIRA get in the business of producing an annual report card for agencies,[86] assessing their cost-benefit analyses of proposed rules for the quality of the analyses (and presumably judging them against one-size-fits-all criteria, applicable whether the agency is evaluating a standard for drinking water or an auto safety improvement[87]).

- *Convert the annual report on regulatory costs and benefits into a detailed report on regulatory ... costs.* OIRA is charged with presenting an annual report on the costs and benefits of regulations. Dudley has taken issue with this "regulatory accounting report," arguing that OIRA has not done *enough* to present the costs of regulations. Accordingly, Dudley has counseled that OIRA should present as robust a picture of costs as possible, even presenting a picture of the costs for rules for which benefits have not been similarly quantified.[88] Given the enormous

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[85] *See, e.g.*, Dudley, *supra* note 5, at 9 ("The desired benefits of regulations are the force behind legislative initiatives that create them, and these desired benefits of regulations are often better understood, qualitatively, at least, than the costs.").

[86] *See id.* at 12.

[87] *See id.* (decrying OIRA's failure to provide "independent verification or any assurance that assumptions and methods are consistent across programs and activities").

[88] *See id.* ("OMB should not limit its totals to rules for which agencies estimate both costs and benefits. It should also present Congress a review of other reliable estimates of regulatory impacts").

difficulty of quantifying the benefits of regulation, which can include such abstract but quite real benefits as equity, civil rights, and the preservation of an interconnected ecology, Dudley's proposal would feed industry's anti-regulatory propaganda by presenting a skewed, cost-heavy picture of regulatory protections.

- *Require OIRA to conduct independent assessments of regulatory costs and benefits.* The annual report mentioned above essentially presents annual totals derived from agency estimates. Dudley has called upon OIRA to go even further: to second-guess the agencies, and independently estimate costs and benefits of proposed regulations.[89] Doing so would open the door to having OIRA do so during the rulemaking process itself, when agencies are preparing the analyses they will use to justify their policy decisions. Given Dudley's penchant for producing cost estimates far in excess of any government estimate,[90] it seems likely that a Dudley-helmed OIRA would supplant agency estimates with assessments that undermine the case for new regulations.

- *Create yet another entity for regulatory reviews.* Having OIRA assert extralegal authority over the regulatory process is not enough for Dudley. She has proposed that yet another entity be created, above or alongside OIRA, to review and analyze regulations. Dudley has testified that "[i]t is not clear that the

[89] *See* Susan E. Dudley, *Testimony on Regulatory Accounting Before the House Subcomm. on Energy Policy, Natural Resources & Reg. Affs.* 3 (Feb. 25, 2004) (calling on OIRA's annual regulatory accounting report to "reflect an independent assessment of regulatory costs and benefits, and not simply provide a summation of agency estimates"), *available at* <http://mercatus.org/repository/docLib/20060809_Dudley_House_Subc_Energy_NR_Reg_Aff_on_Reg_A_Feb_25_2004.pdf>.

[90] For example, Dudley has suggested that OIRA's estimate of the costs of regulations could be too low "by a factor of 20." Dudley, *supra* note 5, at 7. *See also, e.g.*, Appendix E, "Dudleynomics in Action."

> Office of Information and Regulatory Affairs, from its location within the Executive branch, is in a position to provide the necessary check or independent assessment of costs and benefits."[91] Dudley suggests instead that Congress establish a "Congressional or other outside review body . . . to report benefits and costs honestly and without deliberate bias."[92]

Return of the Senior Death Discount

Although she believes that benefits of regulations are better understood than costs, Dudley has proposed methods that would ensure we understand much less about those benefits. The prevailing practice in cost-benefit analysis of assigning a dollar value to human life when calculating benefits is *ab initio* problematic,[93] but Dudley would make the practice even more morally questionable by implementing a senior death discount that counts the lives of seniors as less than the lives of the young.

In formal comments submitted to the Environmental Protection Agency criticizing stricter standards for arsenic in the drinking water (standards Dudley dismissed as "an unwelcome distraction"[94]), Dudley argued that "EPA's value [per statistical life] likely overstates the benefits of the rule. . . . This can be addressed with sensitivity that estimates benefits based on a value per life-year saved, or an age-adjusted value per life."[95] Here, Dudley calls for essentially two kinds of senior death discounts:

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[91] Susan E. Dudley, *Testimony before the House Committee on Small Business, Subcommittee on Regulatory Reform and Oversight, "Reforming Regulation to Keep America's Small Businesses Competitive"* 8 (May 20, 2004).

[92] *Id.*

[93] *See generally* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

[94] Susan E. Dudley, *How Not to Improve Public Health*, Jan. 11, 2001, *available at* <http://mercatus.org/publications/pubID.2630/pub_detail.asp>.

[95] Susan E. Dudley, *Arsenic Comments: Public Interest Comment on the Environmental Protection Agency's Request for Comments on National Drinking Water Regulations for Arsenic* 4 (Oct. 31, 2001), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC2001-14EPA-Arsenic_011031.pdf>.

- *"value per life year saved"* — Agencies estimating the benefits of a proposed new regulatory safeguard could choose to calculate either the number of *lives* saved or, alternatively, the number of *life years* saved. If 1,000 people were saved by a new safeguard, then an agency estimating *lives* would count all 1,000 people equally. An agency estimating *life years*, however, would look at those 1,000 people and count up how many years each person has to live, on average, so that someone with only 10 years left would count for much less than someone with 70 years left.

- *"age-adjusted value per life"* — Even if agencies chose to count lives rather than life years, the trick with this second kind of senior death discount would happen when the lives were converted to dollars. Based on studies, now discredited,[96] that seniors were less willing to pay to reduce mortality risks, the agency following Dudley's advice would assign a lower cash value to the lives of seniors than to the lives of the young.

After enormous public outcry about EPA adopting a senior death discount, Congress forbade government agencies from using funds toward calculating "monetary values for adult premature mortality that differ based on the age of the adult."[97]

The other possible senior death discount — using life-year methods to estimate benefits of proposed health, safety, and environmental regulations — has not, however, been forbidden. Exercising the extralegal powers Graham asserted before her, Dudley could force agencies to adopt this form of senior death discount. The result would be analytical games that bias the rulemaking process against protections that benefit highly vulnerable populations, such as the elderly.

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[96] *See* Cindy Skrzycki, *Under Fire, EPA Drops the 'Senior Death Discount,'* WASH. POST, May 13, 2003, at E1 (summarizing the controversy).

[97] Transportation, Treasury, and Independent Agencies Appropriations Act of 2004, Pub. L. No. 108-199, 108 Stat. 3, 416, Div.G § 419.

Radical Wrecking Ball

Dudley's radical ideas would take a wrecking ball to regulatory policy and the entire network of safeguards we already have in place to protect the air we breathe, the water we drink, and the workplaces we spend most of our daily lives in. The flipside of Dudley's credo applies here: there are too few benefits the public will derive from her ideas, far too many benefits we will lose, and a cost that is much too high for us to bear.

Where Does She Get These Radical Ideas?

Meet the Mercatus Center

Dudley's extremist views make her right at home in the industry-funded think tank she would be leaving to become the new OIRA administrator. Dudley spent the last three years as director of regulatory studies for the Mercatus Center. Based on the campus of George Mason University, the Mercatus Center takes its name from the Latin term "mercatus," which was used to "describe the activity of markets, trade, and commerce."[98] Mercatus describes itself as a "research, education, and outreach organization" that uses "market-based tools and analysis to discover workable solutions to pressing economic and governmental problems."[99]

Underneath this benign cover lies a hostile anti-regulatory agenda. Although Dudley's program has been labeled "regulatory analysis" and "regulatory studies," the truth is that her program has been dedicated to anti-regulatory *advocacy*, so extreme that even the libertarian think tank Cato considers itself more academic than Mercatus. Dudley's radicalism puts her right at home in Mercatus: founded by corporate interests and endowed by large corporations, free-market oriented foundations, and leaders from the corporate world, Mercatus has long operated at the intersection of money, power, and influence in order to promote corporate special interests at the expense of the public interest.

Birth and Development of the Center

Richard Fink, executive vice-president of Koch Industries, Inc.,[100] founded Mercatus (then called the Center for Market Processes) at his alma mater, Rutgers University, in the early 1980s.[101] Later, he moved the organization to George Mason University in Arlington, Virginia, where it resides today. Mercatus blossomed at George Mason in 1997 after receiving a $3 million grant from the Charles G. Koch Charitable Foundation, which was founded by Charles G. Koch,

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[98] Mercatus Center. February 21, 2006, http://www.mercatus.org/category.php/1.html.

[99] Mercatus Center. February 21, 2006, http://www.mercatus.org/category.php/1.html.

[100] Biography of George Mason University Board of Visitors member Richard Fink, at: http://bov.gmu.edu/fink.html (visited Oct. 11, 2002).

[101] "James Buchanan Center Funded with $10 Million Gift," *The Mason Gazette*, March 1998. Available on-line at: http://www.gmu.edu/news/gazette/9803/koch.html (visited October 11, 2002).

chairman and chief executive officer of Koch Industries.[102] Koch Industries, an oil-and-gas giant, is the second largest privately held company in the United States.[103]

The Charles G. Koch Foundation is one of the largest corporate donors to George Mason University, donating over $15 million since 1998 to the George Mason University Foundation, which accepts and manages tax deductible donations on behalf of GMU and its affiliates.[104] The Charles G. Koch Foundation frequently earmarks these donations for the Mercatus Center, and in the past two years alone has donated over $2 million to Mercatus,[105] making the Charles G. Koch Foundation one of the Mercatus Center's largest and most influential continuous donors.[106]

Koch influence has been further felt through donations totaling $150,000 in 1999 and 2000 from the David Koch Foundation, established by Charles' brother, David Koch, an executive vice president of Koch Industries,[107] who also personally donated $100,000 in 2005.[108] Charles Koch and Richard Fink, the Center's founder and Koch executive, both hold seats on Mercatus's eight-member Board of Directors.[109] Thus, the flow of Koch money and influence runs uninterrupted from industry to conservative foundation to recipient.

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[102] George Mason University's Development Publication, *Benefactor: An Update on Private Support*, Fall 2001, available on-line at http://www.gmu.edu/development/pubs/benefact/fall01/pages/teamrecruit.html (visited on November 8, 2002).

[103] Hoover's Online business capsules, available on-line at http://www.hoovers.com/co/capsule/7/0,2163,40267,00.html

[104] George Mason University Development Publication, *Benefactor: An Update on The Campaign for George Mason University,* Fall 2004, available on-line at http://www.gmu.edu/development/pubs/documents/fall2004.pdf, visited Feb. 23, 2006.

[105] The Campaign for George Mason University Fast Facts. October 27, 2005. George Mason University. February 23 2006 http://www.gmu.edu/development/pubs/fastfacts/October_2005/email.htm.

[106] Benefactor in Brief Update on Private Support to George Mason University April 6, 2006, June 16, 2006 http://www.gmu.edu/development/pubs/fastfacts/april_2006/email.htm

[107] David H. Koch Charitable Foundation, IRS Form 990, 1999 and 2000.

[108] The Campaign for George Mason University Fast Facts. October 27, 2005. George Mason University. February 23 2006 http://www.gmu.edu/development/pubs/fastfacts/October_2005/email.htm.

[109] Mercatus Center, March 5, 2006, http://www.mercatus.org/board.php?menuid=1.

Money, Power & Influence

Koch is not alone in funding Mercatus. In fact, the Mercatus Center's funder list reads like a Who's Who of corporate America. The investment has resulted in handsome returns: Mercatus is an anti-regulatory machine, churning out comments in rulemaking after rulemaking to oppose protections of the public interest — positions which safeguard not the public but the industry bottom line. More than just a mouthpiece, Mercatus establishes connections with congressional staff and administration officials in order to serve as a conduit for industry anti-regulatory advocacy in the halls of power.

Influence For Sale

Just like influential lobbying firms, Mercatus has attracted former administration staff to help sell its anti-regulatory agenda to policymakers. The obvious advantage to having former OMB staff or administrators lies with their institutional memory, knowledge of how the process works, and access to key political appointees and career staff who share their ideological convictions. Corporate donors seeking to roll back regulations no doubt find Mercatus's influence especially appealing.

Many past and current staff members from the Mercatus Regulatory Studies Program — the branch of Mercatus that files regulatory comments — have also worked in OMB's halls, if not OIRA itself. They are:

- Susan Dudley herself, who stepped down as the director of regulatory studies upon being nominated officially to OIRA and still serves as a member of the regulatory team, was an OIRA desk officer specializing in environmental regulations in the late 1980s.

- Wendy Lee Gramm, Mercatus's past Director of the Regulatory Studies Program and a current Distinguished Senior Scholar, was the OIRA administrator from 1985-1988. She was chairwoman

of the Commodity Futures Trading Commission from 1998 until January 1993.[110]

- Brian Mannix, a past senior research fellow in the Regulatory Studies Program, served as an OMB economist early in the Reagan administration,[111] and he is now advocating the return of the senior death discount from a perch at EPA.[112]

In addition, James Miller, a former OMB director and chairman of the Federal Trade Commission in the Reagan Administration, is a Distinguished Fellow at the Mercatus Center. (He was also general counsel at the Koch Foundation funded Citizens for a Sound Economy.)[113] Miller was the first director of the office that became OIRA and helped draft Executive Order 12,291, which assigned to OIRA regulatory oversight duties far beyond those authorized by Congress in the Paperwork Reduction Act.[114]

Perhaps the most important person to go through Mercatus's revolving door is OIRA's recent past director, John Graham, who served on the Mercatus Center advisory board until his appointment by Bush in 2001.[115]

Mercatus can also boast its congressional-networking Capitol Hill Campus, a program that attempts to "bridge the gap" between academics and policymakers through breakfasts, seminars, and an annual retreat for congressional chiefs of staff

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[110] For more about Gramm and just what can go wrong when money, power, and influence collide, see appendix D.

[111] Jim Sibbison, "EPA's Loss of Power and Independence," *Newsday*, December 17, 1985.

[112] *See* OMB Watch, *Return of the Senior Death Discount?: Heinzerling Takes On Mannix*, OMB WATCHER, May 30, 2006, available at <http://www.ombwatch.org/article/articleview/3447/1/134?TopicID=3>.

[113] Biography of Mercatus Center Distinguished Fellow, James Miller. Available at http://www.mercatus.org/about/miller.htm (visited October 11, 2002).

[114] Telephone Interview with Gary Bass, Founder and Executive Director of OMB Watch, October 7, 2002.

[115] Ellen Nakashima, "Influence of Industry on Rules Agency Questioned," *Washington Post*, March 13, 2002.

and other high level legislative aides. In 2001 and 2002, the program played host to more than 3,500 staffers.[116]

One annual three-day retreat for these high-level aides was held February 2006 in Richmond, Virginia, at the five-star Jefferson Hotel. The program included seminars and roundtables with titles such as "Costs of the Tort System: Benefits of Reform" and "Making Government Accountable, Improving Oversight of Federal Programs."[117]

The Mercatus Center also holds "Distinguished Scholar Breakfasts," which are invitation-only programs that focus on the role of markets in policy areas designed to promote "exchanges among senior staff, colleagues, and a scholar in a particular field."[118] There are also free lunches for staffers when they attend seminars that have titles ranging from "First Quarter 2006: How About that Economy?" to "Oil, Natural Gas and Economics: A Primer."[119] As an added bonus, Capitol Hill Campus participants can earn continuing education credits through George Mason University.

Mercatus, the Savvy Fundraiser

Aside from Koch, many other corporate interests provide funds to the Mercatus Center, which offers donors increasing levels of access in return for contributions. Contributions of $1,000 or more admit patrons into the Liberty Circle, which entitles them to receive updates on the Center's work, a newsletter and invitations to various Mercatus events, including an annual meeting held each fall in Washington, D.C. The Center promises attendees "an opportunity to meet and visit with our scholars, fellows and staff," briefings "on our new and ongoing projects," and the chance to "hear from movers and shakers who are working to enable individuals to live free, prosperous, and peaceful lives."[120]

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[116] Mercatus Center website, at http://www.capitolhillcampus.org (visited September 24, 2002).

[117] Mercatus Center website, http://www.mercatus.org/capitolhillcampus/article.php/1546.html (visited March 6, 2006).

[118] Mercatus Center website, at http://www.mercatus.org/capitolhillcampus/article.php/1056.html (visited March 6, 2006).

[119] Mercatus Center website, at http://www.capitolhillcampus.org (visited March 6, 2006).

[120] The Mercatus Center uses its website to solicit contributions so that it can "achieve its mission of scholarly research, talent development, and outreach to influential decision-

To lure the heavy hitters, Mercatus sweetens the pot. A $10,000 contribution buys donors a membership to the Founders Circle and an invitation to the Founders Circle Retreat, held each spring. And, for Founders Circle members who donate $25,000 or more, Mercatus created the Founders Circle Executive Level, which offers all of the perks of the traditional Founders Circle membership with added prestige and invitations to "special one-of-a-kind events."[121]

In the past, Founders Circle retreats have been held in posh environs such as the Biltmore in Phoenix, Arizona, and the Ritz-Carlton Laguna Niguel in Dana Point, California. Past speakers have included Larry Kudlow, conservative commentator and regular columnist in the *National Review*; John Stossel of ABC, who has developed a reputation for attacking the tort system, which consumers use to hold corporations accountable for defective products; and Federal Election Commission chairman Brad Smith, an ardent foe of regulating campaign contributions.

Founders Circle membership consistently attracts conservative or free-market oriented individuals, foundations and corporations. Corporate members have included BP Amoco, Exxon Mobil Corporation, General Motors, JP Morgan Chase, Merrill Lynch, Microsoft, Pfizer, the Gillette Company, State Farm Insurance Companies, Altria Corporate Services, Inc. (the service provider for the Altria Group, which owns Philip Morris and Kraft Foods), and UST Public Affairs Inc., a company specializing in smokeless tobacco.

Several right-wing foundations, the vast majority of which have ties to corporate America, have also donated funds to the Mercatus Center gaining membership into the Founders Circle. Among these foundations are the Castle Rock Foundation, which is owned by the Coors family of the Coors Brewing Company; the Walton Family Foundation, Inc., which is controlled by the Walton family of Wal-Mart retail stores; and the Armstrong Foundation, which is entirely funded by the Armstrong Company, which specializes in home flooring, ceilings, and cabinets.

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makers." Potential donors are encouraged to become a member of its "exclusive giving circles," the Liberty Circle and the Founders Circle. *See* http://www.mercatus.org/category.php/23.html?menuid=4, (visited Oct. 11, 2002 and Feb. 7, 2006).

[121] Support Mercatus. Mercatus Center George Mason University. February 23, 2006 http://www.mercatus.org/category.php/23.html?menuid=4.

The Charles G. Koch charitable foundation and the David H. Koch Charitable foundation are also consistent Founders Circle Members. Both of these foundations are managed by Koch company officials and funded entirely by the Koch Company. The Sarah Scaife Foundation, which is largely funded by the Mellon family's oil and industrial fortunes, is also a member of the Founders Circle and is well known for funding conservative public policy think tanks such as the Heritage Foundation and the Cato Institute.

A number of individuals, primarily from the ranks of current or former corporate executives, have also belonged to the Founders Circle. They include: Arthur Cinader, the former chairman of J. Crew; Sheldon Rose, CEO of Edward Rose Building Enterprises, a Michigan-based residential home construction firm; and Sam Wyly, the chairman of Green Mountain Energy and Sterling Software. Wyly was responsible for the clandestine funding of $2.1 million in campaign advertisements that attacked Sen. John McCain's (R-Ariz.) environmental record during the 2000 presidential campaign while trumpeting then-Gov. George W. Bush's environmental record in Texas.[122]

Reaping What They Sow

The companies, foundations, and individuals investing in Mercatus have found a prolific and dedicated group to serve them. Since 1996, Mercatus has weighed in on agency rulemakings, submitting comments critical of regulation. Attacking a wide variety of regulations, Mercatus has commented to EPA, the SEC, the Department of Agriculture, the Department of Energy, the Department of the Interior, the Federal Deposit Insurance Corporation, the Federal Reserve, the Food and Drug Administration, the Federal Motor Carrier Safety Administration, the National Highway Traffic Safety Administration, and the Department of Health and Human Services, among others.

The industries that have provided the most support—petrochemical companies and financial firms—are also the industries that would benefit the most from Mercatus's advocacy. They were rewarded in 2001 and 2002, when former OIRA administrator (and former Mercatus advisory board member) John Graham used an annual report to Congress on the costs and benefits of regulations as an

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[122] John Mintz, "Texan Aired 'Clean Air' Ads; Bush's Campaign Not Involved, Billionaire Says," *Washington Post*, March 4, 2000.

invitation to the public to nominate regulations "that could be rescinded or changed [to] increase net benefits to the public by either reducing costs and/or increasing benefits."[123] Not surprisingly, nearly all of the 71 nominations published in OIRA's final report for 2001 were submitted on behalf of regulated industry and 55 of the nominated regulations were health, safety, or environmental protections.[124]

The Mercatus Center jumped on the opportunity to advance its anti-regulatory agenda, as Dudley and a team of Mercatus staff submitted more than half of the 71 nominations for revision or change culled for OIRA's final report. This was not a difficult task, considering Dudley and her team only had to recycle 44 of the regulatory comments they had submitted to agencies over the years.[125] In all, Mercatus urged OIRA to weaken or eliminate 24 environmental rules (in addition to rules issued by the EPA, this included rules issued by the Army Corps of Engineers, the Department of Energy, Federal Energy Regulatory Commission, the Department of the Interior and the Forest Service), six rules protecting public health and safety (issued by the Department of Health and Human Services, the Department of Labor, and the Department of Transportation), 13 rules relating to finance and banking (issued by the Securities and Exchange Commission, Office of Comptroller of the Currency, Federal Deposit Insurance Corporation, the Commodities Futures Trading Commission, and the Office of Thrift Supervision), and one rule issued by the United States Postal Service. In its 2001 review, OIRA deemed 23 rules to be of "high priority," meaning that OIRA was "inclined to agree and look into the suggestion."[126] Mercatus submitted 14 of these 23: ten targeting environmental safeguards for weakening or elimination, with the remaining four targeting public health and safety protections.

The Mercatus Center's aggressive use of the OIRA nomination process in 2001 set the stage for an outpouring from business and industry in 2002, when Graham issued his next invitation for suggestions regarding changes that could be

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[123]Draft Report to Congress on the Costs and Benefits of Federal Regulations, 66 Fed. Reg. 22,041 at 22,054 (2001).

[124] Making Sense of Regulation: 2001 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities [hereinafter 2001 Final Report] Appendix A, Office of Management and Budget, Office of Information and Regulatory Affairs, http://www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf (visited Oct. 11, 2002).

[125] For more details, read Appendix B.

[126] 2001 Final Report, at 62-64.

made in federal regulations. A total of 267 regulations were targeted,[127] with the largest single segment of commenters — at least 80 or more — from businesses or firms, associations and consultants affiliated with businesses, industries or employer groups.[128] As it had a year earlier, Mercatus took advantage of the 2002 process, this time challenging or commenting on nearly two dozen regulations, with Dudley again leading the charge.

Every time, Dudley and the other Mercatus staffers were pushing rollbacks that would directly benefit their corporate patrons. BP Amoco, ExxonMobil, and the Kochs, for example, would benefit from 14 of the suggestions Dudley and company filed in 2001 to weaken the Clean Air Act. These petrochemical companies would also benefit from four of the Mercatus Center's 2002 submissions calling for the weakening of the Clean Water Act. And of the 44 regulations nominated by Mercatus to OIRA in 2001 as ripe for rescission or change, 24 would have directly benefited the center's corporate funders.

The financial services industry also got its money's worth. Mercatus patrons have included Merrill Lynch, JP Morgan Chase, the NASDAQ Educational Foundation, the New York Stock Exchange, Fannie Mae, and Freddie Mac. Eleven of the 44 deregulatory proposals Mercatus submitted to OIRA in 2001 and six of the 24 proposals submitted in 2002 demanded changes to banking and finance rules that apply to securities firms and self-regulatory organizations.

For example, Mercatus suggested reopening an SEC rule issued in November 2000 that increased transparency in how securities broker-dealers execute orders. In order to spur greater competition among market centers and ensure the best prices on trades, the rule required reports to investors to describe how orders were routed.[129] The SEC estimated that the additional information

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[127] "Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, Tribal Entities," Chapter IV, available on-line at http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf (page 75)

[128] Public Citizen analysis of "Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, Tribal Entities," Appendix B. Key to Public Comments, available on-line at http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf (pages 92-101).

[129]Securities and Exchange Commission, Final Rule: Disclosure of Order Execution and Routing Practices, 11/17/00, http://www.sec.gov/rules/final.shtml; Proposed Rule: Disclosure of Order Routing and Execution Practices, Release No. 34-43084; File No. S7-16-00, http//www.sec.gov/rules/proposed/34-43084.htm.

could allow investors to potentially save more than $160 million from lower trade fees while costing broker-dealers $21 million a year. In its comments, the Securities Industry Association, which represents an array of securities firms and banks, including Merrill Lynch and JP Morgan Chase, suggested that the Commission's proposal would end up hurting small investors. Ironically, the industry's argument relied on measures that deviated from a strict cost-benefit analysis: "The [SIA] believes . . . that the measures of execution quality that the Commission proposes elevate price and speed over other, less easily quantifiable, measures that may be equally important to certain investors in assessing execution quality."[130]

Mercatus's comments to the SEC at the time — resubmitted later by Dudley and crew to OIRA, after the rule was finished — reflected the industry's concerns. In its comments, Mercatus itemized the "other, less quantifiable, measures" alluded to by SIA in its submission: "[i]n addition to trading costs, including commission and bid-ask spread, a trading system or exchange competes on the basis of how well it meets investor demands regarding the speed of execution, transparency of trading activity, certainty of execution, order size, and even the time of transaction. Consequently, different types of traders seek to trade in different markets depending on liquidity effects and transaction costs associated with their particular demands."[131]

Tellingly, Mercatus's comment about unquantified benefits shed its usual cost-benefit straightjacket and embraced the position that other intangibles should be taken into account — a line of argument Dudley shows no fondness for in the context of health, safety, and environmental rules. At the bidding of Dudley's corporate sponsors, however, Mercatus's jettisoning of cost-benefit analysis in this case would leave ordinary investors in the dark. Mercatus's submission is especially wrongheaded in a post-Enron world where the value of greater transparency in financial markets is obvious to everyone.

By far the biggest corporate contributor to the Mercatus Center, and the group with the clearest personal ties to it, is the Koch group of foundations and, through them, Koch Industries. A privately-held $25 billion petroleum, chemical,

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[130]Mark Sutton, Securities Industry Association, to Jonathan Katz, Securities and Exchange Commission, "Re: Securities Exchange Act Release No. 34-43084; File No. S7-16-00," September 26, 2000.

[131]Sharon Brown-Hruska and Jerry Ellig, "SEC's Disclosure of Order Routing and Execution Practices," (RSP-2000-19), 9/22/00. *See* http://www.mercatus.org (visited September 24, 2002).

and agricultural company based in Wichita, Kansas, Koch Industries has good reason to angle for a rollback of environmental standards. In 2001, the company's petroleum division pleaded guilty to violating the Clean Air Act for releasing benzene, a known carcinogen, into the air at a Texas refinery.[132] Koch agreed to pay $10 million in criminal fines and further agreed to spend $10 million for environmental projects in the Corpus Christi area. In addition, Koch must complete a five-year term of probation and adhere to a strict new environmental compliance program.

In a separate incident, Koch agreed to pay a $4.5 million penalty to settle other Clean Air Act violations at its Minnesota refinery.[133] The EPA also forced the company to spend an estimated $80 million to install new pollution-control equipment at two refineries in Corpus Christi, Texas, and one near St. Paul, Minnesota.[134]

Koch also has had a problem playing by the rules of the Clean Water Act. The EPA found that during a seven-year period in the 1990s, a Koch pipeline subsidiary allowed 300 leaks to remain unstopped, spilling three million gallons of oil into waterways across six states. In January 2000, the EPA leveled $30 million in civil fines against Koch, then the largest U.S. civil penalty, and required Koch to spend an additional $5 million on environmental projects.[135]

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[132]Environmental Protection Agency Press Release, April 13, 2001. Available on-line at http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/0dbb0beb2a2d70d885256a2d0072a509?OpenDocument (visited October 11, 2002).

[133]Environmental Protection Agency Civil Enforcement Website, Koch Petroleum Group, L.P. Refinery Settlement, http://www.epa.gov/Compliance/resources/cases/civil/caa/kochcaa.html (visited Oct. 11, 2002).

[134] Environmental Protection Agency Civil Enforcement Website, Koch Petroleum Group, L.P. Refinery Settlement, http://www.epa.gov/Compliance/resources/cases/civil/caa/kochcaa.html (visited Oct. 11, 2002).

[135] "Pipeline operator agrees to huge fine Texas leaks covered by $35 million penalty," *Ft. Worth Star Telegram*, January 14, 2000. *See also*, Environmental Protection Agency Website, Koch Industries, Inc. Oil Spills Settlement, http://www.epa.gov/compliance/resources/cases/civil/cwa/kochcwa.html (visited Oct. 11, 2002).

In all, nine of the 15 deregulatory proposals submitted by the Mercatus Center to OIRA in 2001 affecting EPA regulations dealt with the Clean Air Act. Three of the remaining six EPA nominations targeted the Clean Water Act. Additionally, in the Center's 2002 submissions, nine nominations addressed EPA regulations, five of which targeted the Clean Water Act or the Clean Air Act. All the revisions have the potential, if enacted, of benefiting Koch by weakening environmental standards designed to protect public health and safety.

Mercatus claims to submit regulatory comments "from the perspective of the public interest."[136] Yet unlike most groups promoting the public interest, Mercatus accepts money from corporate sources, creating a conflict between the organization's financial health and the public good when corporate interests and the public interest are at odds. Such a conflict can affect an organization at all levels, from top-level executive decisions to research publications.

Mercatus states that "financial supporters have absolutely no influence or control over the research design, methodology, analysis, or findings of Mercatus research projects, nor do they have influence or control over the content of educational programs."[137] Yet this claim rings hollow considering that an industry-critical research project may cost Mercatus hundreds of thousands of dollars in funding. Moreover, Mercatus' elaborate social events for high-paying contributors encourage interaction between corporate donors and Mercatus staff. Mercatus's rhetoric of purported independence does nothing to minimize the conflict of interest the organization faces in accepting funds from corporate donors and, further, is in stark contrast to its active promotion of interaction between its donors and its staff.

In its comments to agencies, Mercatus also assumes an independent stance, claiming that its comments provide "careful, scholarly analysis independent of any special interest group"[138] and omitting the fact that it accepts funds from corporate interests. This allows Mercatus to lend a public interest veneer to its anti-regulatory agenda, which plays into the hands of its corporate funders, who, through

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[136] Wendy Gramm, "Advanced Air Bags: Regulatory Studies Program Comments," Mercatus Center, December 17, 1998, available at http://dmses.dot.gov/docimages/pdf32/48314_web.pdf.

[137] Mercatus Center, available at http://www.mercatus.org/subcategory.php/328.html, visited March 8, 2006.

[138] Mercatus Center, available at http://www.mercatus.org/regulatorystudies/category.php/36.html, visited March 8, 2006.

Mercatus, are able to combat regulations while concealing their self-interest in rolling back public protections.

Dudley's unique brand of market-friendly "economics" may simply coincide with corporate interests by mere happenstance, but it is highly dubious that Dudley's anti-regulatory crusade is not influenced by the Center's corporate donors. Mercatus faces a deep conflict of interest in accepting funds from corporate donors. There is much for Mercatus's corporate donors to gain from the Center's anti-regulatory actions, and there is much for Mercatus to gain from acting in the interests of its corporate donors. Installing Susan Dudley in OMB will be their latest gain, and the public's loss.

Conclusion

If confirmed as administrator of OIRA, Susan Dudley would be granted enormous power to destroy the nation's safeguards for the public health, safety, civil rights, environment, consumers, and other public interest needs. As we can see from her background, however, Dudley cannot be trusted with such power over the public good. She will bring with her a radical agenda to dismantle the public's protections and weaken or eliminate the agencies' ability to produce the new safeguards that we need.

Dudley is, in fact, so radical that she is outside the mainstream of her fellow anti-regulatory activists. Mercatus works closely with another Koch-funded think tank, the libertarian Cato Institute. Dudley even contributes to a monthly Cato publication called *Regulation*. According the magazine's managing editor, however, Dudley's work has to be toned down for the Cato audience. "'The material that they send to us, they try to tone down,' he says. 'Cato is more of a public policy research organization. We may be a little more academic than they are.'"[139]

Moreover, she is out of step with the administration she would be tapped to serve. Dudley has frequently criticized regulations touted by the administration as an achievement. For example, Dudley departed significantly from the Bush administration's line on a rule to improve the public's protections from arsenic in the drinking water:

What the administration said	*What Dudley said*
"[W]e are acting in a common sense way to defend our environment. We are adopting new, scientifically sensible rules to discourage emissions of lead, to protect wetlands, to reduce the amount of arsenic in drinking water, to curb dangerous pesticides and to clean the air of pollution from on-road diesel engines."[140]	The improved standards are "an unwelcome distraction from the task of protecting the water supply. . . . While [EPA] should share information about arsenic levels and hazards, it should not impose its judgment, based on national average costs and benefits, on individual communities as to how best to invest in their own public health."[141]

[139] *See* Garance Franke-Ruta, *Enron Collapsed; the Earth is Warming Up; and GMU's Mercatus Center Says the Solution Lies in Two Public Policy Heroes: Supply and Demand*, WASH. CITY PAPER, Mar. 14, 2002, at 21, *available on Westlaw at* 2002 WLNR 11578632.

[140] Presidential Radio Address, April 28, 2001, *available at* <http://www.whitehouse.gov/news/releases/2001/04/20010428.html>.

Given her extremism, even when compared against recent administrator John Graham, Dudley's appointment is the signal that the Bush administration is moving from siege to all-out war on the public's protections.

Most troubling is that Dudley is miles away from the American mainstream. The American public has declared, repeatedly and overwhelmingly, its belief that the federal government has an important role to play in protecting the public.[142] Dudley is hostile that role; if allowed to assume power, it is clear that she would actively work to undermine it.

Dudley is opposed to many of the American public's most cherished values. Instead of equity, she offers Dudleynomics. Instead of concern about the world we are creating for our children and future generations to come, Dudley cynically asks,

> If we could go back in time, would we really ask our (relatively poorer) ancestors to set their money aside at a one percent return for our benefit? Indeed, would we even be better off if they had done so? They would have had to forsake many higher return investments to make this "investment in the future" and as a result, our standard of living would likely be lower today, even with the "inheritance" they left us invested at a one percent rate.[143]

Instead of recognizing a need for regulation, Dudley sees only reasons not to protect the public. Dudley's moral vision is one that most Americans would reject.

There is too much at stake to allow Dudley to helm OIRA. The benefits will accrue only to corporate special interests and radical ideologues, while the costs will be borne by the public. Those costs are too high.

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[141] Susan E. Dudley, *How Not to Improve Public Health*, Jan. 11, 2001, *available at* <http://mercatus.org/publications/pubID.2630/pub_detail.asp>.

[142] *See* Harris, *supra* note 21.

[143] *See* Dudley & Mannix, *supra* note 35, at 11.

APPENDIX A

Mercatus Center Founders Circle 2004

List provided to Public Citizen by the Mercatus Center

Altria Corporate Services, Inc.
Anschutz Foundation
The Armstrong Foundation
W. H. Attebury
Richard A. Bacas
Bachman Foundation
Elliot A. Baines
Mr. & Mrs. Frank E. Baxter
Bochnowski Family Foundation
Castle Rock Foundation
Dorothy Byrne
Patrick M. Byrne
Charles G. Koch Charitable Foundation
Paul G. Chelew & Shirley F. McKenzie
Arthur A. Ciocca
Richard W. Colburn
Covenant Foundation
Garland & Carolyn Cox
E. L. Craig Foundation
Dan E. Cullen
D & D Foundation
David H. Koch Charitable Foundation
Mr. & Mrs. Jeremy S. Davis
The Shelby Cullom Davis Foundation
Earhart Foundation
Exxon Mobil Corporation
Freddie Mac
Philip M. Friedmann
Larry & Mary Futchik
Edwin A. Gallun, Jr.
General Motors Corporation
The Gillette Company
Mr. & Mrs. Thomas C. Graham
Richard R. Greer
Elmer R. Haile, Jr.
Harold E. Hamilton
Philip D. Harvey
IFREE
John E. & Sue M. Jackson Charitable Trust
Ruth H. Jackson Charitable Trust
Jeld-Wen Foundation
Craig W. Johnson
John P. Kavooras
Mr. & Mrs. Michael L. Keiser
Randy Parris Kendrick
Mr. & Mrs. Richard Korpan
Dr. & Mrs. Benjamin LeCompte, III
Allan W. & Lois J. Lund
Natalie C. Lund
Mr. & Mrs. Bartley Madden
E. Pierce Marshall
Miriam & Emmett McCoy Foundation
John T. & Libby Menefee
Microsoft
Joseph R. Mitchell
The Modzelewski Charitable Trust
Dorothy Donnelley Moller
The Hon. Herbert N. Morgan
Albert G. Oaks
Pfizer Inc.
Mrs. Dorothy Pollak
The John William Pope Foundation
Robert A. Pritzker
James M. Rodney
Sarah Scaife Foundation Inc.
Dwight C. Schar
James W. Shields
Dr. Vernon L. Smith
Henry M. Staley Charitable Trust
State Farm Insurance Companies
Jackson T. Stephens, Jr.
Sunmark Foundation
William Thomas
James C. Thompson
James E. Upfield
US Chamber of Commerce
UST Public Affairs Inc.
Alex C. Walker Educational & Charitable Foundation
The Walton Family Foundation, Inc.
F. William Weber
Mr. & Mrs. Jerry A. Wenger
Prof. & Mrs. John O. Whitney
Joseph H. Wilkens
Christopher & Patricia Witzky
Betty K. Wolfe
Sam Wyly
Fred M. Young, Jr.
Norma E. Zimdahl

APPENDIX B

Agencies and Regulations Targeted by Mercatus's Submission to OIRA in 2001

Environmental Rules

Environmental Protection Agency (15 Rules)

1. Toxic Release Inventory, Persistent Bioaccumulative Toxics (PBT) Rule/Priority 2
2. Total Maximum Daily Loads/Priority 1
3. Economic Incentive Program Guidance/Priority 1
4. New Source Review 90-Day Review Background Paper/Priority 1
5. Concentrated Animal Feeding Operation (CAFO) Effluent Guidelines/Priority 1
6. National Ambient Air Quality Standard for Particulate Matter/Priority 3
7. Heavy-Duty Engine and Diesel Rule/Priority 3
8. Request for Comments on Petition: Control of Emissions from New and In-Use Highway Vehicles and Engines/Priority 2
9. EPA's and DOJ's Worst Case Scenario Proposal/Priority 3
10. National Ambient Air Quality Standard for Ozone/Priority 3
11. Supplemental Notice for the Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone; Proposed Rule/Priority 3
12. Request for Comments on Environmental Enforcement and Compliance Assistance Activities/Priority 3
13. EPA's Tier 2 Standards for Vehicle Emissions and Gasoline Sulfur Content/Priority 3 (Summarizes two of Mercatus' comments—separate comments provided re: public comments on an FR Notice of Supplemental Information and Request for Comment related to this rulemaking)
14. Arsenic in Drinking Water/Priority 1
15. Ground Water Rule/Priority 3

Department of Defense/Army Corps of Engineers (1 Rule)

1. Nationwide Permits for Discharge of Dredge or Fill Material/Priority 3

Department of Energy (2 Rules)

1. Clothes Washer Energy Conservation Standards/Priority 3
2. Central Air Conditioner and Heat Pump Energy Conservation Standards/Priority 1

Federal Energy Regulatory Commission (1 Rule)

1. Regulation of Short-Term and Long-Term Gas Transportation/Priority 2

Department of the Interior (2 Rules)

1. Hardrock Mining (Section 3809) (proposal)/Priority 1
2. Snowmobile Use in Rocky Mountain National Park (proposal)/Priority 1

United States Department of Agriculture/Forest Service (3 Rules)

1. Roadless Area Conservation (draft Environmental Statement)/Priority 1
2. Forest Service Planning Rules/Priority 1
3. Forest Service's Roadless Area EIS Notice/Priority 1

Total Environmental Rules: 24

Finance & Banking Rules

Securities and Exchange Commission (7 Rules)

1. Nasdaq Integrated Order Delivery and Execution System/Priority 2
2. Concept Release on Regulation of Market Information, Fees and Revenues/Priority 2
3. Commission Request for Comment on Issues Relating to Market Fragmentation/Priority 2
4. Disclosure of Mutual Fund After-Tax Returns/Priority 2
5. Disclosure of Order Routing and Execution Practices/Priority 2
6. Proposed Rule Changes of Self-Regulatory Organizations/Priority 2
7. Registration of Broker-Dealers Pursuant to Section 15(b)(11) of the Securities Exchange Act of 1934/Priority 2

Federal Deposit Insurance Corporation/Office of Comptroller of the Currency/Office of Thrift Supervision (2 Rules)

1. Second Consultative Package on the New Basel Capital Accord/Priority 2
2. Minimum Security Devices, and Procedures and Bank Secrecy Act Compliance/Priority 2

Commodities Futures Trading Commission (2 Rules)

1. Request for Comments on Proposed Rules Relating to a New Regulatory Framework for Multilateral Transaction Execution Facilities, Intermediaries and Clearing Organizations; Exemption for Bilateral Transactions/Priority 2
2. Fast-Track Designation and Rule Approval Procedures/Priority 2

Federal Reserve Board (2 Rules)

1. Privacy of Consumer Financial Information/Priority 2
2. Revision to Regulation B/Priority 3

Total Finance & Banking Rules: 13

Public Health & Safety Rules

Department of Health and Human Services (2 Rules)

1. Standards for Privacy of Individually Identifiable Health Information/Priority 1
2. Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims, and Health Claims/Priority 1

Department of Labor (2 Rules)

1. OSHA Consultation Program/Priority 2
2. Davis-Bacon Act "Helpers" Regulation/Priority 1

Department of Transportation (2 Rules)

1. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations/Priority 1
2. Advanced Air Bags/Priority 2

Total Public Health & Safety Rules: 6

Miscellaneous

United States Postal Service (1 Rule)

1. Delivery of Mail to a Commercial Mail Receiving Agency/Priority 3

Total Miscellaneous Rules: 1

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44 Total Mercatus Nominations

APPENDIX C

Mercatus Center Contributors Affected by Federal Regulatory Proposals Challenged by the Mercatus Center In 2001

Finance, Banking & Trading Industry Contributors	Regulatory Proposals Affecting the Finance, Banking & Trading Industry
Fannie Mae Freddie Mac Instinet Corp. Knight Trading Group Merrill Lynch J.P. Morgan Chase NASDAQ Foundation New York Stock Exchange Mr. & Mrs. Warren B. Lammert	1. Basel Cmte. on Banking Spvn./OCC/FDIC/Bd. of Governors of Fed. Reserve- New Basel Capital Accord (Priority 2) 2. CFTC-Framework for Multilateral Transaction Execution Facilities, Intermediaries and Clearing Organizations (Priority 2) 3. Exemption for Bilateral Transactions (Priority 2) 4. Fed. Res. Bd.-Privacy of Consumer Financial Information (Priority 2) 5. SEC-NASDAQ Integrated Order Delivery and Execution System (Priority 2) 6. SEC-Regulation of Market Information, Fees and Revenues (Priority 2) 7. SEC-Issues Relating to Market Fragmentation (Priority 2) 8. SEC-Disclosure of Mutual Fund After-Tax Returns (Priority 2) 9. SEC-Disclosure of Order Routing and Execution Practices (Priority 2) 10. SEC-Proposed Rule Changes of Self-Regulatory Organizations (Priority 2) 11. SEC-Registration of Broker-Dealers (Priority 2) 12. CFTC-Fast-Track Designation and Rule Approval Procedures (Priority 2) 13. FDIC-Minimum Security Devices, and Procedures and Bank Secrecy Act Compliance (Priority 2) 14. Fed. Res. Bd.-Revision to Regulation B (Priority 3)

Oil and Gas Industry Contributors Affected	Regulatory Proposals Affecting the Oil and Gas Industry
BP Amoco ExxonMobil Dr. Richard Fink Strake Foundation Charles G. Koch Charitable Foundation David H. Koch Charitable Foundation Claude R. Lambe Charitable Foundation	1. EPA-Total Maximum Daily Loads (Priority 1) 2. EPA-Economic Incentive Program Guidance (Priority 1) 3. EPA-New Source Review 90-Day Review (Priority 1) 4. EPA-Toxic Release Inventory (Priority 2) 5. FERC-Regulation of Short-Term and Long-Term Gas Transportation (Priority 2) 6. EPA-National Ambient Air Quality Standard for Particulate Matter (Priority 3) 7. EPA-National Ambient Air Quality Standard for Ozone (Priority 3) 8. EPA-Regional Transport of Ozone Proposed Rule (Priority 3) 9. EPA-Environmental Enforcement and Compliance Assistance Activities (Priority 3) 10. EPA-Ground Water Rule (Priority 3)

Priority 1: High Priority *OIRA is "inclined to agree and look into the suggestion"*
Priority 2: Medium Priority *OIRA "need[s] more information"*
Priority 3: Low Priority *OIRA is "not convinced at this point of the merits of the suggestion"*

APPENDIX D

The Mercatus Center's Toxic Mix of Money, Power, & Influence: A Case in Point

Mercatus's troubling ties to regulated industry are perhaps most vividly embodied in Wendy Lee Gramm, former director of Mercatus's regulatory program who currently holds the title of "Distinguished Senior Scholar."

A long-time government insider, Gramm has been a steadfast advocate of deregulation throughout her career. President Ronald Reagan referred to Gramm as his "favorite economist"[1] and appointed her to several posts during his administration. She served first as Executive Director of the Presidential Task Force on Regulatory Relief, created by Reagan in 1981 to "cut away the thicket of irrational and senseless regulations."[2] In 1982, Reagan selected her to be the assistant director of the Federal Trade Commission's Bureau of Economics and elevated her to director the following year. From 1985 to 1988, Gramm served as the administrator of OIRA, a perch from which she oversaw the development of all federal regulations. Finally, in 1988, Reagan appointed her chairperson of the Commodity Futures Trading Commission (CFTC), a position she held until January 1993, when she left following the inauguration of President Clinton.

The CFTC is an independent agency created by Congress in 1974 with the mandate to regulate U.S. commodity futures and option markets. A futures contract is an agreement between parties to buy or sell in the future a specific quantity of a commodity. Traditionally, traded commodities have included agricultural products, such as wheat and corn. More recently, futures trading has expanded to include such products as natural gas and electricity. An option on a commodity futures contract gives the buyer of the option the right to convert the option into a futures contract. Futures and options must generally be executed on the floor of a commodity exchange (like the New York Mercantile Exchange) and through persons and firms who are registered with the CFTC. Through oversight and regulation of these transactions, the CFTC protects market participants from manipulation, abusive trade practices, and fraud by providing a means for price discovery and offsetting price risk.[3]

In 1992, as the first step in its business plan to profit on the speculation of energy, Enron petitioned the CFTC to make regulatory changes that would limit the scope of the commission's authority over certain kinds of futures contracts.[4] Immediately before leaving the CFTC, Gramm muscled through approval of an unusual draft regulation that would do just that – it narrowed the definition of futures contracts and excluded Enron's energy future contracts and swaps from regulatory oversight. Although her actions were criticized by government officials who feared the change would have severe negative consequences (as, in fact, it did), Gramm was rewarded five weeks after she left the CFTC with a lucrative appointment to Enron's Board of Directors.[5]

Between 1993 and 2001, when the company declared bankruptcy, Enron paid Gramm between

[1] Nancy Benac, "Enron and Phil and Wendy Gramm," *North County Times*, January 24, 2002.

[2] President's Remarks Announcing the Establishment of the Presidential Task Force on Regulatory Relief, January 22, 1981.

[3] The information in this paragraph is from the CFTC's website, (available on line at http://www.cftc.gov/cftc/cftcglan.htm and viewed on November 7, 2002) and *Blind Faith: How Deregulation and Enron's Influence Over Government Looted Billions from Americans*, Public Citizen's Critical Mass Energy and Environment Program, December 2001 [hereinafter *Blind Faith*] (available on-line at http://www.citizen.org/cmep/energy_enviro_nuclear/electricity/Enron/articles.cfm?ID=7104).

[4] Jerry Knight, "Energy Firm Finds Ally, Director, in CFTC Ex-Chief," *Washington Post*, April 17, 1993. *See also Blind Faith.*

[5] *Blind Faith.*

$915,000 and $1.85 million in salary, attendance fees, stock option sales, and dividends.[6] As a member of Enron's Board of Directors, Gramm served on the audit and compliance committee, which was responsible for verifying Enron's accounting procedures and other detailed financial information not available to outside analysts or shareholders.[7] She held this position even as the company's financial status became increasingly precarious and eventually imploded, taking with it the retirement savings of thousands of Americans. Subsequently, Gramm was one of 49 individuals subpoenaed by the Senate Permanent Subcommittee on Investigations in its investigation of the Enron fiasco.[8]

In addition to providing lavish payments to Gramm as a member of its Board of Directors, Enron supported Gramm's work following her departure from the CFTC. For instance, Enron and the Lay Foundation, which was established and controlled by former Enron CEO Kenneth Lay and his wife Linda, donated $50,000 to the Mercatus Center.[9] Kenneth and Linda Lay donated an additional $5,000 in both 1998 and 2000. Former Enron Energy Service Director, Lou Pai rounds out the circle of giving, having contributed an amount reported as "under $10,000."[10] During its investigation into the cause of the Enron meltdown, the Senate Committee on Governmental Affairs found that "the independence and objectivity of the Enron Board was compromised by financial ties between Enron and certain directors," including, specifically, Wendy Gramm.[11]

During her tenure at Mercatus, Gramm has submitted comments to federal agencies consistent with Enron's deregulatory agenda — including at least two comments on regulations proposed by the CFTC (the same agency she led from 1988-1993). In addition, Sharon Brown-Hruska, a former associate professor at George Mason University, and Jerry Ellig, a Mercatus Center Senior Research Fellow, also drafted several comments on behalf of Mercatus that, if adopted, could have had a positive impact on Enron's bottom line.[12] As an interesting aside, Brown-Hruska was a staff economist for the CFTC during Gramm's term as CFTC chairperson. Brown-Hruska returned to the CFTC, where she is currently employed, in August 2002 following her appointment as commissioner by President Bush. Ellig served as the deputy director of the Office of Policy Planning at the Federal Trade Commission from August 2001 until August 2003 and has since returned to the Mercatus Center as a senior research fellow.

Enron also had close ties to Capitol Hill through Wendy Gramm's husband, former Texas Sen. Phil Gramm. Before retiring in December 2002, Sen. Gramm was the highest-ranking Republican on the powerful Committee on Banking, Housing & Urban Affairs, and served as chairman of that committee from 1999 until the Democrats gained control of the Senate in June 2001. Phil Gramm now serves as the vice-chairman of the UBS Investment Bank. Enron was Gramm's single largest corporate contributor between 1989 and 2001, giving $97,350 according to the Center for Responsive Politics.[13] Only fellow Texas senator Kay Bailey Hutchinson accepted more money from Enron.

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[6] *Blind Faith.*

[7] *Blind Faith.*

[8] Mark Benjamin & Nicholas M. Horrock, "Senator Gramm's Wife Gets Enron Subpoena," *UPI Washington Politics & Policy Desk*, January 13, 2002.

[9] "The Role of the Board of Directors in Enron's Collapse," U. S. Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, Report. No. 107-70 at 55, July 8, 2002.

[10] Garance Franke-Ruta, "Bull Market," *Washington City Paper*, March 8-14, 2002.

[11] "The Role of the Board of Directors in Enron's Collapse," U. S. Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, Report. No. 107-70 at 51, July 8, 2002.

[12] Their comments included: Wendy Gramm, "Proposed Rules Relating to a New Regulatory Framework for Multilateral Transaction Execution Facilities, Intermediaries and Clearing Organizations, and Exemption for Bilateral Transactions," submitted to the Commodity Futures Trading Commission (CFTC), 08/21/2000; Wendy Gramm, "Fast-track Designation and Rule Approval Procedures," submitted to Commodity Futures Trading Commission (CFTC), 12/18/1996; Sharon Brown-Hruska, "Proposed Rules for Registration of Security Futures Brokers-Dealers," submitted to the Securities & Exchange Commission (SEC), 07/26/2001; Jerry Ellig, "Regulation of Short-Term Natural Gas Transport Services," submitted to the Federal Energy Regulatory Commission (FERC), 04/22/1999. Available on-line at http://www.mercatus.org/regulatorystudies/.

[13] Mark Benjamin & Nicholas M. Horrock, "Senator Gramm's Wife Gets Enron Subpoena," *UPI Washington Politics & Policy Desk*, January 13, 2002 (available on-line at http://www.upi.com/print.cfm?StoryID=11012002-075635-2222r, visited on November 7, 2002). *See also Blind Faith.*

Enron's investment in politics paid off richly in tax breaks and weakened regulations. In 1990, Senator Gramm specifically mentioned Enron when explaining his decision to support a tax credit for drilling in tight sand wells.[14] Senator Gramm also championed Enron's early efforts to force states to deregulate their electricity markets, sponsoring a 1997 "full-blown deregulation" measure with U.S. Rep. Thomas Bliley (R-Va.).[15]

In 2000, Senator Gramm co-sponsored legislation to reauthorize and amend the CFTC's authorizing statute.[16] The bill was introduced in the chaotic days after the Supreme Court sealed George W. Bush's victory in the disputed 2000 presidential election. Unknown to most Americans, buried in the bowels of the finally enacted bill was a provision that allowed Enron to operate an unregulated energy trading subsidiary. Uninhibited by bothersome transparency and accountability requirements, this provision allowed Enron to command far more market share than it had previously. In the days after the law took effect, California was plunged into a month-long nightmare of rolling blackouts.[17]

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[14] Bill Mintz and Anne Pearson, "Budget Deal Rekindles Gas Plans," *Houston Chronicle*, October 2, 1990.

[15] "Senator Gramm Working with Representative Bliley on 'Full-Blown Deregulation' Measure," *Electric Utility Week*, May 5, 1997.

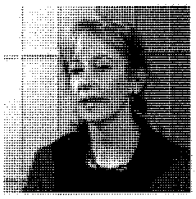
[16] S. 3283, 106th Congress (2000).

[17] From *Blind Faith*.

APPENDIX E

Dudleynomics in Action

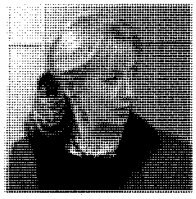
All the rules are different in Dudleynomics. We have already seen how Dudleynomics redefines "market failure" in ways that depart dramatically from the mainstream of economic thought.



Did you know that Dudleynomics also changes the rules of basic mathematics?

Witness this complaint from Dudley's comments on OIRA's 2004 report to Congress on the costs and benefits of regulations. Here, she is complaining again that the costs of regulations are much higher than OIRA has estimated.

> issuing agencies estimated benefits or costs for only six.
>
> These statistics highlight several problems with relying solely on information reported by agencies. The most obvious is the lack of information on the impacts (costs and benefits) of the major rules issued last year. By definition, an economically significant or major rule has an annual impact of $100,000,000 or more,[6] yet costs are presented for only fifteen percent of these rules. If each of the 31 rules not included in OMB's total imposed the minimum cost of $100,000,000 per year, the totals would be understated by $31 billion.
>
> Furthermore, there are real costs associated with regulations that effect large "transfers"



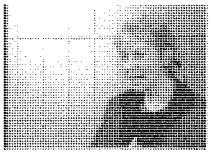
Of course, in the world without Dudleynomics, the numbers work a little differently:

$100 million x 31 = $3.1 billion

Source: Dudley, Public Interest Comment on the Office of Management and Budget's 2004 Draft Report to Congress on the Costs and Benefits of Regulation, p. 3.

Public Citizen Protecting Health, Safety, and Democracy

Why Susan Dudley is Dangerous for Energy Independence



Susan Dudley, nominee for administrator of the Office of Information and Regulatory Affairs, has consistently opposed protections of the public health, safety, and environment. Here is a look at Dudley in her own words.

Fuel Economy

Why It Matters	What She Said
In 1975, Congress passed the first fuel economy requirements over the objections of the auto industry, and every day our nation saves 2.8 million barrels of gasoline as a result. But in recent years, the industry has defeated several attempts to strengthen those standards, and since the late 1980s the average fuel efficiency of U.S.-made vehicles has actually fallen by more than a mile per gallon, due in part to the huge increase of inefficient light trucks. *The United States is currently facing an energy crisis. National security, economic strength, natural resource conservation, and environmental health are all dangerously threatened by skyrocketing energy costs and the nation's dependence on foreign oil. Raising vehicle fuel economy standards is a proven and effective way to address this current crisis.*	"**Worst rule of 2003**: The National Highway and Traffic Safety Administration corporate average fuel economy (CAFE) standards for light trucks. **NHTSA continues to force vehicle manufacturers to achieve higher miles per gallon than the market would offer**, or consumers would choose, in the absence of the regulation. Absurdly, its economic model shows large net benefits to consumers even if markets are assumed to operate perfectly, i.e., without counting any externalities. We know this must be false, because **any regulatory constraints that forces consumers away from their preferred choices must have negative net benefits** (i.e., make Americans worse off)." [1]

Energy Conservation Standards for Consumer Products

Why It Matters	What She Said
The Department of Energy issues energy conservation standards for consumer appliances in order to ensure that inefficient appliances are removed from the market and consumers have access to less energy-intensive products. The average consumer will save money on energy costs over the life of the appliance. [2] *The typical American home spends 20% of its utilities bill on appliances.* [3] *With energy costs currently sky rocketing, it is increasingly important to provide consumers with efficient appliances.*	"The proposed standards will make consumers worse off. **DOE's analysis focuses purely on the cost savings to the average consumer, without adequately considering** either different usage patterns, or **the value consumers place on** reliability, performance (especially dehumidification), or **esthetics**." [4]

[1] *See* Cindy Skrzycki, *2003's Bouquets and Brickbats (The Envelope, Please)*, WASH. POST, Dec. 29, 2003.

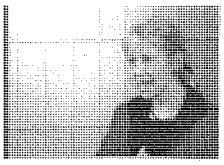
[2] Geller, Howard *National Appliance Efficiency Standards: Cost effective Federal Regulations.* Americans for an Energy Efficient America, 1995, A951

[3] U.S Department of Energy, Energy Efficiency and Renewable Energy available at http://www.eere.energy.gov/ accessed on August 17, 2006

[4] Dudley, Susan, Brian Mannix and Jennifer Zambone. *Public Interest Comment on the Office of Management and Budget's Draft Report to Congress on the Costs and Benefits of Federal Regulation.* Mercatus Center: May 28, 2002, p. A-19

Public Citizen Protecting Health, Safety, and Democracy

Why Susan Dudley is Dangerous for Privacy Rights



Susan Dudley, nominee for administrator of the Office of Information and Regulatory Affairs, has consistently opposed protections of the public health, safety, and environment. Here is a look at Dudley in her own words.

Medical Privacy

Why It Matters	What She Said
The Department of Health & Human Services proposed improved standards for the privacy of individually identifiable health information, to ensure that personal medical information was not inappropriately used for marketing health services and products. *During the rulemaking process HHS received over 52,000 comments from patients, health-care providers, and other stakeholders. Overwhelmingly, the comments called for increased patient privacy rights, and many comments considered patient privacy to be an ethical responsibility for health care workers.*[1]	"Given limited benefits and high costs, this rule may ultimately damage the long-term health of Americans. Indeed, it is quite possible that the rule may generate the perverse result of *less* privacy— owing to the pervasive availability of medical information combined with increased access by government agencies to that information. **A less healthy citizenry may be one consequence, as individuals reduce prevention and treatment visits because of increased costs** and reduced levels of medical privacy."[2]

Consumer Financial Privacy

Why It Matters	What She Said
The Securities and Exchange Commission issued a rule protecting consumer financial information by limiting financial institutions' ability to share that information without proper consent.	"The implicit premise of the rule is that individuals and firms cannot come to a mutually satisfactory agreement as far as privacy is concerned without resort to government assistance. **Indeed, if individuals truly value their privacy, and firms desire to maximally satisfy their customers, then a meeting of the minds ought to be achievable without resort to compulsory regulations.**"[3]

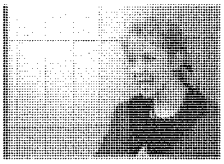
[1] 65 Fed. Reg. 82,464 (2000).

[2] Susan Dudley, Brian Mannix & Jennifer Zambone, Public Interest Comment on the Office of Management and Budget's Draft Report to Congress on the Costs and Benefits of Federal Regulation, May 28, 2002, p. A-6. The Bush administration apparently agreed with Dudley's position: despite widespread support for the rule by the public and medical community, the Bush administration limited patient privacy rights in the final rule, giving pharmaceutical companies access to patient information for marketing activities.

[3] *Id.* at A-14

Public Citizen Protecting Health, Safety, and Democracy

Why Susan Dudley is Dangerous for Public Health



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Limiting Arsenic in Drinking Water

Why It Matters	What She Said
Exposure to arsenic is directly linked to bladder, lung and skin cancer. Following a 1999 National Academy of Sciences (NAS) report examining arsenic's dangerous health effects, the EPA was urged to issue a rule limiting the allowable Maximum Contaminant Level (MCL) of arsenic in drinking water.[1]	"[The proposed standards are] an **unwelcome distraction from the task of protecting the water supply**." [2] "While [EPA] should share information about arsenic levels and hazards, it should not impose its judgment, based on national average costs and benefits, on individual communities as to how best to invest in their own public health."[3]

Reducing Smog-Related Health Risks from Ground-Level Ozone

Why It Matters	What She Said
Ground-level ozone is a serious public health concern responsible for premature mortality, chronic asthma, and chronic and acute bronchitis.[4] *Industry groups opposed the rule by circulating mythical claims that ground-level ozone has the same effect as stratospheric ozone in screening out UV rays. This claim was instantly discredited.*	"**Due to ozone's screening effect on harmful ultraviolet-B radiation,** the proposed reduction in ozone levels would increase malignant and nonmelanoma skin cancers and cataracts, as well as other UV-B-related health-risks. This doesn't mean that more ozone is always better. It does mean that if the EPA really cares about public health it should take these trade-offs into account."[5]

Safeguarding Against Potential Risks of Genetically Modified Foods

Why It Matters	What She Said
Great controversy exists over the safety of Genetically Modified (GM) Foods and their potential to pose long-term health risks to humans and animals, such as the potential to introduce dangerous new allergens into the food supply.[6] *Additionally, GM crops pose potential risks to the environment and biodiversity.*[7]	"**Unscientific fears, fanned by activists and short-sighted government policies**, have led to a regulatory framework that signals out genetically modified crops for greater scrutiny and even prohibition... Policymakers regulating agricultural biotechnology face pressure from well-organized activists to constrain the new technology. Large biotech companies do not speak out aggressively against unscientific policies, either because they don't dare offend the regulators on whom their livelihood depends, or because regulations give them a competitive advantage." [8]

[1] The Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring Final Rule (66 FR 6976) January 2001

[2] Dudley, Susan. How not To Improve Public Health. Mercatus Center: January 11, 2001 *available at* http://mercatus.org/publications/pubID.2630/pub_detail.asp

[3] Dudley, Susan. Public Interest Comment on the EPA's National Drinking Water Standards for Arsenic. Mercatus Center: Oct. 31, 2001 p. 8

[4] Overview of Rulemakings for the Purpose of Reducing Interstate Ozone Transport, Environmental Protection Agency / Air and Radiation (AR), 40 CFR 51, Fall 2003, *available at* http://www.rtknet.org/new/reg/reg.php?reptype=R&rin=2060-AJ20&data_set=200310&database=reg&detail=3&datype=T

[5] Dudley, Susan, Wendy Gramm. The Human Costs of EPA Standards. Wall Street Journal: July 1997

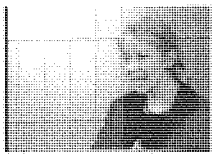
[6] Pioneer Hi-Bred International (Dupont). 2004. Press Room: Biotechnology - Biotech Soybeans and Brazil Nut Protein.

[7] Brown, Paul, David Gow. Damning Verdict on GM Crop. The Guardian: March 2005

[8] Dudley, Susan. Issues in Science and Technology: Forum : Genetically modified Crops: 2006 *available at* http://www.issues.org/21.3/forum.html

Public Citizen Protecting Health, Safety, and Democracy

Why Susan Dudley is Dangerous for Public Safety



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Air Bags: Maximizing Safety Benefits for all Vehicle Occupants and Minimizing Injuries

Why It Matters	What She Said
Air bags have reduced the risk of death in frontal collisions by 30%, and have saved over 14,000 lives. *When the first requirements for air bags went into effect, some automakers used cut-rate technology and shoddily designed air bags, which posed safety risks to infants, children, and small-statured adults. Better technology was available, but the manufacturers chose not to use it.* *After the auto industry failed to voluntarily improve the safety design of air bags, Congress ordered the National Highway Traffic Safety Administration to mandate safety improvements. In 1998, NHTSA proposed upgraded performance requirements for air bags that would reduce air-bag related risks to all vehicle occupants.* [1]	"NHTSA does not propose to require all vehicles to be equally comfortable or attractive to all consumers, yet through this very complex rulemaking, **it attempts to make all vehicles equally safe for occupants** with widely different sizes, preferences, and behaviors."[2] "**[R]egardless of how sophisticated NHTSA makes its tests, or how sophisticated manufacturers make air bags**, this one-size-fits-all approach will not meet the preferences or protect the safety of all consumers under all conditions." [3] "NHTSA estimates that air bags have reduced fatalities in frontal crashes by about 30 percent. Moreover, judging from vehicle manufacturers' pre-regulation actions and ongoing advertising, which lists dual air bags as a positive attribute in new vehicles, consumers appear to prefer vehicles equipped with air bags. **These facts, however, are not sufficient to justify federal regulation requiring air bags. If air bags protect lives, and consumers demand them, it is reasonable to assume that automobile manufacturers would have installed air bags in the absence of federal requirements to do so.**"[4]

Making Roads Safer by Reducing Fatigue-Related Truck Crashes

Why It Matters	What She Said
*Almost 5,000 people are killed each year in truck-related crashes, many of which are directly linked to sleep deprivation and fatigue. Under standards that had not been updated in decades, trucking companies could force their drivers to work **up to 70 hours in an eight-day period.*** *The Federal Motor Carrier Safety Administration issued a notice of proposed rulemaking in 2000 to reduce the incidence of fatigued drivers.*	"The real reduction of accidents involving trucks, and other vehicles as well, is clearly a desirable aim. Restrictions on hours and driver flexibility as proposed in all five options will not, however, achieve those goals. The proposed work hour caps cannot effectively mandate reductions in sleep debt, and DOT's proposal to eliminate alternatives and flexibility in a system with as large and diverse a work force as trucking will not address **the sleep deficit problem, if indeed one exists.**" [5]

[1] "Federal Motor Vehicle Safety Standards; Occupant Crash Protection." Federal Register 63 (18 September 1998): 49958.

[2] Dudley, Susan. *Comments to "Federal Motor Vehicle Safety Standards; Occupant Crash Protection,"* Mercatus Center p. 7.

[3] Dudley, Susan. *Advanced Air Bags Regulatory Studies Program Comments Executive Summary.* Mercatus Center: Dec. 17, 1998, p. 1.

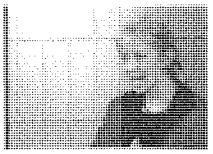
[4] Dudley, Susan. *Advanced Air Bags Regulatory Studies Program Comments Executive Summary.* Mercatus Center: Dec. 17, 1998, p. 7.

[5] Susan Dudley, Brian Mannix & Jennifer Zambone, Comment on the Office of Management and Budget's Draft Report to Congress on the Costs and Benefits of Federal Regulation, May 28, 2002, at A-26.

Public Citizen **Protecting Health, Safety, and Democracy**

Why Susan Dudley is Dangerous for

The Public's Right to Know



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The Public's Right to Know about Toxic Releases

Why It Matters	What She Said
In 1986, Congress developed a Community Right to Know Program, which requires industries to report on the presence and release of certain toxic chemicals on an annual basis. The program was developed in response to the Bhopal, India tragedy when thousands died following the release of a toxic gas from a Union Carbide pesticide plant. *Public disclosure of the release of toxic chemicals gives citizens the power to hold corporations accountable for their actions. The program is also credited for encouraging corporations to limit their use of toxic chemicals.*[1]	"Even if we determine that information on the release of certain chemicals has a net social value, we cannot assume that more frequently reported information, or information on a broader range of chemicals would be more valuable. **Only when the social costs of information are weighed against the social benefits can a determination be made regarding what and how much information is optimal."**[2] "Information is a good, and like other goods, it is costly to produce. **More information is not necessarily more valuable nor more relevant to communities."** [3] **"**The presumption that the provision of more information to communities is always better also assumes rational behavior on the part of the recipients of the information. **Even if the information TRI provided conveyed important information on potential risk, the recipients of the information may not interpret it correctly or rationally."**[4]

The Public's Right to Know about Dangerous Chemical Plants

Why It Matters	What She Said
The Risk Management Program Rule requires facilities that work with dangerous chemicals to create risk management plans for use in worst-case scenario disasters. The program also requires facilities to report on the potential affects these disasters could have on the public and the environment. *Dudley commented on a proposed EPA rule to make this information available to the public through secured reading rooms and the limited release of some information over the Internet. Providing the public with this information will ensure that facilities work to decrease all risks and prevent any potential accidents.* [5]	"If there is a public demand for this information, as EPA's benefit assessment argues, nongovernmental organizations would find value in deriving it. The fact that they don't suggests that the value of the information to the public is less than the cost of the information. **Certainly the public would value receiving a company's products and services as well, but the quantity and price of those goods and services is determined by the market**; the federal government doesn't simply require companies give products away. **Information is a good, and like other goods, has associated costs as well as benefits."**[6]

[1] Environmental Protection Agency Toxics Release Inventory (TRI) Program Fact Sheet *available at* http://www.epa.gov/tri/tri_program_fact_sheet.htm

[2] Dudley, Susan. *Comments on the Environmental Protection Agency's Lead and Lead Compounds; Lowering of Reporting Thresholds; Community Right-to Know Toxic Chemical Release Reporting; Proposed Rule.* Mercatus Center: Dec. 10 1999, p. 3

[3] *Id.* p. 10

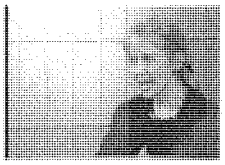
[4] *Id.* p. 3

[5] 65, Fed. Reg. 24838 (2000).

[6] Dudley, Susan. *Public Interest Comment on EPA's and DOJ's Proposed Distribution of Off-Site Consequence Analysis Information.* Mercatus Center: June 8, 2000, p. 9

Public Citizen Protecting Health, Safety, and Democracy

Why Susan Dudley is Dangerous for Workers' Rights



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Davis-Bacon: Keeping Federal Projects from Undercutting Area Wages

Why It Matters	What She Said
The Davis-Bacon Act protects workers by ensuring that contractors for federal construction projects do not undercut the prevailing wage for the area. Dudley commented on a rule intended to maintain this landmark protection for workers by preventing a "helper" job classification from becoming an escape clause for contractors.	"**The prevailing wage requirement does not offer net benefits to society**, but rather reflects a transfer from low-skilled and low-wage workers to skilled and union workers . . . . There is **no economic justification** for a federal role in defining construction practices and determining wages, as required by the Davis-Bacon Act."[1]

OSHA: Protecting Worker Health and Safety

Why It Matters	What She Said
The Occupational Safety and Health Administration is charged with protecting workers on the job. Despite mountains of evidence of the substantial positive effects for worker health and safety from OSHA regulations — and despite case examples in which OSHA regulations have ultimately saved money for industry — Dudley is harshly critical of all workplace health and safety regulation.	"In the case of OSHA regulation, empirical analysis has not found strong evidence that OSHA regulations have had a substantial impact on worker health and safety . . . . **OSHA's regulations are costly for the economy.** According to recent estimates, OSHA regulations contribute nearly one-half of the total direct cost of workplace regulations—around $41 billion per year in 2000. MSHA regulations cost another $7.4 billion. **It is unclear whether these costs produce commensurate benefits.** Econometric studies have generally failed to find evidence that OSHA regulations have had a significant impact on job safety."[2]

Improving Maximum Working Hours for Truck Drivers

Why It Matters	What She Said
Almost 700 truckers die in crashes every year, and those crashes put everyone else on the road at risk. Under standards that had not been updated in decades, trucking companies could force their drivers to work up to 70 hours in an eight-day period. *The Federal Motor Carrier Safety Administration issued a notice of proposed rulemaking in 2000 to reduce the incidence of fatigued drivers.*	"The real reduction of accidents involving trucks, and other vehicles as well, is clearly a desirable aim. Restrictions on hours and driver flexibility as proposed in all five options will not, however, achieve those goals. The proposed work hour caps cannot effectively mandate reductions in sleep debt, and DOT's proposal to eliminate alternatives and flexibility in a system with as large and diverse a work force as trucking will not address **the sleep deficit problem, if indeed one exists.**" [3]

Protecting Workers from Musculoskeletal Disorders and Repetitive Stress Injury

Why It Matters	What She Said
"Work-related musculoskeletal disorders (MSDs) are a leading cause of pain, suffering, and disability in American workplaces," and cost employers an estimated $15 billion each year in direct compensation costs.[4] *In 2000, after finding that work-related MSD's are a widespread and persistent problem, OSHA issued a final rule.*[5] *In 2001, however, Bush signed a resolution in disapproval of the rule, rendering it invalid.*	"OSHA offers no evidence that employers and employees do not have adequate incentives to provide the optimal level of workplace protection against MSD hazards. On the contrary, OSHA provides evidence that (1) MSDs impose significant costs on employers, which should offer ample incentives to reduce their occurrence, (2) employers are, in fact, developing programs and other initiatives to reduce MSDs, and (3) MSDs are declining. Lack of knowledge on the causes of and remedies for MSDs, not lack of motivation, has hindered efforts to reduce MSDs."[6]

[1] John Charles Bradbury & Susan E. Dudley, Comments on DOL's Proposed Rule Governing Helpers on Davis-Bacon Act Projects, June 8, 1999, *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC1999-05_DOL-Davis-Bacon_990608.pdf>, at 2, A-1.

[2] Andrew P. Morriss & Susan E. Dudley, Defining What to Regulate: Silica & the Problem of Regulatory Categorization, Aug. 2005, *available at* < http://www.utexas.edu/law/news/colloquium/papers/Silica.pdf >, at 14, 56-57.

[3] Susan Dudley, Brian Mannix & Jennifer Zambone, Comment on the Office of Management and Budget's Draft Report to Congress on the Costs and Benefits of Federal Regulation, May 28, 2002, at A-26.

[4] Unified Agenda on Regulatory Plan (Fall 2000), *available at* http://www.rtknet.org/new/reg/reg2.php?database=reg&datype=T&detail=1&reptype=R&rin=1218-AB36&data_set=200010

[5] *Id.*

[6] Dudley, Susan and Hayden G. Bryan. Public Interest Comment on the Occupational Safety and Health Administration's Proposed Ergonomics Program Standard. Mercatus Center: Feb. 25, 2000, p. 28 http://mercatus.org/publications/pubID.1505/pub_detail.asp

10 times worse than Graham

If confirmed as OIRA administrator, Susan Dudley would be 10 times worse than Graham. Let us count the ways....

1 Dudleynomics

Graham may have played funny games with the methodology and applied concepts that rigged the rules of the game against regulation... but at least what he was doing looked *something* like economics.

Not so with Dudley. She has her very own worldview, Dudleynomics, that shares some words in common with economics (like "market failure") but redefines them in ways that bear no relation whatsoever to economics, or any intellectual discipline of any sort.[1]

The "science," for Graham, sometimes meant limits even he couldn't cross in his anti-regulatory zeal. If Dudley is making up the rules as she goes, what limits are there?

2 Only When Markets Collapse

Unlike Dudley, Graham recognized that there might be many reasons to regulate, not just to correct market failure.

His guidelines for cost-benefit analysis, for example, instructed agencies to "try to explain whether the action is intended to address a significant market failure *or to meet some other compelling public need* such as improving governmental processes or promoting distributional fairness, privacy, or personal freedom."

The very idea drives Dudley crazy. "[T]he 'other justifications' for regulation are unclear," she wrote in her comments on these guidelines. "OMB should clarify, in particular, what it means by 'promoting privacy and personal freedom,' since regulation is more commonly viewed as restricting personal freedoms."[2]

3 The Cult of Costs

Dudley repeatedly insists that the benefits of regulations are better understood, qualitatively if not quantitatively, than the costs. Accordingly, she has proposed to consume vast amounts of taxpayer dollars on navel-gazing analyses that would increase the reported estimates of regulatory costs while doing little to inform the public about the life-saving benefits. Among the ideas:

- *Analysis of the analysis of the analysis.* Dudley has proposed that OIRA start producing an annual report card for agencies on the quality of their cost-benefit analysis.

- *Convert the annual report on regulatory costs and benefits into a detailed report on regulatory ... costs.* Dudley has taken issue with OIRA's annual "regulatory accounting report," arguing that OIRA has not done *enough* to present the costs of regulations. Accordingly, Dudley has counseled that OIRA should present as robust a picture of costs as possible, even presenting a picture of the costs for rules for which benefits have not been similarly quantified.[3]

4 Science? What Science?

Graham was no friend to science, but he occasionally had to admit defeat when the science was overwhelming.

Take, for example, arsenic in the drinking water. There was no longer any scientific dispute that the 40-year-old standard of 50 ppb was insufficiently protective. The only legitimate dispute was over what new, lower number should replace it. After a brief struggle over possibly withdrawing the new standard published in the

final hours of the Clinton administration, even Graham had to admit that the new standard was justified and withstood the toughest scientific scrutiny.[4]

The overwhelming scientific consensus was lost on Dudley, who insisted we should not even be reviewing the old standard at all, calling the new and improved standard for arsenic in the drinking water "an unwelcome distraction." [5]

5 Senior Death Discount

How much is Granny worth? According to Dudley: less than Junior.

Dudley has advocated a return to the senior death discount, approaches in cost-benefit analysis that count the lives of seniors as worth less than the lives of the young.

In comments submitted to the EPA criticizing stricter standards for arsenic in the drinking water (standards Dudley dismissed as "an unwelcome distraction"), Dudley argued that "EPA's value [per statistical life] likely overstates the benefits of the rule. . . . This can be addressed with sensitivity that estimates benefits based on a value per life-year saved, or an age-adjusted value per life." [6]

Meaning what? Either (1) counting up only the number of remaining life years saved by a rule, rather than the number of *whole lives*, or (2) using a cash value for the lives of seniors that is *lower than the value for the lives of the young*. Take your pick.

6 No Values but Value$

Measuring benefits of a rule in cost-benefit analysis is a dicey game as it is. Graham cheated that game from time to time, but at least he didn't just throw out the rules. Dudley wants to play her own game, which the public will never win.

Consider her comments on the "fish kill rule" — standards to protect the trillions of fish and other aquatic life destroyed annually by industrial plants that suck in water from natural bodies of water to cool their systems.

Dudley essentially argued that it is not enough that EPA can show that the population of fish are significantly depleted by cooling water intake systems; rather, she believes we have to wait until the fish population is depleted enough to cause a rise in the price of fish.[7]

In Dudley's sophistic view, the only value that a fish has is monetary and the government has no justification for protecting fish until they are practically extinct.

7 The Costs Are Endless...

Graham was definitely riding the industry-funded bandwagon to persuade the public that our protections are breaking the bank... but Dudley is driving her own cart.

Here's an example: commenting on Graham's 2005 estimates of the costs and benefits of regulations, Dudley relied on a single, discredited study to declare that "OMB's cost range of $35 to $39 billion may be low *by a factor of 20*."[8]

Not even Graham could say that with a straight face.

8 Her Hit List Runneth Over

Every time that Graham opened up our public protections for industry hit lists, Dudley was there... with more suggestions for rules to eliminate or weaken than even Graham felt comfortable with.

9 Can We Keep Ignoring What *Congress* Wants This Position to Do?

Like Graham before her, Dudley has no experience or expertise in the only parts of the job that Congress actually required by law. The Paperwork Reduction Act charges the OIRA administrator with taking the lead for federal work on information resources management, including IT, information security, and privacy.

With government data security failures left and right, the most infamous being the breakdowns that left personal information about veterans and active duty military personnel at risk, isn't it long past time we had an OIRA administrator qualified to do the job Congress wants it to do?

10 She's Got Her Running Shoes On

The White House is looking ahead to its last two years and is already planning an all-out assault. "[The president] told all of us, 'Put on your track shoes. We're going to run to the finish,'" Tony Snow told *Time*. "He's going to be aggressive on a lot of fronts. He's been calling all his Cabinet secretaries and telling them, 'You tell me administratively everything you can do between now and the end of the presidency. I want to see your to-do list and how you expect to do it.' We're going to try to be as ambitious and bold as we can possibly be."

We have already seen the damage Graham wrought. Dudley promises to be 10 times worse. And that's just the way the White House wants it.

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[1] Public Citizen & OMB Watch, *The Cost Is Too High: How Susan Dudley Threatens Public Protections*, pp. 16-19.
[2] Dudley & Mannix comments, p. 2, *available at* http://www.mercatus.org/repository/docLib/MC_RSP_PIC2003-14OMBRIAGuidelines_030505.pdf.
[3] For more, see *The Cost Is Too High*, pp. 37-39.
[4] John Graham, speech to National Economists Club, available at http://www.whitehouse.gov/omb/legislative/testimony/graham030702.html
[5] Susan E. Dudley, *How Not to Improve Public Health*, Jan. 11, 2001, *available at* <http://mercatus.org/publications/pubID.2630/pub_detail.asp>.
[6] Susan E. Dudley, Comments on Arsenic Standard, at 4 (Oct. 31, 2001), *available at* <http://mercatus.org/repository/docLib/MC_RSP_PIC2001-14EPA-Arsenic_011031.pdf>.
[7] For more, see *The Cost Is Too High*, pp.21-22.
[8] Susan E. Dudley, Comments on OIRA 2005 Draft Regulatory Accounting Report, at 7.

So, if Dudley is

10 times **worse** than Graham

...how bad is that?

If confirmed, Susan Dudley would be 10 times worse than John Graham as OIRA administrator. How bad can that be? Take a look back at some highlights from the destructive legacy of John Graham.

1 All-out war on science.

Graham is no scientist, but he waded into scientific territory nonetheless, with a particular emphasis on risk assessments — the process in which agency experts and scientists make educated judgments that bridge the gap between the known and the unknown in order to help agency regulators make sound decisions.

Graham implemented unnecessary "peer review" guidelines, adding extra layers of review and impossible standards of reproducibility that risk assessments cannot easily meet.

And he followed suit with a direct attack on risk assessments, issuing a one-size-fits-all policy for all risk assessments, whether they are NASA risk assessments about getting shuttles up to space and back again or FDA risk assessments about tolerance levels of pesticide residues on the foods we eat.

2 Paralysis by analysis.

Bury them in paper: that has long been the mantra of regulated industry, which has sought to spare itself new regulations by burdening the regulatory process itself.

Graham issued a dizzying array of new analytical burdens on agencies. Among them:

- new processes for guidance documents and interpretive rules (which Congress explicitly excluded from such processes in the APA);
- elaborate additional guidelines for conducting cost-benefit analysis, along with a new requirement for conducting cost-per-benefit ratio analyses;
- impossible requirements for risk assessments and a large universe of risk-related assessment activities; and
- burdensome "peer review" guidelines.

3 Just taste that air!

Graham proudly touted his work pushing EPA to regulate off-road diesel... but he worked on other fronts to thwart safeguards for cleaner air.

Examples: He let industry write its own rules for controlling some hazardous air pollutants. He weakened EPA's proposal to reduce emissions from snowmobiles. And he weakened EPA plans to reduce diesel emissions from large ships and tankers.

4 A world of waste.

Graham weakened rules that agencies drafted to protect us from all sorts of waste.

Waste from factory farms: raw sewage, bacteria-laden and hazardous in too many ways, dumped on land and then allowed to become runoff after a storm. After EPA submitted a proposed rule on factory farm runoff to Graham's OIRA, the final product was weakened – stripping out safeguards against excessive

application of manure, creating a new loophole for runoff from the Clean Water Act, and encouraging the construction of vast waste "lagoons."

Hazardous waste in soil and water: Manganese can cause a disorder much like Parkinson's disease, along with sexual dysfunction and respiratory damage. Graham blocked EPA from listing manganese as a hazardous waste prohibited from being disposed on land or injected underground.

Pollution from construction sites: Runoff from construction and development sites is the largest source of pollution in our coastal waters. Graham eviscerated an EPA proposal to control this runoff.

5 Putting our protections on a hit list.

Graham gave industry not one, not two, but three chances to nominate regulations to be weakened or eliminated on a hit list.

Graham then selected items from the hit list to push agencies to roll back safeguards. Among them:

- protections against Listeria in ready-to-eat meats;
- rules for safe disposal of PCBs;
- the Toxic Release Inventory, which secures our right to know about toxics released in our backyards; and
- workers' rights to family and medical leave.

6 So much for safety.

After the Ford-Firestone tragedies, Congress ordered NHTSA to require manufacturers to install systems that alert drivers when a tire is dangerously under-inflated.

Graham forced NHTSA to produce a rule requiring a cheap "indirect system," which would actually fail to alert drivers if all four tires were low.

7 Want fries with that?

Listeria is deadly: it has the highest hospitalization rate, and the second-highest fatality rate, of all foodborne pathogens. It is particularly hazardous to pregnant women, who almost always miscarry when they contract Listeriosis.

After OIRA held a meeting with food industry representatives, it ordered USDA to make changes to its proposed performance standards for controlling Listeria in ready-to-eat meats such as the sandwich meats that go into children's lunch boxes.

8 I said what?

Graham's anti-regulatory zeal sometimes got the better of him, leading to contradictory messages.

Example: the Listeria rule. Just three months after praising it as a "regulatory reform accomplishment," Graham added it to a list of items hand-picked from the hit list for further rollbacks.

Same with the rule for labeling trans fats: Graham sent a "prompt letter" pushing the agency to produce the rule, then declared it a high priority item hand-picked from another hit list for being rolled back.

9 Looking back for propaganda.

We have long known that industry cost estimates, which are used in agency cost-benefit analyses when they are making important policy decisions, are routinely overestimated.

Graham suggested we might learn something if we find after-the-fact "look-back" studies, which compare the pre-rule cost estimates with estimates of the actual compliance costs. Lo and behold, Graham concluded that costs are not routinely overestimated after all.

Except... that his research was another rigged game. A new study by a Resources for the Future economist following up on Graham's mini-study questions some of Graham's methodology and reaches quite different conclusions.

10 Discounting our future.

Discounting in cost-benefit analysis is like compound interest in reverse. Step 1: estimate the number of lives saved by a proposed rule. Step 2: convert those lives into dollar values. Step 3: treat lives saved in the future the same as money earned in the future, then apply a discount rate to find the "present value."

When Graham revised the OMB circular that dictates how cost-benefit analysis is performed, he did not take this opportunity to abandon such a morally questionable practice. Instead, Graham required agencies to do two side-by-side analyses using a 3% and a 7% discount rate.

By the way — at a 7% discount rate, a regulation to prevent a cancer that manifests itself 30 years after exposure to a substance will result in a life saved 30 years from now counting for 1/6 the value of a life saved today. ♦

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if Dudley puts her track shoes on ... what would her footprints be?

The President has told administration heads, "Put on your track shoes. We're going to run to the finish." How much damage could Dudley do in that two-year sprint to the finish?

The Race Is On

The White House is looking ahead to its last two years and is already planning an all-out assault. "[The president] told all of us, 'Put on your track shoes. We're going to run to the finish,'" Tony Snow told *Time*. "He's going to be aggressive on a lot of fronts. He's been calling all his Cabinet secretaries and telling them, 'You tell me administratively everything you can do between now and the end of the presidency. I want to see your to-do list and how you expect to do it.'"

Snow added, "We're going to try to be as ambitious and bold as we can possibly be."

What would that mean for a Dudley-led OIRA? If Dudley put her track shoes on, what important safeguards would she run over? What would her footprints be?

Risky Business: Risk Assessment Bulletin

One item still on the to-do list at OIRA is a proposed bulletin to create a one-size-fits-all policy for all agency risk assessments.

Risk assessments are important to many government activities, including but not limited to the crafting of new regulations. In a risk assessment, agency scientists and experts bridge the gap between the known and the unknown by applying their expert judgment and considering the weight of the scientific evidence to produce an estimate of risk that risk managers then use when making policy decisions.

Not long before announcing his resignation, previous OIRA administrator John Graham issued a proposed bulletin to create a one-size-fits-all regimen for all risk assessments... whether it's a NASA risk assessment determining what it would take to get a space shuttle up and back or an FDA risk assessment about the amounts of pesticide residue on food that are likely to harm human health.

The proposed risk assessment bulletin would threaten public protections in many ways, including the following:

- *Makes risk assessment less useful by replacing point estimates with mushy ranges.* Risk managers, such as regulators crafting new rules, need the risk assessors to produce a best estimate of the point at which health and safety are endangered. The OIRA bulletin would strip risk assessments of all utility—and invite endless litigation from businesses seeking to thwart new safeguards—by replacing point estimates with mushy, useless risk *ranges*.
- *Brings risk assessment down to the least common denominator by replacing worst case scenarios with misleading averages.* If you were climbing a ladder, would you prefer it to be set to hold the weight of the heaviest male or the average person? Risk assessments typically look for the worst-case scenario, such as the cancer risk to the person most exposed to a hazardous waste site or an "adequate margin of safety." The OIRA bulletin would replace these conservative, precautionary approaches with a "central risk estimate."

- *Induces paralysis by analysis by setting impossible requirements for risk assessments.* Risk assessment is the application of expertise and scientific judgment to the weight of the evidence. Especially in cases of long-latency, low-probability risks, a great deal of scientific judgment is involved (such as reading tumors, and compensating for weaknesses in epidemiological data). OIRA's bulletin would demand the impossible: that these assessments be *reproducible*, like a physics experiment. This requirement could cripple much risk-based regulation, such as chemical regulation.
- *Makes risk assessment blind to health risks.* The OIRA bulletin would force risk assessors to ignore studies that link exposures to early molecular events in the human body (precursors to irreversible illnesses like cancer) and instead focus only on studies showing fully-realized adverse health effects. The OIRA bulletin thus would fly in the face of reputable scientific opinion on the subject.

If allowed to become OIRA administrator, Dudley would be in a position to make this stark threat to health, safety, and the environment a tragic reality.[1]

Leaving the Public in the Dark: "Good" Guidance Practices Bulletin

Another major item on the OIRA to-do list is a proposed bulletin to change the Administrative Procedure Act by executive fiat.

At the end of 2005, OIRA published a draft bulletin to change the way agencies put out guidance documents, general policy statements, interpretative rules, and other such informal statements. The bulletin purports to make agency guidance documents "more transparent, consistent, and accountable" by setting new requirements that include high-level review by senior agency staff of "significant" guidance documents and a lengthy review and approval process for any "economically significant" guidance.

Congress explicitly excluded guidance documents and interpretative rules from notice and comment requirements of the APA. This bulletin would effectively rewrite the APA by executive fiat.

Agencies use guidance and interpretations to inform the public, such as regulated industry, how it plans to implement the rules on the books. The guidance bulletin would delay this important information and would create perverse incentives for agencies not to publish such information at all.[2]

Dudley is no stranger to paralysis by analysis. Such a burden on agencies, as presented by the guidance bulletin, would be right up her alley.

Safeguards at Stake: Regulations in the Pipeline

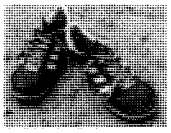
Dudley would bring her radical anti-regulatory agenda to play at a critical time. Agencies are currently working on important new safeguards to address unmet needs for public health, safety, the environment, and the public interest.

Among the safeguards in the pipeline just waiting for a Dudley-led OIRA to gum up the works:

- Protections for mine workers, demanded in the aftermath of the Sago tragedy when Congress realized that initiatives taken off MSHA's to-do list could have averted the miners' deaths.
- Important protections to improve safety for automobiles, including improved roof strength and other features to protect occupants in rollover crashes.
- A review of the national ozone standard, required every five years by the Clean Air Act (although the Bush administration has ignored that mandate and had to be forced by a court to do its duty).
- Revision of the EPA approach to testing vehicles for determining their compliance with fuel economy standards, which are crucial to weaning America from its dependence on foreign oil.
- Additional safeguards against mad cow disease, such as prohibiting certain high-risk materials from the food supply and improving standards for inspecting machine-separated meat.

Dudley's hostility to regulation could lead to enormous new risks for the public if Dudley is allowed to take over the powerful Office of Information and Regulatory Affairs.

Susan Dudley would put the public health, safety, and environment at unnecessary risk as OIRA administrator. That cost is too high.



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[1] For more information, see www.ombwatch.org/regs/whitehouse/risk.
[2] For more, see www.ombwatch.org/regs/whitehouse/guidance.

Confirmation Conversion?

Can Susan Dudley renounce the viciously anti-regulatory agenda she has pursued for years and become a fair and neutral policy gatekeeper at OIRA? Don't bet on it.

"I think we have a lot of confirmation conversions here on Capitol Hill," cautioned Senator Durbin in 2001, pointing out that nominees with a history of opposing the public interest have often come to their confirmation hearings professing to have seen the light.

All too often, such "confirmation conversions" have proven to be empty words.

Susan Dudley, nominee for a position with enormous power over all regulatory policy, has been consistently anti-regulatory over the years. Will we hear yet another confirmation conversion? Should we believe it?

Remember John Graham's Broken Promises

Not if history is any guide.

During the nomination hearing for Dudley's predecessor, John Graham, Graham tried to allay Sen. Durbin's fears, promising he could become a fair decision maker who would be able to work within the scope of the very laws he had long sought to dismantle.

"In my role as a college professor and in my role as an advocate, I try to make a case for changing environmental laws in a direction that I feel is appropriate and reasonable," Graham conceded. "But in the context of being OIRA administrator, I have a responsibility to enforce the laws as they are written."

Empty words. Once Graham was confirmed, the gloves came off. He forced agencies to produce rules that failed to comport with their legal mandates, such as the following cases:

- **Tire pressure monitoring:** After the Ford-Firestone tragedies, Congress ordered NHTSA to protect the public by requiring dashboard alerts that warn drivers whenever a tire is dangerously underinflated. Graha, weakened the rule that NHTSA issued, resulting in a standard so far from the law that a federal court has sent the agency back to the drawing board.
- **Fish kills:** Trillions of fish and aquatic life are killed annually when industrial plants suck up water from natural waterways to cool their systems. Contrary to the Clean Water Act's requirement of demanding standards consistent with the best available technology, Graham forced EPA to issue less protective standards urged by energy giants.

As with so many nominees to so many other offices before, Graham's confirmation conversion turned out to be a hollow promise.

The White House Wants the Opposite

Another reason not to believe any confirmation conversions: it's the last thing the White House wants.

The White House is looking ahead to its last two years and is already planning an all-out assault. "[The president] told all of us, 'Put on your track shoes. We're going to run to the finish,'" Tony Snow told *Time*. "He's going to be aggressive on a lot of fronts. He's been calling all his Cabinet secretaries and telling them, 'You tell me administratively everything you can do between now and the end of the presidency. I want to see your to-do list and how you expect to do it.'"

Snow added, "We're going to try to be as ambitious and bold as we can possibly be."

These signals reveal a White House with no intention of reversing course from its long, destructive record of weakening and eliminating vital protections for the public. Dudley's agenda would be all too consistent with that record.